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Section 18 and Schedule 6: diverted profits tax

Part 3 of the Finance Act 2015 (FA 2015) introduced an entirely new tax on cross-border businesses and transactions. Four years later, the diverted profits tax (DPT) remains largely unique amongst national tax codes, with Australia the only other country to have followed the UK's approach. Commentators—the writer included—who at the time expressed concern at the DPT's radical scope, complexity, and "hair-trigger" conditions,[1] would have been forgiven for thinking that the actual impact of the DPT would become clear within a few years. This has notably not been the case.

One of the few concrete things we do know is that the tax—quickly christened the "Google Tax" by media outlets following George Osborne's commitment to tackle "technology companies [who] go to extraordinary lengths to pay little or no tax"[2]—does not apply to Google.[3] Everything else is speculation. Anecdotal evidence suggests that the DPT is, in the main, being used by HMRC as an additional negotiation lever in transfer pricing disputes (using the section 80 FA 2015 charge), rather than to counter permanent establishment avoidance (using the section 86 FA 2015 charge).

The actual yields from the DPT add to the impression that the DPT is more of a negotiating tool for HMRC than the revolutionary counter to profit shifting that Mr Osborne originally suggested.

At Committee Stage of the Finance (No.3) Bill 2018, the former Financial Secretary to the Treasury, Mel Stride, declared that:

> "DPT has been a success…it has raised more than originally forecast [and] continues to prevent multinationals from exploiting our tax system".[4]

The yield does indeed exceed forecasts. DPT raised £388 million in 2017–18 compared with the projected £360 million[5] (£219 million of DPT was collected, and HMRC estimates that a further £169 million of corporation tax was raised as the result of behavioural change[6]). However, viewed in the context of overall UK onshore corporation tax receipts for 2017–18 of £55 billion, these amounts are immaterial. Either the cost of "multinationals…exploiting our tax system"[7] is much less than commonly thought, or the DPT has not in fact been as successful as Mr Stride believes.

[1] D. Neidle, "The diverted profits tax: flawed by design?" [2015] BTR 147.
[2] G. Osborne, *Speech to Conservative Party Conference* (29 September 2014, Birmingham).
[3] A. Mostrous, "Osborne's 'Google tax' does not tax…Google", *The Times*, 29 January 2016.
[4] *Hansard*, Public Bill Committee, Finance (No.3) Bill (Third Sitting), col 106 (29 November 2018).
[5] HM Treasury, *Autumn Statement 2014* (December 2014), Cm.8961, available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/382327/44695_Accessible.pdf* [Accessed 18 June 2019], 64.
[6] HMRC, *Transfer Pricing and Diverted Profits Tax statistics, 2017 to 2018* (2018), available at: *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/729876/Transfer_Pricing_and_Diverted_Profits_Tax_statistics.pdf* [Accessed 20 June 2019], 5.
[7] *Hansard*, above fn.4.

The amendments to the DPT introduced by Schedule 6 to the Finance Act 2019 (FA 2019) are consistent with this view of the DPT as bargaining chip rather than game-changer.

The first amendment, in paragraph 11 of Schedule 6 FA 2019, slightly slows down the (relatively fast) pace of DPT procedures. Following issue of a DPT charging notice, any tax assessed as due must be paid within 30 days. Subsequently, a "review period" commences during which a taxpayer's representations are considered, at the end of which a balancing payment in respect of over- or under-paid tax may be due. It has been suggested HMRC were finding the timelines challenging,[8] and so paragraph 11 extends this review period from 12 to 15 months.

The second amendment, in paragraph 12 of Schedule 6 FA 2019, permits a taxpayer in receipt of a charging notice to amend its corporation tax return within the first 12 months of the review period window. Thus providing a taxpayer facing a 25 per cent DPT charge with an escape route, if they can self-assess themselves into a 19 per cent corporation tax charge instead. It is easy to see how this can be done where the DPT charge is, in essence, a transfer pricing matter; less easy to see how this can be done in an avoided permanent establishment case (although paragraph 12 expressly contemplates that it could be).

The third amendment, contained in paragraphs 2 to 8 and paragraph 10 of Schedule 6 FA 2019, is intended to make clear that diverted profits will not be subject to double-counting. Profits are to be subject either to the DPT or to corporation tax, but not to both. The writer is surprised by the contention that such double-counting would have arisen.

Finally, paragraph 9 of Schedule 6 FA 2019 removes an (apparently unused[9]) tax planning opportunity which permitted amendments to be made to a taxpayer's corporation tax return once the window for HMRC to issue a preliminary DPT notice had closed. Hence a sufficiently brave (or, more likely, foolish) taxpayer could have taken an aggressive pricing position, perhaps one outside traditional transfer pricing rules, in a corporation tax return amendment that was made so late as to be immune from DPT attack. No longer.

We are unlikely to learn much more about the DPT until we start seeing it tested in the courts. All we have to date is the rather unsatisfyingly procedural decision in *Glencore Energy UK Ltd v HMRC*[10]; however the writer is aware of at least two substantive cases that are expected to reach trial in the next couple of years. The shame of it is that, thanks to Brexit, the DPT's vulnerability to EU law challenge may never be properly tested.

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[8] H. Self, "In conversation with HMRC's Jim Harra", *Tax Journal*, 6 September 2018, available at: *https://www.taxjournal.com/articles/conversation-hmrc-s-jim-harra-06092018* [Accessed 20 June 2019].
[9] *Hansard*, above fn.4, col 107.
[10] *Glencore Energy UK Ltd v HMRC* [2017] EWHC 1476 (Admin); [2017] STC 1824.

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