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Outsourcing in India: Issues in the IT Services Market

BY JAMES D. STEINBERG, SUNJAY V. SOOD, AND WILLIAM J. HELMSTETTER, III (KILPATRICK STOCKTON LLP)

(EDITOR's NOTE: This is part one of a two part article. Part two will appear in the July 2007 issue.)

An Outsourcing Overview

The last decade has seen the enlargement of economic ties between the United States and India. Much of this expansion can be traced to the outsourcing boom of the last decade. By 2005, about half of the Fortune 500 companies were IT clients of Indian IT companies.[1] Overall, India is home to approximately seventy percent of the global offshore IT services market.[2] In addition to IT functions, U.S. companies, recognizing the benefits of favorable tax treatment and a relatively inexpensive labor market, have increased the level of their outsourced business processes and functions to India as well.

continued on page 21

Canada Has Limited Border Enforcement Measures to Protect Against IP Infringement

BY DALTON J. ALBRECHT (MILLER THOMSON LLP)

Intellectual property ("IP") crime is increasingly a global concern that poses a threat to a country's economic sustainability and public safety. As a result, many countries have adopted stronger and more effective border enforcement measures to stop the import, export, and transit of pirated and counterfeit goods. Counterfeiting is also a huge and growing concern in Canada. According to the Canadian Anti-Counterfeiting Network (CACN) and RCMP estimates, counterfeiting is responsible for billions of dollars in losses to the Canadian economy. It has been directly linked to organized crime, and it raises significant consumer health and safety concerns. Goods that are commonly counterfeited include pharmaceutical products, electrical products (both household and industrial), software, movies, music, toys, food, wine, personal care products, automobile parts and

continued on page 2

IN THIS ISSUE

Canada from page 1

luxury goods.The CACN recently issued a report outlining the threats posed by rampant counterfeiting and piracy in Canada and setting out a practical action plan for government. The report, entitled "A Road Map for Change," is the most comprehensive and detailed study of Canada's counterfeiting problem published to date. It is available online at http://www.cacn.ca.

While Canada is a signatory to various international agreements, including the North American Free Trade Agreement, the Canada-Israel Free Trade Agreement and the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIMs), it has only limited customs procedures at the border to assist in deterring and prohibiting entry to goods that infringe copyright. Canada is not as advanced as the United States (there is no equivalent to the U.S. direct action trade procedures) or the E.U., and arguably it has not fully implemented TRIMs.

Under the Canadian Copyright Act and Trademarks Act, the owner of a registered trademark or name, the owner or exclusive licensee of a copyright, or the owner of a performer's performance may apply to a court on an ex parte basis to seek an order directing the Canada Border Services Agency ("CBSA") to take reasonable measures to detect and detain alleged infringing goods. Such applications must be made on notice to the CBSA, and the application must be supported by affidavits that provide detailed information including the description of the goods, the classification of the goods under the Harmonized System, the quantity and value of the goods, the identity of the importer, exporter or vendor, the county of export or origin, the method of importation or release, the estimated date of arrival in Canada, and the mode of trans-

continued on page 20

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Planning Advisory

Protecting Product Designs in Europe has Become Easier

BY RAYMOND C. MEIERS, JR. AND JEREMY KLOBUCAR (DICKINSON WRIGHT PLLC)

Design protection is becoming an increasingly attractive option for clients who develop and introduce products at a relatively accelerated pace. Exclusive rights in a design can be acquired in months, whereas the acquisition of patent rights can take years. Design protection can also be advantageous when the client has a large product portfolio since the cost of acquiring design protection for a product is much less than the cost of acquiring patent protection for the product. Since April 1, 2003, protection for product designs has been available in the European Union (EU) in the form of a "Community Design." Generally, in comparison with U.S. law, the protection scheme most closely resembles copyright – relatively narrow protection and relatively easy acquisition. Community Design protection is available in two forms, Registered Community Design (RCD) protection and Unregistered Community Design (UCD) protection. Both forms of Community Design are enforceable in all twenty-five of the member states of the EU. A limited number of courts have been assigned responsibility for resolving Community Design disputes to promote consistency in the application of the law.

As a legal right, a UCD is much like an unregistered copyright in that it comes into existence only when asserted against an alleged infringer. An RCD can be acquired from the Office for Harmonization in the Internal Market (OHIM) http://oami.europa.eu/. The system for acquiring a Registered Community Design has been designed to be simple, inexpensive and quick. The application is examined only for formalities, the cost to file is about $450, and the RCD issues in three months.

Eligibility for Protection

To be eligible for protection as a Community Design, the proposed design must be new and have individual character. The design is defined by the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colors, shape, texture and/or materials of the product itself and/or its ornamentation.

- For UCDs, a design is new if no identical design has been made available to the EU public prior to the date that the unregistered design was made available to the public. Importantly, if the design is first made public in a non-EU jurisdiction, protection as a UCD is not available.
- For RCDs, a design is new if no identical design has been made available to the public prior to the filing date of the application or the date of priority. However, the applicant has twelve-months from the initial disclosure to file for an RCD.

To be eligible for protection as a Community Design, the proposed design must be new and have individual character.

Designs that satisfy the requirements of novelty and individual character may still be denied protection. Features dictated solely by technical function cannot be protected. Mechanical fittings that engage two other modular products can be protected, but appear to be subjected to a higher scrutiny so that the inter-operability of component products of different makes will not be hindered. Protection cannot be extended to component parts that are not visible during normal use of a product. Designs contrary to public policy or morality cannot be protected.

continued on page 4

Product Designs from page 3

Rights Afforded and Differences between UCDs and RCDs

The holder of a Community Design (UCD or RCD) has the exclusive right to use the design and prevent any third party from using the design. "Use" includes making, offering, putting on the market, importing, exporting, or stocking. The differences between the two forms of Community Design (UCD and RCD) become clear during the enforcement of rights. The first difference between UCDs and RCDs relates to the burden of proving copying.

- The holder of a UCD has the burden of proving that an alleged infringer copied the design in order to make a prima facia case of infringement. The alleged third party infringer is not required to prove independent creation.
- The holder of an RCD is not required to prove that an alleged infringer copied the design in order to make a prima facia case of infringement.

The second difference between UCDs and RCDs relates the consequences of independent creation.

- A third party independent creator has unfettered rights in the design relative to the "holder" of a UCD.
- A third party independent creator may have limited rights relative to the holder of an RCD if substantial efforts have been expended to commercialize the design.

Commencement and Term

For UCDs, rights arise on the date on which the design was first made available to the public within the EU and lasts for three years. For RCDs, rights arise upon filing the application and last for five years. The term may be renewed for five year periods up to a total term of twenty-five years.

Prosecution of an RCD Application

A single application for RCD may cover more than one design. However, all of the designs must fall within the same Locarno Classification. See www.wipo.int/classifications/locarno/en/about/locarno.html#P10_192. The application can claim priority to a design patent or utility model filed within the previous six months. A priority claim can be made upon filing the application and must be made at least one month from the filing date of the application. Examination of the application is made to confirm that (1) the legal requirements of novelty and individual character are met and (2) the design is not contrary to public policy or morality. The OHIM does not undertake searches for identical or similar designs.

The application will be published upon registration of the design unless deferment is requested. The applicant may elect to defer publication up to 30 months. The RCD can be granted prior to publication. If the applicant wishes to institute legal proceedings on the RCD during the period of deferment, the applicant must communicate the contents of the registration file to the person against whom the action is brought.

When does a Community Design make sense?

In view of the minimal cost and ease associated with the acquisition of an RCD, UCDs appear to provide very little value. A UCD is best viewed as an option of last resort. RCDs appear to provide a valuable basis of exclusivity in several scenarios.

- *When the aesthetic appearance of the product is important* – The implementing regulations for RCDs do not bar concurrent filing of application for RCD and application for utility model or design patent. Thus, a design that is aesthetically valuable can be substantially immediately protected by an RCD while more robust protection is acquired.
- *When urgency is required* – If the time between conception and production is short, an RCD can provide a expedited barrier to competition until a broader, more valuable utility patent issues.
- *When the potential scope of a utility protection is narrow* – If the scope of coverage of a utility patent is substantially commensurate with the scope of coverage of a Community Design, a Community Design is much less costly and can be obtained much quicker than a utility patent. ❑

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Information Law Round-Up

Issues from Around the Globe

BY THOMAS J. SMEDINGHOFF (WILDMAN, HARROLD LLP)

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EUROPEAN UNION – European Parliament Approves Anti-Piracy Directive. The European Parliament has approved the Intellectual Property Rights (IPR) Enforcement Directive. The IPR Enforcement Directive will criminalize commercial copyright infringement The goal is to harmonize the copyright laws of the member countries of the EU through the new directive. See articles at www.nordichardware.com/news, 6197.html.

CYBERCRIME

GERMANY – New Legislation Addresses Computer Hacking. Germany has approved legislation that would impose penalties for illegally accessing others' electronic data, and which would bring Germany in line with prevailing anti-hacking standards in Europe. Under the new law, illegally accessing others' passwords would be punishable by one to two years in prison, hacking into computer programs or damaging others' sensitive data could bring a prison sentence of three years, and damaging corporate files could result in a penalty of up to 10 years in jail depending upon the seriousness of the damage. See article at www.computerworld.com.au/index.php/id;690399781;fp;4194304;fpid;1.

IDENTITY THEFT

UNITED STATES – Federal Government Releases Plan to Combat Identity Theft. The President's Identity Theft Task Force has released its Strategic Plan for Combating Identity Theft. Highlights of the recommendations include reducing the unnecessary use of Social Security numbers, establishing national standards that require private sector entities to safeguard the personal data they compile and maintain, providing notice to consumers when a breach occurs that poses a significant risk of identity theft, and creating a National Identity Theft Law Enforcement Center to allow law enforcement agencies to coordinate their efforts and information more efficiently, and investigate and prosecute identity thieves more effectively. See Announcement and Plan at www.ftc.gov/opa/2007/04/idtheft.shtm.

INFORMATION SECURITY

UNITED STATES – Minnesota Law Imposes New Liabilities on Merchants that Process Credit Cards. Responding to concerns about breaches of sensitive credit card data held by merchants, new legislation approved by the Governor on May 21 places limits on how long a business can hold a customer's credit and debit card information. Generally, the law prohibits merchants from retaining the card security code data, the PIN verification code number, or the full contents of any track of magnetic stripe data, subsequent to the authorization of the transaction or in the case of a PIN debit transaction, subsequent to 48 hours after authorization of the transaction. If a business retains the data beyond the permitted period it will be liable to affected financial institutions for their resulting damages if the data is subsequently breached. See legislation at www.revisor.leg.state.mn.us/bin/bldbill.php?bill=H1758.4.html&session=ls85.

Germany has approved legislation that would impose penalties for illegally accessing others' electronic data, and which would bring Germany in line with prevailing anti-hacking standards in Europe.

UNITED STATES – Court Recognizes Common Law Duty to Provide Security, But Still Requires Injury. Another court has recognized the existence of a common law duty to provide security for sensitive personal data. In a case involving a break-in and theft of computer equipment and disk drives containing sensitive personal data about the plaintiff, the court stated quite bluntly that "It is clear to the Court that Defendant owed a duty of care to the Plaintiff and that the duty was breached." However, because no unauthorized use of plaintiff's personal information had occurred, the court went on to find that without specific evidence of identity fraud, it could not find the cost of obtaining credit monitoring to amount to damages in such a negligence claim. See Kahle v. Litton Loan Servicing, 2007 U.S. Dist. LEXIS 35845 (S.D. Ohio, May 16, 2007).

continued on page 6

Roundup from page 5

UNITED STATES – Settlement in Failure to Comply With Breach Notification Law. The New York Attorney General has entered into a settlement agreement with a Chicago company for failure to provide notification of a security breach as required under the New York Information Security Breach and Notification Law. The claims management company failed to notify the owner of computerized data and approximately 540,000 New York consumers that their personal information was at risk for seven weeks. The company has agreed to implement precautionary procedures and comply with New York's notification law in the event of a security breach. See press release at www.oag.state.ny.us/press/2007/apr/apr26a_07.html.

PRIVACY

EUROPEAN COMMISSION – Safe Harbor Compliance Cited as Defense to Privacy Violation. On June 6 the European Commission (EC) rejected a complaint that the transfer of personal data about employees of a Greek subsidiary of U.S.-based Abbott Laboratories violated EU data protection law. A Greek legislator had complained to the EC that the company had "informed its workers by letter that it was collecting and processing sensitive personal data, including information relating to workers' activities away from their places of work, [and that it was] maintaining its right to forward that data to companies in the Abbott Group and to the USA, or to government authorities." The EC responded by noting that, "An EU entity that transfers personal data to a U.S. entity that adheres to the Safe Harbor scheme is not in breach of the [EU data protection] directive." The EC also noted that "Transfers of personal data to a US organisation in the field of employment and human resources are covered by Safe Harbour." See BNA Privacy & Security Law Report, Vol. 6, No. 24, June 11, 2007 at p. 921.

ITALY – New Guidelines for Employer Monitoring. In March the Italian Data Protection Authority enacted new Guidelines aimed at clarifying the rules for the use of e-mail and Internet within the workplace. Among other things, the Guidelines regulate the monitoring of employee e-mail and Internet activities, and require employers to adopt appropriate security measures to ensure the availability and the integrity of the systems and data, and to prevent unlawful use. Their objective is to ensure that employee monitoring complies with the Italian data protection law. The Guidelines (in Italian) are available at: www.garanteprivacy.it/garante/doc.jsp?ID=1387522.

OECD – New Plan to Improve Cross-Border Privacy Law Enforcement. In June, the OECD adopted a new plan to improve cross-border enforcement of domestic privacy laws. The new Recommendation on Cross-Border Cooperation in the Enforcement of Laws Protecting Privacy, which has been endorsed by the U.S. Federal Trade Commission, calls on OECD countries to "provide mutual assistance to one another in the enforcement of laws protecting privacy, including through notification, complaint referral, investigative assistance and information sharing, subject to appropriate safeguards." It also calls for greater cooperation on cross-border privacy enforcement with non-OECD countries. See OECD "Report on the Cross-Border Enforcement of Privacy Laws," available at www.oecd.org/dataoecd/17/43/37558845.pdf, and OECD "Recommendation on Cross-border Co-operation in the Enforcement of Laws Protecting Privacy," available at http://www.ftc.gov/os/2007/06/070614oecd.pdf.

SPAM

HONG KONG – New Spam Law takes Effect. On June 1, 2007, Hong Kong's new Unsolicited Electronic Messages Ordinance took effect. The ordinance covers "commercial" messages via "unscrupulous techniques," such as automated e-mail address harvesting from Web sites and the use of false identities and false header information. It also contains provisions requiring that commercial e-mail messages must contain a clear "unsubscribe" mechanism that complies with certain technical criteria, but those provisions will not take effect until later this year. See information on the new Ordinance available at www.ofta.gov.hk/en/uem/main.html.

SINGAPORE – New Spam Law Takes Effect. On June 15, 2007, Singapore's new Spam Control Act 2007 took effect. The law requires marketers to clearly label "commercial" e-mail as well as text messages sent to mobile phones, and to provide a means for recipients to opt out of receiving similar messages in the future. Like the U.S. CAN-SPAN Act, it takes an opt-out approach. The Act requires that the subject line or first few sentences of any unsolicited commercial messages be preceded by an "<ADV>" label, and requires that the sender include an address or telephone number that recipients can use to unsubscribe. According to the Ministry of Information, the law is "reasonably easy for marketers to follow and consumers to understand." See Spam Control Act at www.parliament.gov.sg/Publications/070006.pdf. ❑

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Antitrust and Intellectual Property: The Federal Enforcement Agencies (Finally) Speak

BY ROGER W. FONES AND W. STEPHEN SMITH (MORRISON & FOERSTER LLP)

In April, 2007, the U.S. Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued their long-awaited report on Antitrust Enforcement and Intellectual Property Rights ("Antitrust-IP Report" or "Report").[1] The Report summarizes and synthesizes a series of hearings in 2002 conducted jointly by the FTC and the DOJ (collectively, the "Agencies"), entitled "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy." The hearings spanned 24 days over a 10-month period, incorporating submissions and testimony from more than 300 commentators representing a wide range of interests and industries.

The Antitrust-IP Report was, in many ways, simply a reaffirmation of the Agencies' existing practices and enforcement policies over the last several years, policies that are embodied in the 1995 DOJ-FTC Antitrust Guidelines for the Licensing of Intellectual Property (the "1995 IP Guidelines"). The fundamental theme of the Report was that most uses of intellectual property—including tying, exclusive dealing, licensing terms (such as grantbacks and non-assertion clauses), and patent pools and cross-licenses—can enhance competition and benefit consumers. The Agencies will therefore evaluate the lawfulness of these kinds of agreements under the antitrust "rule of reason." The rule of reason requires courts and the Agencies to balance the procompetitive effects of specific agreements against their anticompetitive effects, and challenge only those that create more harm than good.

Unfortunately, the Report did not address the important issue of how settlements of patent litigation should be analyzed under the antitrust laws. The silence is not surprising, given that the Agencies have expressed divergent views on the subject, particularly where "reverse payments" from the patent holder to the alleged infringer are involved. Parties to patent litigation need to be aware that the FTC is likely to be more aggressive than the DOJ in investigating and challenging patent settlement agreements.[2]

Even though the Antitrust-IP Report largely reaffirmed the principles and policies set forth in the 1995 IP Guidelines, the Report is helpful in a number of areas because it provides greater analytical detail. For example, the Report repeated the 1995 IP Guidelines' overriding principle that the Agencies apply the same antitrust rules to intellectual property issues that they apply to issues involving other property. Report at 3. In the Report, however, the Agencies also catalogued some important differences between intellectual property and other property:

- Intellectual property is easier to misappropriate or copy than other forms of property;
- Intellectual property may be used without interfering with its use by others;
- The fixed costs of creating intellectual property can be high, while the marginal costs of using intellectual property are often low;
- The boundaries of intellectual property rights are often uncertain and difficult to define, so that neither the intellectual property holder nor competitors know the precise extent of protection afforded by the intellectual property right without a decision from a court or binding arbiter;
- The value of intellectual property typically depends more on its combination with other factors of production, such as manufacturing and distribution facilities, workforces, or complementary intellectual property, than does tangible property; and
- The duration of some, but not all, intellectual property rights is limited.

Unfortunately, the Report did not address the important issue of how settlements of patent litigation should be analyzed under the antitrust laws.

The Agencies acknowledged that careful attention must be paid to these differences when applying the antitrust laws to intellectual property issues. Report at 4.

The Report went on to announce and explain a number of general policy views categorized loosely by the Agencies as involving either conduct by the holder of an intellectual property right to maximize its value (*e.g.*, refusals to license and

continued on page 8

Antitrust from page 7

"hold-up" strategies in standard setting situations), or licensing practices:

Unilateral Refusals to License. The Agencies concluded that § 271(d)(4) of the Patent Act does not create antitrust immunity for unilateral refusals to license patents. Although testimony at the hearings was not unanimous on this point, the Agencies declined to find antitrust immunity because the statute does not expressly grant such immunity and "immunity from the antitrust laws is both exceptional and disfavored." Report at 26. Notwithstanding their conclusion that there was no antitrust *immunity* for such conduct, the Antitrust-IP Report reiterated the Agencies' position, announced in the 1995 IP Guidelines, that unilateral, unconditional refusals to license patents will not "play a meaningful part" in the Agencies' enforcement policies. While the Report's language stopped short of declaring unilateral refusals to license to be conclusively legal, it remains a strong endorsement of the patentholder's right to not license.

The Antitrust-IP Report stated, for the first time, the Agencies' view that there is no antitrust or economic basis for the patent law doctrine that prohibits patent holders from collecting royalties beyond the life of the patent.

The Agencies noted, however, that *conditional* refusals to license can cause competitive harm and therefore are subject to antitrust liability. Report at 6. This conclusion seems simply to recognize that a patent license is a valuable asset, and like any valuable asset, can be consideration for an illegal agreement or offered to induce illegal conduct.

Standard Setting and "Hold Up." The Antitrust-IP Report acknowledged the importance and value of industry standards to the modern economy, such as where these standards enable network interoperability or solve technical problems. Report at 33. The Agencies also acknowledged that the alternative to standards set cooperatively in Standard Setting Organizations ("SSOs") is a "winner-take-all standards war" in the marketplace, and that a collaborative SSO approach may be more beneficial to both producers and consumers. Report at 34.

The Agencies also noted opportunities for anticompetitive use of SSOs, including opportunities that can arise when collaborative standards include technologies that are protected by intellectual property rights. The Report focused a great deal of attention on competitive concerns surrounding the so-called "hold up" problem and collaborative efforts to prevent it.

Hold up occurs when an SSO adopts a standard that includes patents or other protected IP rights, potentially allowing the patent holder to "hold up" firms that wish to implement the standard for higher royalties than the patent holder would have been able to demand before the standard was adopted. Because hold up may ultimately increase consumer prices, the Agencies are sympathetic to collaborative efforts by SSOs to defeat hold up. These collaborative efforts include:

- Requiring disclosure by SSO participants of any IP rights that may be infringed by a standard, often coupled with a commitment to license the IP on reasonable and non-discriminatory terms; and
- Further requiring IP holders to commit, before the standard is adopted, to the specific license terms to which they would agree.

Ordinarily, collective negotiation of license terms by SSO members might raise the same antitrust concerns presented by monopsony or group buying activity,[3] but the Agencies will apply the rule of reason to such activities where designed to mitigate or prevent hold up. Report at 52. The conduct is most likely to be found reasonable when the joint negotiation is *ex ante* (*i.e.*, occurs *before* the standard is chosen so that alternative technologies can bid against each other to become the standard), and the adoption of a standard will likely create or enhance the market power of the patent holder (*i.e.*, there are in fact alternative technologies vying to be included in the standard).[4] In sum, the Agencies appear willing to let prospective licensees combine to exert pressure on patent holders to participate in a pre-standard bidding contest, although the Agencies were also clear that they take no position on whether SSOs *should* combine to exert such pressure on patent holders. Report at 54.

Also interesting was the contrast in the Agencies' tolerance for SSO buyer (licensee) collaboration in two situations: (1) jointly negotiating with competing holders of substitute patents (acceptable, at 52), and (2) jointly negotiating with the owner of a necessary patent for which there are no close substitutes (not acceptable, at 53). The dichotomy is interesting because the traditional monopsony vice—depressing purchase prices below the competitive level—is possible in the first instance, but unlikely in the second. The second negotiation is akin to a bilateral monopoly negotiation, whose outcome is indeterminant, but should produce prices somewhere below the monopoly level but above the monopsony level. Apparently, the Agencies concluded that the potential benefit of preventing hold up in the first situation justifies the distinction.

Although previously the FTC and the DOJ had each indicated a general view that prospective negotiation of license terms would not be considered *per se* unlawful, the Antitrust-IP Report makes this principle explicit, and also provides a more expansive explanation of the Agencies' rationale for their view. Significantly, the expanded explanation in the Report appears more permissive about licensee collaboration than SSO business review letters issued both before the Report and after.[5]

Cross-Licensing and Patent Pools. The Report reiterated the continued validity of the 1995 IP Guidelines to pooling and cross-licensing, stating that such arrangements are potentially procompetitive and the Agencies "typically will analyze both types of agreements under the rule of reason." Report at 9. As further guidance, the Agencies noted:

- Cross-licensing generally raises fewer concerns than pooling;
- Pooling complementary patents is generally procompetitive;
- Pooling substitute patents will be reviewed case-by-case;
- Pool licensing terms will be analyzed case-by-case;
- The Agencies will focus on a pool's formation and structure; the "reasonableness" of pool royalties generally will not be evaluated; and
- Refusal to license less than all of a pool's patents will not raise competition concerns, provided members may license their patents individually.

The Report also compiled and summarized pool-related actions by the Agencies subsequent to the 1995 IP Guidelines. In issuing three favorable business review letters on patent pools, the DOJ concluded that each was potentially procompetitive. The business review letters also catalogued various safeguards the pools had adopted to address DOJ concerns about diminished price competition in downstream markets:

- Each pool retained an independent expert to exclude substitute technologies in the pool, and included only complementary patents essential to comply with the standard;
- Pool members retained the right to license their patents individually;
- The scope of the pools' grantback clauses were limited;
- The pools' licenses were clear and available to all; and
- The pools adopted procedures to protect competitively sensitive information from disclosure among competing licensors or licensees.

The Antitrust–IP Report stressed, however, that failure to adopt all of these safeguards "will not automatically lead to the conclusion a pool is anticompetitive." Report at 72.

The Report also reviewed and explained the FTC's 1999 challenge of the Summit–VISX Pool. In that case, the pool consisted of the only two FDA-approved laser eye surgery technologies; the parties agreed not to license their patents unilaterally; and each had a veto over pool licenses to any third parties. No third-party licenses had been awarded over the pool's six-year existence. The parties also agreed to pay the pool $250 per licensed procedure, which the FTC alleged set a price floor under what each licensee must pay. The FTC's challenge resulted in dissolution of the pool.

Tying and Bundling of Intellectual Property. Two patents are tied or bundled if a licensee cannot license only one of them. The Antitrust–IP Report recognized that tying and bundling can be procompetitive, and stated that the Agencies will review such practices under the rule of reason. Patent holders should remember, however, that Agency policy does not bind private plaintiffs or the courts, which may still apply a type of *per se* rule. Under the Supreme Court's decision in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), tying can be held illegal—regardless of its actual effect on competition—if there is market power for the tying product (or patent) and a "not insubstantial" volume of commerce in the tied product (or patent) is affected. The market power in the tying patent must be proven; it will not be presumed from the existence of the patent. *Ill. Tool, supra*, at 1292. Some federal courts of appeals, however, have applied rule of reason analysis to tying and bundling cases.[6]

Extending Patent Rights Beyond the Statutory Term. In general, the Antitrust-IP Report

continued on page 10

Antitrust from page 9

followed the conventional view of the Agencies that standard antitrust analysis applies to practices that have the potential to extend the market power conferred by a patent beyond its expiration, and that the starting point for evaluating such practices is determining whether the patent in question confers market power.

Notably, however, the Antitrust-IP Report stated, for the first time, the Agencies' view that there is no antitrust or economic basis for the patent law doctrine that prohibits patent holders from collecting royalties beyond the life of the patent. The report observes that this doctrine, established by the Supreme Court over 40 years ago in *Brulotte v. Thys Co.*, 379 U.S. 29 (1964), may actually reduce incentives to innovate and harm consumer welfare by depriving the patent holder of the full value of its invention. Specifically, the Antitrust-IP Report explains the Agencies' view that collecting royalties beyond a patent's statutory term can be efficient. Although *Brulotte* places some limitations on a patent owner's ability to collect royalties beyond a patent's statutory term, the Agencies believe that such a practice may permit licensees to pay lower royalty rates over a longer period of time, thereby reducing the "deadweight loss" associated with a patent monopoly, allowing the patent holder to recover the full value of the patent, and preserving innovation incentives. At least one court of appeals has suggested the Supreme Court should overturn *Brulotte*; the Agencies' view may provide support for that argument in future cases. ❑

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[1] http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf.

[2] As revealed in their separate briefs to the Supreme Court at the petition for certiorari stage in Federal Trade Commission v. Schering–Plough Corp., et al. (No. 05-273, 2005), the Agencies disagree on the presumptive significance of reverse payments. The FTC argued that reverse payments should shift the burden to the parties to explain why the reverse payment is not evidence that the alleged infringer had a meritorious case, and the payment is therefore to delay or forgo entry. The DOJ argued that the significance of reverse payments cannot be assessed without first examining the underlying merits of the patent litigation.

[3] Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); Pacific Stationery & Printing Co. v. Northwest Wholesale Stationers, Inc., 472 U.S. 284 (1985).

[4] This second prerequisite is consistent with the Supreme Court's recent decision that market power cannot be presumed by the mere existence of a patent. Ill. Tool Works Inc. v. Indep. Ink, Inc., 126 S. Ct. 1281 (2006).

[5] VITA/VSO Business Review Letter, October 30, 2006, available at http://www.usdoj.gov/atr/public/busreview/219380.htm; IEEE Business Review letter, April 30, 2007, available at http://www.usdoj.gov/atr/public/busreview/222978.htm. The VITA/VSO letter, for example, considered it important that joint "negotiation" by prospective licensees would not occur, and that the prospective license term disclosures by the patent holders would be binding only as a maximum. Letter at 9. The Report, in contrast, states that joint activity to establish license terms as part of the standard-setting process is "likely to confer substantial procompetitive benefits." Report at 52.

[6] E.g., U.S. Philips Corp. v. International Trade Commission, 424 F.3d 1179 (Fed. Cir. 2005); United States v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001). ❑

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Software Payments No Longer Subject to Brazilian CIDE Tax

BY EDUARDO PUPO AND JOHN SALERNO (PRICEWATERHOUSECOOPERS LLP)

According to recently-enacted Law no. 11452, certain cross-border software payments made by Brazilian companies to non-Brazilian residents are no longer subject to the CIDE tax.

When first introduced in the Brazilian tax system, CIDE was levied only on cross-border payments of royalties and technical assistance fees involving the transfer of technology. In subsequent years, however, the list of transactions subject to CIDE was expanded by the Brazilian tax authorities. In this regard, cross-border payments of service fees became subject to CIDE regardless of whether a transfer of technology was involved. Then, based on an interpretation that software payments are, by their nature, equivalent to royalties, the Brazilian tax authorities issued several rulings establishing that CIDE should also apply to software payments made by Brazilian companies to non-Brazilian companies. Note that CIDE is a tax levied at a 10 percent rate and is imposed on the Brazilian paying entity and not on the non-Brazilian payment recipient.

Law 11452 clarifies that cross-border software payments that do not involve the transfer of technology should not be subject to CIDE. This rule is retroactive to January 1, 2006, thus Brazilian taxpayers may, in principle, seek a tax refund or, alternatively seek to utilize excess CIDE paid in 2006 and 2007 to offset other Brazilian federal tax liabilities.

Note that payments under software license agreements involving the transfer of technology may continue to trigger CIDE. ❑

Certain cross-border software payments made by Brazilian companies to non-Brazilian residents are no longer subject to the CIDE tax.

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Double Irish More than Doubles the Tax Savings

Hybrid Structure Reduces Irish, U.S. and Worldwide Taxation

BY JOSEPH B. DARBY III (GREENBERG TRAURIG LLP) AND KELSEY LEMASTER (TYCO HEALTHCARE)

Some well-known U.S. software companies have made headlines in recent years by opening "operations centers" in Ireland, i.e., Irish affiliates that offer software and related services to customers in Europe and the Middle East.[1] Ireland is an attractive venue for performing these functions because of the favorable interaction between the Irish corporate tax regime (with a maximum corporate tax rate of 12.5 percent on active business income) and the tax rules of the United States.

This article examines how U.S. software companies (and other U.S. companies with valuable intellectual property) can use Ireland as a center for manufacturing, distributing, and selling goods and services outside the United States, with particular focus on a business structure commonly known as the "Double Irish." We will start by reviewing U.S. tax laws, with a special focus on the "anti-deferral" regimes that largely determine whether a U.S. company can move its property and operations (and hence income) outside of U.S. tax jurisdiction. Second, we will provide a summary of the Irish tax regime. Third, the article will describe the "Double Irish" structure, and examine how this structure can help U.S. companies minimize worldwide tax costs.

U.S. Tax Regime

Overview

A fundamental principle of U.S. tax law is that U.S. persons, including domestic corporations, are subject to federal income tax on their worldwide income.[2] Worldwide taxation is the "price" exacted for the privileges and protections of residing and/or enjoying citizenship in the United States.[3] An equally fundamental principle of U.S. tax law is that "accessions to wealth" generally are not

continued on page 12

Ireland from page 11

taxable until "recognized" by the taxpayer. Thus, for example, a United States person owning stock of a domestic "C" corporation does not incur federal income tax liability with respect to increases in the value of that stock unless or until such person either sells the stock or receives a distribution with respect to the stock.[4]

It was recognized early in the history of the U.S. income tax regime that U.S. taxpayers could create a tax arbitrage between the two fundamental principles identified above by investing in a foreign corporation. In particular, a U.S. taxpayer could avoid current U.S. taxation by transferring assets and/or business activities to a foreign corporation, such that neither the corporation nor the U.S. shareholder would be currently taxable in the U.S. on the corporation's income. To address this issue, Congress enacted a series of rules and procedures that seek to prevent (or penalize) the use of a foreign corporation to avoid or defer tax on certain "suspect" categories of income. Those rules, referred to in this article collectively as the "anti-deferral rules," constitute one of the most important and sophisticated areas of U.S. federal income taxation.

Transfer Pricing and "Anti-Deferral" Rules

The transfer-pricing rules of Code Section 482 and the anti-deferral rules of subpart F of the Code are of central importance whenever a U.S. corporation attempts to move business assets (e.g., software and related sales activities) offshore in order to avoid current U.S. tax.[5] Code Section 482 is one of the most complex areas of U.S. taxation, and a complete discussion of that provision is beyond the scope of this article. However, the principles of Code Section 482 are easy to summarize: A U.S. person must transfer property or provide services to a related person at a price equal to the fair market value of such property or services, i.e., the price at which the transaction would occur between unrelated persons. If the related party price does not reflect the property's fair market value, then the IRS has broad authority to make corrective adjustments to the taxpayer's income or deductions.[6] Code Section 482 is the IRS's principal weapon to challenge artificially high or low transfer prices (low outbound, high inbound) that could otherwise be used to transfer property or income offshore.

The primary anti-deferral regime discussed in this article is subpart F of the Code, which requires U.S. corporations to recognize currently the "subpart F income" received by any of their subsidiaries that are classified as controlled foreign corporations (CFCs).[7] A CFC is any foreign corporation with respect to which more than 50 percent of either (A) the voting power of all classes of stock, or (B) the total value of all outstanding stock, is owned by "United States shareholders" at any time during the taxable year.[8] A "United States shareholder" is any U.S. person that owns (directly or through attribution) 10 percent or more of the combined voting power of the foreign corporation's voting stock.[9] The foreign corporate subsidiaries of a U.S. parent corporation generally will meet the definition of a CFC, and therefore the U.S. parent corporation generally will be subject to the subpart F rules with respect to income earned by those subsidiaries.

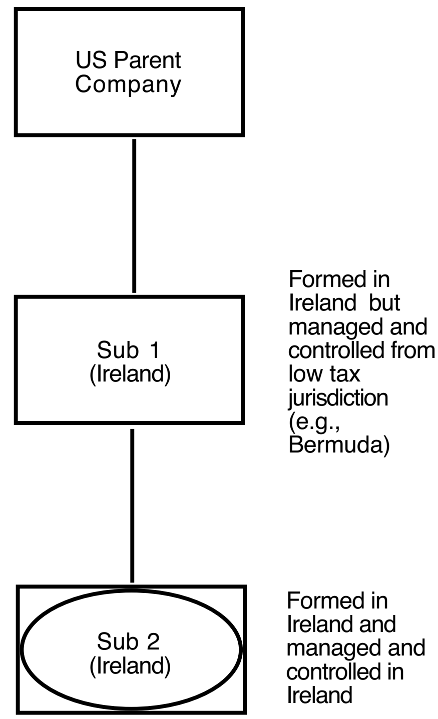
Subpart F income can be divided into two broad categories: (1) active income from sales of property or the provision of services involving a related party; and (2) most types of passive income.[10] Included in the first category is "foreign base company sales income," which is income recognized by a CFC from sales of personal property (including software) if such personal property is purchased from or on behalf of, or sold to or on behalf of, a person that is related to the CFC, and such personal property is both produced and sold for consumption outside the country in which the CFC is organized.[11] For a U.S. software company that sells or licenses software products at retail through one or more CFC subsidiaries, the concern is that the software revenues will constitute foreign base company sales income, as described in the following illustrative example.[12]

> Megasoft (a U.S. corporation) sells the popular computer operating system, "Doors," to customers around the world. In an effort to reduce its U.S. tax on income from sales outside of the United States, Megasoft establishes "Foreign Sub," a 100 percent owned subsidiary organized in a jurisdiction outside of the United States that will sell Doors to non-U.S. customers in accordance with the following uninformed and ill-considered structure: Foreign Sub will purchase pre-packaged Doors operating systems[13] from Megasoft and resell these systems without modification or enhancement to customers in Europe, Asia and Africa. Under subpart F, Foreign Sub is classified as a CFC, and Foreign Sub's sales income is foreign base company sales income, since Foreign Sub is purchasing and reselling a product from a related party that is both produced and sold for consumption outside the jurisdiction in which Foreign

Sub is organized.[14] Therefore, Megasoft annually must include this subpart F income in its U.S. federal gross income.[15]

A key exception to foreign base company sales income exists for a CFC that "manufactures" the products it sells.[16] A CFC will qualify for this manufacturing exception if the property it sells is "in effect not the property which it purchased."[17] That standard is satisfied if either (1) the CFC "substantially transforms" its input materials into the final product, or (2) in the case of property constructed from purchased components, the operations conducted by the CFC in connection with the components are "substantial in nature and are generally considered to constitute the manufacture, production, or construction of property."[18] The regulations provide the following examples of activities that constitute a "substantial transformation" under the first test: transformation of steel rods to screws and bolts, transformation of wood pulp to paper and transformation of fish to canned fish.[19] The regulations provide a limited safe harbor under the second test for a CFC whose direct labor and factory costs with respect to the final product account for at least 20 percent of the total costs of goods sold.[20] Notwithstanding the foregoing tests, however, the regulations caveat that the mere assembly or packaging of a product will "in no event" constitute manufacturing.[21]

The manufacturing regulations were adopted in 1964,[22] long before intangible intellectual property such as software became a staple of modern commerce. Curiously, the IRS has made little effort to update or modernize these regulations, and so scant guidance can be found as to whether or how products, such as software, that are predominantly intangible in nature might qualify for the manufacturing exception. One position the IRS has asserted publicly is that imprinting computer software onto blank disks and packaging those disks for retail sales do not, by themselves, constitute substantial transformation of the underlying software for purposes of the manufacturing exception.[23] Due to the uncertainty in this area, software companies are reluctant to rely on the manufacturing exception when structuring software sales by a CFC.



Double Irish Structure

Code Section 367 and Cost Sharing Agreements

In addition to the subpart F rules, there is another significant hurdle to achieving a tax-efficient structure for offshore software sales. Under Code Section 367, a U.S. company that transfers intangible property to a foreign corporation (whether or not a subsidiary) is *deemed* to have sold such property in exchange for payments that are contingent upon the productivity, use, or disposition of such property.[24] Such deemed payments are required to be "commensurate with the income attributable to the intangible," regardless of the actual amount of consideration, if any, received for the property, and they are taxable as ordinary income to the U.S. transferor.[25] In the case of a transfer of software rights, this means that the deemed payments must be commensurate with the foreign subsidiary's income from sales of that software. Thus, a significant portion of the sales income recognized by a foreign software subsidiary would be taxable to the U.S. software company through this mechanism of deemed payments under Code Section 367(d), whether or not the sales in question generated subpart F income.[26]

Fortunately, the impact of Code Section 367 on software sales can be largely mitigated at the present time through careful planning. Software is a unique asset in that the existing version of a software program becomes largely obsolete upon

continued on page 14

Ireland from page 13

the development of a new version. While Code Section 367 applies to cross-border *transfers* of the intangible property embedded within a software program, it does not apply if the intangible property is developed by a foreign affiliate outside of the United States.[27] Moreover, joint development of a software product by a domestic corporation and its foreign subsidiary can be structured through the use of a so-called "cost sharing arrangement," so that the rights to use the underlying intangible property in the United States are retained by the U.S. parent company while the rights to use the underlying intangible property outside the United States are transferred, over time and through the use of "buy in" payments, to a subsidiary CFC.[28] The non-U.S. rights in the intellectual property developed under the cost-sharing arrangement will be treated as created in the jurisdiction where the intellectual property is intended to be utilized by the foreign subsidiary and therefore will not be subject to Code Section 367.[29]

Check the Box Rules and Disregarded Entities

A final area[30] of U.S. federal tax law that may apply to foreign subsidiaries engaged in software sales is the U.S. entity classification regime, which became part of the federal tax regulations in 1997.[31] Under those rules, many foreign entities have the ability to elect whether to be treated as a corporation, partnership or disregarded entity for U.S. federal tax purposes by filing a form with the IRS.[32] A foreign eligible entity may elect to be classified as either a corporation or a partnership if it has two or more members, or as either a corporation or an entity that is completely disregarded as separate from its owner if the entity is wholly-owned by a single member.[33] A disregarded entity owned by a U.S. corporation is the equivalent of a branch for U.S. federal tax purposes.

Filing a so-called "check-the-box election" typically has no effect on a company's tax or legal status for foreign tax purposes. Thus, for example, a Bermuda limited company (which is a "foreign eligible entity")[34] that has a single owner could elect to be a disregarded entity for U.S. federal tax purposes but would be treated under the tax laws of most other countries around the world as a separate corporation. Such "hybrid" entities are often utilized aggressively at the present time by tax planners in order to obtain favorable results, particularly since U.S. and foreign tax laws have not been significantly modified as yet to cope with the monumental changes introduced by the U.S. entity classification regulations.[35]

Irish Tax Regime

Responding to pressure from the European Union to remove certain discriminatory tax incentives under its prior tax regime, Ireland enacted a uniform corporate income tax in 1999 (1999 regime).[36] Under the 1999 regime, taxable income of a corporation is divided into two broad categories: trading income and non-trading income. Trading income includes income from active businesses and is subject to a flat tax of 12.5 percent; non-trading income includes income from passive activities and is subject to a flat tax of 25 percent.[37] Ireland's flat tax rate of 12.5 percent on trading income is one of the lowest in the world and, when coupled with the extensive network of Irish tax treaties, creates a strong tax incentive to conduct business operations in Ireland. When these tax benefits are combined with Ireland's well-educated, English-speaking workforce, it is easy to see why Ireland has become a preferred foreign base of operations for U.S. software companies and other U.S. technology-driven enterprises.

In addition to offering low corporate tax rates, Ireland is attractive because it has yet to implement (or enforce aggressively) some of the more familiar "anti-abuse" mechanisms that are present in the tax regimes of most other advanced countries. For example, the Irish tax laws do not contain detailed transfer pricing rules,[38] which many other countries implement to ensure that arm's-length principles apply in related party transactions.[39] Such transfer-pricing rules are normally a priority for a country that hosts substantial economic activity because they help to protect that country's tax revenues by preventing the diversion of profits to low-tax jurisdictions. However, Ireland has elected to protect its interests in other ways.[40]

The Double Irish Structure

Seeking to combine opportunities presented by the favorable Irish tax regime and the U.S. entity classification rules, taxpayers and their advisers have developed a hybrid structure that allows software sales to be made through an Irish subsidiary to customers in non-U.S. jurisdictions while greatly reducing Irish, U.S. and worldwide taxation. Known informally as the "Double Irish," this structure calls for a U.S. parent corporation to create two Irish subsidiaries, "Sub1" and "Sub2." Sub1 is a first-tier Irish subsidiary of the U.S. parent, organized under Irish law but managed and controlled from Bermuda (or some other low-tax jurisdiction). Sub2 is wholly-owned by Sub1 and is organized, managed and controlled in

Ireland. The diagram on this page illustrates this structure.

Unlike the U.S. rules, which generally determine whether a corporation is a "United States person" based on jurisdiction of incorporation,[41] tax residency under Irish law in many cases turns on the location of a company's management and control activities.[42] Thus, a company incorporated in Ireland but whose management and control activities occur in another country will be treated for U.S. tax purposes as an Irish corporation but for Irish tax purposes as a non-resident if that company (1) "controls" an Irish company that conducts an active business in Ireland and (2) is "controlled" by one or more residents of a country with which Ireland has a double taxation treaty.[43] For these purposes, "control" is satisfied by 50 percent or greater stock ownership,[44] and the Ireland-U.S. income tax treaty qualifies as a double taxation treaty. Applying these rules to the Double Irish structure, it means that Sub1 will be treated as a Bermuda company for Irish tax purposes because (1) it will control Sub2, which will engage in the conduct of an active (software) business in Ireland; and (2) it will be controlled by the U.S. parent, which is a treaty-eligible resident of the United States.

Meanwhile, for U.S. tax purposes, the tax strategy is to create a hybrid structure. In particular, Sub2 will file a U.S. "check-the-box" election to be disregarded as an entity separate from Sub1 (in the diagram, the circle in the Sub2 box represents the disregarded entity structure). As a result of this election, Sub1 and Sub2 will be combined and treated as a single Irish corporation for U.S. federal tax purposes, but will continue to be treated for Irish tax purposes as two distinct corporations—a Bermuda resident corporation and its Irish subsidiary. Significantly, transactions between Sub1 and Sub2 will have no effect for U.S. tax purposes, and the income and activities of Sub1 and Sub2 will be combined in determining whether sales made by either company result in foreign base company sales income to Sub1 (which is a CFC).

To complete the implementation of the Double Irish structure, Sub1 will enter into a cost sharing arrangement with its U.S. parent for the co-development of the applicable intellectual property (e.g., the software code). If the intellectual property in question is an existing software program owned by the U.S. parent, the U.S. parent will typically retain all rights in the software for the geographic region comprised of the United States, while Sub1 will make a "buy in" payment to the U.S. parent in exchange for the rights to co-develop and exploit the software outside of the United States. U.S. parent and Sub 1 will jointly fund the development of the intellectual property, e.g., by creating a new version of the software program. This newly developed intellectual property will in turn be licensed by Sub1 to Sub2, and will be used by Sub2 to "manufacture" or produce software products in Ireland and then sell those products to customers in Europe and the Middle East.[46] The non-U.S. sales should not be characterized as generating foreign base company sales income because the Sub1/Sub2 combined entity will not have purchased any property from a related person.[47] Moreover, the license payments from Sub2 to Sub1 should be disregarded entirely for U.S. federal tax purposes,[48] and hence Sub1 should not be at risk of earning foreign personal holding company income as a result of this "internal" royalty arrangement.[49]

In contrast to the U.S., which will disregard the license payments from Sub2 to Sub1, Ireland will treat such payments as royalties paid by an Irish corporation to a Bermuda corporation for the use of the Bermuda's corporation's intellectual property in Ireland. Accordingly, Sub2 should be able to deduct the royalty payments made to Sub 1 as a trade expense against its Irish taxable income.[50] Perhaps cognizant that Ireland does not aggressively apply its transfer pricing rules, Sub1 and Sub2 may set such royalty payments at an optimal level to reduce Sub2's taxable income in Ireland. The remaining income of Sub2 will be subject to tax at the standard 12.5 percent Irish corporate tax applicable to active business income, while the royalty payments to Sub1 will be subject to taxation in Bermuda, i.e., at a zero tax rate. Thus little or no tax will be paid on the income earned in Bermuda, and only a 12.5 percent tax will be paid on income earned in Ireland, until such time as the U.S. parent determines to repatriate the income (e.g., through a dividend), at which time such income will become subject to U.S. tax.

The foregoing analysis assumes that the royalty payments from Sub2 to Sub1 are for licensing of software that is not eligible for patent protection, and thus such royalty payments are not subject to Irish withholding tax. Ireland does impose a withholding tax on so-called "annual payments" made by Irish companies to non-residents.[51] The definition of "annual payments" includes royalties paid with respect to patents, but generally does not include other types of royalties,

continued on page 16

Ireland from page 15

including copyright or trade secret royalties.[52] Interestingly, and perhaps importantly in a given case, it is unclear at this time whether Irish tax law views a software royalty as an annual payment if the software (which as a form of written expression is inherently a form of copyrightable work, and in almost all cases is also a form of "trade secret" protected through "shrink wrap" licensing provisions) is also protected by a patent. Some Irish tax practitioners have concluded that such a royalty should be free from Irish withholding tax, but there is apparently no certainty on this issue at this time.[53]

In addition to evaluating the U.S. and Irish tax consequences of the Double Irish structure, U.S. companies should consider any accounting implications of the structure. For instance, an aggressive position taken by Sub2 with respect to its Irish withholding obligations may raise issues if the U.S. parent maintains its financial statements in accordance with generally accepted accounting principles (GAAP).[54] Moreover, the U.S. parent could be required to reserve on its financial statements a liability for the anticipated Irish taxes that would be due by Sub2 if its position were successfully challenged by Irish tax authorities.[55] Despite such hurdles, U.S. taxpayers will likely continue to employ the Double Irish structure because of the significant tax savings it can produce.

A key exception to foreign base company sales income exists for a CFC that "manufactures" the products it sells.

Conclusion

As more U.S. software companies establish operations centers and strategic hubs in Ireland, the so-called "Celtic Tiger" and its people will continue to enjoy a growing economy driven in large measure by smart and welcoming business and tax policies. Ireland has recognized that a low-tax regime on corporations will generate far more prosperity (and even more tax revenues, when you take into account well-employed Irish citizens paying personal taxes) than a high-tax regime would be likely to generate. In the future, Ireland may attempt to counter-act the effects of tax structures like the Double Irish by enacting comprehensive anti-abuse or transfer-pricing measures. However, it is also possible that Ireland will happily accept the erstwhile "loss" of tax revenues in exchange for the tremendous economic wealth being generated by foreign investment.

Ireland is a vivid and vibrant example of the fact that, when it comes to taxing business profits, less is often more. ❑

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[1] *See,* e.g., Glen R. Simpson, "Irish Subsidiary Lets Microsoft Slash Taxes in U.S. and Europe," *The Wall Street Journal*, Nov. 7, 2005. Microsoft Corporation (Microsoft) states that its operations center generates 40 percent of Microsoft's global revenues and is its "largest operations centre outside the U.S., providing not just manufacturing and distribution, but key support for all the company's data, sales and service activities." *See* http://www.microsoft.com/ireland/careers/whatwedo/eoc/default.mspx (last visited Mar. 15, 2007).

[2] *See* Internal Revenue Code of 1986, as amended (I.R.C. or the Code) § 61 ("[G]ross income means all income from whatever source derived."); Treas. Reg. § 1.1-1(b) ("[A]ll citizens . . . are liable to the income taxes imposed by the Code whether the income is received from sources within or without the United States."); *Joe Buck Coker* T.C. Memo 1994-129 ("It is a well-settled rule that U.S. citizens are subject to income taxation by the United States on their worldwide income."); *Nat'l Paper – Type Co. v. Bowers*, 266 U.S. 373 (1924) (a domestic corporation's worldwide income may be taxed).

[3] *See,* e.g., *Nat'l Paper – Type Co. v. Bowers*, 266 U.S. 373 (1924) (a domestic corporation's worldwide income may be taxed because the "corporation gets the power of the United States to protect its interests and redress its wrongs in whatever part of the world its business may take it"); *Cook v. Tait*, 265 U.S. 47 (1924) (a citizen's worldwide income may be taxed because "the government, by its very nature, benefits the citizen and his property wherever found, and therefore has the power to make the benefit complete").

[4] I.R.C. §§ 301(c); 302(a); 1001(c) (dividends, redemptions and sales or other dispositions of stock treated as recognition events, respectively); *but see* I.R.C. § 475 (requiring mark-to-market accounting for securities dealers), and § 1256 (requiring mark-to-market accounting for certain types of derivative contracts).

[5]The "PFIC" regime, which is not discussed in this article, provides additional anti-deferral rules intended to govern foreign corporations that hold significant passive assets or recognize significant amounts of passive income, i.e., the equivalent of an offshore mutual fund. However, the so-called "asset test" under the PFIC rules has a nasty habit of turning foreign operating companies into "surprise PFICs" when there is a significant accumulation of profits in the offshore entity. *See* Joseph B. Darby III, "The PFIC Storm: How the Passive Foreign Investment Company Rules Cause Problems for U.S. Companies with Foreign Subsidiaries," *Practical US/International Tax Strategies*, April 15, 2007, p. 2.

[6]*See* I.R.C. § 482. As we will examine in the discussion of Code Section 367 in the text below, a stricter standard applies to transfers of intellectual property, requiring that the U.S. person report income that is "commensurate" with the income earned by the related foreign entity from use of the property.

[7]I.R.C. §§ 951 et. seq., generally referred to as "subpart F."

[8]I.R.C. § 957(a).

[9]I.R.C. § 951(b).

[10]*See generally* I.R.C. §§ 952, 954.

[11]I.R.C. § 954(d).

[12]This article will limit its focus to retail sales of software products that do not include any of the "copyright rights" described in Treasury Regulations §§ 1.861-18(c)(2)(i) through (iv). Such sales are classified for purposes of subpart F as sales of "copyrighted articles," which are appropriately analyzed under the foreign base company sales category of subpart F income. *See generally* Treas. Reg. § 1.861-18 ("This section provides rules for classifying transactions relating to computer programs for purposes of subchapter N of chapter 1 of the Internal Revenue Code [which includes subpart F]."). Accordingly, this article does not discuss foreign personal holding company income, which could be relevant to a CFC that engaged in other types of software licensing activities.

[13]The sales of pre-packaged software would be treated as sales of "copyrighted articles" under Treasury Regulations § 1.861-18.

[14]I.R.C. §§ 957, 954.

[15]I.R.C. § 951.

[16]*See* Treas. Reg. § 1.954-3(a)(4).

[17]Treas. Reg. § 1.954-3(a)(4)(i).

[18]Treas. Reg. § 1.954-3(a)(4)(ii) and (iii).

[19]Treas. Reg. § 1.954-3(a)(4)(ii).

[20]Treas. Reg. § 1.954-3(a)(4)(iii).

[21]Treas. Reg. § 1.954-3(a)(4)(iii). *But see Bausch & Lomb v. Comm'r*, T.C. Memo 1996-57 (CFC that constructed Ray-Ban sunglasses from loose parts qualified as a manufacturer because highly-trained employees were responsible for creating the final product and advanced assembly techniques were used).

[22]T.D. 6734 (May 14, 1964).

[23]Internal Revenue Service Memorandum, Vaughn #8083, Apr. 4, 1991.

[24]I.R.C. § 367(d)(2).

[25]I.R.C. §§ 367(d)(2)(A), (C).

[26]If the foreign sales did generate subpart F income, such income would potentially be subject to double tax—i.e., the same income would be taxed as deemed sale payments under Code § 367(d) and as subpart F income under Code § 951. Fortunately, the regulations contain an overlap rule which provides that *(i)* the earnings and profits of the foreign transferee corporation are reduced by the amount required to be included in the income of the transferor of the intangible property as deemed payments under Code § 367(d) and *(ii)* the transferee foreign corporation may treat the deemed payments as expenses allocable to its subpart F income. Treas. Reg. § 1.367(d)-1T(c)(2); *see also* I.R.C. § 367(d)(2)(B). Thus, deemed sale payments under Code § 367(d) generally will not also be taxable as subpart F inclusions.

[27]I.R.C. § 367(d)(1) (limiting the application of the deemed royalty rules of Code § 367(d) to transfers of intangible property by a U.S. person to a foreign corporation).

[28]*See generally* Treas. Reg. § 1.482-7. A detailed discussion of cost sharing arrangements is beyond the scope of this article. In addition, note that there are currently pending proposed regulations that would substantially revamp the U.S. treatment of cost sharing agreements, and would likely tend to discourage and curtail further outbound transfers of intellectual property. *See* Prop. Treas. Reg. § 1.482-7, Notice of Proposed Rulemaking, 70 F.R. 166, at 51,115 (Aug. 29, 2005).

[29]*Cf.* Preamble to Final Treasury Regulations § 1.482-7, T.D. 8632 (Dec. 19, 1995) (stating that "in revising § 482 [to include the commensurate with

continued on page 18

Ireland **from page 17**

income standard], Congress did not intend to preclude the use of bona fide research and development cost sharing arrangements as an appropriate method of allocating income attributable to intangibles among related parties").

[30]Although pertinent to the characterization of software for U.S. federal tax purposes, the software sourcing rules in Treasury Regulations § 1.861-18 will not be discussed in this article because those rules generally do not apply to software sales made by a foreign corporation to non-U.S. customers (which is the principal reason for using the Double Irish structure).

[31]Treas. Reg. §§ 301.7701-2 and -3, *adopted by* T.D. 8697 (Dec. 17, 1996).

[32]The classification rules are often referred to as the "check-the-box" regulations because a taxpayer may choose its classification for U.S. federal tax purposes by literally checking a box next to the desired classification on IRS Form 8832.

[33]Treas. Reg. § 301.7701-3(b)(2). A "foreign eligible entity" is any foreign entity that *(i)* engages in a threshold quantum of business activity such that it is not properly classified as a trust and *(ii)* is not explicitly listed in the regulations as a "*per se*" corporation. Treas. Reg. §§ 301.7701-3(a); 301.7701-2(a); 301.7701-2(b)(8) (listing certain foreign entities as *per se* corporations).

[34]Treasury Regulations § 301.7701-2(b)(8) does not list a Bermuda limited company as a *per se* corporation. By default, assuming a Bermuda limited company is not properly classified as a trust (which should be a safe assumption for an operating company with real business activities), it will be a foreign eligible entity. *See* Treas. Reg. § 301.7701-3(a).

[35]The IRS and Congress are fully aware that the check-the-box regulations have been used aggressively by tax planners to produce favorable (and sometimes extraordinarily favorable) tax results in international transactions, and so significant future changes in this area may well be forthcoming.
See, e.g., Bittker & Eustice: Federal Income Taxation of Corporations & Shareholders, Warren, Gorham & Lamont, 7th ed., at ∂15.61[4] (describing the ongoing struggle between the IRS, Treasury and Congress to promulgate rules that would restrict the use of hybrid CFC structures that are made possible by the check-the-box regulations).

[36]*See generally* Finance Act 1999, §§ 71, 73, amending Section 21 of, and adding new Section 21A to, the Taxes Consolidation Act 1997, available at http://www.revenue.ie/pdf/fb99act.pdf (last visited Mar. 23, 2007).

[37]Id. The 1999 amendments phased in the 12.5 percent rate over four years while phasing out a prior 10 percent rate which was viewed by the EU as discriminatory.

[38]*See*, e.g., OECD Transfer Pricing Country Profile: Ireland, Nov. 2006, available at http://www.oecd.org /dataoecd/40/54/37841011.pdf ("Ireland has not enacted comprehensive transfer pricing rules. There are some specific areas that have special rules concerning transactions between related parties such as artificial reductions in the profits of Irish branches or agencies of non-resident persons (Section 1036 of the Taxes Consolidation Act, 1997). There are also general features of Irish tax law, such as the criteria for the deductibility of trading expenses, that may apply to disallow payments that are not arm's length.") (last visited Apr. 17, 2007); *see also* The International Comparative Legal Guide to: Corporate Tax 2006, Ireland as a Gateway Jurisdiction, published by the Global Legal Group, available at http://www.mop.ie/dynamic/files/Tax%20Dept%20Ireland%20as%20a%20Gateway%20Jurisdiction_ICLG%20to%20Corporate%20Tax%202006_ JR_AConnell.pdf (last visited Mar. 24, 2007); Inward Investment in Ireland, An Overview of the Legal Issues for Investors Doing Business in Ireland, published by Matheson Ormsby Prentice, available at http://www.mop.ie/dynamic/files/Inward%20Investment%20Brochure%202006%20ed%20soft%20copy.pdf (last visited Mar. 24, 2007).

[39]For instance, in the United States, Code § 482 grants the Treasury Secretary broad authority to "adjust" items reported by taxpayers as necessary "in order to prevent evasion of taxes or clearly to reflect the income" of such taxpayers. The expansive scope of Code § 482 is implemented through voluminous regulations that define in often nuanced detail the arm's-length pricing principle for related party transactions. *See* Treas. Reg. §§ 1.482-1 through -9.

[40]Ireland imposes significant requirements on any Irish corporation to assure that it is truly an active business, in order to qualify for the favorable tax rate on trading income, including leasing of a facility, hiring of Irish employees,

and other factors. Ireland has shrewdly emphasized the generation of business activity in Ireland, including emphasis on real estate development and employment, and has been less concerned about taxing corporate profits. A perceptive observer might view this "lax" approach to the transfer-pricing rules as a "back door" way of re-lowering the Irish tax rate (‡ la the pre-1999 regime) in order to attract business.

[41]I.R.C. §§ 7701(a)(4), (a)(30); 954(d)(1).

[42]Ireland Tax Consolidation Act 1997, § 23A, as added by Ireland Finance Act 1999, § 82. The "management and control" standard comes from Irish common law and is reflected in many tax forms published by the Irish revenue authority. *See*, e.g., Tax Forms at http://www.revenue.ie/forms/dir_astn.pdf, and http://www.revenue.ie/forms/cnrf_mgtassert.pdf (last visited Mar. 24, 2007).

[43]Ireland Tax Consolidation Act 1997, § 23A(3), as added by Ireland Finance Act 1999, § 82.

[44]Id. at §23A(1)(b).

[45]Id. at §826.

[46]It is possible that Sub2 could also sell its products to U.S. customers without incurring direct U.S. taxes, if such sales could avoid being attributed to a permanent establishment of Sub2 within the U.S. *See* U.S.-Ireland Income Tax Treaty, Article 7 (providing that an Irish resident is not subject to tax on business profits in the U.S. unless such profits are attributable to a permanent establishment). This strategy, however, would be complicated by the presence of a U.S. parent whose significant U.S. operations might be attributed to the selling activities of Sub2 through a "force of attraction" theory. Moreover, it is unclear how the U.S. would view the Sub1/Sub2 hybrid structure for purposes of treaty benefits. It seems likely that the U.S. would treat Sub1 as the potential taxpayer because of Sub2's status as a disregarded entity. Residency under the U.S.-Ireland treaty is generally determined with reference to the laws of the country in which the party seeking treaty benefits is located. *See* U.S.-Ireland Treaty, Article 4. Because Sub1 is treated as a non-resident of Ireland under Irish tax law, it therefore may not qualify for treaty benefits.

[47]I.R.C. § 954(d)(1).

[48]*See*, e.g., Rev. Rul. 85-13, 1985-1 C.B. 184 (disregarding a sale between a grantor trust and its sole owner); PLR 200102037 (Jan. 16, 2001) (disregarding rent payments made by an individual to a disregarded entity).

[49]Independently, the time-limited changes introduced in the subpart F rules by Code § 954(c)(6), creating a "look-thru" rule for related foreign corporations, would also treat the royalty payments from Sub2 to Sub1 as "good" income for subpart F purposes (i.e., not subpart F income) even in the absence of a check-the-box election. However, this provision is, for the moment, scheduled to "sunset" and terminate at the end of 2008.

[50]*See*, e.g., discussion of deductible revenue expenditures at http://www.revenue.ie/index.htm?/revguide /corporationtax.htm (last visited Mar. 24, 2007).

[51]*See* Ireland Tax Consolidation Act of 1997, § 237.

[52]*See*, e.g., "Notes for Guidance – Tax Consolidation Act 1997 – 2006 Edition," published by the Department of Revenue, available at http://www.revenue.ie/pdf/tcagpt8_06.pdf (last visited Mar. 11, 2007) ("The meaning of 'annual payment' has been established by case law and is generally taken as meaning payments which are 'pure income profit' in the hands of the recipient. This arises where the recipient is not required to incur some expense or to provide goods or services or give some other consideration in return for the annual payment."). A royalty payment for the use of a copyright or trade secret generally would not be treated as an annual payment under this standard because the recipient of the payment is providing valuable consideration (a license) in return for the payment.

[53]This information is derived from conversations between the authors and U.S. tax practitioners regarding their dealings with Irish software companies and Irish tax lawyers.

[54]*See*, e.g., FASB Interpretation No. 48, No. 281-B, June 2006 (providing rules for when tax benefits may be recognized under GAAP).

[55]Id.

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Canada from page 2

port on which the counterfeited goods will arrive.

Prior to issuing an order, the Court may require the applicant to supply security to cover items such as duties, storage and handling charges, or any damages that may be sustained by the owner, importer or consignee. Upon an order being issued, the CBSA will notify the applicant and the importer when the goods have been detained, and provide the applicant and the importer the opportunity to inspect the detained goods for the purpose of substantiating or refuting the applicant's claim. Within two weeks of the applicant receiving notice from the CBSA of the detained goods (unless this period is varied by an order of the Court), the applicant must notify CBSA that an action has been commenced for a final determination of the issue by the Court. Otherwise, CBSA may release the goods without further notice to the applicant. If the court makes an order in favor of the applicant, the Court will issue an order considered appropriate under the circumstances, including that the goods be destroyed, exported or delivered to the applicant.

Current border enforcement system in Canada places the burden on IP rights holders to initiate enforcement procedures, and IP rights holders are responsible for obtaining shipment information with respect to IP crimes.

An alternative available to copyright holders of printed material (books) is to complain to the CBSA that books infringing their copyright are being imported (or are about to be.) A court order is not necessary to prevent the importation as imports of printed matter infringing copyright are prohibited under Tariff Item 9897.00.00. This applies to Canadian and British copyrighted works. It is a quicker and much less expensive method, even though the remedy is not as extensive as a court order granting ownership of the wares.

The problem is that the current border enforcement system in Canada places the burden on IP rights holders to initiate enforcement procedures, and IP rights holders are responsible for obtaining shipment information with respect to IP crimes. This often may be difficult to obtain. Furthermore, only copyrighted works (books) are the subject of the tariff item prohibiting importation under the Customs Tariff.

Therefore, it is not surprising that the Canadian border detention procedures are under-utilized, to say the least. One alternative would be to extend the streamlined prohibited goods procedures applicable to books to other works. It should not be that difficult to establish to the CBSA's satisfaction (and to reasonable legal standards to ensure legitimacy) that one is the owner of the trade name or copyright in wares that are currently being counterfeited.

It should be noted that "parallel imports" or "gray market" goods are not counterfeit goods and are therefore not subject to the potential border enforcement procedures discussed above. The term "parallel imports" generally refers to goods sold in the country of export and imported and sold into the country of import without the permission of the intellectual property owner in the import country. They are produced with the consent of the intellectual property owner in the export country. However, they are imported parallel to, or outside of, the distribution system established by the intellectual property owner in the import country. The key concern of intellectual property owners respecting parallel imports is the protection against the unlawful distribution of imports. Intellectual property distribution rights are protected under the Copyright Act and Trademarks Act. This action must initiated by the injured party to protect their rights, but it does not involve a Customs Seizure or the CBSA, as it is a civil matter.

IP crime generates huge losses for the legitimate producers and importers in Canada as their goods are undermined and replaced by counterfeit and pirated goods. This adversely affects employment and government tax revenues. Counterfeit goods such as electrical products, pharmaceuticals, automotive parts, and food products that do not meet Canadian safety standards, impose serious health and safety risks to Canadians. It is apparent why IP crime is a global concern. Canada has an inherent interest in adopting stronger border enforcement measures against IP crimes. The Government should be encouraged to develop a more competitive IP protection law with easier application to injured rights holders. ❑

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India from page 1

This article discusses various topics for U.S. companies (the "Customer") engaged in outsourcing transactions with an India Vendor or provider of services (the "Indian Vendor"). The discussion will center around export issues, commercial disputes, intellectual property, and data protection and security issues in the outsourcing to India context.

Export Issues

The outsourcing of services to a service provider in a foreign country will likely require you to determine if any software or technology being transferred to the service provider constitutes an export and is thus subject to the export controls of the U.S. For instance, if a call center application currently utilized by your employees in the U.S. will be transferred to contractors in India, that software may require an export license.

Unfortunately, the export controls in the U.S. are both complex and archaic. These regulations were drafted over twenty-five years ago and have not been sufficiently modified to address the ways and means in which software and technology are transferred across borders in the Twenty-First Century. This section provides an overview of the U.S. export control regulations and the questions a company must consider in order to ensure compliance with these regulations.

Overview of U.S. Export Regulations

The primary export regulations in the U.S. are the Export Administration Regulations ("EAR")[3], which regulates the export of items for both commercial and military use, and the International Traffic in Arms Regulations ("ITAR")[4], which regulates defense articles. In addition, the Office of Foreign Asset Control ("OFAC") regulates, among other things, exports to specific countries and entities.[5]

Software and technology exported from the U.S. are typically covered by EAR. Under EAR, an export license may be required depending on the technical characteristics, destination, end user and end use of the software or technology. In determining whether a license is required, a company must answer several questions:

(i) Is the item covered by EAR?
(ii) Is the item being exported?
(iii) What is the classification of the item being exported?
(iv) Where is the item being exported?

Is the Item Covered by EAR?

EAR applies only to the following:

(1) all items in the U.S. or moving in transit through the U.S. from one foreign country to another; (2) all U.S. origin items wherever located; and (3) U.S. origin commodities, software and technology commingled with foreign items.[6] Publicly available technology and software are specifically not subject to EAR.[7] Publicly available technology and software include that which: (1) is available for general distribution either for free or at a price that does not exceed the cost of reproduction and distribution; (2) arises during or results from fundamental research; (3) is educational; (4) is included in certain patent applications; or (5) is government-sponsored research.[8] For example, shareware source code published in a website that is freely available to anyone is "publicly available." On the other hand, proprietary software that is customized for the end-user is within the parameters of EAR.

The outsourcing of services to a service provider in a foreign country will likely require you to determine if any software or technology being transferred to the service provider constitutes an export and is thus subject to the export controls of the U.S.

Is the Item Being Exported?

If an item is subject to EAR (*i.e.*, not publicly available), a company must then determine if there is an actual export of such item. An item is exported under EAR by either: (i) an actual shipment or transmission of the item out of the U.S. or (ii) the release of technology or software to a foreign national in the U.S.[9] Also, for "encrypted software," the definition of export includes the downloading, or causing the downloading of, such software to locations outside the U.S., or making such software available for transfer out of the U.S.[10]

Based on these definitions, a CD with an executable software file sent outside of the U.S. would constitute an export. Additionally, allowing an individual in a foreign country to download encrypted software from the internet or via email would generally constitute an export.

continued on page 22

India from page 21

The export controls in the U.S. are both complex and archaic.

However, if an individual in a foreign country simply accesses software, without the ability to download, such as through an application service provider, such access would not constitute an export of the software. Further, the release of technology or software to a foreign national while in the U.S. constitutes a deemed export. For instance, if an outsourcing vendor sends its employees from another country to the U.S. to do preliminary diligence, and those employees have access to software or technology subject to EAR, that access constitutes an export of the applicable software or technology to the home country of the foreign national.[11]

What is the Classification of the Item Being Exported?

If an item is exported, you must determine whether an export license is required. The first step is to determine the appropriate Export Control Classification Number ("ECCN") under EAR. The ECCN is an five digit alpha-numeric classification (*e.g.*, 3A001), assigned to a particular type of item. The first number represents one of ten commerce control list categories (*e.g.*, 3 = Electronics). The second character represents one of five product categories (*e.g.*, A = systems, equipment and components). The remaining characters are specific classifications under that particular number/letter category. The proper ECCN classification can be determined by checking with the manufacture of the software or technology or by submitting a classification request to the Bureau of Industry and Security ("BIS").

Each ECCN lists the reasons for control for the particular ECCN (*e.g.*, NS for National Security, AT for Anti-Terrorism, CC for Crime Control).[12] Depending on the type of item, the reasons for control will vary in order to protect the national security and economic interests of the United States. For example, "4D001 Specified

Commerce Control List Overview and the Country Chart **Supplement No. 1 to Part 738–page 6**

Commerce Country Chart

Reason for Control

Countries	Chemical & Biological Weapons			Nuclear Nonproliferation		National Security		Missile Tech	Regional Stability		Firearms Convention	Crime Control			Anti-Terrorism	
	CB 1	CB 2	CB 3	NP 1	NP 2	NS 1	NS 2	MT 1	RS 1	RS 2	FC 1	CC 1	CC 2	CC 3	AT 1	AT 2
Guatemala	X	X		X		X	X	X	X	X	X	X		X		
Guinea	X	X		X		X	X	X	X	X		X		X		
Guinea-Bissau	X	X		X		X	X	X	X	X		X		X		
Guyana	X	X		X		X	X	X	X	X	X	X		X		
Haiti	X	X		X		X	X	X	X	X	X	X		X		
Honduras	X	X		X		X	X	X	X	X	X	X		X		
Hong Kong	X	X		X		X		X	X	X		X		X		
Hungary	X					X		X	X							
Iceland	X			X		X		X	X							
India	X	X	X	X		X	X	X	X	X		X		X		
Indonesia	X	X		X		X	X	X	X	X		X		X		
Iran	See part 746 of the EAR to determine whether a license is required in order to export or reexport to this destination.															
Iraq[1]	X	X	X	X	X	X	X	X	X	X		X	X			
Ireland	X					X		X	X	X		X		X		

Software" has the following Reasons for Control: NS, CC, AT, NP.[13]

If an item is subject to EAR but does not fall within a particular ECCN, it is designated as EAR99. EAR99 items generally consist of low-technology consumer goods and do not require a license unless such item is being exported to an embargoed country, an end-user of concern or in support of a prohibited end-use.

Where is the Item Being Exported?

Upon determining the ECCN for an item, a company must then review the Commerce Country Chart and cross-reference the control reasons listed under the country to which the item will be exported against the control reasons listed under the particular ECCN. See 15 C.F.R. Part 738, Supplement 1. (See chart on page 22).

If the control reason is listed under both, then a license is required unless an exception exists. For example, license exception "APP" authorizes the export of certain technologies and software to India upon confirmation of eligibility by BIS. See 15 C.F.R. ß 740.7. Additionally, mass market software that is sold from stock at retail and designed for installation by the user without substantial support from the supplier is exempt under license exception "TSU." See Sec. 740.13(d).

To Whom is the Item Being Exported?

Finally, prior to exporting the item, you must ensure that it is not being exported to certain individuals and organizations that are prohibited from receiving U.S. exports under EAR and OFAC. The exporter must check the following lists available on the BIS website: (1) Entity List; (2) Treasury Department Specifically Designated Nationals and Blocked Persons List; (3) Unverified List; and (4) Denied Persons List.

Obtaining a Export License

If you determine that an export license is required, you can utilize BIS' Internet-based electronic licensing system, SNAP-R. You must first obtain a PIN by submitting to BIS an "Electronic Submission Letter" on company letterhead, with a corporate officer's signature. Once you obtain the PIN you may submit an electronic license application or classification request via the SNAP-R system and view whether the request was accepted or rejected.

Penalties

If a company willfully violates EAR, it may be fined not more than five times the value of the export or reexport involved or $1,000,000,

continued on page 24

Country Index. . .

India **from page 23**

whichever is greater; and, in the case of an individual, may be fined not more than $250,000. In addition, an individual may be imprisoned for not more than ten years. Also, the items that were exported or intended for export may be seized and subject to forfeiture.[14] ❏

1 See Swati Lodh Kundu, India, A Fortune 500 Success Story, Asia Times Online, Nov. 4, 2005.
2 See Special Report, Can India Fly?, Economist, June 3, 2006, at 4, 13.
3 See 15 C.F.R. ßß 730 et seq.
4 See 22 C.F.R. ßß 120 et seq.
5 See 31 C.F.R. Part 500.
6 See 15 C.F.R.ß 734.3(a).
7 See id.
8 See id. at ß 734.7-734.11.
9 See id. at ß 734.2(b)(1).
10 See id. at ß 734.2(b)(9).
11 See id. at ß 734.2(b)(2).
12 See id. at 15 C.F.R. ß 774.
13 See id. Supp. No. 1.
14 See 15 C.F.R. ß 764.3

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