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Is there room for tax planning?

A place for wealth and tax planning going into the year 2020

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In 2006, the first major tax investigation against a jurisdiction with bank secrecy started. This eventually led to the change in global transparency that began in the year 2009. Since the original investigations with regard to Swiss banks and a Liechtenstein trustee, this has evolved into a major global phenomenon, first requiring that countries enter into tax information exchange agreements (TIEAs) and eventually leading to automatic and spontaneous information exchange through FATCA and the OECD's Common Reporting Standard (CRS). There has been much written to date about the impact of the CRS and FATCA and whether they will have their desired effect. Irrespective of whether they have any long term effect on tax evasion or tax compliance, before a single piece of information was exchanged, they already made their most significant impact: they changed the way people view undeclared money and started a process of global amnesties that have led to compliance.

Simultaneously, albeit with less publicity, we have seen a greater harmonization of tax laws, particularly when it comes to individuals. The tax rate brackets in most jurisdictions and the types of items subject to tax are growing more similar globally. Further, there are greater similarities with respect to items subject to an inheritance or donation tax. In addition, on the corporate tax side, the confluence of the BEPS Project and other similar proposals and the compression of tax rates have led to a similar convergence.

This situation has led me to think about the question, is there a role for tax planning going forward?

There are two immediate knee-jerk reactions that occur when that question is asked. The first is almost always, "Well, of course there will always be methods to reduce one's tax and as such there will always be tax planning." The counter-argument is that fewer people will seek tax planning services as more and more jurisdictions create reporting requirements on advisors who help facilitate tax planning (not tax evasion, but specifically tax planning)— for example, the proposal in the European Union, new legislation coming into force in the UK, and the tax shelter legislation affecting advisors in the United States. However, both of these extremes are, by themselves, flawed. In my opinion, the reality is somewhere in between.

The more sophisticated tax authorities and governments have undoubtedly been taking action, both independently and in conjunction with their foreign counterparts, to clamp down on tax evasion and secrecy. This September legislation will come into force in the UK that creates a new criminal tax

offence for companies that facilitate onshore (UK) and offshore tax evasion. The offence exposes companies to criminal prosecution with the prospect of large fines and reputational damage if they are found to assist an individual or legal entity evade its tax liabilities. Furthermore, the European Commission has recently proposed a new set of transparency rules for intermediaries (such as tax advisors, banks and lawyers) to report any cross-border arrangement that contains one or more features or "hallmarks". The main purpose of the reporting is to provide the tax authorities of EU Member States with information to enable them to take action, for example to better target their audits or change their legislation, and also to act as a deterrent for those that promote aggressive tax planning schemes.

What is clear following the ongoing developments in domestic and international tax regulation is that reducing one's tax obligation to zero is off the table. What is also clear is that regulatory arbitrage between jurisdictions is becoming harder and harder. Furthermore there are tax reduction techniques, based on law but without any economic substance, that will certainly go away. However, does that mean that tax planning itself will disappear?

The short answer is that unless every jurisdiction in the world went to a flat 10% tax rate with no deductions, there will always be some tax planning that can be done. However, in order for tax planners and their clients to adjust to our new reality, there has to be a change in philosophy. One change that is needed is acknowledgement that tax minimization may be acceptable, but paying zero or almost zero tax, which causes unnecessary burdens on countries, needs to stop. The second is that there needs to be an easy method of sharing tax information among jurisdictions that will not allow for any kind of arbitrage. This type of system is already being put in place with FATCA and CRS, and there needs to be acknowledgement that these types of systems will be unavoidable.

Yes, these measures would, of course, over time eliminate certain types of planning. However, some types of planning are necessary — not to manipulate the rules, but simply because some people's real lives do not fit perfectly with the typical situation imagined by the rules. For example, you will always have families with assets and family members in multiple jurisdictions. That will, of course, always lead to the desire to try to mitigate tax costs as money moves from one generation to another.

Some families may be adverse to disclosure because of historical or cultural reasons. Take the following example: a Russian family with assets around the world has never been concerned about paying the 13% income tax in Russia. However, they have been concerned about disclosure in Russia because of the history of how such information has been used domestically or sold to third parties. Planning to mitigate disclosure will always be there as long as people are concerned about safety and privacy.

As another example, if people live in a jurisdiction that places rates of 40% or more on growth assets, which is clearly confiscatory, such people will want to engage in tax planning to look for some form of tax reduction.

In contrast, if people live and maintain their assets exclusively in a jurisdiction where tax rates have dropped to an effective rate on income of 15% or lower, such people will just not engage in tax planning. However, even people living in such a jurisdiction might have a need for tax planning if their situation becomes more complicated. For example, if a person living in such a jurisdiction has members of the next generation living in the United States, they will want to engage in tax planning to attempt to mitigate the impact of the U.S. estate tax.

It is true that we are seeing trends towards automatic information exchange, leveling the rates among jurisdictions, and standardizing the types of income and assets that are subject to tax. These trends minimize the need for tax planning, and it is likely that over time we will see that tax planning

for families at a certain range of assets will naturally disappear. However, for families with more complicated situations in multiple jurisdictions, there will always be a need for tax planning.

Thus, the answer to the question is far more complicated and complex than people might think at first glance. Will there be tax planning in the future? Of course. Will it be necessary for the level of mid-range clients that have historically required it? Certainly not. However, there will always be a role for tax planning for certain families.

Marnin Michaels has been practicing for more than 15 years in the areas of tax and international private banking and handles insurance matters relating to tax investigations and wealth management. He counsels clients on US withholding tax and qualified intermediary rule, as well as money laundering avoidance legislation. Marnin was a member of the firms Steering Committee leading the US Department of Justice Initiative for Swiss Banks. In the end, the firm acted for 45 banks and the project won litigation firm of the year by American Lawyer Magazine.

Widely regarded as one of the world's leading wealth management lawyers, Marnin is on the Firm's European tax steering committee, chairs its European wealth management committee and is a member of the global wealth management steering committee. He is also Tax Chair of the Firm's Global Africa Initiative.

In addition to writing extensively for many publications, Marnin has also authored two legal treatises: International Taxation: Withholding and International Estate Planning (both published by Thomson Reuters). Marnin also teaches in several LLM and MBA programs on various tax issues.

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