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HOME-COUNTRY EFFECTS OF CORPORATE INVERSIONS

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Abstract: This article develops a framework for the study of the unique effects of corporate inversions (meaning, a change in corporate-residence for tax purposes) in the jurisdictions from which corporations invert ("home jurisdictions"). Currently, empirical literature on corporate inversions overstates its policy implications. It is frequently argued that in response to an uncompetitive tax environment, corporations may relocate their headquarters for tax purposes, which, in turn, may result in the loss positive economic attributes in the home jurisdiction (such as capital expenditures, R&D activity, and high-quality jobs). The association of tax-residence relocation with the dislocation of meaningful economic attributes, however, is not empirically-supported and is theoretically-tenuous. The article uses case studies to fill this gap. Based on observed factors, the article develops grounded propositions that may describe the meaningful effects of inversions in home jurisdictions. Such propositions may guide future empirical research aimed at identifying the meaningful effects of inversions. The case studies suggest that whether tax-relocation is associated with the dislocation of meaningful economic attributes in home-jurisdictions is a highly contextualized question. It seems, however, that inversions are more likely to be associated with dislocation of meaningful attributes when *non*-tax factors support the decision to invert.

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INTRODUCTION

Much of the international tax reform discourse in the United States is grounded in two truths:[1] First, multinational corporations (MNCs) locational decisions are sensitive to home-country tax burdens.[2] High taxes in an MNC's home jurisdiction may induce the MNC to relocate its tax-residence to a low-tax jurisdiction.[3] Second, having an MNC headquartered within a jurisdiction has positive effects on the local economy, in the form of increased capital expenditures, research and development (R&D)

[1] See, Part I *infra* for a description of U.S. tax policy discourse in this context.

[2] Michael P. Devereux, *The Impact of Taxation on the Location of Capital, Firms and Profit: A Survey of Empirical Evidence*, Oxford University Centre for Business Taxation Working Paper 0702, 41 (2007). ("It is clear from this accumulated evidence that taxation does play a role in affecting the choices made by multinational companies").

[3] *See, e.g.*, Johannes Voget, *Relocation of Headquarters and International Taxation*, 95 J. PUB. ECONS. 2011 (finding that additional home country tax due upon repatriation of foreign earnings has a positive effect on the probability of corporate migration); Tomi Laamanen, Tatu Simula & Sami Torstila, *Cross-Border Relocations of Headquarters in Europe*, 43 J. OF INT'L BUS. STUDS. 187 (2012) (finding that high home country taxes increase the likelihood of corporate headquarters relocation).

activities, and high-quality jobs.[4]

The combination of these two truths has led to a policy-argument according to which U.S. tax-law should not target corporate headquarters' locations. Taxing an MNC based on the location of its headquarters raises a concern that "management … would flee to other countries",[5] resulting in the loss of both the corporate tax-base as well as the positive externalities associated with having the headquarters located within the United States.[6] This article suggests, however, that this argument may be overstated for two reasons.

First, there is no reason to assume that the place of tax-residence is also the place of the economic attributes that policymakers care about. It is well established that the meaningful functions of the modern MNCs are decentralized.[7] Different substantive attributes of a corporation may be located in different jurisdictions, which are not necessarily the jurisdiction of the MNCs' tax residence. Tax residence can be changed with no need to dislocate any meaningful structures in the jurisdiction from which an MNC inverts. Conversely, economic attributes of an MNC can be shifted across borders with no corresponding change to the tax-residence. A change of an MNC's tax-residence ("inversion") and a dislocation of economic attributes in the jurisdiction from which the MNC inverts are two distinct phenomena.

Second, even if tax is imposed based on the location of meaningful economic attributes (for example, by determining tax-residence based on the place of management), there is no reason to assume that MNCs will necessarily dislocate such attributes in order to change their tax-residence. Literature in organizational-studies suggests that meaningful corporate functions are likely to be located in jurisdictions that offer substantive advantages, such as developed financial markets, skilled labor force, infrastructure and other agglomeration benefits.[8] The dislocation of real

[4] For a summary of such possible positive effects see, Kimberly A. Clausing, *Should Tax Policy Target Multinational Firm Headquarters?*, 63 NAT'L TAX. J. 741, 744-747 (2010).

[5] *Tax Reform Options: International Issues: Hearing Before the S. Comm. on Fin.*, 112th Cong. 15 (2011) [hereinafter: Tax Reform Options] (statement by James T. Hines Jr., Collegiate Professor of Law, University of Michigan Law School); Tax Reform Options, at 9 (statement of Scott Naatjes, Vice President and General Tax Counsel, Cargill Inc.) (Taxing corporations based on their place of management would "put at risk highly mobile headquarters job and all economic benefits they create to our nation.").

[6] Hines, *id.*, at 47-48 (Taxing corporations based on the place of management "discourages firms from locating management activities in a country that uses such standard , which is not sensible if management activities are thought to be desirable").

[7] *See*, discussion in part II.B.1 *infra*.

[8] *See*, Julian Birkinshaw et. al, *Why Do Some Multinational Corporations Relocate Their Headquarters Overseas?*, 27 STRAT. MGMT. J. 681, 682 (2006). ("There are well established theories of agglomeration in the literature, and it is now accepted that proximity

attributes is costly, and may also result in the loss of agglomeration benefits. If the dislocation of real economic attributes is necessary in order to "lose" tax residence, tax-savings may not justify the cost of such dislocation.

A possible reason for the lack of coherence in policy implications of inversions literature is that it lacks testable theoretical constructs. Public finance economists have for long studied the effects of taxation on locational decisions.[9] However, there is no theoretical framework that explains what *substantive* dislocations may specifically be associated with inversion transactions. This article aims to fill such gap by executing a Grounded Theory research,[10] in order to develop theoretical propositions based on observed dislocations in the context of inversion transactions. Several case studies of large-scale inversions are examined in order to articulate—in policy-relevant terms—the possible *meaningful* economic effects in the jurisdiction from which a corporation inverts.

The article finds that inversions that are driven exclusively by tax-considerations are less likely to be associated with dislocation of real economic attributes, compared with inversions that are supported by non-tax business reasons. These findings are consistent with literature in organizational-studies.[11]

The policy discussion on the implications of inversions gained urgency recently, with the advent of a wave of corporate expirations[12] from the United States to other jurisdictions. Over the past five years multiple U.S.-based MNCs have changed their tax-residence,[13] moving out of the U.S. to jurisdictions such as the UK, Ireland and Switzerland.[14] Some have suggested that in order to prevent inversions, the U.S. must adopt a more competitive tax-system, eliminating the incentives to invert.[15] Others have suggested that the United States should enforce stricter locational tax rules. Currently, the U.S. determines the tax-residence of corporations based of

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to specialized labor, complementary suppliers and customers, and access to knowledge spillovers are all important benefits to the firm").

[9] For a detailed summary of this voluminous literature see, Devereux, *supra* note 2.

[10] Such approach is well established in social sciences. *See*, discussion in Part III.A. *infra*.

[11] *Supra* note 8.

[12] *See*, DONALD J. MARPLES & JANE G. GRAVELLE, CONGRESSIONAL RESEARCH SERV., CORPORATE EXPATRIATIONS, INVERSIONS, AND MERGERS: TAX ISSUES 5-7 (2014) (describing the recent inversions phenomenon).

[13] For a summary of recent inversion transactions see, Martin A. Sullivan, *Lessons from the Last War on Inversions*, 142 TAX NOTES 861, 866 (2014).

[14] *Id*., at 5 ("these types of inversions generally target countries such as Ireland, Switzerland, and, more recently, the UK").

[15] *See*, *infra* notes 32-34 and accompanying discussion.

the place of incorporation.[16] This test enables U.S. MNCs to invert without any significant dislocation in the U.S. It has therefore been suggested to tax corporations based on substantive factors, such as the place of management, or the place of assets, sales and employees.[17] Taxing corporations based on substantive factors will make it harder to escape U.S. taxing jurisdiction. Then again, such proposals are fiercely resisted. The resistance stems from the argument that taxing U.S. MNCs based on the location of substantive attributes, creates an incentive to dislocate such attributes out of the United States in order to "lose" tax residence (rather than to simply incorporate some place else while maintaining the meaningful attributes in the U.S.).[18]

The case studies explored in this article suggest that the dislocation of meaningful attributes in the context of inversion transactions is a highly contextualized issue, and that the fear of substantive dislocations is not always warranted. Further research is needed before the debate can be settled, and the article outlines a path for such future research. This article is structured as follows: Part I briefly outlines some of the current policy considerations and legislative proposals aimed at dealing with the problem of corporate inversions. Part II surveys current literature on MNCs tax-residence locational decisions, and explains the limitations of such literature for tax-policy making. Part III is the core of this Article. It explains why a case-study approach may overcome some of the limitations of empirical research. It then executes a case-study analysis of five events in which MNCs relocated their residence for tax purposes. Part IV analyzes the case studies surveyed, and identifies observed constructs that warrant further research. The article concludes with a summary of its limitations and caveats, and a call for a more nuanced empirical approach in the study of the meaningful effects of corporate inversions.

I. BACKGROUND: CORPORATE INVERSIONS AND THE TAX RESIDENCE DEBATE

The purpose of this part is to briefly describe the phenomenon of corporate inversions, and explain why inversions are a focal point of tax-policy making. Some of the proposals put forward in order to deal with the inversions problem are also described.

A. The Two Waves of Corporate Inversions

During the late 1990s through the early 2000s the United States experienced a wave of transactions by which U.S. based multinational corporate-groups restructured themselves as a multinational groups controlled by parents incorporated in tax-havens.[19] The change of place of

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[16] I.R.C. § 7701 (2006).
[17] *See*, *infra* notes 39-41 and accompanying discussion.
[18] *See*, *supra* note 5-6 and accompanying discussion.
[19] MARPLES & GRAVELLE, *supra* note 12, at 3-4.

incorporation was the only effect of such restructurings. No shift of economic activity from the U.S. to the new jurisdiction followed.[20] This period of inversions is sometime described as the "first wave" of corporate inversions.[21]

These transactions, known as "naked inversions", were completely tax-driven. They were made easily possible because, for tax-purposes, the United States determines the residence of corporations based on the place-of-incorporation (POI).[22] Thus, reincorporation as a foreign corporation makes an MNC "foreign" for federal income tax purposes. Such transactions were perceived abusive (and even "unpatriotic")[23], as the MNCs involved where able to avoid U.S. taxing jurisdiction with absolutely no dislocation of their U.S. operations. Congress responded with the enactment of section 7874 of the internal Revenue Code in 2004.[24]

Section 7874 prevents naked inversions by treating an inverted corporation as "domestic" for tax purposes (notwithstanding its foreign incorporation) if it is 80% owned by shareholders of the former parent.[25] If the inverted corporation is 60% owned by shareholders of the former parent, then the corporation is unfavorably taxed in the U.S. for a period of ten years on certain gains from the disposition of assets. Such tax may or may not affect the decision to invert, depending on the particular status of the inverting corporation. For example, if less than 80 percent (but more than 60 percent) of the inverted corporation shareholders were shareholders of the old corporation, there is no disincentive in inverting as long as the disposition of the inverting corporation's assets is not expected to generate gains. In such a case no corporate-tax liability is expected as a result of the inversion.

In order to allow inversions that are not driven by tax-avoidance (but rather by real business considerations), an exception has been added to the anti-inversion rules of Section 7874. The exception applies if the inverted corporation has "substantial business activity" in the jurisdiction to which it inverted. In such a case, Section 7874 is made inapplicable. Section 7874

[20] *Id*. at 4.

[21] Zachary R. Mider, *Medtronic is Biggest Yet to Renounce U.S. Tax Citizenship*, Bloomberg (Jun. 16, 2014; 1:01 PM) http://www.bloomberg.com/news/2014-06-16/medtronic-is-biggest-firm-yet-to-renounce-u-s-tax-status.html (describing the late 1990s to the early 2000s period as "the first wave of corporate inversions").

[22] I.R.C. § 7701 (2006).

[23] Hale E. Sheppard, *Flight or Fight of U.S.-Based Multinational Business: Analyzing the Causes for, Effects of, and Solutions to the Corporate Inversion Trend*, 23 Nw. J. Int'l L. & Bus. 551, 558 (2003) (describing how corporate inversions were perceived by media and policy makes in the early 2000s).

[24] American Jobs Creation Act of 2004, Pub. L. No. 108-357, 118 Stat. 1418 (2004).

[25] I.R.C. § 7874 (2006).

was largely successful at shutting-down naked inversions.[26]

As evident from its construction, Section 7874 leaves two avenues open for an inversion transaction. First, an inverting U.S. corporation may merge with a smaller foreign-incorporated corporation, creating a foreign-incorporated entity which is less than 80 percent owned by owners of the former corporation, thus avoiding the 80-percent ownership threshold. In the alternative, it is possible for a U.S.-based MNC to merge with, or purchase a smaller foreign corporation with some activity in the foreign jurisdiction—making the foreign corporation the parent—thus qualifying for the "substantial business activity" exception. Under current regulatory guidance, the "substantial business activity" exception is met if 25 percent of the employees, assets, and sales of the combined entity are located in the new jurisdiction.[27]

U.S.-based MNCs have identified these opportunities to avoid U.S. tax jurisdiction. Over the past several years multiple U.S. MNCs have purchased or merged with smaller foreign corporations—incorporated in places like the UK, Ireland or Switzerland—in order to change their tax-residence. Some of the most conspicuous examples include Perrigo, the U.S. drug-maker, which acquired Irish biotech corporation Elan in a $8.6 billion deal;[28] Medtronic, the U.S. medical devices maker, merging with the Irish-based Covidien (which itself inverted in 2008) in a $42.9 billion deal;[29] and, the failed attempt by Pfizer, the giant U.S. pharmaceuticals corporation, to acquire the UK-based pharmaceutical company AstraZenca in a $118 billion (!) hostile takeover.[30] This renewed corporate expatriation activity has been dubbed the "second wave" of corporate expatriations.[31]

B. Current Policy Discussion on Corporate Inversions

Many have suggested that in order to deal with the problem of inversions the United States should adopt a more "competitive" tax system. Most prominently it has been suggested the U.S. should abandon its system

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[26] MARPLES & GRAVELLE, *supra* note 12, at 5 ("[t]he 2004 Act largely eliminated the generic naked inversions").

[27] 26 C.F.R. §1.7874-3T (2014).

[28] Jonathan D. Rockoff, *Perrigo to Buy Elan for $8.6 Billion; Deal for Irish Biotech Firm Provides a Path to Lower Taxes*, the Wall Street Journal (Jul. 29, 2013; 4:07 PM) http://online.wsj.com/news/articles/SB10001424127887324354704578634652886726058.

[29] Catherine Boyle, *Medtronic $43B Covidien Deal-and Irish Tax Move*, CNBC (Jun. 16, 2014; 8:25 AM) http://www.cnbc.com/id/101760661.

[30] Ben Hirschler & Bill Berkort, *Pfizer Walks Away from $118 Billion AstraZeneca Takeover Fight*, Reuters (May 26, 2014; 11:55 AM) http://www.reuters.com/article/2014/05/26/us-astrazeneca-pfizer-idUSBREA3R0H520140526.

[31] MARPLES & GRAVELLE, *supra* note 12, at 1-2.

of worldwide taxation. Under the U.S. "worldwide" tax system, corporate taxes are imposed on worldwide income of domestic corporations (though foreign-sourced business-income is only taxed when repatriated). This is in stark contrast to most other industrialized jurisdictions, which have in place some form of a "territorial" system, by which only profits from within the jurisdiction are taxed while profits from foreign sources are exempt. Because U.S. MNCs are taxed on repatriated profits while foreign competitors are not, it is argued that the U.S. tax system is "uncompetitive".[32] This problem is exacerbated by the fact that the United States has one of the highest corporate tax rates in the world.[33] Adopting a territorial system and reducing the U.S. corporate tax rates would put the U.S. at par with its trading partners, thus eliminating the incentive to invert.[34]

Such proposed solution is tenuous, however. Notwithstanding the fact that the U.S. indeed has one of the highest nominal corporate tax rates in the world (currently 35%), it is contested that U.S. MNCs face higher effective tax burden compared to their foreign counterparts.[35] Moreover, while self-help territorial system may be an incentive for inversion,[36] it is unlikely to be the only significant one. As many commentators have noted, myriad loopholes in current U.S. tax law make the U.S. functionally similar to a territorial jurisdiction.[37] Therefore, the benefit of territoriality cannot account for the full spectrum of inversion incentives. Rather, it has been convincingly argued that another major incentive for inversions stems from the fact that under U.S. tax law, "foreign" MNCs are better positioned to reduce the tax bill on their *U.S. source* income when compared with "domestic" MNCs.[38] If this is true, the adoption of a territorial system is of

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[32] For a summary of the policy debate about the adoption of territorial system in the United States and competitiveness arguments in this regard, see Omri Marian, *Meaningless Comparisons: Corporate Tax Reform Discourse in the United States*, 32 VA. TAX. REV. 133, 163-167 (2012).

[33] For a summary of the policy debate about corporate tax rates in United States and competitiveness arguments in this regard, see Marian, *id.*, at 152-161.

[34] MARPLES & GRAVELLE, *supra* note 12, at 9.

[35] *Marian, Meaningless Comparisons*, *supra* note 32, at 158 (describing studies that contest the argument according to which U.S. tax rates are uncompetitive).

[36] By inverting, corporations are able to access offshore profits, thus avoiding tax on repatriation.

[37] *See*, *e.g.*, Edward D. Kleinbard, *Stateless Income*, 11 FLA. TAX. REV. 699, 700 (Concluding that the U.S. tax system is an "ersatz variant on territorial systems." 2010; Trio worse than exemption); J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, *Worse Than Exemption*, 59 EMORY L. J. 79 (2009) (describing the U.S. international tax system and suggesting that foreign-source income of U.S. MNCs is even more generously treated than foreign-source income under territorial taxation principles).

[38] Bret Wells, *What Corporate Inversions Teach About International Tax Reform*, 127

little help, since under such a system the U.S. will continue to tax income earned in the United States.

For this reason, some have brought forward proposals to deal with inversions by making it harder for inverting corporations to avoid taxation on income that is substantively generated in the United States.[39] Others suggested reforming the way by which the United States determines MNCs' residence for tax purposes.[40] Specifically, many proposals suggest applying a "Real Seat" test that considers substantive factors in determining residence, instead of the formal place-of-incorporation (POI) test currently adopted. MNCs can easily change their POI, but it might prove more difficult to change the location of substantive attributes. The most common proposal has been to implement a residence test based on the central management and control (CMC),[41] which is adopted by multiple industrialized jurisdictions.[42] Such proposals have met with criticism. The criticism is grounded in the argument that under a Real Seat system of tax-residence determination, corporations would not be able to invert solely by changing their POI, and would be induced to move real activities out of the U.S. in order to "lose" their U.S. tax-residence.[43]

To summarize, inversions are achieved through a change of tax-

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TAX NOTES 1345 (2010) (Studying several case studies of corporate inversions in order to unravel the motives for inversions, and concluding at 1367 that "[t]he corporate inversion phenomenon provides clear and noncontroversial evidence that foreign-owned firms are tax preferred whether they are competing against U.S.-owned multinational corporations in the U.S. domestic economy or in foreign markets); Mihir A. Desai & James R. Hines, *Expectations and Expatriations: Tracing the Cause and Consequences of Corporate Inversions*, 55 NAT'L TAX JOURNAL 409 (2002) (finding, among others, that market participants expect that an inversion transaction will result in reduction of tax liabilities on U.S. source income).

[39] For a summary of such proposals, see Bret Wells, *Corporate Inversions and Whack-a-Mole Tax Policy*, 143 TAX NOTES 1429, 1433-1434 (2014).

[40] *See, e.g.*, Stop Tax Haven Abuse Act, S. 1346, 112th Cong. § 103 (2011). Under the Act, a publicly traded corporation managed "directly or indirectly, primarily within the United States . . . shall be treated as a domestic corporation." Id. Additional bills suggest similar. See, *e.g.*, Cut Unjustified Tax Loopholes Act, S. 268, 113th Cong. § 103 (2013); Cut Unjustified Tax Loopholes Act, S. 2075, 113th Cong. § 103(2012); International Tax Competitiveness Act of 2011, H.R. 62, 112th Cong. § 2 (2011).

[41] For such proposals see, *e.g.*, STAFF OF THE JOINT COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 178-181 (Comm. Print 2005) (proposing the adoption of a CMC test); Edward D. Kleinbard, *The Lessons of Stateless Income*, 65 Tax L. Rev. 99, 160 (2011) (suggesting to adopt a "mind and management" residence test); Tax Reform Options, *supra* note 5, at 29–37 (statement of Reuven S. Avi-Yonah, Professor, University of Michigan Law School).

[42] *See*, Omri Marian, *Jurisdiction to Tax Corporations*, 53 B.C. L. Rev. 1613, 1625-1626 (discussing the widespread adoption of the CMC and similar residence tests in industrialized jurisdictions).

[43] *See, e.g.*, sources cited in *supra* note 5-7.

residence. When changing tax-residence is strictly formal (such as reincorporation), it is not expected that anything will be lost in the home jurisdiction other than the tax base. Suggestions to prevent inversions by imposing rules of substance to determine tax-residence are met with criticism, since such rules may induce inverting MNCs to dislocate the factors based on which tax-residence is determined (such as the place of management). The next part discusses the empirical literature supporting such criticism, and identifies its shortcomings.

II. TAXATION AND THE LOCATION OF CORPORATE HEADQUARTERS

This part explains the empirical literature that purports to supports the policy argument according to which inversions may be associated with the dislocation of meaningful attributes in the home jurisdiction. Drawing on research in organizational studies, this part explains how inversion literature overstates it policy implication.

A. Empirical Literature on Corporate Inversions and its Claimed Policy Implications

There are several benefits in having a corporate headquarters located within a jurisdiction.[44] For example, the national pride associated with having a well-known corporation headquartered within a jurisdiction may produce certain political benefits.[45] In addition, a firm's headquarters may bring with it job creation and capital expenditure, resulting in positive economic effects in the jurisdiction in which the headquarters operate.[46] Headquarters are also likely "to generate learning and innovation, since research, development, and entrepreneurial activities"[47] happen within corporate headquarters. Such activities are likely to be associated high-quality, high-paying jobs.[48] Moreover, some studies find that in multinational groups, headquarters locations are more profitable than other locations,[49] suggesting that "multinational headquarters will generate larger profits, higher wages and labor rents, and greater tax payments."[50] It is

[44] Clausing, *supra* note 4, at 744-747 (describing the benefits of having MNC headquarters located within a jurisdiction).

[45] *Id*., at 744.

[46] *Id*.

[47] *Id*.

[48] *Id*.

[49] Matthias Dischinger, Bodo Knoll & Nadine Riedel, *There is No Place Like Home: The Profitability Gap Between Headquarters and their Foreign Subsidiaries*, 23 J. OF ECONS. & MGMT. START. 269 (2014) (Finding empirical evidence that evidence that an overproportional part of multinational group profits accrues with the corporate headquarters).

[50] Clausing, *supra* note 4, at 745.

therefore obvious that incentives and disincentives for MNC headquarters locational decisions are policy-relevant questions.

Several empirical studies examined how taxes affect the decision of MNCs to locate their headquarters in one jurisdiction or another. One recent paper by Johannes Voget questions "to what extent … observed relocations [of MNCs' headquarters] exhibit a tax avoidance motive."[51] Comparing large sample of MNCs that have inverted with MNCs that did not, Voget finds that home country tax on profits repatriated from foreign jurisdictions increase the likelihood that MNCs would relocate their headquarters. He also finds that headquarters relocation is more likely if subsidiaries of an MNC residing in a worldwide jurisdiction are subject to low taxes in their respective jurisdictions.[52] Voget concludes with a policy implication according to which "countries have an incentive to present themselves as attractive locations for headquarters if hosting headquarters has certain positive externalities like an increased demand for skilled labor, a larger tax base, or even a better representation of the country's interest in the decision making of the multinational firm." [53] Therefore, according to Voget, countries should not impose taxes on repatriated profits.

In another paper, Huizinga and Voget study the impact of taxes on MNC structure following international mergers and acquisition.[54] They test cross-border M&As involving two countries, constructing two hypothetical tax rates for a post-merger structure, depending on whether the post-merger parent firm is located in one jurisdiction or the other. They find taxes to have a significant impact on the decision of where to locate the parent, with "[c]ountries that impose high levels of international double taxation are less likely to attract the parent companies of newly created multinational firms."[55] They suggest that such a result has important policy implications since "the international organization of the firm implies cross-border relationships of ownership and control that are bound to affect the internal operation of the firm and the dealings of the firm with the affected national economies, for instance, in the form of employment."[56] A similar study by Barrios et. al, finds that MNCs' decisions where to locate new subsidiaries is negatively affected by MNCs' home-country taxes.[57]

Finally, Laaman, Simula and Torstila analyze a data-set of 52 cross-

[51] Voget, *supra* note 3, at 1067.
[52] *Id*. 1079
[53] *Id*. 1079
[54] Harry P. Huizinga & Johannes Voget, *International Taxation and the Direction and Volume of Cross-Border M&A*, 64 J. OF FIN. 1217 (2009).
[55] *Id.* at 1244
[56] *Id*.
[57] Salvador Barrios et. al., *International Taxation and Multinational Firm Location Decisions*, 96 J. OF PUB. ECONS. 946 (2012).

border headquarters relocations in Europe.[58] They suggest that inquiry into the factors that drive headquarters relocations has important policy implications, since corporate headquarters create "different kinds of spillover effects to the national economy they are part of."[59] They find that corporate-taxation plays an important role in locational decisions of multinationals. Specifically, they find that high taxes in a home jurisdiction serve as "push factor" incentivizing corporations to relocate their headquarters into jurisdictions with lower taxes (i.e., low taxes serve as a "pull factor").[60]

It therefore seems that tax policymakers have good reasons to worry about MNCs decisions on the locations of their headquarters. According to the studies discussed, inversion may result not only in the loss of the tax base, but also with the loss of important attributes associated with having an MNC headquarters located within a jurisdiction.

B. How Empirical Studies on Corporate Inversion Overstate their Policy Implications

1. Identifying Meaningful Headquarters Relocations

The studies discussed above strongly support the assertion that MNCs are incentivized to change their tax-residence in response to high taxes in their country of residence (or in response to low taxes in other jurisdictions). However, suggesting that headquarters relocation *for tax purposes* is also associated with the loss of meaningful attributes in the jurisdiction from which MNCs invert (as such studies indeed argue), requires a significant logical leap. As further discussed below,[61] empirical literature on inversion views headquarters locational decision as a binary variable (i.e., the headquarters is either located in one jurisdiction or the other). However, the headquarters of a modern MNC can hardly be viewed as a binary variable.

It is well established that the corporate functions of the modern MNC are not centralized in a single identifiable location.[62] Therefore, it is problematic to assume that meaningful functions—the functions that create positive economic effects that policymakers might care about— are located in the same place as the place of tax-residence of an MNC (whether before or after an inversion).

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[58] Tomi Laamanen, Tatu Simula & Sami Torstila, *supra* note 3 (2012).
[59] *Id*. 189
[60] *Id*. at 204-205
[61] *See* discussion in Part II.B.2 *infra*.
[62] For a summary of research on the decentralization of corporate functions, see David Collis, David Young & Michael Goold, *The Size and Composition of Corporate Headquarters in Multinational Companies: Empirical Evidence*, 18 J. OF INT'L MGMT. 260, 262-263 (2012).

For example, organizational researchers distinguish between various levels of corporate functions. Such functions include "*obligatory functions* (general management, treasury and tax, financial reporting)"[63], "*discretionary activities* (value adding and control functions related to HR, audit, corporate planning, IT)",[64] and "operational functions (marketing, distribution and production)".[65] Each such function may generate different attributes, and might be located in a different jurisdiction. It is not necessarily the case that the most important attributes are in the jurisdiction of tax-residence, or that such attributes may be affected by a change to tax-residence.

In addition, decentralization can be observed within each functional level. For example, how is the substantive "location" of corporate headquarters defined? This is a difficult question to answer since "the location of the headquarters themselves has become increasingly scattered in recent years".[66] Mihir Deasi suggests that an MNC "home" is triple-faceted, divided between "managerial", "financial", "legal" home.[67] The "managerial home" is where "the managerial talent and key decision-makers" are located.[68] The managerial home itself can be dispersed among several jurisdictions, with various management functions performed in different places. A firm's "financial home" is the "place where its shares are listed,"[69] which in turn dictates the rights and obligations of investors and managers in publicly traded entities. An MNC's "legal home" is the residence of the corporation for legal purposes.[70] The legal home itself can be divided. For example, residences for tax purposes and for corporate-law purposes may be separately determined, creating tension between different jurisdictional rules.[71] Each such "managerial", "financial" or "legal" home may be located in a different place, and each such home may generate different types of positive attributes in the jurisdiction in which it is located. There is no reason to expect that when the "tax home" is changed (i.e., inversion) other "homes" will follow.

To summarize, MNCs operations, and specifically MNC's headquarters' functions are not "black boxes" with single identifiable

[63] *Id*. at 264.
[64] *Id*.
[65] *Id*.
[66] Clausing, *supra* note 4, at 743.
[67] Mihir A. Desai, *The Decentring of the Global Firm*, 32 WORLD. ECON. 1271 (2009).
[68] *Id*. at 1277.
[69] *Id*. at 1278
[70] *Id*. 1280-128.
[71] For a discussion on the interaction between residence for corporate purposes and residence for tax purposes, see Mitchell A. Kane & Edward B. Rock, *Corporate Taxation and International Charter Competition*, 106 MICH. L. REV. 1229 (2008).

location. They must be viewed as complex organizational structures. When this is the case, it is rather a complex task to define a "relocation" of corporate headquarters. Organizational researchers did tackle the issue, however.

For example, Birkinshaw et. al. sought to explain MNCs decisions to relocate corporate headquarters and corporate business units overseas.[72] They clearly distinguish between three elements that define corporate headquarters: The first two are "a top management group that typically has an official location at which it meets... [and] a series of HQ functions … (treasury, investor relations, corporate communications etc.), each one of which has an identifiable physical location."[73] The third is "the legal domicile" of the MNC.[74] They recognize that headquarters may be incorporated in one jurisdiction for tax purposes, but meaningfully operate in another. They also note and that various *substantive* management functions may be located in different jurisdictions. They therefore conclude that it is "possible to conceptualize the HQ's location on some sort of continuum, from entirely based in the home country through to entirely relocated overseas."[75] The *degree* of HQ relocation is therefore the dependent variable in their analysis.

Birkinshaw et. al. then study the spectrum of headquarters relocations based case studies of 40 MNCs, using multiple interviews and questioners. Such a method allows them to disaggregate management functions, and identify the geographical locations of each. They find that business units (meaning, operational functions) tend to relocate in response to demand of local markets, and in order to take advantage of local agglomeration effects. Corporate headquarters tend to meaningfully relocate in response to the demand of shareholders and financial markets. They acknowledge that corporate tax may play a role in relocation decisions, but unfortunately they do not directly study it.[76]

Similarly, Barner-Rasmussen, Piekkari and Bjorkman use case studies to identify which factors explain the relocation of specific management functions.[77] Like Birkinshaw et. al. they view headquarters relocation on a spectrum, rather than a binary variable. They differentiate between "full, partial or virtual" relocation of headquarters.[78] They define each as follows: "*Full* relocation means that the entire top management group and all HQ

[72] Birkinshaw et. al., *supra* note 8.
[73] *Id*. 684.
[74] *Id*.
[75] *Id*.
[76] *Id*. at 690.
[77] Wilhelm Barner-Rasmussen, Rebecca Piekkari & Ingmar Bjorkman, *Mobility of Headquarters in Multinational Corporations*, 1 EUROPEAN J. OF INT'L MGMT. 260 (2007).
[78] *Id*. 263

functions are moved. *Partial* HQ relocation signifies that only selected members of the top management group and functions are transferred. *Virtual* relocation refers to situations in which HQ management responsibilities are handled through frequent travel and modern IT support systems."[79] They find that the both pragmatic and symbolic factors may drive meaningful relocations, and that such drivers may be highly contextualized.

Unfortunately, as explained below, public-finance researchers who have studies cross-border relocations of tax-residence have viewed relocations headquarters as a binary variable. This makes the policy implications of their studies limited.

2. Revisiting the Policy Implications of Inversions Literature

The article now turns to question the policy implications of empirical research on inversions against the backdrop of organizational literature discussed above. Inversions researchers suggest that jurisdictions should present MNCs with competitive tax environment for headquarters locations. Noncompetitive jurisdictions are in risk of losing important economic attributes. This policy implication is not, however, supported by these researchers' empirical findings.

For example, in Voget's study, relocation occurs "when a headquarter firm sells its assets to a foreign company or alternatively when the firm's shareholders sell their shares to a foreign company in exchange for shares or for cash."[80] This means that Voget's empirical findings only explain how tax may affect the nominal change of ownership of stock or assets. Voget's study offers no insight into the effects of taxes on locational decisions of meaningful headquarters functions. Using the terminology of Desai, Voget studies the effect of taxes on "legal relocations". Such relocations may be of interest to policymakers due to the loss of the corporate tax-base associated with them. However, legal dislocations do not necessarily entail the dislocation of economically significant attributes (contrary to what Voget suggests).

Huizinga and Voget study on post-merger structure is made under the assumption that "for tax purposes, the newly created multinational is resident in the acquiring or parent country".[81] That is probably true. However, such locational decision means little in terms of where the relevant management attributes are. Tax residence and the residence of managerial talent are two different attributes. For example, when the U.S.

[79] *Id*. (italics in original, citations omitted).
[80] Voget, *supra* note 3, at 1069.
[81] Huizinga & Voget, *supra* note 54, at 1226.

based Eaton Corporation inverted in 2012 by way of merging with the Irish corporation Cooper Industries, the post-merger parent company ("New Eaton") was indeed located in Ireland (a low-tax jurisdiction), in-line with Huizinga and Voget's prediction. However, in its offering documents, Eaton stated that "The New Eaton senior management team after the acquisition and the merger will be the same as the current senior management team of Eaton."[82] In other words, the merged corporation, notwithstanding the fact that it is incorporated in Ireland, seems to be substantively managed from the U.S. This is inconsistent with Huizinga and Voget's policy argument according to which high taxes may affect dislocation of meaningful management attributes. To be sure, it is *possible* that this is indeed the case, but if so, Huizinga and Voget's study provides no empirical support for such argument. All their study does is to explain the effect of taxes on *nominal structuring* decisions.

Laaman, Simula and Torstila definition of relocation is similarly problematic.[83] Interestingly, they note the fact the headquarters relocation is a matter of degree, citing Barner-Rasmussen, Piekkari and Bjorkman.[84] Nonetheless, they explicitly choose to study virtual relocations, ignoring that such relocations may not to be associated with relocation of meaningful attributes. They define headquarters relocation as "as the *legal transfer* of a firm's corporate or regional HQ from one country to another."[85] They explicitly "do not require that even the top management team itself would have to move to the new HQ location."[86] It is therefore surprising that given their methodological choice of virtual relocation, they suggest that such relocations may have meaningful economic effects.[87]

To summarize, in formulating its policy implications, current inversion literature assumes that MNC's tax-residence overlaps with the place of all

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[82] Eaton Corporation, Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (Schedule 14A) 100 (Sept. 14, 2012). In addition, according to Eaton's 2013 annual report (namely, at the end of the first full fiscal year following the transaction), all eleven board members were U.S. nationals. See, EATON CORPORATION, ANNUAL REPORT 22 (2013)

[83] Laamanen, Simula & Torstila, *supra* note 3.

[84] *Id*. at 189.

[85] *Id*.

[86] *Id*.

[87] Interestingly, Laaman, Simula and Torstila observe that actual move of managers "would seem to be the case in most relocations." *Id*. They do not provide support for such an assertion. The case studies explored herein suggest to the contrary, namely that managers rarely move for tax reasons alone. Rather, following tax-driven inversions managements perform minimal functions (such as board meetings) in the new jurisdictions, in order to assure that the new tax-residence is respected. However, in most cases they continue to reside and operate their daily business in the old jurisdiction. *See*, discussion on *Virtual Relocations from a CMC Jurisdiction*, *infra* Part IV.B.3.

the meaningful management attributes that create positive effect in the local economy. This assumption, as explained above, is supported by neither organizational studies, nor by empirical findings. The most sanguine reading of empirical literature on inversions would only support the conclusion that in response to high taxes, MNCs may engage in tax planning (such as a scheme to change tax-residence). From a policy-making point of view, that is not an interesting argument. Rational taxpayers will always attempt to reduce their tax burdens by using available tax-planning schemes.

Obviously, it still *possible* that tax-residence planning is associated with distorted capital allocations, causing meaningful effects. There is no question that taxation influences decisions about where to locate capital.[88] However, inversion studies do not show that to be the case in the context of MNC relocations. In fact, some studies imply to the contrary. A 2010 study by Kimberly Clausing did not find strong relationship between the registered location of *Fortune 500* firms, and meaningful R&D activities that are usually associated with headquarters locations.[89] Similarly, a study by Bandik, Gorg and Karpaty did not find a decline in the level of R&D activity in Sweden, following acquisition of Swedish corporations by foreign-owned MNCs.[90]

3. Inversions Literature Excludes Many Meaningful Relocations

There is an additional shortcoming stemming from the fact that legal (or virtual) relocation is the dependent variable in empirical inversion studies. By defining relocation based on tax-residence, inversion studies exclude from their sample many *meaningful* relocations that are not accompanied by a change of tax-residence.

For example, in 2004, Nokia – the Finish communications giant – established a corporate office in New York, by *substantively* moving the corporate CFO office and other key corporate management functions from Espoo, Finland to New York.[91] At the time of the announcement of the relocation, Nokia expected the New York headquarters to employ approximately 100-150 people.[92] Such move was not accompanied by the

[88] *See*, Devereux, *supra* note 2.

[89] Clausing, *supra* note 4, at 756-760.

[90] Roger Bandick, Holger Gorg & Patrik Karpaty, *Foreign Acquisitions, Domestic Multinationals, and R&D*, SCAND. J. OF ECONS. (forthcoming, 2014) http://onlinelibrary.wiley.com/doi/10.1111/sjoe.12071/pdf.

[91] Press Release, *Nokia to Establish a New Corporate Office in the New York Metropolitan Area* (Dec. 17, 2003) http://company.nokia.com/en/news/press-releases/2003/12/17/nokia-to-establish-a-new-corporate-office-in-the-new-york-metropolitan-area.

[92] *Id*.

change of the tax-residence. Nokia's parent entity is tax-resident in Finland to this day. Since inversion studies define relocation based on the change of tax residence, all corporate headquarters moves that are not associated with a change in tax residence, such as Nokia's, are excluded from their samples. The result is that such studies overstate the effects of taxation on virtual headquarters moves, and understate the effects of taxation on meaningful headquarters moves.

The summary of the analysis of inversion literature is that it does not support its purported policy argument according to which taxing MNCs based on the location of their headquarters my cause meaningful loss of economic attributes. The purpose of the article is to address such shortcoming by formulating a framework for the study of real economic effects that may be associated with changes in the tax-residence of MNCs.

III. A CASE STUDY APPROACH TO HOME COUNTRY EFFECTS OF CORPORATE INVERSIONS

A. Method and Case Selection

One of the main shortcomings of current inversion literature is the lack of a cohesive theoretical-connection between the empirical findings (which this article does not dispute), and their proposed policy implications. This article attempts to fills this gap by developing a framework for the description of meaningful home-country effects that may be associated with corporate inversions.

Where a coherent theory to explain a phenomenon is lacking, Grounded Theory serves an important instrument of research. Grounded Theory is a research process by which meanings are deduced from observed data (rather than using observed data to test theories). Grounded Theory is a well-developed method of research in social sciences,[93] and consists "of systematic, yet flexible guidelines for collecting and analyzing qualitative data to construct theories from the data themselves… Thus, data form the foundation of [the] theory… ."[94]

In order to deduce testable constructs that describe the meaningful effects of inversions, it is not enough to look at nominal loss of tax residence as current literature has done. There is a need for an explorative

[93] *See, e.g.*, BARNEY G. GLASER, THEORETICAL SENSITIVITY: ADVANCES IN THE METHODOLOGY OF GROUNDED THEORY (1978); BARNEY G. GLASER, BASICS OF GROUNDED THEORY ANALYSIS (1992); JULIET CORBIN & ANSELM STRAUSS, BASICS OF QUALITATIVE RESEARCH: TECHNIQUES AND PROCEDURES FOR DEVELOPING GROUNDED THEORY (1998).

[94] KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY: A PRACTICAL GUIDE THROUGH QUALITATIVE ANALYSIS 2 (2006).

task, aimed at unearthing meaningful changes that policymakers may care about. For such a task, case study research is particularly well-suited.[95] Such strategy "focuses on understanding the dynamics present within a single setting"[96], which in the case of this article is an inversion transaction. The idea is to identify observable "themes, concepts and even relationship between variables",[97] and use such observations to offer constructs to guide future research. Future research may negate or support such constructs.

To that end article closely studies the *substantive* home country effects of five inversions of large MNCs.[98] The case studies selected are aimed at generating a sample of inversions that vary in their legal, jurisdictional and commercial characteristics. This is in order to try and articulate, in policy relevant terms, what are the meaningful relocations that take place, uniquely in the context of inversion. Characteristics considered are: the jurisdictions involved (both home and target jurisdiction); the tax system in each jurisdiction (territorial systems versus worldwide systems); tax-residence determination in each jurisdiction (CMC versus POI); and, industry segment of the inverted MNC. The article only explores inversions from one industrialized nation to another (meaning, intra-jurisdiction relocations and relocation to small tax-havens are not explored). As explained above,[99] the assumption is that inversions involving pure tax havens are unlikely to entail dislocation of real economic attributes, as tax havens are generally not positioned to support such attributes, as they lack infrastructure and skilled workforce. The characteristics of the transactions studied are summarized in Table 1.

Table 1 – Characteristics of Corporate Inversion Case Studies

Inverting corporation	Year complet-ed (fiscal)	Home jurisdiction	Target jurisdiction	Home jurisdiction tax characteristics (tax system; residence determination)	Target jurisdiction tax characteristics (tax system; residence determination)	Industry of inverting corporation
Shire Pharmaceuticals	2008	UK	Ireland	Worldwide; CMC	Worldwide; CMC	Pharmaceuticals
Wolseley PLC	2011	UK	Switzerla-nd	Territorial; CMC	Territorial; POEM	Building materials
Nobel Biocare	2002	Sweden	Switzerla-nd	Worldwide; POI	Territorial; POEM	Dental implants
News Corporation	2004	Australia	USA	Worldwide; CMC	Worldwide; POI	Media
Tim Hortons	2009	USA	Canada	Worldwide; POI	Mixed; CMC	Food chain

[95] Kathleen M. Eisenhardt, *Building Theories from Case Study Research*, 14 ACADEMY OF MGMT. REV. 532 (1989).

[96] *Id*. at 534.

[97] *Id*. at 541.

[98] It is generally accepted that a minimum of four case studies and a maximum of ten is the desired range of grounded-theory research. *See*, Eisenhardt, *supra* note 95, at 545.

[99] See, *supra* notes 27-31 and accompanying text.

Changes in the home country are explored at two points in time: immediately after the inversion (meaning, at the end of the fiscal year in which the inversion took effect), and a year after the inversion (meaning the end of the first full fiscal year following the inversion), under the assumption that at that point changes that are directly attributable to the inversion have already taken effect. Of course, it is possible that changes attributable to the inversion can be observed in the long term, but the article refrains from such inquiry primarily due to data limitations: most inversions studied are relatively recent, and long-term effects (to the extent they exist) are yet to be observed. In addition, for long post-inversion periods it should prove difficult to isolate the effects of inversions from other factors, such as external economic effects or a change in business strategy.

Numerous data sources are used in order to identify changes in the home jurisdiction. Company filings and press releases are used in order to articulate the drivers to, as well as the structure of each inversion transaction. Annual reports are used as qualitative sources describing MNCs substantive operations both before and after the inversions. The article also draws from investigative reporting by reputable news outlets that looked into the nature of MNCs operations both before and after an inversion.

Some quantitative data from companies' public filings is also used. Specifically, to the extent available, the article investigates financial segment reporting. MNCs are required to separately report financial data for "material" geographic segments.[100] It is many times the case that the home jurisdiction from which an MNC inverts is its historical home, which is usually a material market for the MNC operations. The home jurisdiction is therefore reported as a separate segment. Changes in that segment occurring after the inversion may provide useful insights.

Unfortunately, the breadth of information contained in segment reporting varies depending on the jurisdiction in which the MNCs securities are listed for trade. However, all include, at the minimum, the book value of long-loved assets (i.e., assets that provide the company with benefits extending beyond current fiscal year), and gross revenues in each material segment. Some MNCs also report capital expenditures and the number of employees in the geographical segment note. Even if not reported in the segment note, most MNCs annual reports contain a breakdown of the

[100] Herita T. Akamah, Ole-Kristian Hope & Wayne B. Thomas, *Tax Haven and Disclosure Aggregation* 2, Rotman School of Management Working Paper No. 2419573 (2014) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2419573 (describing the requirements for geographical segment disclosure). Interestingly, the authors find that MNC that are aggressive in their tax planning tend to aggregate segments, meaning, providing lower-quality disclosure.

number of employees in each geographical segment.

Finally, multiple data sources are used to assess whether a change of management composition can be observed following an inversion. Annual reports are used to study management composition before and after the inversion and to understand the reasons for any observed change in composition. Nationality of board members is taken from ICC Directors database as well as other sources (such as annual reports of other firms in which management members hold positions, and sometimes LinkedIn profiles of management members).

The findings are narratively discussed immediately below. Some stylized facts are presented in tabular form following the discussion of each case study.

B. Results: Inversion Case Studies

1. Shire Pharmaceuticals' 2008 move from UK to Ireland

Shire plc ("Shire") is a large MNC specializing in the development, manufacturing and sales of pharmaceuticals. It is a dual-listed company, with securities traded on both the London Stock Exchange (LSE) and NASDAQ. As of the date of this paper, Shire market cap is about $34 billion.

Shire was founded in 1986 in the UK ("Old Shire"), and was headquartered in Basingstoke, UK for both tax and business purposes until April 2008, when it announced its intention to change its tax-residence to Ireland.[101] Under the inversion plan, a new holding company, Shire Limited ("New Shire"), was registered in the Isle of Jersey, a tax haven. New Shire "operational headquarters" as well as tax-residence were to be located in Ireland. Shareholders of Old Shire received shares of New Shire on a one-for-one basis, and New Shire became the publicly traded entity.[102] The inversion was completed in late May, 2008.

Prior to announcing the inversion plan Old Shire had significant presence in both the U.S. and the UK, but very limited presence in Ireland. Shire's board of executives was composed of four U.S. nationals (including the Chairman, as well as the CEO), five British nationals (including the CFO), and one French national. Shire also did not have any significant Irish investor base. Of its three largest shareholders, none were Irish.[103]

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[101] Press Release, *Shire to Introduce a New UK Listed Holding Company* (Apr. 15, 2008) http://www.shire.com/shireplc/uploads/press/NEWUKLISTEDHOLDINGCOMPA-Y15Apr2008.pdf [Hereinafter: Shire's Press Release].

[102] *Id*.

[103] Shire Limited, Introduction of up to 700,000,000 Ordinary Shares of 5 pence each to the Official List (Prospectus) 11 (Apr. 16, 2008) [hereinafter: Shire's Prospectus].

Shire's operations in Ireland were also insignificant compared to other geographical regions. For example, as of Dec., 31, 2007, Shire employed 3,346 personnel, of whom 74% where based in the United States and 13% were based in the UK.[104] Shire had only 55 employees in Ireland (about 1.6% of the global workforce), primarily in sales and marketing operations.[105] The Irish employees were based in a 16,000 sq ft office complex in Dublin,[106] which accounted for about 1.00% of the total area of Shire's principal properties worldwide. For comparison, Shire's UK principal properties covered an area of 67,000 sq ft, and Shire's principal properties in the U.S. covered an area of 1,005,000 Sq. ft., or about 90% of Shire's reported principal properties. The U.S. properties included all of Shire's principal manufacturing, research and technology centers.

According to Shire's geographical segment reporting,[107] most of its long-lived assets were located in the North America ($294.8 million of a total of $368.6 million, or about 80%). 74% of the gross revenues were also produced in the U.S. ($1798.2 million of a total of $2436.3 million). UK was the second largest segment, where 19% on the long-lived assets where located, and 7.00% of the revenues generated.

Prior to the inversion Ireland was not reported as a separate geographical segment, supporting the conclusion that it was not significant for Shire's operation in general. Indeed, as of Dec. 31, 2007 Shire had only $1 million of long-lived assets in Ireland (less than 1.00% of Shire's worldwide long-lived assets), and it generated less than 1.00% of its worldwide revenues in Ireland.

To summarize, Ireland had no significant role in Shire's global operations prior to the inversion, and therefore agglomeration effects cannot have possibly played a significant role in Shire's decision to move to Ireland. Rather, the move was completely tax driven. In its press release announcing the inversion, Shire stated that given the group's international operations "Shire has concluded that its business and its shareholders would be better served by having an international holding company with a group structure that is *designed to help protect the group's taxation position*, and better facilitate the group's financial management."[108]

Shire's effective tax rate for 2007 was rather low, at 11.9%.[109] However,

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[104] SHIRE PLC, ANNUAL REPORT 117 (2008).

[105] Salamander Davoudi & Andrew Jack, *Shire Deals Blow To UK As It Moves Tax Domicile To Ireland*, Financial Times (Apr. 16, 2008 3:00 AM). http://www.ft.com/intl/cms/s/0/051e289c-0b4c-11dd-8ccf-0000779fd2ac.html

[106] Shire's Prospectus, *supra* note 103, at 298.

[107] SHIRE PLC, ANNUAL REPORT 80 (2008).

[108] Shire's Press Release, *supra* note 101.

[109] In fact, the rate was 2007 was negative 4.0%. The 11.9% figure excludes the impact of a one-time charge made in respect of a specific investment. See, Shire plc Annual

Shire's effective tax rates for 2006 and 2005 were quite substantial, at 26.8% and 27.5%, respectively.[110] Shire did not disclose the expected effect of the inversion on the group's effective tax rate. However, the incentive to adopt Irish tax residence in lieu of the UK one was rather obvious: At the time, the UK tax system was a worldwide system, meaning that a resident UK MNC was subject to tax in the UK on its worldwide income. The UK corporate income tax was substantial, at 30.00%. This created an incentive for UK MNCs to "lose" their UK tax residence (in which case they would only be taxed in the UK on income derived from source within the UK), and establish residence in a lower-tax jurisdiction. While Ireland was also a worldwide tax-jurisdiction, Ireland's corporate tax rate at the time was 12.5%.

Under UK law, tax-residence of corporations is determined based on two alternative tests, the satisfaction of either would result in UK tax-residency: The place of incorporation, or the place of central management and control (CMC). This means that in order to "lose" its UK tax-residence Shire had to take a two-step approach. First, it had to reincorporate some place other than the UK. This is rather easy to achieve, and indeed, Shire had changed its place of incorporation to the Isle of Jersey, a tax haven.

Second, Shire had to change its place of central management and control. Changing the place of central management and control may seem more challenging. Under UK law, the place of central management is, broadly speaking, the place where the highest level of control of the business of the company' is directed.[111] Presumably then, managers would actually have to move someplace else, dislocating real management attributes, in order for Shire to "lose" its UK status. This is the type of behavioral incentive that opponents of the Real Seat tests are worried about. Indeed, when discussing the planned inversion, Shire's CEO explicitly differentiated Shire's planned inversion from naked inversions that were common practice in the U.S. in the early 2000s. He explained: "[t]he era of paper transactions and occasional board meetings in order to have intellectual property in the Caymans, Bermuda and the Bahamas has ended, with a shift to substance over form."[112] This strongly implies that a real, economically significant move would have had to take place in order to shift Shire's tax-residence.

However, in stark contrast to such a story, Shire took great care to assure its various stakeholders that no substantive changes are expected to

Report (Form 10-K) 89 (2007).

[110] *Id*.

[111] Christiana HJI Panayi, *United Kingdom*, *in* RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 817, 826-827 (Guglielmo Maisto ed., 2009).

[112] Davoudi & Jack, *supra* note 105.

take place as a result of the inversion. Shire assured its shareholders that "[t]he new holding company… will have the same Board and management team as [Old] Shire and there will be no substantive changes to corporate governance and investor protection measures."[113] Shire also stated that the inversion "will not result in any changes in the day to day conduct of Shire's business".[114]

Indeed, Shire board composition had hardly changed following the inversion. While some personal changes have occurred, the national composition of board-members remained largely the same. Following the inversion Shire's board included four Americans (including the Chairman), five British nationals (including the CEO as well as the CFO), and one French national, just as before the inversion. The following year (i.e., 2009) two American and one British board member left, and one American has been appointed. In other words, British residents maintained majority in Shire's board.

While Shire had to have its central management and control in Ireland in order to have gained residence there, not a single board member moved to Ireland, nor was any Irish board member appointed. An investigation by the Guardian newspaper into Shire's post inversion operations suggested that as of February 2009, Shire had approximately 70 employees in its Dublin office (about 2.00% of its global workforce), none of whom involved in the "central management" of Shire.[115] For comparison, Shire's UK headquarters employed three hundred staff at the time.[116] It therefore seems that at the strategic corporate-level, the relocation has been completely virtual.

Given that both the UK and Ireland determine the place of residence based on the central management and control test, this seems odd. How is it that no significant dislocation of corporate-level functions can be observed in the UK following Shire's inversion? The answer seems to be that Shire felt comfortable that its place of central management and control would be based on the place of board meetings.[117] The place of board meetings is viewed the as having an in important (even if not determinative) role at

[113] Shire's Press Release, *supra* note 101.

[114] *Id*.

[115] Tax Gap Reporting Team, *Tracking Down the Addresses of the Irish Headquarters*, The Guardian (Feb. 9, 2009) http://www.theguardian.com/business/2009/feb/10/tax-gap-ireland-firms/.

[116] *Id*.

[117] SHIRE PLC, ANNUAL REPORT 45 (2008) ("In this regard the Board noted that as Shire is tax resident in Ireland it is obligated to hold all its Board meetings outside the UK, and as such there will always be an element of travel time before it can hold an urgent ad hoc").

concluding where the place of central management is.[118] Indeed, Shire instituted a $9,271 budget to support executive's travels for board meetings in Ireland.[119] Of the five board meetings that took place in the year following the inversion, three took place in Ireland, and two in the U.S. It appears that three board meetings were enough to substantiate tax-residence in Ireland.[120]

An examination of Shire's geographical segment reporting and annual reports tells a similar story. In the years following the inversion, the bulk of Shire's work force remained in North America, with about 72% and 73% of the work force employed there in 2008 and 2009 respectively (compared to 73% before the inversion). The UK workforce also maintained its size. Prior to the inversion Shire employed 458 employees in the UK (13% of the global work force). It employed 452 and 465 employees in the UK in 2008 and 2009 respectively (12% of the global workforce for both 2008 and 2009).

Following the inversion, Shire's only principal property in Ireland remained the same 16,000 Sq. ft. office complex in Dublin. Shire's occupation of properties in the UK did not suffer a loss, and even increased following the inversion. The area covered by Shire reported principal properties in the UK in 2008 increased to 88,500 sq. ft., and significantly increased in 2009 to 148,000 sq. ft. Most of Shire's occupied properties remained in the U.S. (1,039,000 sq. ft. in 2009). All of Shire's main research and manufacturing facilities remained in the U.S. until the end of 2009, as was the case prior to the inversion.

North America also remained the location of most of Shire's long-lived assets (87%, representing an increase of about 7.00%) in both 2008 and 2009, and gross revenues (76% and 71% in 2008, 2009 respectively). The UK remained the second most significant geographical segment with 11% and 12% of the long-lived assets in 2008 and 2009 respectively, and 5% of the revenues in both years. In nominal terms, in the year of the inversion the U.K. assets decreased by $7.2 million, but in the following year UK assets increased to a level higher than before the inversion. In terms of proportional part to Shire's global assets UK has seen a decrease from 17% to 11% in both 2008 and 2009. Ireland remained marginal with less than 1.00% of both long-lived assets and gross revenues.

It is therefore clear that from UK's perspective, the only result of Shire's inversion to Ireland was the loss of the UK tax-base. There were no

[118] Panayi, *supra* note 111, at 830.

[119] SHIRE PLC, ANNUAL REPORT 51 (2008) ("In addition, to recognize the travel required for Directors to attend meetings in Ireland or the US, a $9,271 travel allowance was instituted for travel exceeding four hours").

[120] *Id*.

overall noteworthy changes, positive or negative, to Shire's economic activities in the UK. One report summarized that Shire was able to move to Ireland (for tax purposes) with "[N]o change to strategy. No change to dividend policy. No staff relocation or job losses."[121]

Some of the geographical data of Shire's global activities before and after the inversion is summarized of Table 2. UK, the home country from which Shire inverted, is highlighted.

Table 2 – Summary of Shire's activity by geographical segment before and after the inversion

	2007	2008 (Inversion announced and completed)	2009
Board Members Nationality			
American	4	4	3
British	5[122]	5	4
French	1	1	1
Total	10	10	8
Employees[123]			
UK	458 (13%)	452 (12%)	465 (12%)
North America	2,533 (74%)	2,714 (72%)	2,892 (73%)
Rest of the world	445(13%)	603(13%)	581(15%)
Total	3,436 (100%)	3,769 (100%)	3,875 (100%)
Ireland[124]	55[125] (2%)	not reported	70[126] (2%)
Properties (sq ft)[127]			
UK	67,000 (6%); Basingstoke, UK, Global HQ	88,500 (8%); Basingstoke, UK, UK HQ	148,000 (9%); Basingstoke, UK, UK HQ
US	1,005,000 (90%); Offices, manufacturing, research and distribution facilities	1,039,000 (91%); Offices, manufacturing, research and distribution facilities	1,357,000 (86%); Offices, manufacturing, research and distribution facilities
Ireland	16,000 (1%); office space	16,000 (1%); Dublin, Ireland – Global HQ	16,000 (1%); Dublin, Ireland – Global HQ
Canada	34,000 (3%; office space	Not reported	35,000 (2%); office space
Germany	Not reported	Not reported	16,500 (1%; office space
Brazil	Not reported	Not reported	14,000 (1%; office space

[121] Andrew Hill, *Shire's Shift in Tax Residency is a Warning to the UK*, Financial Times (Apr. 15, 2008, 8:07 PM) http://www.ft.com/intl/cms/s/0/035ff9f2-0b1c-11dd-8ccf-0000779fd2ac.html.

[122] One none-executive director who lives in London in the relevant period is counted as British, though she possibly holds U.S.

[123] These figures are taken from Shire's respective annual reports for 2007, 2008 and 2009.

[124] Number of Irish employees is taken from Cite take from reports; While Ireland was reported as a separate segment in Shire's annual reports, Irish employees were not reported separately. It is therefore possible that such employees are included in the UK figures.

[125] *Supra* note 105.

[126] This figure was current as of February 2009. *See*, Tax Gap Reporting Team, *supra* note 115.

[127] The data for Shire's occupied properties is taken from the following sources: Shire plc Annual Report (Form 10-K) 35 (2007); Shire plc Annual Report (Form 10-K) 36 (2008); Shire plc Annual Report (Form 10-K) 35 (2009).

Total	1,122,000 (100%)	1,143,500 (100%)	1,585,500 (100%)
Long Lived Assets ($ million)			
Ireland	1.4 (<1%)	1.0 (<1%)	0.7 (<1%)
UK	68.8 (19%)	61.6 (11%)	79.5 (12%)
North America	294.4 (80%)	468.6 (87%)	593.5 (87%)
Rest of the World	3.6 (1%)	6.6 (1%)	6.9 (1%)
Total	368.8 (100%)	537.8 (100%)	680.6 (100%)
Gross Revenues ($ million)			
Ireland	16.2 (1%)	17.8 (1%)	19.5 (1%)
UK	177 (7%)	160 (5%)	163.9 (5%)
North America	1798.2 (74%)	2299.6 (76%)	2141.3 (71%)
Rest of the World	444.9 (18%)	544.8 (18%)	683 (23%)
Total	2436.3 (100%)	3022.2 (100%)	3007.7 (100%)

2. Wolseley PLC's 2010 move from UK to Switzerland

Wolseley PLC ("Wolseley") is the world's largest distributor of heating and plumbing products to professional contractors and a leading supplier of building materials to the professional market.[128] Its shares are traded on the London Stock Exchange and its current market cap is about £9 billion. Wolseley was founded in 1887 in Australia, as a sheep shearing machines company,[129] and moved to England in 1889. For tax purposes Wolseley remained headquartered in England until its move to Switzerland in 2010 ("Old Wolseley").

On Sept. 27, 2010 Old Wolseley announced its intention to "create a new Group holding company which will be UK listed, incorporated in Jersey and will have tax residence in Switzerland ('New Wolseley')." Under the plan New Wolseley issued ordinary shares to holders of Old Wolseley shares on a one-for-one basis in exchange for the cancellation of their Old Wolseley shares. The result was that Old Wolseley became subsidiary of New Wolseley, a Swiss corporation for tax purposes. The plan took effect in late 2010.[130] Since Wolseley's fiscal year ends on July 31st, the inversion took effect in the 2011 tax-year.

Wolseley strategic affiliation to Switzerland was not obvious prior to the inversion, though it did have some operations there. Wolseley executive board consisted of nine British nationals (including the Chairman, the CEO and the CFO), one American and one French. Wolseley also did not have a significant investor-base in Switzerland. On its annual report for 2010 Wolseley reported six shareholders who have held substantial interests, none of which were Swiss (though the second largest shareholder, with

[128] Wolseley, Our Story, http://www.wolseley.com/index.asp?pageid=177.

[129] Wolseley, History, http://www.wolseley.com/index.asp?pageid=24&year=1880.

[130] Press Release, Results of Court and Scheme General Meeting 2 November 2010 (Nov. 2, 2010).

holdings of about 5.17% of Wolseley share capital was a hedge fund with offices in, among others, Zurich).[131]

Prior to announcing the inversion plan, U.S. employees accounted for 35% of Old Wolseley's global workforce (17,108 employees out of a total number of 48,226, employed in 1241 branches out of a total of 4,118). UK accounted for 22% (10,544 employees in 1,486 branches), France 18% (8,831 employees) and the Nordic countries for 13% (6,468 employees). The Central European segment (which included Switzerland) had 2,591 employees, accounting for about 5% of the global workforce. [132]

Segment reporting also demonstrates Wolseley's non-strategic affiliation to Switzerland. Rather, U.S. was Wolesley's largest geographical segment. The U.S. accounted for 33% of Wolesley's long lived assets[133] (£2,304 million of a total of £7,058 million), the UK accounted for 17%, and the Nordic jurisdictions accounted for 25%. Other significant geographical segments in terms of assets were France, Canada and Central Europe (which includes Switzerland), with 13%, 6% and 5%, respectively, of the group's total long-lived assets. In terms of revenues, U.S., the UK, and the Nordic region accounted for 39%, 19% and 15% of the group's gross revenues, respectively. France, Canada and Central Europe accounted for 15%, 6% and 6%. Within the small Central European segment, Switzerland was Wolseley's most profitable area.[134] However, in comparison to global operations, Switzerland seems marginal.

As in the case of Shire, it seems the agglomeration benefits played little role in the inversion plan. In explaining the inversion, Wolseley reasoned that the inversion is "expected to enable the Group to achieve a competitive effective corporate tax rate,"[135] of "up to 28 percent in the first full financial year"[136] following the inversion. It should be noted that a post-inversion 28% effective tax rate seems rather significant. However, it represented an improvement compared to Old Wolseley's effective tax rate, which was 34% for 2010.[137] The main difference form Shire's inversion—which makes the inquiry into Wolseley's inversion worthwhile—is that significant tax reforms took place in the UK by the time of Wolseley's inversion.

In July of 2009 (i.e., before the inversion plan had been announced), the UK effectuated a reform of its tax system, exempting most foreign source income from UK taxation. By doing so, the UK functionally adopted a

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[131] WOLSELEY PLC, ANNUAL REPORT 54 (2010).

[132] *Id*. at 89.

[133] WOLSELEY PLC, ANNUAL REPORT 95-98 (2011).

[134] WOLSELEY PLC, ANNUAL REPORT 24 (2010).

[135] Press Release, Wolseley to Introduce a New UK Listed Holding Company (Sep. 27, 2010).

[136] Wolseley plc, Prospectus Dated 22 October 2010 6 (2010).

[137] WOLSELEY PLC, ANNUAL REPORT 27 (2010).

territorial system of taxation. This is of major significance, as territoriality is frequently advocated as a remedy to the problem of corporate inversions, with many commentators pointing to the UK as an example.[138] The UK reform itself has been pitched as a necessary response to the problem of inversions by UK corporations.[139] Apparently, however, a territorial system was not enough of an incentive to keep Wolseley from inverting. Few other UK corporations completed an inversion from the UK after the UK adopted a territorial system. Some examples include INEOS Group LTD. (moved from UK to Switzerland in 2010)[140] and Brit Insurance N.V. (moved from the UK to the Netherlands in late 2009).[141] At the same time, it is fair to say, other companies that have previously inverted out of the UK returned. Such companies include The Henderson Financial Group and UBM plc who have returned to the UK from Ireland during 2012-2013, after making the opposite move from the UK to Ireland a few years earlier.[142]

Inverting out of a territorial system might be particularly suggestive that the inversion will result in a true dislocation of economic attributes. In a territorial jurisdiction a corporation pays taxes only on income sourced from within that jurisdiction. Moving out of the jurisdiction would only result in tax decrease to the extent the inversion results in less income reported in that jurisdiction. This suggests, in theory, that less income producing activities would take place in the jurisdiction following the inversion. Reality, however, is more complicated. As noted by other commentators, a complex system of tax rules may allow foreign-owned MNCs more tax-planning opportunities to strip income from a particular jurisdiction, than domestic-owned MNCs.[143] Inversion in such context is a "self-help"

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[138] *See, e.g.*, Michelle Hanlon, *The Lose-Lose Tax Policy Driving Away U.S. Business*, The Wall Street Journal (June 11, 2014, 6:55 pm) (The U.K. may be a good example: In 2010, after realizing that too many companies were leaving for the greener tax pastures of Ireland, the government's economic and finance ministry wrote in a report that it wanted to 'send out the signal loud and clear, Britain is open for business.' The country made substantive tax-policy changes such as reducing the corporate tax rate and implementing a territorial tax system."); Amanda Athanasiou & David D. Stewart, *News Analysis: Cheers and Jeers for U.K. Corporate Tax Climate Post-Pfizer*, TAX NOTES TODAY (June 11, 2014).

[139] *How Other Countries Have Used Tax Reform to Help Their Companies Compete in the Global Market and Create Jobs: Hearing Before the H. Comm. On Ways and Means*, 112th Cong. 24 (2011) (statement of Steve Edge, Slaughter & May) (describing the UK reform to territoriality as a response to the threat of inversions).

[140] Press Release, INEOS Move from UK to Switzerland (Apr. 13, 2010).

[141] *Brit Insurance Holdings to Reorganise its Corporate Structure and Moves to the Netherlands*, News Insurance (Nov. 12, 2009) http://www.newsinsurances.co.uk/brit-insurance-holdings-to-reorganise-its-corporate-structure-and-moves-to-the-netherlands/01698589.

[142] Athanasiou & Stewart, *supra* note 138.

[143] *See*, *supra* note 37 and accompanying discussion.

strategy of domestic owned MNCs, to guise themselves as foreign-owned. This allows such domestic-owned MNCs to decrease taxes on income earned from within their original home jurisdiction.

Indeed, in its inversion plan Wolseley explicitly stated that "New Wolseley will have the same business and operations after the [inversion] as Old Wolseley has before the [inversion],"[144] and that the inversion will cause no change "in the day-to-day operations of the business of the Wolseley Group or its strategy."[145] Wolseley also noted that following the inversion, it will continue to report its financial results in British pounds.[146]

While Wolseley suggested its intention to establish and maintain permanent staff in Switzerland[147], such permanent staff apparently included "as few as four people in Switzerland managing its treasury operations."[148] Wolseley also expected the move to make little differences in the composition of its board of directors,[149] and to have the senior executives of Old Wolseley to become the senior executives of New Wolseley.[150] While, some changes to the board composition did take place, they did not alter the board composition in a way that implies a move of board members to Switzerland. In fact, the only change announced prior to the inversion was that one French non-executive director of Old Wolseley would not be appointed to New Wolseley.[151] This non-executive director was scheduled to retire regardless of the inversion.[152] In addition, in the year in which the inversion was completed (fiscal year 2011) three British board members have stepped down. They were replaced by one British national and one Irish/South African national. No Swiss nationals were appointed to Wolseley's board. At the end of 2012 the board comprised of seven British nationals, one American and one Irish/South African.

Indeed, the only change implicit to having the board place of control in Switzerland, seems to be the marked increase in greenhouse gas emissions

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[144] Wolseley plc, Prospectus Dated 22 October 2010 6 (2010).

[145] *Id*.

[146] Anita Likos & Steve, McGratch, *U.K.'s Wolseley Moves Tax Residence to Switzerland*, The Wall Street Journal (Sep. 27, 2010, 3:32 pm) http://online.wsj.com/news/articles/SB10001424052748704654004575517950321881956.

[147] Wolseley plc, Prospectus Dated 22 October 2010 6 (2010).

[148] Phillip Inman, *Wolseley's Move to Swiss Tax Haven Raises Fears of Second UK Exodus*, The Guardian (Sep. 27, 2010, 16:06) http://www.theguardian.com/business/2010/sep/27/wolseley-tax-havens-swirtzerland.

[149] Wolseley plc, Prospectus Dated 22 October 2010 6 (2010) ("New Wolseley will have the same Board of Directors and management as Old Wolseley on the Scheme Effective Date, save that Alain Le Goff will not be a Director of New Wolseley").

[150] *Id*. at 10.

[151] *Id*. at 42.

[152] Press Release, Alain Le Goff, EVP Supply Chain, To Retire: Successor Announced (Feb. 17, 2009).

attributable to air and rail travel. While all other emitting activities have shown a decline in emission from 2010 to 2011, Wolesely's business travel for air and rail showed a 44% *increase* in emissions,[153] possibly due to UK managers travel to have board meetings in places other than UK. To summarize, it is clear that at the corporate-level, Wolseley's inversion was completely virtual.

At the operational level, Wolseley's segment reporting tells a more complex story. In the years following the inversion, the U.S. remained Wolseley's largest market by far, with 41%, and 46% of gross sales in 2011 and 2012 respectively, and 32% and 42% of the assets. This represents a marked increase compared to U.S. operations prior to the inversion. U.S. workforce has also increased from 17,108 employees (35% of the global workforce) to 17,822 (41% of the global workforce) by the end of 2012.

The UK operations, however, had shown a marked *decrease*. In 2011, the UK accounted for 15% of the group's assets (a decrease of 2.00%), 18.00% of gross revenues (1.00% decrease), and 20% of the global workforce (2.00% decrease, or a loss of 1,129 employees). These decreases were apparently attributed to the divestment of two UK divisions, explained in the 2011 annual report as a "part of a strategy of focusing on businesses with significant scale and leading market positions".[154] It is thus not clear whether such marked losses of UK operations had anything to do with the tax move. Such divestments continued in 2012, causing further decrease in UK operations. By the end of fiscal year 2012, 2,334 additional jobs were lost in the UK, bringing the UK proportion of the global work force to 16% (down from 22% prior to the inversion). Also at the end of 2012, UK only accounted for 14% of global sales (compared to 19% prior to the inversion) and 12% of global assets (as compared to 17% prior to the inversion).

While marked decrease can be observed in UK operations, and marked increase was noted in US operations, no noteworthy changes occurred in other geographical segments. Interestingly, the central European segment (where Switzerland is located) did not show a gain in jobs (but rather had shown a slight decrease) or a marked change in assets and sales. Today, three years after the inversion, Wolseley has 744 employees in Switzerland (out of 39,286 worldwide) in 46 branches (out of 2,917 worldwide).[155] This is negligible in comparison to Wolseley's global operations.

To summarize, Wolseley, like Shire, had changed little in its UK management activities as a result of the inversion, notwithstanding that Wolseley moved out of a territorial system and that Shire moved out of a

[153] WOLSELEY PLC, ANNUAL REPORT 51 (2011).
[154] *Id*. at 26.
[155] WOLSELEY PLC, ANNUAL REPORT (2013) http://www.wolseley.com/index.asp?pageid=215.

worldwide system of taxation.[156] The virtual-management relocation pattern demonstrated by Shire and Wolseley has been followed closely by multiple other UK-based MNCs, who have moved from the UK. In many such cases, UK MNCs have maintained the bulk of their management functions in the UK, and have added minimal presence (if at all) in the jurisdictions to which they moved to.[157]

Wolseley did show a loss of operational attributes in the UK following the inversion. It is impossible to tell whether the inversion had anything to do with it, though it seems unlikely. Wolseley inverted to Switzerland, but the loss of UK activities was not matched by an increase in Swiss activities. The only segment showing marked increase in the period after the inversion was the US. Attributing the UK operational losses to the inversion would also contradict Wolseley's own assertion that no changes were expected "in the day-to-day operations of the business of the Wolseley Group or its strategy."[158] It thus seems that Wolseley's divestment of UK operations was part of its business strategy (as the divestments were explained in its annual reports for 2011 and 2012), and unrelated to tax considerations.

Some of the geographical data of Wolseley's activities before and after the inversion is summarized in Table 3.

Table 3 – Summary of Wolseley's activity by geographical segment before and after the inversion

	2010	2011 (Inversion announced and completed)	2012
Board Members' Nationality			
British	9	7	7
French	1	0	0
American	1	1	1
Irish/South African	0	1	1
Total	11	9	9
Employees[159]			
USA	17,108 (35%)	17,175 (37%)	17,822 (41%)
Canada	2,503 (5%)	2,645 (6%)	2,599 (6%)
UK	10,544 (22%)	9,325 (20%)	7,018 (16%)
Nordic Region	6,468 (13%)	6,535 (14%)	6,565 (15%)
France	8,831 (18%)	8,184 (18%)	7,020 (16%)

[156] One commentator summarized what Wolseley UK employees need (or need not) worry about: "building supply depots are inherently local. Tax residence is irrelevant to their future." *See*, Andrew Hill, *Wolseley Tax Moves Possesses Little Threat*, Financial Times (Sep. 27, 2010, 8:01 PM) http://www.ft.com/intl/cms/s/0/ed074288-ca67-11df-a860-00144feab49a.html.

[157] Tax Gap Reporting Team, *supra* note 115.

[158] *Supra* note 145.

[159] These numbers represent the annual average number of employees, which Wolseley provides as part of its annual segment reporting (as opposed to the number of ongoing employees at the end of the fiscal year, which is also regularly reported by Wolseley).

Central Europe	2,591 (5%)	2,190 (5%)	2,016 (5%)
Other	181 (<1%)	165 (<1%)	130 (<1%)
Total	48,226 (100%)	46,246 (100%)	43,170 (100%)
Local Branches			
USA	1,241	1,261	1,274
Canada	220	221	220
UK	1,486	1,059	919
Nordic Region	285	288	264
France	697	322	313
Central Europe	189	144	142
Total	4,118	3,295	3,132
Gross Assets (£ million)			
USA	2,304 (33%)	2,288 (32%)	2,517 (42%)
Canada	357 (5%)	382 (5%)	384 (6%)
UK	1166 (17%)	1,082 (15%)	735 (12%)
Nordic Region	1,757 (25%)	1,878 (26%)	1,465 (24%)
France	902 (13%)	1,095 (15%)	592 (10%)
Central Europe	391 (6%)	345 (5%)	297 (5%)
Other	181 (3%)	93 (1%)	42 (1%)
Total	7,058 (100%)	7,163 (100%)	6,032 (100%)
Gross Revenues (£ million)			
USA	5,174 (39%)	5,500 (41%)	6,168 (46%)
Canada	765 (6%)	811 (6%)	850 (6%)
UK	2,466 (19%)	2,404 (18%)	1,898 (14%)
Nordic Region	2,012 (15%)	2,128 (16%)	2,125 (16%)
France	1,937 (15%)	1,943 (14%)	1,666 (12%)
Central Europe	849 (6%)	772 (6%)	714 (5%)
Total	13,203 (100%)	13,558 (100%)	13,421 (100%)

3. Nobel Biocare's 2002 move from Sweden to Switzerland

Nobel Biocare (Nobel) was founded in 1981 as Nobelpharma in Gothenburg, Sweden, as a titanium dental-implants manufacturer. Nobel has been publicly traded since 1994 (first on the Stockholm Stock Exchange, and since 2002 on the Swiss exchange), and is currently the world's largest manufacturer and distributor of restorative esthetic dental implants.[160]

In April 2002, Nobel announced its plan of restructuring under which Nobel would move its tax-residence from Sweden to Switzerland.[161] Under the plan, a new Swiss subsidiary ("New Nobel") was incorporated in Switzerland. New Nobel's shares were then offered to the shareholders of Nobel, in exchange for Nobel shares on a one-to-one basis.

At the time of the announcement, Sweden had a worldwide system of

[160] Nobel Biocare, History http://corporate.nobelbiocare.com/en/our-company/history-and-innovations/default.aspx.

[161] NOBEL BIOCARE, ANNUAL REPORT 28 (2002).

taxation in place, and determined the residence of corporations based on the place of incorporation, much like the United States today.[162]

Nobel outlined several reasons for the inversion. To begin with, Nobel suggested that "A Swiss holding structure will allow Nobel Biocare to optimise its corporate tax position to levels closer to standards with other multinational companies and thereby maximising the capital it can re-invest to grow the company and better exploit the market potential."[163] Nobel expected that the inversion will decrease Nobel's effective tax rate to 25% in the year following the inversion,[164] from an effective tax rate of about 37.5% prior to the inversion.[165]

Nobel's noted several other reasons for the move, in addition to the tax incentive. For example, Nobel explicitly noted the move will facilitate an access to a larger "healthcare focused" investor base and better access to capital,[166] as well as increased liquidity.[167]

Indeed, prior to the move, Nobel had a large Swiss investor base. Nobel estimated that as of the end of 2001 (the last complete fiscal prior to the inversion), 47% of its total investor base was Swiss.[168] Nobel's largest shareholder was BB Medtech AG, a Swiss fund, which owned 12.7% of Nobel's share capital.[169] Another significant investor in Nobel was Metalor SA, a Swiss corporation, with a holding of 7.5%.

Nobel's Swiss affiliation was also apparent in the composition of its board. Prior to the inversion, Noble's board comprised of seven members, of which four were Swedish nationals, and three were Swiss nationals (including the chairman and the deputy chairman). The CEO, appointed in late 2001, was also a Swiss national. Prior to her appointment she headed a Swiss corporation headquartered in Bülach, Switzerland.

Nobel also had other business interests in Switzerland at the time of the inversion. According to Nobel's 2001 annual report, Switzerland was the largest penetrated-market of dental implants (followed by Italy and Sweden).[170] One of Nobel's largest competitors, Straumann, was a Swiss

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[162] Sweden adopted a participation exemption system, a variant of a territorial system, in 2003. See, TAX MGMT. (BNA) Portfolio 985-4th: *Business Operations in Sweden*, pt. V.B.3. § d.

[163] Press Release, Nobel Biocare Holding AG – New holding structure for Nobel Biocare AB 2 (May 27, 2002).

[164] *Id*.

[165] Nobel Biocare, Tender Offer/Rights Offering Notification Form (From CB) 19 (May 28, 2002).

[166] *Id*.

[167] *Id*.

[168] NOBEL BIOCARE, ANNUAL REPORT 45 (2001).

[169] *Id*.

[170] *Id*. at 11.

company.

It therefore seems that in addition to the tax incentive, Nobel had non-tax reasons to move to Switzerland. The move would allow Nobel to be closer to its investor base, competitors, and costumers in one of the most developed markets for its main line of business. Substantive move of management attributes under such circumstances would be consistent with literature in management studies.[171] Strong local affiliation of both investors and managers to the target jurisdiction would also ameliorate any frictions between managers and shareholder that may have different geographical preferences.

Nonetheless, Nobel went to a great length to assure shareholders that the inversion is not expected to negatively affect Nobel's *Swedish operations*. In its description of the inversion plan, Nobel explicitly stated that the restructuring is not expected to affect Nobel employees, that all operational headquarters functions, including R&D will remain in Sweden, and that production facilities will not be affected.[172] Indeed, a comparison of Nobel executive team in 2001 thru 2003 shows that no Swiss executives were hired following the inversion, and that Swedish executives who had left were replaced by other Swedish executives.

In its plan description Nobel also suggested that the board of directors of New Nobel will remain largely the same as the board of directors of Old Nobel.[173] However, changes can be observed in Nobel's board composition. In the year following the inversion the board has been comprised of five members, of which three were Swiss nationals (including the chairman) and two Swedish nationals. This national composition of board members carried through 2003. In other words, after the inversion to Switzerland the majority of the board members were shifted from Swedish to Swiss nationals, a marked difference that possibly represents a significant move of management attributes. This is rather surprising, since in Sweden, much like the United States, a corporation is resident for tax purposes if it is incorporated in Sweden. It thus seems that all that Nobel had to do in order to invert is to reincorporate someplace outside Sweden, and change little else. Nonetheless, a meaningful relocation of the board of directors did occur.

Based on Nobel's segment reporting it is hard to tell whether any other

[171] *See*, *supra* notes 72-79, and accompanying text.

[172] NOBEL BIOCARE, INTERIM REPORT 1, JANUARY-MARCH 2002 4 (2002).

[173] Press Release, *supra* note 163, at 2-3. As a rule, however, a board of director of a Swiss company had to consist of a majority of Swiss nationals resident in Switzerland. Nobel apparently asked and received and exemption from this rule by the Swiss Federal Office of Justice, provided that at least one director authorized to represent the company would be a national and a resident in Switzerland. *See*, Tender Offer/Rights Offering Notification Form, *supra* note 165, at 23.

significant economic changes took place. Sweden was not reported as a separate segment in the relevant years, but rather included in the "Nordic Countries" segment. Moreover, following the inversion, Nobel stopped reporting the Nordic Countries as a separate segment, and instead aggregated all European jurisdictions into a single segment, further complicating the ability to learn of Nobel's post-inversion Swedish operations.

However, employment figures reported in 2001 through 2003 suggested that no significant changes occurred in the Swedish workforce. Both before and after the inversion, for example, Nobel's R&D team consisted of 80 employees based in Sweden and the U.S., with the head of R&D based in Sweden. Prior to the inversion, Sweden-based employees accounted for 29% of a 1,328-strong global workforce. In 2002, Sweden accounted for 32% of the global work force that remained unchanged in size. In 2003, 31% of Nobel's employees were located in Sweden, of a workforce of 1,363.

It is also interesting to note that Prior to the inversion Nobel had four major manufacturing facilities, located in Yorba Linda, CA, Fair Lawn, NJ, Stockholm, Sweden, and Karlskoga, Sweden. New Nobel maintained the same production facilities.

To summarize, Nobel move had some economic significance at the very top of the corporate management, with the board of directors turning to be majority-controlled by Swiss nationals. At the board level, the move has been at least partial (if not full). However, the board had a strong Swiss flavor even prior to the move (in fact, only one new Swiss Board member was appointed, while the appointment of two Swedish board members was not renewed). At the operational level, Nobel's move seemed to have made little economic difference (if at all) in Sweden.

Some of the data of Nobel's global activities before and after the inversion is summarized in Table 4.

Table 4 – Summary of Nobel's activity by geographical segment before and after the inversion

	2001	2002a (Inversion announced and completed)	2002b[174]	2003
Board Members'				

[174] Until 2002, the Nobel Biocare comprised of two primary business segments: Dental Implants and a product named Procera. Geographic information was provided for dental implants only. After the integration of Procera in 2002, a decision was made to change segment reporting from 2003 onwards, to include all products in geographical segment reporting. Column 2002a should therefore be compared to column 2001, as both have figures that are exclusive of Procera. Column 2002b represents the restated results for 2002 after the change in segments, and includes Procera. Column 2002b should therefore be compared with column 2003. See, NOBEL BIOCARE, ANNUAL REPORT 44 (2003)

Nationality				
Swedish	4	2		2
Swiss	3	3		3
Total	7	5		5
Senior Executives' Nationality				
Swedish	8	10		10
American	2	2		2
Canadian	1	1		1
Swiss	1	1		1
Employees (% of workforce)[175]				
Europe (excluding Sweden)	27%	24%		25%
North America	34%	34%		33%
Asia/Pacific	5%	5%		6%
Other	5%	5%		5%
Sweden	29%	32%		31%
Total (Global workforce)	1,328	1,330		1,363
Capital expenditures (€ thousand)				
Europe	6,321 (62%)	7,365 (60%)	8,435 (62%)	8,354 (60%)
North America	2,615 (25%)	4,437 (36%)	4,653 (34%)	4,677 (34%)
Asia/Pacific	191 (2%)	311 (3%)	311 (2%)	596 (4%)
Other	1,128 (11%)	178 (1%)	178 (1%)	251 (2%)
Total	10,255 (100%)	12,291 (100%)	13,577 (100%)	13,878 (100%)
Gross Assets (€ thousand)				
Europe	109,724 (45%)	143, 572 (55%)	201,693 (62%)	256,498 (68%)
North America	112,394 (46%)	95,482 (37%)	102,162 (32%)	97,650 (26%)
Asia/Pacific	9,669 (4%)	9,248 (4%)	9,248 (3%)	13,927 (4%)
Other	14,537 (6%	11,150 (4%)	11,150 (3%)	10,445 (3%)
Total	246,324 (100%)	259,452 (100%)	324,253 (100%)	378,520 (100%)
Gross Revenues (€ thousand)				
Europe	105,578 (42%)	116,569 (43%)	136,529 (44%)	157,714 (47%)
North America	95,655 (38%)	101,840 (38%)	126,580 (41%)	121,846 (36%)
Asia/Pacific	27,182 (11%)	31,390 (12%)	33,341 (11%)	37,093 (11%)
Other	23,658 (9%)	21,655 (8%)	14,740 (5%)	17,325 (5%)
Total	252,073 (100%)	271,454 (100%)	311,190 (100%)	333,978 (100%)

4. The News Corporation Limited's 2004 Move from Australia to the United States

News Corporation (News Corp.) is a public multinational media conglomerate. It was founded in 1923 in Adelaide, Australia as a publisher

[175] These numbers represent the annual average number of employees, which Nobel provides in its annual reports (as opposed to the number of ongoing employees at the end of the fiscal year, which is also regularly reported by Nobel).

of a daily newspaper. Since then it became a media empire with interests in film, televisions, book publishing and multiple other media-related businesses.[176]

In April of 2004, News Corp. made public its intention to change its legal domicile and reincorporate as a Delaware company, with primary public listing of its securities to move from the Australian Stock Exchange to the New York Stock Exchange.[177] While the precise scheme of the reorganization plan was somewhat complex,[178] shareholders generally exchanged their shares in the Australian News Corp (Old News Corp), for shares in a new Delaware incorporated company (New News Corp) on a one-to-two basis (one new share of New News Corp for every two shares of Old News Corp).[179] The reincorporation was completed in November of 2004. News Corp.'s Fiscal Year ends on June 30. The inversion was therefore announced in the 2004 fiscal year, but completed in the 2005 fiscal year.

The change of incorporation from Australia to the U.S. resulted in a corresponding change of tax-residence from Australia to the U.S. Significantly, however, News Corp explicitly stated that the change in tax-residence was not expected to have a significant effect on New Corp's effective tax rates in the foreseeable future.[180] If anything, News Corp had to reassure shareholders that the reincorporation will not result in an *increase* in effective tax rates. The reason was that as a U.S. company, News Corp would be subjected to taxation on its worldwide income at a 35% corporate tax rate. The expert opinion supporting the transaction stated that "[p]rima facie this is disadvantageous as, under the [pre-inversion] structure, News Corporation is subject to tax on its worldwide income at the Australian corporate tax rate of 30%..."[181]

It is therefore obvious that corporate-level tax-advantage was not a factor driving the reincorporation, notwithstanding that the transaction resulted in an inversion. The plan was driven by other factors. Rupert Murdoch, the long-time Chairman, CEO and largest shareholder of News Corp stated at the time that "[w]e undertook this move for one reason: to

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[176] Grant Samuel & Assocs., *Re-incorporation of The News Corporation Ltd in the United States and Acquisition of Queensland Press Pty Ltd*, [Hereinafter: New Corp. Expert Report] *in* INFORMATION MEMORANDUM IN RELATION TO A PROPOSAL TO "RE-INCORPORATE" IN THE UNITED STATES AND TO ACQUIRE FROM MURDOCH FAMILY INTERESTS THEIR SHAREHOLDING IN QUEENSLAND PRESS PTY. LIMITED (From 6-K/A) E1, E-35 (Sept. 15, 2004) [hereinafter: News Corp Form 6-K].

[177] News Corp Form 6-K, *id.* at 2.

[178] For a description of the transaction, see *id*., at 40-58.

[179] News Corp. Expert Report, *supra* note 176 at E-1.

[180] News Corp Form 6-K, *supra* note 176 at 30.

[181] News Corp. Expert Report, *supra* note 176 at E-121.

create greater value for our shareholders."[182] The expected benefit for shareholders was to come from several factors such as:

> "[e]nhanced US-based demand for the company's shares, over time, resulting from an expanded active US shareholder base and the expected inclusion in major US indices; Potential narrowing of the trading discount of the non-voting shares relative to the voting shares, further enhancing the relative value of the non-voting shares; Improved access to a larger pool of capital available in the US, which should provide greater financial flexibility and improved pricing for capital raisings and acquisition purposes; Full consolidation and control of [certain publishing business]…; Reduced corporate complexity; and [e]xternal reporting in a manner consistent with News Corporation's peer group in the US"[183]

The main justification thus seemed to be financially-driven and not tax-driven.[184] Indeed, in the two decades preceding the inversion, News Corp aggressively expanded its U.S. operations.[185] For example, it acquired 20th Century Fox in 1985, Fox TV Network in 1987, lunched the Fox News Channel in 1996, and completed the acquisition of DirectTV in 2003.[186] Approximately 70% of the group's revenues, 80% of the profits[187] and 80% the long-lived assets were located in the United States at the time of the inversion. The corporate operational headquarters was in New York, where it has been located for twenty years by the time of the move.[188]

The largest shareholder of News Corp was the Murdoch family that through various holding entities controlled 29.86% of the voting power (this was expected to increase to 29.47% after the completion of the transaction). Mr. Murdoch, although born in Australia, has lived in the U.S. since 1974, and became a U.S. citizen in 1985.[189] Moreover, U.S. investors controlled the largest share of publicly traded-stock with 20.83% holding in the ordinary class of voting stock, and 34.28% of the non-voting preferred

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[182] NEWS CORPORATION, ANNUAL REPORT 4 (2004)

[183] News Corp Form 6-K, *supra* note 176 at 2.

[184] *Id*. at 1 ("Mr. Murdoch said the proposal was designed to make News Corporation a more attractive investment to shareholders and that he believes the proposal has potential benefits for shareholders").

[185] News Corp. Expert Report, *supra* note 176 at E-35.

[186] *Id*.

[187] *Id*. at E-3.

[188] *Id*. at E-5

[189] Murdoch, Keith Rupert, *in* THE ENCYCLOPEDIA OF THE HISTORY OF AMERICAN MANAGEMENT 393, 393 (Morgen Witzel, ed., 2005).

stock. News Corp's board was also U.S. dominated. According to the 2004 annual report, eleven board members where U.S. nationals, four were Australians, one was British and one was Finnish.

Given the dominant U.S. flavor of News Corp operations and management at the time of the transaction, the expert opinion supporting the transaction concluded that News Corp was "already a United States based company".[190] A change in legal domicile simply followed News Corp's business reality.[191]

The transaction did not go without conflict. Australian investors — who have held a significant stake in News Corp — were concerned that corporate governance will be affected to their disadvantage given the difference between Australia and U.S. corporate and securities laws, as well as the physical dislocation of governance mechanisms (such as that the general meeting would no longer be held in Adelaide). [192] This eventually resulted in legal battles and the offloading of shares by Australian institutional investors.[193] Some have speculated that the move was indeed driven by controlling shareholders desire to take advantage of governance mechanism available under U.S. law, but not under Australian law.[194]

It is also interesting to note that from an investor-level-tax point of view, the inversion might have been detrimental to Australian shareholders, but beneficial to U.S. shareholders. Most jurisdictions in the world, U.S. and Australia included, impose withholding tax on dividend payments from domestic corporations to foreign shareholders. This meant that prior to the inversion, U.S. shareholders (including the Murdoch family), but not Australian shareholders, were subject to dividend withholding tax in Australia on any dividend paid by Old News Corp. (under the U.S.-Australia tax treaty, the rate is 5% to shareholders who hold 10% or more of the voting power, and 15% to all others).[195] After the inversion, U.S. shareholders (including the Murdoch family) were not subject to dividend

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[190] News Corp. Expert Report, *supra* note 176 at E-5.

[191] *Id*., at E-4 ("a change of domicile is probably inevitable at some point if the shareholder base becomes increasingly dominated by United States investors. Deferring this event will not make the index and transition issues go away").

[192] For a detailed discussion of shareholders' disputes the ensued see, Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1 (2010).

[193] Richard Siklos, *News Corp. Sued Over Poison Pill Move*, The New York Times (Oct. 8, 2005).

[194] *Id*., at 29-40 (discussing to comparative differences in respect of the poison pill mechanism adopted by News Corp following the inversion).

[195] CONVENTION BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA FOR THE AVOIDANCE OF DOUBLE TAXATION AND THE PREVENTION OF FISCAL EVASION WITH RESPECT TO TAXES ON INCOME Art. 10 (2001).

withholding tax on any dividend paid by New News Corp., while Australian shareholders were.

However, notwithstanding corporate-governance and other agency issues, News Corp went to a great length to explain that its Australian operations will not be affected by the move. New News Corp.'s registration statement (made with connection of the New News Corp.'s stock offering) suggested that "the Directors of News Corporation do not intend to make (a) any material change to the continuation of the business of News Corporation; (b) any major changes to the business of News Corporation, including redeploying of fixed assets; or (c) any change to the future employment of the present employees of News Corporation."[196] Mr. Murdoch, in his annual letter to shareholders, added that notwithstanding the inversion plan "[f]or more than 80 years, the Company has proudly called Australia its home. It is where the Company was founded, nurtured, and from where we get our entrepreneurial spirit Australia is our spiritual home, and will always remain so."[197] He noted that "[t]he move will have no discernible impact on our operations, in Australia or elsewhere. We will remain a proud and vital part of the Australian media landscape with a listing on the Australian Stock Exchange – now and for generations to come."[198]

Indeed, based on public disclosures, it seems that News Corp made good on its promise not to change its Australian operations. In the years following the inversion Australian revenues and assets slightly increased (consistent with expansion of the worldwide activity of News Corp), and maintained (even slightly increased) their relative share in global operations. Australia accounted for 11% of the groups' long-lived assets in both 2005 and 2006, and for 15% of the revenues in both years (similar to pre-inversion figures). The national composition of the board had also changed little. In both 2005 and 2006 the board was comprised of ten American members, three Australian (compared with four prior to the inversion) and one British. One Spaniard was appointed in 2006.

To summarize, News Corp inversion resulted in little change to Australian operations, both in terms of strategic management and in terms of local operations. Significant economic attributes have been built up in the U.S. over a period of two decades preceding the inversion. To the extent any meaningful dislocations took place in Australia, they have happened

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[196] News Corp Form 6-K, *supra* note 176 at 94; *See*, also News Corp Expert Report, *supra* note 176, at E-1 ("There will be no material change to the operations, management or strategy of News Corporation. The directors of News Corporation following the 2004 annual general meeting will all become directors of News Corp US.")

[197] NEWS CORPORATION, ANNUAL REPORT 4 (2004).

[198] *Id*. at 4-5.

long before the inversion, and were driven by non-tax considerations. Tax-residence seems to have followed management and business relocation in this case, and not the other way around as empirical literature suggests. Moreover, tax-residence followed business considerations even though the change in tax-residence was not expected to generate any corporate-level tax-benefit (and might have even been detrimental).

Some of News Corp's geographical data before and after the inversion is summarized in Table 5.

Table 5 – Summary of News Corp's activity by geographical segment before and after the inversion

	2003	2004 (Inversion announced)	2005 (Inversion completed)	2006
Board Members' Nationality				
American	7	8	8	8
Australian	3	4	3	3
British/American	4	3	2	2
British	1	1	1	1
Finish	1	1	0	0
Spanish	0	0	0	1
Total	16	17	14	15
Long-Lived Assets ($ million)				
United States and Canada	Not reported	30,683 (82%)	33,764 (81%)	35,097 (81%)
Europe	Not reported	3,407 (9%)	3,381 (8%)	3,582 (8%)
Australia and other	Not reported	3,254 (9%)	4,768 (11%)	4,847 (11%)
Total	Not reported	37,344 (100%)	41,913 (100%)	43,526 (100%)
Gross Revenues ($ million)				
United States and Canada	11,150 (64%)	12,022 (58%)	12,884 (54%)	14,102 (56%)
Europe	3,846 (22%)	6,015 (29%)	7,511 (31%)	7,552 (30%)
Australia and other	2,384 (14%)	2,765 (13%)	3,464 (15%)	3,673 (15%)
Total	17,380 (100%)	20,802 (100%)	23,859 (100%)	25,327 (100%)

5. Tim Hortons' Inc. 2009 Move from the U.S. to Canada

Tim Hortons is a fast-food chain known mostly for its coffee and doughnuts. It was founded in 1964 in Hamilton, Canada.[199] It operated almost exclusively in Canada until 1995, when it was acquired by the U.S.-based Wendy's corporation.[200] In 2006, Tim Hortons went public as a dual listed company, listing its stock on both the NYSE and the Toronto Stock

[199] *The Story of Tim Hortons*, http://www.timhortons.com/us/en/about/the-story-of-tim-hortons.php

[200] *Id*.

Exchange. At the time, Wendy's sold 17.25% of the stock to the public.[201] The remaining stock was distributed to shareholders later in 2006, and Tim Hortons has been a widely held company ever since.[202]

The IPO was structured as a spinoff of Tim Hortons out of Wendy's. The spun-off public entity was a Delaware-incorporated entity. Therefore, the publicly traded entity was a U.S. corporation for tax purposes. It remained so until the 2009 inversion discussed below. Notwithstanding its U.S.-based IPO structure, Tim Hortons' management remained in Canada.[203] After the IPO, Tim Hortons also continued to earn substantially all of its operating income from Canada.[204]

On June 29, 2009, Tim Hortons (Old THI) announced a reorganization plan, under which the publicly-traded entity will become a Canadian corporation for tax purposes.[205] Under the plan, Old THI merged with a newly formed Canadian subsidiary ("New THI"), and the shares of Old THI were converted to shares of New THI.[206] New THI maintained its dual-listing in Canada and the United States.

Tax savings was one of the stated reasons for the inversion.[207] As a Canadian company, Tim Hortons expected to reduce its effective tax rates by 4%, 6% and 8% for years 2010, 2011 and 2012 respectively.[208] The tax benefit was expected primarily due to reduction in Canadian corporate tax rates.[209] However, tax did not play an exclusive role in the consideration to invert.

As noted above, following the 2006 IPO, the corporate management as well as most of the operational activity remained in Canada. The registration statement for the 2009 inversion offering recognized such

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[201] Tim Hortons Inc., 2008 Annual Report (Form 10-K) 99 (Feb. 20, 2009) ("On March 29, 2006, the Company completed its initial public offering ("IPO") of 33.35 million shares of common stock, representing 17.25% of the common stock outstanding. The remaining 82.75% continued to be held by Wendy's. On September 29, 2006, Wendy's disposed of its remaining 82.75% interest in the Company, by a special pro-rated dividend distribution of the Company's stock to Wendy's shareholders of record on September 15, 2006, and, as a result, since September 30, 2006, the Company's shares have been widely held").

[202] *Id*.

[203] According to the IPO registration statement, the principal executive offices remained in Oakville, Canada. *See*, Tim Hortons Inc., Registration Statement (Form S-1) 1 (Mar. 21, 2006).

[204] According to its 2007 annual report, 91.9% of the 2007 revenues were produced in Canada. Tim Hortons Inc., 2007 Annual Report (Form 10-K) 121 (Feb. 22. 2008).

[205] Press Release, Registration Statement Filed for Proposed Reorganization of Tim Hortons as a Canadian Public Company (Jun. 29, 2009).

[206] *Id*.

[207] Tim Hortons Inc., Registration Statement (From S-4/A) 26 (Aug. 12, 2009)

[208] *Id*. at 19.

[209] Press Release, *supra* note 205

reality, noting that "[c]urrently, our U.S. public company parent… is a holding company *that conducts no business and has no material assets*… We currently derive approximately 90% of our revenue from our Canadian operations."[210]

The board concluded that "[t]he existence of a non-operating parent holding company incorporated in a country where we conduct only a small portion of our business creates inefficient administrative complexities unrelated to our business operations."[211] Along the same lines, it has been suggested that "organizing under a Canadian parent is expected to permit us to expand in Canada and internationally."[212] Also, since Tim Hortons generated most of its cash flow from Canadian operations,[213] it was expected that the post-inversion structure would "reduce exposure to volatility in reported earnings and other items by substantially lowering exposure to foreign exchange rate fluctuations."[214] The board even noted that the pre-inversion U.S. structure, coupled with the dominant Canadian flavor of Old THI, caused confusion among "lenders, suppliers, landlords and local governmental agencies".[215] Matching the legal domicile with the operational reality has therefore been pitched as an expected benefit of the inversion.

This story is well supported by Old THI's corporate filings for 2008 (the year preceding the inversion).[216] At the time, the entire executive team of Old THI was composed of Canadian nationals. Similarly, the board of directors was overwhelmingly controlled by Canadians, with ten Canadian board members and only two Americans. Also at the end of 2008, Old THI had 2,917 restaurants in Canada, compared with 520 in the U.S. Old THI occupied 546,410 sq. ft. of manufacturing and distribution facilities in Canada, compared with about 45,500 sq. ft. in the United States. Canada accounted for 66% of Old THI's long-lived assets and 79% of the gross revenues, compared with 27% and 6% in the U.S., respectively.

Under such circumstances, Old THI's board was not concerned with any possible penalties imposed by the U.S. anti-inversion rule of Section 7874. Old THI easily met the "substantial business activity" exception, as most of its activities were conducted in Canada, the jurisdiction to which it

[210] Tim Hortons Inc., Registration Statement (From S-4/A), *supra* note 205, at 26 (italics added).

[211] *Id*.

[212] *Id*.

[213] *Id*. at 27.

[214] *Id*.

[215] *Id*.

[216] The data is taken from Tim Hortons Inc., 2008 Annual Report (Form 10-K), *supra* note 201.

inverted.[217] Section 7874 did not apply to the transaction.

A review of New THI annual reports in the years following the inversion indicates that no meaningful dislocations can be observed in the United States. For example, there has been little change in the composition of the executive team. In 2009 one Canadian executive left. One Canadian and one American were appointed. The executive team remained the same in 2010. The only change observed in the Board of Directors during the 2008-2010 periods was the departure of one American board member.

U.S. operations were also not negatively affected. In fact, New THI opened additional restaurants in the United States. The chain increased its U.S. presence from 520 restaurants before the inversion, to 583 and 602 restaurants in 2009 and 2010 respectively. New THI manufacturing and distribution facilities in the United States remained the same throughout the tested period. U.S. revenues remained largely unchanged, with a slight increase observed in 2009 (but a decrease to the pre-inversion level in 2010). While some decline can be observed in the size of the net U.S. long-lived assets (from $402,839 in 2008, to $324,600 in 2010), this decline has not been matched with a decline in revenues. A corresponding increase in assets can be observed in the "corporate" segment, which refers to assets that support the corporate as a whole (i.e., assets the benefits of which can be associated with an identified geographical segment).[218]

To summarize, Tim Hortons inversion was a virtual "naked" inversion. In fact, the very suggestion that Tim Hortons' 2009 inversion is an "expatriation" of a corporation away from the United States is a misnomer. The transaction is much better described as *repatriation* to Canada. Tim Hortons was simply "returning to its origins."[219] Given that Tim Hortons has always retained its Canadian identify, one might wonder why did it move to the U.S. in the first place (in 2006), and why did it wait until 2009 to return to its true home.

The 2006 IPO was driven by THI's U.S. owner, Wendy's, which at the time held the entire capital stock of THI. This can explain the choice to go public as a U.S. entity. Under such circumstances, there was little reason to expect that the 2009 inversion would result in a loss of important economic attributes in the United States. Such attributes were always located in Canada, and were never the United States' to lose.

2009 may have been chosen as the year for repatriation for two reasons. First, as stated in the inversion registration statement, Canada was in the process of gradually reducing its corporate income tax rates, from 22% in 2007 to 15% by 2012. In 2008, the rate was 19.5%, and was expected to be

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[217] Tim Hortons Inc., Registration Statement (From S-4/A), *supra* note 205, at 34.
[218] Tim Hortons Inc., 2010 Annual Report (Form 10-K) 100 (Feb. 22, 2011).
[219] MARPLES & GRAVELLE, *supra* note 12, at 6.

reduced to 18% by 2010, the year in which New THI expected to start reaping the tax benefit.[220] It seems odd, however, that a rate reduction 1.5% made the difference in the decision to invert. Even before Canada's gradual rate reduction, the maximum Canadian rates of 22% were substantially lower than the U.S. rate of 35%.

A second aspect for the decision to invert in 2009 is briefly noted in the registration statement. OLD THI, the public company that spun of Wendy's, entered into certain tax sharing agreement with its parent as part of the IPO. Tax sharing agreements generally prevent a corporation from taking any actions that change the ownership structure within an affiliated group.[221] Also, the U.S. tax code restricts certain dispositions in spun-off companies' stock from taking place too close in time after the spinoff.[222] These issues were explicitly noted in the registration statement as restrictions that prevented earlier changes to the corporate structure. One might wonder what would have happened if it was not for the contractual obligations and the time limits embedded in the U.S. Code. It is plausible to conclude that the 2009 inversion was "a writing on the wall" ever since the 2006 IPO.

Some of News Corp's geographical data before and after the inversion is summarized in Table 6.

Table 6 – Summary of Tim Hortons activity by geographical segment before and after the inversion

	2008	2009 (Inversion announced and completed)	2010
Executives' Nationality			
Canadian[223]	9	9	9
American	0	1	1
Total	9	10	10
Board Members' Nationality[224]			
Canadian	10	10	10

[220] Press Release, *supra* note 205,

[221] Tim Hortons Inc., Registration Statement (From S-4/A), *supra* note 205, at 26 ("As a result of a tax sharing agreement that we entered into with Wendy's at the time of our IPO, and of time constraints under U.S. tax rules relating to our spinoff from Wendy's, our ability to engage in certain acquisitions, reorganizations and other transactions was limited for a period of time. These restrictions have now expired)." For a discussion of reasons for such restrictions, see Stanley Barsky, *Tips on Drafting Tax Sharing Agreements*, 144 TAX NOTES 180 (2014).

[222] For a discussion of such restrictions, see Herbert N. Beller and Lori E. Harwell, *After the Spin: Preserving Tax-Free Treatment Under Section 355*, 92 TAX NOTES 1587 (2001).

[223] This includes one executive with a dual Canadian/British citizenship.

[224] The nationality of most of Tim Hortons' executives is based on inferences such as the executives' education and other managerial positions. Most are not included in biographical databases that provide citizenship data.

American	2	2	1
Total	12	12	11
Restaurants			
Canada	2,917	3,015	3,148
U.S.	520	563	602
Ireland	247	206	194
UK	46	85	81
Afghanistan	1	1	1
Total	3,731	3,830	4,026
Properties (Sq. Ft.)			
Canada	546,410	622,410	757,490
U.S.	≈ 45,500[225]	≈ 45,500	≈ 45,500
Gross Assets ($ thousands)			
Canada	1,290,219 (62%)	1,373,325 (66%)	1,686,209 (68%)
U.S.	567,557 (27%)	478,395 (23%)	424,089 (17%)
Variable Interests[226]	213,407 (10%)	226,470 (11%)	37,868 (2%)
Corporate[227]	26,511 (1%)	16,101 (1%)	333,350 (13%)
Total	2,097,694 (100%)	2,094,291 (100%)	2,481,516 (100%)
Long Lived Assets (net, $ thousands)			
Canada	913,823 (61%)	967,879 (65%)	1,012,322 (74%)
U.S.	402,839 (27%)	356,560 (24%)	324,600 (24%)
Variable Interests	163,376 (11%)	156,712 (10%)	25,252 (2%)
Corporate	13,647 (1%)	12,881 (1%)	11,496 (1%)
Total	1,493,685 (100%)	1,494,032 (100%)	1,373,670 (100%)
Revenues ($ thousands)			
Canada	1,750,399 (79%)	1,914,210 (78%)	2,114,419 (83%)
U.S.	122,679 (6%)	140,491 (6%)	123,116 (5%)
Variable Interests	356,095 (16%)	384,152 (16%)	298,960 (12%)
Total	2,229,173 (100%)	2,438,853 (100%)	2,536,495 (100%)

IV. DISCUSSION: PATTERNS OF INVERSIONS AND HOME COUNTRY DISLOCATIONS

A. Summary of Findings

Table 6 summarizes each of the case studies discussed. It outlines whether tax-saving was a factor driving the inversion, as well as the business affiliation of each inverting corporation to the target jurisdiction. The two right-most columns summarize what types of meaningful dislocations can be observed in the home jurisdiction following the inversion.

[225] This includes three assets that are reported as having a size of < 2,500 Sq. Ft. For purposes of the calculation, it is assumed that these assets size is 2,500 Sq. Ft. each.

[226] Variable interests include consolidation of financial results in “variable interest entities” which include entities in which a holder holds controlling interest that is not based on majority of voting rights.

[227] Corporate assets include assets that benefit the groups as a whole, rather than an identified geographical segment.

Table 6 – Summary of observed dislocations in the home jurisdictions

Inverting corporation	Was entity-level tax saving a driving factor?	Pre-inversion interests in target jurisdiction	Management relocation	Can other home-jurisdiction dislocations be observed?
Shire Pharmaceuticals	Yes	Insignificant	No; Virtual	No
Wolseley PLC	Yes	Insignificant	No; Virtual	Yes, operational, but not to target jurisdiction; Unclear if attributable to inversion
Nobel Biocare	Yes	Significant: Board members, CEO nationality; Investor base; Major local market	Yes; partial to full	No
News Corporation	No	Significant: Board members nationality; Functional HQ; Controlling shareholders nationality; Investor base; Largest market of operations	Management already located in target jurisdiction	Yes, corporate governance functions; direct result of the inversion
Tim Hortons	Yes	Significant: Board members and executives nationality; Functional HQ; Largest market of operations	Management already located in target jurisdiction	No; Operational activities already located in target jurisdiction

The first obvious outcome from an analysis of the case studies is that the type and scope of meaningful dislocations varies tremendously. Whether an inversion is associated with the dislocation of meaningful functions in the home jurisdiction is a highly contextualized question. Therefore, a blanket policy statement according to which inversions result in the loss of positive attributes cannot stand. This further supports the need for an observation-based grounded theory that may explain the relationship between inversions and meaningful dislocations. Such theory can suggest propositions for future empirical research, which in turn will provide useful guidance for tax-writers. Such propositions are discussed in subsection B. below.

A second interesting observation is that in all cases in which meaningful headquarters dislocations occurred, the inverting corporation already had significant business affiliation to the target jurisdiction. It is thus plausible to theorize that meaningful dislocations of management attributes are to be expected where *non-tax* considerations, such as the draw of the target's jurisdiction financial markets, investor base or personal affiliation of management are present. Such conclusion is consistent with the findings of Birkenshaw et. al.[228]

This conclusion does not stand to negate the opposite, that is, that no dislocations are expected where *only* tax considerations are present. As

[228] *Supra* notes 72-76 and accompanying discussion.

further discussed below,[229] however, having meaningful attributes in the home jurisdiction rather than the target jurisdiction seem to serve as a deterrent for meaningful relocations.

To be sure, the case studies are not in conflict the vast literature on the effects of tax on capital locational decisions. In fact, it seems to support it. Tax seems to play a role in inducing meaningful dislocations of management attributes, but only in cases were such dislocations are supported by non-tax business rationale. This implies that developed jurisdictions should be able to determine corporate tax-residence based on substantive factors, without fear of competition from tax havens that cannot offer substantive locational benefits. Tax-residence competition may still be an issue to the extent that developed jurisdictions offer similar comparative benefits. This implies that as long as corporate tax rates are set at competitive rates, it is possible to determine tax-residence based on substantive factors without worrying about substantive dislocations from one developed jurisdiction to another.

B. Grounded Constructs of Home Country Effects of Inversions

Various patterns of management relocations can be identified in the case studies that warrant further research. Such patterns are discussed below, and are summarized in Table 8.

Table 8 – Summary of dislocation patterns in inversions

Inverting corporation	Chronology of dislocations	Spectrum and type of dislocations	Pattern of tax-residence dislocation	Dislocation conflicts of interests
Shire Pharmaceuticals	No dislocation observed	Legal relocation; no financial relocation; virtual management relocation; no operational relocation	Virtual CMC relocation	Interests probably aligned for virtual relocation
Wolseley PLC	No management dislocation; concurrent operational dislocation, but not to target jurisdiction	Legal relocation; no financial relocation; virtual management relocation; some operational relocation, but not to target jurisdiction	Virtual CMC relocation	Interests aligned for virtual relocation; Interests probably not aligned for operational relocation
Nobel Biocare	Concurrent management dislocation with inversion	Legal, financial and management relocation; no operational relocation	Substantive POI relocation	Interests aligned for management relocation and for operational non-relocation
News Corporation	All dislocations prior to inversion	Legal, financial, management and operational relocation	Substantive CMC relocation	Conflicts of interest for legal relocation; interests aligned for non-relocation of operational activities
Tim Hortons	No dislocation observed	Legal	Virtual POI relocation	Interests probably aligned for virtual relocation

Several observation-based propositions that warrant further research are suggested below. This is done by summarizing different types of inversion

[229] See discussion *infra* at Section IV.B.3.

constructs. In the context of each construct, the Article discusses the types of meaningful dislocations that can be observed.

1. Chronology of Inversions and Dislocations

The case studies suggest that when an inversion is associated with *meaningful* management relocation, it is not necessarily the case that management relocation chronologically *follows* the inversion (as currently suggested in empirical literature). Rather, management relocation can be observed only in cases where tax relocation happens *after* significant connections of the management to the target jurisdiction had already been established. Two patterns can be observed:

Inversion follows meaningful management relocation. Under such a pattern, inversion is the last step in a substantive move of management and business operations to another jurisdiction. Over a period of time an MNC may develop a foreign market that completely outgrows the MNCs historical home market. When the MNC is no longer substantively located in its historic jurisdiction, but rather in the new market, the inversion follows the business reality. For example, by the time News Corp inverted from Australia to the U.S., it was already, in substance, an American corporation.

Tim Hortons is another interesting example in this context, but somewhat different than News Corp's. In that case the inversion followed management (which was located in Canada), but the management was never in the U.S. to begin with. In fact, Tim Hortons' first move to the U.S. in 2006 is an example for an inversion that was not followed by management dislocation, while the 2009 repatriation is an example of inversion of the kind of "return to origins".

Inversion complements meaningful management relocation. Under such a pattern, at the time of the inversion management already has strong business or personal affiliation to the target jurisdiction. For example, Nobel's management move to Switzerland followed the appointment of a Swiss CEO. Three Other board members were also Swiss before the inversion. Switzerland was an important market for Nobel, so there were both personal and business reasons to transfer the headquarters from Sweden to Switzerland. Tax savings supported such a move, and may have been the "final straw" necessary to initiate the inversion. It is possible that a more competitive tax environment in Sweden would have prevented the move. However, it does not seem that tax consideration alone would have facilitated an *actual* move of the management.

Other case studies not discussed herein show similar patterns. For example, when Ensco inverted from the U.S. to the U.K. in 2009, ENSCO announced that "most of [its] senior executive officers and other key decision makers will move to England."[230] However, at the time, ENSCO already had significant operations in the U.K.[231]

Theoretically speaking, a third pattern could occur, as suggested by empirical literature on inversions:

Inversion precedes meaningful management relocation. Under such a pattern management move would follow an inversion, even though the corporation had no previous affiliation to the target jurisdiction. This pattern has not been observed in the case studies explored, but it does not mean it is impossible.

2. Spectrum and Types of Headquarters Dislocations

The case studies lend support to the decentralized view of MNCs headquarters. The dislocation of meaningful attributes cannot be described as a binary variable. It is better placed on a spectrum, consistent with studies in organizational science. Different functions may dislocate, and each to a different degree.

For such purposes, Desai's division of MNCs' headquarters to "legal", "financial" and "managerial" is helpful in describing observed patterns of functional dislocations. The crucial question for the purpose of this study is whether it can be observed that a relocation of a firm's tax home (part of the "legal home") is also associated with the relocation of the firm's financial home and managerial talent. This may help to articulate the types of attributes that may be lost as a result of tax-relocation. The loss of different attributes may dictate different policy considerations.

Management Relocations. Relocation of managerial talent results in the loss of meaningful attributes, but does not seem to be driven (at least not primarily) by tax relocation. The movement of management talent is a matter of degree. It can be complete, partial or virtual.[232] Inversions driven solely by tax considerations seem to be associated with *virtual management relocations* (Shire; Wolseley). *Full or partial management relocations* happen in the context of inversions that are supported, at least in part, by non-tax considerations (Nobel; News Corp).

Financial Relocations. Financial relocations may bring about a change to governance mechanisms, which can be viewed as a meaningful attribute the loss of which is detrimental. Changes in governance seem to be associated with tax relocation in cases where non-tax considerations are

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[230] See, ENSCO International Incorporated, Form S-4 (Nov. 20, 2009).

[231] According to ENSCO's annual report for 2009, the U.K. was the largest single-jurisdiction segment in terms of revenues, and accounted for about 10% for the long-lived assets of worldwide operations. See, ENSCO INTERNATIONAL INCORPORATED, ANNUAL REPORT 101 (2009).

[232] *Supra* notes 77-79 and accompanying discussion.

also involved (Nobel; News Corp). Where an inversion is driven solely by tax considerations, no changes in governance mechanisms can be observed (Wolseley, Shire).

Tax/Legal Relocation. Tax relocation, in and of itself, results in the loss of the corporate tax base. The case studies suggest that tax relocation may be associated with financial and management relocation (Nobel, News Corp), but does not necessarily explain them. Also, management-home seems more likely to attract the legal home than the legal home is likely to attract management. For example, contractual and tax obligations forced Tim Hortons management to maintain separate the legal home and the management home. Once this obstruction had been removed, the legal home moved to the place of the managerial home (and not the other way around).

3. Tax Residence and Meaningful Headquarters Dislocations

One of the main arguments against the adoption of a Real Seat test for corporate tax-residence is that it will induce *meaningful management relocations*. It is therefore preferable to have POI test in place, as it is not expected to distort locational decisions in an economically meaningful manner. The case studies lend little support to such argument, and contradictory patterns can be observed.

Meaningful Relocation from a POI Jurisdiction. The adoption of a POI test for corporate residence is not an assurance against the dislocation of meaningful management attributes. In the presence of non-tax considerations in the target jurisdiction, management may meaningfully move even if there is no need to do so (meaning, when tax relocation can be achieved without a management-move). Nobel is an example for such an inversion. In that case meaningful dislocations can be observed even though the home jurisdiction has applied a POI test (Sweden), and the target jurisdiction applied an RS test (Switzerland). Theoretically, all that Nobel had to do in order to lose its tax-residence in Sweden is to incorporate elsewhere. Nonetheless, meaningful management move took place. Similarly, Tim Hortons’ management had always remained in Canada, while the place of incorporation changed in 2006 to the United States, only to return back to Canada in 2009.

Virtual Relocation from a POI Jurisdiction. When the home jurisdiction is a POI jurisdiction, all that an MNC has to do in order to “lose” its tax residence is to achieve foreign incorporation. If only tax considerations are involved, there is no reason to expect further dislocation of economic attributes. This has been the case during the first wave of corporate inversions in the U.S.,[233] and seems to be supported by a case study from the second wave of corporate expatriations (Tim Hortons).

Tim Hortons' case study is an interesting example for a corporation that had little presence in the U.S., and therefore little reason to stay in the U.S. Tim Hortons' management was already located in Canada. It seems that the inversion would have happened even if the United States had adopted a Real Seat corporate-residence test.

Virtual Relocation from a CMC Jurisdiction. The case studies also suggest that it is not necessarily the case that meaningful attributes must be dislocated when an MNC inverts away from an RS jurisdiction. In both cases of Wolseley and Shire, management relocations were virtual, notwithstanding the fact that the UK decides the residence of corporations based on an RS test of central management and control (CMC).

This can be explained, however, by suggesting that the CMC test applied in the UK is not truly a substantive test. The ability to relocate without dislocating real management attributes suggests that the CMC test used in the UK is nothing more than a formal residence test (similar to POI) in disguise. In turn, this implies that corporations virtually inverted from the UK simply because they could do so at minimal cost (by having board meetings conducted outside the UK). There is no telling what would have happened had the CMC test been applied more aggressively (for example, based on the residence of the board members; or based on the place of daily operations).

Meaningful Relocations from a CMC Jurisdiction. One case study suggests that meaningful relocations from a CMC jurisdiction may be associated with an inversion (News Corp.). However, in that case it is clear that the meaningful dislocations happened long before the inversion, and were not caused by the inversion.

It is interesting to note that an inquiry into recent corporate inversions suggests that inversion from CMC jurisdictions are made almost entirely from the UK.[234] No "wave" of cross-border inversions can be observed from CMC jurisdictions such as Germany, France and others jurisdiction known for high corporate tax rates. France decides the place of corporate residence based on the corporate "effective seat" which is defined as "the place where bodies of management, administration and control are

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[233] MARPLES & GRAVELLE, *supra* note 12, at 1 ("These corporate inversions apparently involved few, if any, shifts in actual economic activity from the U.S. abroad, at least in the near term)."

[234] *See*, Laamanen, Simula & Torstila, *supra* note 3, at 197. Their descriptive statistics report that during the tested period, the net change in UK headquarter firms (i.e., MNCs inverting *from* the UK *minus* MNCs inverting *to* the UK) has been -14. For comparison, the second most negative change had been that of the Netherlands, with -3. Germany had a net loss of only -1, while France had a net gain of 2.

located."[235] French courts have consistently refused to recognize the "foreign" tax status of firms that had no substantive attributes in the foreign jurisdiction, and all of the significant attributes located in France.[236] Similarly, in Germany, the place of management refers to "the place of day-to-day business management of the company, rather than to the site of strategic direction."[237] To make such substantive determination German courts consider, among others, the identity of the executives involved, their performed management functions, and the availability (or lack thereof) of permanent management facilities.[238] Simply conducting board-meetings elsewhere would not suffice if an MNC seeks to give up its German tax-status.

It is therefore plausible that inversions out of the UK are common since UK MNCs can invert out of the UK with no need to incur significant costs by dislocating meaningful attributes. On the other hand, when tax-residence is truly determined based on substantive factors, the cost of the dislocations required to achieve a shift of tax residence operates as a deterrent for inversions. An interest example in this context is Tim Hortons inversion that had apparently been delayed due to contractual arrangement and time limits embedded in the U.S. tax Code. These costs were apparently successful in deterring an earlier inversion.

4. Conflicts of Interests, Reputation and Meaningful Dislocations

Another pattern emerging from the case studies concerns the important role of conflicts of interests arising from an inversion, and corporate handling of such conflicts. Where potentially affected parties—such as managers, investors, customers and employees—face different inversion-related outcomes, agency issues may dictate particular results.

Conflict of interest emerges as a relevant cost factor that may prevent meaningful dislocations. For example, if an inversion can be achieved without dislocations of management attributes, the interests of shareholders and managers are aligned, as both groups wish to see the effective rate of corporate tax decrease. If, however, managers have to actually move in order to achieve an inversion, their interests are no longer aligned with those of shareholders (assuming managers do not want to move). Managers who wish to maintain their place of residence may resist an inversion.

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[235] Nicolas de Boynes, *France*, *in* RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 441, 450 (Guglielmo Maisto ed., 2009).

[236] *Id*. at 451-452.

[237] Joachim Englisch, *Germany*, *in* RESIDENCE OF COMPANIES UNDER TAX TREATIES AND EC LAW 461, 487-488 (Guglielmo Maisto ed., 2009).

[238] *Id*. at 489-495 (discussing German courts' adjudication on the place of effective management).

In all case-studies explored the inverting corporations addressed reputational issues that may arise from conflicts of interest, usually in the press release announcing the inversion. MNCs take great care to appease the minds of potentially affected parties. It therefore seems that inversion consequences that are viewed negatively by interested parties may also serve as a deterrent for meaningful dislocations.

Several constructs can be observed in these contexts.

Inversion with Alignment of Interests Regarding Dislocation. When the tax relocation is achieved with no conflicts of interests between stakeholders, meaningful dislocation will occur if all interested parties share positive view of dislocation, and are less likely to occur if interested parties share negative view of dislocation. Within an inverting corporation, different interests may align differently in respect to the relocation of different functions.

For example, when Noble moved to Switzerland, is seemed that the tax savings and the actual move of management were in the interest of both management members and the large Swiss investor base. Such alignment of interests may explain the meaningful move of the board to Switzerland. On the other hand, the interest of Swedish employees was, obviously, to maintain their jobs in Sweden. Some board members as well as the entire executive team were Swedish. At the same time it did not seem that any interested party demanded the dislocation of Swedish operations. Such alignment of interests dictated that notwithstanding the tax move, Swedish operations remained untouched.

When Shire and Wolseley inverted, both investors and managers were interested in tax savings. This could have been achieved with no need for the managers to move out of the UK and into the target jurisdictions. This may have contributed to the virtual relocations observed in those circumstances.

Inversion with Conflict of Interest on Dislocation. When interested parties share different interest in the context of the inversion, conflicts may arise. For example, in the context of News Corp relocation, Australian shareholders had different corporate-governance (and tax) interests than those of American shareholders and controlling shareholders.[239] Such conflict presented an increased cost to the dislocation of meaningful attributes, resulting from shareholders litigation that ensued (though it did not prevent the inversion).

5. Other Considerations

The patterns of meaningful dislocations described herein are probably

[239] Hill, *supra* note 192.

not exhaustive and definitely not exclusive of each other. Each inversion discussed combines different patterns, and different combinations of such patterns may be suggestive of various types and degrees of meaningful dislocations. The picture that emerges suggests that some factors—such as personal affiliation of executives, business interests in foreign jurisdictions, and a large foreign investor-base—may support meaningful dislocations the prevention of which is of interest of tax policymakers. Other factors—such as conflicts of interests, substantive determination of tax residence, and reputational issues—may deter dislocations, and possibly present policymakers with a non-tax tool-box for the prevention of negative effects of corporate inversions.

CONCLUSION

Taxes are an important consideration in the context of investment decisions. But they are many times secondary to real business considerations.[240] Empirical literature that suggests that inversion transaction will cause dislocation of meaningful attributes ignores this simple truth. Due to the decentralized nature of MNCs, meaningful attributes may not leave a home-jurisdiction following an inversion, simply because it is not necessarily the case such attributes were in the home jurisdiction to begin with. And if they were there, there is no reason to assume such attributes will necessarily be dislocated in conjunction with a change in tax residence.

Taking a case studies approach, the article developed observation-based constructs that describe the possible *meaningful* effects of corporate inversions in the home jurisdiction. Such constructs should not be viewed as empirical conclusions, but rather as providing an opportunity for more nuanced empirical research on corporate inversions. Future empirical study of corporate inversions should move beyond the binary variables of tax relocation, and study the effects of inversions on multiple corporate functions as a matter of degree.

Two conclusions, however, can be stated based on the observations made in this article. First, an answer to the question whether inversions are associated with meaningful dislocation in the home jurisdiction is highly

[240] *The Foundation of International Tax Reform: Worldwide, Territorial, and Something in Between: Hearing Before the S. Comm. on Fin.*, 110th Cong. 2 (2008) (statement of Robert H. Dilworth, McDermott, Will, and Emery) ("I have never met a businessman (or even a tax executive) who was actually involved in decision-making about the tax issues of where to locate a business (that actually employed people) who would agree that his MNC employer acted to invest somewhere because of an interest-free loan of residual U.S. corporate tax if the company invested in a foreign country rather than the United States. Businesses follow customers, efficient delivery of material and productive work forces to such an extent that tax incentives are often just an afterthought").

contextualized. It cannot be simply stated that an inversion results (or does not result) in meaningful dislocations. Various factors interact in different ways to bring about dislocations. While tax may indeed serves as an incentive to meaningfully dislocate, it seems to be a secondary consideration to other factors.

Second, there seem to be an inherent tension between the desire to locate a headquarters where business opportunities can be exploited on the one hand, and taxes-saving on the other. It is clear that non-tax considerations play an important role in MNCs decisions whether to dislocate meaningful attributes, even where tax incentives to invert exit. This implies that it is easier for MNCs to engage in tax-induced inversions if they are able to shift their tax-residence without incurring the high cost of shifting *real* economic structures. Conversely, the need to change the location of meaningful economic attributes may operate as a deterrent to inversion, which in turn may support both the tax-base and the economic factors in the home jurisdiction.