subsidiary RTI. Newco was free to pay a dividend out of its own safe income, which was attributable entirely to RTI's post-1971 income. Because of the legislative wording and principles of statutory interpretation, the TCC concluded that Newco's safe income was calculated independently of its parent's (DDL's) safe income.

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BEPS and the Rule of Law

A French reference launched by dissident parliamentarians challenged numerous articles in the 2014 Loi de finances. The year-end decision by the French Conseil constitutionnel (no. 2013-685 DC, 29 December 2013) upheld the government's second attempt at a 75 percent "millionaires' tax"—a confiscatory imposition on the employee had been converted into a disallowed deduction by the employer—but struck down 17 other provisions as unconstitutional.

Several of these defeated proposals are connected with the global tendency to curb corporate tax avoidance, including the BEPS (base erosion and profit sharing) initiatives. Article 96 was a pre-notification requirement for those who promote or implement "tax minimization schemes" ("les schémas d'optimisation fiscal") and carried a noncompliance penalty of 5 percent of the tax saving. Affected schemes were broadly defined to include any combination of legal, fiscal, accounting, or financial transactions or instruments whose main purpose was to reduce or defer tax. More detailed criteria were left to be developed by the Conseil d'État—in effect, by administrative fiat.

The finding that article 96 was unconstitutional recalls an early debate about the Canadian GAAR. When GAAR was introduced, some commentators wondered whether the new rule might be struck down as too imprecise to satisfy the rule of law (for example, Joel Nitikman, "Is GAAR Void for Vagueness?" *Canadian Tax Journal*, 1989). Although a few judges considered the argument, the best proof of GAAR's constitutional vigour may be the significant body of case law that has developed, including judgments from the SCC. In contrast, the French judiciary said that article 96's fatal flaw was its vagueness. The Déclaration des droits de l'homme of 1789 is considered to guarantee both universal accessibility to and intelligibility in the law. Dispositions must be sufficiently clear and unequivocal to protect against arbitrary and unconstitutional application, and cannot be saved by recourse to extralegislative bodies like tax authorities. This basic principle was offended by reliance on administrative regulation or interpretation for further delineation of the broadly defined "tax minimization schemes."

In a similar vein, a change to the rule concerning "abuse of right" ("abus de droit") was also struck down. The current provision applies to fictitious transactions and to any transaction that relies on a literal reading of the law that is contrary to its object where the only motivation is tax saving. Article 100 proposed to substitute a test that relied on the taxpayer's having tax savings as its "main purpose" rather than its "only purpose." That proposal was unacceptable to the Conseil constitutionnel because it left the tax administration too much interpretive leeway, especially in light of the fact that a penalty applies to those assessments.

Two attempts to strengthen the transfer-pricing regime were also defeated. As in Canada, in France a penalty may apply to a transfer-pricing adjustment. Article 97 established a new base for the penalty's calculation: instead of the current law's 5 percent of the adjustment, the proposed penalty was 0.5 percent of total sales. The Conseil constitutionnel saw this change as an offence against the principle of proportionality.

The other transfer-pricing provision that was struck down addressed business restructuring—in particular, transactions that transfer functions or risks and reduce profits by at least 20 percent (relative to the previous three years). The proposal was purely procedural: it reversed the burden of proof, which in France normally lies with the tax administration and not the taxpayer. The phrase "transfer of risks and functions" was not defined, and the vagueness of the phrase was seen as an affront to accessibility and intelligibility.

Different jurisdictions will no doubt approach the task of legislating BEPS-related initiatives in different ways and encounter opposition that varies in both intensity and source. No one expects that constructing coordinated and harmonized responses, a major preoccupation of the OECD, will be simple. This recent French experience reminds us that the uniform implementation of those measures may be equally challenging.

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FC Decides TCC Jurisdiction?

Since 2003, the TCC has been a superior court of record (Tax Court of Canada Act, section 3) that "has exclusive original jurisdiction to hear and determine references and appeals to the Court on matters arising under . . . the *Income Tax Act*" (TCCA section 12(1)). The TCC "has exclusive original jurisdiction to hear and determine applications for extensions of time under . . . section 166.2 or 167 of the *Income Tax Act*" (TCCA section 12(4)). The FC has power to hear applications for judicial review, except for a decision of an administrative body—such as the CRA—that can be appealed to the TCC (Federal Courts Act, sections 18, 18.1, and 18.5). However, in *Conocophillips Canada Resources Corp.* (2013 FC 1192), on a judicial review the FC concluded that it was within its jurisdiction—not the TCC's—to decide that it was unreasonable for the minister to say that the window for filing an extension had passed. The Crown has appealed the FC decision to the FCA.

The CRA's records showed that it mailed its reassessment of Conocophillips (Conoco) on November 7, 2008. Conoco said that it did not know of the reassessment until April 14, 2010, and on June 7, 2010 it filed a notice of objection. The minister said that Conoco was too late to object and too late to request an extension of the time to object, and argued that under subsection 244(14) the date that a reassessment is mailed starts the limitation period for filing an objection. Conoco relied on cases that concluded that subsection 244(14) creates a rebuttable presumption, and it sought to show that the CRA had not sent the reassessment notice in November 2008. Conoco said that it treated CRA correspondence with great care, especially because the reassessment imposed a $4.6 million tax liability; it had "diligent record keeping practices" and was in constant contact with the CRA through the CRA's large-file case manager. Conoco applied to the FC for judicial review.

In *JP Morgan* (2013 FCA 250), the FCA wrote a long decision that discouraged excessive judicial review applications and cited the SCC decision in *Addison & Leyen* (2007 SCC 33) for the view that "[j]udicial review should not be used to develop a new form of incidental litigation designed to circumvent the system of tax appeals established by Parliament and the jurisdiction of the Tax Court." The FC judge in *Conocophillips* dismissed the FCA's decision in *JP Morgan* in a single paragraph, relying on his view that "the purpose of the present Application is not to challenge the validity of the Assessment but to remove the Decision that is an obstacle placed in Conoco's path towards a proper consideration by the Minister of its Objection," and saying that "the present Application is within the jurisdiction of this Court and Conoco has no other access to justice besides the filing of the present Application." The FC concluded that it was unreasonable for the minister to decide that the objection was late and thus invalid.

Was the minister's decision that the objection was invalid really an obstacle to Conoco's objection being heard? Was there no other "access to justice" for Conoco apart from the FC? Can the TCC, a superior court of record, determine its own jurisdiction, including whether an appellant before it has met the statutory objection and appeal deadlines? The TCC has often assumed jurisdiction to decide whether an objection was filed too late. In *Carcone* (2011 TCC 550), the TCC concluded that the minister's evidence about mailing the notice of reassessment did not withstand cross-examination and was given no weight. In *Barrington Lane* (2010 TCC 388), the TCC noted that the presumption in subsection 244(14) was rebuttable, and in *Burke* (2012 TCC 378), the TCC said the presumption was rebuttable and concluded that the taxpayer had not missed the time to object. The FC in *Conocophillips* did what the FCA decision in *JP Morgan* and the SCC said it should not do: it allowed judicial review to be used to develop a route for circumventing the jurisdiction of the TCC.

Assume that Conoco had also appealed to the TCC within the permitted 90 days on the assumption that its objection was timely. If the Crown argued that the taxpayer's objection was late, the TCC would have two options. If the TCC accepted that the FC had properly assumed jurisdiction—because the taxpayer had "no other access to justice" besides FC judicial review—it must effectively conclude that it erred in assuming jurisdiction in its many earlier cases that rejected the minister's evidence of mailing a reassessment and upheld a taxpayer's objection. In effect, the TCC would be concluding that the FC was the proper body for deciding the issue and that the TCC's dealing with that issue would be an abuse of the TCC's process. However, in *JP Morgan*, the FCA said the following:

> The Tax Court has jurisdiction to enforce its own rules, insist on standards of fairness, and prevent an abuse of its process. . . . Misconduct within the Tax Court's appeal process that can be dealt with by the Tax Court as part of its jurisdiction over its own processes must be litigated in the Tax Court, not in the Federal Court by way of judicial review.

Thus, the TCC could apply *JP Morgan*, refuse to be bound by or ignore the FC decision in *Conocophillips*, and affirm the TCC's exclusive jurisdiction in tax appeals over matters that include whether an appeal is properly brought. The option of effectively overturning the FC is not an attractive one. The Crown's appeal should resolve the jurisdictional issue.

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Wilful Blindness: Gross Negligence Penalties

The TCC recently summarized gross negligence penalties in the "sad and sorry tale" of a group of taxpayers "who were led down a garden path, with the carrot at the end of the garden being significant tax refunds." *Torres* (2013 TCC 380), which includes seven appeals heard consecutively, reaffirmed that gross negligence is supportable when