BUYING IN: RESIDENCE AND CITIZENSHIP BY INVESTMENT

ALLISON CHRISTIANS*

INTRODUCTION

Italy recently announced a new immigration program that invites certain high net worth individuals to make Italy their country of residence, enticing them with the right to pay a "substitute tax" of €100,000 per year on their foreign income and gains.migrants have significant foreign income and gains that would otherwise face the highest marginal rates of tax, the new program's outcome would seem to ensure that prior residents face a significantly higher overall tax bracket than their new neighbours (unless of course, such individuals use other mechanisms and programs, whether in Italy or elsewhere, to also reduce their own tax rates).

Why would Italy design a tax scheme that appears to privilege certain immigrants over its other taxpayers in this manner? In reporting on the program for Forbes, journalist David Schrieberg stated that "[s]ome observers speculate that the new tax regime is aimed particularly at super-rich individuals

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

considering a Brexit-induced change of residence."[3] Schrieberg further acknowledged that Italy is not innovative in this respect: "Various countries including Portugal, Malta, Cyprus and Ireland have been chasing high net worth individuals with various incentives."[4] In fact, much of the world is engaged in an intense competition to make wealthy individuals their own tax residents, luring them away from rival countries.[5]

International law and political theory scholars have long wrestled with the normative implications of commodifying citizenship and access to immigration with pay-to-play visa programs, but the analysis does not typically consider the role the tax system plays or could play in valuing these schemes, nor how such schemes might impact the tax regime in terms of gross revenue or distributional effect.[6] Yet governments increasingly appear to view their tax systems as a means of potentially increasing the value of residence and citizenship in their countries. The decision to define nationality to fulfill strategic aims may be viewed as consistent with the principle in international law that states are free to define their nationality as they see fit, and that other states should recognize these determinations unless they conflict with other international legal principles.[7]

Given the cost involved in forfeiting revenue from those arguably most able to pay, whether the programs actually produce the predicted outcomes, is one

3. David Schrieberg, *Italy Joins the European Race to Attract Wealthy Foreigners*, FORBES (Mar. 9, 2017, 4:33 PM), https://www.forbes.com/sites/davidschrieberg1/2017/03/09/italy-joins-the-european-race-to-attract-wealthy-foreigners/#61a8614361e4 [https://perma.cc/PS8L-HJ4B].

4. *Id.*

5. *See* DAVID LEY, MILLIONAIRE MIGRANTS: TRANS-PACIFIC LIFE LINES 9 (2010) ("Some 30 nations around the world have business immigration programmD 6 >>BDC2 8.52 -0 0 8.0 0 8( )]TJ6S7(es)-12.nd7(nes)-12(r)-12(gt)-10.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

stash of "offshore cash" held by some of the world's largest, most visible, and, presumably, most profitable companies was the catalyst for the ongoing multilateral initiative to curb tax competition, known by its now-famous acronym of BEPS, for "base erosion and profit shifting."[10] With all eyes focused on the kinds of tax rules that allow companies to shift their profits for tax purposes, often without changing much or anything by way of "real" business locations or operations, the program to counter BEPS, if successful, will shift countries away from tax incentives that reward paper profit shifting in favour of tax incentives that will reward shifting of other activities and operations.[11]

Shifting activities and operations will mean shifting people as well, including entrepreneurs, managers, highly skilled workers, and other key personnel. Tax incentives for favoured immigrants are but one aspect of this brave new world of tax competition. Yet these incentives, and the implications for countries that do not have the means to compete effectively or protect themselves against such competition, appear to be completely off the agenda for the countries currently focused on BEPS.[12]

As Italy's new program implies, nations stand to gain from luring the wealthy in hopes that their fortunes will follow. Ultimately, the rich migrant population might be expected to become part of the tax base when the incentive expires, generating spillover effects in the meantime.[13] In a world of increasing

Latvia	Investor - Equity Capital Investment	$40,288
Macedonia	Residence	$43,460
Costa Rica	Investor Visa	$60,000
United Kingdom	Tier 1 Entrepreneur	$62,525
Ukraine	Investor Visa	$108,650
Colombia	Colombia Investor Visa	$134,444
Jersey	High Value Residency	$135,813
Canada (Quebec)	Entrepreneur Program	$147,580
Cayman Islands	Residency for persons of independent means (Cayman Brac or Little Cayman)	$152,439

Italy's program (and that of similar programs, such as those in the United Kingdom and Portugal) offers a reduced tax rate on specified income relative to

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

Vanuatu	Honorary Citizenship under the Vanuatu Economic Rehabilitation Program	2015	b7(739 re 6 Tc30]TJ43r.[u)]TJ 6u

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

explicitly state tax evasion as a goal, but many advertise investor residence and citizenship programs as means to achieve legal tax avoidance via a change in tax residence.[34]

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

departed before terminating their tax status, sometimes because departure is often akin to death for tax purposes, as assets may be deemed disposed, giving rise to phantom income.[44] For example, Finland treats nonresident citizens as tax residents for three years after they emigrate unless they demonstrate that they no longer have any ties to Finland.[45] Similarly, Hungary treats nonresident citizens as permanent tax residents of Hungary, unless they also have another nationality or reside in a country that has a tax treaty with Hungary.[46]

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

attribution, look-through, and anti-abuse rules designed for the most sophisticated taxpayers,[55] and has proven to be virtually immune to compliance by persons of modest means living permanently in other countries.[56]

Persons with U.S. citizenship are therefore significantly less able to take advantage of foreign immigration incentive programs, owing to the unique inclusion of all citizens as permanent tax residents of the United States regardless of whether they have any personal or economic ties to the jurisdiction or even speak the language.[57] However, two features of the U.S. tax system potentially provide incentives for U.S. citizens to relocate abroad.

First, the foreign earned income exclusion might make it worthwhile for certain moderately wealthy U.S. citizens to relocate abroad so long as they engage in strict planning with respect to their financial investments and generally keep most of their passive investments and any business operations exclusively within the United States, and earning mostly or only employment income abroad.[58] Second, relocation to Puerto Rico could be a means to lower

55. For a survey, see generally ALLISON CHRISTIANS, SAMUEL A. DONALDSON & PHILIP F.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

of family and other human relationships, the old observations about tax competition apply equally whether the targeted activity involves paper profit shifting or physical relocation of people and investments: an incentive is only as good as its latest competition.[69] There was a time when the U.S. statutory corporate tax rate was average or even low by world standards; tax competition has lowered the rates across the OECD and has made the U.S. system appear uncompetitive.

SAINT LOUIS UNIVERSITY SCHOOL OF LAW

SAINT LOUIS UNIVERSITY SCHOOL OF LAW