Three Bites of the *Apple*

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In this article, the authors continue the debate regarding the recent *Apple* decision, explaining why the result reached by the EU's Court of Justice was correct.

The views expressed in this article by Brian J. Visalli are his own and do not represent the views of the IRS or the federal government.

In her latest letter, "A Second Bite at the *Apple*,"[1] Kimberly Blanchard repeats her recent criticisms of the September 2024 EU Court of Justice decision concerning two Irish-incorporated Apple subsidiaries.[2] Her letter's title, which of course inspired the title of this article, and her explanations recall the 1967 MGM comedy *Three Bites of the Apple*,[3] in which a helpful stranger offers elaborate explanations for why taxes need not be paid. In the film, and perhaps in this exchange as well, the relevant question is who ultimately benefits from the arrangement.

This exchange began with professor Philip Laroma Jezzi's article reassessing the *Apple* decision,[4] followed by Blanchard's initial response,[5] and our reply.[6] Blanchard now clarifies her thesis. In doing so, though, she doubles down on matters, including her belief that the European Commission and the EU's Court of Justice simply don't understand U.S. taxation. We respond at length in this article.

Blanchard's "Second Bite" merits a broader response than merely pointing out errors or inconsistencies. Because *Apple* is not unique in the sense of multinationals pushing the envelope on profit-shifting structures, it is important to illuminate governance and tax authority enforcement issues that arise when, as the facts of *Apple* demonstrate, there is a serious divergence between the tax consequences resulting from the legal and contractual structure that a multinational has created and economic reality. The addendum includes some additional detail regarding the "Second Bite" letter, as well as comments on certain of these broader issues.[7]

As a brief summary of what follows, the commission and the Court did not misunderstand the U.S. system. Rather, they politely ignored it — not out of ignorance, but out of discipline. *Apple* is not about reallocating taxing rights between sovereigns; it is about refusing to let a member state (that is, Ireland) explain away nontaxation at home by pointing across the Atlantic.

We Agree on the Issue, But Not the Result

Blanchard appropriately writes: "There is no real disagreement that most of the income of Apple's Irish subsidiaries was not earned in Ireland and thus [should] not [have been] Ireland's income to tax."[8] Precisely. Yet despite this commonly agreed factual background supported by court records,[9] Apple recorded this income in Irish-incorporated subsidiaries — Apple Sales International (ASI) and Apple Operations Europe (AOE) — that paid effective tax rates ranging between 0.045 and 0.1 percent.[10] The €13.1 billion recovery (plus €1.2 billion in interest) that was held in escrow[11] and later released to Ireland represents Ireland's belated (and reluctant) application of its own tax law to income that, as we all acknowledge, was earned from activities primarily conducted by group companies in other countries.[12]

Blanchard has appropriately identified the problem. Her inappropriate solution is that Europeans — specifically Ireland, the European Commission, and European courts — should recognize and give full respect to what she refers to as the "U.S. concept of jurisdiction." She explains:

> The U.S. concept of jurisdiction over foreign income of a U.S. taxpayer is that the United States is entitled to tax 100 percent of the income on a *residence* basis, with no allocation of that income to any other country.[13] [Emphasis in original.]

While Blanchard's description of this "concept" is impeccable and reasonably applies for the pre-Tax Cuts and Jobs Act years relevant to the *Apple* decision, there are two important matters being ignored (in addition, of course, to the principal point that the Court applied state aid law to examine what Ireland *actually did* in executing its own law and not at what the United States *might do* at some indefinite time in the future).[14]

First, the U.S. concept of jurisdiction is not the only concept relevant to this discussion. There is also the "separate entity concept," under which respect is given to each separate taxpayer. By respect, we of course mean that tax law is applied independently to each taxpayer based on that taxpayer's facts and circumstances.[15] Another concept is the separateness of each tax period.

Second, this "U.S. concept of jurisdiction" represents overall tax *policy* as in effect before the TCJA and is not itself the equivalent of existing law as applied to the facts and circumstances of each specific taxpayer. Existing U.S. tax law imposes tax on corporations and their shareholders as separate taxpayers. This is an articulation of the "separate entity concept" within the tax code, which is also exercised in law generally throughout the world.

There is no U.S. tax law that mandates income recognition and taxation that would put into effect this U.S. *concept* of jurisdiction under which *all* Apple Operations International's (AOI's)[16] income (in excess of any subpart F income and more recently any global intangible low-taxed income or net CFC tested income) would be taxed. Only if AOI pays a dividend to Apple Inc. or if some other transaction occurs that under the law would cause gain to be treated as ordinary income to Apple Inc. (for example, investment in U.S. property under section 956 or a sale of AOI for which a portion of the gain is treated as a dividend under section 1248) would there be income recognition at the Apple Inc. shareholder level. If these dividends or other transactions were to occur,[17] the "concept" of full U.S. taxation of ASI and AOE's income would be fulfilled (along with the granting of a foreign tax credit). Importantly, though, profits recorded in one year may disappear because of losses in later years, meaning that there might never be dividends or ordinary income arising from other transactions that can cause unrepatriated profits to be treated as ordinary income in the hands of the U.S. shareholder. Any future potential U.S. taxation is *speculative* at best.

We all agree that this U.S. concept of jurisdiction was the pre-TCJA concept. However, it was only a *concept*, which is not what taxpayers obey, the IRS enforces, or the U.S. courts adjudicate. Rather, what is obeyed and enforced are the specific *laws* that are applied to the facts and circumstances of each separate taxpayer within each separate tax period.

In short, quoting a tax concept that reflects tax policy may sound good, but it is the tax law and how it actually affects corporations and their shareholders that is relevant. Because of this, the European Commission and the courts were correct to wholly ignore the potential and speculative future shareholder-level taxation that would only occur if and when AOI pays dividends or other transactions occur that trigger ordinary income treatment in the hands of Apple Inc., AOI's U.S. shareholder.

Basis for Irish Taxation

The Court properly ignored the U.S. jurisdictional tax concept and applied solely the reference framework[18]:

> The reference framework in the present instance was the ordinary rules of taxation of corporate profit in Ireland, the intrinsic objective of which was the taxation of profit of all companies subject to tax in that Member State, and, consequently, that that framework included the provisions applicable to non-resident companies laid down in section 25 of the TCA 97.[19]

Income was intentionally and systematically recorded in Irish entities ASI and AOE. It was booked there based on the contractual arrangements that Apple and its subsidiaries voluntarily executed among themselves[20] and with third-party vendors, suppliers, contract manufacturers, and customers. As noted earlier, there appears to be universal agreement among commentators and the EU's General Court[21] that this intentional arrangement stuffed excessive profits into ASI and AOE beyond what their own operations could justify. (The European Commission clearly agreed as well, given its gracious offer in its 2016 decision to reduce the amount of tax due to Ireland by an appropriate amount to reflect the claims of other countries, including the United States.[22])

Despite this universal agreement that much of ASI and AOE's profits were attributable to both research and development and exploitation activities conducted within the United States, the fact that the IRS did not make any transfer pricing adjustments[23] or direct taxation of effectively connected income means that the income as recorded by ASI and AOE was legally income earned from their respective operations for application, as a starting point, of any relevant country's taxation laws.

What is the nature of this ASI and AOE income? Is it, for example, legally or for tax purposes split up between income attributable to nonroutine intellectual property and income attributable to routine or nonroutine exploitation functions? In the world of transfer pricing, where there is a need to examine the assets, functions, and risks conducted by two separate taxpayers, it can be important to identify nonroutine and routine functions and the profits therefrom to determine the profits of each separate taxpayer. However, when one is looking at the taxation of a single taxpayer that holds rights to certain nonroutine IP that the taxpayer itself exploits through the manufacture and sale of products and the performance of services, the taxpayer's revenues and costs of sales result in gross profits that are in no way split legally into components that reflect the nonroutine and routine IP and exploitation factors. Yes, if ASI and AOE had active home offices or other branches that performed relevant functions, then as found by the Court of Justice the reference framework for Ireland required that relevant assets, functions, and risks would determine how much profit would be attributable to each of the Irish branches and the home office (and/or other branches).[24] If there had been an active home office and the authorized OECD approach (AOA) that existed from 2010 had applied, there would have been a transfer pricing issue that would determine for each of ASI and AOE how the home office and branch would determine which third-party revenues and expenses belonged to each and, importantly, what *notional* home office/branch revenues and expenses should have been recognized, which could include a notional royalty payable by the branch to the home office. However, under the facts presented by Ireland and Apple, there were neither any ASI or AOE branch offices in the United States to which profits could be attributed[25] nor any actual home offices with personnel of ASI and AOE. This being the case, all of ASI and AOE's activities were found by the Court to have been conducted solely within their respective Irish branches.[26] And on this basis, the Court made its decision.[27]

Was this a sensible result that properly reflected the economics and relative values of the functions performed within Ireland and the United States? No. All can agree that Ireland received a windfall from Apple's structuring and the Court's decision. But is this the correct result given both (1) Apple's stuffing of artificially high profits in ASI and AOE and (2) the IRS's failure to impose any transfer pricing adjustment or ECI taxation that would have appropriately reflected the value of the exploitation and other support that Apple Inc. conducted on behalf of its subsidiaries? Yes, it is unfortunately correct. In short, the combination of Apple's structuring and the IRS's inaction forced this "correct" result.[28]

As Laroma Jezzi has so wonderfully articulated, this is a case about "the internal coherence of Ireland's application of its own rules." Irrespective of whether any party involved in the Apple debacle — that is, the European Commission, the courts, or the parties themselves — understood or appreciated the distinction that Blanchard makes regarding differing U.S. taxation concepts and what she believes is often applied by countries within the EU, the reality is that in the years at issue the United States did not impose any direct tax on the subpart F income of a CFC. Rather, subpart F income, as well as any dividends paid by a CFC, were only *included* in the taxable income or loss of each U.S. shareholder of a CFC. Whether there was any additional tax imposed depended entirely on the taxable position of each U.S. shareholder. For example, if a U.S. shareholder had taxable losses from its operations that offset partially or fully the amount of any subpart F income or dividend income, then there would be reduced or no current taxation on that subpart F and dividend income. This is fundamentally and factually shareholder-level taxation. It is not legally or economically equivalent to corporate-level taxation imposed directly on the CFC. And, as noted earlier regarding potential future dividends, any taxation at the shareholder level is contingent and speculative at best since future CFC losses would prevent their distribution. For these reasons, this shareholder-level taxation cannot alter or displace the authority of jurisdictions, including Ireland, to impose corporate income tax directly on the income of ASI and AOE.

As perhaps a nail in the coffin on this point, this same ability to *directly* tax AOI (as the owner of ASI and AOE, which are disregarded entity subsidiaries) independently of any actual or potential U.S. shareholder-level tax applies not only to Ireland, but also to the United States. This is made especially clear if AOI is engaged in a U.S. trade or business or has U.S.-source fixed and determinable annual or periodic income. The application of these taxes is not affected at all by what taxes AOI's U.S. shareholder might pay currently or in the future.[29]

Conclusion

Blanchard concludes that "much of the discord in international tax law can be traced to people from one country making unfounded, and ultimately incorrect, assumptions about how another country's tax rules work."[30] We agree — though perhaps not in the way she intends.

Apple arose because Ireland assumed it could grant bespoke tax treatment to multinational enterprises without consequences. The European Commission and the Court of Justice corrected that assumption, at least regarding Apple, by applying the ordinary rules of taxation of corporate profits in Ireland as the reference framework. This was neither anti-U.S. nor pro-EU; it was simply about the internal coherence of a member state's application of its own law.

From a broader perspective, Apple is not unique in having perhaps pushed the envelope by recording a high proportion of its profits within untaxed or low-taxed foreign companies. A former Treasury deputy assistant secretary for tax analysis, Kimberly Clausing, calculated that *roughly two-thirds of the real activities that earned these untaxed and low-taxed profits took place within the United States*.[31] Focusing on just 2017 and 11 tax havens, she estimated that this implied a loss of profits from the U.S. tax base of between $213 billion and $265 billion.

Despite Clausing's findings supporting that Apple is not unique and that significant activities occur within the United States that earn, or at least importantly support, these large reported foreign untaxed and low-taxed earnings, the limited resources of the IRS and perhaps some hesitancy to attack major corporations' profit-shifting structures[32] have resulted in relatively few such structures being challenged or reversed. This, however, may be changing, as evidenced by apparent IRS intentions to apply the periodic adjustment provisions within the transfer pricing regulations[33] and the recent assessment of Meta Platforms Inc. on that basis.[34] For some multinationals' profit-shifting structures, when the facts support it, the IRS may challenge them by taxing ECI. In either case, given the materiality of potential tax adjustments, it seems likely that many multinationals and their outside auditors will have to take these developments seriously and consider not only what additional tax provisions and/or disclosures might be required, but also whether these structures should be continued or terminated. (See text accompanying *infra* notes 56 and 57 concerning potential applicability to 2025 financial statements.)

As just noted, the *Apple* decision, the discussion herein, and Clausing's research strongly suggest that many multinationals have recorded excessive income within untaxed and low-taxed group members with significant related-party operations in other countries contributing to those profits, but being undercompensated. When the tax authorities in those other countries fail to impose any transfer pricing adjustments, the arguably excess profits have the character that the taxpayer group created through its entity and contractual structuring. In *Apple*, ASI and AOE earned gross profits from the sales of manufactured products and the performance of services. ASI and AOE hold the relevant intangible rights that contribute to these profits. To the extent that these profits become subject to taxation in any country (say, because of a dependent agent permanent establishment, an actual branch, or from the company providing services in other countries), the starting point for the tax base is the full gross profit from sales and services less direct and indirect expenses, including in ASI and AOE's case each company's share of Apple Inc.'s

R&D costs. It would depend on local law and any applicable tax treaty[35] whether any regard would be given to economic arguments that some portion of the gross profits is attributable to intangible value or exploitation functions that some other related party created or conducted.

As an example, in the United States, when reg. section 1.865-3 applies, for inventory property that is both purchased and sold by a foreign taxpayer, 100 percent of the gross income will be U.S.-source income and therefore ECI. For inventory property that was produced by the foreign taxpayer outside the United States and sold through a U.S. office or other fixed place of business, without a valid election of the "books and records method," a 50/50 rule will apply so that 50 percent of gross income will be U.S.-source income and ECI.

In the *Three Bites of the Apple* movie, the tour guide eventually realizes that his helpful adviser was working against him all along. The income that seemed to belong nowhere — and could therefore escape taxation everywhere — turned out to belong somewhere after all. Sometimes the elaborate explanation is just misdirection.

Addendum

Residence vs. Source

Blanchard describes how the United States and EU countries apply taxation to their own resident corporations. Speaking as if this were a black-and-white matter, she describes the U.S. approach as being based on "residence," with the European approach being based on "source." She says on page 703 that:

> through an EU lens, . . . income is allocated among the various countries that have a claim to it based on *source*. The U.S. concept of jurisdiction over foreign income of a U.S. taxpayer is that the United States is entitled to tax 100 percent of the income on a *residence*

basis, with no allocation of that income to any other country. [Emphasis in original.]

Regarding the application of U.S. taxation to a U.S. taxpayer (for example, a U.S. shareholder like Apple Inc.), Blanchard is correct for both the time before the TCJA and now. The United States taxes its residents on their worldwide income and grants an FTC to prevent double taxation.

As for countries in Europe, it is incorrect to maintain or suggest that all European countries would tax their resident taxpayers on only domestically sourced income, exempting any income from home country taxation that has a foreign source.[36]

There are two points to make. First, for countries that typically exempt certain foreign income through tax treaties (whether with countries within or outside the EU), the income exempted is often limited to income that has been earned through a branch or other PE maintained within the other country or is income otherwise specified within the applicable treaty. As such, income from a foreign source that is not attributable to such a foreign branch or PE and is not otherwise exempted by a tax treaty will often still be included within a taxpayer's domestic taxable income, and an FTC will be granted to prevent double taxation. Germany is an example of such a country.[37]

Second, there are many European countries that fully include in taxable income all foreign income recorded by their tax residents. This includes not only foreign-source income that is not attributable to a foreign branch or PE but also all foreign income that is so attributable. For this included income, these countries grant FTCs to prevent double taxation. Examples of countries that apply taxation fully or partially in this manner include Ireland, Italy, and the United Kingdom.[38]

Given the above explanation of how European countries actually tax their residents' foreign income that is not attributable to a foreign branch or PE, with many also taxing income that is so attributable, the distinction that Blanchard claims ("the entirely different approaches that the United States and the EU take to taxing *jurisdiction*") is close to nonexistent. Yes, there are differences between U.S. tax rules and those in Europe, but in *Apple*, these differences are in no way the "entirely different approaches" that she maintains the European Commission was unaware of.

The above focuses on how countries tax their *resident* taxpayers. What about the significance of source when considering the taxation of a *nonresident*?

Looking at Ireland because of its significance to the Court decision, Ireland's section 25 defines what trading profits of a nonresident corporation will be included in the tax base. That section includes:

> (2) For the purposes of corporation tax, the chargeable profits of a company not resident in the State but carrying on a trade in the State through a branch or agency shall be —
>
> > (a) any trading income arising directly or indirectly through or from the branch or agency, and any income from property or rights used by, or held by or for, the branch or agency . . .

This makes clear that the source of any specific item of income is irrelevant.[39] Rather, for trading income, the determination is made based on whether the income arises directly or indirectly through or from the branch. And it includes any income from "rights used by, or held by or for, the branch." Thus, for example, income from sales of inventory property manufactured outside Ireland by contract manufacturers (meaning not through any manufacturing branch of the taxpayer), which use intangible property held by or for the branch, will be included in the Irish tax base irrespective of whether the customers purchasing the products are within or outside Ireland (as long as there is no other branch of the taxpayer involved in the sale). The same is true for income from services. The structural similarity of this Irish approach to determining the tax base of an Irish branch to the U.S. approach to calculating ECI is commonly understood and, we believe, will be appreciated by Blanchard.[40]

More on the Irrelevant U.S. Concept of Jurisdiction

Apple is not, and was never meant to be, a seminar on U.S. worldwide taxation. The judgment does not turn on subpart F, global intangible low-taxed income, TCJA transition taxes, or the metaphysics of eventual income inclusion at the shareholder level. The decision does not ask whether the United States might tax Apple Inc. someday, somehow. It correctly asks something far more narrow and prosaic: whether Ireland, applying its own law as the reference framework, could coherently treat profits related to business conducted through a taxpayer's Irish branch as being attributable not to the Irish branch, but rather to the taxpayer's "head office," which had neither offices nor personnel. The judgment for stated reasons excluded both R&D and exploitation functions conducted by Apple Inc. personnel within the United States that benefited ASI and AOE.[41]

How Apple Inc. as the U.S. parent might later be taxed on distributions or deemed inclusions is legally irrelevant to Irish taxation of operating corporations[42] like ASI and AOE, which were Irish-incorporated non-tax-resident companies with Irish branches conducting substantial activities within Ireland.[43] No country asks whether a foreign shareholder might someday be taxed, or might be taxed now under CFC rules, before determining a corporation's tax liability.

Blanchard is mistaken to invoke the U.S. worldwide taxation concept to defend Ireland's favorable rulings for ASI and AOE. Neither domestic tax laws of countries throughout the world nor the EU state aid rules operate on a "no harm, no foul . . . the IRS will catch it later" basis when taxing the subsidiaries of U.S.-

based multinationals. Were that the rule, selective administrative leniency would become perfectly acceptable whenever a parent is subject to taxation in its home country on its dividend income from its foreign subsidiaries, such as occurred under the pre-TCJA U.S. worldwide taxation regime. If this leniency were to exist, there would be corporate-level taxation incoherence.

As noted in our previous reply to Blanchard,[44] the commission's 2016 decision expressly provided for retroactive restatements of "statutory accounts or tax returns of ASI and AOE following corresponding payments and adjustments to the statutory accounts of other Apple group companies."[45] With ASI and AOE having no operating branches or PEs outside Ireland, there was no basis for other countries to directly tax them (which Blanchard has referred to as source-based taxation).[46] As a result, the 2016 decision invited restatements of the two companies' statutory accounts or tax returns to reflect actual transfer pricing adjustments that would move appropriate amounts of income from ASI and AOE (thereby lowering the state aid recovery to Ireland) to other Apple group members, thereby allowing other countries, including the United States, to tax that income.

It will be appreciated that this detailed guidance in the 2016 decision is not the product of an authority unaware of taxation principles in general, and of the U.S. tax system in particular. Rather, it is the product of an authority seeking a coherent outcome for all countries that would allow a result fully in line with Ireland's domestic tax law (in particular, section 25 of the Irish Taxes Consolidation Act, 1997) and EU-level state aid requirements. Clearly, the commission understood the system and invited both other relevant countries and the IRS to participate — an invitation, in the case of the United States, that went unanswered.

Ireland's Conduct

On the surface, Ireland's strenuous rejection and fight against the commission's effort to increase Ireland's tax receipts by such a material amount[47] makes no sense. Why would Ireland's parliament vote 93-36 to reject €13 billion in tax revenue?[48] Why would Ireland spend more than €7 million in legal fees fighting against receiving that money?[49] Why would Ireland align with Apple through eight years of litigation rather than collect the windfall?

Ireland understood exactly what was at stake: the sustainability of a national model encouraging foreign investment and local job creation that, in practice, allowed profits far exceeding local value added to be booked in Ireland without being taxed there or elsewhere. The commission disrupted this arrangement for Apple by insisting that Ireland apply its own law coherently.[50] If Ireland were not to defend the integrity of its national model, that could affect its reputation and its ability to attract increased foreign investment in the future.

Tools to Attack Profit Shifting Are Available

Blanchard dismisses our discussion of IRS enforcement tools as "irrelevant to the point I was making."[51] We respectfully disagree. The availability of statutory, regulatory, and common-law tools demonstrates that the IRS was not powerless and is still not powerless.[52] The commission explicitly invited the IRS in 2016 to assert claims. The tax agency's apparent failure to act at that time, or even earlier following the 2013 Senate Permanent Subcommittee on Investigations hearings, does not validate Blanchard's position; rather, it raises questions about U.S. enforcement priorities.

Had the IRS pursued a timely, more substance-oriented approach after the 2013 Senate hearings, much of the pressure that ultimately fell on the European Commission to act might never have arisen.[53] The income's true source and character (that is, what appears to be making so many commentators, including Blanchard, maintain that the bulk of ASI and AOE's income is attributable to functions conducted by Apple Inc. within the United States and not by ASI and

AOE's efforts in Ireland) could have been apparent, and the United States could have asserted its claims, whether through transfer pricing adjustments, ECI taxation, or another of the available tools, long before the commission issued its 2016 decision.

With the aggressive nature of many profit-shifting structures, a "follow the money" approach has been proposed[54] that would involve the IRS conducting joint criminal and civil investigations in appropriate situations. In particular, the IRS Criminal Investigation division, through its enhanced investigative toolkit — summonses, search warrants, and interviews — can gather relevant information that is shared with the civil auditors (in the Large Business and International Division) examining the taxpayer. Together, they can establish how a taxpayer group conducts its business and identify the evidence that, if necessary, can convince a court regarding the character of the taxpayer group's structure and the legitimacy, or the illegitimacy, of that structure and transaction characterization. If such a joint IRS effort had been timely conducted on Apple, it would likely have revealed the best approach for subjecting some appropriate portion of AOI's income to U.S. taxation. Whether that approach would have been a substance-over-form recharacterization, traditional transfer pricing adjustments, commensurate-with-income periodic adjustments, ECI taxation, or something else is, of course, unknown. While Apple's years covered by the state aid decision are now in the rearview mirror, it is understood that Apple is still using essentially the same structure that it used in those early years to achieve its apparent goal of shifting profits out of the United States and into low-taxed foreign structures. The same, of course, is true for many other multinationals. The suggested joint CI/LB&I investigative approach should be considered for all multinationals engaging in aggressive profit shifting when appropriate.

A recent development in the long-running transfer pricing dispute between the U.S. government and Meta Platforms Inc. (Facebook) is the IRS's application of periodic adjustments under reg. section 1.482-7(i)(6) within a notice of deficiency issued September 23, 2025.[55] This development should not only concern all multinationals whose profit-shifting structures have included one or more transfers of intangibles potentially subject to the section 482 commensurate with income statute, but importantly, it should also concern their outside auditors, who must opine on the reasonableness of their audit clients' tax provisions and disclosures.[56] With the scope for periodic adjustments to tax income at either 35 percent (if the IRS is able to apply a pre-TCJA year as the adjustment year) or 21 percent, along with the likelihood that their clients have not previously accrued sufficiently for uncertain tax positions, it is possible that many multinationals and their auditors will have to consider material additions to financial statement tax provisions to reflect the now-clear risk of IRS imposition of periodic adjustments. In particular, with the 2025 disclosure of the IRS notice of deficiency to Facebook, multinationals and their auditors may need to consider whether already prepared and filed financial statements require restatement.[57]

That governments worldwide began recognizing that multinational tax avoidance had eroded their tax bases was evidenced well over a decade ago with the initiation of the base erosion and profit-shifting project. Today, the momentum continues with the present pillar 2 rollout and the recent side-by-side agreement. As the results of the BEPS project and the ongoing developments are less than perfect and leave in place considerable motivation for continued profit shifting, tax authorities in all countries may be expected to be increasingly sophisticated and active in reversing the effects of profit shifting, whether through the pillar 2 mechanisms or through domestic-law tools.

FOOTNOTES

[1] Kimberly S. Blanchard, "A Second Bite at the *Apple*," *Tax Notes Int'l*, Jan. 26, 2026, p. 703.

[2] *European Commission v. Ireland*, C-465/20 P (2024).

[3] *Three Bites of the Apple* (MGM 1967). In the film, a British tour guide wins a fortune at an Italian casino. A beautiful woman offers to help him avoid British taxes by smuggling the money to Switzerland, but she and her ex-husband plan to steal it. The scheme to avoid taxes leads to them losing everything.

[4] Laroma Jezzi, "Not So Rotten After All: Reassessing *Apple*," *Tax Notes Int'l*, Dec. 15, 2025, p. 1757.

[5] Blanchard, "Responding to Professor Jezzi on *Apple*," *Tax Notes Int'l*, Dec. 22, 2025, p. 2025.

[6] Jeffery M. Kadet et al., "Support for the *Apple* Decision: A Response to Blanchard," *Tax Notes Int'l*, Jan. 19, 2026, p. 543.

[7] Perhaps because of her strong belief in her message and her writing style, Blanchard's "Second Bite" includes certain broad generalizations and other assertions that we have chosen not to detail and respond to in this article or the addendum. These include, for example, some of what she wrote about EU member state controlled foreign corporation rules, whether foreign countries often objected to the United States' worldwide taxation of its residents, and whether the IRS could have taxed Apple's Irish entities' income on a timely basis, an action that would have reduced the payment of Irish tax. These and other matters are not germane to the correctness of the 2016 European Commission decision and the 2024 Court decision confirming it.

[8] Blanchard, *supra* note 1, at 703.

[9] A good summary of this factual background is found in para. 301 of the 2020 General Court decision (*Apple Sales International and Apple Operations Europe v. Commission*, T-892/16 (2020)): "In addition, it is apparent from the file that contracts with third-party original equipment manufacturers ('OEMs'), which were responsible for the manufacture of a large proportion of the products sold

by ASI, were negotiated and signed by the parent company, Apple Inc., and ASI through their respective directors, either directly or by power of attorney. ASI and AOE also submitted evidence regarding the negotiations and the signing of contracts with customers, such as telecommunications operators, which were responsible for a significant proportion of the retail sales of Apple-branded products, in particular mobile phones. It is apparent from that evidence that the negotiations in question were led by directors of the Apple Group and that the contracts were signed on behalf of the Apple Group by Apple Inc. and ASI through their respective directors, either directly or by power of attorney."

[10] Permanent Subcommittee on Investigations, Committee on Homeland Security & Governmental Affairs, "Offshore Profit Shifting and the U.S. Tax Code — Part 2 (Apple Inc.)," at 172 (May 21, 2013). Notably, ASI recorded pretax earnings of $4 billion in 2009, $12 billion in 2010, and $22 billion in 2011. Over the same period, it paid global taxes amounting to just $4 million in 2009, $7 million in 2010, and $10 million in 2011, resulting in ETRs of approximately 0.1 percent in 2009, 0.06 percent in 2010, and 0.045 percent in 2011.

[11] *See* Apple Inc., Form 10-K for fiscal year ended Sept. 28, 2024, at 62 (reporting that "as of September 28, 2024, the total recovery amount of €13.1 billion plus interest of €1.2 billion was held in escrow").

[12] Blanchard, *supra* note 1, at 703.

[13] *Id.*

[14] This is not the first time that there has been a need to refute this erroneous claim about U.S. taxing jurisdiction. *See* David G. Chamberlain, "Apple, State Aid, and Arm's Length: EU General Court's Failure of Imagination," *Tax Notes Federal*, Aug. 31, 2020, p. 1623, at 1626-1627. Chamberlain appropriately refuted former Treasury official Robert Stack who gave the same faulty logic in 2016. Chamberlain said, in part:

By allowing deferral, the United States essentially conceded that the income was earned abroad; otherwise, a transfer pricing adjustment should have been made to bring the income home immediately. If the income was earned abroad, then internationally accepted standards would allow the country [or countries] where the income was earned to tax it. The fact that the TCJA ended deferral and treated deferred income as repatriated as of the end of 2017 does not change this reality.

[15] There are some exceptions, such as when the U.S. parent of an affiliated group elects to file a consolidated tax return or when a taxpayer makes a check-the-box election to be treated as a disregarded entity. These exceptions, though, are few and are clearly exceptions to the separate-entity concept that otherwise applies.

[16] ASI and AOE are disregarded entity subsidiaries under the U.S. check-the-box rules, so AOI is the relevant CFC taxpayer for U.S. tax purposes.

[17] Note the subjunctive verb tense. There might never be future dividends or other transactions that would cause taxable realization of income at the shareholder level. As noted, there could even be future losses that reduce or eliminate the accumulated retained earnings (earnings and profits in U.S. parlance), preventing the distribution of earnings from earlier years.

[18] In brief, to determine if there has been state aid granted to a company, the European Commission and the courts must identify the reference framework (or reference system) against which to compare the treatment of that specific company or a group of companies. That framework will normally reflect rules and existing laws applicable in a member state.

[19] The EU Court of Justice's decision (para. 303) determined that the reference framework as determined by the EU General Court (para. 163) would stand because "in the absence of a cross-appeal, the judgment under appeal has the

force of *res judicata* ."

[20] One particularly important intercompany contractual arrangement was Apple's cost sharing arrangement (CSA). The validity of this CSA as a valid preexisting CSA from 2009 when the current CSA regulation became effective has been questioned. *See* Stephen L. Curtis and David G. Chamberlain, "Apple's Cost-Sharing Arrangement: Frankenstein's Monster," *Tax Notes Federal* , Aug. 16, 2021, p. 1049; Curtis and Chamberlain, "Apple's Cost-Sharing Arrangement: Frankenstein's Monster, Part 2," *Tax Notes Int'l* , Aug. 23, 2021, p. 975; and Curtis, "Is the United States Giving State Aid to Apple?" *Tax Notes Int'l* , Jan. 20, 2025, p. 437. The Apple CSA long predates the 1995 issuance of the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations, which included guidance in Chapter VIII on cost contribution arrangements (CCAs). Under the 2017 amendments to these guidelines, it seems likely that neither ASI nor AOE would be a valid CCA participant because of the requirement in para. 8.15 that a party will not be a participant in a CCA if that party does not exercise control over the specific risks that it assumes under the CCA. Given the disclosures made by Apple during the course of the state aid saga regarding the limited routine functions performed by both ASI and AOE and the management and other functions performed for these companies by Apple Inc. (and assuming that these facts haven't changed post-2014), it seems doubtful that either ASI or AOE could sustain a valid CCA if that were to become an issue.

[21] *Apple* , T-892/16, at paras. 296-311. For a few commentators, see Jezzi, *supra* note 4, at 1757, notes 2 and 3.

[22] That there were other countries that took up this offer is evidenced by the disclosure in Apple Inc.'s September 28, 2024, Form 10-K that "from time to time, the Company requested approval from the Irish Minister for Finance to reduce the recovery amount [in the escrow fund] for certain taxes paid to other countries."

[23] Note that with the cost-sharing arrangement (CSA) in place for many years, under reg. section 1.482-7, ASI and AOE were paying Apple Inc. the appropriate amounts that represented their respective shares of the R&D costs incurred by Apple Inc. (subject, of course, to normal IRS audit procedures that would examine the expense pool and the "reasonably anticipated benefit" shares of that pool for each CSA participant). As a result, the bulk or all of any potential U.S. transfer pricing adjustments (that the IRS didn't make) should concern solely exploitation and other corporate support activities conducted by U.S. Apple Inc. group members that benefited ASI and AOE. See *Apple*, T-892/16, at para. 301, regarding the exploitation functions, and see *Apple*, T-892/16, para. 7, describing a marketing services agreement executed between ASI and Apple Inc. It is unknown what if any other intercompany service agreements existed between ASI and AOE on the one hand and Apple Inc. on the other. It was noted above that Curtis and Chamberlain have questioned the validity of Apple's CSA. If the IRS were to follow suggestions made in their papers and apply, for example, commensurate-with-income taxation or effectively connected income adjustments, then the adjustments could reflect significant profits related to intangible property value and not only undervaluing of the exploitation and other corporate support activities performed by U.S. Apple Inc. group members.

[24] *See European Commission v. Ireland*, C-465/20 P, at para. 279; and *Apple*, T-892/16, at paras. 233-239.

[25] *See* discussion *infra* note 41. Apple would not admit to ASI or AOE having branches in the United States despite its late admission that ASI and AOE had agents within the United States performing major core business functions on their behalf.

[26] *See European Commission v. Ireland*, C-465/20 P, at paras. 205-222. Any functions performed by Apple Inc. are disregarded when determining under the reference framework the profits of the Irish branches and the home offices.

[27] *Apple*, T-892/16, at paras. 276-281.

[28] *See* Curtis, *supra* note 20.

[29] Several provisions in the U.S. tax law show the respect that is given to the completely separate application of U.S. taxation to a foreign subsidiary's ECI and the taxation of the subsidiary's U.S. shareholder. These include section 952(b), which provides an exclusion from subpart F income for ECI, and section 245, which provides a dividends-received deduction to the U.S. corporate shareholder.

[30] Blanchard, *supra* note 1, at 706.

[31] *See* Clausing, "5 Lessons on Profit Shifting From U.S. Country-by-Country Data," *Tax Notes Federal*, Nov. 9, 2020, p. 925, at 933*ff*.

[32] *See* Brian J. Visalli, "'World of Taxcraft': Defeating Transfer Pricing's Dark Arts With Economic Substance Magic," *Tax Notes Federal*, Oct. 6, 2025; and Visalli, "'World of Taxcraft': The Government's 'Wipe' in *Perrigo* Shows Its Need for a Better Strategy Guide," *Tax Notes Federal*, Dec. 22, 2025, p. 1981.

[33] AM 2025-001.

[34] *See infra* note 55 and accompanying text.

[35] Few tax treaties apply the AOA, which provides for notional payments between a branch and its home office (or another branch) like royalties when the relevant IP is considered to be owned by the home office (or another branch). *See* OECD, "2010 Report on the Attribution of Profits to Permanent Establishments," para. 200*ff* (July 22, 2010). Most treaties are still based on the pre-AOA OECD model or the U.N. model, neither of which provides for these notional payments, but which instead allocate the actual third-party cost of any

intangibles (*e.g.* , R&D costs or royalties paid to third parties). *See* commentary on article 7, para. 34 of the OECD model commentary (as effective before 2010); and article 7, para. 3 of the U.N. model treaty.

[36] Although the term "source" is often used in taxation discussions with a general meaning, the actual source of an item of income can vary considerably based on its specific facts and the tax rules concerning source in the country that might want to tax that item of income or provide an FTC for foreign taxes paid on that income. An item of income such as services or royalty income might result from services conducted for a foreign client or royalties collected from a foreign licensee. Although the taxpayer's home country may include those items of income within the domestic tax base, it may also treat them as foreign source, which will be important for the taxpayer's ability to claim an FTC. For a more complete discussion of the classes and sources of income, see Kadet, "Overview of the Practice of International Taxation," SSRN, at 37-44 (2017).

[37] See, *e.g.* , article 23 of the German treaties with India and the United States, each of which provides for the elimination of double taxation for German residents through providing FTCs for certain income not earned through a PE.

[38] EU law allows resident EU member states to tax branches and PEs located in other EU member states. In these cases, relief from double taxation is granted through an FTC or exemption mechanism. Some tax treaties between EU members provide for the exemption from taxation of income attributable to foreign branches by the country of residence. These exemptions are provided by treaties, not by either EU law or the domestic law of the home country. When a host country is outside the EU, then domestic law and any applicable treaty would apply to determine the right of the country of residence to tax the income of its resident's foreign branch. As an example between two EU members, the treaty between Italy and Germany, which allows either country to tax the PEs of residents of the other, provides for Italy an FTC mechanism to prevent double

taxation of Italian residents and provides an exemption to prevent double taxation of German residents. The Germany-U.K. treaty is similar. It may be added that *Cadbury Schweppes*, which involved the application of CFC rules, did not prevent member states from including the income of branches located in other member states in a resident taxpayer's income and then granting an FTC for taxes paid to the host member state (*Cadbury Schweppes PLC and Cadbury Schweppes Overseas Ltd. v. Commissioners of Inland Revenue*, C-196/04 (2006)).

[39] As a demonstration that a nonresident's income might be taxable by a country despite its being sourced outside that country, some tax treaties that relieve double taxation through FTCs will include provisions like the following, taken from article 23 of the Germany-U.S. tax treaty: "For the purposes of applying paragraph 1 of this article, an item of gross income, as determined under the laws of the United States, derived by a resident of the United States that, under this Convention, may be taxed in the Federal Republic of Germany shall be deemed to be income from sources in the Federal Republic of Germany"; and "For the purposes of this paragraph, income, profit or gain derived by a resident of the Federal Republic of Germany that, under this Convention, may be taxed in the United States shall be deemed to be income from sources within the United States."

[40] Whether from section 864(c)(4) or section 865(e)(2), which was added by the Tax Reform Act of 1986, the base for direct U.S. taxation of a foreign corporation that is engaged in a trade or business within the United States includes income from any sale of personal property (including inventory property) attributable to an office or other fixed place of business maintained by the taxpayer within the United States (with an exception for sales for use, disposition, or consumption outside the United States if an office or other fixed place of business of the taxpayer in a foreign country materially participated in the sale). These rules override the normal sourcing rule, which looks to the location of title passage. Blanchard will also appreciate that before the enactment of section 865(e)(2),

which defines as U.S. source this sales income that is attributable to a U.S. office or other fixed place of business, section 864(c)(4) expressly included certain income with a foreign source in taxable ECI.

[41] The EU Court of Justice's decision for both procedural and substantive reasons did not consider evidence Apple provided late in the process that there were powers of attorney that presumably made Apple Inc. or its personnel agents of ASI and AOE. From para. 142 of the decision: "As regards, in particular, the alleged evidence of contracts that 'were negotiated and signed by the parent company, Apple', mentioned in paragraph 301 of the judgment under appeal, these were produced not during the administrative procedure, but for the first time before the General Court, in Case T-892/16, and are therefore, in the commission's submission, inadmissible. So far as concerns the powers of attorney under which Apple Inc. directors allegedly signed those contracts 'on behalf' of ASI, three of them were submitted only at the stage of the reply produced in that case. There was no reason for not submitting those powers of attorney at the stage of the application, and, by relying on them, the [General] Court had committed a breach of procedure." *See also* paras. 180-193, 245, 252, 255, and 282-288. That Apple never put forward any argument that ASI and AOE operated through a U.S. branch, which would have strongly supported a favorable outcome in its state aid case, presumably reflected Apple's desire for consistency with its apparent position that AOI was not conducting a U.S. trade or business and incurring direct U.S. taxation on its ECI. Apple failed to negotiate the fine line required when attempting to make inconsistent positions presented in two jurisdictions appear consistent.

[42] *See* discussion in the text of the U.S. concept of jurisdiction and Kadet et al., *supra* note 6, at 545-546 (explaining the distinction between corporate-level taxation of ASI/AOE and shareholder-level taxation of Apple Inc.). Added to this is the simple logical question: How could one country (Ireland in *Apple*) take into account, to justify low current taxation of a corporation's income, possible future

U.S. taxation of the corporation's shareholders when that future taxation is (1) contingent and will only be triggered upon dividend payments or the occurrence of certain other transactions; (2) subject to disappearing, which will happen to the extent of subsequent losses; (3) avoidable, since whether there will be future dividends or other transactions is under the complete control of the multinational; and (4) not automatically imposed by self-executing features in the U.S. tax law? The answer is that if a potential future tax is no more than speculative at best, it cannot logically be used to justify some current tax restraint.

[43] Commission Decision 2017/1283, 2017 O.J. (L 187) 1, paras. 49-57. The decision described ASI and AOE as Irish-incorporated, non-tax-resident companies with Irish branches. The substantial activities for ASI included product procurement (which involved manufacturing products through contract manufacturers), sales, logistics, distribution, and other functions performed primarily for both Apple's Europe, Middle East, and Africa region and its Asia-Pacific region. For AOE, they included the manufacture and assembly of a specific set of IT products for sale to related parties only. AOE conducted additional functions involving production planning, scheduling, engineering, quality control, refurbishing, and shared services for other Apple group members.

[44] Kadet et al., *supra* note 6.

[45] Commission Decision 2017/1283, at paras. 449-451.

[46] Two points need to be made. First, this reflects Apple and the IRS's, as well as the European Commission's, apparent belief at that time that AOI did not conduct a U.S. trade or business that would have been a basis for direct U.S. taxation of AOI's ECI. *See* Commission Decision 2017/1283, at paras. 51 and 287. Also, questioning this lack of any U.S. trade or business, see Ruth Mason, "Special Report on State Aid — Part 3: Apple," *Tax Notes*, Feb. 6, 2017, p. 735, at 736-737; and Curtis and Chamberlain, *supra* note 20, "Apple's Cost-Sharing Arrangement:

Frankenstein's Monster, Part 2," at 1232. Second, this ignores the existence of a Singapore branch of AOE in certain years, the profits of which were excluded from the state aid calculations. *See* Commission Decision 2017/1283, at para. 448.

[47] According to an Irish government website, 2016 total public expenditures were €68.1 billion. The €13 billion in tax revenue eventually collected from ASI and AOE thus represent almost 20 percent of the country's 2016 annual spending. *See* Where Your Money Goes, "Irish Public Spending Data — 2016 Total Expenditure: €68.1 Billion."

[48] *See* "Dáil Backs Plan to Appeal Apple Ruling," RTÉ News, Sept. 7, 2016.

[49] *See* Gordon Deegan, "State Has Paid €7.1m to Lawyers and Experts for Apple Case," *Irish Times*, Mar. 13, 2019.

[50] Readers will appreciate that Ireland has continued this sometimes-labeled "beggar thy neighbor" practice following the demise of the commonly used "double-Irish" structure by providing a mechanism for foreign multinationals to import their IP at high values into an Irish-resident company that then shelters future income through amortization of the imported intangibles. *See* The Left in the European Parliament, "Exposed: Apple's Golden Delicious Tax Deals — Is Ireland Helping Apple Pay Less Than 1 Percent Tax in the EU?" (June 21, 2018).

[51] Blanchard, *supra* note 1, at 705.

[52] *See* Kadet et al., *supra* note 6, at 551-553 (discussing normal transfer pricing rules, commensurate-with-income periodic adjustment provisions, ECI rules, and section 6501(c)'s false or fraudulent return and willful attempt to evade tax exceptions that could cause relevant tax years to remain open to the present).

[53] *Apple*, T-892/16.

[54] *See* Visalli, "Defeating Transfer Pricing's Dark Arts," *supra* note 32 (arguing that transfer pricing cases should be analyzed primarily through the economic substance doctrine, asking whether structures have a genuine business purpose beyond tax avoidance); and Visalli, "The Government's 'Wipe' in Perrigo," *supra* note 32 (arguing that a "follow the money" investigative approach best positions the IRS for victories).

[55] *See* Petition, *Meta Platforms Inc. v. Commissioner*, No. 16081-25 (T.C. Dec. 4, 2025); and Meta Platforms Inc.'s Form 10-Q for the quarter ended September 30, 2025, at 29-30.

[56] *See* Jesse Drucker, "I.R.S. Tactics Against Meta Open a New Front in the Corporate Tax Fight," *The New York Times*, Feb. 24, 2026.

[57] *See* Reuven S. Avi-Yonah et al., "Commensurate With Income: IRS Nonenforcement Has Cost $1 Trillion," *Tax Notes Federal*, May 22, 2023, p. 1297; Curtis, "Facebook, the IRS, and the Commensurate With Income Standard," *Tax Notes Int'l*, Dec. 21, 2020, p. 1639; Curtis and Chamberlain, "Apple's Cost-Sharing Arrangement: Frankenstein's Monster," *supra* note 20; Curtis and Chamberlain, "Apple's Cost-Sharing Arrangement: Frankenstein's Monster, Part 2," *supra* note 20; Curtis, "Google's Cost-Sharing Arrangement: Bride of Frankenstein," *Tax Notes Int'l*, Dec. 20, 2021, p. 1339; Curtis, "eBay's Cost-Sharing Arrangement — Frankenstein's Progeny," *Tax Notes Int'l*, June 13, 2022, p. 1363; Curtis, "Cisco's Cost-Sharing Arrangement: Frankenstein Poker," *Tax Notes Int'l*, July 18, 2022, p. 243; Curtis and Avi-Yonah, "Microsoft's Cost-Sharing Arrangement: Frankenstein Strikes Again," *Tax Notes Int'l*, Mar. 6, 2023, p. 1237; Curtis, "Frankenstein Calling: Qualcomm's Unenforced Periodic Adjustment," *Tax Notes Int'l*, Sept. 11, 2023, p. 1337; Curtis, "Frankenstein's Cloud — Is Oracle Due for a Monstrous Periodic Adjustment?" *Tax Notes Int'l*, Mar. 4, 2024, p. 1329; Curtis, "Frankenstein's Cloud — Is Oracle Due for a Monstrous Periodic Adjustment? Part 2," *Tax Notes Int'l*, Mar. 11, 2024, p. 1501; Curtis, "Frankenstein's Implant: Is Stryker Due for a

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END FOOTNOTES

DOCUMENT ATTRIBUTES

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