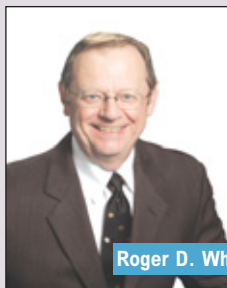


World Tax Review



Roger D. Wheeler*

As you have likely heard, last December's 17th annual international tax conference in Mumbai involved many interesting and timely topics, and based on the high level of discussion most attendees consider it one of the best ever. The theme of the conference was anti-avoidance measures, both specific and general; India's consideration of general anti-avoidance rules (GAAR) was a hot topic. En route home following the conference, I decided to impress my travelling companions with the knowledge I had learned.

I was travelling with an American and an Indian — neither was a tax expert. Nonetheless I asked them for their thoughts on GAAR, and their responses confounded and amused me. The American said she had never seen gar but had always been told to keep her distance because gar could take a chunk out of you before you could react in self-defense. By way of explanation, she told me gar were North American river fish with heavily protected bodies, elongated jaws filled with long, sharp, flesh-ripping teeth, and they are durable enough to tolerate adverse conditions that would kill most other fish. My Indian friend laughed and shook his head "no," but then described a similar dislike for the Indian gaur — calling it an ugly, vicious beast, bold and aggressive, possessing an insatiable appetite. In actuality, the Indian gaur is a forest bovine resembling a cross between a water buffalo in front and domestic cattle in the hind quarters.

I chuckled at their descriptions of river monsters and forest beasts, and then ordered another soft drink. As I was enjoying it I realized my companions had used some of the same descriptions as my colleagues at the Mumbai conference had: ugly, vicious, and insatiable appetite were descriptions I had heard used in connection with India's proposed new anti-avoidance GAAR. Go figure.

My column this month will address other aspects of the Mumbai tax conference, my top tax tips for the new year, and some personal thoughts on tax avoidance and anti-avoidance measures.

1. COMMENTARY

I've enjoyed everything about my annual trips to Mumbai for the tax conference there, except the travel: 30 hours from Greenville to Atlanta, to Paris, to Mumbai; and 32 hours to return. On a trip that long there's plenty of time to read newspapers. I read a local one over the Atlantic, a European one over Turkey, and a Mumbai one coming home. And I learned a few things.

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1.1 Risk As Deterrent

One article that caught my eye was written by a good friend of mine from Mumbai: Uday Ved, deputy CEO and chairman for tax at KPMG International member firm in India. In his excellent piece, Mr. Ved discusses how uncertainty in the country's tax regime is the biggest challenge faced by foreign investors.

While it is true that most investors do not view Indian taxes as being excessively high, the lack of certainty in India's tax regime and the need for frequent litigation are perhaps the biggest challenges faced by foreign investors considering India. Mr. Ved gives us some examples: Revenue's position on key concepts such as permanent establishment, royalties, and profit allocation on intercompany transactions have not been explicitly clarified. This has often led to conflicting positions being taken by tax authorities, leading to prolonged disputes and litigation. Intercompany transfer pricing, meant to be a mechanism to ensure arm's-length dealing, has become a major source of protracted controversy. Similarly, the ongoing dispute over eligibility for benefits under the Indo-Mauritius treaty leaves foreign investors in the lurch about tax implications of their investments, including exit strategies.

Moreover, even the proposed new Direct Tax Code, while trail-blazing in many respects, may do little to help restore certainty. For instance, the expected general anti-avoidance rule confers vast powers on the tax authorities to disregard or re-characterize transactions perceived by Revenue to be tax avoidance transactions. According to Mr. Ved, this may end up exacerbating the uncertainty already faced by foreign investors.

1.2 Risk as Opportunity

Another article beckoned me, this one by the famous business author Jim Collins, whose studies have become popular best sellers – *Good to Great*, for instance. Mr. Clark describes why some companies thrive in uncertainty, even chaos, and others do not.

Mr. Clark embarked on an ambitious journey to identify and study a select group of companies that had thrived in uncertain conditions. He set out to find companies that started from a position of vulnerability, rose to become great companies with spectacular performance, and did so in unstable environments characterized by big forces out of their control; fast moving, uncertain and potentially harmful. From an initial list of 20,400 companies, he sifted through eleven layers of cuts to identify cases that met all of his criteria. Only seven did, and they didn't merely get by or just become successful. They truly thrived – in every case beating their respective industry index by at least ten times.

Let's first look at what Mr. Clark did not find about the seven high-performers relative to the otherwise successful comparisons: they're not more creative, more visionary, or more charismatic. They're not more ambitious or blessed with better luck, or more heroic or more risk-taking. And they're not more prone to making bigger, bolder moves. So then how did the seven distinguish themselves? Mr. Clark found these seven distinguished themselves by embracing the paradox of control and non-control; the seven seemed to understand that they face continuous

uncertainty in the world that they cannot control and cannot accurately predict. So they find ways to live with uncertainty, and thrive on it.

A good lesson for all of us considering our current uncertain tax environments.

2. OVERHEARD

In this part of my column, I usually report on interesting things I'm currently listening in on, have read, or what other practitioners have told me. At this time in the new year, it seems appropriate to report on some of the interesting tips I've heard about lately. Here is a list of five for 2012.

2.1 Tips for the New Year

As a cautionary note, the matters mentioned below are meant merely to alert my readers to situations they may want to know about, so that they can separately look into them in more detail if they seem applicable. These tips are not meant to be complete discussions of the subjects mentioned. If readers express sufficient interest in any of these, I may provide more detailed coverage in a later column.

1. Companies doing business in the United States (US) that do not have a permanent establishment under federal law or tax treaties, may still have "nexus" in a state based on their assets or activities in that state, as federal law and treaties do not apply to state income taxes. In addition, employees who travel to the US may be subject to state taxation as a result of spending time in the state even though their income may not be taxable under applicable federal income tax laws. As a result, state nexus issues should be considered when determining the tax consequences of doing business in the US.
2. The US Tax Court, in a ground-breaking decision in its continuing exploration of new rules governing Internal Revenue Service (IRS) whistleblowing procedures, has recently allowed an informant to remain anonymous, encouraging observers to suggest anonymity could encourage more informants to make claims under the developing IRS whistleblowing program. My readers will recall my concern over possible adverse effects of the government's creation of a whistleblowing culture, and the court's extension of anonymity to informants simply heightens my concern. It is a matter foreign investors may want to assess.
3. US export control laws have been enacted to serve national security interests by regulating or restricting access to certain goods, services, technology and technical data by certain countries and foreign persons. If a particular item (whether goods, services, or technical data) is controlled for export purposes, then a license or some other authorization may be required from the US government in order to "export" that item, unless exportation is prohibited altogether. Under US export law, any person who exports a controlled item without the requisite export licenses or government authorization may face civil penalties or in some cases criminal penalties, including imprisonment of corporate executives and/or denial of export privileges altogether.
4. As is the case elsewhere around the world, intercompany transfer pricing is one of the most significant tax issues facing most multinational companies, and failure to meet the US pricing requirements could result in the imposition of significant penalties. Whenever a tax return contains an underpayment of tax attributable to a so-called "valuation mis-statement" severe penalties may apply. Penalties can be as high as 20 per cent if the valuation mis-statement is "substantial," increasing to 40 per cent if it is a "gross" mis-statement. These are defined terms worth looking at.
5. Many US states have come up with novel ways of compelling residents to pay their taxes. Some, including California, have passed legislation to suspend the driving licenses of delinquent taxpayers, while others publish names online or in newspapers, trying to shame tax delinquents into paying. All states have had the traditional recourse of tax liens and wage garnishment, but these

actions take time and effort, causing impatient tax authorities to take quicker, more targeted action. For instance, Minnesota tax delinquents risk losing the ability to rent a booth at the State Fair, while in Louisiana, large unpaid tax bills might preclude renewal of hunting and fishing licenses.

3. IF YOU ASK ME

This is the part of my column where I tell you what I'm thinking, impart a piece of my own philosophy, or just get something off my chest. In view of the high likelihood of controversy between multinational companies and tax authorities, I am often asked about dispute resolution – what I'm seeing, what I'm hearing, and what trends are emerging. So let's discuss dispute resolution. **If you ask me**, the need for effective dispute resolution has never been greater, nor the opportunities more available. Here are the trends I'm seeing and hearing about.

First off, there seems to be an increasing pressure on tax authorities to produce larger and larger revenue from tax return audits, and the numbers of tax examinations at all levels are increasing at a fast pace. Moreover, in the public press, there is more and more interest in exploring tax planning techniques (real and perceived) used by multinationals, as part of a broader anti-business sentiment. As a result of these factors, many practitioners see an increased tax authority emphasis on cross-border or multi-jurisdictional tax situations, increasing the likelihood of double taxation as more than one government targets

the same income for taxation. Companies are faced with additional and higher expectations for transparency, accounting and tax return disclosure, and reporting requirements are growing in complexity. Information exchange among nations and between agencies within the same government, according to some, is outpacing government's ability to assimilate it.

Against this background, many tax executives tell me their internal tax departments and resources are being rationalized, downsized, or under pressure to control controversies and manage disputes with less and less.

On the other hand, there seem to be more and more genuine opportunities than ever before to avoid or resolve disputes using both traditional and non-traditional means. Many governments have instituted a wide variety of alternative dispute resolution procedures and techniques, and my sources tell me these often produce fair and satisfactory results. In addition, many tax executives have found that competition among service providers offers reasonably priced value-added expertise, often including access to former tax officials, now working with major law and accounting firms, who have particularly personal insights into the ambiance of dealing with tax authorities generally.

So all in all, the trends in tax dispute resolution may present the best of times as well as the worst of times. At least that's what I'm hearing, I'd like to know your thoughts. Please contact me at TaxmannRoger@gmail.com.

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