# Looking Down from a Height at the EU State Aid Cases

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November 7, 2017

# Irish & EU interests in the *Apple* case

Ireland: ≠ Amazon HQ2 competition. No real HQ in Ireland!

It's just a few thousand jobs in exchange for tax planning aid. Distinguish between real & formal tax competition (cf. "real" vs. "fake" patent boxes).

EC: $$$ billions from Apple's inbound EU sales hadn't been taxed anywhere (including in the US).

No serious question that tax rulings can be state aid; the big legal issue is MNEs and "selectivity."

# U.S. interests in the *Apple* case

Not mainly about tax revenue! Why would Apple repatriate @ 35% after the EC forced it to pay Irish tax @12.5%?

Even if tax "reform" -> deemed repatriation, this will probably be at a low rate (as per the House bill).

So the main US national welfare effect concerns U.S. shareholders who own a piece of Apple's residual.

But no reason to be mad about $$ going US -> EU unless we feel that our EU friends are being unreasonable.

Sane & rational friends can manage good faith disputes & conflicting interests.

# Why might the US view the EC as unreasonable here?

Because we are experts on EC law??

Because it's "retroactive?" – But what about the history of U.S. anti-tax avoidance jurisprudence?

Because it was unanticipated? But whose fault was that?

Because the EC is trying to tax US source income of US companies?

This argument at least is interesting.

# What was the source of Apple's income from EU sales?

Monty Python tax principle: "To boost the British economy, I'd tax all foreigners living abroad."

International comity instead requires basing tax claims on residence or source. Here, obviously, the issue is source.

Apple's US employees developed technology for products sold WW.

The EC is addressing EU sales, nominally through Ireland.

There's an underlying US view that this was "really" (albeit, not under US law) US source income.

# What does "source" mean?

Need an underlying economic concept to judge the reasonableness of source claims.

2 meaningful possibilities: locus of production ("origin-based"), or of consumption ("destination-based").

Say that I, in the US, write a novel in Bengali that earns $$ in India.

US source under an origin concept, Indian source under destination.

In theory, origin & destination are long-run equivalent (you get to consume what you produce), but we live in the short run.

# Source under an income tax

Income is a production/origin-based concept, whereas consumption taxes are usually destination-basis.

BUT: (1) Income tax vs. consumption tax issues ≠ those at stake here. Domestic treatment of savers vs. international comity.

(2) Actual & reasonably proposed income taxes often use destination.

E.g., existing US rules for intangibles; state & proposed federal income tax rules for formulary apportionment; the DBCFT (if we call it an income tax).

(3) The IRS agreed that Apple's income from EU sales was foreign source – based on a fake origin concept (bogus "cost-sharing").

# Formalistic concepts of source

Source is often allocated entirely formalistically. E.g., for interest income, residence of the issuer.

This is a fake origin-based approach, but "real" would be impeded here by the fungibility of money.

Returning to the Apple case, the income wasn't truly Irish – little happened there.

But that's how Apple & Ireland elected to treat it formalistically!

It's hard to complain when you're hoist on your own petard – would Apple prefer to pay tax in the true consumption jurisdictions?

# Looking behind the state aid cases

Tax results for Apple & other multinationals were contrary to sound global tax policy (although individual countries' / regions' interests are more ambiguous).

They also were (increasingly) "too good to be true."

This holds not just for Apple, but also for US policymakers if we think of fake cost-sharing as a selective export subsidy.

There are also US distributional issues here, if we tax neither Apple nor its owner-employees on global rents & untaxed labor income …

... although that's an issue of US, not EU, tax revenues.

# What's going to happen?

Suppose the ECJ upholds the European Commission. What likely U.S. response?

The current U.S. executive branch is bellicose, anti-EU, & seemingly anti-European (at least, up to the Russia border).

But it also is distractible & has exceptionally limited bandwidth.

Current Congressional leadership differs from this only in degree.

So the best bet (and hope) is probably that nothing happens.