

POLICY & LEGAL ISSUES RAISED BY THE PROPOSED U.S. BORDER ADJUSTABLE TAX

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ABSTRACT

This article considers the policy and legal issues raised by the Border Adjustable Tax (hereinafter “BAT”), part of the tax reforms proposed by the Republican Tax Reform Task Force. After explaining the BAT and the functions it is intended to serve, it examines the compatibility of the BAT with World Trade Organization (hereinafter “WTO”) obligations, concluding that it is likely to violate a number of WTO Agreements. It suggests modifications to the measure to assist with WTO compatibility while still addressing concerns about boosting United States (hereinafter “U.S.”) tax revenue.

KEYWORDS: *World Trade Organization (WTO) law, Republican Tax Reform Task Force, Border Adjustable Tax (BAT), Destination Based Cash Flow Tax (DBCFT), General Agreement on Tariffs and Trade (GATT), General Agreement on Trade in Services (GATS), Agreement on Subsidies and Countervailing Measures (SCM Agreement)*

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I. INTRODUCTION

President Donald Trump has, on numerous occasions,¹ talked of using additional taxes levied to fund the “Wall”—the border wall between Mexico and the U.S. Of course, a 20% tax on Mexican imports into the U.S. would be considered outright discrimination and a violation of both international trade and tax treaties, which is unfeasible in light of the political backlash the U.S. is likely to suffer. Instead, a Republican Tax Reform Task Force (hereinafter “the Task Force”) announced by Paul Ryan, Speaker of the House of Representatives, and led by Congressman Kevin Brady, Chairman of the House of Representatives Ways and Means Committee, has come up with a comprehensive tax reform plan (hereinafter “Blueprint”).² Amongst other tax reforms contained within the Blueprint of laws to be spearheaded under the Republican conservative agenda, “border adjustability” is a key feature which the Task Force claims will level the playing field between American-made and imported products,³ and which the White House has said could be used to finance the Wall.⁴

In Part II, this article seeks to explain the proposed BAT measure within the proposed Destination Based Cash Flow Tax (hereinafter “DBCFT”) and how it purportedly fulfils the functions claimed by the Task Force.⁵ Part III then goes on to consider that the reforms are likely to be illegal *vis-à-vis* the U.S.’ obligations as a Member of the WTO, in particular such a tax would definitely not be allowed under the General Agreement on Trade and Tariffs 1994 (hereinafter “GATT”), the General Agreement on Trade in Services (hereinafter “GATS”), and might not be allowed under the Agreement on Subsidies and Countermeasures

¹ *Donald Trump’s Mexico Wall: Who Is Going to Pay For It?*, BBC NEWS (Feb. 6, 2017), <http://www.bbc.com/news/world-us-canada-37243269>; Jeremy Diamond, *Trump Floats 20% Tax on Mexican Imports to Pay for Wall, but Considering Other Options*, CNN POL. (Jan. 27, 2017, 4:02 PM), <http://edition.cnn.com/2017/01/26/politics/donald-trump-mexico-import-tax-border-wall/>.

² *A Better Way: Our Vision for a Confident America*, A BETTER WAY (2016), http://abetterway.speaker.gov/_assets/pdf/ABetterWay-Tax-PolicyPaper.pdf [hereinafter *A Better Way*].

³ *Id.* at 28.

⁴ Adriana Barrera, *Mexico Economy Minister Says Doubts US Border Tax Will Materialize*, REUTERS (Feb. 15, 2017, 5:53 AM), <http://uk.reuters.com/article/uk-usa-trump-mexico-tax-idUKKBN15T2WV?il=0>.

⁵ The Blueprint does not refer to these measures as a “Border Adjustable Tax” or a “Destination Based Cash Flow Tax”. However, the Blueprint does refer to “border adjustments” (*A Better Way*, *supra* note 2, at 27-28). It has been noted that “border adjustments” are in fact taxes or tax exemptions (Alan J. Auerbach & Douglas Holtz-Eakin, *The Role of Border Adjustments in International Taxation*, AM. ACTION F. (Nov. 30, 2016), <https://www.americanactionforum.org/research/14344/>). Additionally, it has been said that the Blueprint contains a “destination-based cash flow tax” (Kyle Pomerleau & Stephen J. Entin, *The House GOP’s Destination-Based Cash Flow Tax, Explained*, TAX FOUNDATION, (June 30, 2016) <https://taxfoundation.org/house-gop-s-destination-based-cash-flow-tax-explained/>). See also Reuven S. Avi-Yonah & Kimberley Clausing, *Problems with Destination-Based Corporate Taxes and the Ryan Blueprint* 17-19 (U. Mich. L. & Econ., Research Paper No. 16-029, 2017)).