Nir Fishbien

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Fishbien's areas of interest and research include corporate taxation, international tax, and tax policy.

FROM TAX-HAVEN WITH LOVE:

SURREY'S PAPERS AND THE ORIGINAL INTENT(S) OF SUB-CHAPTER-F'

Abstract

Seven internal Treasury Department reports found in the archive of Harvard Law School Library, reveal the dramatic sequence of events that led to the legislation of one of the most predominant international tax reform the United States had ever known.

In 1962, Congress enacted a new law, also known as ‘Subpart-F’, which subjected certain earnings of foreign subsidiaries of American parent corporations to current-base taxation. This was a deviation from the general tax principle of tax deferral, under which earnings of foreign subsidiaries are taxed only upon repatriation of these earnings (by a dividend, for example). The new legislation was the result of a political compromise. While Treasury supported a wide-scale elimination of tax deferral, Congress, eventually, adopted a much narrower law, eliminating tax deferral only in cases where it was abusively used in avoiding what should be otherwise owed U.S. taxes.

The reports unequivalently support the notion that the ‘original intent’ of Subpart F, as set by its main architect, Assistant Secretary of the Treasury, Stanley S. Surrey, was based on the principle of equity (and Capital *Export* Neutrality), and that in the final legislation, Congress rejected this notion, mainly based on the concern that eliminating deferral will result in a competitive disadvantage to American corporations operating abroad (focusing on Capital *Import* Neutrality).

Unfortunately, as in 1962, the main principles of the international provisions of the Tax Cuts and Jobs Act of 2017, are also based on notions of competitiveness and preventing abuse. The adoption of a territorial system is intended to help American corporations operating abroad while the new Global Intangible Low Tax Income is intended to prevent abusive avoidance of U.S. taxes. The 1962 and 2017 Congresses were both persuaded by overly-emphasized and exaggerated competitive concerns, instead of concrete tax, and sound fiscal, policies.