POLITICO

A Whopper of a tax problem

By Kelsey Snell
August 26, 2014

Even the loss of the Whopper and fries won't budge Congress.

Burger King's $11 billion takeover of Canadian doughnut chain Tim Hortons, a deal that lets the burger behemoth drastically cut its U.S. tax rate by moving its headquarters to Canada, moved closer to fruition on Tuesday, following a chain of companies using an increasingly popular tax maneuver.

The move has been lighting up social media, with Burger King's Facebook page buzzing with customers calling for a boycott and blasting the company as a traitor, Democrats renewing calls to act immediately and Republicans calling it a symptom of the dysfunctional U.S. tax system.

But despite hand-wringing by lawmakers of both parties — and a shaming by President Barack Obama, who essentially accused the companies mulling the deals of lacking patriotism — prospects for any kind of intervention by Congress are still dim.

"The definition of fixing this is very different depending on if you're a Republican or a Democrat," said Ken Kies, who was chief of staff of the Joint Committee on Taxation in the 1990s. "The probability that there's actually going to be legislation that would actually get to president and he would actually sign, any reasonable person would have to say is near zero. Burger King won't change that."

The impotent Washington response to losing an iconic American fast food company over a tax issue is a reflection of just how dysfunctional Congress has become — and a stark illustration of how far apart the two parties are on tax reform. Simply put, many Democrats want to ban these so-called tax inversions, where companies flee U.S. taxes by taking headquarters overseas.

Republicans say the solution is cutting corporate taxes to make the U.S. more competitive. And not surprisingly, broad tax reform has gone nowhere.

"This is the business community saying we have zero confidence that the president will do anything on tax reform," said Grover Norquist, president of the conservative Americans for Tax Reform. "Every world-class company would be better off doing an inversion."

The deal is being financed in part by Berkshire Hathaway, the multinational conglomerate owned by the famously pro-tax billionaire Warren Buffett. He led the public push for higher tax rates for the top earners in the 2012 fiscal cliff deal. His involvement in a deal that allows Burger King to skip out on billions in U.S. taxes drew fire from critics.

Political commentators from MSNBC host Joe Scarborough to Neil Cavuto at Fox News have criticized Buffett's choice to invest as hypocritical.

Buffett could not be reached for comment, but the White House stood by its position on Tuesday.

"Let's be very clear," a spokeswoman said in a statement. "The president believes that as a general matter, it is not right that some corporations are able to exploit a loophole in the tax code despite having the bulk of their operations in the U.S."

The Treasury Department is still reviewing options to act on its own if Congress doesn't, the official said.

Current law allowing companies to shift their headquarters on paper and essentially renounce their U.S. citizenship highlights the need for a revamp of the entire tax code — on that lawmakers agree.

But the effort has floundered in the past year after top Senate tax writer Max Baucus (D-Mont.) retired, and the bid by his Republican counterpart, Ways and Means Committee Chairman Dave Camp, was shelved by Republican leaders.

Obama and Republicans actually share some common ground when it comes to corporate tax reform, but longstanding disagreements about individual tax rates — specifically taxing the rich — have hampered any progress.

The tax strategy used by Burger King — known as an inversion — lately has involved a company merging with a foreign rival or smaller competitor in a low-tax country like Ireland, the United Kingdom and now Canada. The move is completely legal — for now.

The company is the latest in a string of U.S. corporations, from Walgreens to Pfizer, looking to take advantage of foreign subsidiaries to avoid paying the high 35 percent U.S. corporate tax rate. Moving to Canada would mean Burger King will take advantage of its 15 percent corporate tax rate.

The Burger King move is unique among inversions, most of which have involved big companies scooping up smaller ones to get the foreign address. Burger King actually earns less revenue than Tim Hortons, and analysts said they see a strategic rationale for acquiring the doughnut company's operations.

No matter, the fact that it is a consumer brand name highlights the tax inversion issue.

Forty-seven U.S. companies have shifted headquarters abroad in the past 10 years at least, in part, to avoid paying U.S. taxes — a more than 60 percent jump compared to the prior two decades combined, according to the nonpartisan Congressional Research Service.

Acknowledging that tax reform is a ways off, lawmakers of both parties say they want to do something in the near term — but lines in the sand make prospects of any deal dim.

Senate Finance Committee Chairman Ron Wyden (D-Ore.) has said he is working with some Republicans on his panel to craft a short-term fix, but the talks have yet to produce a bill and are moving slowly, with less than a month of time in session before the lawmakers leave again for the elections.

But principles laid out by Sen. Orrin Hatch, the top Republican on the Finance Committee, essentially rule out any of the legislative proposals that have been embraced by Democrats so far.

The Utah Republican has warmed to the idea of a short-term fix in concept, but he has insisted that the legislation not be retroactive or punitive for companies that may have already made a tax change. He has also said it must be revenue neutral and act as a step toward a Tax Code overhaul that includes a territorial tax system.

Those criteria eliminate the only legislative option so far: a bill introduced by Michigan Democratic Sen. Carl Levin.

Levin's bill would apply retroactively to May of this year and require U.S. companies to shift at least 50 percent of stock ownership to the foreign company, from the current threshold of 20 percent. Companies that attempt to shift taxes overseas through inversions would still be subject to U.S. taxes if management and control remain in the country and 25 percent of its employees, sales or assets stay.

"Short of a tax overhaul that will make it easier for American companies to invest and create more jobs at home, Sen. Hatch has advocated for an interim proposal to address the disturbing recent uptick in inversions," Julia Lawless, a Hatch spokeswoman said.

There's also no incentive for Republicans to move on any controversial legislation before the midterm elections: The odds are good the GOP will gain control.

"I don't think that this really increases pressure on Republicans for a legislative solution prior to the election," said Matt McDonald, a partner at Hamilton Place Strategies. "Most of the competitive Senate races are ones where the incumbent is a Democrat, so maybe they would like to see a vote on it."

Democrats, indeed, see a good political issue.

Staunch liberals like Democratic Sen. Sherrod Brown called for a boycott of Burger King and suggested consumers switch to two other junk food icons in his home state of Ohio.

“Burger King’s decision to abandon the United States means consumers should turn to Wendy’s Old Fashioned Hamburgers or White Castle sliders,” Brown said.

But as the Buffett link shows, the issue does not break down entirely along party lines.

Sen. Chuck Schumer (D-N.Y.) has expressed concern for some Democratic proposals to mandate that most of management leave the country along with the company.

Schumer released general outlines earlier this month to limit the ability of inverted companies to shift profits to overseas subsidiaries while loading up their U.S. base with excessive debt. The practice, known as earnings stripping, is a popular tax dodge for multinationals.

Some conservatives say there is nothing wrong with a company legally taking advantage of existing tax rules, even if it means uprooting their headquarters and heading abroad.

“Inversions are not tax evasion. It’s not cheating at all,” said Dan Mitchell, a senior fellow at the Cato Institute. “It’s simply dealing with the law as it is, a very flawed law.”

As for the White House, the Burger King deal helps its case that if Congress doesn’t act, it has an obligation to do something.

Democrats could win political points by finding a way to get tough on corporations that are fleeing U.S. taxes. Obama slammed companies that use inversions as corporate deserters, a phrase in a passionate denunciation of the practice, and Treasury Secretary Jack Lew has said he is looking at options for executive action.

The Obama administration tried to tighten the rules once before in 2012, requiring at least 25 percent of a company’s employees, property and income to be located in the foreign country. But creative tax lawyers have had little trouble circumventing the change.

Public shaming may do more to limit the deals than actions by Congress or the White House.

Drugstore giant Walgreens backed down from a proposed inversion last month after lawmakers — including the Senate’s No. 2 Democrat, Dick Durbin of Illinois, the company’s home state — sought punitive legislation and harshly criticized the move.

On Facebook on Tuesday, angry consumers lashed out at Burger King.

Gabe Givens wrote: “If you attempt to buy Tim Horton’s for the purposes of evading US Taxes, I will NEVER step foot in another Burger King again…Don’t do it >” a line “liked” at one point by at least 4,600 people.

Another writer, a veteran, called for all Burger Kings on military installations to be shut down.

The rush of comments compelled Burger King to issue a reply on Facebook:

“We hear you. We’re not moving, we’re just growing and finding ways to serve you better,” noting that its HQ will remain in Miami - underscoring the loophole nature of the move.

Some comments mocked the apology.

“I’m not boycotting your product, I’m merely relocating my loyalties,” one said.