Back to the 1930s? The Shaky Case for Exempting Dividends

Reuven S. Avi-Yonah
University of Michigan Law School, aviyonah@umich.edu

Available at: https://repository.law.umich.edu/articles/813

Follow this and additional works at: https://repository.law.umich.edu/articles
Part of the Securities Law Commons, Taxation-Federal Commons, and the Tax Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
BACK TO THE 1930s?
THE SHAKY CASE FOR EXEMPTING DIVIDENDS

By Reuven S. Avi-Yonah

In recent weeks, there has been a renewed push for an old idea from the first Bush administration: Enact an exemption for dividends. The details are unclear, except for the potential significant revenue loss (some $485 billion over 10 years).1 The rationale for exempting dividends now is to boost the economy or at least revive the sagging stock market. Neither of these reasons is persuasive as an argument for a major change of our corporate tax structure. In general, as recent studies of last year’s tax rebate have shown, it is very hard to boost the economy with tax cuts.2 In addition, most taxable dividends are paid to high-income individuals who are likely to save, not spend the added funds.3

As for the stock market, it is unclear that increasing the price of stocks is a legitimate ground for government intervention (Alan Greenspan, for one, does not seem to think so). But even if it were, economists disagree about whether the tax on dividends has any impact on the price of shares. A high percentage of corporate equity is held through pension plans and by other tax-exempt institutions that do not pay the tax on dividends. Many corporations, like Microsoft or Intel, do not pay dividends. Thus, it is doubtful that cutting the tax on dividends will have a significant impact on the stock market. And even if it did, current holders of the stock, wealthy individuals who bought the stock at a discounted price anticipating that they would be taxed on future dividends, would get an unjustified windfall.

However, there is a more serious case for exempting dividends, which is that exemption is a form of corporate/shareholder integration, similar to what the U.S. had
The rationale for exempting dividends now is to boost the economy or at least revive the sagging stock market. Neither of these reasons is persuasive as an argument for a major change of our corporate tax structure.

Or do they? The recent trend, in fact, has been to move away from integration. Integration has been cut back severely in Japan, Germany, and the U.K., and is being reconsidered in Italy and France. Other countries (for example, Singapore) have also recently restricted the scope of integration. Thus, it may still be true that most of our trading partners practice integration (as they have since the 1970s), but perhaps not for long.

What is the reason for this reversal? In a word, it is globalization — or more specifically here, the increasing levels of cross-border equity investments. Integration has generally not been applied to foreign shareholders (except sometimes in treaties, and except for a brief failed attempt by the Australians in the 1990s). As more and more investors are foreign, integration looks much less appealing to each country. In Europe, there is the added complication that the European Court of Justice is forcing countries to grant integration to investors from other European countries if they grant it to domestic shareholders, which is the major reason for the German and U.K. moves to change from full imputation to partial dividend exemption (rather than extend it to foreign investors).

Thus, this seems to be a good time to re-examine the case for corporate tax integration (via dividend exemption or other means). On a closer look, it turns out that in a globalizing world, this case is much shakier than is commonly thought. In what follows, I will first explain the traditional case for integration and its limitations. I will then examine the drawbacks of integration from an international perspective. Finally, I will make some alternative suggestions about what should be done if we do or do not adopt integration.

I. The Traditional Case for Integration

Historically, there have been three reasons advanced for countries to adopt corporate/shareholder integration, to overcome biases in the classical system:

1. Under the classical system, there is a bias to conduct business in noncorporate forms, since they are not subject to double taxation (although this is mitigated if the individual rate exceeds the corporate rate, since in corporate form the individual tax can be deferred).
2. Under the classical system, there is a bias to avoid dividend distributions and instead retain earnings, thus avoiding the double tax (this bias is exacerbated when the individual rate exceeds the corporate rate);
3. Under the classical system, there is a bias in favor of capitalizing corporations with debt (producing deductible interest) rather than equity (producing nondeductible dividends).

None of these reasons is completely convincing in the U.S. context, which may be a reason why the U.S. has maintained the classical system since 1936 (and indeed strengthened it in 1986 with the repeal of the General Utilities doctrine, which enabled corporations to avoid corporate tax on a distribution of appreciated assets). First, the alleged bias against the corporate form is mitigated by the excess of the individual rate over the corporate rate;
over the corporate rate (although that excess is much lower now than it was before 1986, and is scheduled to disappear) and by the absence of strong provisions to prevent retentions in the domestic context. The accumulated earnings tax and the personal holding company tax are both weak. In addition, under current rules, the classical system applies primarily to large, publicly traded corporations, while small, closely held businesses are able to avoid the double tax even if they are in corporate form for nontax purposes. It is doubtful if there is sufficient substitutability between the two forms of business for the double tax to create much deadweight loss from the bias toward noncorporate form. The double tax is a price large businesses have to pay for access to the public equity markets and the liquidity that accompanies that access. Finally, to the extent that the corporate tax can be shifted to consumers or to labor, the bias disappears, and even the Treasury’s 1991 integration study has suggested that considerable shifting can take place. (The bias reappears again if noncorporate businesses can likewise shift the individual tax burden, but it seems plausible that the shifting potential of large multinationals is larger than that of small, closely held businesses.)

Second, the bias in favor of retentions is mitigated by the ability of corporations to redeem shares from shareholders at the favorable capital gains rate, and by the fact that numerous shareholders are tax exempt or corporate (and thus do not pay a full tax on dividends). Indeed, even U.S. corporations that used to pay dividends have now generally moved to structured redemption programs addressed to their taxable individual shareholders. Other corporations (especially high-tech ones) retain all their earnings, but it is not clear that this is primarily tax motivated (corporations used to pay dividends under the same rules in the past). Finally, there is an unresolved debate among economists whether the dividend tax is capitalized into the price of the shares. If it is, then the retention bias applies only to new equity, but new equity is unlikely to pay dividends for nontax reasons. Third, the bias in favor of debt and against equity is a general problem of the income tax that should not be addressed only in the corporate tax area. Moreover, to address it completely it is necessary to make dividends not exempt, but rather deductible, a form of integration that is never adopted (in part because it would automatically extend integration to foreign and tax-exempt shareholders). If integration takes the normal forms of imputation or dividend exemption, there is still a difference in treatment between interest and dividends that can be manipulated.

II. The International Case Against Integration

Even if one accepts the validity of all the alleged biases generated by the classical system set out above, all of them need to be offset by the countervailing biases created by integration in the international context. Two situations need to be considered: when the source country is integrationist and the residence country classical, and when the source country is classical and the residence country integrationist. In the following, I assume the current U.S. (classical) regime; if dividend exemption were adopted here, one would need to switch the examples to treat the U.S. as the integrationist country.

A. U.S. as Residence Country

If a U.S.-resident portfolio investor invests in shares of a company of an integrationist country, the resulting bias depends on the form taken by integration. If the source country grants integration in the form of dividend exemption, the U.S. investor would not benefit since the U.S. would tax him on the dividend without allowing a foreign tax credit for underlying corporate taxes. A domestic investor in the source country would be subject only to the corporate tax, while the U.S.
Even if one accepts the validity of all the alleged biases generated by the classical system set out in this report, all of them need to be offset by the countervailing biases created by integration in the international context.

If the imputation credits are extended to U.S. investors, a different bias arises. In that case, both domestic source country and U.S. investors in a foreign corporation would be taxed the same by the source country, but the cost of imputation credits to U.S. investors would be borne by the source country, while any tax on the dividend would be collected by the U.S. From a U.S. perspective, moreover, there would be a bias in favor of investing in source-country corporations and against investing in U.S. corporations, since only dividends from the former would carry the imputation credits. Such a bias would not be eliminated by the U.S. taxing the dividends in full, since the investor would still receive an imputation credit check from the source country not available for her U.S. investment.

B. U.S. as Source Country

If the foreign residence country grants integration by way of dividend exemption, presumably the exemption would apply to dividends from U.S. as well as from domestic corporations. In that case, a bias is created in favor of foreign investors in U.S. companies, since they would be exempt from tax on the dividend (unless a U.S. withholding tax applies, but those taxes are generally reduced by treaty or avoided by other devices). By contrast, a U.S. domestic investor would be taxable on the dividends in full.

If the foreign country grants integration by way of imputation credits, there will be no credits available for a foreign investor who invests directly in a U.S. company. In that case, there will be a bias in favor of the foreigner investing in her own country’s domestic corporations. This bias may be partially eliminated if credit is given for U.S. taxes to a domestic portfolio investor in a domestic company with U.S.-source income. But, similar to the case of a dividend exemption, that would create a bias in favor of foreign investors in such companies over U.S. investors in a domestic U.S. corporation.

III. Conclusion and Recommendation

In general, there seems to be no reason to assume that the biases created by integration from an international perspective are less important than the biases created by the classical system from a domestic perspective. In fact, the former may be gaining in importance as cross-border investment grows, while (as discussed above) there are reasons to doubt the importance of the latter. This is the reason why many countries (for example, Japan, Germany, and the U.K.) have recently been restricting integration. If the whole world reverted to the classical system, the international biases would be eliminated.

Nevertheless, in the foreseeable future, some countries will continue to grant integration while others are likely to maintain a classical system. In that situation, it is necessary to make a choice between the international biases described above, which is similar to the choice between capital import neutrality (treating all investors in the source country alike) and capital export neutrality (treating all investment opportunities to a resident investor alike). Since most of the empirical evidence continues to suggest that the elasticity of the demand for capital is greater than the elasticity of the supply of capital, most economists would support a continued preference for capital export neutrality (neutrality in the allocation of investments) over capital import neutrality (neutrality in the allocation of savings).

If one prefers capital export neutrality, this suggests that integrationist source countries should not extend integration benefits to foreign investors (since that would violate CEN while maintaining CIN). This is consistent with current practice. When the integrationist country is the residence country, integration benefits should be extended to investments in classical source countries. This can be done by granting integration credits for taxes paid to the source country, either through a domestic corporation (which is common) or even through a foreign corporation (less common but possible — it is equivalent to granting the indirect foreign tax credit to portfolio U.S. investors, which would raise many difficult administrative issues). A simpler solution, however, is to exempt dividends from both domestic and foreign corporations.

The biases may also be eliminated if all countries adopted integration in similar ways. However, under current imputation systems, domestic investment in local companies is generally favored and inbound and outbound investment discouraged (although ordering rules for distributions may mitigate this bias). This situation may persist even if all countries adopted integration. In addition, the current trend seems to be toward abandoning integration rather than adopting it.
This would still leave a possible bias in the form of a dividend withholding tax imposed by the source country (plus a branch profits tax if the investment is through a foreign corporation), but in the case of the U.S., portfolio investors can usually avoid the dividend withholding tax.

Thus, if the U.S. were to adopt integration, I would recommend dividend exemption as the chosen method, as long as dividends from both domestic and foreign corporations are exempt. This would preserve CEN as far as the U.S. is concerned, but there will still be a bias in favor of investing in domestic corporations to the extent foreign source countries levy a withholding tax on dividends. In addition, foreign investors in U.S. corporations would be disadvantaged compared to U.S. investors, either because of U.S. withholding taxes on dividends (which the U.S. can and should abolish) or because their country of residence taxes dividends (which the U.S. can do nothing about).

However, the best solution from a U.S. perspective to the above biases is to maintain the current classical system, as the case against it is shaky. A temporary recession and stock market downturn is no reason to abandon our long-standing method of taxing corporations and shareholders.

22In that case, we should consider abolishing the withholding tax on dividends (and the branch profits tax) so as to do our part to reduce the bias against investors from integrationist countries.