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Apple and Transfer Pricing Turmoil

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The European Union's ("EU") antitrust regulator, the European Commission ("Commission"), has changed the way the world looks at transfer pricing and tax favored regimes. Asserting that certain Member States of the European Union have gained an unfair competitive advantage because of government help, the Commission recently demanded large tax assessments against Apple, Fiat Chrysler, Starbucks, AB InBev, among others. More assessments are pending against other U.S.-based multinational entities ("MNE's") such as Amazon and McDonalds.

Putting a whole new twist on how taxes are determined, the Commission's State Aid Investigation assessments do not examine whether tax laws have been complied with in the Member States. Traditional transfer pricing guidelines promoted by the Organization for Economic Cooperation and Development ("OECD") and transfer pricing reporting condoned by Advanced Pricing

Agreements ("APAs") are not considered either. Rather, the assessments derive from the assertion that "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of goods shall, in so far as it affects trade between Member States, be incompatible with the internal market."¹

In the Apple case, the Commission demanded that \$14.5 billion of unpaid taxes in Ireland accumulated from 2004-2014 be paid to the Irish government. The Commission's investigation determined that Ireland gave illegal tax benefits in 1991 and 2007 that allowed Apple to pay

annual tax rates in Ireland of between 0.005% and 1% on its European profits by designating a small portion of its profit as taxable in Ireland. Apple was thereby able to avoid taxation on almost all profits generated by sales of products in the EU. These illegal benefits were

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sanctioned by APAs with the Irish government with regard to what profits were reportable in Ireland. The Commission stated that the APAs granted to Apple were illegal under EU state aid rules because they allowed Apple to pay substantially less than other businesses.

The consequences of the Commission's State Aid Investigation assessments are far-reaching, both for the U.S. government and U.S. companies. **As noted in the U.S. Department of the Treasury White Paper on the topic:**

- The Commission's actions undermine OECD's and the United States' efforts to develop transfer pricing norms through the OECD/G20 Base Erosion and Profit Shifting ("BEPS") project.
- Repayments to Member States ordered by the Commission will be considered foreign tax credits, thereby transferring deferred U.S. revenue to the EU from the U.S. government and its taxpayers.
- The Commission has suggested that it is still evaluating other tax rulings and may initiate more cases which could lead to a chilling effect on U.S. - EU cross border investment.
- The new anticompetitive enforcement regime is adopted retroactively and sets an unwelcome precedent for tax authorities around the world to take similar retroactive actions.

Despite the recent developments resulting from the EU antitrust regulator, MNE's still must consider the existing OECD transfer pricing guidelines and U.S. Treasury regulations to support and document transfer pricing policies. Whether the accepted methodologies for determining and reporting the arm's length standard will withstand the regulatory adjustments remains to be seen as most of the Member State governments involved are appealing through the courts and the companies maintain they have complied with the law.

1. Consolidated Version of the Treaty on the Functioning of the European Union art. 107, 2016 O.J. C 202/47



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Professional & Civic Affiliations

American Institute of Certified Public Accountants (AICPA)
New York State Society of CPA's (NYSSCPA)

Publications & Presentations

The Transfer Pricing Audit Roadmap, Marcum by the Numbers, January 2016
Schedule UTP, Uncertain Tax Positions
Statement: Marcum SEC Insights, March 2011
The Work Product Doctrine - How Does It Apply To Accounting Work
Papers After Taxation, New York City
Bar Association, May 27, 2010
Recoverability of Equity Based Compensation Deferred Tax Assets,
Journal of Taxation, January 2009



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