



According to plan?

The world of tax planning is changing, but not as fast as everyone would like

The world of tax planning is like one big global tug o' war being played between multinational companies and their advisers, tax authorities, supranational bodies and non-governmental organisations. Everyone has an interest in changing the international tax system. But with everyone pulling in different directions, the pace of change is frustrating for most.

Authorities are becoming more proactive in chasing revenue. Clearly, there need to be checks, but authorities in the Asia-Pacific region, for instance, must be careful to strike the right balance between enforcing compliance, stamping out abuses, and attracting investment.

In the Americas, uncertainty is the order of the day. The effects of lingering uncertainty regarding the prospects for domestic reform have been exacerbated by further uncertainty over the likelihood of successful resolutions coming from the OECD's BEPS project. The size of the task, coupled with extremely ambitious (and self-imposed) timeframes, has caused many to doubt whether the project can deliver. Some countries have even moved to act unilaterally on the very issues at the heart of the OECD's BEPS work, clearly not confident of a workable solution from the Paris-based organisation. While the non-governmental organisations (NGOs) are concerned that BEPS will lack the necessary teeth to end tax avoidance, or bring much benefit for the developing world.

In Europe, multinational boardrooms acknowledge that tax planning must be seen to be fair, but the use of such nebulous concepts serves to further blur the issue and increases uncertainty. This, in conjunction with looming, but as yet far from complete, reforms, has created a grey area. Taxpayers and their advisers now have the task of harnessing creativity once more to continue conducting planning work, but with one eye firmly placed on the likely direction of future policy. Structures employed now must anticipate the changes that are slowly but surely coming about. Meanwhile, for Europe's tax justice movement, closely linked with development agencies operating in Africa, change to the international tax system cannot come fast enough. The NGOs are pushing for greater and faster reforms to curb aggressive planning strategies.

All of this means that the quality of advice and structuring expertise taxpayers seek from their advisers is of paramount importance. With this in mind, *International Tax Review* brings you its annual rankings of the world's top tax planning firms.

Methodology

In January and February, *International Tax Review* asked its readers, and the tax directors of the world's leading multinational companies, to vote for their top three tax planning firms in more than 50 jurisdictions across the world. The votes were added up to produce the survey results. No votes from advisory firms were counted and

firms could not send submissions to improve their chances of being ranked. The objective was to find out if there are other firms that did not appear in our *World Tax* directory that the market regarded highly because they had a particular specialty. Or if there were firms that appeared in *World Tax* and were known as

dependable groups of tax advisers without having any star practitioners. Would they be rated for their excellence in tax planning? This survey should be seen as complementary to *World Tax*, which looks at the whole profile of a firm, not just its size and its deal flow. This survey is more specific about a firm's advisory strength.

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The fight against tax avoidance is far from won

The rhetoric of tackling aggressive tax avoidance has never been louder. But governments' actions have yet to speak as loudly as their words. Despite its successes, the campaign to end tax avoidance still has a long way to go, writes **Salman Shaheen**.

AMERICAS

Uncertainty lingers but planning work must go on

In North America the state of flux continues as BEPS concerns replace reform uncertainty, while Latin American tax planning developments can be characterised by the burdens associated with new technology. **Matthew Gilleard** explores.

With 2014 seeing the two leading lights of potential US tax reform leave their posts of influence (Senate Finance Committee chairman Max Baucus left to become US ambassador to China earlier this year, while Dave Camp leaves his role as House Ways & Means Committee chairman at the end of this congressional term) it is not surprising that the issue has once again been pushed down Capitol Hill's to-do list.

This has left an uncertainty-shaped hole for taxpayers. The Sword of Damocles they had grown accustomed to seeing if their eyes ventured skywards no longer hangs over their heads. Or, more accurately, it does still hang there, but taxpayers are safe in the knowledge that the thin thread protecting them from the major legislative headache of getting to grips with a new tax code will remain intact until at least next year.

But while US domestic reform has been sidelined once more, work to achieve reform of international tax rules continues apace and slots nicely into the uncertainty-shaped void temporarily left by US inaction.

Jim Fuller, partner at Fenwick & West, says the main source of tax planning uncertainty that has not previously been seen is the OECD-led project to reform international rules to curb base erosion and profit shifting (BEPS).

"The primary change has been the uncertainty BEPS has brought. It can be difficult to plan when the world's tax laws seem to be in a state of flux. There also well could be an inconsistent implementation of the BEPS proposals from a country-by-country perspective, with multinational corporations caught in the middle," says Jim Fuller, partner at Fenwick & West. "In addition, there have been a number of legislative proposals in the US regarding corporate tax reform, but it remains to be seen whether the Republicans and Democrats will be able to agree on substantive changes which in any event will not take shape until 2015 if at all."

US taxpayers remain aware that domestic tax reform will impact their tax planning, but with substantial policy differences still to be breached, and action therefore coming in 2015 at the earliest, they know business must continue as usual in the meantime.

"Corporate operations continue and tax structuring needs to accommodate them. Multinationals certainly haven't stopped doing business waiting to see what tax changes will result from BEPS or otherwise," says David Forst, also of Fenwick & West. "General business and tax planning thus proceeds under current law, as it must. As a result, despite the uncertainty, the market has not yet really changed."

"It's just that the diligent tax adviser needs to keep his or her eye on what might happen in the future," adds colleague Ron Schrottenboer. "The uncertainty from BEPS and proposed legislation adds an extra item to consider."

Lauren Kovar, director of client advisory and strategy at Thomson Reuters' Tax and Accounting division, says taxpayers are accustomed to uncertainty lingering over them, and that the OECD BEPS discussion is an example of one of many areas of evolution for tax.

"At any given point in time, there are multiple changes on the horizon to consider. BEPS, the Marketplace Fairness Act, R&D tax credits, and so on. All must be tracked and considered in planning, but do not necessarily impact results until officially instituted," says Kovar.

While they may not impact results until legislation is formalised and enacted, taxpayer planning methodologies must stay abreast of developments. Gradually developing systems and tweaking methodologies to ensure a framework for continuing compliance in advance of actual regulatory reform is preferable to a complete process overhaul after the fact. Anticipation is a key skill for a multinational tax department, which must constantly ask itself: "If this measure comes in, what will we need to do differently, if anything?"

"In tax systems and operations, the lead-time necessary to plan for changes is much longer and impending regulatory change often forces organisations to look at their operational preparedness and make plans even prior to those changes being certain," says Kovar.

But while the US is engaged in the BEPS conversations, whether it will participate in a broad-based multilateral solution to BEPS remains to be seen and Kristin Konschnik, of Withers Worldwide, believes this is not likely to happen in the near future.

"It is more likely Congress will address aspects of international tax planning they view as particularly objectionable though domestic legislation and as tax practitioners we have to be alert to any such proposals and consider how they may impact both future planning and existing structures," she says.

So uncertainty over the extent of US involvement and engagement can be added to the uncertainty of the shape a possible BEPS solution will take, as well as to the uncertainty of delayed domestic reform.

On the BEPS front, Konschnik sounds a note of caution over the shape a possible solution takes, saying that tax planning and tax optimisation strategies will continue to be devised and applied. The more generic the rules are – often the case when seeking multilateral solutions – the more scope there is for planning in the gaps.

"Implementing a broad-based, multilateral solution to BEPS is potentially dangerous as any solutions may have significant unintended consequences, whether the impact is on tax revenue or, more broadly, on capital markets, inbound or outbound investment etc," she says. "In addition, taxpayers will continue to look to structure their ongoing business operations in the most operational and tax efficient manner possible, and any BEPS solutions may merely change the nature of tax planning rather than eliminate it."

In Latin America, too, taxpayers feel unilateral measures to tackle BEPS may be more likely than a wide scale, global solution.

ARGENTINA

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Nicholson y Cano

Daniel Paulo Marques, direct tax manager, tax planning, at Heineken in Brazil, says that, with regards to BEPS, Brazil's non-membership of the OECD means the country is tackling related issues on a unilateral basis.

"Since Brazil is not an OECD member, there is no impact in this matter, and in any case the government already started to look after profit shifting and base erosion by publishing new regulations and normative instructions to avoid those kinds of tax planning," says Marques.

It is clear from Marques' statement that the impacts of OECD and other multilateral-level discussions are not being felt by taxpayers

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KPMG

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Machado Associados Advogados e Consultores

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PwC

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Trench, Rossi e Watanabe

Tier 2

CFA Advogados

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Pinheiro Neto Advogados

operating in Latin America. This goes against much of the rhetoric coming from the OECD, which claims to be actively engaging with emerging economies and developing countries, including those that are not OECD members.

Pascal Saint-Amans, head of the OECD's centre for tax policy and administration, recently stressed the importance of involving developing countries in multilateral processes on an equal footing.

"The specific needs of developing countries should not be addressed by lowering standards for them, but rather by helping them to meet the standards," said Saint-Amans.

The final make-up of an OECD BEPS solution, and the extent to which it caters to the needs of developing countries, will indicate whether this was merely lip service or not.

The challenges

Regardless of the potential impacts of BEPS action and national reforms, the show must go on and Adam Halpern, Fenwick & West partner based in Mountain View, says routine tax planning activities have continued.

"Most of the tax planning work we've been doing for clients involves general structuring to accommodate business operations and post-acquisition integration structuring," says Halpern, who adds that tax planning is neither easier nor more difficult than it was, say, a year ago. "It still requires a knowledge of the US tax laws, some creative thinking and working with foreign tax counsel."

Another development which is impacting North American tax planning, in particular, is increased scrutiny of multinational tax affairs and of tax planning structures regarded as aggressive. While the public has not taken hold of the issue to the extent seen in the UK over the past two years, there have been a number of Senate hearings on the matter, with Senator Carl Levin leading the charge.

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Brazil Tax Firm of the Year, 2012, International Tax Review (Euromoney)

Brazil Transfer Pricing of the Year, 2013, International Tax Review (Euromoney)

Levin, chairman of the Senate Permanent Subcommittee on Investigations, has hauled various multinationals including Apple and Microsoft to Washington to explain their tax practices. Caterpillar was the company most recently called to testify when it appeared before Levin at the end of March.

"Caterpillar is an American success story that produces tremendous industrial machines," said Levin at the hearing. "But it's also a member of the corporate profit-shifting club that has shifted billions of dollars in profits offshore to avoid paying US taxes. This is a prime example of a tax avoidance strategy that has cost the US Treasury billions of dollars."

Caterpillar, broadly speaking, engaged in a strategy allowing it to report the majority of its profits in Switzerland, with a royalty payment being exchanged.

"The tax structure consisted of shifting 85% of its profits from its replacement parts division, located in the US, to a wholly controlled Swiss affiliate in exchange for a small royalty," says Mirna Screpante, tax specialist currently based in Argentina. "The other 15% of profits remained in the US, where 70% of the company's third party manufactured parts that are sold abroad are manufactured, stored and shipped. No personnel or business activities were moved from the US to Switzerland, and most of the parts business remains in the US. In this regard, none of the manufacturing, warehousing, or distribution activities – the heart of the parts business – exists in Switzerland."

CANADA

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Gowlings – Taxand
KPMG
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But the company defended itself in front of Levin, maintaining that it complies with all relevant tax laws.

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- *World Tax 2014*, Supplement to the *International Tax Review*

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- *Chambers Global: The World's Leading Lawyers for Business 2014*

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- North America Tax Directors Poll, *International Tax Review*, March 2014 and May 2014

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Orozco Pardo & Asociados
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“Caterpillar takes very seriously its obligations to follow tax law and pay what it owes. Caterpillar’s philosophy is that our business structure drives our tax structure. We comply with tax laws enacted by Congress, by the states and by all of the many jurisdictions in which we conduct business,” said Julie Lagacy, vice president of the company’s financial services division.

With taxpayers operating within the limits set by lawmakers, and with lawmakers stalling on reforming those rules to adjust those limits, the arguments of Levin and others do not progress much further than this. Konschnik says that although tax planning techniques employed by US multinationals have been the subject of a number of congressional hearings, it is unclear how much this is actually impacting the US tax planning market.

“Politicians are leading the charge, but the US public doesn’t seem to have engaged in the debates in the same way as perhaps has happened in the UK. Further, tax planning by necessity follows business realities – implementing a tax-efficient structure that doesn’t mirror how business is conducted doesn’t work in practice and, in my experience, the most important question for clients is how their business will operate,” says Konschnik. “As a result, practitioners have always looked first to business realities, although long-established case law in the US recognises that, presented with several alternatives, taxpayers are not obliged to opt for a structure that generates the most revenue for the fisc.”

The reputational impact of the heat being created by Levin and others should not be underestimated, however. In a global survey of chief financial officers recently conducted by Taxand, 76% of respondents agreed that exposure in the media of corporate tax planning activity has a detrimental impact on a company’s reputation. Occupy Wall Street and US Uncut have also been making waves on their side of the Atlantic.

In Latin America, public scrutiny is even less of an issue that impacts tax planning activity. In Brazil, Marques says the main challenge is the availability of highly-qualified personnel. He says that because of the way tax planning work ties in with the rest of the



Senator Carl Levin has brought various companies to testify on Capitol Hill, only to find they are tax-compliant

business, qualifications are not just limited to tax, but should also include a general business overview and project management skills.

"In Brazil I guess that the main obstacle is qualified personnel, because the law offices and Big 4 consultancy firms can give us the theory, but to apply it is another story," he says. "Most of the planning work demands a minimum project management office-level knowledge of how to carry out a project to implement effective tax planning."

He says that because of the complexity of legislation in Brazil, a lot of tax planning is devoted to the recovery of tax credits and other tax benefits.

"States give benefits to companies when they invest – for example in a new plant – and consequently bring more employment to that state, so there is a reduction or postponement of the VAT into that state, and considering that for industrial companies VAT is the largest tax burden, factories are built or improved in accordance with those incentives," says Marques. "A new approach to planning work is to get a full picture of Brazilian state incentives, and mix this information with tax, logistics and labour costs to ensure the best final option. So decisions are made not only based on the tax benefits anymore."

Data accuracy and tax technology

Many of the challenges outlined can be overcome by data accuracy. Again, keeping up-to-date records while keeping one eye on possible future developments is of paramount importance.

"Change appears to be more frequent and the complexity of tax considerations for global organisations continues to be a challenge. Tax departments are placing a greater emphasis on being proactive in their operational and technology strategies to ensure they are able to respond quickly to change and to ensure the infrastructure supporting tax planning is solid and meets their needs," says Kovar. "In technology, we are seeing this very apparently as the approach to service our clients is slowly migrating to large-scale global platforms versus smaller system-by-system implementations."

The way data is handled, stored and analysed is constantly evolving, and tax departments must be able to harness this in an effective way. Access to the most accurate level of data, in a timely manner, says Kovar, is one of the key challenges.

"Tax departments have undertaken steps to better understand their data needs and put systems in place that can manage the large volumes of data they require. In many organisations, tax is the largest consumer of data from other areas of the business, but does not always receive the data they need in a direct fashion," says Kovar. "The amount of effort tax departments must expend to manipulate and manage data at its base level directly impacts the amount of time available to properly analyse and respond to that

Tax departments are placing a greater emphasis on being proactive in their operational and technology strategies to ensure they are able to respond quickly to change

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Deloitte
Mancera (EY)
PwC

Tier 2

Basefirma
Basham Ringe y Correa
KPMG
Ortíz Sainz y Erreguerena
SKATT International
Tron Abogados

PERU

Tier 1

Deloitte
Estudio Echecopar / Baker & McKenzie
Estudio Olaechea
EY
KPMG
PwC

Tier 2

Hernandez & Cía
Muniz, Ramirez, Perez – Taiman & Olaya
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URUGUAY

Tier 1

Ferrere
Grant Thornton
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PwC

US



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Baker & McKenzie
Deloitte
DLA Piper
EY
Fenwick & West
KPMG
Miller & Chevalier
PwC
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Sullivan & Cromwell
Vinson & Elkins

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Akin Gump
Alvarez & Marsal – Taxand
Baker Botts
Basefirma
Caplin & Drysdale
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White & Case

data. Ensuring a strong operational framework and placing an increased focus on data management and systems is important to reduce manual data manipulation.”

With the continuing focus on data accuracy, it is unsurprising that tax technology is increasingly being used to support tax operations

and provide more timely access to information. If technology is managed and operated efficiently, this removes the burden of manual work for tax departments, freeing up time for deeper analysis.

“With increasing global regulatory requirements and scrutiny, heightened focus on controls, and an ever-growing demand for trans-

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parency, tax information, operations and technology have become a key focus of companies and the firms that advise them. In addition, tax technology and the involvement of tax in enterprise data initiatives have changed dramatically,” says Kovar. “Executives are pushing for more optimised procedures and technologies to support end-to-end tax processes and produce timely and accurate results that migrate risk and protect corporate reputation, as well as justify IT expenditure for tax. Tax operations and the way companies do tax work are in the midst of a global transformation that will require an evolution of tax process, technology, strategy and the people that support it. They are demanding an infrastructure and skilled employees that can meet their needs, as well as expand the operational model globally. Tax is aligning to the structured and centralised evolution that has occurred with the rest of finance and accounting.”

Experiences in Latin America, however, indicate that tax technology is not proving as useful for taxpayers there.

In Mexico, since the start of 2014 taxpayers have been required to upload their book records to an electronic platform developed by the Mexican authorities.

“This new obligation has been controversial for taxpayers since uploading their book records on a regular basis may represent for

VENEZUELA



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EY

Tier 2

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the tax authorities the possibility to keep all taxpayers under an informal audit permanently,” says Gustavo Gomez, partner at EY Mexico.

Another technological development has seen the introduction of an electronic invoicing regime known as CFDI (*Comprobante Fiscal Digital por Internet*) which obliges companies to deliver payroll receipts through the CFDI scheme.

“This reform represents a substantial burden for taxpayers since the potential cost to comply will be very high,” says Gomez. “For instance, a company with a payroll of 1,000 employees that pays wages twice a month will have to emit 24,000 CFDI receipts in a year.”

While Cristina Sampaio Cavalieri Teixeira, managing partner at Hirashima & Associados, and former Latin America tax director and Brazil finance director at DuPont, reports similar experiences in Brazil.

This trend was already beginning to emerge back in 2007 when the Brazilian government created new electronic filings including the SPED digital public bookkeeping system, which companies must comply with or face penalties.

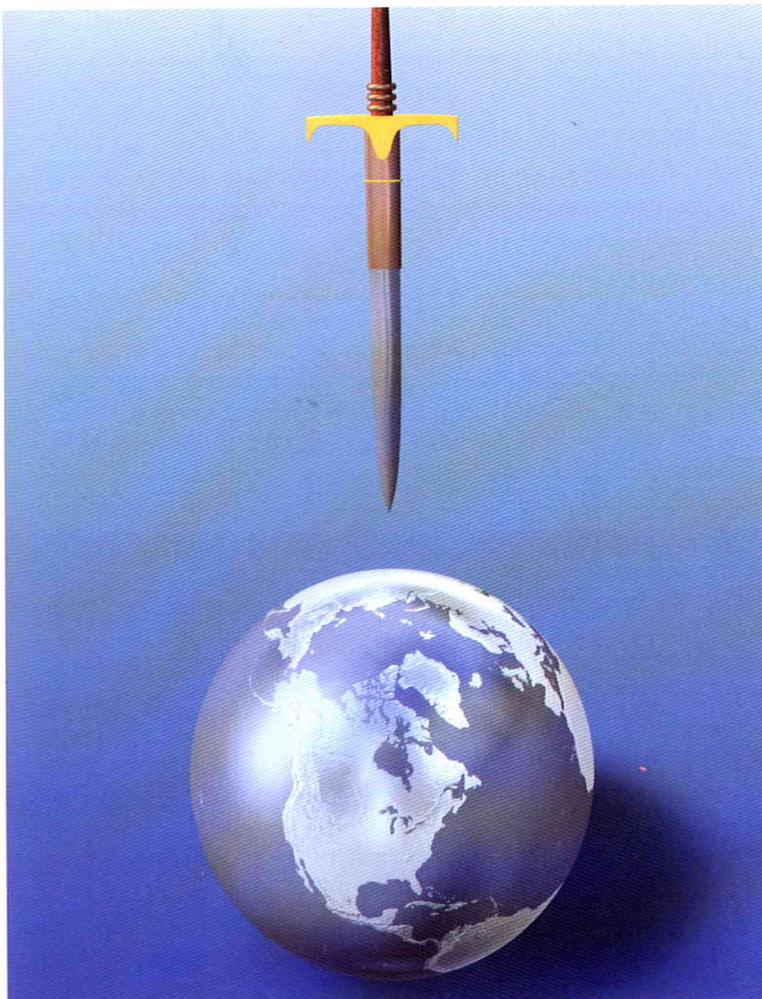
“Though it was created under the supposed intention to be one more initiative to automate the relationship between tax authorities and taxpayers, the truth is that the strategy behind all of these electronic filings is to shift the burden of a tax audit from the tax authorities to the taxpayers,” says Teixeira.

“Companies have to invest a significant amount of money in their systems to comply with all the obligations that have been created by the government. And the tax authorities, in turn, take much less time and use fewer resources to audit companies,” she adds.

Teixeira says Brazil is continuing to establish further electronic requirements so companies should continue to invest to ensure compliance. She also warns taxpayers in other parts of the region to anticipate future tax technological advances.

“While this trend started in Brazil, it is quickly spreading to other countries in Latin America. In the past, Brazil had already given ideas like this one to other governments. Therefore, even when Brazil is done setting up all of the requirements, we will certainly need to continue working on similar fronts in other Latin American countries,” she says.

So while taxpayers in North America continue to find themselves staring up at the Sword of Damocles with uncertainty, in Latin America it is the e-Sword – or Lightsaber – of Damocles that must be contended with, as the threat of failing to comply with modern technology systems brings a new dimension to tax planning.



The Sword of Damocles remains over taxpayers, with domestic and international reforms causing uncertainty