TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 37 | Number 1 Article 11

2021

Are Digital Services Taxes Imposed by Other Countries Creditable Under IRC Section 903? Yes. But, What if the Opposite Is True?

Charles Edward Andrew Lincoln IV

ARE DIGITAL SERVICES TAXES IMPOSED BY OTHER COUNTRIES CREDITABLE UNDER IRC SECTION 903? YES. BUT, WHAT IF THE OPPOSITE IS TRUE?

*Charles Edward Andrew Lincoln IV**

I. INTRODUCTION

Are digital services taxes imposed by other countries creditable under Section 903?[1] Yes. But what if the opposite is true? This article examines the question of whether digital services tax are taxes "in lieu of a tax on income."[2]

This is one of the unanswered questions in the Trump and Republican tax reform from 2017.[3] One such inquiry came up from Ben Willis's and José Rubens Scharlack's masterful article exploring the connection and unanswered questions of the TCJA and DST rules indicating the conflicts between the TCJA and current United States law:

> After exploring the support that the TCJA's international provisions lend to foreign countries imposing DSTs, [the authors then recap] the facts that led to the current impasse and explore a 2018 Supreme Court

---

* Charlie Lincoln IV is a Ph.D. student at the University of Groningen focusing on international tax law. He received an LL.M. in Tax Law from Boston University in May 2018; an Advanced LL.M. in International Tax Law from the University of Amsterdam in October 2017; and a J.D. from Texas A&M University in May 2016 after graduating, cum laude, with a Bachelor's Degree in Government. Charlie would like to thank the *Touro Law Review* team for their input and dedicated hard work on shaping this article.

[1] All references are to the Internal Revenue Code—Title 26 of the U.S. Code—abbreviated ("IRC"). This article expands on one of the author's past articles dealing with the same issue regarding digital taxation, technically digital tax services, and one forthcoming Bocconi Legal Studies Research Paper—Working Paper—on a similar subject with a more focused view on European digital tax services.

[2] 26 U.S.C. § 903 (2018); 26 C.F.R. § 1.903-1 (2013).

[3] Benjamin M. Willis & José Rubens Scharlack, *The TCJA's Unilateral Provocation of DSTs*, 170 TAX NOTES FED. 591 (2021).

> case that made it clear that the United States understands the concerns underlying pillar 1 and DSTs.[4]

This falls at the intersection of statutory and regulatory interpretation. As Willis and Scharlack point out regarding this intersection of statutory and regulatory convergence:

> [f]inally, Treasury and the IRS issued REG-101657-20, on November 12, 2020, which introduced a new jurisdiction nexus requirement for a foreign tax to be considered an income tax (or a tax in lieu thereof) and thus qualify as an FTC under sections 901 and 903.[5]

The new proposed regulations suggest that a foreign tax meets the nexus requirements under Prop. Reg. section 1.901-2(c)(1)(i), (ii), and (iii).[6] However, as previously discussed and addressed in another article about the digital services tax issue, these rules will likely change once the OECD responds.[7] Aside from regulatory interpretation concerns regarding deference under *Chevron U.S.A. Inc. v. National Resource Defense Council, Inc.*,[8] this has ramifications for the

[4] *Id.*; *see generally* H. Rosenbloom & Peter A. Barnes, *Digital Services Taxes: How Did We Get Into This Mess?*, TAX NOTES FED. (Mar. 23, 2020), http://www.capdale.com/files/27031_digital_services_taxes_how_did_we_get_into_this_mess.pdf. (Further discussion of Pillar 1 of the OECD's digital services plan. Pillar 1 is the digital services tax proposal from the OECD).

[5] Willis & Scharlack, *supra* note 3, at 594.

[6] Id.

[7] Charles Lincoln, *Crediting (or Not) Foreign Countries' Digital Services Taxes Under Section 903*, A.B.A. TAX TIMES (Nov. 30, 2020), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/20fal/20fal-pp-lincoln-dst-under-sec-903. "The Preamble does acknowledge, however, that the ongoing OECD/G20 BEPS negotiations may conclude with an agreement on a new international framework for allocating taxing rights that would require changes to the rules in these proposed regulations. Thus, the rules may still change." *Id.*; *see generally* forthcoming Bocconi Legal Studies Research Paper—Working Paper—on a similar subject with a more focused view on European proposed rules for digital tax services, such as France.

[8] 467 U.S. 837 (1984). "Chevron deference" is the Supreme Court's enunciated rule of how to interpret ambiguous statutes. *Id.* at 843-44. *Chevron* and its progeny (*See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); *see also Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Svcs.*, 545 U.S. 967, 1000 (2005); *Home Care Ass'n. of Am. v. Weil*, 799 F.3d 1084 (D.C. Cir. 2015)) have been key in developing statutory and administrative rule of law.

future of the digital economy.[9] Several articles have touched on this specifically and peripherally.[10]

This article is divided in the following parts. Part II will discuss and define what Section 903 stands for from a legislative, regulatory, and case perspective. Part III will discuss what digital services taxes are. Part III will define "nexus" and how the concept of "nexus" will relate to Section 903. Part IV concludes by suggesting that digital services taxes do not fall into the traditional statutory paradigm. Ultimately, Section 903 hypothecates that a tax will either be a traditional income tax creditable under Section 901 or tax in the place of that tax. If it does not fall into this category, then it is a tax in addition.

II. WHAT DOES SECTION 903 STAND FOR?

From a statutory construction point of view, Section 903 speaks for itself. Taxes paid in the stead of traditional income taxes

---

[9] For a general discussion of the importance of statutory changes to the digital economy, see JOSEPH STIGLITZ, REWRITING THE RULES OF THE EUROPEAN ECONOMY 225-230 (W.W. Norton & Co. eds., 2020). Stiglitz, awarded the Nobel Prize in Economic Sciences in 2001, highlights that European countries' economies could change substantially depending on what type of taxes the European Union creates for the taxation of the digital economy whereby major multinationals operate in countries without a physical tax presence—the traditional basis for taxation historically—and avoid taxes on profits in those countries because profits did not actually "exist" there. Compare and contrast with an amicus brief to the United States Supreme Court that Joseph Stiglitz participated in regarding the interconnectedness of taxes and regulatory frameworks. Brief of Amici Curiae Oxfam America and Professors of Economics Joseph E. Stiglitz and Geoffrey M. Heal in Support of Respondents at 9-12, Nestlé USA., Inc. v. John Doe I, (2020) (No. 19-416), 2020 WL 6291309. Stiglitz reflects this interconnectedness of taxes, legal systems, and regulatory frameworks in his Rewriting the Rules of the European Economy (2020) as well. For a more recent discussion from the OECD, see the following for the challenges regarding the digital economy. Angel Gurría, *11th Meeting of the Inclusive Framework on BEPS Remarks*, OECD PARIS (Jan. 27, 2021), http://www.oecd.org/about/secretary-general/oecd-sg-at-meeting-of-the-inclusive-framework-on-beps-27-january-2021.htm.

[10] Andres Baez Moreno & Yariv Brauner, *Taxing the Digital Economy Post BEPS ... Seriously,* 58 COLUM. J. TRANSNAT'L L. 121, 182 (2019) ("An additional advantage of the withholding solution over the DBCFT is its actual division of the tax base among market and residence countries. This division is reflected in the relatively low rate of withholding and the use of withholding a universally accepted tax 'in lieu of a tax on income' and therefore acceptable as double tax relief, even in credit jurisdictions. The DBCFT is the only and final tax proposed.").

are creditable under Section 901[11] (the provision calling for a credit in the U.S. of taxes paid abroad) as if they were taxes.[12] This is because the form of the payment made may not be a tax but rather a subsidy, government deal, war profit, etc.[13] Taxes imposed in addition to traditional income taxes shall be imposed "in lieu of" that traditional income.[14] For example, when examining a Mexican tax imposed in addition to a "normal" income tax, Rev. Rule. 91-45 states:

> [p]ursuant to section 1.903-1(b)(1), a foreign levy satisfies the substitution requirement only if it operates in substitution for, not in addition to, an income tax. Taxpayers are subject to both the assets tax and an income tax. Therefore, the assets tax is imposed in addition to the income tax and cannot qualify as an in lieu of tax for purposes of section 903.[15]

Moreover,

> [t]axes also must be validly owed for a foreign tax credit to be taken. When a taxpayer claims a foreign tax credit for taxes paid and subsequently receives a refund for all or part of those taxes, the taxpayer is required to file an amended return in the United States reducing the foreign tax credit.[16]

There is, however, a limitation to this credit as illustrated in the statutory language of Section 904(a) in relation to the total taxable in-

---

[11] David Elkins, *A Critical Reassessment of the Role of Neutrality in International Taxation*, 40 N.W. J. INT'L L. & BUS. 1, 19-20 n.39 (2019) ("The United States ordinarily provides a credit for foreign income taxes paid. I.R.C. § 901 (Westlaw 2017). The OECD model treaty recognizes both the exemption method and the credit method. Org. for Econ. Co-operation & Dev. [OECD], Model Tax Convention on income and on Capital, at 376-406 (2017)").

[12] 26 U.S.C. § 903 (2018); 26 C.F.R. § 1.903-1 (2013); *see* 26 U.S.C. § 960 (2018); 26 U.S.C. § 901 (2018).

[13] 26 U.S.C. § 901(i)(1)-(2) (2018); *see* 26 C.F.R. § 1.901–2(e)(2) (2013).

[14] 26 U.S.C. § 903 (2018); 26 C.F.R. § 1.903-1 (2013); *see* Rev. Rul. 91-45, 1991-33 (1991).

[15] Rev. Rul. 91-45, 1991-33 (1991) at *2 (quoting 26 C.F.R §1.901-2(a)(1) (2013)).

[16] Patrick J. McCormick, *International Tax for the Growing Business*, 29 J. INT'L TAX'N 30, 38 (2018).

come:

> The total amount of the credit taken under section 901(a) shall not exceed the same proportion of the tax against which such credit is taken which the taxpayer's taxable income from sources without the United States (but not in excess of the taxpayer's entire taxable income) bears to his entire taxable income for the same taxable year.[17]

There are also other limits to the foreign tax credit as well that operate in other code sections such as the Section 78 gross-up provision.[18] However, although a credit limit may be limited in a single tax year, foreign tax credits may be carried back to the previous tax year and carried forward for up to ten years.[19]

In examining the legislative history for the foreign tax credit, the United States Supreme Court indicated that it "clearly demonstrates that the credit was intended to protect a domestic parent from double taxation of its income."[20] Moreover, regarding the legislative history of the foreign tax credit, the United States Court of Federal Claims wrote, "[t]he United States taxes the income of its citizens, residents, and domestic entities on a worldwide basis—*i.e.*, regardless of whether the income is earned domestically or internationally."[21] Furthermore, the court wrote that this means "a domestic corporation must include foreign source income on its U.S. tax returns even though that income may also have been subject to foreign taxation."[22] Specifically, in reference to the history of the rule, "[s]ince 1918, however, the United States has allowed domestic taxpayers in this circumstance to claim a dollar-for-dollar credit in the U.S. for income taxes they have paid in a foreign country."[23]

Indeed, the *Albemarle Corporation & Subsidiaries v. United States*,[24] Federal Claims Court case indicates that the language in the

---

[17] 26 U.S.C. § 904(a) (2018).
[18] 26 U.S.C. § 78 (2018).
[19] *See* I.R.S., FOREIGN TAX CREDIT FOR INDIVIDUALS (2020).
[20] United States v. Goodyear Tire & Rubber Co., 493 U.S. 132, 139 (1989).
[21] Salem Fin., Inc. v. United States, 112 Fed. Cl. 543, 582 (2013), *aff'd* in part, *rev'd* in part, 786 F.3d 932 (Fed. Cir. 2015).
[22] *Id.*
[23] *Id.*
[24] 118 Fed. Cl. 549 (2014).

Salem Financial, Inc. v. United States decision succinctly reflects the language of the legislative history to the Tax Reform Act of 1976, Public Law 94-445. The Senate Report states in part:

> This foreign tax credit system embodies the principle that the country in which a business activity is conducted (on in which any income is earned) has the first right to tax that income arising from activities in that country, even though the activities are conducted by corporations or individual resident in other countries. Under this principle, the home country of the individual or corporation has a residual right to tax income arising from these activities, but recognizes the obligation to insure that double taxation does not result. Some countries avoid double taxation by exempting foreign source income from tax altogether. For U.S. taxpayers, however, the foreign tax credit system, providing a dollar-for-dollar credit against U.S. tax liability for income taxes paid to a foreign country is the mechanism by which double taxation is avoided.[25]

Furthermore, the *Salem* court explicitly mentioned that, "[a]s courts consistently have recognized, the purpose of the foreign tax credit is to allow taxpayers to avoid double taxation on foreign income, and thus to 'neutralize the effect of U.S. tax on the business decision of where to conduct business activities most productively.'"[26] The foreign tax credit fulfills a worthy tax policy. It allows United States residents to operate abroad and find relief when taxed in another country avoiding economic burdens of double taxation.[27] There are restrictions from gaining a double non-tax benefit—such as through Section 78 gross up—and these restrictions help meet the policy objectives of promoting international commerce.[28]

---

[25] S. REP. NO. 94-938, at 233 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 3438, 3664.

[26] *Salem Fin.*, 112 Fed. Cl. 543; *see* Albemarle Corp. & Subsidiaries v. United States, 118 Fed. Cl. 549, 565 (2014), *aff'd*, 797 F.3d 1011 (Fed. Cir. 2015).

[27] "The purpose of the foreign tax credit can be simply stated: to eliminate international double taxation of foreign-source income. In its application, however, the foreign tax credit regime is a byzantine structure of staggering complexity." 15.21 Foreign Tax Credit, 1999 WL 516687, 1.

[28] "The Revenue Act of 1962 attacked the preference for the use of foreign subsidi-

III. SO, THEN, WHAT IS A DIGITAL SERVICES TAX?

The digital services tax purports to tax transactions that occur digitally through an expanded concept of nexus.[29] As alluded to earlier, countries and international organizations—such as the member states of the European Union—realized that multinational enterprises can engage in digital online business in a country without having a residence in that country.[30] In such a scenario, under the traditional rules of source and residence based taxation going back to the scientific formulations on accretion of income originating in the League of Nations drafts in the 1920s, such online and digital activities would not be subject to taxation.[31] This is because in theory there is no physical nexus to the country if a purchase is made online and the item is delivered to the destination country. Such questions of the digital economy are absolutely important in the modernized economy—and arguably even more vital based on the ever-increasing digital economy based on the COVID-19 pandemic.

In essence, the European Commission proposed a "Digital Services Tax" (DST) on March 21, 2018, that provided:

> a single rate of 3% levied on gross income derived from certain digital services for which the French Government deems user participation is essential for

---

aries that arose under the American Chicle computation formula in a different way: The Act amended the formula rules of § 902 and added § 78, which requires the domestic corporate shareholder to gross up the foreign taxes that are creditable under § 902 (i.e., to treat them as a constructive dividend for purposes of computing the domestic shareholder's tax under § 61 on the dividend income received from the foreign corporation). Under the current gross-up system, § 78 requires the domestic corporate shareholder to gross up the foreign taxes that are creditable under § 902 (i.e., to treat them as a constructive dividend for purposes of computing the domestic shareholder's tax under § 61 on the dividend income received from the foreign corporation). Under this gross-up approach, the domestic corporate shareholder first computes its deemed-paid foreign tax credit under § 902(a)(1) (without the American Chicle limitation), and then includes this credit amount in its gross income as a deemed dividend under § 78." 15.21 FOREIGN TAX CREDIT, 1999 WL 516687, 10.

[29] Charles Lincoln, *Crediting (or Not) Foreign Countries' Digital Services Taxes Under Section 903*, A.B.A. TAX TIMES (Nov. 30, 2020).

[30] *See* Stiglitz, *supra* note 9.

[31] Professor Avi-Yonah outlines the scientific origins of the existing tax paradigms in the League of Nations's drafts of double tax conventions. Reuven Avi-Yonah, *Advanced Introduction To International Tax Law* 2-6 (2015).

> creating value; namely, targeted online advertising, which include the sale of user data, and online intermediation services (i.e., platforms), whether they are provided in the context of a relationship between businesses (B2B), businesses and consumers (B2C), or between consumers (C2C).[32]

Moreover, in France on March 6, 2019, the French Government submitted a draft bill detailing the French proposal on taxation of digital services to the French Council of Ministers.[33] Since then, DST proposals have come up in several European countries.[34] France pushed the development of this idea by moving ahead with its own draft of a digital services tax bill:

> [o]n 6 December 2018, after substantial European Union (EU)-wide negotiation, the French Minister for Economy and Finance Bruno Le Maire announced that France would unilaterally move ahead and present a draft bill to implement a new tax on digital services (the GAFA tax), which would be applicable in France as from 1 January 2019.[35]

It is unclear whether the European Union would have proceeded without this impetus of France acting alone. But this has allowed for France to move forward with its own proposal and the European Union as a whole to seek a unified approach.

Indeed, the European Commission made profitable strides in attempting to categorize and make rules on the digital economy based on digital services taxation. However, as indicated, France decided to unilaterally move ahead with a digital services tax without the European Commission.[36] For France, as a model, this tax will only ap-

---

[32] EY Indirect Tax, *French Government Submits Draft Bill On Digital Services Tax To Council Of Ministers*, 30 J. INT'L TAX'N 21, 21 (2019).
[33] *Id.*
[34] Such as France, Italy, and Turkey. *See* Amie Ahanchian et al., *Digital Services Tax: Why the World is Watching*, BLOOMBERG TAX (Jan. 6, 2021, 3:01 AM), https://news.bloombergtax.com/daily-tax-report/digital-services-tax-why-the-world-is-watching.
[35] *Id.*
[36] This brings up interesting questions about European Union unity and the effectiveness of the European Union's ability to coordinate tax policies. The inability to

ply to companies making in excess of revenues of over €750 million per year.[37] Under the model in France, "[t]he tax base will include all revenues (i.e., gross revenues) received by the taxpayer, (excluding Value Added Tax (VAT)) for taxable services deemed to be made or supplied in France, and a single rate of 3% applies."[38]

A. What does this mean for the concept of "nexus" in digital taxation?

To understand the concept of nexus in general, it is helpful to recall that countries and jurisdictions need to have a reason to tax an individual or entity.[39] Such reasons could be through a property (the nexus is the property in question whether movable or immovable)[40]

---

functionally coordinate tax policies is due to the intentional omission from the Treaty of Maastricht—the foundational treaty of the European Union—a tax provision that would unify tax policy in the European Union. For examples of problems with this unified approach and potential solutions. *See* Charles Edward Andrew Lincoln IV, *A New Deal for Europe? The Commerce Clause As the Solution to Tax Discrimination and Double Taxation in the European Union*, 11 J. BUS. ENTREPRENEURSHIP & L. 115 (2018) (In part arguing that a post-Lochner interpretation of the Commerce Clause could provide for a "New Deal" similar to Franklin Delano Roosevelt's New Deal in the 1930s and early 1940s that could revamp the European model based on the Case C-513/04, Kerckhaert v. Belgium, 2006 E.C.R. I-10967, ¶¶ 14-21 and the "internal consistency test" as it is discussed in the US Supreme Court case *Comptroller of Treas. Of Maryland v. Wynne*, 135 S. Ct. 1787, 1795 (2015)).

[37] "The DST, which applies to revenues from online advertising, online intermediation, and sales of user data, is payable by technology companies with annual worldwide revenues of at least €750 million, of which €3 million is from sales to Spanish customers." William Hoke, *Amazon to Pass Along Cost of Spanish Digital Tax to Advertisers*, 2021 TNTI 15-5. "Pillar One, for which only Amount A is modelled, is assumed to focus on Automated Digital Services (ADS) and Consumer Facing Businesses (CFB), with a global revenue threshold of EUR 750 million, a profitability threshold percentage of 10% (based on the ratio of profit before tax to turnover), a reallocation percentage of 20% and a nexus revenue threshold of EUR 1 million for ADS and EUR 3 million for CFB." *Addressing the Tax Challenges from the Digitalisation of the Economy*, ORG. FOR ECON. CO-OPERATION AND DEV. (2020), https://www.oecd.org/tax/beps/brochure-addressing-the-tax-challenges-arising-from-the-digitalisation-of-the-economy-october-2020.pdf.

[38] EY Indirect Tax, *supra* note 32, at 22.

[39] Fritz Neumark, *Taxation*, BRITANNICA, https://www.britannica.com/topic/taxation (last visited Jan. 28, 2021).

[40] For a discussion of the relationship of the Constitutional fair apportionment doctrine see Hellerstein, *4.13 Effects of U.S. Supreme Court's Current Approach to Commerce Clause On Its Earlier Decisions And Doctrine*, ST. TAX'N (3d ed. 2020)

or carbon emission levels (the event of carbon emitting from the pipe of the car or a manufacturing facility creates the nexus)[41] among other examples. These specific predicates to taxation could be considered the connection between levying the tax and the thing being taxed. This idea is sometimes termed a nexus. The United Supreme Court has interpreted the concept of nexus as the ability to constitutionally justify the imposition of a tax under the Commerce Clause.[42] In international tax, nexus is a concept that has its origins in the concept of branches and permanent establishments, where there is a nexus of cash. Historically, "in effect the use of the term became widespread in reliance on an implied nexus between an item of income and a territory to broaden the traditional PE concept contained in Article 5 of both the OECD and the UN Model Tax Conventions."[43] Moreover, "Article 5 already includes physical and personal extensions to the PE concept, contained in Articles 5(1) to 5(3) and 5(5) of the Models, all of which could also be considered manifestations of the nexus approach."[44]

However, in the context of digital economics and taxation of the digital economy, the "'nexus approach' refers to the various initiatives to include (at both treaty and domestic law level) an extended concept of Virtual PE or Significant Economic (Digital) Presence and corresponding rules for attributing profits to such newly created PE."[45]

In theory, the concept and

---

at *9.

> although there may be circumstances in which the freight's presence in the state is so ephemeral as to fall short of the "substantial nexus" required by the Commerce Clause—even though the freight is physically present in the state—we believe that in most circumstances a fairly apportioned, nondiscriminatory property tax on goods in transit will survive Commerce Clause scrutiny.

Id.

41 *See* Andrew L. Kinde, *Let's Make A Green New Deal: An Analysis of State Carbon Taxes As A Foundational Piece of Climate Legislation in the United States*, 11 NE. U. L. REV. 474, 506 (2019); *Cf.* Erin Adele Scharff, *Green Fees: The Challenge of Pricing Externalities Under State Law*, 97 NEB. L. REV. 168, 203 (2018).

42 S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2085 (2018); *see* Quill Corp. v. N. Dakota By & Through Heitkamp, 504 U.S. 298, 304, (1992), *overruled by* S. Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018), for an earlier discussion of nexus.

43 Moreno & Brauner, *supra* note 10, at 168.

44 Id.

45 Id. at 168-69.

> [t]he existence of a Virtual PE could hypothetically depend on: (1) a revenue factor identified with a (preferably) high threshold of gross revenues generated from remote transactions, calculated on a group basis, combined with either (2) digital factors either in the form of local domain names, local digital platforms, or local payment options, and/or (3) user-based factors, such as monthly active users, online contract conclusion, or data collected.[46]

This is an example of a potential solution to the loss of revenue caused in the digital economy. It is unclear whether such a proposal would be politically viable in the European Union or in individual countries.

However, it has been difficult for countries to decide on an approach to move from the deeply embedded approach of the residence and source-based taxation approach. This traditional paradigm emanating from the scientific tax contributions in the 1920s sponsored by the League of Nations is the paradigm of over 3,000 bilateral income tax treaties currently in effect and the domestic law of most countries.[47] Realizing this adherence to the paradigm, originally,

> [p]roposals based on the nexus approach . . . focused on the reframing of the traditional nexus (or PE) rules to accommodate taxable presence based not only on physical but also on virtual presence. The entire BEPS work until 2018 essentially ignored the complementary profit attribution rules that actually determine the new tax base created by the reform of the rules.[48]

However, because there is still an inability to find an agreeable solution that incorporates the taxing rights of all countries interested in the changes, there is now a focus on profit allocation.[49]

---

[46] Id. at 169.

[47] Brian J. Arnold, *An introduction to tax treaties*, U.N. DOCS. (2011), https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/TT_Introduction_Eng.pdf.

[48] Moreno & Brauner, *supra* note 10, at 172.

[49] Id.

The European Union's proposal is not without critics.[50] One such example occurred in 2019 when the U.S. Trade Representative initiated a Section 301 investigation of "France's proposed Digital Services Tax (DST), which would impose a 3% tax on total annual revenues generated by some companies from providing certain digital services to, or aimed at, French users."[51]

B. Yes, Virginia, digital services taxes imposed by other countries are creditable under Section 903[52]

The premise of this argument begins with the concept that the nexus approach is based on the same nexus approach found in Article 5 of tax treaties for permanent establishment and branch profits.[53]

---

[50] 4 E-COMMERCE & INTERNET LAW 33.04[1] (Supp. 2020).

[51] *Id.*; "See Council Directive 2002/38/EC of 7 May 2002 amending and amending temporarily Directive 77/388/EEC as regards the value added tax arrangements applicable to radio and television broadcasting services and certain electronically supplied services (Repealed), https://eur-lex.europa.eu/eli/dir/2002/38/oj." *Id.* at n.2.

[52] The concept from this title comes from the Ninth Circuit Court of Appeals, penned by Circuit Court Judge Kozinski, discussing the concept of negative basis in relation to Internal Revenue Code Section 357 involving transactions with assumption of liability:

> But skeptics say that negative basis, like Bigfoot, doesn't exist. *Compare* Easson v. Commissioner, 33 T.C. 963, 970, 1960 WL 1347 (1960) (there's no such thing as a negative basis) with Easson v. Commissioner, 294 F.2d 653, 657-58 (9th Cir.1961) (*yes, Virginia, there is a negative basis*). Basis normally operates as a cost recovery system: Depreciation deductions reduce basis, and when basis hits zero, the property cannot be depreciated farther. At a more basic level, it seems incongruous to attribute a negative value to a figure that normally represents one's investment in an asset. Some commentators nevertheless argue that when basis operates merely to measure potential gain (as it does here), allowing negative basis may be perfectly appropriate and consistent with the tax policy underlying nonrecognition transactions. *See, e.g.*, J. Clifton Fleming, Jr., *The Highly Avoidable Section 357(c): A Case Study in Traps for the Unwary and Some Positive Thoughts About Negative Basis*, 16 J. CORP. L. 1, 27-30 (1990). Whatever the merits of this debate, it seems that section 357(c) was enacted to eliminate the possibility of negative basis. *See* George Cooper, *Negative Basis*, 75 HARV. L. REV. 1352, 1360 (1962).

Peracchi v. Comm'r, 143 F.3d 487, 491 (9th Cir. 1998) (emphasis added).

[53] *See generally* Charles Lincoln, *The Myth of "Separate Enterprises" in International Taxation: Approaches to Attribution of Profits to Permanent Establishments*, 22 TRINITY L. REV. 30, 31 (2017) (discussing permanent establishments and a comparison of the OECD model and UN model tax treaties).

Syllogistically, (a) nexus creates a right for the source country to tax the profits of a permanent establishment or branch, and that right *usually* provides for a foreign tax credit. Moreover, (b) it follows that if an item of income is taxed under such a nexus approach, then (c) there should be a foreign tax credit attributable under section 903. In short, all (a) are (b), and all (b) are (c), then all (c) are (a). The major premise (a) is that nexus creates a right for taxation. The minor premise (b) that if a certain tax is imposed based off that theory of taxation, then other rights for credit (or exemption in other country cases) apply. In conclusion, (c) in the case of the United States, the corollary right is the right to have a credit in lieu of taxation.

IV. CONCLUSION AND THE FOURTH CATEGORY

In answering the main question of this article, what if digital services taxes imposed by other countries are not creditable under IRC 903, the basic paradigm implies that either a digital services tax is section 903 creditable in lieu of tax or it is not. The problem lies in the formulation: section 903 hypothecates that a tax will either be a traditional income tax creditable under section 901 or tax in the place of that tax. If it does not fall into this category, then it is an additional tax, and not one in place of that tax.

Is it possible that a digital services tax is neither a normal income tax nor a tax in lieu of traditional income tax? Such a digital services tax could still at the same time be a tax and not an additional tax—in some sense stepping out of the traditional categories discussed thus far. This would act as a fourth category that is neither the first, second, nor third categories just described, but carries their qualities at the same time. This is not to say it is a non-tax type of payment, but rather an "unknown known."[54] Slavoj Žižek, a Slovenian philosopher, wrote on how authority figures from Lacanian psychoanalytic perspective cannot acknowledge problems publicly known.[55] Žižek writes in *The Sublime Object of Ideology* that:

---

[54] Jameel Jaffer, *Known Unknowns*, HARV. C.R.-C.L. L. REV. 457, 461 n.34 (2013); "Žižek uses the phrase 'unknown knowns' to describe the government's open secrets, but it seems to me that 'known unknowns' better captures the phenomenon of information that is publicly known but not officially acknowledged." *Id.*

[55] Bruno Bosteels, *Force of Nonlaw: Alain Badiou's Theory of Justice*, 29 CARDOZO L. REV. 1905, 1919 (2008):

> there is always a residue, a leftover, a strain of traumatic irrationality and senseless sticking to it, and that this leftover, far from hindering the full submission of the subject to the ideological command, is the very condition of it: it is precisely this non-integrated surplus of senseless traumatism which confers on the Law its unconditional authority.[56]

In other words, there is a "leftover" irrationality to sticking to the paradigms that existed before.[57] Žižek suggests that this adherence to the paradigms that formerly existed is akin to an "ideological command" lacking rationality.[58] Referring to the Lacanian psychoanalytic idea of "surplus" (Jacques Lacan's notion that certain things irrationally give us pleasure—thus, it is enjoyable to follow ideology, at least according to Lacan), Žižek goes further to say that this ideological command" is what gives "law" its authority and forceful power.[59] Analogously, the strict adherence to the conventional system of digital services taxation three categories is almost akin to Žižek's critique of following an ideology in law. The lack of debate for a fourth category illustrates this ideological adherence for a fourth category. In this case, the problem of taxation is that it is neither in lieu of traditional income nor a non-tax that is in addition to income, but a new

---

> Zizek's creative synthesis of German idealism and Lacanian psychoanalysis enables the argument to be advanced that certain properties of an a subjective, heteronomous libidinal-material foundation (as the barred Real of human nature) function as fundamental conditions of possibility for the ontogenesis of subjective autonomy (as a transcendence of this same "natural" foundation). Not only would these two perspectives--the ontological and the eventual or the structural and the contingent--not be incompatible, but both of them would already be at work in Lacan's theory, even if to remember this today we may first have to learn a lesson or two from Zizek.

Id.

[56] *See* SLAVOJ ŽIŽEK, THE SUBLIME OBJECT OF IDEOLOGY (Cromwell Press Ltd. 1989).

[57] *Id.*

[58] Žižek suggests that people can "never know if the determinate content that accounts for the specificity of our acts is the right one, that is, if we have actually acted in accordance with the Law and have not been guided by some hidden pathological motives" meaning that it is almost impossible to act rationally because the law is unknown. Instead hidden "ideologies" or "pathological" motives guide human action.

[59] *Id.*

type of "tax" on levy or income. This is because it is neither a tax that will either be a traditional income tax creditable under section 901 or a tax in the place of that tax, making it not creditable. Therefore, this "tax" falls into a separate fourth category to analyze this new paradigm.[60] This is an idea for another article.

* * *

[60] Jaffer, *supra* note 54, at 461; *Cf.* Slavoj Žižek, *Ideology Between Fiction and Fantasy*, 16 CARDOZO L. REV. 1511, 1532 (1995).