

TAX TAKE: OECD is GILTI as Charged?

Tax Alert

07.12.2021

Earlier this month, over [130 members](#) of the OECD's Inclusive Framework (IF) signed on to the institution's two-Pillar framework to overhaul the international tax regime. This endorsement encompasses the new articulations of jurisdictional nexus and profit allocation embodied in [Pillar 1](#), as well as a primary rule implementing a global minimum tax (at a rate of at least 15 percent – more on that later) regime with a backstop rule authorizing the denial of deductions for related party payments made to recipients in low-tax jurisdictions under [Pillar 2](#).

And while the OECD work on both Pillars barrels ahead, we are left to ponder some serious questions regarding the future of tax legislative changes both at home and abroad:

- Reports emerged last week that the Democrats are aiming to include the revised global intangible low-taxed income (GILTI) and "Stopping Harmful Inversions and Ending Low-Tax Developments" (SHIELD) provisions in the second infrastructure bill that is slated to be passed via reconciliation. As if there weren't enough pressure already on the reconciliation bill as the vehicle for all of the Administration's tax increases on corporations and the wealthy, certain legislative changes to the existing GILTI provision seem to be required for it to be deemed compliant with the OECD's global anti-base erosion (GloBE) regime. Country-by-country, anyone?
- Even if Pillar 2 elements can be legislated in the second infrastructure bill now, the future of Pillar 1 remains unclear. While there is united, bipartisan opposition to digital services taxes (DSTs) levied against American companies, there is no Congressional consensus that Pillar 1 is the best way to combat unilateral measures. Especially in its most recent iteration, Pillar 1 has lost its last shred of sound policy rationale, and now seems headed in the direction of a tax levied against the most profitable global enterprises, as long as they're not in the financial services or extractive industries. In exchange, France is the only country that has promised to formally abandon its DST once Pillar 1 is [implemented](#). Of course, the key question remains: What constitutes "implementation?" It's France's rule and so it's up to them to decide, but implementation could realistically be several years away. The Pillar 1 Blueprint envisioned the rules would be implemented in 2023, but the framework will almost certainly require the conclusion of a multilateral instrument (MLI) to settle double taxation disputes. Of course, the drafting of the MLI will involve input from many stakeholders before it can be adopted by each jurisdiction. The United States has yet to sign onto any MLI and there remains the requirement that treaties be ratified by the Senate, which has been a significant challenge in recent years.
- And what of this EU digital levy? Proponents are claiming it suffers from an "[image problem](#)" – in fact, it is meant to apply to a much broader swath of taxpayers than the offending DSTs do and will be consistent with the policy contours of Pillar 1. Detractors note that passage of the digital levy will require unanimous support from all EU member states, at least some of whom are reserving support for Pillar 1, which would suggest that they also would not support this measure. Already, Treasury Secretary Yellen has been vocal in her opposition to the digital levy and has met with EU officials to urge their abandonment of the policy. Expect more details of the digital levy to be released around July 20.

In the short term, the G20 meetings wrapped up this past weekend, and Secretary Yellen was expected to put pressure on leaders to support a higher than 15 percent minimum tax rate, undoubtedly to give the Administration cover for pushing the GILTI rate to 21 percent. A little further down the road, more details regarding the substance of both Pillars are expected by October of this year.

The timeline for the domestic implementation of the Administration's articulations of the GILTI and SHIELD provisions is short. In particular, although many questions are being raised regarding the implementation of SHIELD, it is unlikely that it will be abandoned in light of the need to fund the significant cost of the expansive "human infrastructure" policies the Administration would like to implement. Time to get in front of legislators now and make the case. Silent tax-writing committees are usually silent

because they're doing just that – writing tax laws. **#TaxTake**

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