

DOUBLE IRISH DUTCH SANDWICH: NEED FOR REFORM IN INTERNATIONAL TAXATION

- Tasba.B.Joseph*

Introduction

The Double Irish Dutch Sandwich (DIDS) is a strategy on reducing tax liability, used by Corporates earning lots of revenue globally. It is seen as a tax avoidance strategy and makes use of tax laws in certain territories that are in favour of corporates and reduce their tax liability. The paper is divided into eight parts. The first part discusses differences between tax avoidance and evasion. Part II will analyse the "Double Irish Dutch Sandwich" (DIDS) tax avoidance strategy and part III gives a case study of how leading MNEs use this strategy for avoidance. The paper will discuss the repercussions of this strategy in part IV and provide arguments given in support in part V and against tax avoidance in part VI. Part VII will then discuss the proposed solutions to avoid DIDS and part VIII will provide the concluding remarks.

What is Tax avoidance and tax evasion?

Tax evasion is the illegal means used by individuals to avoid paying taxes. This may take the form of underreporting income, inflation of deductions or even hoarding money in offshore areas.² Tax evasion is considered a crime in most jurisdictions in the world.³ Unlike tax evasion, tax avoidance serves as a legal operating strategy involving the bending of rules of the tax system to gain a tax advantage.⁴ It uses every available method approved by the state to keep tax rates at an absolute minimum. It is in line with the letter of the law but not its spirit and thus it becomes difficult to look at these practices as illegal.⁵

* Tasba.B.Joseph is a student at Jindal Global Law School, O.P. Jindal University.

¹ Boyu Wang, 'After the European Commission Ordered Apple to Pay Back Taxes to Ireland: Ireland's future in the New Global Tax Environment', Project Muse, Indiana Journal Of Global Legal Studies, Volume 25, Issue 1, 2018, pp 539-564, Indiana University Press.

² Tax Evasion', Legal Information Institute, Cornell Law School, Available at: https://www.law.cornell.edu/wex/tax_evasion, accessed 3 March, 2020.

³ Ibid.

⁴ Hunter Snowden, 'Apple's Double Irish with a Dutch Sandwich', Juris: Duke's Undergraduate Law Magazine, 2017, Available at: <http://dukeundergraduatelawmagazine.org/2017/06/01/apples-double-irish-with-a-dutch-sandwich/>, accessed 4 March, 2020.

⁵ 'Tax Avoidance: An Introduction', HM Revenue and Customs, (UK Govt), 2016, Available at: <https://www.gov.uk/guidance/tax-avoidance-an-introduction>, accessed 1 May, 2020.

What is the Double Irish Dutch Sandwich (DIDS) strategy?

The Double Irish Dutch Sandwich (DIDS) is a strategy on reducing tax liability, used by Corporates earning lots of revenue globally. It is seen as a tax avoidance strategy and makes use of tax laws in certain territories that are in favour of corporates and reduce their tax liability. Some of the places that are known for being favourable to these corporate giants include the Cayman Islands, Panama Islands, Bermuda and Ireland. They in essence serve as tax havens for corporates seeking to grow larger and increase their lucrative business while ensuring a significant plummet in their tax payments to their respective countries.

Case-Study: How does the DIDS strategy work?

The DIDS helps *Multi National Enterprises* (MNEs) like Apple, Google, Facebook and Amazon, otherwise called the 'Four Horsemen'⁶ to reduce their tax liability. They use DIDS as a strategy to avoid tax payment on the revenue earned on their intellectual property in their markets. This has led to their economic hyper-prominence all over the world. In this strategy, the MNE creates a subsidiary in the Ireland, say entity B, to which they license their **Intellectual Property** (IP) rights. This entity is usually controlled and managed by a director in a low corporate tax jurisdiction such as Bermuda or the Cayman Islands. Under Irish law, if the control and management⁷ is proved to be from any of these jurisdictions, the company is considered a tax resident in these havens and subject to their laws and jurisdiction and thus B pays reduced taxes. Upon establishing a structure as mentioned above, the entity B further sub-licenses the IP rights to a newly created entity in Ireland, say entity C. It owns real estate, employs workers, exploits the IP portfolio and carries out other economic activity. However C owes withholding taxes to Irish authorities for the royalty payments in favour of B. Thus another entity needs to be in place to avoid these payments and which is more favourable to corporates. The location for this entity, let's say D, is selected in Netherlands. It will serve as a shell company⁸. Now entity D acts as the Dutch cheese in the Irish sandwich. B sub-licenses the IP portfolio to this entity whose role is to

⁶ Daniel Shaviro, 'Digital Service Taxes and the Broader Shift From Determining the Source of Income to Taxing Location Specific Rents', LAW & ECONOMICS RESEARCH PAPER SERIES, WORKING PAPER NO. 19-36, New York University School of Law, 2019.

⁷ 'Company residence: the case law rule - central management and control', HM Revenue and Customs, (UK Govt), 2016, Available at: <https://www.gov.uk/hmrc-internal-manuals/international-manual/intm120060>, accessed 2 April, 2020.

⁸ Danielle Thorne, 'The Double Irish And Dutch Sandwich Tax Strategies: Could A General Anti-avoidance Rule Counteract The Problems Caused By Utilisation Of These Structures?' LLM Research Paper Laws 516: Taxation, Domestic And International, Faculty of Law, Victoria University of Wellington, 2013.

prevent royalty payments earned by entity C to Ireland. This becomes possible as the tax liability of D disappears by virtue of Irish law tax exemptions regarding royalties payments towards entities based in the Netherlands.⁹

What are the repercussions of DIDS?

1) Reduction of Corporate taxes owed by MNEs

The United States has a 35 percent corporate tax rate and the United Kingdom's rate is 19 percent. The DIDS leads to reduction in taxes paid by the MNEs for their intangible property. The idea behind DIDS is that a parent company can create a subsidiary which can own intangibles and harness them to commercial use by exempting them from taxes in the location where the business and customers actually are found.¹⁰ This involves some paper work after which it gets termed as a *corporate inversion*.¹¹

2) Leads to loss of revenue to the government

DIDS allows the parent company to shift all profits emerging from its IP portfolio to a low tax or no tax jurisdiction where it can keep its revenues away from taxation. It causes countries to lose billions of tax money that could be used to pay off any current budget deficit they may face¹². An argument based on the *Benefit theory of Taxation*¹³ is that allowing such large scale tax avoidance while the companies enjoy benefits of the home market is unacceptable.¹⁴ It would lead to the creation of an anticompetitive economy where MNEs or big companies can shift their profits to the disadvantage of the small companies. It was seen in the famous US case *Helvering v. Gregory*¹⁵ that corporations cannot reorganize themselves for tax purposes. It is the first decision that addresses corporate techniques to avoid paying taxes.

3) Leads to increased taxation of individuals and small companies

If the parent corporate is based in US and has foreign subsidiaries, then the income earned offshore evades taxes if not repatriated to US or through dividends. In essence, the larger

⁹ EC Directive 2003/49.

¹⁰ Edward D. Kleinbard, "Stateless Income," 11 Fla., at 710, Tax Rev. 699 (2011).

¹¹ Khadija Sharife, 'Jackpot Tax Avoidance: How one lottery company hides its billions', Project Muse, World Policy Journal, Volume 34, Number 3, pp 99-104, Duke University Press, 2017.

¹² *Ibid*.

¹³ John T. VanDenburgh, 'Closing International Loopholes: Changing the Corporate Tax Base to Effectively Combat Tax Avoidance', Valparaiso University Law Review, Volume 7, No.1, pp.313-355, Valparaiso University, 2012.

¹⁴ Danielle Thorne, 'The Double Irish And Dutch Sandwich Tax Strategies: Could A General Anti-avoidance Rule Counteract The Problems Caused By Utilisation Of These Structures?' LLM Research Paper Laws 516: Taxation, Domestic And International, Faculty of Law, Victoria University of Wellington, 2013.

¹⁵ 293 U.S. 465.

corporations are passing costs onto someone else while still utilizing the same U.S. economy, infrastructure, and other benefits that the United States provides by shifting their profits earned to another jurisdiction¹⁶.

4) Exploitation of the Intellectual Property (IP) protection

Intellectual Property is an intangible asset of the MNEs. DIDS functions on the existence of intangible property like IP and tries to keep profits or royalty fee earned on the same away from the home country. Use of structures like DIDS causes significant problems from an intellectual property point of view as well.¹⁷ It is seen that creation of rights and protection of products encourages innovation. DIDS brings in problems for Intellectual Property as shifting profits and some of the associated economic activity offshore leads to lack of connection between the state where the incentive to work is provided and the state where the profits reside.¹⁸

5) Creation of tax Havens and accumulation of Stateless income

DIDS structure is an example of stateless income tax planning in operation. It leads to the creation of tax havens where the income lying there becomes termed as '*Stateless income*'¹⁹. Stateless income is income derived for tax purposes by an MNE from business activities in a country other than the domicile of the parent company, but which is subject to tax only in a jurisdiction that has no relation to the place of domicile or use of factors of production.²⁰ The lack of country-by-country reporting to show where business activity takes place, in combination with the use of tax havens, enables companies to withhold monies offshore indefinitely²¹.

Arguments in favour of Tax Avoidance

1) High taxation on corporate revenue in the country of domicile

It is seen that countries like US and UK charge high taxes on corporations. These tend to reduce the income received by the corporations after taxes are paid. It reduces the incentive to declare

¹⁶ *Supra n. 13*.

¹⁷ Danielle Thorne, 'The Double Irish And Dutch Sandwich Tax Strategies: Could A General Anti-avoidance Rule Counteract The Problems Caused By Utilisation Of These Structures?' LLM Research Paper Laws 516: Taxation, Domestic And International, Faculty of Law, Victoria University of Wellington, 2013.

¹⁸ *Ibid*.

¹⁹ Edward D. Kleinbard, 'Through a Latte, Darkly: Starbucks's Stateless Income Planning', Center in Law, Economics and Organization Research Papers Series No. C13-9, Legal Studies Research Paper Series No. 13-10, pp. 1515-1535, USC Gould School of Law, 2013.

²⁰ *Ibid*.

²¹ Khadija Sharife, 'Jackpot Tax Avoidance: How one lottery company hides its billions', Project Muse, World Policy Journal, Volume 34, Number 3, pp 99-104, Duke University Press, 2017.

actual revenue and increases the tendency of MNEs to create structures or make arrangements that will save their revenue from taxation.²²

2) *Using strict interpretation of tax law, it is seen that there is no violation of the law*

It is argued that even if Ireland did offer unfair advantage to the MNEs in their jurisdiction, they were operating completely under Irish domestic law, in its letter. In this sense, they would argue that since the companies have not flouted any law, they cannot be punished for using the loophole in the law to avoid taxes.²³ If anyone should be fined it should probably be countries that violate tax treaties by agreeing to enter into agreements with MNEs.²⁴

3) *There is a right to tax avoidance*

The MNEs would argue that since there is no law regarding prohibition of tax avoidance, they have a right to plan their taxes and avoid paying high taxes.²⁵ It is to be seen that this understanding of tax avoidance developed through case law and the same cannot be taken as rule or principle of law as argued by Daniel Weisbach.²⁶

4) *Reduction in costs of the company*

The MNEs argue that with globalization and an expansion of their businesses all across the world, it becomes important to adopt cost-efficient strategies. The DIDS structure or base case offers one such option where the MNEs can smoothly conduct their businesses without having to incur costs in the several jurisdictions, they operate in.

5) *Complicated taxes*

It is seen that the complexity in tax law, makes it difficult for companies to understand the intricacies involved in complying with them. In order to prevent flouting the law, MNEs use tax avoidance measures. Rules on restricting avoidance and evasion are added to tax legislations every year, complicating the tax law.²⁷ MNEs demand for legislations that are easy to comprehend and comply with.

²²John T. VanDenburgh, 'Closing International Loopholes: Changing the Corporate Tax Base to Effectively Combat Tax Avoidance', Valparaiso University Law Review, Volume 7, No.1, pp.313-355, Valparaiso University, 2012.

²³David A. Weisbach, 'Ten Truths about Tax Shelters', Coase-Sandor Working Paper Series in Law and Economics, Coase-Sandor Institute for Law and Economics, University of Chicago Law School Chicago Unbound, 2001.

²⁴Andrea Tosato, 'Corporate tax avoidance and IP rights – The Double Irish Dutch sandwich', IP Finance, 2013, Available at: http://www.ip.finance/2013/09/corporate-tax-avoidance-and-ip-rights_18.html, accessed 5 March, 2020.

²⁵*Supra n.23.*

²⁶*Ibid.*

²⁷*Supra n. 22.*

Why are some countries in support of DIDS Tax Strategy?

Countries and governments in power are against the idea of taxing the revenue of such MNEs for many reasons. It is seen that Ireland allows MNEs to structure their corporate tax in a way that allows them to avoid taxes by keeping their profits in tax havens and having no stringent transfer pricing within the law.²⁸ The DIDS strategy came to light when the European Commission ruled that Apple owed Ireland over €13 billion (\$14.1 million) due to the illegality of their transfer pricing and illegal state aid received from Ireland.²⁹ It was seen that Ireland granted illegal tax benefits to Apple, which enabled it to pay substantially less tax than other businesses for a long period of time.³⁰ Under the *Treaty on the Functioning of the European Union*,³¹ it is illegal for countries to provide financial aid to a specific company if they do not also make it available to every other company. Ireland had breached the treaty by allowing Apple to pay less than 1% in taxes to the Irish government (standard Irish corporate tax is 12%).³²

The money owed by Apple as taxes would be enough to fund Ireland's entire health care budget or even to pay off 6% of the country's current debt³³. Yet Ireland refuses to assert its right to demand these backtaxes from Apple due to the substantial revenue, business and job creation that the DIDS arrangement provides for the country. It also helps in creating employment and solving issues of unemployment in the country. It would entice more corporations into investing and expanding their business in such jurisdictions. Further, seeking the repayment of taxes would also shed light on the misdeeds of the Irish government and lead to them accepting their acts of malafide in collaboration with the companies being permitted to carry these activities.³⁴

Arguments against DIDS: Is it an aggressive tax avoidance?

²⁸ Boyu Wang, 'After the European Commission Ordered Apple to Pay Back Taxes to Ireland: Ireland's future in the New Global Tax Environment', Project Muse, Indiana Journal Of Global Legal Studies, Volume 25, Issue 1, 2018, pp 539-564, Indiana University Press.

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ Treaty on the Functioning of the European Union, 2007.

³² *Supra n. 28.*

³³ Hunter Snowden, 'Apple's Double Irish with a Dutch Sandwich', Juris: Duke's Undergraduate Law Magazine, 2017, Available at: <http://dukeundergraduatelawmagazine.org/2017/06/01/apples-double-irish-with-a-dutch-sandwich/>, accessed 4 May, 2020.

³⁴ *Supra n. 32.*

DIDS can be seen as an aggressive tax avoidance scheme. It uses the loopholes in international tax laws and financial border hopping to reduce tax burdens of the corporate giants.³⁵ There was a recent controversy regarding the stashing of wealth of some of the affluent people, political leaders, famous and infamous personas of the world that was revealed in a series of investigations titled “*the Panama Papers*”.³⁶ It was seen that a firm in the Panama Islands catered to the needs of many global figures in helping them transfer money from their respective countries to offshore shell companies in the Cayman Islands and the Panama.³⁷ This made headlines when investigators received access to these documents revealing the names of corporate giants, political figures as well as celebrities involved in this scandal. This has led to severe economic issues faced by the countries that do not have access to its citizens’ offshore money. The problem with this issue is on the ethical aspects such actions. There is no law that prohibits people transacting through shell companies or stowing away their wealth in shell companies located in tax-friendly jurisdictions abroad. In essence, there is no law breaking involved in any of these activities. Yet when one looks closely at these activities being carried out by a law firm in secrecy and surreptitiously, it raises concerns on acts of money laundering and tax evasion.³⁸ It also contributes to the financial burdens faced by the home government due to a monetary deficit in funding welfare schemes in their own jurisdiction. The imbalanced advantage gained by these large MNEs, also results in small and medium enterprises being affected adversely. It could be considered as an inconspicuous move by the MNEs, violating the laws regulating competitive practices. Moreover, the actions of these corporates which leads to base erosion of the home government and profit shifting to the foreign jurisdiction could also potentially detrimental effects on the socio-economic development of developing and under-developed countries.³⁹ These negative effects are termed as spillover effects which, deter the developing countries from meeting the welfare requirements of their citizenry, due to money being laundered by MNEs into tax havens.⁴⁰ It is important to consider such

³⁵ Wes Messamore, ‘Double Irish With A Dutch Sandwich’ – Cryptocurrency Didn’t Start The Tax Evasion Fire’, 2019, Available at: <https://hacked.com/double-irish-with-a-dutch-sandwich-cryptocurrency-didnt-start-the-tax-evasion-fire/>, accessed 6 May, 2020.

³⁶ Bastian Obermayer & Frederik Obermaier, ‘The Panama Papers: Breaking the story of how the rich & powerful hide their money’, 2016.

³⁷ ‘What are the Panama Papers?’ New York Times, 2016, Available at: <https://www.nytimes.com/2016/04/05/world/panama-papers-explainer.html>, accessed 8 April, 2020.

³⁸ *Ibid.*

³⁹ ‘Pulling the Plug -How to stop corporate tax dodging in Europe and beyond’, Oxfam International Report, 2015, Available at: <http://www.taxjustice.net/wp-content/uploads/2015/03/Oxfam-EU-Pulling-The-Plug-tax-note-March-2015.pdf>, accessed 13 May, 2020.

⁴⁰ *Ibid.*

arrangements and devices as aggressive forms of tax avoidance due to their adverse impact on economies and IP protection rights, and prevent the same accordingly.

Is it ethical/moral for companies to plan their taxes using these strategies?

It is argued that while tax avoidance may not be illegal, aggressive tax avoidance is certainly immoral and unethical.⁴¹ This is because of the covert use of the loopholes in the taxation law of various countries and within their tax treaties, to aggrandize profits while denying revenue to the resident government on the profits earned by the MNEs in foreign jurisdictions and defying the spirit of the law and transgressing parliamentary intention. The protection afforded, in the form of exclusive rights to the intellectual property created by MNEs, gets defeated, if they misuse the benefits and do not repatriate the money earned from profits in the technology they develop.⁴² It must be seen that due to being deprived of these monetary resources, the resident country finds itself in a catch-22 situation of being unable to formulate welfare laws for the residents as well as prevented from acting aggressively against the parent companies incorporated, in fear of it hindering the lucrative prospects of these MNEs abroad and losing their position and large share of the global market.

Proposed solutions to avoid DIDS

1) Reduction in the Corporate tax rate

This could in theory solve the problem as it removes the incentive for corporations to shift their income abroad. It would also increase the foreign investments made in the country while preventing domestic corporations from indulging in income manipulation.⁴³ However some studies suggest this won't have the desired effect because corporations will yet again continue "jurisdiction shopping" for strategically placed subsidiaries.⁴⁴

⁴¹ Recording – Public Accounts Committee Hearing (12/11/2012) on Taxation of Multinational Corporations, witnesses: Matt Brittin (CEO, Google UK), Troy Alstead (Global CFO, Starbucks), Andrew Cecil (Director Public Policy, Amazon), Available at: <https://www.parliamentlive.tv/Event/Index/ab52a9cd-9d51-49a3-ba3d-e127a3af018c>, accessed 18 May, 2020.

⁴² *Ibid.*

⁴³ John T. VanDenburgh, 'Closing International Loopholes: Changing the Corporate Tax Base to Effectively Combat Tax Avoidance', Valparaiso University Law Review, Volume 7, No.1, pp.313-355, Valparaiso University, 2012.

⁴⁴ Khadija Sharife, 'Jackpot Tax Avoidance: How one lottery company hides its billions', Project Muse, World Policy Journal, Volume 34, Number 3, pp 99-104, Duke University Press, 2017.

2) *There could be a shift to territorial system of taxation in countries like the US*

It is important to strike a balance between cross-border investment and double non-taxation. The Territorial system of taxation will tax income derived within a particular country, irrespective of its corporate residency. But this system is not perfect as well as there could be instances of income manipulation again⁴⁵.

3) *Amendments to the National Taxation Law (Rules) along with adoption of standards*

New provisions would be narrow and technical, suited to serve specific instances of tax avoidance.⁴⁶ These would come within tax rules. However, this must be accompanied by standards as well to address broader instances of tax avoidance that would not be covered by the rules.⁴⁷

4) *Transparency in Corporate economic activities*

The government must try to investigate the ways in which corporates allocate funds and what composes the true profit of a company.⁴⁸ There is a need to require the MNEs to disclose their income earned in foreign territories. An endemic problem is the lack of data and information on corporate revenue, management, dealings and so on⁴⁹. Under current laws established by the International Accounting Standards Board, companies only need to disclose minimal information which allows businesses to shield the value of trade or services between subsidiaries of the same parent company⁵⁰. By the implementation of *Country by Country Reporting* (CbCR) in all countries, it would be easier to trace the presence and purpose behind every MNE's subsidiary.⁵¹ It lies applicable to the banking sector in the EU. By its adoption as part of **Base Erosion Profit Shifting** (BEPS) Plan, it could lead to reform in International Taxation.⁵² The current CbCR has two disadvantages at present. Firstly, it has a very high threshold based on a turnover in a MNE, for it to be liable to produce reports. This would make it easy for many big companies to avoid being transparent on where they shift their profits⁵³. Secondly, it only mandates disclosure of

⁴⁵ *Ibid.*

⁴⁶ *Supra n. 43.*

⁴⁷ David A. Weisbach, 'Ten Truths about Tax Shelters', Coase-Sandor Working Paper Series in Law and Economics, Coase-Sandor Institute for Law and Economics, University of Chicago Law School Chicago Unbound, 2001.

⁴⁸ 'OECD Tax Reforms: The Double Irish with a Dutch Sandwich is off the menu

'The Byte Direction, Available at: <https://thebytedirection.com/2015/10/07/oecd-tax-reforms-the-double-irish-with-a-dutch-sandwich-is-off-the-menu/>, accessed 9 May, 2020.

⁴⁹ *Ibid.*

⁵⁰ Khadija Sharife, 'Jackpot Tax Avoidance: How one lottery company hides its billions', Project Muse, World Policy Journal, Volume 34, Number 3, pp 99-104, Duke University Press, 2017.

⁵¹ 'Pulling the Plug -How to stop corporate tax dodging in Europe and beyond', Oxfam International Report, 2015, Available at: <http://www.taxjustice.net/wp-content/uploads/2015/03/Oxfam-EU-Pulling-The-Plug-tax-note-March-2015.pdf>, accessed 13 May, 2020.

⁵² *Ibid.*

⁵³ *Ibid.*

reports by the MNE to its own tax authorities in the home jurisdiction.⁵⁴ This means that other countries would have to demand a free exchange of information which, can be inefficient due to delays and also dependent on reciprocal treatment by the demanding State, as a condition.

5) Automatic exchange of Information

The automatic exchange of information between national tax administrators would help in delivering information in a free and transparent manner in order to hold MNEs liable for any aggressive tax avoidance schemes. This is the EU standard for sharing of information.⁵⁵

6) Strengthening Competition Law in each jurisdiction

At present there lies a fight against aggressive tax avoidance due to the unfair competitive advantage it gives to the MNEs over small and medium enterprises. This disturbs the market as seen in EU. The EU uses its legislation on Competitive practices to avoid MNEs from escaping impunity for their unethical practices.⁵⁶

7) Creating uniform and adequate legislation

A major problem faced is the lack of uniformity in domestic and international standards. It is seen that international standards have not always kept pace with the changing global business environment⁵⁷. The national tax laws have failed to keep pace with the advances made in technology, innovation and rise in globalization.⁵⁸ The focus on double taxation avoidance has shifted attention from a possible double non-taxation of revenue that could possibly take place in today's scenario due to the tax treaties and transfer pricing rules in place⁵⁹.

We need a common approach to classify which countries serve as tax paradises and sign 'sweetheart deals'⁶⁰ with MNEs to bring in investments. The OECD has launched an action plan

⁵⁴ *Ibid.*

⁵⁵ "Pulling the Plug -How to stop corporate tax dodging in Europe and beyond", Oxfam International Report, 2015, Available at: <http://www.taxjustice.net/wp-content/uploads/2015/03/Oxfam-EU-Pulling-The-Plug-tax-note-March-2015.pdf>, accessed 13 May, 2020.

⁵⁶ *Ibid.*

⁵⁷ David A. Weisbach, 'Ten Truths about Tax Shelters', Coase-Sandor Working Paper Series in Law and Economics, Coase-Sandor Institute for Law and Economics, University of Chicago Law School Chicago Unbound, 2001.

⁵⁸ Andrea Tosato, 'Corporate tax avoidance and IP rights – The Double Irish Dutch sandwich', IP Finance, 2013, Available at: http://www.ip.finance/2013/09/corporate-tax-avoidance-and-ip-rights_18.html, accessed 5 March, 2020.

⁵⁹ Kamal Ahmed, 'OECD attacks 'aggressive' tech tax plans', BBC News, 2015, Available at: <http://www.bbc.co.uk/news/business-32730305>, accessed 3 June, 2020.

⁶⁰ 'Europe: "secret 'sweetheart' tax deals with multinational corporations soar up', Global Alliance for Tax Justice, 2018, Available at: <https://www.globaltaxjustice.org/en/latest/europe-secret-%E2%80%99sweetheart%E2%80%99-tax-deals-multinational-corporations-soar>, accessed 11 June, 2020.

to deal with the tax evasion menace.⁶¹ The plan seeks to close tax gaps and focuses on *Base Erosion and Profit Shifting* (BEPS). It is trying to ban tax avoidance mechanisms such as the DIDS⁶². However, this scheme requires MNEs to file information in the country where the parent company is based. This allows information on subsidiaries to be omitted, leaving many governments in the dark.⁶³

Countries that fail to comply with BEPS Action Plan must be blacklisted as non-cooperative tax jurisdictions.⁶⁴ There must be uniform financial sanctions in place all over the world, to hold these MNEs responsible and prevent them from taking advantage of the former loopholes in laws of different countries. These steps would help control the race to the bottom in taxation matters.⁶⁵

Another possible proposal could be a creation of a *Common Consolidated Corporation Tax Base* (CCCTB), as suggested in the EU. There would be one set of rules and MNEs would establish their base⁶⁶. This will be beneficial to corporates as they will only be required to adhere to one set of rules, avoiding the costs incurred in dodging multiple laws and complexities by existence of multiple laws⁶⁷. This will also ensure fairer and open competition all over the world⁶⁸.

8) Introduction of withholding taxes

A possible way of reducing the outflow of cash from domestic corporations would be to introduce withholding taxes on such transactions, especially if there is an absence of equal cash inflows⁶⁹. To reduce the flow of cash, the countries may increase the rate or scope of such taxes. Most home governments must also do away with deductions that were given to such outflows of cash from MNEs.⁷⁰

⁶¹ BEPS Action Plans, Available at: <http://www.oecd.org/tax/beps/beps-actions/>, accessed 20 May, 2020.

⁶² *Ibid.*

⁶³ *Ibid.*

⁶⁴ "Pulling the Plug -How to stop corporate tax dodging in Europe and beyond", Oxfam International Report, 2015, Available at: <http://www.taxjustice.net/wp-content/uploads/2015/03/Oxfam-EU-Pulling-The-Plug-tax-note-March-2015.pdf>, accessed 13 May, 2020

⁶⁵ *Ibid.*

⁶⁶ "Pulling the Plug -How to stop corporate tax dodging in Europe and beyond", Oxfam International Report, 2015, Available at: <http://www.taxjustice.net/wp-content/uploads/2015/03/Oxfam-EU-Pulling-The-Plug-tax-note-March-2015.pdf>, accessed 13 May, 2020

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ Peter Harris, 'Neutralizing Effects of Hybrid Mismatch Arrangements' Papers on Selected Topics in Protecting the Tax Base of Developing Countries, September 2014, Available at: https://www.un.org/esa/ffd/wp-content/uploads/2014/09/20140923_Paper_-HybridMismatchArrangements.pdf, accessed 20 May, 2020.

⁷⁰ Peter Harris, 'Neutralizing Effects of Hybrid Mismatch Arrangements' Papers on Selected Topics in Protecting the Tax Base of Developing Countries, September 2014, Available at: https://www.un.org/esa/ffd/wp-content/uploads/2014/09/20140923_Paper_-HybridMismatchArrangements.pdf, accessed 20 May, 2020.

9) Prevention of transfer of profits earned from IP

With respect to Intellectual property, there has been an understanding and creation of *patent or Knowledge Development Boxes* (KDB). These are seen as incentives to the company to retain and commercialise their existing patents and to develop new innovative patented products.⁷¹ It is hoped that this would encourage companies to create high value jobs associated with creation and manufacture of patents in the UK.⁷² This would also allow the collection of tax income from intellectual property in addition to the tangible sources of profit.⁷³ Ireland recently introduced the KDB along with a 6.25% corporate tax rate. This rate is seen to apply to profits derived from patented/similarly protected inventions. This is in line with Ireland's compliance to OECD's Modified Nexus Standard (MNS). This concept was introduced to allow companies to enjoy IP protection to their developed assets in the home country, only if they could clearly show that the expenditure incurred by the corporate was related to the development of a qualifying asset or Intellectual Property (IP). If the corporate is able to successfully prove the relation between the profits earned on the IP and the corporate expenditure on developing it, only then would it be protected under IP laws of the Ireland as well as be eligible for Research & Development (R&D) tax credit claim.⁷⁴

10) Value added taxes on MNEs

Another proposal seeks to transfer the taxing ability of States from profits earned by the corporates to taxing every value added to the invention or even the sales of these MNEs. This has been proposed as a long-term solution in some States like the US.⁷⁵

11) Strengthen the Control of Foreign Corporations Rules

The strengthening of CFC rules and removing of existing gaps to the same could be seen as a way to prevent the avoidance of corporate taxes by MNEs. This could also include the dilution of the concept of 'corporate veil' where the idea of the foreign subsidiary being an independent legal entity must be probed into. The Courts have always taken a rigid approach (rarest of rare instances)

⁷¹ Andrea Tosato, 'Corporate tax avoidance and IP rights – The Double Irish Dutch sandwich', IP Finance, 2013, Available at: http://www.ip.finance/2013/09/corporate-tax-avoidance-and-ip-rights_18.html, accessed 5 March, 2020.

⁷² Leonid Bershidsky, 'Goodbye Double Irish, Hello Knowledge Box', Bloomberg Opinion, 2014, Available at: <https://www.bloomberg.com/opinion/articles/2014-10-15/goodbye-double-irish-hello-knowledge-box>, accessed 7 May, 2020.

⁷³ *Ibid.*

⁷⁴ Andre O'Reilly, 'Knowledge Development Box Adding to Ireland's R&D incentives, Deloitte, Available at: <https://www2.deloitte.com/ie/en/pages/tax/articles/knowledge-development-box-ireland.html>, accessed 12 May, 2020.

⁷⁵ Michael C Durst, Taxing Multinational Business in Low- Income Countries

to lifting the corporate veil, especially in the US, however, it is important to lift the veil and understand the tax structures of these companies.⁷⁶ By lifting the veil, we will afforded an opportunity to analyse their tax arrangements and understand the purposes for which subsidiaries are set up. This could help in determining whether there existed any business purpose in setting up foreign subsidiaries and if they appear to fulfil the requirements of the doctrine of 'economic substance'.⁷⁷

12) Doing away with Permanent Establishment

The physical presence of corporates was sufficient previously to impose taxes on them. However with the spread of globalization and economic integration, it is important to amend laws that reflect the progress and advancement achieved, as well as to prevent MNEs from using out-dated laws to increase their profits, without being made to comply with their legal obligations to their home government. For this purpose, we could consider the idea of 'Significant Economic Presence' (SEP)⁷⁸ as a possible way to impose tax liability on the tech-companies that have manifested themselves in various forms in different jurisdictions. An example for taxing digital transactions and holding corporates liable can be taken from the example of India. There has been an introduction of taxation on corporates through the imposition of an 'equalization levy'⁷⁹ at the rate of 6%. This is however applicable to consideration received or receivable on 'specified services' which includes, online advertisement, any provision for digital advertising space and any other service notified by the Central Government of India.

13) Formulary apportionment

This is a new idea of taxing corporations by way of treating the parent and subsidiary as one unit.⁸⁰ Their worldwide income is to be calculated using a mathematical formula that would reflect the distribution of economic activity and divides the income of the business among the jurisdictions

⁷⁶ Danielle Thorne, 'The Double Irish And Dutch Sandwich Tax Strategies: Could A General Anti-avoidance Rule Counteract The Problems Caused By Utilisation Of These Structures?' LLM Research Paper Laws 516: Taxation, Domestic And International, Faculty of Law, Victoria University of Wellington, 2013.

⁷⁷ Hugh.J.Ault, 'Some Reflections on the OECD and the Sources of International Tax Principles', Max Planck Institute for Tax Law and Public Finance Working Paper 2013 – 03, July 2013, Available at: <http://www.tax.mpg.de>, accessed 10 May, 2020.

⁷⁸Significant Economic Presence for E-Commerce Taxation, Available at :<https://www.taxmann.com/blogpost/2000000334/significant-economic-presence-for-e-commerce-taxation.aspx>, accessed 5 May, 2020.

⁷⁹ Provisions relating to Equalization Levy, TaxGuru, Available at: <https://taxguru.in/income-tax/levy-equalisation-levy.html>, accessed 19 May, 2020.

⁸⁰ John T. VanDenburgh, 'Closing International Loopholes: Changing the Corporate Tax Base to Effectively Combat Tax Avoidance', Valparaiso University Law Review, Volume 7, No.1, pp.313-355, Valparaiso University, 2012.

in which it operates.⁸¹ It would measure taxes based on real economic activity and simplifies the tax system for corporations.⁸²

14) Renegotiation of bilateral tax treaties

Several developing countries rich in natural resources have signed treaties that only secure the interests of the developed countries where most of these large MNEs have their base. The treaties must be re-negotiated to include the interests of the developing countries and making the MNEs pay a fair share of their taxes in these based eroded jurisdictions.⁸³ Additionally, these treaties need to shift focus from prevention of double taxation to prevention of double non-taxation.

Conclusion

It is seen that DIDS is a tax avoidance strategy that is used by MNEs to reduce their corporate taxes in the domicile country. It can be seen as an aggressive form of avoidance due to the creation of tax havens which hoard 'stateless income', leading to double non-taxation of their income. While there are arguments propounded to see this strategy as legal, there remains the need to prevent this form of tax avoidance due to the adverse economic effects it leads to. A look at the proposed solutions gives us an idea as to the means of addressing this menace. It however remains unclear who will have the actual right to tax these multinationals. But it is certain that due to the amount of money involved, there will be an increase in international tax disputes.

⁸¹ *Ibid.*

⁸² *Supra n. 79.*

⁸³ "Pulling the Plug -How to stop corporate tax dodging in Europe and beyond", Oxfam International Report, 2015, Available at: <http://www.taxjustice.net/wp-content/uploads/2015/03/Oxfam-EU-Pulling-The-Plug-tax-note-March-2015.pdf>, accessed 13 May, 2020