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# United States Senate

COMMITTEE ON FINANCE

WASHINGTON, DC 20510-6200

CHRIS CAMPBELL, STAFF DIRECTOR  
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January 15, 2016

The Honorable Jacob Lew  
United States Secretary of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, DC 20220

Dear Secretary Lew:

We are writing to you to express our strong concerns regarding the State aid investigations currently being conducted by the European Commission (“EU Commission”) of several of its member States regarding tax rulings and advanced pricing arrangements provided to multinational businesses, most of them U.S. firms. We applaud the Treasury Department’s (“Treasury”) efforts to make sure the EU Commission is aware that the United States has a stake in these cases and has serious concerns about their fairness and potential impact on the U.S. fisc. In that regard, we urge Treasury to intensify its efforts to caution the EU Commission not to reach retroactive results that are inconsistent with internationally accepted standards and that the United States views such results as a direct threat to its interests. We also ask that you consider, pursuant to the President’s powers under Internal Revenue Code section 891 (which would impose a double rate of tax on citizens and corporations of foreign countries engaging in discriminatory taxation), whether “corporations of the United States are being subjected to discriminatory or extraterritorial taxes.”<sup>1</sup>

In June 2014, the EU Commission issued opening decisions with respect to Ireland (regarding Apple), Netherlands (regarding Starbucks) and Luxembourg (regarding Fiat Financing and Trade). In October 2014, the EU Commission issued an opening decision with respect to Luxembourg (regarding Amazon). On December 3, 2015, the EU Commission announced its opening decision with respect to Luxembourg (regarding McDonald’s).

On October 21, 2015, final decisions were announced in the Netherlands – Starbucks case and the Luxembourg – Fiat case. In those decisions, the EU Commission ordered those countries to recover what the EU Commission believes should have been collected in tax revenue from the companies going back up to ten years. Both Luxembourg and the Netherlands are appealing the EU Commission’s decisions. In a letter to the Dutch Parliament announcing its appeal, the Dutch Minister of Finance, J.R.V.A. Dijsselbloem, said “the [EU] Commission applies its own new criterion for profit calculation, which is incompatible with domestic regulations and the OECD framework.” Final decisions on the cases involving Apple and Amazon are expected soon, and both Ireland and Luxembourg have stated their positions that the EU Commission’s state aid allegations are without merit.

On December 1, 2015, the Senate Committee on Finance held a hearing on “International Tax: OECD BEPS and EU State Aid.” At this hearing, Robert Stack, Treasury’s Deputy Assistant Secretary (International Tax Affairs), testified that Treasury is concerned that the EU

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<sup>1</sup> See Itai Grinberg, *A Constructive US Counter to EU State Aid Cases*, 81 TAX NOTES INTERNATIONAL 167 (Jan. 11, 2016).

Commission's investigations and potential decisions (1) appear to disproportionately target U.S. companies; (2) potentially undermine U.S. rights under our bilateral tax treaties with EU Member States; (3) are taking a novel approach in applying EU state aid rules and applying that approach retroactively rather than prospectively; (4) could give rise to U.S. companies paying EU Member States billions of dollars in tax assessments that may be creditable foreign taxes, resulting in U.S. taxpayers "footing the bill"; and (5) substantively amount to EU taxation of historical earnings that, under internationally accepted standards, no EU member state had the right to tax. During the hearing, several members of the Finance Committee expressed similar concerns.

We are writing to make clear that we, and many of our colleagues on the Committee, share Treasury's concerns with the EU Commission's State aid investigations. We recognize that the EU Commission believes it is on solid ground in pursuing these cases and enforcing EU competition law against its EU Member States. It alarms us, however, that the EU Commission is using a non-tax forum to target U.S. firms essentially to force its Member States to impose taxes, looking back as far as ten years, in a manner inconsistent with internationally accepted standards in place at the time. By all accounts, these cases have taken the Member states, companies, and their advisors by surprise. These cases have created significant uncertainty and instability. We agree with Mr. Stack's hearing testimony that "[t]he retroactive application of a novel interpretation of EU law calls into question the basic fairness of the proceedings."

In the United States, Congress and Treasury are very careful when it comes to changing tax policy on a retroactive basis, particularly in a manner that penalizes taxpayers for relying on laws and regulations in effect at the time they engaged in transactions or made investments. Predictable tax policy fosters a fair and stable environment for business and investment. Going back in time to penalize taxpayers under a new law, or a new interpretation of an existing law without notice, runs counter to that objective. The EU Commission surely understands the importance of promoting a tax environment that is fair, efficient, and growth-friendly.

A related issue is the potential impact on the U.S. fisc. As long as our worldwide tax system relies on the foreign tax credit to mitigate double taxation, there may be a risk of foreign governments seeing U.S. multinationals as a source of "easy cash." As Mr. Stack testified at the hearing, assuming these state aid cases result in foreign tax assessments, and that such assessments would be eligible for foreign tax credit treatment, "U.S. taxpayers would wind up footing the bill for these state aid settlements." In response to a question from Senator Robert Casey (D-PA), Mr. Stack bluntly labeled it a "direct transfer to the European jurisdiction that is getting the ruling from the [EU] Commission."

Moreover, these investigations raise serious questions about our ability to rely on bilateral tax treaties negotiated with EU Member States. As Mr. Stack testified, "[if] the EU Commission is in effect telling member states how they should have applied their own tax laws over a ten-year period," the ability of U.S. companies and the U.S. government to rely on bilateral tax treaties is thrown into doubt. Neither the U.S. companies being targeted nor the U.S. government is a party to these cases, and the EU is not a party to our bilateral tax treaties. We question a process under which the U.S. government has no rights to protect U.S. tax interests while ensuring U.S. firms are not subject to double taxation because of EU state aid decisions.

When asked at the hearing about what steps Treasury is taking to protect U.S. interests, Mr. Stack replied that Treasury has been closely following the cases and making its concerns known to the EU Commission, but beyond doing that, it is unclear what else can be done. He said, however, that "shining a light" on the cases and discussing the issues openly, as we did at the hearing, might help the EU Commission "see that being fair is better in the long run."

Again, we applaud Treasury's efforts to make sure the EU Commission is aware that the United States has a stake in these cases and has serious concerns about their fairness and potential impact on the U.S. fisc. Our concerns are driven not only by these initial cases, but also by the precedent they will set that could pave the way for the EU to tax the historical earnings of many more U.S. companies – in some cases, the earnings in question could have been generated up to a decade ago. We urge Treasury to intensify its efforts to caution the EU Commission not to reach retroactive results that are inconsistent with internationally accepted standards and that the United States views such results as a direct threat to its interests. We also ask that you consider, under section 891, whether U.S. corporations are being subjected to discriminatory taxation.

Sincerely,



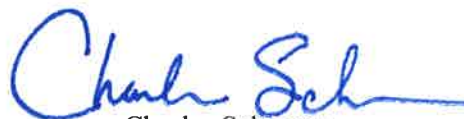
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