



The Legal 500 & The In-House Lawyer
Comparative Legal Guide
United States: Tax

This country-specific Q&A provides an overview to tax laws and regulations that may occur in United States.

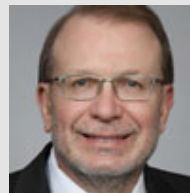
It will cover withholding tax, transfer pricing, the OECD model, GAAR, tax disputes and an overview of the jurisdictional regulatory authorities.

This Q&A is part of the global guide to Tax. For a full list of jurisdictional Q&As visit <http://www.inhouselawyer.co.uk/index.php/practice-areas/tax-second-edition/>

MAYER
BROWN

Country Author: Mayer Brown

The Legal 500



Kenneth Klein, Partner

KKlein@mayerbrown.com

The Legal 500



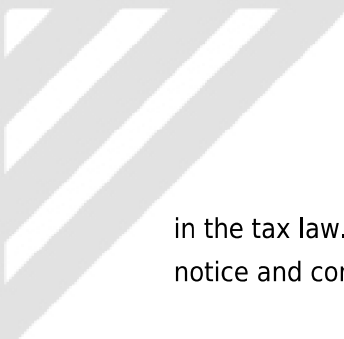
Megan K. Hall

mhall@mayerbrown.com

1. **How often is tax law amended and what are the processes for such amendments?**

The last comprehensive reform of the U.S. tax code was in 1986. However, almost every year Congress adds or amends individual provisions to the tax code. Amendments to the tax code must be passed by both the House of Representatives and the Senate, and generally must be signed into law by the President.

In addition to the statutory tax code, the Internal Revenue Service (IRS) promulgates regulations on a regular basis that provide the Treasury Department's official interpretation of the tax code. New or revised regulations can make significant changes



in the tax law. Significant IRS regulations are published in proposed form and include a notice and comment period that provides for public consultation prior to finalization.

Both Democrats and Republicans for several years have been proposing various versions of comprehensive tax reform. With Republicans controlling both branches of Congress and the presidency, there is the possibility of comprehensive tax reform by the end of 2017. The President is extremely focused on tax reform and is working closely with Republicans in Congress to pass legislation. There is consensus among policy makers to lower corporate and individual tax rates, move to a territorial-style system, and impose significant anti-tax base protection rules. The specific details of each of these policy goals are under negotiation.

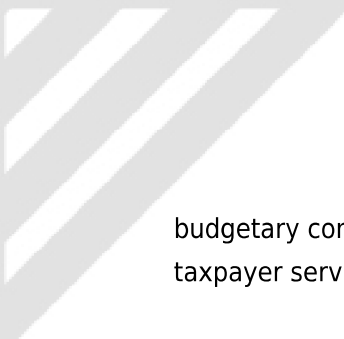
2. What are the principal procedural obligations of a taxpayer, that is, the maintenance of records over what period and how regularly must it file a return or accounts?

Taxpayers are required to file tax returns each year. Tax returns are generally due by April 15th of the following calendar year for individuals, and for corporations by the 15th day of the third month following the end of its fiscal year. Automatic 6 month extensions of time to file a return are available. Companies (and certain individuals, such as self-employed individuals) generally are required to make quarterly payments of their estimated tax liability.

Generally, taxpayers are required to maintain adequate records for at least three years. Records must be kept for as long as the statute of limitations is open for that item. Thus, in certain situations where the statute of limitations is longer than three years, records must be kept for 7 years or even indefinitely. In addition, many substantive provision of the tax code and regulations have their own separate record keeping requirements.

3. Who are the key regulatory authorities? How easy is it to deal with them and how long does it take to resolve standard issues?

The IRS is a part of the U.S. Treasury Department and is the regulatory authority of the United States for tax. The most recently available survey from the IRS Oversight Board shows that in 2014, 74% percent of taxpayers were satisfied with their interactions with the IRS, a drop of 4 percentage points from 2013. The drop in satisfaction may be due to



budgetary constraints that have somewhat limited the ability of the IRS to provide taxpayer services.

The length of time to resolve tax issues varies greatly and depends on the complexity of the issues. There is no standard amount of time that a tax dispute will take to resolve. Although the vast majority of tax disputes are settled prior to litigation, some disputes, especially those that go to litigation, can take years to resolve.

4. Are tax disputes capable of adjudication by a court, tribunal or body independent of the tax authority, and how long should a taxpayer expect such proceedings to take?

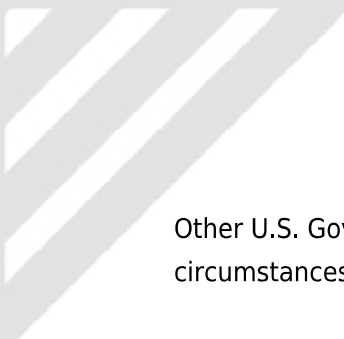
Tax disputes can be resolved administratively or judicially. Within the IRS, the IRS Office of Appeals is an independent appeals process where taxpayers can resolve tax disputes. The Office of Appeals will try settle tax disputes without litigation. If no settlement is reached, a taxpayer can still dispute the tax in federal court. Taxpayers can bring tax cases in federal court to the U.S. Tax Court, a federal district court, or the U.S. Court of Federal Claims. All of these courts are independent of the IRS.

5. Are there set dates for payment of tax, provisionally or in arrears, and what happens with amounts of tax in dispute with the regulatory authority?

Generally, taxpayers must pay all tax owing by the due date of the tax return. In many cases, taxes or estimated taxes must be paid quarterly. Payments received after the due date are subject to interest and penalties. Taxpayers do not need to pay disputed tax in advance of litigation in cases before the IRS Appeals or the Tax Court. Tax disputes before a federal district court or the Court of Federal Claims must be paid in advance.

6. Is taxpayer data recognised as highly confidential and adequately safeguarded against disclosure to third parties, including other parts of the Government?

The tax code provides for strict confidentiality and non-disclosure rules for taxpayer information. Criminal penalties may be imposed on people who disclose tax information.



Other U.S. Government agencies can receive taxpayer information only in limited circumstances and with a court order.

The United States has entered into numerous tax treaties and Tax Information Exchange Agreements under which the United States will exchange tax information on a government to government basis in certain situations.


7. Is it a signatory (or does it propose to become a signatory) to the Common Reporting Standard? And/or does it maintain (or intend to maintain) a public Register of beneficial ownership?

It is unclear whether the United States will become a signatory of the Common Reporting Standard (CRS). The United States does not maintain a public register of beneficial ownership.

In 2010, the United States introduced the Foreign Account Tax Compliance Act (FATCA) which was the basis for CRS. While CRS has similar objectives as FATCA, there are significant differences between CRS and FATCA, including the scope of information to be reported, the definition of a financial institution and applicable de minimis levels.

8. What are the tests for residence of the main business structures (including transparent entities)?

Generally, the test for residency is simply incorporation or formation of the entity in the United States. A corporation formed under U.S. state law is a U.S. resident (domestic) corporation even if it does not carry on a business or own any property in the United States. With respect to a fiscally transparent (hybrid) entity, an analysis of the residency of the owners of such an entity must be undertaken for U.S. tax purposes. The IRS will provide a U.S. residency certification (Form 6166) for an entity upon request that certifies the entity is a resident of the United States for U.S. federal income tax purposes. Such certifications are typically required by treaty partners in order for the entity to claim income tax treaty benefits or certain other tax benefits. In the case of a fiscally transparent entity, a U.S. residency certification, will only be provided if the entity can demonstrate that its partners/members/owners/beneficiaries, as the case may be, filed income tax returns as residents of the United States. Foreign entities that receive payments from U.S. sources provide IRS Form W-8 to withholding agents / payors to



certify foreign status for U.S. federal income tax purposes in order to claim reduced rate of or exemption from 30% withholding on such payments.

9. Can the policing of cross border transactions within an international group to be a target of the tax authorities' attention and in what ways?

Yes. Cross border transactions are a prime target of the IRS – in both IRS examinations and in cases that are litigated. International aspects of transactions are closely scrutinized. Transfer pricing is a very large target with all intercompany sales, services and licensing transactions reviewed closely by IRS examination teams. Typically, the first question an IRS examination team will ask is to review a taxpayer's transfer pricing studies. Other targeted areas are those where companies are moving intellectual property or activities out of the United States. The IRS has challenged cost sharing arrangements, valuation of pre-existing intangibles and allocation of royalty income, in such recent cases as *Veritas Software Corp. v. Commissioner*, 133 T.C. 297 (2009), *nonacq.*, *Amazon v. Commissioner*, 148 T.C. No. 8 (2017), *3M Co. v. Commissioner*, T.C. No. 5816-13. In addition, cross border intercompany restructurings and attempted repatriations to bring back cash to the United States are often targets as in *BMC Software, Inc. v Commissioner*, 780 F.3d 669 (5th Cir. 2013).

The IRS has also waged its attack on cross border transactions by regulation. In a series of recent pronouncements, the IRS has attempted to prevent certain cross border transactions by attacking, for example, cross-border reverse triangular reorganizations ("Killer B" transactions) under IRC section 367(b) regulations (T.D. 9526), outbound transfers of foreign goodwill and going concern value under regulations that modify IRC sections 367(a) and 367(d) (T.D. 9803)(currently under review by the U.S. Treasury Department for possible modification or withdrawal), inversion transactions under IRC sections 7874 and 367 regulations (T.D. 9761), and the treatment of certain interests in corporations that are debt as equity (T.D. 9790) (currently under review by the U.S. Treasury Department for possible modification or withdrawal).

10. Is there a CFC or Thin Cap regime? Is there a transfer pricing regime and is it possible to obtain an advance pricing

agreement?

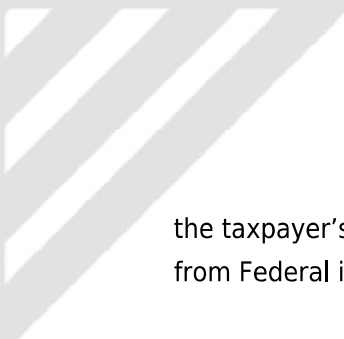
The United States operates a CFC regime. Generally, a foreign corporation is a CFC if more than 50 percent of its value or voting power is held by one (or more) 10 percent voting U.S. shareholders. Under the Subpart F rules, certain income (including, in part, certain related party income, certain passive income, and certain oil and gas income) of a CFC is includible in its U.S. parent's taxable income. In addition, a CFC's investment in United States property is generally taxable to its 10 percent U.S. shareholders.

The United States also has thin capitalization rules under Section 163(j) of the tax code that apply to U.S. companies and foreign companies engaged in a U.S. trade or business. Generally, if a company has a debt-to-equity ratio that exceeds 1.5 to 1, part of any interest paid to a related party that is not subject to U.S. tax may be not be deductible. Under regulations published on October 13, 2016, debt between certain related companies issued after January 1, 2018, must meet new documentation rules effective January 1, 2019 or the debt will be presumed to be equity; however, the U.S. Treasury Department announced in 2017 that such regulations are currently pending review and will be modified or repealed. The rules as currently drafted do not apply to foreign issuers of debt. In addition, in certain instances under such rules debt instruments between related companies are automatically treated as equity.

The United States has detailed and comprehensive rules governing transfer pricing in Section 482 of the tax code and the regulations promulgated thereunder. Taxpayers may obtain a unilateral, bilateral or multilateral APA.

11. Is there a general anti-avoidance rule (GAAR) and, if so, how is it applied by the tax authority? Eg is the enforcement of the GAAR commonly litigated, is it raised by tax authorities in negotiations only, etc?

The United States does not have a general statutory GAAR, but relies on judicially developed doctrines such as substance over form, business purpose, sham transaction and economic substance. In 2010, Congress codified the judicially developed economic substance doctrine. Under Section 7701(o) of the tax code, where the economic substance doctrine is relevant, a transaction will be deemed to have economic substance only if it changes in a meaningful way (apart from Federal income tax effects)



the taxpayer's economic position, and the taxpayer has a substantial purpose (apart from Federal income tax effects) for entering into such transaction.

In addition, many provisions of the tax code and regulations have anti avoidance provisions.

U.S. tax treaties contain a Limitation on Benefits (LOB) provision that limits "treaty shopping" by non-residents of the treaty country to claim benefits under the treaty.

12. Are there any plans for the implementation of the OECD BEPs recommendations and if so, which ones?

Many of the BEPS recommendations are embodied by the rules already in effect in the United States. For example, Treasury has stated that the BEPS recommendations on transfer pricing (Actions 8-10) as being consistent with the arm's length standard under the existing section 482 regulations. However, many would argue the BEPS recommendations go beyond existing law.

The United States released proposed revisions to the U.S. Model Income Tax Convention to reflect the BEPS project, which included changes to the Limitations of Benefits article (Action 6), to special tax regimes (Action 5), and to certain aspects of permanent establishments (Action 7).

The United States has also taken steps to implement country-by-country ("CbC") reporting (Action 13) by requiring under final regulation (T.D. 9773) that the ultimate parent entity of a multinational enterprise (MNE) group that has annual revenue for the preceding annual accounting period of \$850 million or more file a CbC report (IRS Form 8975). However, other aspects of Action 13 including the "Master File" requirement have not been adopted.

With respect to interest deductions (Action 4), the United States took a decidedly different direction than the BEPS recommendations by issuing new recharacterization rules and documentation requirements, which is different than the fixed ratio approach contemplated by Action 4.

13. **How will BEPS impact on the government's tax policies?**

It remains to be seen what the impact of BEPS will be in the United States. Aspects of BEPS were addressed in the United States prior to BEPS, such as the adoption of anti-hybrid and anti-treaty shopping provisions. Throughout the BEPS initiative, certain other aspects have been or currently are being addressed through regulation and revisions to the U.S. Model Income Tax Convention. However, the United States has stated that it will not adopt certain aspects of BEPS, such as the loosening of the definition of permanent establishment through revisions to the dependent and independent agent rules and the exemption for preparatory and auxiliary activities.

Implementing other aspects of BEPS may require the United States Congress to pass legislation, such as rules that would address issues related to the management and control of risk and related allocation of profits. The United States Congress may not have an interest in changing existing law and the current President and his Administration may not have an appetite to follow such recommendations.

However, even if the IRS does not adopt all aspects of BEPS, there have been instances where IRS examiners will take positions that use BEPS like principles and do so under existing regulations.

14. **Does the tax system broadly follow the recognised OECD Model?**

Does it have taxation of; a) business profits, b) employment income and pensions, c) VAT (or other indirect tax), d) savings income and royalties, e) income from land, f) capital gains, g) stamp and/or capital duties.

If so, what are the current rates and are they flat or graduated?

a. Taxation of business profits

Corporations are taxed at graduated rates. The corporate tax brackets are indexed to inflation. The following rates are for the 2017 tax year.

Income Bracket	Rate
Income up to \$50,000	15%
\$50,000 to \$75,000	25%

\$75,000 to \$10M	34%
\$10M and above	35%

Although corporations are taxed at a graduated rates, the brackets are gradually phased out. The first and second brackets phase out by an additional tax of 5 percent on income between \$100,000 and \$335,000. The third bracket phases out by an additional tax of 3% on income between \$15,000,000 and \$18,333,333.

b. Taxation of employment income and pensions

There are four filing statuses and seven brackets for individual federal income tax. The rates are graduated and the brackets are indexed to inflation. The following table is for the 2017 tax year.

Tax Rate	Single	Married filing Jointly	Married Filing Separately	Head of Household
10%	\$0—\$9,325	\$0—\$18,650	\$0—\$9,325	\$0—\$13,350
15%	\$9,325—\$37,950	\$18,651—\$75,900	\$9,326—\$37,950	\$13,351—\$50,800
25%	\$37,951—\$91,900	\$75,901—\$153,100	\$37,951—\$76,550	\$50,801—\$131,200
28%	\$91,901—\$191,650	\$153,101—\$233,350	\$76,551—\$116,675	\$131,201—\$212,500
33%	\$191,651—\$416,700	\$233,351—\$416,700	\$116,676—\$208,350	\$210,801—\$413,350
35%	\$416,701—\$418,400	\$416,701—\$470,700	\$208,351—\$235,350	\$416,701—\$444,550
39.6%	\$418,401 or more	\$470,701 or more	\$235,351 or more	\$444,501 or more

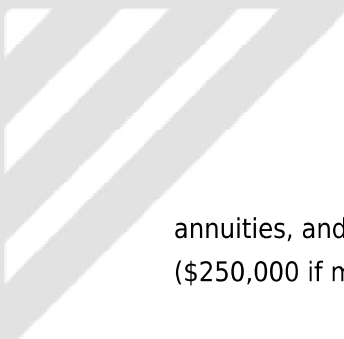
Individuals are also subject to employment taxes, at the rates below.

Social Security - 6.2% paid by both the employer and employee up to a cap of \$127,200 for 2017. Self employed individuals are responsible for the total 12.4%.

Medicare - 1.45% paid by both the employer and employee. An additional 0.9% Medicare tax is imposed on wages in excess of \$200,000 (\$250,000 if married filing jointly). Self employed individuals are responsible for the total 2.9%.

Federal Unemployment Tax - paid by the employer only at a rate of 6% applied to the first \$7,000 paid to each employee.

In addition, a net investment tax of 3.8 percent applies to the lesser of income from interest, dividends, certain capital gains, rental and royalty income and non qualified



annuities, and the amount a person's modified adjusted gross income exceeds \$200,000 (\$250,000 if married filing jointly).

Most states impose a state income tax in addition to the federal tax above.

c. VAT (or other indirect tax)

There is no VAT tax in the United States. A sales tax applies in most states.

d. Taxation of savings income and royalties

Interest, royalties, and ordinary dividends are taxed as ordinary income. Qualified dividends are taxed at the same rate as capital gains. See 13f.

In addition, the net investment tax described in 13a may apply.

e. Taxation of income from land

Income from land is taxed either as capital gain or ordinary income determined by purpose for which the land was held. For example, gain from the sale of land that was held primarily for sale to customers in a trade or business will be ordinary income.


The disposition of a U.S. real property interest by a foreign person is generally subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). FIRPTA authorized the United States to tax foreign persons on dispositions of U.S. real property interests as income effectively connected to a U.S. trade or business and taxed under the ordinary tax rates in 13a.

f. Taxation of capital gains

For individual taxpayers, the capital gains rate varies based on a taxpayer's tax bracket (See 13b): 0% on income in the 10% or 15% brackets; 15% on income in the 25%, 28%, 33%, or 35% brackets; and 20% on income in the 39.6% bracket.

Special rates apply for specific categories of capital gains. For example, gain from the sale of collectibles is taxed at a 28% rate, and part of the gain from the sale of certain real property (generally, the gain that is due to depreciation) is taxed at a 25% rate.

A corporation's capital gains are taxed at the same rates as ordinary income. See 13a.



Capital losses can only offset capital gains and may be carried back three years and forward five years to offset capital gains.

g. Stamp and/or Capital duties.
None.

15. Is the charge to business tax levied on, broadly, the revenue profits of a business as computed according to the principles of commercial accountancy?

Yes. Corporate tax is a tax on the profits of the corporation. However, certain provisions of the tax code, such as depreciation allowances, may differ from commercial accounting principles.

16. Are different vehicles for carrying on business, such as companies, partnerships, trusts, etc, recognised as taxable entities? What entities are transparent for tax purposes and why are they used?

Yes. Corporations, partnerships, estates and certain trusts generally are treated as separate entities for U.S. federal income tax purposes. Partnerships and certain trusts are not subject to tax at the entity level.

Certain entities (generally limited liability companies (LLCs)) may “check the box” to elect their classification for U.S. federal income tax purposes. Except for entities that are per se corporations (such as U.S. state law corporations or similar foreign entities), an entity with at least two members can choose to be taxable as a corporation or a partnership, and a business entity with a single member can choose to be taxable as a corporation or disregarded as an entity separate from its owner. As disregarded entities are not recognized for U.S. federal income tax purposes, they are used in tax structures for a variety of reasons to allow a group of entities to report as one company for U.S. federal income tax purposes, but for other state or foreign law purposes to be recognized as a separate legal entities; for example, to hold assets or businesses separate from other related entities, to facilitate a parent company’s need to register an entity in a foreign jurisdiction in order to own assets or carry on its business and comply



with local payroll and social insurance requirements.

17. Is liability to business taxation based upon a concepts of fiscal residence or registration? Is so what are the tests?

The United States taxes the worldwide income of U.S. companies. A company is a U.S. company if it is incorporated in the United States. Foreign corporations are subject to tax in the United States on income that is effectively connected with a U.S. trade or business and on certain of its income from U.S. sources.

Individual U.S. citizens and U.S. residents are generally taxed on their worldwide income regardless of their country of residence.

18. Are there any special taxation regimes, such as enterprise zones or favourable tax regimes for financial services or co-ordination centres, etc?

There are no special federal tax zones in the United States. The United States does recognize special rules for certain entities, such as Regulated Investment Companies (RICs), Real Estate Investment Trusts (REITs), Domestic International Sales Corporations (DISCs), Real Estate Mortgage Investment Conduits (REMICs) and S Corporations.

19. Are there any particular tax regimes applicable to intellectual property, such as patent box?

The United States does not have a patent box regime. There have been recent proposals for the United States to adopt a patent box regime, but it is unclear if any will be included in current tax reform efforts.

The United States does have a research and development tax credit that provides an incentive to develop intellectual property. In addition, Section 174 of the tax code provides for an immediate deduction of research and development expenses, i.e. such expenses are not required to be capitalized.

20. **Is fiscal consolidation employed or a recognition of groups of corporates for tax purposes and are there any jurisdictional limitations on what can constitute a group for tax purposes? Is a group contribution system employed or how can losses be relieved across group companies otherwise?**

The United States allows for related companies to file consolidated returns. For these purposes, companies are related if they have a common parent owning stock in at least one of the controlled corporations and are connected through stock ownership of at least 80% of the voting power and 80% of the value of the stock of the controlled corporation.


Certain entities are generally not eligible to be part of a consolidated group including foreign companies, tax-exempt companies, certain insurance companies, companies electing to take the possession tax credit under Section 936 of the tax code, regulated investment companies, real estate investment trusts and S corporations.

21. **Are there any withholding taxes?**

Yes. Most U.S. source income, except for capital gains, that is paid to a foreign person is subject to a 30 percent withholding tax. The withholding rate may be reduced or eliminated by a tax treaty. Further, the disposition of a U.S. real property interest by a foreign person is generally subject to FIRPTA withholding of 15 percent. Withholding may also apply at a 30 percent rate under FATCA for non-compliant entities.

22. **Are there any recognised environmental taxes payable by businesses?**

The United States imposes environmental taxes on crude oil and petroleum products (oil spill liability), and on the use or sale of ozone-depleting chemicals (IRS Form 6627). Oil spill liability taxes are imposed on crude oil received at a U.S. refinery and on petroleum products that enter into the United States for consumption, use or warehousing at a rate of \$.09 per barrel for products entered into the United States after December 31, 2016. Imported products that use ozone-depleting chemicals ("ODCs") as materials in the manufacture or production of the product and floor stocks of ODCs are subject to excise tax on the weight of the ODC at various rates based on type of ODC as specified on IRS Form 6627. A "gas guzzler" excise tax is imposed manufacturers of vehicles that have



fuel economy standards of less than 22.5 miles per gallon. The tax rate is based on fuel economy rating and specified on IRS Form 6197.

23. Is dividend income received from resident and/or non-resident companies exempt from tax? If not how is it taxed?

Corporations are often permitted to deduct dividends received from other U.S. corporations. A 70 percent dividend received deduction is allowed for corporate recipients that own less than 20 percent of the stock of the dividend-paying corporation. An 80 percent deduction is allowed to corporate recipients owning 20 percent or more of the stock of the dividend-paying corporation. A 100 percent deduction is allowed for dividends received from a domestic corporation in the same affiliated group. An affiliated group is generally a group of corporations eligible to file consolidated returns. See 19 above.

In certain circumstances, a dividend received deduction is available for dividends paid by a foreign corporation. To be eligible, the foreign corporation must not be a passive foreign investment company, must be subject to U.S. tax (i.e. it must have a U.S. trade or business), and at least 10 percent of the vote and value must be owned by the recipient corporation. The deduction is only allowed with respect to the U.S. source portion of the dividend.

24. From the perspective of an international group seeking to relocate activities from the UK in anticipation of Brexit, what are the advantages and disadvantages offered by the jurisdiction?

Under current law there are very few advantages from a tax perspective. The corporate tax rates in the United States are among the highest in the world. U.S. companies have been looking to invert to get out of the United States to places like the United Kingdom and Ireland, so until comprehensive tax reform, including a substantial reduction of the corporate tax rate, happen, there are not really any advantages.