Montana Department of Revenue

Dan Bucks
Director

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MEMORANDUM

To: Dan R. Bucks, Director of Revenue

From: Brenda J. Gilmer, Senior Tax Counsel

Date: November 10, 2010

Subject: Corporation Tax Water's Edge Election – Tax Haven Countries

Each biennium the department is required to provide the Revenue and Transportation Interim Committee an update of the countries that may be considered tax havens. The following information provides information to enable you to provide the required update along with a recommendation on changing the tax haven status of certain countries. This report also provides a general background discussion on tax havens.

Summary Recommendation

Ireland and the Netherlands should be added to the list of tax havens. Additionally the language in 15-31-322(1)(f), MCA, should be amended to apply not only to corporations incorporated in tax havens, but also to companies treated as headquartered or managed in the tax havens. These recommendations are explained in more detail in the final section of the report.

Tax Haven: General Background

In general in Montana the tax base of multinational corporations is their unitary world-wide combined income. A portion of their unitary world-wide combined business income is attributed to Montana based on the proportionate amount of their Montana sales, property, and payroll. Starting in 1987, the Montana legislature allowed multinational corporations to elect to have the combination of affiliated entities stop "at water's edge" --- most of their foreign affiliate income is not included in the unitary combined tax base.

Beginning in 2003, corporations that make this water's edge election, however, were required to include the income from affiliates located in listed foreign tax havens.[1]

[1] Section 15-31-322(1)(f), MCA (2009), requires that the income and apportionment factors be included for "a corporation that is in a unitary relationship with the taxpayer and that is incorporated in a tax haven, including Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize, Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Grenada, Guernsey-Sark-Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, Marshall Islands, Mauritius, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, San Marino,

Under this law, 26 multinational corporations have properly reported to Montana $60.3 million in income for tax year 2008 that would otherwise have been untouchable in tax haven countries. The Montana corporate tax on this income was $4.2 million. Absent the 2003 law, this income that is properly apportioned to Montana would have been shifted elsewhere.

As noted in a prior report, the first recognition that it was proper for states to include corporate affiliates established in foreign tax havens came from a report from then Treasury Secretary Donald Regan who issued a report in August 1984 on state corporate tax practices related to multinational corporate operations.[2] While he recommended that states generally used water's edge reporting, he also recommended that foreign tax haven entities be included in a combined report.

The list of tax havens in 15-31-322, MCA, was developed primarily, but not exclusively, from the Organization for Economic Co-operation and Development (OECD). The OECD is a group of countries, including the US, which shares a commitment to democratic government and fair market economies. The OECD's identification of tax havens was part of a harmful tax practices initiative launched in 1996. In1998 it adopted a framework in an attempt to stop the spread of harmful tax competition,[3] drawing a distinction between tax havens and harmful preferential tax regimes and applying different recommendations and guidelines to each.[4] The 1998 report recognized three principal purposes of tax havens and identified four key factors.

The three recognized principal purposes for tax havens were:

(1) They provide a location for holding passive investments ("money boxes");
(2) They provide a location where "paper" profits can be booked; and
(3) They enable the affairs of taxpayers, particularly their bank accounts, to be effectively shielded from scrutiny by tax authorities of other countries.

Seychelles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Turks and Caicos Islands, U.S. Virgin Islands, and Vanuatu" (the 2009 Montana legislature removed Maldives and Tonga from the list and added Cyprus, Malta, Mauritius, and San Marino).

[2] *Worldwide Unitary Taxation Working Group – Chairman's Report and Supplemental Views* (August 1984)

[3] *Harmful Tax Competition: An Emerging Global Issue*, ("1998 Report")

[4] "42. The first two categories, which are the focus of this report, are dealt with differently. While the concept of "tax haven" does not have a precise technical meaning, it is recognised that a useful distinction may be made between, on the one hand, **countries** that are able to finance their public services with no or nominal income taxes and **that offer themselves as places to be used by non-residents to escape tax in their country of residence** and, on the other hand, countries which raise significant revenues from their income tax but whose tax system has features constituting harmful tax competition.

43. **In the first case, the country has no interest in trying to curb the "race to the bottom" with respect to income tax and is actively contributing to the erosion of income tax revenues in other countries.** For that reason, these countries are unlikely to co-operate in curbing harmful tax competition. By contrast, in the second case, a country may have a significant amount of revenues which are at risk from the spread of harmful tax competition and it is therefore more likely to agree on concerted action." 1998 Report, p. 20 [emphasis added].

The four key identifying factors are:

> (1) No or only nominal taxation on the relevant income, and:
>
> (2) lack of effective exchange of information (tax havens typically have in place laws or administrative practices under which businesses and individuals can benefit from strict secrecy rules and other protections against scrutiny by tax authorities thereby preventing the effective exchange of information on taxpayers benefiting from the low tax jurisdiction); or
>
> (3) lack of transparency (a lack of transparency in the operation of the legislative, legal or administrative provisions is another factor in identifying tax havens); or
>
> (4) no substantial activities (the absence of a requirement that the activity be substantial is important since it would suggest that a jurisdiction may be attempting to attract investment or transactions that are purely tax driven).

The Multistate Tax Commission adopted a Model Combined Reporting Statute in the fall of 2006 that includes a water's edge election and addresses tax havens.[5] The model contains some clarification and additional factors that the department incorporates in its analysis and report:

> [the jurisdiction] has no or only nominal effective tax on the relevant income, and
> - facilitates the establishment of foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy; or
> - explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market; or
> - has created a tax regime which is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial/other services sector relative to its overall economy.

MTC Model Combined Reporting Statute, Section 1.I.

[5] The hearing officer's report explains the policy reason for including tax havens: "Whether or not, or the extent to which, foreign affiliates are included in the combined group is one of the most significant policy issues addressed in the proposed model statute. In principle, a combined group should include all affiliates participating in the group's unitary business, domestic and foreign. If combination includes only domestic corporations, then the apportionment of income associated with the foreign activity of a multinational unitary business can be manipulated through changes in the corporate structure. The income (or loss) and apportionment factors associated with the foreign activity could be excluded by conducting the activity as a foreign affiliate, or it could be included by conducting the activity as a foreign division of the domestic corporation." (Report of the Hearing Officer regarding the proposed Model Statute for Combined Reporting, pp. 9-10, April 25, 2005.)

Interim Developments

As noted in previous reports, tax havens and the income of foreign affiliates have been the subject to proposed federal legislation and study and debate. Since the last report:

1. The IRS Statistics of Income Bulletin, Volume 27, No. 4 included a report on dividends repatriated from controlled foreign corporations under the 2004 Jobs Creation Act. Table 3 details the foreign jurisdictions from which the dividends were transferred. The Netherlands, Switzerland, Bermuda, Ireland, Luxembourg, and the Cayman Islands were among the top 10 countries by amount.[6]

2. In December of 2008, the GAO issued a report to congress entitled "International Taxation, Large Corporations and Federal Contractors with Subsidiaries in Jurisdictions Listed as Tax Havens or Financial Privacy jurisdictions", GAO-09-157. The report identified tax havens from:
   - the OECD list of committed jurisdictions and uncooperative tax havens,
   - a National Bureau of Economic Research working paper, Dhammika Dharmapala and James R. Hines, Jr., Which Countries Become Tax Havens? (National Bureau of Economic Research, Cambridge, Mass.: December 2006); and
   - a U.S. District Court order granting the IRS leave to serve a "John Doe" summons, which included a list of jurisdictions that are recognized as offshore tax haven or financial privacy jurisdictions by industry analysts and are actively promoted as such by promoters of offshore schemes.

   Included were findings that:
   - 83 of the 100 largest publicly traded U.S. corporations (2007 revenues) reported having subsidiaries in jurisdictions listed as tax havens or financial privacy jurisdictions
   - eight jurisdictions listed as tax havens or financial privacy jurisdictions had more than 100 corporate subsidiaries, ranging from 123 to 569
   - for the jurisdiction with 569 subsidiaries, 372 were owned by four corporations.

3. G-20 leaders at an April 2009 meeting in London announced they were adopting measures to curtail tax havens and to target "non-cooperative jurisdictions" in an effort to protect their public finances and financial systems. Their proposals included increased disclosures, withholding, and denying deductions for expenses.

4. The OECD, which had remained somewhat passive since its efforts in the early 2000's, has again begun to move forward in combating tax abuses. In April 2009

[6] Netherlands (28.8%), Switzerland (10.4%), Bermuda (10.4%), Ireland (8.2%), Luxembourg (7.5%), Canada (5.9%), Cayman Islands (5.9%), United Kingdom (5.1%), Hong Kong (1.7%), Singapore (1.7%). 2008 Statistics of Income, Vol. 27, No. 4, Melissa Redmiles, One Time Received Dividend Deduction, 102, Table 3 at page 114 (http://www.irs.gov/pub/irs-soi/08sprbul.pdf).

it included Costa Rica, Malaysia, the Philippines, and Uruguay as uncooperative tax havens. All were removed, however, when they agreed to OECD's transparency standards which, since 2002, have been promoted in both OECD non-OECD economies through the framework of a "Global Forum."

The current focus of the OECD is promoting transparency and the exchange of tax information for tax purposes. It currently has no projects underway that address the tax haven features enumerated in the MTC model statute.

5. Because the OECD is not actively updating its list of tax havens, the MTC is currently considering whether to propose that the model statute be amended to provide a different standard for determining tax haven status or whether to adopt a substitute (non-tax-haven) standard for including foreign subsidiaries when a water's edge election is made.

6. The Congressional Research Service issued a report dated July 24, 2009 titled "The OECD Initiative on Tax Havens," 7-5700, www.crs.gov, R40114, that described the OECD history and actions.

7. In July of 2009, the Organization for International Investment (OFII), which represents foreign corporations that do business in the U.S., asked the MTC to change its model statute water's edge election (the MTC declined to do so).

8. On October 19, 2010 the Global Forum on Transparency And Exchange Of Information For Tax Purposes issued a background paper[7] that describes how the forum transformed from an ad hoc group of OECD member countries and partners in 2000 to a 95 member consensus-based group that includes all G20 members, all OECD countries, and all major financial centers following a 2009 restructuring. The background paper describes the forum's initial 3-year mandate to promote rapid and consistent implementation of standards on transparency and the exchange of information for tax purposes and includes a description of those standards.

9. Two federal tax haven bills were introduced:
   - Stop Tax Haven Abuse Act of (2009) (S. 506; HR 1265), which principally focuses on tax evasion by individuals but briefly addresses transfer pricing abuses that shift income to low- and no-tax jurisdictions
   - A bill that would treat controlled foreign corporations established in tax havens as domestic corporations, (S. 396 (2007)). The bill's enumerated tax havens did not include Luxembourg or the U.S. Virgin Islands and included two jurisdictions Montana removed from its list in 2009 (the Maldives and Tonga).

10. Several bills were introduced that address foreign tax matters generally, but not tax havens specifically. They include:

[7] The report is available at: http://www.oecd.org/dataoecd/32/45/43757434.pdf

- The American Business Competitiveness Act of 2010, H.R. 5962, contains a wide range of tax amendments, including rules for allocating the foreign-related tax credits and deductions and repealing the worldwide allocation of interest for computing the limit on the foreign tax credit.
- Small Business Tax Relief Act of 2010, H.R.5982, contains a wide range of tax amendments related to foreign income, deductions, and credits, including providing that foreign tax credits are suspended until the related foreign income is taken into account in the US; denying a foreign tax credit for foreign income not subject to U.S. tax due to a covered asset acquisition (an acquisition that results in an increase in tax basis for U.S. tax purposes but not for foreign tax purposes); requiring foreign tax credits to be separately accounted for; preventing reduction in the earnings and profits of a foreign corporation when more than 50% of the dividends arising from an acquisition would not be subject to US tax or be includible in the earnings and profits of a controlled foreign corporation; treating a foreign corporation as a member of an affiliated group for interest allocation and apportionment purposes if more than 50% of its gross income is effectively connected with a US trade or business and at least 80% of either the vote or value of its outstanding stock is owned directly or indirectly by members of the affiliated group; repealing tax rules exempting foreign source income attributable to the active conduct of a foreign trade or business from withholding of tax requirements; treating amounts received from noncorporate residents or domestic corporations with respect to guarantees and amounts paid by any foreign person as income received in the United States if the amounts are connected with income that is effectively connected with the conduct of a trade or business in the United States, and limiting the statute of limitations for assessing tax only to failures for which there is reasonable cause and not for willful neglect.
- H.R.5793 -- Close Foreign Tax Loopholes: Make it in America Act of 2010. Contains a wide range of foreign tax provisions including many of the same items in above HR 5982.
- H.R. 3933 - Foreign Account Tax Compliance Act of 2009, contains a wide range of provisions related to foreign accounts, including many of the same items in above HR 5982.
- S. 3816 -- Creating American Jobs and Ending Offshoring Act, would exempt wages paid to U.S. workers to replace foreign off-shore workers from certain employment taxes, would disallow deductions for expenses incurred in moving a U.S. business offshore, taxes the profits, commissions and fees attributable to offshore subsidiaries whose products are imported to the U.S. (excluding agricultural commodities not grown in the US in marketable quantities); and applies separate foreign tax credit limits for imported property offshored income.

11. Six bills containing foreign tax or foreign entity provisions were enacted. None addresses tax havens specifically. The extent to which any of the provisions will reduce the incentive for multinational corporations to create subsidiaries in tax havens remains to be determined.

- P.L. 111-092 (H.R. 3548 -- Worker, Homeownership, and Business Assistance Act of 2009) paid for extending UI benefits, extending the first-time

homebuyers' credit, and providing a credit or existing homeowners, among other provisions, by (among other provisions) delaying the effective date of world-wide interest allocation used in determining the foreign tax credit to 2018. Enacted November 2009.

- P.L. 111-147 (H.R.2847 -- Hiring Incentives to Restore Employment Act), paid for foregoing employment taxes on certain workers and increasing the 179 expensing deduction by (among other provisions) requiring increased foreign account reporting and withholding, denying a tax deduction for interest on unregistered bonds issued outside the US, addressing dividend equivalent payments, and further delaying the effective date worldwide allocation of interest to 2021. Enacted March 2010.
- P.O. 111-152 (H.R. 4872 -- Health Care and Education Affordability Reconciliation Act of 2010), codified the economic substance doctrine, which may affect some offshore activities. Enacted March 2010.
- P.L. 111-203 (H.R.4173 -- Dodd-Frank Wall Street Reform and Consumer Protection Act) contains various provisions related to the financial, securities, and hedge funds industries that may affect some offshore activities. Enacted July 2010.
- P.L. 111-226 (H.R. 1586 -- Education Jobs and Medicaid Assistance Act of 2010) enacted various provisions intended to prevent splitting foreign tax credits from the income to which they relate. It denies a foreign tax credit for foreign income not subject to U.S. tax due to a covered asset acquisition, applies a separate foreign tax credit limit for U.S. sourced income that is treated as foreign-sourced under a tax treaty, limits the amount of foreign tax credits that may be claimed by a domestic corporation for a deemed dividend paid by a foreign subsidiary, prevents a reduction of a foreign corporation's earnings and profits in an acquisition if more than 50% of the dividends arising from the acquisition would not be subject to U.S. tax or would be includible in the earnings and profits of a controlled foreign corporation, treats a foreign corporation as a member of an affiliated group for interest allocation and apportionment purposes if more than 50% of its gross income is effectively connected with a U.S. trade or business and at least 80% of either the vote or value of its outstanding stock is owned directly or indirectly by members of the affiliated group, and repeals tax rules exempting foreign source income attributable to the active conduct of a foreign trade or business from tax withholding requirements. Some or all of these provisions may affect offshore activities. Enacted August 2010.
- P.L. 111-240 (H.R. 5297 -- Small Business Jobs Bill of 2010) contains a provision that specifies the US or foreign sourcing of income from related-party guarantees, which may affect some offshore activities. Enacted September 2010.

Recommendations for Tax Haven Updates

There are a number of other countries other than those listed in 15-31-322, MCA, that could be considered as tax havens.

- As discussed above, the December 2008 GAO Report, *International Taxation, Large Corporations and Federal Contractors with Subsidiaries in Jurisdictions*

Listed as Tax Havens or Financial Privacy Jurisdictions"[8] identified tax havens from multiple sources. They included jurisdictions that are not included in our list of tax havens.[9]

- A 2007 white paper of the Tax Justice Network,[10] "Identifying Tax Havens And Offshore Finance Centres," reviewed "tax havens" and related "offshore finance centers." The white paper compares the 2000 OECD list of tax havens and member countries with potentially harmful preferential tax regimes,[11] a 2000 list[12] of the Financial Stability Forum[13] and a list of tax havens and offshore finance centers the Tax Justice Network compiled in 2005.[14] The Tax Justice Network noted that its list of tax havens was intended to be comprehensive and that it therefore included:
    - OECD countries that offer some tax haven facilities or offshore financial services, even if they do not account for a major part of the economy
    - OECD member countries with harmful preferential tax regimes (noting that countries with a broader economic base have a greater responsibility to end any provisions in their laws which facilitate avoidance of the laws of others, and it should not be only the small jurisdictions that are targeted)
    - countries proposed by network members that they view to be tax havens, which were subjected to a "reputation test" by reviewing tax planning websites and reviewing documentation of tax legislation in the jurisdiction
- The Center for Research on Multinational Corporations (Stichting Onderzoek Multinationale Ondernemingen, or SOMO), a Dutch research and advisory bureau established in 1973 that investigates the effect of multinationals' policies and globalization, also identified the Netherlands as a tax haven, citing the burgeoning number of corporate shells set up by

[8] GAO-09-157.
[9] Costa Rica, Hong Kong, Ireland, Jordan, Latvia, Lebanon, Macao, Maldives, Singapore, and Switzerland (Maldives was removed from Montana's list at the recommendation of the Department in 2009).
[10] The Tax Justice Network is an independent British-based organization (principally financed by charitable grants) started in 2003 to map, analyze and explain the role of tax and the harmful impacts of tax evasion, tax avoidance, tax competition, and tax havens in order to encourage global and national reform.
[11] The jurisdictions are shown in the attached table. OECD member countries with potentially harmful preferential tax regimes that do not appear on any of the other lists are omitted (Australia, Austria, Canada, France, Greece, Korea, and Sweden), as are political subdivisions of countries (Finland (Åland), Germany (Frankfurt), Israel (Tel Aviv), Italy (Campione d'Italia & Trieste), Malaysia (Labuan), Portugal (Madeira), Russia (Ingushetia), Spain (Melilla), Taiwan (Taipei), Turkey (Istanbul), United Kingdom (City of London), and U.S.A. (New York)).
[12] The jurisdictions are shown in the attached table.
[13] The Financial Stability Forum, operating out of Basel, Switzerland, was established in 1999 to promote international financial stability. It brings together major national financial authorities from private industry and government. U.S. members include the Board of Governors of the Federal Reserve System, the SEC, and the Department of Treasury
[14] The jurisdictions are shown in the attached table.

> foreign companies and individuals to avoid taxes on royalties, dividends, and interest payments.[15]

We recommend two additions at this time -- Ireland and the Netherlands. We are still researching whether other candidates,[16] identified by the OECD as "financial centers," should be added to the list, and will report in the next biennium.

We do not recommend removing any countries at this time. Whether the OECD transparency and information sharing initiative will ever have any practical effect on the use of paper companies in these jurisdictions remains to be seen.[17]

Ireland. Ireland is an OECD member country that OECD identified in 2000 as having a potentially harmful tax regime. It is also included in multiple tax haven lists.[18]

David S. Miller, in "Unintended Consequences: How U.S. Tax Law Encourages Investment in Offshore Tax Havens," p. 6 (October 19, 2010 draft),[19] in discussing the magnitude of deferral under Subpart F of the Internal Revenue Code, cites the following chart as suggesting that "U.S. corporate profits are being disproportionately diverted to tax haven countries, as U.S. companies earn on average more than 1000% more profits in Bermuda as compared to G-7 countries based on relative GDP."

U.S. Company Foreign Profits Relative to Jurisdiction Gross Domestic Product[20]	
Weighted average for G-7 Countries	0.6%
Ireland	7.6%
Cyprus	9.8%
Barbados	13.2%
Luxembourg	18.2%
Island of Jersey	35.3%
Bahamas	43.3%
Marshall Islands	339.8%
British Virgin Islands	354.7%
Cayman Islands	546.7%
Bermuda	645.7%

[15] Michiel van Dijk, Francis, Weyzig, and Richard Murphy, "The Netherlands: A Tax Haven?" (SOMO: 2006) (hereafter 2006 SOMO).
[16] Other countries examined for inclusion were Costa Rica, Guatemala, Hong Kong, Singapore, and Uruguay (all identified by the OECD as "financial centers"), as well as Latvia, which was included in the IRS John Doe summons list.
[17] Many of the listed tax havens have met the requirement to enter into at least 12 tax sharing agreements by entering into tax sharing agreements with each other. The OECD keeps a running list of executed agreements at:
http://www.oecd.org/document/7/0,3343,en_2649_33767_38312839_1_1_1_1,00.html
[18] See the attached table. It is included in the 2000 Financial Stability Forum list, the 2005 Tax Justice Network list, and the 2006 National Bureau of Economic Research working paper.
[19] Electronic copy available at: http://ssrn.com/abstract=1684716
[20] Jane G. Gravelle, Tax Havens: International Tax Avoidance and Evasion, Congressional Research Service 13-14 (July 9, 2009).

He references the following chart as suggesting that "a disproportionate share of profits is being shifted to other low-tax jurisdictions, stating "[i]t is otherwise hard to explain how U.S. subsidiaries in Ireland on average return almost 300% more than U.S. subsidiaries generally.

Return on Assets (1998)[21]	
Average for U.S. manufacturing subsidiaries	8.40%
Cayman Islands	16.67%
Switzerland	17.90%
Ireland	23.80%

Ireland has enacted a number of provisions that alone or in combination with multinational entity structuring, reduce or eliminate its nominal 12.5% tax on their profits earned by companies formed in Ireland[22] (other companies are taxed only on profits earned by Irish branches or agents). In addition, Ireland has in the past, and continues, to adopt provisions designed to induce nonresident companies to establish nominal headquarters in Ireland and reduce or eliminate taxes on their profits where earned:

- Ireland created a holding company regime under which:
    - Irish holding companies are exempt from tax on capital gains on the sale of stock in EU state (including Ireland) companies or double tax treaty resident companies in which they have at least a 5% ordinary capital interest
    - taxes are eliminated on distributions to parents from companies in which the parent owns only a 5% capital interest and a credit is granted for any foreign tax imposed on a distribution to the parent (even if the company making the distribution i disregarded in Ireland (a "transparent" entity).
    - a parent's credits for all subsidiaries and unlimited companies are pooled so that if the rate of another country's tax exceeds the Irish rate, the excess can be applied to increase the tax credit for countries that impose a lower rate.
- There are no currency or exchange restrictions:
    - no restrictions on repatriating earnings, capital, royalties, or interest.
    - no restrictions on importing capital to Ireland.
    - residents and nonresidents can open bank accounts in Ireland in any currency
    - Irish residents and companies can open bank accounts anywhere outside of Ireland

[21] Martin Sullivan, "U.S. Citizens Hide Hundreds of Billions in the Caymans," Tax Notes, p. 96 (August 25, 2008).

[22] Ireland's 12.5% nominal corporate tax rate is lowered by various means, including R & D credits, by exempting income derived from patent royalties (before 2008 the exemption was limitless), starting in 2009, by a new scheme of capital allowances for expenditures for intangible assets, including to a related party, amounting to 100% recovery over 15 years at 7% for years one through 14 and two percent in year 15)), by granting withholding tax exemptions for distributions from corporate subsidiaries and "unlimited companies" formed in Ireland, by allowing foreign tax credits for branch profits, by not applying "thin-capitalization" rules, and by not taxing controlled foreign subsidiaries.

- While Irish law requires the directors of most Irish companies and branches of foreign companies operating in Ireland to prepare and file detailed financial accounts with the Companies Registration Office with their annual returns (www.cro.ie), "unlimited companies"[23] that are absolved from the account filing requirement can be used to prevent disclosure.

A 2010 report by the accounting firm Grant Thornton[24] reported the following companies located in Ireland:

ICT	R&D	Pharmaceutical/Medical	Group Treasury/Cash Pooling
Analog Devices	Dow Corning	Abbott Ireland	IBM Ireland
Apple Computer Ltd.	Xilinx	Merck Pharmaceutical	Bristol Myers Squibb
Dell	IBM	Johnson and Johnson	Proctor and Gamble
Google	Intel	Tyco Healthcare	Newell Rubbermaid
Hewlett Packard	CRH	Schering Plough	Pitney Bowes
Microsoft		Boston Scientific	Lucent
Yahoo		Medtronic Ireland Ltd.	
Intel Ireland Ltd		Smith and Nephew	
Engineering	**Captive Insurance**	**Financial Services**	**Shared Service Centres**
Allied Signal	Coca Cola	Grant Thornton	Citibank
Pratt and Whitney	Hertz	Citibank Europe	Dell
Altair Engineering		Paypal	Xerox
		JP Morgan	Yahoo
		Citco Fund Services Ltd	EMC Ireland
		PNC Global Investment Servicing Ltd	
		ABN AMRO	
		KPMG	
		PWC	

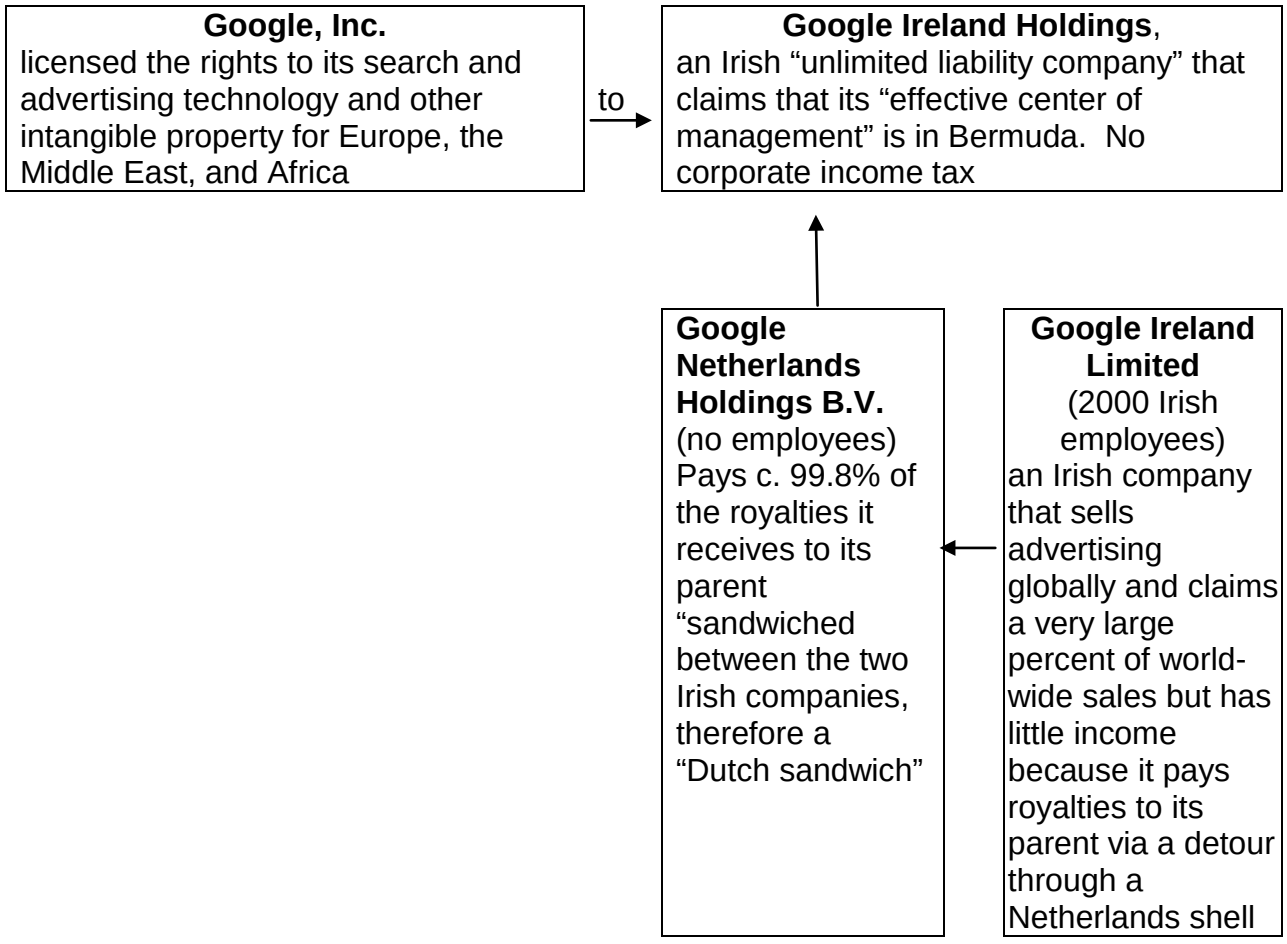
Google's use of Irish and Netherlands companies to avoid $3.1 billion in U.S. tax is discussed below,

The Netherlands. As set forth in the 2006 SOMO report, the Netherlands is a tax haven, applying the standards describe above. It hosts a multitude of "mailbox

[23] At least one owner of an unlimited company must have unlimited liability to its creditors if the company's assets are insufficient to pay its debts. Limited liability is obtained, however, by forming a limited liability company to be the owner with unlimited liability.
[24] Doing business in Ireland, Grant Thornton (2010).

companies" that have no substantial commercial presence[25] and actively promotes itself as a tax haven.[26]

The Netherlands' participation in tax avoidance is historic – the term "Dutch Sandwich," recently used to describe the method by which Google, Inc. reduces its U.S. income tax liability,[27] was also used in the 1980's to describe how Canadian firms reduced their U.S. dividend withholding tax from 15% to 5% and their interest withholding rate from 30% to 0% by funneling their U.S. investments through the Netherlands Antilles.[28] As described in the Bloomberg article, the "Dutch Sandwich" is now but one part of a complex multi-party transaction that also uses a "Double Irish" to enable Google, Inc. to avoid $3.1 billion in U.S. taxes over the past three years.



The current list of tax havens would not capture the unitary income of Google Netherlands Holdings B.V. because it is not incorporated in a listed tax haven, nor the

[25] 2006 SOMO at 3.
[26] 2006 SOMO at 7.
[27] Jesse Drucker, Bloomberg, "Google 2.4% Rate Shows How $60 Billion Lost to Tax Loopholes" (Oct. 21, 2010).
[28] 2006 SOMO at 16.

unitary income that ends up in Google Ireland Holdings because, while Bermuda is a listed tax haven, the entity was actually incorporated in Ireland.

As shown above, an Irish company parking money in one of the listed tax havens is not included in Montana's water's edge election because the entity is not a corporation that is "incorporated in" a tax haven. It shows a weakness in the language used in 15-31-322(1)(f), MCA, that should be rectified, whether or not Ireland is added to the list of tax havens, particularly in light of the proliferation in the use of non-corporate and hybrid entities in the U.S. and worldwide:

> (1) . . . . A return under the water's edge election must include the income and apportionment factors of the following affiliated ~~corporations~~ entities only:
> . . .
> (f) ~~a corporation~~ an entity that is in a unitary relationship with the taxpayer and that is incorporated or has its registered office or effective center of management in a tax haven, including . . . .

Jurisdiction	OECD[29]	NBER[30]	IRS "John Doe"[31] summons	Financial Stability Forum[32]	Tax Justice Network[33]	15-31-322, MCA (2009)
Andorra	X[a]	X		X	X	X
Anguilla	X	X	X	X	X	X
Antigua and Barbuda	X	X	X[b]	X	X	X
Aruba	X		X[b]	X	X	X
Bahamas	X	X	X[b]	X	X	X
Bahrain	X	X		X	X	X
Barbados	≠	X	X[b]	X	X	X
Belgium	□				X	
Belize	X	X	X	X	X	X
Bermuda	X	X	X[b, c]	X	X	X
British Virgin Islands	X	X	X[d]	X	X	X
Cayman Islands	X	X	X[b]	X	X	X
Cook Islands	X	X	X	X	X	X
Costa Rica			X[b]	X	X	
Cyprus	X	X	X[c]	X	X	X
Dominica	X	X	X[b]	X	X	X
Dubai					X	
Gibraltar	X	X	X	X	X	X
Grenada	X	X	X[b]	X	X	X
Guernsey	X	X[d]	X[b, e]	X	X	X
Hong Kong		X	X	X	X	
Hungary	□				X	
Iceland	□				X	
Ireland	□	X		X	X	
Isle of Man	X	X	X[b]			X
Jersey	X	X[d]	X[b]	X	X	X
Jordan		X				
Latvia			X[c]			
Lebanon		X		X	X	
Liberia	X	X			X	X
Liechtenstein	X[a]	X	X	X	X	X
Luxembourg	□	X	X[c]	X	X	X
Macao		X		X	X	
Maldives		X			X	
Malta	X	X	X	X	X	X
Marshall Islands	X	X		X	X	X
Mauritius	X			X	X	X
Monaco	X[a]	X		X	X	X
Montserrat	X	X		X	X	X
Nauru	X		X	X	X	X

[29] OECD 2000. The symbol □ denotes an OECD member country identified in 2000 as having a potentially harmful preferential tax regime. The symbol ≠ denotes a country subsequently determined not to meet the definition of "tax haven."
[30] National Bureau of Economic Research 2006 working paper.
[31] The United States filed an ex parte petition for leave to serve a "John Doe" summons on PayPal, Inc. and its affiliates and subsidiaries in the U.S. District Court for the Northern District of California on October 14, 2005, and the court issued an order granting the leave in February 2006 (In the Matter of Tax Liabilities of John Does, et al., No. 5:05-cv-04167-JW (N.D. Cal. 2006). The petition was supported by a declaration of an IRS revenue agent who stated that the 34 jurisdictions were" all recognized as principal offshore tax haven or financial privacy jurisdictions by industry analysts and are actively marketed as such by promoters of offshore schemes."
[32] 2000 list of the Financial Stability Forum.
[33] 2005 list of the Tax Justice Network.

Jurisdiction	OECD	NBER	IRS "John Doe" summons	Financial Stability Forum	Tax Justice Network	15-31-322, MCA (2009)
Netherlands	□				X	
Netherlands Antilles	X	X	X[b]	X	X	X
Niue	X			X	X	X
Northern Mariana					X	
Palau				X		
Panama	X	X	X	X	X	X
Samoa	X		X	X	X	X
San Marino	X					X
São Tomé e Principe					X	
Seychelles	X			X	X	X
Singapore		X	X	X	X	
Somalia					X	
South Africa					X	
St. Kitts and Nevis	X	X	X	X	X	X
St. Lucia	X	X	X[f]	X	X	X
St. Vincent and the	X	X	X	X	X	X
Switzerland	□	X	X[c]	X	X	
Tonga	≠				X	
Turkish Rep. of					X	
Turks and Caicos	X	X	X	X	X	X
Uruguay					X	
U.S. Virgin Islands	X				X	X
Vanuatu	X	X	X	X	X	X

[a.] This was used in GAO-09-157, U.S. Corporations with Foreign Subsidiaries, pages 12-13 to denote countries identified as "uncooperative tax havens" (contrasted with "committed jurisdictions").
[b.] This was used in GAO-09-157 to denote when a Tax Information Exchange Agreement (TIEA) was in force between the United States and this jurisdiction.
[c.] This was used in GAO-09-157 to denote that a double tax treaty was in force with an exchange of information provision.
[d.] This was used in GAO-09-157 to explain that "NBER's list included the Channel Islands. Jersey and Guernsey are part of the Channel Islands. The two other sources we used to identify tax havens listed Jersey and Guernsey as two separate tax havens and did not include the Channel Islands on their lists of tax havens. To be consistent, we are including Jersey and Guernsey as tax havens on the bureau's list rather than the Channel Islands."
[e.] This was used in GAO-09-157 to explain that "[t]he John Doe summons lists Guernsey/Sark/Alderney. OECD only included Guernsey. Since Sark and Alderney are part of the Bailiwick of Guernsey, to be consistent, we are only including Guernsey on our list of tax havens.
[f.] This was used in GAO-09-157 to explain that "[th]e TIEA signed by the United States and St. Lucia on January 30, 1987, is not in effect within the meaning of section 274(h)(6)(A)(i) of the Internal Revenue Code because the government of St. Lucia has not enacted legislation to implement the agreement.