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The Future of the Corporate Form in Income Tax: A Case Study of Canada

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The Future of the Corporate Form in Income Tax:

A Case Study of Canada

[ROUGH DRAFT ONLY]

Jinyan Li

Osgoode Hall Law School, York University, Canada

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ABSTRACT

A corporation is nothing but a piece of paper. And yet, this piece of paper enjoys the status of a person and has an independent identity as a taxpayer (the "separate entity principle"). It can generate tremendous value for its shareholders through tax savings resulted from tax deferral, tax shifting, and tax subsidies. Why does tax law allow such value to exist? Is there any hard line constraining the scope of the tax benefits associated with the corporate form? To what extent can the two pillars (Pillar One and Pillar Two) crush the corporate form? What is the future of corporate form in income taxation? This paper seeks to answer these questions through examining the Canadian income tax system.

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1. INTRODUCTION

A corporation is nothing but a piece of paper.[1] And yet, this piece of paper enjoys the status of a person and has an independent identity as a taxpayer (the "separate entity principle"). It can generate tremendous value for its shareholders through tax savings resulted from tax deferral, tax shifting, and tax subsidies. Why does tax law allow such value to exist? Is there any hard line constraining the scope of the tax benefits associated with the corporate form? To what extent can the two pillars (Pillar One and Pillar Two)[2] or the general avoidance rule (GAAR) crush the corporate form? What is the future of corporate form in income taxation?

This paper seeks to answer these questions through examining the Canadian income tax system. Part 2 provides a sketch of the corporate tax system in terms of its rationale, objectives and technical design. Part 3 considers the issue of tax deferral arising from preferential tax rate and foreign residence. It discusses the scope and extent of tax deferral and highlights the importance of distinguishing between passive income and active business income of corporations. Part 4 considers the role of corporate form in achieving tax shifting among resident individuals and members of a multinational corporate group. Part 5 explains corporate tax expenditures in the form of technical or structural rules, such as corporate reorganizations as well as tax subsidies. Part 6 briefly assess the impact of the GAAR and the two pillars on the future of the separate entity principle. Part 7 concludes with a predication that the corporate form will stay, but with declining fiscal effect.

2. THE CANADIAN CORPORATE TAX SYSTEM

2.1 A Bane of Canadian Income Tax

The current Income Tax Act (ITA) [3] can be traced to the Income War Tax Act, 1917.[4] It is full of legal fictions.[5] Treating the corporate form as a taxpayer is one of the banes of the system.[6]

> Most nations that follow a rule of law accept as given certain important legal fictions. Indeed, a basic aspect of legal training, absorbed by law students throughout the world, is that the 'law' operates with unshakable acceptance of such fictions. In these circumstances, it would be practically impossible for any jurisdiction to disregard fictions altogether in shaping its rules of taxation, if only because those fictions have important non-tax consequences.[7]

It is one of the reasons why the statute has grown in length (from 11 pages in the IWTA, 1917 to over 1,500 pages in print today) and technical complexity. Fictions beget more fictions. In order to make the tax system work, the statute must rely on the general legal system and make a number of assumptions as to both the factual and the legal nature of the taxpayer's income. Meanwhile, the statute must "correct" the tax results when the effect of these assumptions leads to a tax result that is incompatible with the values and principles underlying the fiscal contract.[8] As a result, the ITA contains numerous deeming rules, specific anti-avoidance rules (SAARs) and the GAAR.

Most of the rules in the corporate tax regime are designed to neutralize the otherwise "natural" tax effect of the corporate form. "Much of the Act, and the IWTA before it, has been effectively devoted to

eliminating corporations as taxpayers – that is, erasing their autonomous fiscal significance.[9] The desires of achieving tax equity and neutrality as well as redistributive justice through progressive taxation on the basis of ability to pay dictate the taxation of income of human persons, not the legal fictions that own the income on behalf of individuals. However, these desires are balanced with the desires of promoting economic growth through tax expenditures and using corporations as convenient tools for tax administration. Why taxing corporations in the first place?

2.2 Justifications for the Separate Entity Principle

The Income War Tax Act, 1917 taxes on the income of every person resident in Canada and defines person to include a corporation.[10] The tax personality of corporations was influenced by the US Internal Revenue Code, 1913.[11] The main reasons for Canada to take this approach were political and pragmatic. Politically speaking, the income tax was introduced to accompany the Military Service Act (the Conscription Crisis) to share the burden and sacrifice of the Great War.[12] Not taxing corporations owned by wealthy individuals would not be politically acceptable. Practically speaking, the emerging corporate economy meant that there was money to be taxed and corporations were easier to tax than their individual shareholders. Ontario had already levied a corporate profits tax. Today, making corporations, especially the large ones, "pay their fair share" remains a political or popular justification for introducing anti-avoidance rules or the two pillars. Corporations function as deputy tax collectors through withholding of taxes or information providers to enable effective tax administration.

There are various theories or principles justifying the taxation of corporations.[13] For example, the aggregate theory of the corporation posits that the corporate tax is an indirect way of taxing the shareholders and backstops progressive personal income tax. If income earned by corporations is not taxed, unless tax law imputes corporate income to individual shareholders, shareholder level tax would be deferred, indefinitely, as corporate law does not require annual distribution of profits to shareholders. Such outcome would render progressive income tax elective, violating fundamental principles of equity and neutrality. Imputing income to each and every individual shareholder is administrative difficult, especially in the case of publicly held, multinational corporations. Taxing corporate income is thus desirable and convenient. The benefit theory justifies the corporate tax on the ground of benefits of incorporation (e.g., the limited liability protection) and business environment supported by public expenditures. It views the tax as a price paid for public expenditures that benefit businesses. This is particularly relevant when the business is carried on by a foreign corporation. There is also a regulatory rationale for taxing corporations: corporate tax is necessary to control the excessive accumulation of power in the hands of corporate management.[14]

Even though none of the theories or rationales, in itself, is conclusive as to why corporations should be taxed as separate taxpayers, the reality is that not taxing corporations is hard to justify in a country governed by the rule of law and relies on the income tax system as a main source of revenue.

2.3 The Fiscal Unity Principle

The fiscal unity principle is consistent with the aggregate theory mentioned above. It seeks to tax the income earned through a corporation at a level parallel to that of the individual shareholder, albeit with allowance for deferral for societal benefit reasons. The ITA reflects this principle through integration

mechanisms, especially in regard to income earned through private corporations, and various anti-deferral and anti-shifting rules. There is a pervasive thread of "putting Humpty Dumpty" back together again — in more prosaic terms, to overcome the separation of income from its owners, notably in the case of passive income.[15]

In essence, individuals are free to use corporations as their alter egos in commercial and investment arrangements, but they should not use these alter egos to reduce their tax liability. Since 1917, large swaths of the Act have been dedicated to overcoming, even ignoring, the legal separation of income from its owners without actually overturning the private law that has created the legal fictions of corporations that enable this separation. The *ITA* also accepts the "fiscal" separateness of corporations when they exist primarily for commercial purposes, and this is typically the case with public corporations and private corporations carrying on business in Canada.

2.4 Technical Features

2.4.1 Liability to tax

The Income Tax Act taxes income of resident persons (regardless of geographical source) and Canadian-source income of non-residents.[16] The use of residence and source as evidence of nexus or economic allegiance between the income and Canada is consistent with the economic allegiance theory, which was recently rephrased as the value-creation principle in the BEPS project.[17]

Corporate residence is determined by reference to the place of incorporation in Canada[18] and place of central management of control for corporations incorporated outside Canada.[19] It is a tax fiction layered upon a legal fiction. There is no requirement of any substantial economic ties of a corporation to the country chosen by the corporation to be its residence country.[20]

Like the concept of income,[21] the source of income is a fiction. There is no natural origin of income. "Source is fundamentally a legal jurisdictional notion. The word "source" and its companions "earned" and "arises" are commonly encountered in taxation, particularly where potentially intersection tax claims of two or more countries need to be resolved."[22] The notion of source functions as proxy for "real and substantial link" to a taxing jurisdiction, cognizable by reference to public international law, convention, and customary practice."[23] In the case of passive income, such as dividends, interest, rent or royalties, the source is tied to the payer's residence, which itself is a fiction when the payer is a corporation.

As far jurisdictional parameters go, "nothing is not malleable to fit its context"[24] and income can be sourced or re-sourced to meet the need of tax planning. Some corporate income becomes "stateless" for tax purposes.[25]

2.4.2 Corporate Income

Corporations compute their income and taxable income in accordance with the same rules applicable to individuals. Income from business or property is the profit therefrom.[26] The computation of profit is generally based on, but not limited by, accounting rules. A corporation's income derived from both domestic and foreign sources is taxable. Foreign income earned by a foreign-resident subsidiary of a Canadian parent is generally not taxable. Each corporation is taxed separately. There is no consolidation

taxation of corporate groups. The character of income as business income or non-business/passive investment income determines the application of anti-deferral rules.

Income may be taxed differently depending on the status of the corporation. For policy reasons, corporations are treated differently, depending on whether they are public corporations, and, if they are private corporations, whether they are Canadian-controlled private corporations (“CCPCs”), and whether their income is from carrying on business (technically, an “active business”) or not. Private corporations offer opportunities for the selective and self-interested separation of income from its economic owners. The same effect occurs with public corporations but their “publicness” generally means that they cannot be easily used by their shareholders to accomplish ulterior, highly personal planning objectives.

2.4.3 Corporate tax rates

The general federal rate is 15%,[27] which is also the rate for personal income in the lowest income bracket.[28] It applies to public corporations and business income of private corporations. The rate is reduced to 9% for active business income up to $500,000 per year earned by a CCPC or a group of associated CCPCs.[29]

Additional taxes are imposed on a private corporation’s investment income[30] and personal service business income. In effect, investment income is taxed at the rate of 38.67%, which is higher than the top personal tax rate of 29%. A portion of the corporate tax (currently 38.33%) is refunded to the corporation when it distributes the investment income as a dividend.[31] A private corporation’s income from a personal service business (i.e., an incorporated employee) is subject to tax at 33%,[32] which matches the top marginal personal tax rate.

2.4.4 Dividends and Shareholders

After-tax corporate income distributed to shareholders in the form of dividends is taxable to the shareholders. In the case of corporate shareholders, however, the dividends are technically included in computing income, but fully deducted in computing taxable income, are thus, in effect, tax-free. Such tax-free treatment of inter-corporate dividends apply when the payer is a resident corporation[33] as well as a non-resident corporation. In the latter case, however, the dividends must be paid out of “exempt surplus” of the foreign corporation.[34] Dividends are taxable only they are received by individuals.

Individuals receiving dividends from Canadian corporations must include the amount of dividends in computing their income.[13] Assuming that the dividends are paid out of corporate after-tax income, the *ITA* effectively allows an individual shareholder a tax credit for the amount of corporate tax “borne” by the dividends. The mechanism for achieving this effect is complex, consisting of dividend gross-up rules and tax credit rules.[14] Two corporate tax rates are assumed and indicated by distinguishing dividends as “eligible dividends” (dividends paid out of income taxed at the general corporate tax rate) and dividends other than eligible dividends (non-eligible dividends). Public corporations and CCPCs earning business income over the small business deduction limit ($500,000) pay tax at the general rate and can pay eligible dividends to shareholders. Private corporations earning non-business income or business income eligible for the lower rate of corporate tax can only pay non-eligible dividends. The dividend tax credit rate is higher for eligible dividends.

The dividend gross-up and credit mechanism was designed to achieve fiscal unity in taxing the income earned through a corporation at a level of total taxation as if the income were earned directly by the individual without using the corporate form. This mechanism is based on assumed corporate taxes and does not trace whether the underlying income is actually taxed. It does not account for the value of tax deferral and is not available to non-resident individual shareholders.

2.4.5 Corporate tax reporting obligations

Corporations are required to withhold and remit taxes from payments of wages and salaries made to their employees[35] and payments of interest, rent, royalties and dividends made to non-residents.[36] They are also required to file information returns regarding payments of employment income, interest, royalties and dividends.[37] Corporate employers must also deduct payroll taxes, contributions to Canada Pension Plan and premiums to the employment insurance program.

3 TAX DEFERRAL

3.1 "Natural" consequence of the separate entity principle

Because each corporation is a separate taxpayer, shareholder-level tax is deferred when corporate income is not immediately distributed to shareholders. There is no requirement of mandatory annual distributions under corporate law. The extent of such tax deferral is determined by the gap between corporate tax and personal tax and the length of deferral.

3.2 Business income and societal benefits of tax deferral

Business income of corporations is taxed at the general rate of 15% that corresponds to the personal tax rate for the lowest bracket.[38] As an added incentive, the *ITA* provides a special, lower CCPC tax rate of 9% for business income.[39] The gap between personal and corporate tax rates is thus 18% in general and 24% in the case of private corporations. Such preferential taxation of corporate income is a form of tax subsidy: the "free-use" of the deferred tax dollars help the corporation to lower the cost of capital. Why?

The tax deferral is the way in which the *ITA* recognizes corporations as quintessentially vehicles for carrying on business, and the limited liability principle as important in encouraging entrepreneurs to take risks and raise capital. The success of business corporations contributes to the success of the Canadian economy in terms of innovation, risk-taking and job creation.

Tax deferral is not limited to domestic business income. Foreign business income of a foreign subsidiary is, in effect, exempt from Canadian tax when the income is earned as well as when the income is distributed to a Canadian parent. This treatment makes sense under the theory of tax neutrality (capital export neutrality) and the assumption that the income is subject to corporate income tax comparable to the Canadian tax. In practice, such assumption is misplaced when the income is not taxed at all or taxed at a level below the Canadian tax. If Canada implement Pillar 2 rules and impose a global minimum tax on the Canadian parent under the IIR (income inclusion rule) in respect of low-taxed foreign business income earned by foreign subsidiaries, the benefit of tax deferral will be lost.[40]

3.3 Non-business income and anti-deferral Rules

The societal benefits justifying tax deferral are not available when a corporation earns passive income and functions like an investment account. In other words, when corporations are largely the alter egos of their legal owners, the *ITA* adopts various measures to remove the fiscal effect of using the corporate form to defer taxation. Private corporations and controlled foreign corporations must employ more than five full-time employees to qualify their investment business as active businesses.[41]

In the case of domestic private corporations, the ITA contains several types of anti-deferral rules. For example, passive income and personal service business income of private corporations are taxed at a rate on par with the top marginal personal income tax rate.[42] More importantly, refundable tax is imposed on corporate passive income and portfolio dividends. There is an elaborate mechanism for tracking the passive income through a "refundable dividends tax on hand" (RDTOH) account in respect of eligible dividends and non-eligible dividends, refunding the tax upon distribution of dividends, tracking the RDTOH and tax refund through the chain of corporate holdings, and integrating personal income tax on the dividends and the corporate tax on the passive income.[43] Portfolio dividends received by a resident private corporation that are otherwise excluded from income (i.e., tax free inter-corporate dividends) are subject to an additional, refundable tax to the effect of erasing the relevance of the corporate status of the holding company.[44]

When passive or non-business income is earned through controlled foreign corporations, the CFC rules impute the income to the Canadian resident shareholder for tax purposes. In effect, these rules look through the foreign corporation. The choice of taxing such imputed income as "income from a share" as opposed to "dividend" reinforces the fiscal unity idea. In other words, these rules do not recognize the foreign corporation as the earner of the passive income and deem a distribution of such income as dividend. Instead, they tax the income directly as if the corporation did not exist.[45]

4. TAX SHIFTING

4.1 Benefits of tax shifting

Tax shifting through the use of corporate form can be achieved through having low-income family members subscribe shares for nominal consideration or acquiring a foreign residence. In the case of family-owned corporations, tax savings arise from the shifted income being taxed at a lower rate and enabling the family member to benefit from non-refundable tax credits. Because the tax unit is each individual or corporation and personal tax rates are progressive (currently ranging from 15 to 33 percent), splitting or shifting of income from high-income taxpayers to low-taxed related taxpayers is a no-brainer. The corporate form is one of the common means to this end.

4.2 Family-owned Corporations

Family-owned private corporations are convenient vehicles for shifting income from the person who operates the business of the corporation to passive family shareholders (e.g., spouse and/or children who hold preferred shares of the corporation). This is known as "sprinkling" strategy. For example, in *Neuman v. R.* (1998),[47] the wife of a taxpayer had made no contribution to the company other than her subscription

to the shares on which the dividend was paid. The Supreme Court of Canada held that the dividends were taxable to the wife, not the taxpayer.[49] Iacobucci J. of the Supreme Court of Canada stated in at para. 63: "[T]axpayers can arrange their affairs in a particular way for the sole purpose of deliberately availing themselves of tax reduction devices in the *ITA*." That, he explained, included the use of "corporate structures which exist for the sole purpose of avoiding tax".

The ITA provides for several anti-splitting rules.[46] The tax-on-split-income rule (TOSI) is the most recent.[47] recent addition to the anti-income splitting rules: the tax on split income in section 120.4. This tax eliminates the advantage of "sprinkling" dividends among low-tax family members. Effective 2018, the TOSI rule imposes a special tax at the top rate (currently 33 per cent) on "split income", which is defined to include dividends from private corporations (except dividends that represents a reasonable rate of return on the capital.[48]

4.3 Foreign residency

A foreign-resident corporation is not taxable in Canada in respect of its business income, even if its shareholders are resident individuals. Acquiring foreign residency is easy: having the corporation incorporated under foreign law and the central management and control located outside Canada. A resident corporation can also migrate to a foreign jurisdiction and cease to be a Canadian resident. Off-shoring residence means off-shoring Canadian tax base.

4.4. Transfer pricing

Through pricing transactions and dealings, related corporations can shift profit and tax base out of Canada. Canada has been concerned with transfer pricing say the beginning of the tax system. Subsection 3(2) of the IWTA, 1917 contained the modern day arm's length principle:

> Where an incorporated company conducts its business, whether under agreement or otherwise, in such a manner as either directly or indirectly to benefit its shareholders … by selling its product or the goods and commodities in which it deals at less than the fair price which might be obtained therefor, the Minister may, for the purposes of this Act, determine the amount which shall be deemed to be the income of such company for the year, and in determining such amount the Minister shall have regard to the fair price which, but for any agreement … might be or could have been obtained for such product, goods and commodities.

The rule relied on "fair price", which can be regarded as a fiction, to test the contractual price and be the basis for determining the corporate income. Such hypothetical test is now entrenched in the transfer pricing rules in section 247. It basically requires a determination as to whether, if the parties had not been related, would they have transacted as they ostensibly did. If the tested transactions had comparable arm's length counterparts, then the price of the counterparts would be used – this scenario is addressed by paragraphs 247(2)(a) and (c). If the transactions would not have occurred at all if friction had been present (such as transferring potentially valuable intangibles), a further hypothetical is required: what would be the comparable transaction that would have been entered into by non-related parties, and what would be the price of such hypothetical transaction- a scenario addressed by paragraphs 247(2)(b) and (d)? In Rosenbloom's words, the question asked by this test is "whether, if you had a brother, he would like cheese."[49]

The arm's length principle is difficult to apply when transactions involve unique intangibles or services and there is information asymmetry between taxpayers and tax administrations. As pointed out by the courts in the *Canada v. Cameco Corp.*[50] that the transfer pricing rules do not mean piercing the corporate veil for tax purposes or regarding special purpose corporations located in low-tax jurisdictions (Salesco) as shams. The Federal Court of Appeal said in paragraph 60:

> Subsection 247(2) of the Act, the heading is "Transfer Pricing Adjustment." These headings support an interpretation of subsection 247(2) of the Act that would result in an adjustment tin the pricing of the relevant transactions, rather than an interpretation that would allow the Minister to pierce the corporate veil of CEL [Salesco] and reallocate all of its profits to Cameco.

4.5 Related Party Debt

Related party debt is "a principal tool of the tax planner."[51] It is more "fictional" than transactions involving goods, services or even intangible property as capital can be circled among related corporations at will, anytime, anywhere. More importantly, it is utterly nonsensical in an economic or fiscal sense. Again, Rosenbloom explains:

> There seems to be only one serious problem with related party debt: by most standards of economics, 'substance,' or common sense, it is not debt. That is, related party debt is generally not compensation for money lent by one person to another. Rather, it is a transfer of funds from one incorporated pocket to another, usually for tax-reduction purposes. Only a tax professional, considering indebtedness between commonly controlled entities, would perceive a similarity to raising funds from unrelated parties.[52]

The tax effect is tremendous. Under paragraph 20(1)(c) of the Income Tax Act, a person can deduct interest expenses in computing profits.[53] To be deductible, there must be a legal obligation to pay interest on borrowed money used for the purpose of earning income. It goes without saying that one cannot contract with oneself to lend money to oneself. However, because a corporation is a separate person, one can lend money to one's company. Also, related corporations can lend money to one another. The fantastical tax effect can be seen in the "money in the circle" case – *TDL Group Co. v. R.*[54] The relevant "transactions" are:

- Wendy's International Inc. (Wendy's), a US resident and the ultimate parent corporation of the Wendy's group of corporations, lent $234 million (Cdn) to a U.S. subsidiary, Delcan Inc., at a rate of interest not to exceed 7%.
- The same day, Delcan Inc. lent the full amount to TDL, the taxpayer in this case, at an interest rate of 7.125%.
- Also the same day, TDL used the full amount of the loan to purchase additional common shares in its wholly-owned U.S. subsidiary Tim Donut U.S. Limited, Inc. (Tim's U.S.).
- The next day, Tim's U.S. lent the monies received on account of TDL's share subscription to Wendy's on an interest-free basis, evidenced by a promissory note.

The effect of the above transactions is to enable the taxpayer to deduct the interest expense, thereby reducing profits for Canadian tax purposes. The interest payments to Delcan are free from Canadian withholding tax.[55] Tim's US may never pay dividends to TDL as it would attract US withholding tax. Even if

it did, the dividends would be exempt from Canadian tax.[56]

In *TDL,* the Tax Court of Canada ruled against the taxpayer, holding that the sole purpose of borrowed funds was to facilitate interest-free loan to parent company while creating interest deduction in Canada, therefore failed the income-earning purpose test. The Federal Court of Appeal overruled that decision. It found that the temporary use of the subscription proceeds by Tim's US did not distract from TDL's income earning purpose -- acquisition of additional shares.[57]

The Income Tax Act contains several anti-avoidance rules, including thin capitalization and the recent excessive interest and financing expenses limitation (EIFEL) rules. These rules recognize the validity of each corporate form and prescribe tax treatment to reflect the fiscal outcome in the absence of the special relationship between the parties. The thin capitalization rules, in effect, treat excessive related party debt as equity and deny the deduction of interest on excessive debt.[58] The EIFEL (known in other countries as EBITDA) rules restrict the deduction for interest and financing expenses of Canadian corporations to 30% of their earnings before interest, taxes, depreciation and amortization computed for tax purposes (or adjusted taxable income).

5. TAX EXPENDITURES

5.1 Notion and type of tax expenditures

Canada adopts a broad notion of tax expenditures in the annual reporting on tax expenditures.[59] Any departure from the benchmark system is a tax expenditure. The benchmark system is defined by including only the most fundamental aspects of the system. For example, the unit of taxation is the individual for personal income tax and the single corporation for the corporate income tax. The tax base for residents is the worldwide income, while only Canadian source income for non-residents. The benchmark corporate tax rate is the statutory general rate. As such, taxing corporate income at 15% is not a tax expenditure, even though, from a fiscal unity perspective, the correct benchmark should be the personal tax rate for the individual shareholder.

The type of tax expenditures include exemptions, lower tax rates, deferral rules (timing preferences), tax credits, rebates or refunds. For purposes of illustrating the role of corporate form, tax expenditures are discussed in two groups: tax subsidies that represent spending programs implemented through tax law; technical or structural preferences, such as timing preferences in the case of corporate reorganizations.

5.2 Tax Subsidies

Tax subsidies aim at promoting certain investment or business activities, each corporation is the unit for qualifying for the subsidies. For example, the Scientific Research and Experimental Development Investment Tax Credit (SR&ED) was first introduced in 1948 and is available to each corporation in respect of eligible expenditures.[60]

Another example is the Canada Emergency Wage Subsidy (CEWS)[61] introduced as a pandemic fiscal response measure. It aimed to help prevent job losses due to lock-down and the social distancing to slow down the spread of the corona virus and to encourage employers to quickly rehire workers previously laid off as a result of COVID-19. Given the nature of the emergency, the many unknowns at the beginning of

the pandemic in March 2020, and the need to provide reliefs as quickly as possible, the income tax system became the natural choice for delivering fiscal reliefs. Corporations became tools of convenience. The CEWS was designed by reference to each corporation's revenues (whether the amount dropped due to COVID-19) and eligible remuneration paid to employees, including furloughed employees, in respect of a specified period.[62]

As an example of using corporations to implement social and economic policies, the effect of SR&ED and CEWS is difficult to determine. In the case of CEWS, the money was used by the recipient corporations to pay increased executive compensation, dividends to shareholders or buyback shares. For example, one report claims that 37 companies that received the CEWS spent a combined $81.3 billion on dividends, $41.1 billion on share buybacks and $51.1 billion on acquisitions in 2020 and 2021.[63]

When the benefit of a tax subsidy is capped for policy reasons, associated or related corporations are treated as one unit. For example, the small business deduction[64] was limited to $500,000 per year to emphasize "small". Its purported objective is to allow small businesses to retain more of their earnings to reinvest and create jobs.[65] Because small businesses are presumed to have difficulties in raising capital and are important in generating jobs and growing the Canadian economy, the Income Tax Act seeks to ensure that it is the business, not the corporate entity, that deserves the tax subsidy and applies the $500,000 limit to a group of associated corporations or non-associated but related corporations in certain circumstances.

5.3 Reorganizations

The corporate form is malleability and mutable. It is different from a natural person. Rosenbloom describes as follows:

> The corporation can be brought quickly into life and then transformed into a different corporation, loaded with features to support economic substance, or merged into other corporations by filing appropriate documents with appropriate authorities. … In the modern world, it can migrate to countries … facing no immigration issues, with fiscal authorities in the new motherland welcoming the corporate citizen without extensive inquiries into its lineage, substance, or purpose.[66]

Whenever a corporate person is created, merged, divided or terminated, it involves legal transfers of assets and each transfer can give rise to a capital gain tax liability.[67]

The Income Tax Act contains several rollover rules to allow the deferral of recognition of capital gains for tax purposes.[68] Under these rules, transfers of assets to a taxable Canadian corporation for consideration that includes at least one share of the corporation may be made on a tax-deferred basis. Shareholders and the corporation itself are also permitted tax deferrals under corporate reorganization rules applicable to amalgamations, windings up and divisive reorganizations. The rationale is that the transactions are purely paper transactions in that the exchanges represent merely changes in form and not in substance. The substance is unchanged because of the continuity in ownership or business activity.[69] These rules are also justified as measures "to support business activity."[70]

6. THE GAAR AND TWO PILLARS

6.1 Corporate Form and Fiscal Reality

The previous discussions show that tax law accepts the legal fiction that a corporation is a person. It also adopts numerous tax fictions, mostly in the form of SAARs, to neutralize the effect of the corporate form to achieve the policy objectives of tax law. The introduction of the GAAR, "the biggest tax law fiction of them all"[71] and the two pillars further reduce the fiscal effect of the corporate form.

6.2 The GAAR

Bestowing the Duke of Westminster's right onto corporations means a wide and open field for tax planning. The protean nature of corporations that enables them to take advantage of ambiguities and gaps inherent in taxing statutes and to get around the hardlines drawn by SAARs. The fiscal cost of corporate tax planning includes not just the loss of revenues, but erosion in public confidence in the integrity of the tax system. The GAAR was introduced in 1988 to serve as the last weapon against aggressive (abusive) tax planning.[72] It reiterates the basic fact that income tax law is about reality even though it is a matrix of organizational and transactional fictions. When SAARs fail to narrow the gap between legal reality and economic reality, the GAAR comes to the rescue. [73]

The application of the GAAR hinges on the use of another fiction – intent or purpose of Parliament in enacting the pertinent provisions relied upon to obtain the tax benefit or the "object or spirit" of such provisions. Of course, spirit is invisible. So is Parliament's intent or purpose. As such, these are also fictions.[74] If the tax benefit obtained through avoidance transactions is inconsistent with Parliament's intent, purpose or the spirit of the provisions, the tax benefit is denied. The ultimate invisible fiction prevails the legal fictions and specific tax fictions.

6.3 Pillar One Retires the Separate Entity Principle

Under the existing jurisdictional rules, a corporation's residence and source of income determine the boundaries of Canadian tax jurisdiction. In a digitalizing economy, corporate residence is meaningless as a jurisdictional marker as it is elective on the part of the taxpayer, and the existing source rules and permanent establishment test are ill-fit for digital profits. Pillar One redefines source-based taxation by creating a new jurisdictional nexus based on sales revenue (as opposed to physical presence of business assets or agents) and a formulary apportionment method to determine the amount of MNE group profit taxable in each source jurisdiction.[75]

Even though Pillar One covers only a portion of the MNE group's residual profits, it is the first global effort to replace the separate entity principle with a unitary formulary allocation method. Each group member or corporate form is no longer the unit of determining tax liability.

6.4 Pillar Two Enhances the Value of Corporate Residence

Unlike Pillar One that redefines jurisdictional boundaries, Pillar Two is an anti-abuse regime aimed to create a global floor (15 percent effective tax rate) for tax competition. Pillar two includes two main rules that allow a country to charge a top-up tax or global minimum tax on the parent entity of an in-scope multinational corporation or a constituent entity (which can be a subsidiary or permanent establishment).

The IIR (income inclusion rule) applies to the parent entity resident in the taxing jurisdiction. In effect, the IIR extends the existing controlled foreign corporation (CFC) rules to normal business profits to the extent that such profits are not taxed up to the 15% ETR.

The UTPR (undertaxed profits rule) applies to any constituent entity (a subsidiary or PE) located in the taxing jurisdiction. Without any lineage to existing tax rules,[76] the UTPR extends residence-based taxation to income that taxpayer does not own or control directly or indirectly. Designed as a backstop measure for the IIR, the UTPR, in effect, allows a country to tax income belonging to another country's tax base. In this sense, it gives premium to corporate residence as a jurisdictional basis, even though the amount of the UTPR tax is determined by a formula, using assets and employees as allocation keys, and thus representing the share of the top-up tax in proportion to the relative share of assets and employees of the local entity in the MNE group.

Nevertheless, both the IIR and UTPR can be considered as discarding the separate entity principle by testing the 15% ETR against group profit in a jurisdiction (i.e., the computation of jurisdictional top up tax) and allocating the UTPR tax base under a formula. On the other hand, they shift taxing rights from low-tax jurisdictions (where profits are earned or booked) to countries that are the resident country of a parent or sister corporation of the low-taxed corporation.

Pillar Two rules ostensibly rely on the use of corporate form for the purpose of computing ETR and applying IIR or UTPR. The effect of these rules is more profound. First, the corporate tax base of sovereign countries is treated as fungible: if a low-tax jurisdiction opts not to tax the profits of its resident corporations up to 15% ETR, the "missing tax" is picked up by another country through the IIR or UTPR. More significantly, a country's use of tax subsidies as part of its fiscal policy is constrained.[77]

7. THE FUTURE OF CORPORATE FORM IN INCOME TAXATION

"It is tough to make predictions, especially about the future."[78]

What is the future of the corporate form in income tax law? The short answer is that it is as good as the future of corporate income tax. The main justifications for taxing corporations are likely to remain valid in the foreseeable future. "The death of corporation taxation has been greatly exaggerated."[79] In spite of the pressures that should lead to their demise, corporate taxes continue to be an important component of government revenues. Not taxing corporations, especially those giant multinational corporations apparently making massive profits, is a political risk that few politicians dare to take. The recent trend shows the opposite. As long as economic activities are conducted through corporations, governments will continue to regulate these activities through changing the behavior of corporations and implement social and economic policies through corporations. To paraphrase Rosenbloom, a tax world in which legal fictions are abandoned altogether is probably not possible, but there is no good reason to employ them except when they are truly necessary.[80]

However, the fiscal effect of the corporate form is likely to be further constrained through SAARs, GAAR and structural reforms such as Pillar One and Pillar Two. It is possible that the corporate form is fiscally meaningful in regard to active business income of resident corporations. In other cases, the fiscal unity

principle will prevail and see through the corporation form in order to tax the corporate income at a level that makes policy sense.

Notes

[1] David Rosenbloom, "Banes of an Income Tax: Legal Fictions, Elections, Hypothetical Determinations, And Related-Party Debt," 32 *Tax Notes Int'l* 989 (2003).

[2] OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy by the Inclusive Framework, October 8, 2021.

[3] R.S.C. 1985 (5th Supp.), c. 1 [*ITA*].

[4] S.C. 1917, c. 28 [*IWTA 1917*]. For an overview of the importance of the IWTA, see J. Li & S. Wilkie, "Celebrating the Centennial of the Income War Tax Act, 1917: The Future by the Light of 100 Candles" in J. Li, J.S. Wilkie & L. Chapman, eds., *Income Tax at 100 Years*: *Essays and Reflections on the Centennial of the Income War Tax Act* (Toronto: Canadian Tax Foundation, 2017] at 1:1.

[5] See Lon L. Fuller, Legal Fictions (1967). Tessa Davis, "Tax and Social Context: Legal Fictions within Tax", (2017) 4:1 Savanhan L Rev. 31-; Nancy Knauer, "Legal Fictions and Juristic Truth" (2010) 23 St. Thomas L. Rev. 70. See Aviam Soifer, "Reviewing Legal Fictions" (1986) 20 Georgia L. Rev. 871; Johan A. Miller, Liars Should Have Good Memories: Legal Fictions and the Tax Code," (1993) 64 U. Colo. L. Rev., 1, at 22-25; John Prebble, "Fictions of Income Tax", (2011). Victoria University of Wellington Legal Research Paper No. 29/2011 ("Prebble, Fictions of Income Tax") (https://ssrn.com/abstract=1604978); John Prebble, "Ectopia, Tax Law and International Taxation" (1997) British Tax Review, No. 5, pp. 383-403; John Prebble, "Ectopia, Formalism, and Anti-Avoidance Rules in Income Tax Law (1994) in W. Krawietz, N. MacCormick, G.H. Von Wright, eds., *Prescriptive Formality and Normative Rationality in Modern Legal Systems* (Duncker and Humblot, 1994), p. 367; Stephen E. Shay, "Chapter 40: Legal Fictions, Elections and Tax Law Boundaries," in Georg Kolfer, Ruth Mason and Alexander Rust, eds., *Thinker, Teacher, Traveler: Reimagining International Tax* (Amsterdam, IBFD, 2022) 513-25; Tessa Davis, "Tax and Social Context: Legal Fictions within Tax", (2017) 4:1 Savanhan L Rev. 31; and Nancy Knauer, "Legal Fictions and Juristic Truth" (2010) 23 St. Thomas L. Rev. 70.

[6] A corporation is a legal fiction or creature of statute. Under the Canadian federal or provincial corporate law, a corporation is a legal person and separate from its shareholders. The shareholders have no proprietary interest in the corporation's underlying assets, that is, assets acquired by the corporation with the funds raised by issuing shares (or borrowing money or retaining after-tax earnings). They own shares in the corporation and shares are a quite different kind of asset. Similarly, shareholders are not liable to the liabilities of the corporation and corporate debts are satisfied out of the assets of the corporation. Shareholders' personal assets are not at risk, which is known as "limited liability".

[7] Rosenbloom, supra note 1, at 20. Shay notes (supra note 5, at 519): "A challenge of the tax law is to impose tax through a legal framework of non-tax law while least disturbing ex ante pre-tax economic decisions and arrangements. Non-tax law interacts with economic activity as a regulator and also as a participant in the sense that legal relationships, including corporations, constitute economic actors (as well as taxpayers). The non-tax law, including its legal fictions, on which tax law relies, is a necessary ingredient to determine income and taxable income."

[8] It generates about two-thirds of total tax revenues for the federal government, "spends" about one-third of the total personal income tax revenues through tax expenditures and "delivers" benefits to low-income individuals. The ITA affects virtually every Canadian's economic well-being and is a kind of mirror of Canada in terms of how Canadians desire to share the burden of funding public expenditures. Tax equity based on the ability to pay and tax efficiency to allow the market to maximize economic outputs are important policy objectives. One can say that there is a fiscal contract that underlies the ITA. See Jinyan Li, "Fiscal Contract and the Canada Disability Benefit: Lessons from Income Tax Law" (2023) Osgoode Hall Law J. (forthcoming).

[9] J. Scott Wilkie, "Three Spirits of Canadian Corporate Income Tax: The Relic, the Remnant, and the Reflection" in Jinyan Li, J. Scott Wilkie & Larry Chapman, eds., *Income Tax at 100 Years*: *Essays and Reflections on the Centennial of the Income War Tax Act* (Toronto: Canadian Tax Foundation, 2017] at 7:7.

[10] ITA, s.248(1) and Income War Tax Act, s.2.

[11] Colin Campbell and Robert Raizenne, "The First 100 Years: Evolution of the Law, Policy, and Principles" in Jinyan Li, J. Scott Wilkie & Larry Chapman, eds., *Income Tax at 100 Years*: *Essays and Reflections on the Centennial of the Income War Tax Act* (Toronto: Canadian Tax Foundation, 2017] at 2:34-35.

[12] Colin Campbell and Robert Raizenne, *A History of Canadian Income Tax, vol.1: The Income War Tax Act 1917-1048* (Toronto: Canadian Tax Foundation, 2022), at 26-33.
[13] Richard Bird, "Why Tax Corporations?" Working Paper 96-2, Prepared for the Technical Committee on Business Taxation; Reuven Avi-Yonah, "Corporations, Society, and the State: A Defense of the Corporate Tax", (2004) 90:5 Va. L. Rev. 1193-255.
[14] Avi-Yonah, ibid., at 1244-49.
[15] Jinyan Li, Joanne Magee and Scott Wilkie, *Principles of Canadian Income Tax Law* (10th ed.) (Toronto: Thomson Reuters 2022), at 443-449.
[16] ITA, sections 2, 3, 212 and 219. Jinyan Li, Arthur Cockfield and Scott Wilkie, *International Taxation in Canada* (4th ed.) (Toronto: LexisNexis, 2018), 63-93.
[17] Jinyan Li, Nathan Bao and Huaning Li, "Value Creation: A Constant Principle in a Changing World of International Taxation," (2019) 67:4 Can. Tax J. 1107; Angelo Nikolakakis, "Aligning the Location of Taxation with the Location of Value Creation: Are We There Yet!?!" (2021) 75 (11/12) Bull. Int'l Tax'n 549.
[18] ITA, s.250(4).
[19] Fundy Settlement v. Canada, 2012 SCC 14, para.9. The "central management and control of a corporation will be exercised where its board of directors exercises its responsibilities." For further, see Brian Arnold, "A Tax Policy Perspective on Corporate Residence" (20030 51:4 Canadian Tax J., 1559; Robert Couzin, Corporate Residence and International Taxation, (Amsterdam, IBFD, 2002); Michael J. McIntyre, "Determining the Residence of Members of a Corporate Group", (2003) 51:4, Canadian Tax J. 1567; Geoffrey Loomer, "The Disjunction between Corporate Residence and Corporate Taxation: Is Improvement Possible?" (2015) 63:1, Canadian Tax J., 91.
[20] Canada v. Alta Energy Luxembourg S.A.R.L., 2021 SCC 49.
[21] The Act imposes taxes on income but does not define what income is. Section 3 prescribes rules on what must be included in computing income, e.g., income from a source (inside or outside Canada), including, but not limited to, office, employment, business or property, as well as taxable capital gains (which is currently 50% of capital gains). Most of the provisions of the Act are dedicated to operationalize section 3 in unlimited and evolving circumstances. In general, however, the Act relies on non-tax law for the meaning of words used in the provisions and accept the legal transactions (i.e., the accessory principle). It taxes the results of legal transactions rather than their underlying economic effect. As such, income has a legal meaning, as opposed to an economic, or objective, common sense meaning – the phenomenon of ectopia. For further, see Prebble, Fictions in Tax Law, supra note 5, at 2.
[22] Jinyan Li and J. Scott Wilkie, "Source of Income and Canadian International Taxation" in Jinyan Li, J. Scott Wilkie & Larry Chapman, eds., *Income Tax at 100 Years*: *Essays and Reflections on the Centennial of the Income War Tax Act* (Toronto: Canadian Tax Foundation, 2017] at 10:4.
[23] Ibid.
[24] J. Scott Wilkie, "David Rosenbloom: A Custodian of the First and Continuing "Real" Model Tax Treaty" in Georg Kolfer, Ruth Mason and Alexander Rust, eds., *Thinker, Teacher, Traveler: Reimagining International Tax* (Amsterdam, IBFD, 2022) at 669.
[25] Edward D. Kleinbard, "Stateless Income" (November 15, 2011). Florida Tax Review, Vol. 11, p. 699.
[26] ITA, s.9(1).
[27] Due to fiscal federalism and both the federal and provincial-level governments can tax corporations, the federal rules on corporate tax rates are complex. Under subsection 123(1), the general corporate tax rate for federal purposes is 38% of taxable income. This rate is reduced by 10% of the taxable income of a corporation earned in a province (the "provincial abatement") (subsection 124(1)). A further reduction of 13% is available as the general rate reduction percentage under subsection 123.4(2) for business income not subject to the "small business deduction" tax treatment described below (see the subsection 123.4(1) definitions of "general rate reduction percentage" and "full-rate taxable income" paragraphs (a) and (b)). The federal rate on eligible income is thus 15%.
[28] ITA, s.117 for individuals.
[29] ITA, s.125.
[30] Investment income (other than inter-corporate dividends) of a CCPC does not benefit from the 13% general rate reduction under s.123.4(1) and is subject to an additional special tax of 102/3% under section 123.3. Consequently, a CCPC's investment income is taxed at a federal rate of 38 2/3% (38% - 10% +10-2/3%).

[31] ITA, s.129(1). This dividend refund mechanism is part of the integration system in respect of investment income of private corporations.

[32] ITA, s.123.5.

[33] ITA, ss.82 and 112(1).

[34] ITA, s.113 and supporting rules in the Income Tax Regulations.

[13] *ITA*, ss. 12(1)(j), 82(1)(a), 82(1)(a.1).

[14] Underpinning the design of the gross-up and dividend tax credit systems are the concepts of “corporations resident in Canada”, “taxable dividends”, “eligible dividends” and “dividends other than eligible dividends” (non-eligible dividends). A corporation is resident in Canada by reason of incorporation under Canadian laws (federal or provincial) or having its central and management control in Canada. Section 89(1) defines “taxable dividends” to mean all dividends except for dividends that are exempt from tax, such as capital dividends. Subsection 89(14) defines a dividend as an “eligible dividend” if the corporation designates it as such when it is paid. Eligible dividends can be designated by public and private corporations.

[35] ITA, s.153.

[36] ITA, s.212(1) and (2).

[37] Regulations, ss.200-237.

[38] ITA, ss.123 and 117(2).

[39] ITA, s.125. This is known as the small business deduction. The current rate is 9%, applicable to taxable income up to $500,000 per year.

[40] See Jinyan Li, “Introducing a Global Minimum Tax (Pillar Two) in Canada: Some Knowns and Unknowns”, (2023) No.1 Canadian Tax Journal (forthcoming)

[41] ITA, ss.125(7) and 95(1).

[42] ITA, s.123.3 (tax rate on passive income of private corporations is 33.67%) and s.117(2) (the top marginal rate for individuals is 33%).

[43] ITA, s.89(1) (defining “refundable dividend tax on hand”), s.129 (dividend tax refund), and s.82 and s.112 (dividend gross-up and dividend tax credit, forming the integration regime for resident individual shareholders).

[44] ITA, s.186. This tax is refunded when the holding company distributes the income to individual shareholders (ITA, s.129).

[45] ITA, s.91 (the Canadian CFC rule).

[47] *Neuman v. Minister of National Revenue*, [1998] 3 C.T.C. 177, 98 D.T.C. 6297 (S.C.C.) [*Neuman*]

[49] *Neuman*, ibid.

[46] Li, Magee and Wilkie, supra note 15, at 419-436.

[47] ITA, s.120.4.

[48] Reasonable return is determined as follows: if the adult is age 18 – 24, means a return based on the prescribed rate or an arm’s length rate; and if the adult is age 25 or older, means a reasonable return based on work performed, capital, risk and other relevant factors.

[49] Rosenbloom, supra note 1, at 28.

[50] 2020 FCA 112, affirming the decision of the Tax Court of Canada (2018 TCC 195) that rejected the Minister’s assessment of the transfer pricing transactions. In this case, the taxpayer created a subsidiary in a low-tax jurisdiction (Salesco), which bought and sold uranium, including uranium produced by the taxpayer in Canada. Salesco had two employees and relied on the taxpayer for the administrative services under a services contract. The Federal Court of Appeal found that paragraph 247(2)(b) applies when no arm’s length persons would have entered into the transactions in question, under any terms and conditions, and it does not apply in this case. The profits of Salesco arose from buying and selling uranium, not shifted from Canada. The FCA noted that Crown’s interpretation of the provision was overbroad, and if correct, would result in being applied any time a Canadian corporation wanted to carry on business in a foreign country through a foreign subsidiary. Further, the FCA held in para.60 that the Crown’s interpretation effectively ignored the separate existence of Salesco and the transfer pricing rule does not allow the Minister to pierce the corporate veil and reallocate profits between members of a corporate group.

[51] Rosenbloom, supra note 1, at 29.

[52] Ibid., at 30-31.

[53] ITA, s.20(1)(c).

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[54] 2016 FCA 67 (allowing TDL to deduct the interest on the loan from Delcan Inc. even though TDL already owns 100% of Tim's US.)

[55] Per Canada-US tax treaty, article X.

[56] ITA, s.113(1).

[57] This decision is consistent with the Supreme Court of Canada decision in *Ludco Enterprises Ltd. v. Canada* 2001 SCC 62.

[58] ITA, s.18(4)-(6).

[59] Department of Finance, Canada, *Report on Federal Tax Expenditures 2022.*

[60] ITA, s.127, scientific research & experimental development (SR&ED) aims to encourage businesses to conduct R&S to develop new or improve existing methods, processes, services and products. It targets eligible expenses, including salaries, sub-contractor fees and materials.

[61] ITA, ss.125.7 and 164.

[62] The CEWS was available to other types of employers as well, such as individuals, partnerships, trusts and charitable organizations. It came into effect on March 15, 2020 and lasted until October 23, 2021. The estimated cost of CEWS was $70,940 millions in 2020 and $29,555 millions in 2021 and the number of beneficiaries is 458,000. See Tax Expenditures Report (2022), at 84-85; Government of Canada, "CEWS claims – detailed data" (May 22, 2022) (https://www.canada.ca/en/revenue-agency/services/wage-rent-subsidies/cews-statistics/cews-detailed-data.html)

[63] DT Cochrane, "Public Funds for Private Gains: Canada's Most Profitable Corporations received pandemic subsidies while avoiding billions in taxes", February 2023, Canadians for Tax Fairness (https://www.taxfairness.ca/sites/default/files/2023-02/cews-final-2023-02-09.pdf); Financial Post Staff, "Canadian companies that received CEWS and kept paying a dividend" (10 December 2020) (https://financialpost.com/investing/canadian-companies-that-received-cews-and-kept-paying-a-dividend).

[64] ITA, s.125.

[65] *Report on Federal Tax Expenditures 2022,* supra note 59, at 259.

[66] Rosenbloom, supra note 1, at 991.

[67] Capital gains are taxable upon realization or disposition of property. The Income Tax Act defines "disposition" to include any event or transaction to entitles the owner proceeds of disposition.

[68] ITA, ss.55, 85, 86, 87 and 88.

[69] Shay, supra note 5, at 520 (The basic idea is that under certain conditions of continuing ownership and business activity these entities and their shareholders may exchange assets of the entity or their stock for stock of another corporation without recognizing gain or loss.). For further, see Yariv Brauner, "A Good Old Habit, or Just an Old One? Preferential Tax Treatment for Reorganizations," 2004 BYU L. Rev. 1.

[70] *Report on Federal Tax Expenditures 2022*, supra note 59, at 128.

[71] Prebble, Fictions of Tax Law, supra note 5, at 24.

[72] ITA, s.245.

[73] Prebble, Fictions of Tax Law, supra note 5.

[74] Andrew Burrows, *Thinking About States: Interpretation, Interaction, Improvement (Hamlyn Lectures)* (Cambridge University Press 2018), at 38.

[75]Amount A, Pillar One Model Rules, art.1(2) is designed to provide jurisdictions in which consumers and users are located (market jurisdictions) with a new taxing right over a portion of the residual profits of covered multinational corporations (e.g. annual revenue over EUR 20 billion in revenues and having profitability exceeding 10%). A market jurisdiction is eligible to tax amount A if the covered corporate group derives more than EUR 1 million in revenues from that jurisdiction in accordance with new sourcing rules fit for the digital era (i.e. a nexus based on sales as opposed to the traditional physical presence). The Amount A profit allocated to an eligible market jurisdiction is determined by a new global allocation method, as opposed to the existing arm's length method. In essence, 25% of the group consolidated residual profit is allocated to each eligible market jurisdiction in proportion to the amount of revenues the covered group derives from that jurisdiction.

[76] See Jinyan Li, "The Pillar 2 Undertaxed Payment Rule Departs from International Consensus and Tax Treaties," *Tax Notes Int'l*, Mar.21, 2022, p.1401; Angelo Nikolakakis and Jinyan Li, "UTPR: Unprecedented (and Unprincipled?) Tax Policy Response" *Tax Notes Int'l,* Feb. 6, 2023, 743-51; Angelo Nikolakakis and Jinyan Li, "UTPR: No Taxation without Value Creation", *Tax Notes Int'l,* April 3, 2023, p. 49.

[77] There is some room to retain tax subsidies for substantive activities under the Pillar Two rules. See Devereux, Michael P. and Vella, John and Wardell-Burrus, Heydon, Pillar 2: Rule Order, Incentives, and Tax Competition (January 14, 2022). Oxford University Centre for Business Taxation Policy Brief 2022, Available at SSRN: https://ssrn.com/abstract=4009002; OECD, Tax Incentives and the Global Minimum Corporate Tax: Reconsidering Tax Incentives after the GLoBE Rules (October 6, 2022).

[78] This is attributed to Yogi Berra.

[79] Arnold, supra note 19, at 1560.

[80] Rosenbloom, supra note 1.