PRACTITIONERS' CORNER

Wolters Kluwer Interviews TCPI Symposium Experts on Tax-Issues Surrounding Global Capital

The taxation of global capital has become a matter of growing concern among a wide variety of businesses from compliance, risk management and planning perspectives. The Tax Council Policy Institute (TCPI), a non-profit, non-partisan organization, will devote its upcoming 17th Annual Tax Policy & Practice Symposium to those concerns, when it presents, "Capital Matters: How Taxes Influence the Global Creation, Deployment, and Mobility of Capital" (February 11-12). Wolters Kluwer Tax & Accounting sat down recently with two principal organizers of this year's TCPI Symposium to preview some of the issues that will be discussed. Lynda K. Walker, Esq., is executive director and general counsel, TCPI. John Gimigliano is principal-in-charge, KPMG Legislative and Regulatory Services, former senior tax counsel for the Ways and Means Committee, and program manager for the 2016 Symposium.

Wolters Kluwer: Why has global capital been identified as a key issue in pressing issues that resonate with many businesses?

Lyn Walker—The creation and deployment of capital, its use and mobility should be explored from a number of different perspectives. Our Symposium has economists talking about capital and historically how capital has been valued, used and taxed. CFO/treasurer-level discussions will focus on how companies make decisions based on the cost of capital and the place they are going to locate their investment. And several prominent chief tax officers are expected to talk in concrete terms about how they are dealing with the changing environment. So we move from a larger picture to a more practical discussion of how people are coping and how they are planning.

John Gimigliano—The common thread of the concerns of many international businesses is the taxation of capital in some form. Capital means something different to everybody, but capital as a common thread brings certain concerns together. If you're a bank, the definition of capital to you is probably different than if you're a manufacturer. Or if you're a high-tech company, when you think about capital, you're thinking about your intellectual capital more than you're thinking about working capital or otherwise. Nevertheless, capital means something to everybody; it is the common thread to all the issues: the influence of tax reform on developing tax policy, the influence of the BEPS project on companies that are currently doing business worldwide, and how companies are going to have to manage these new rules once they become in force.

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Lyn Walker—Despite the fact that "global capital" impacts industries differently, it also is an issue that is shared cross-industry. Capital is the lifeblood of business. Whether it is in dollars, intellectual or thought capital, labor infrastructure, hard assets—the environment in which a business operates—these things have different weights and values for different industries and varying businesses, and they all are components in investment decisions.

Wolters Kluwer: Does capital also include consideration of labor?

Lyn Walker—Every element of your business is capital to some degree.

John Gimigliano—Labor is human capital. The human capital issue is critical. The human capital issue comes up in the Symposium's panel on "Taxing Genius," which is the taxation of intellectual capital. In that regard, there is a nexus between the taxation of intellectual capital and the OECD Base Erosion and Profit Shifting (BEPS) project. One of the recommendations arising out of that project is the modified nexus standard—that there should be a connection between the intellectual capital (the intellectual property) and the human capital, i.e. the people who create it. So, the research, the R&D, should be connected to the intellectual property itself. That recommendation would have major consequences as relates to the taxation of intellectual property.

Wolters Kluwer: What role does global M&A (mergers and acquisitions) play in the "creation" of global capital?

John Gimigliano—Generally, in a world without taxes, capital would go to seek its highest returns. But the influence of taxes sometimes can shift that calculus. One of the clearest pieces of that is global M&A—the acquisition of companies cross-border, and how the tax rules influence that.

Certain tax rules may create an imbalance between a buyer and a seller in different jurisdictions. The tax rules, as they currently exist, can create an advantage or disadvantage between buyers and sellers in cross-border M&A. A panel, "Beyond Borders: The Global Mobility of Capital and Taxes," moderated by Dave Lewis of Eli Lilly, will explore these concerns and opportunities.

Wolters Kluwer: What solutions or approaches should businesses expect to see in the future?

John Gimigliano—While the Symposium panel cannot offer specific solutions, a range of options will be considered.

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Ultimately, it may be up to regulators or legislators to pick one.

Lyn Walker—The issues themselves are very complex, and very taxpayer specific. One distinct benefit people generally should be able to take away from our Symposium is how chief tax officers are generally dealing with these issues in a pragmatic, forward-thinking way, recognizing that everyone's situation is going to be a bit different. Right now, with tax policy in such a global state of flux, such differences may be even more pronounced.

Wolters Kluwer: How are various governments dealing with changes in global tax policy and global capital?

Lyn Walker—The OECD's Base Erosion and Profit Shifting project (BEPS) is not just a business issue, obviously; it is a government-driven project, so knowing how countries are going to implement proposals of that plan, how they are moving forward in the current time-line is of great value to those operating globally. Governments, too, still need to figure out how to divide the pie so that they can achieve the goal of growing their economies while cultivating commerce. The challenge to our governments is to avoid policies that will result in double or triple tax to business earnings, the challenge to business is to remain competitive while this is being sorted out. The U.S., the U.K. and Canada will be represented on our Symposium's BEPS panel to discuss these challenges. We also have experienced advisors who can speak on the current and expected movement on these issues around the globe.

Wolters Kluwer: How should U.S. companies approach tax reform?

John Gimigliano—Every company has to decide that for itself. Some say that the primary goal for an industry should be economic growth. Others want simplicity that takes complexity out of complying with the Tax Code. Some just want tax reduction, which is related to but not identical to creating economic growth. For some companies, it may be to keep the one thing they have—one thing in the Tax Code that is really important to them, and they want to hang on to that for as long as possible. So, there are a lot of questions –and competing interests-- as to what tax reform should look like; and the answers depend on who you're talking to.

Lyn Walker—The conundrum that most every company is going to face is how to retain a particular structure that relies on one tax benefit or another more than its neighbor does. When you start talking about the alleged goals of tax reform, and simplification is always one, it becomes quite challenging. You wind up with some people losing, and others gaining. It's always a juggling act. When you add into that the goal of revenue neutrality, it becomes even more challenging.

Wolters Kluwer: What "better way" might be suggested by your panel, "Capitalization: Finding a Better Way?"

John Gimigliano—The essence of that topic came from the fact that, of the tax reform proposals that we've seen—(former House Ways and Means Committee Chair) Camp, retired Senate Finance Committee Chair Baucus, and now Finance Committee Ranking Member Wyden—all put out tax reform recommendations, some (Camp's) more detailed than others. Sen. Wyden's was more theoretical. All three of them, when they looked at the math of revenue-neutral tax reform, concluded that it was necessary to address and revisit cost recovery; specifically, to repeal MACRS [the Modified Accelerated Cost Recovery System]. All three of them would have recommended repealing the MACRS system. Especially for capital-intensive businesses, many of those companies are beginning to think really hard about it—"OK, if we assume that Congress is going to revise cost recovery, then how should they do it?"

The "better way" may be in the eye of the beholder, depending on who you are. For some companies, better could mean more rapid recovery. Others might say that better is taking tax out of the equation in deciding what asset class to buy; the decision should be based exclusively on nontax issues. Today, because the Code provides faster recovery for asset class X versus Y, taxpayers are encouraged to invest in asset class X. Some might say, simply let business decisions drive investments. The Symposium's panel includes the person who wrote Camp's proposal on cost recovery; as well as the draft person of Baucus's plan. They had dueling proposals, so the discussion should prove instructive.

Wolters Kluwer: It seems like there is a lot of uncertainty. Businesses still have to act, and plan.

John Gimigliano—I think it's a hard time to be a tax director. Of course there always is uncertainty, and laws are subject to change, but we really are going through a very difficult, complex time. On the domestic front, Congress seems more committed to tax reform, and it may be one big deal, or it may be a series of deals—international reform, followed by domestic reform, followed by individual reform. We don't know. But it does appear that Congress is very intent on finding a way to modify the Code. If you assume that's going to be done on a revenue neutral basis, which seems to be the plan, that creates the possibility—that there will be some winners and losers. Even on a pure domestic basis, tax directors and officers have to figure out how to navigate that. Also, what is the event horizon—are we talking about something in the next year or the next five years? That makes a big difference in how they try to manage their affairs.

Then, you layer on top of that, from a multinational point of view, the OECD BEPS project and even greater uncertainty is generated. Yes, we have the recommendations out of the OECD; but we have no idea how or when those are going to get implemented. At the moment, they're only recommendations. Different countries are going to implement them in their own way, and almost certainly with differences. This creates a lot of issues and uncertainties for tax directors right now.

Wolters Kluwer: What are you hoping the symposium accomplishes?

Lyn Walker—Our goal is to arm tax leaders with the knowledge and perspective to address the issue of the taxation of capital as they work to help their organizations navigate in today's high-stakes global environment. We believe the Symposium's robust agenda will highlight practical strategies and emerging policy considerations that will best prepare them to do so.