The Contents of Intertax, Volume 47, Issue 12, 2019

Kluwer International Tax Blog
December 9, 2019

Ana Paula Dourado (General Editor of Intertax)

Please refer to this post as: Ana Paula Dourado, 'The Contents of Intertax, Volume 47, Issue 12, 2019', Kluwer International Tax Blog, December 9 2019, http://kluwertaxblog.com/2019/12/09/the-contents-of-intertax-volume-47-issue-12-2019/

We are happy to inform you that the latest issue of the journal is now available. It is a special issue on transfer pricing in the digital economy. It combines academics and practitioners' analysis on recent developments, so that the reader gets the broad picture on some of the most complex issues related to the current and future international tax system. This special issue includes, among others, the following contributions:
Wolfgang Schön, *One Answer to Why and How to Tax the Digitalized Economy*

The question of why and how to tax the digitalized economy has been at the top of the international tax policy debate since the inception of the BEPS Action Plan in 2013. Over the years, a number of approaches have been discussed including far-reaching proposals to fully or partially reallocate taxing rights to market countries. In recent months, three options have emerged at the level of the Inclusive Framework/OECD: international taxation on the basis of 'significant market presence', taxation according to the value of 'user contributions', and profit allocation to 'marketing intangibles'. This article attempts to assess the merits of these proposals against a number of benchmarks: revenue, fairness, and efficiency. Finally, this analysis leads to a different approach: taxation on the basis of 'digital investment' and takes the nature of the corporate income tax as a tax on return on country-specific investment seriously while addressing the legitimate concerns and aims of the current debate.

Vikram Chand, *Allocation of Taxing Rights in the Digitalized Economy: Assessment of Potential Policy Solutions and Recommendation for a Simplified Residual Profit Split Method*

In 2019, the OECD released a public consultation document and its work program that address the tax challenges raised by the digitalization of the economy. These documents essentially discuss proposals that either address the allocation of taxing rights (Pillar I) or unresolved Base Erosion of Profit Shifting issues (Pillar II). Regarding Pillar I, three solutions were proposed: user participation, significant economic presence, as well as the marketing intangibles approach. The purpose of this contribution is to assess the Pillar I proposals considering their policy rationale and the broadly agreed tax policy principles by tax administrations. In light of the assessment, the author takes the view that the marketing intangible proposal, which seems to apply to consumer (or user) facing businesses, could be the most appropriate solution to address the issue of the allocation of taxing rights. However, that proposal incites several issues concerning its profit allocation mechanism. Thus, in order to achieve tax certainty, the contribution offers a potential solution for implementing the consumer (or user) facing proposal, that is, to resort to a simplified residual profit split method that is based on operating profit margins of a MNE Group . The article provides a high-level overview of the design of the mechanism and briefly addresses issues related to scope and nexus as well as rules that deal with elimination of double taxation.

Paul Klaassen & Arco Bobeldijk, *Country-by-Country Reporting and the Effective Tax Rate: How Effective Is the Effective Tax Rate in Detecting Tax Avoidance in Country-by-Country Reports?*

A low effective tax rate in combination with a high profit can be an important indicator of possible tax avoidance. In this article, we will discuss the limitations of the definitions of two columns in the country-by-country report, namely 'profit (loss) before income tax' and 'income tax accrued – current year'. We will conclude that the effective tax rate calculated based on the country-by-country report can not be accurately used in high level risk analyses.

Gary Lambert, Amanda Pletz & Georg Dettmann, *Implicit Support and Its Implications on Guarantee Fee Pricing: Fact or Fiction*

In recent discussions as part of the Base Erosion and Profit Shifting (BEPS) initiative, the OECD has raised a number of questions regarding financial transactions relied upon in an intragroup context. These include questions on determining the shadow credit rating, implicit support, and data to be relied upon when evaluating the arm's length nature of financial transactions. (OECD, Public Discussion Draft Financial Transactions, BEPS Actions 8–10, (3 July – 7 Sept. 2018), https://www.oecd.org/tax/transfer-pricing/BEPS-actions-8-10-transfer-pricingfinancial-transactions-discussion-draft-2018.pdf (accessed 29 July 2019).) More recently, comments by an OECD representative have asserted that a compromise between OECD members on the issue had been reached. (See comments made on 4 June 2019 by Tomas Balco (Head of the Transfer Pricing Unit, OECD Centre for Tax Policy and Administration) during the OECD International Tax Conference in Washington DC. See J. Martin, Agreement reached on OECD transfer pricing guidelines for financial transactions, official says, MNE Tax (8 June 2019), available at (accessed on 29 July 2019).) In this respect, the OECD acknowledges that Article 9 is relevant, but confirms that domestic law has priority, except to the extent that domestic provisions discriminate. This ongoing discussion demonstrates the complexity that tax payers and tax administrators face when considering financing arrangements.

Although the focus of this article is on intra-group financial guarantees in a broad sense, it focuses attention on of implicit support, a concept potentially relevant to all intra-group financial transactions. This article will also consider some of the issues currently discussed in the context of intra-group financing, including the importance and impact of implicit support on financing arrangements, from the viewpoint of tax courts, the OECD, and financial market participants. It then considers approaches used to determine the extent, if any, of implicit support by the main credit rating agencies as well as other financial market participants, and it goes on to consider the pros and cons associated with different pricing methods to assess the arm's length level of guarantees, once credit ratings adjusted for implicit support have been derived.

Scott Wilkie, *The Way We Were? The Way We Must Be? The 'Arm's Length Principle' Sees Itself (for What It Is) in the 'Digital' Mirror*

Under the first pillar, focused on the allocation of taxing rights including nexus issues, several proposals have been made that would allocate more taxing rights to market or user jurisdictions in situations where value is created by a business activity through participation in the user or market jurisdiction that is not recognized in the framework for allocating profits. … Some of the proposals would require reconsidering the current transfer pricing rules as they relate to non-routine returns, and other proposals would entail modifications potentially going beyond non-routine returns. In all cases, these proposals would lead to solutions that go beyond the arm's length principle (OECD, Addressing the Tax Challenges of the Digitalisation of the Economy – Policy Note, OECD/G20 Base Erosion and Profit Shifting Project 2 (OECD Publishing Jan. 2019). See also, the G20, G20 Leaders' Declaration: Building Consensus for Fair and Sustainable Development, Buenos Aires Summit (1 December 2018), paragraph 26).

Marcin Wrotniak, Sara Coccia & Yannick Zeippen, *Assessing the VAT status of independent supervisory board members: IO Case Note*

On 13 June 2019, the Court of Justice of the European Union (the "CJEU") released its decision in the IO case, C-420/18. In the case at hand, the CJEU ruled that a member of the supervisory board of a foundation, which in its status and duties, acts independently towards the said supervisory board or the foundation, but which however, when performing its activity does not act in its own name, on its behalf and under its own responsibility, and does not bear the economic risk arising from such activity, cannot be considered as carrying out an economic activity independently for VAT purposes. Hence, such person cannot qualify as a taxable person from a VAT perspective. The IO case adds to the EU VAT framework on the VAT status of members of independent bodies, by providing increased legal certainty on this point. Furthermore, the conclusions provided by the CJEU could be applied in assessing the VAT status of similar actors, such as self-employed counsels and consultants.

Enjoy your reading!