Transfer pricing - Base erosion and profit shifting (BEPS)

In today's world, aggressive tax avoidance is the new tax evasion

Taxpayers, corporate and individuals must pay attention to their tax affairs now more than ever before and must temper their appetite for aggressive tax planning with a pinch of morality to ensure that a fair amount of their profits is paid in taxes in locations where their business functions are performed.

Lionel Messi, the Argentine footballer who plays as a forward for La Liga club FC Barcelona and the Argentina national team, is without a doubt one of the World's best footballers of all time. Added to his extra ordinary talent is his decent and friendly disposition which has endeared him to many fans around the world. Very likeable indeed but may be not to the taxman, at least in Spain, where he has been accused of tax evasion.

Messi has been resident in Barcelona since 2000 and gained Spanish citizenship in 2005. It was alleged that Messi and his father Jorge avoided paying millions of euros in back taxes on Messi's image rights income through complex overseas structures in Uruguay, Belize and Switzerland. Messi is reported to have earned $41.3 million in 2013 up to June, $20.3 million from his club salary and $21 million in endorsements. The

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prosecutor claims that Messi used shell companies in low tax jurisdictions and tax haven to avoid paying tax on his image rights earnings.

According to a statement credited to Messi in response to the allegation, he said "It is something that surprises us because we have never committed any offence." Unfortunately it seems the taxman has changed the goal post such that tax avoidance, which is essentially tax planning within the ambits of the law, is now being considered as tax evasion which is criminal. Dolce and Gabbana were recently convicted of tax evasion in Italy under more or less similar circumstances.

As the world becomes more borderless and physical locations of business activities become less relevant, governments around the world are battling to keep their traditional tax base in the face of stiff tax competitions among nations. Intuitively every rational person wants to minimize their tax bill hence the continuous search for legitimate tax planning by exploiting loopholes in the tax laws. Unfortunately, the line between illegality (tax evasion) and legitimate tax planning (tax avoidance) is becoming thinner by the day.

G8, the group of eighth of the world's most developed countries met recently to discuss key issues including Tax, Trade and Transparency. The entire discuss around "Tax" centered on transfer pricing whereby multinationals and high net worth individuals are accused of shifting their profits from countries where their business activities are conducted into low tax jurisdiction or worse still into tax havens.

Corporations, big or small and especially multinationals, are expected to contribute into government funding by way of taxes. In Europe and particularly in the UK, some of the multinationals recently accused of transfer mispricing include Google, Facebook, Starbucks and Amazon. Although parliament agreed that these corporations did not violate any laws it however questioned their morality with respect to the payment of their fair share of tax. This raises another question of whether it is wrong to avoid paying taxes legally if you can.

The major cause of base erosion and profit shifting (BEPS) is that as businesses have become more sophisticated and complex, tax rules remains largely the same in the 21st century as they were in the pre industrialization era. It is common sense that you cannot expect tax rules designed to address traditional commerce to adequately tackle today's economic environment of global businesses characterised by information and communication technologies. The fluidity of intellectual property coupled with the ease of risk portability and the delivery of digital goods and services mean that tax arbitrage is not only easier but also economically attractive. In addition, competitiveness and the quest for super efficiency in the face of harsh economic conditions is making shared service centers, captive insurance, central procurement and other arrangements more popular with the potential to result in base erosion and profit shifting.

The OECD has been working on BEPS, which is likely to change how we view tax planning since it is becoming apparent that aggressive tax avoidance may now be viewed as tax evasion thereby attracting not just a civil sanction but also a criminal liability. The OECD's BEPS project is looking at whether and why multinationals' taxable profits are being allocated to locations different from those where the actual business activity takes place. This effort is being followed and supported by the G20. In June 2012, the G20 Leaders in their declaration at Los Cabos said "… we reiterate the need to prevent base erosion and profit shifting and we will follow with attention the ongoing work of the OECD in this area"

Also there are moves to introduce more transparency around taxation by global organisations through the adoption of country by country reporting. It is said that African countries lose more money to transfer mispricing that to corruption so the focus on this important subject is only going to become more intense. Nigeria, Ghana, Angola, Kenya, Malawi, Namibia, South Africa, Uganda and Zambia are some of the countries in Africa that have introduced formal transfer pricing rules with more expected in the coming years.

Taxpayers, corporate and individuals must therefore pay sufficient attention to their tax affairs now more than ever before and must temper their appetite for aggressive tax planning with a pinch of morality to ensure that a fair amount of their profits is paid in taxes in locations where their business functions are performed. Whilst it is generally agreed that governments should avoid excessive or double taxation which is anti-investment, taxpayers also should not seek to achieve double non taxation. Sometimes it not just about tax, it is also about fair trade as transfer mispricing and the attendant artificially low taxes will confer undue advantage on the benefiting organisations to the detriment of others

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