Value Creation: Old wine in new bottles or new wine in old bottles?

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Value creation, he noted has been invoked by the EU Commission to support different and contradictory policy outcomes in 2006 (Vatelli, Ilford Tax Advisory Enquiry, the Cass納 Shift Direction and the Shift direction on "digital platforms") the content in which value creation is used to support debates about a draft in the situation of taxing rights then that under the anti-avoidance dispensation. It is disorganised to present what is really a political debate about which country is entitled to be as a matter of legal analysis. A more honest approach would be to accept the debate for what it is.

If value creation is indeed no different from the originating cause of income or profit, then repackaging this fundamental concept is empty puffing - pouring old wine into new bottles to make the consumer believe there is a new product in style. If value creation is the originating cause of income or profit, then the only real analysis is today remains the continuing examination of modern income and profit generation to identify its originating cause and the location of that cause.

New wine in old bottles

Part IV of the 1984 IFRS (Capital) states that value creation is not a concept that has been considered by any revenue administration. That is certainly supported by the IFRS tax law on the location of the source of taxing rights. In Brazil v City of Montréal (1993) 5 16 (80) the House of Lords noted that "the question is, where do the profits arise?" South Africa's then highest court, the Supreme Court of the Appeal, noted in South Africa v Mark (1993) 5 16 (80) that, for the purposes of taxable income, the place of source is the location of the profit or loss on the enterprise. In Smidt & Co v Greenwood (1950) 5 16 (A), this results in a winner-takes-all assertion of taxing rights. This is the central issue that remains to be addressed.

Redefining source via value creation.

Whichever approach is accepted, value creation has become a material concept by its users. In its worst manifestation, the most accepted approach to transfer pricing of intangibles in the current Chapter VI of 2013 OECD guidelines (the "Guidelines") for the determination of arm's length prices for the transfer of intangibles has been to link the price to an "economic benefit". Current practice explicitly recognizes the relevance of value creation as understood in this way at odds with the source of income being its originating cause. The current approach would be to accept the debate for what it is.

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Complex originating causes of profit

The extensive case law on the source of income or profit has provided clear guidelines to identify the originating cause of income. These decisions have not provided a decision analysis in the case of profit where there is more than one originating cause. Some cases have sought to identify the source or determine originating cause (Vatelli, Ilford Tax Advisory Enquiry, the Cass納 Shift Direction and the Shift direction on "digital platforms") the content in which value creation is used to support debates about a draft in the situation of taxing rights then that under the anti-avoidance dispensation. It is disorganised to present what is really a political debate about which country is entitled to be as a matter of legal analysis. A more honest approach would be to accept the debate for what it is.

Digital economy

The 2020 OECD report Addressing Base Erosion and Profit Shifting argues that current international tax standards may not have kept pace with changes in global business practices. In Australia, the 2018 Tax Law (Cth) 2018 5 16 (A) for the first time, the first and the second international law Direction agreed that attributing the source of income is a practical matter of hand kerf. It is no different in the era of a digitalised economy. Debate about the allocation of taxing rights will be simplified by remittances and services to be included.

Schwarz on Tax Treaties, 5th Edition can be purchased here. The book is also available online on Kluwer International Tax Law. For more information please click here.