

How Does Taiwan Respond to Tax Challenges Arising from Digitalization

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I. The Tax Challenges arising from Digitalization

According to the Ability-to-pay principle, companies need to pay income tax for their income or profit. Nevertheless, in order to avoid their tax obligations, Multinational Corporations (MNCs) have been continuously developing sophisticated and refined tax planning practices to disconnect or mismatch between “where value is created” and “where taxes are paid”, and such practices erode the tax base.[1]

A well-known example of trade model under digitalization of MNCs is that “MNCs do not necessarily have to open domestic physical stores or set up servers, those domestic consumers can purchase goods and services from MNCs directly through the Internet”. This trade model not only breaks the international tax rules “With Permanent Establishment (PE), With taxing power”, but also disconnects or mismatches between “where value is created” and “where taxes are paid” more perfectly. As a result, the taxing power of “where value is created” is eroded. This is a classical type of challenges faced by tax regulators in the age of digitalization of the economy.

In response, The European Commission (EC) and The Organization for Economic Cooperation and Development (OECD) had respectively proposed new plans to ensure that digital business activities are taxed in a fair and friendly way.

(I) The Digital Service Tax proposed by EC[2]

In 2018, EC proposed a temporary tax - Digital Services Tax (DST), which a basic rate of 3% to be imposed on revenues of a digital platform when such platform meets all of the following criteria, including (1) online placement or advertising services, (2) sales of collected user data, (3) facilitate interactions between users, (4) annual worldwide revenues exceeding 750 million euros and (5) taxable revenues within the European Union (EU) exceeding 50 million euros.[3]

Concerning that the DST apparently targeting US MNCs - Google, Amazon, Facebook and Apple (GAFA), the US government once threatened to impose retaliatory tariffs. Insofar, it seems that only a part of MNCs will be immediately affected by DST, but the entire trading systems in the rest of the world will be impacted if the retaliatory tariffs conducted by the US take effect.

(II) The Two-Pillar plan released by OECD[4]

In October 2020, OECD had released Reports on the Pillar One and Pillar Two Blueprints (The Two-Pillar plan), which aimed to terminate the international dispute resulting from DST of EC and provide solutions for tax challenges arising from the digitalization of the economy in the long term.[5]

Pillar One is “Unified Approach”, to ensure the exercise of taxing powers of governments and a fairer distribution of profits among countries where largest MNCs, including digital companies are located at. It would “re-allocate” the taxing powers over MNCs among governments of different jurisdictions. The governments located at the place where MNCs have business activities and earn profits will have the tax powers over those MNCs, even MNCs do not have a physical presence there. Pillar Two is “Global Anti-Base Erosion rules (GloBE)”, tried to protect tax bases of countries through the introduction of “Global Minimum Tax (GMT)” which sets up a minimum corporate income tax rate on MNCs to prevent tax competitions among countries.

Compared with DST proposed by EC, which focuses on the taxing powers of the government that is located at the place where value is created. The Two-Pillar plan focuses more on both re-allocation of international taxing powers and protects the tax base of each country.

(II) The Consensus on The Two-Pillar plan[6]

The Group of Seven (G7[7]), G20[8] and 137 countries and jurisdictions OECD stated not only agreed to remove the DST or the similar measures, but also had a consensus on Two-Pillar plan to reform international taxation rules[9]. In order to ensure that MNCs pay a fair share of tax wherever they operate, as well as to set a GMT rate to protect tax base of each country. Moreover, the new international tax system that the GMT rate is 15%[10] is expected to take effect in 2023 and an estimated 154 domestic MNCs will be thus affected accordingly.

II. The Response of Taiwan to Tax Challenges

A foreign enterprise has to pay Taiwan taxing regulators enterprise income tax for income generated in Taiwan in the premise that this foreign enterprise has a PE in Taiwan. In other words, a PE in Taiwan, which is recognized as the fixed place of business through which the business of an enterprise is wholly or partly carried on[11], is the determinant that affects the power of Taiwan to tax the profits of a foreign enterprise. In brief, “No PE, No taxing power”.

In the era of digitalization, the foreign enterprises can create value through the digital means without establishing a PE in Taiwan. The situation of disconnection or mismatch between where value is created and where taxes are paid not only erodes the taxing power of Taiwan, but also breaks the principle of equality in substantive taxation[12] as mentioned above. As a result, the Ministry of Finance (MOF) adjusted and implemented several new taxation policies or measures, including, *inter alia*, “Income Taxation on Cross Border Electronic Services[13]” and “Income Basic Tax Act”. These two measures were once considered similarly to DST or GMT individually.

(I) Income Taxation on Cross Border Electronic Services

Responding to tax challenges posed by foreign enterprises under digitalization, the MOF promulgated a new income tax regulation “Income Taxation on Cross Border Electronic Services[14]”, and asked those foreign enterprises who provide cross-border electronic

services to purchasers in Taiwan, shall register for business value-added tax (VAT), including register a tax identification number and file taxes. The causation between the electronic services and national economy shall be the determinant to identify income generated in Taiwan:

1. The payment made by a purchaser located in Taiwan to a foreign enterprise in order to procure following products or services provided by such foreign enterprise shall be deemed as income generated in Taiwan.

(1) The product that is produced, manufactured, transmitted, downloaded and saved in a digital device and can only be provided with assistance by individuals or enterprises in Taiwan.

(2) The real-time, interactive, handy, and continuing electronic services that are provided through digital means

2. A foreign enterprise provides a digital platform to conduct transactions, once one of the transaction parties is in Taiwan, the sales amounts shall be recognized as income generated in Taiwan

(II) Income Basic Tax Act (IBT)

To promote domestic economic development and industrial innovation, Taiwan has enacted many laws on tax incentives, mainly tax deductions and credits. However, these laws have been overdeveloped, the implement period has also been excessively extended, which contributes to severely unreasonable tax burden inequality.

Therefore, Taiwan officially introduced Alternative Minimum Tax System (AMT) and promulgated Income Basic Tax Act (IBT)[15] since 2006. As a separate taxation system, AMT is imposed by government that places a floor on the percentage of taxes a certain filer must pay, regardless of how many tax incentives the filer may claim[16]. Hence, in accordance with Article 1 of IBT "*the purposes of this Act are to uphold tax equity, to ensure tax revenue for the country, and to establish the basic requirements of profit-seeking enterprises and individuals in regard to their obligation to fulfill their income tax burden as a contribution to public finance.*"

AMT uses a different set of rules to determining taxable income compared with the normal tax calculations. Once the regular income-tax amount is higher than the AMT, the taxpayer pays the regular income tax. Thus, if AMT is higher, then the taxpayer pays the AMT. And according to Article 8 (1) of IBT, the enterprise IBT rate is prescribed of 12% since 2013.[17]

However, according to Article 3 (1) (5) of IBT[18], a foreign enterprise without domestic fixed place of business or domestic business agent is not regulated by IBT.

(III) Conclusion

1. "Income Taxation on Cross Border Electronic Services (Hereinafter referred to as "the measure")" asked the foreign enterprises to file income tax. But the elements of "the measure" are different from DST. The reasons may be (1) "This measure" has been designed and promulgated earlier than DST and (2) The DST is essentially more like alternative minimum tax.

2. IBT may effect by the concept of "with PE, with taxing power". Therefore, a foreign enterprise without PE in Taiwan is not regulated by IBT, this means "No PE, No obligation of IBT". Also, the IBT rate of profit-seeking enterprise is 12%.

III. The Remaining Problems of Tax System in Taiwan

It is foreseeable that with the international consensus on launching the Two-Pillar Plan in 2023, those countries and jurisdictions will start to adjust their tax policies, inclusive of increasing the income tax rate as well as basic tax rate. As long as the issue of "Taiwan companies abusing tax planning to hide wealth aboard and avoid domestic tax obligations" is not solved, this issue will lead to the continuous erosion of Taiwan taxing power.

Concretely, in order to reduce domestic tax burden, several Taiwan companies abusing tax planning to detain profits in foreign affiliated companies or disguise as foreign companies. Though Income Taxation on Cross Border Electronic Services has taking effect, those companies pay income tax only on income generated in Taiwan instead of global income. Therefore, the Controlled Foreign Company Rules and the Place of Effective Management Rules have been proposed.

(I) The Controlled Foreign Company Rules

A controlled foreign corporation (CFC) is a corporate entity that is registered and conducts business in foreign countries or jurisdictions, and is either directly or indirectly controlled by a resident taxpayer.

According to Article 43-3 of the Income Tax Act, if a parent company holds 50% or more of the shares of a foreign subsidiary, or has significant influence on such foreign subsidiary, the subsidiary may be seen as a conduit of the parent company and subject to domestic enterprise income, whether there is dividend distribution to the parent company or not, unless the subsidiary can pass the substantial activity test or its revenue is below a certain threshold.[19]

Yet, the "Paragraph 3", compared with "Paragraph 4", is not ruled the "a CFC can deduct the domestic income tax from foreign income tax it paid[20]", which may result in double taxation.

The Taiwan CFC rules have not come into effect yet. However, according to the ancillary resolution passed by Legislative Yuan[21], our CFC Rules will come into effect within one year after the tax amnesty legislation, "The Management, Utilization, and Taxation of Repatriated Offshore Funds Act", expires. Namely, the Taiwan CFC Rules will finally come into effect in 2022 at the latest.

(II) The Place of Effective Management Rules

The place of effective management (PEM) is defined as a place where key managements and commercial decisions a business entity substantially made.[22] This means, once a foreign company sets and operates a branch in Taiwan, and this branch substantially made key managements and commercial decisions for the foreign company, then it will be deemed as a PEM, the foreign company will also be deemed as a domestic company, and will be subject to tax assessment in accordance with the Taiwan Income Tax Act and other tax regulations.[23]

Following the PEM rules, which is incorporated into Article 43-4 of the Income Tax Act, the elements of PEM including (1) decision making location, (2) record keeping and maintenance location, and (3) actual operating location are all in Taiwan.

However, take foreign experience for example, German practice believes that the PEM rules only need to list "decision making location" as a necessary condition. The rest elements "record keeping and maintenance location" and "actual operating location" are more like reference factors than necessary conditions^[24].

The Taiwan PEM rules list all three elements as necessary conditions, which may probably cause excessive restrictions on future applications. And the PEM Rules were announced by the MOF in July 2016, which have yet to take effect neither.

(III) Attachment: The Sophisticated and Conflicting Tax System

The enterprise income tax rate in Taiwan is 20% to 24% in accordance with Article 5 (5) and Article 66-9 (1) of Income Tax Act. Still, to achieve specific policy goals by promoting or suppressing certain behaviors, a policy that oriented tax deductions and credits is called tax incentives, and the disadvantage of which is apparently turn the tax burden into inequality. In the end, to solve the inequality of tax burden resulting from tax incentives and to ensure tax revenue, the minimum tax will be levied by AMT. The AMT rate in Taiwan is 12% as aforementioned.

The implementation of tax incentives and AMT has made the domestic tax system over-complicated. Since the overused tax incentives have abnormally increase the amount of uncompetitive enterprises, who heavily rely on them. While the AMT may strangle the enterprises, who are compliance with economic policies. Then, the interaction and conflicts between tax incentives and AMT not just complicate the domestic tax system, also substantively result in unpredictability and inconsistency of domestic tax environment, which may cause a double-loss situation between tax revenue for the country and economic development policies.

IV. Conclusions and Prospects

(I) Conclusion

1. Amend the Income Basic Tax Act and Increase Enterprise Rate to at Least 15%

First, those foreign enterprises without PE but create value in Taiwan are not ruled by IBT. Second, the enterprise IBT rate in Taiwan is now 12%, apparently lower than GMT of 15%. If IBT rate maintains 12% through 2023, the difference between GMT and IBT may be deemed as a harmful tax-based competition. Hence, it is imperative to amend the IBT to rule the foreign enterprises without PE but create value in Taiwan and increase the enterprise IBT rate to at least 15%.

Once consider that GMT is aimed at large MNCs, the IBT may adopt a categorized approach and set different rates based on the size of the enterprise. For instance, increase the IBT rate of MNCs that meet all GMT criteria to 15%, and the rest maintains 12%.

2. Amend and Take CFC rules and PEM rules into effects

A domestic company pays income tax on global income, while a foreign company with PE in Taiwan pays income tax on income generated in Taiwan. Responding to digitalization, the implement of Income Taxation on Cross Border Electronic Services regulates foreign companies without PE in Taiwan to pay income tax generated in Taiwan fairly.

It is necessary to implement both CFC rules and PEM rules, to prevent domestic companies from abusing tax planning to detain the profit in foreign affiliated companies or to disguise as foreign companies for reducing domestic tax burden, which may continuously eroding taxing power of Taiwan. However, CFC rules and PEM rules still leave some problems to be improved and solved as aforementioned, which is undoubtedly the obligation of Taiwan government.

(II) Prospects

1. Substantive Review the Tax Incentives and Reconstruction of Taiwan Tax System

The Reasoning of Interpretation No.565 mentioned that "*[W]hile taxpayers should, under the principle of equality in taxation, pay taxes which they are supposed to pay according to their actual taxpaying ability, it is not forbidden by Article 7 of the Constitution to specify, with reasonable cause, differential treatments by way of exceptions or special provisions within the scope of discretion authorized by law to grant taxpayers of a particular class tax benefits in the form of tax reduction or exemption in order to promote the public interest.*".

The principle of ability-to-pay means that those who have greater ability to pay taxes, usually measured by income, wealth and financial capability, should pay more in taxes compared with those who have minor capability. Since taxation is the pecuniary obligation with non-counter performance under public law, the only foundation of legitimacy is the principle of ability-to-pay. Therefore, this is the core principle of the tax law.

To achieve specific policy goals, a policy that oriented tax deductions and credits to promote or suppress certain behaviors is called tax incentives, which can be permitted only in case of justifiable reasons presented. Nevertheless, the weak connection between the policy goals and the tax incentives made the acts, especially the tax incentives, unreasonable.

Additionally, the tax-form expenditure is generally a formal review of fiscal balance, no substantive review of the impact on principle of ability-to-pay taxation and the compensation for it. Under these premises, the excessively extended implementation period of tax incentives has resulting in severely unreasonable tax burden inequality and excessive reliance of uncompetitive enterprises on tax incentives.

To sum up, instead of implement the tax incentives to limit the principle of ability-to-pay, then solve it with AMT. The enactment, amendment and implement of tax laws must strictly abide by above principle. The restriction of above principle must be strictly review and limited as a whole. Namely, it is better to comply with the principle of ability-to-pay strictly. Therefore, it is important to substantively review the domestic tax incentives and reconstruct the domestic tax system.

2. Ministry of Digital Development and The Tax Reform

Taiwan government is intending to form Ministry of Digital Development (MODD),^[25] which is considered as a step toward the right direction to coordinate and expedite the development of Taiwan's digital economy.

According to Article 1 of the Organizational Act of MODD, "*[T]o promote the development of digital industries such as national*

communications, information, cyber security, network and communication, to undertake digital governance and digital infrastructure, and to assist the digital transformation of public and private sectors, the Executive Yuan has specially established the Ministry of Digital Development."^[26]

However, in name of the above-mentioned policies and ideals, which may possibly related to tax policies. Thus, this article considered that, once the MODD is staffed with public servants and experts both proficient in tax law as well as forward-thinking, and given a clear mandate, the MODD may not only contribute significantly to both domestic digital transformation and the tax reform, but also improve the efficiency of tax administration and maximize the overall economic and social benefits.

- [1] OECD, 〈BEPS – Base Erosion and Profit Shifting〉, <https://cleartax.in/s/beps-oecd> (last visited Aug 20, 2021).
- [2] 拙著, 〈柳暗花明的數位服務稅〉, 工商時報名家評論, 2021年5月17日, 網址: <https://view.ctee.com.tw/tax/29375.html>, 最後瀏覽日: 2021年11月24日。
- [3] 陳衍任, 〈歐洲數位服務稅發展簡析〉, 台灣經濟論衡, 2020年3月, 第18卷第1期, 頁58, 網址: https://www.ndc.gov.tw/Content_List.aspx?n=1BD4A3B93EF55A5F, 最後瀏覽日: 2021年4月21日。
- [4] 拙著, 〈勢在必行的全球企業最低稅負制〉, 工商時報名家評論, 2021年4月20日, 網址: <https://view.ctee.com.tw/tax/28814.html>, 最後瀏覽日: 2021年11月24日。
- [5] 拙著, 〈勢在必行的全球企業最低稅負制〉, 工商時報名家評論, 2021年4月20日, 網址: <https://view.ctee.com.tw/tax/28814.html>, 最後瀏覽日: 2021年11月24日。
- [6] 拙著, 〈取消數位服務稅已為國際趨勢〉, 工商時報名家評論, 2021年11月23日, 網址: <https://view.ctee.com.tw/economic/34152.html>, 最後瀏覽日: 2021年11月24日。
- [7] Mayer Brown LLP, 〈The G7 Agrees on a Broad Framework for Pillar One and Two〉, June 23, 2021, <https://www.mayerbrown.com/en/perspectives-events/publications/2021/06/one-small-step-but-perhaps-one-giant-leap-for-global-tax-reform-the-g7-agrees-on-a-broad-framework-for-pillar-one-and-two> (last visited Nov 11, 2021).
- [8] G20, 〈G20 ROME LEADERS' DECLARATION〉, at 11 of 20, <https://www.g20.org/wp-content/uploads/2021/10/G20-ROME-LEADERS-DECLARATION.pdf> (last visited Nov 11, 2021).
- [9] OECD, 〈Mauritania joins the Inclusive Framework on BEPS and participates in the agreement to address the tax challenges arising from the digitalization of the economy〉, <https://www.oecd.org/tax/mauritania-joins-the-inclusive-framework-on-beps-and-participates-in-the-agreement-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy.htm> (last visited Nov 11, 2021).
- [10] Statement on a Two-Pillar Solution to Address the Tax Challenges Arising From the Digitalization of the Economy, at 4 (Aug 2021), available at <https://www.oecd.org/tax/beps/statement-on-a-two-pillar-solution-to-address-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-july-2021.pdf> (last visited Aug 20, 2021).
- [11] Model Tax Convention on Income and on Capital 2010 (Full Version), at c(5)-1 (2010), available at https://read.oecd-ilibrary.org/taxation/model-tax-convention-on-income-and-on-capital-2010_9789264175181-en#page208 (last visited Aug 20, 2021)
- [12] 稅捐稽徵法第12條之1第1項:「涉及租稅事項之法律,其解釋應本於租稅法律主義之精神,依各該法律之立法目的,衡酌經濟上之意義及實質課稅之公平原則為之。」亦有釋字第420、460、496、519、597、625及第700號供參。
- [13] 資誠,〈法國徵數位服務稅,我不跟進〉,2019年7月24日報導,網址: <https://www.pwc.tw/zh/news/media/media-20190724-1.html>, 最後瀏覽日: 2021年4月15日。
- [14] 財政部賦稅署,〈外國營利事業跨境銷售電子勞務課徵所得稅制度簡介〉,2018年4月27日,頁1以下,網址: https://www.dot.gov.tw/download/dot_201804270002_1_doc_476, 最後瀏覽日: 2021年4月21日。
- [15] 中華民國94年12月28日總統華總一義字第09400212601號令制定公布全文18條;本條例施行日期除另有規定外,自95年1月1日施行。
- [16] 所得基本稅額條例第1條:為維護租稅公平,確保國家稅收,建立營利事業及個人所得稅負擔對國家財政之基本貢獻,特制定本條例。
- [17] 財政部台財稅字第10100670710號函:自102年度起營利事業基本稅額之徵收率為12%。
- [18] 所得基本稅額條例第3條第1項第5款:營利事業或個人除符合下列各款規定之一者外,應依本條例規定繳納所得稅:五、所得稅法第七十三條第一項規定之非中華民國境內居住之個人或在中華民國境內無固定營業場所及營業代理人之營利事業。
- [19] 所得稅法第43條之3第1項:營利事業及其關係人直接或間接持有在中華民國境外低稅負國家或地區之關係企業股份或資本額合計達百分之五十以上或對該關係企業具有重大影響力者,除符合下列各款規定之一者外,營利事業應將該關係企業當年度之盈餘,按其持有該關係企業股份或資本額之比率及持有期間計算,認列投資收益,計入當年度所得額課稅:一、關係企業於所在國家或地區有實質營運活動。二、關係企業當年度盈餘在一定基準以下。但各關係企業當年度盈餘合計數逾一定基準者,仍應計入當年度所得額課稅。
- [20] 參考「所得稅法增訂第43條之3建立我國受控外國公司(CFC)課稅依據,係以受控外國公司當年度盈餘,依控制公司對其持有之資本比率按「權益法」認列之國外投資收益。惟查此依權益法認列之投資收益,似漏未規定該關係企業在國外已納所得稅額可予扣抵,恐形成公司階段稅負重複課稅;對照本條第4項規範營利事業於實際獲配股利或盈餘時,國外已納所得稅額得予扣抵之規定,其疏漏自明。」立法院,〈受控外國公司課稅新制相關問題評析〉,110年8月,網址: <https://www.ly.gov.tw/Pages/Detail.aspx?nodeid=6590&pid=210513>, 最後瀏覽日: 2021年10月25日。
- [21] 境外資金匯回管理運用及課稅條例自2019年8月15日起施行,施行期間2年,已於今(2021)年8月14日失效,故我國CFC制度至遲於明(2022)年8月14日前報請行政院核定施行日期。參考「另附帶決議針對105年增訂之「所得稅法」第43條之3條文(營利事業CFC制度),與106年增訂之「所得基本稅額條例」第12條之1條文(個人CFC制度),要求財政部於本案施行期滿後1年內報請行政院核定施行日期,有助落實反避稅條款。」立法院,〈制定境外資金匯回管理運用及課稅條例〉,網址: <https://www.ly.gov.tw/Pages/Detail.aspx?nodeid=33324&pid=184215>, 最後瀏覽日: 2021年8月20日。
- [22] OECD, 〈THE IMPACT OF THE COMMUNICATIONS REVOLUTION ON THE APPLICATION OF "PLACE OF EFFECTIVE

MANAGEMENT"AS A TIE BREAKER RULE》, at 4 (Feb 2001), <https://www.oecd.org/ctp/treaties/1923328.pdf> (last visited Aug 20, 2021).

[23] 所得稅法第43條之4第1項：依外國法律設立，實際管理處所在中華民國境內之營利事業，應視為總機構在中華民國境內之營利事業，依本法及其他相關法律規定課徵營利事業所得稅；有違反時，並適用本法及其他相關法律規定。

[24] 參考「從德國的經驗回頭看台灣可以發現：台灣雖然立意良善地將「決策者或決策地」、「帳簿及會議紀錄的製作或儲存地」，以及「實際執行主要經營活動地」，「同時」列為PEM的認定標準。然而，其中只有「決策者或決策地」確實屬於PEM認定上的必要條件；至於將「財務報表、會計帳簿紀錄、董事會議事錄或股東會議事錄的製作或儲存處所」及「實際執行主要經營活動地」也列為PEM的認定標準，恐怕就值得商榷。因為上述兩項標準，固然可以作為認定企業的PEM是否在台灣境內的「參考因素」，但卻不適合作為認定企業的PEM在台灣境內的『必要條件』」。陳衍任，〈實際管理處所在適用上的爭議問題〉，月旦會計實務研究，2018年3月，頁29以下。

[25] 2021 Taiwan White Paper Overview, 〈Facing New and Existing Challenges Head On〉, at WP7 (2021), <https://amcham.com.tw/wp-content/uploads/2021/06/June-2021-Taiwan-Business-TOPICS.pdf> (last visited Aug 20, 2021).

[26] 作者自譯。

Links

- [BEPS – Base Erosion and Profit Shifting](#)
- [柳暗花明的數位服務稅](#)
- [歐洲數位服務稅發展簡析](#)
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- [Facing New and Existing Challenges Head On \[pdf \]](#)



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