

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Tuesday, November 24th, 2020

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Carla De Pietro, Beneficial Ownership, Tax Abuse and Legal Pluralism: An Analysis in Light of the CJEU's Judgment Concerning the Danish Cases on Interest

The complex interconnections characterizing the relationship between the international tax treaty law system and the EU tax law system increasingly require attention. Accordingly, within the framework of this article, the judgment of the EU Court of Justice concerning the Danish cases on interest has provided the concrete opportunity to evaluate the significant effects that a lack of coordination between these two systems may have.

In fact, due to the broad economic concept of beneficial owner applied by the EU Court of Justice vis-à-vis the narrower OECD concept, there is no complete coordination between EU tax law and international tax treaty law. Even if, under the OECD approach, further conduit arrangements are covered under Article 7(1) of the MLI (or the anti-conduit mechanism), the different scope of the OECD and the EU concepts of abuse is an obstacle to complete coordination.

Very significantly, this lack of coordination may concretely create situations of conflict between the international and the EU obligations held by the same EU Member State. The significant practical relevance of these conflicts, which cannot be solved on the basis of a common conflict rule, requires solutions in terms of global tax governance. Accordingly, the author has developed her theory on the basis of a legal pluralist approach.

Jeroen J.M. Janssen & Mónica Sada Garibay, What Should Be the Scope of the Beneficial Owner Concept?

In this article, the authors present their considerations regarding the differences

between the OECD beneficial owner concept and the interpretation and use that the European Court of Justice has given to it in the so-called Danish Cases, including the recent European tendency to use it as an anti-abuse instrument. The authors analyse the implications of both approaches for recipients that are, for example, parties to (secured) financial transactions, limited recourse loans, or prescheduled repayment schemes in private equity structures. The authors conclude that a recipient can both be and not be the beneficial owner of an item of income depending on whether the OECD beneficial owner concept or the interpretation and use of the European Court of Justice are followed. In the view of the authors, the more 'economic' approach of the European Court of Justice in respect of the beneficial owner concept leads to legal uncertainty in bona fide transactions.

Nikolai Milogolov, The Emergence of the 'Technological Tax Hub': Digitally Oriented Trajectories of Reforms in Tax Planning Hub Jurisdictions

This article contains an empirical analysis of the recent tax developments in five major tax planning hub jurisdictions (the Netherlands, Cyprus, Malta, Singapore, and Hong Kong) by testing their potential for attracting the important parts of the value chain (significant people functions, intellectual property (IP), and the digital infrastructure) in the context of the highly digitalized businesses (platforms, cloud computing, fintech, robotics, and artificial intelligence). The digitalized businesses require relatively less physical substance for the creation of significant economic value. The combination of tax incentives for Multinational Enterprises (MNEs) and start-ups, transfer pricing rules, rules for valuation of intellectual property (IP), and wage tax incentives are increasingly used by the 'tax hub' countries to win in the global economic battle for the most important parts of the digitalized value chains that exacerbate tax competition.

Stefano Castagna, The Benefits of Differentiated Transparency. Proposal for Graduated Confidentiality Regimes within International Tax Disputes

To date, legislators and policymakers have not yet used any explicit policy criterion to balance transparency matters when dealing with EU and OECD tax dispute resolution reforms. This article wants to fill this void by providing a unique tool for implementing changes in international tax dispute resolution mechanisms, balancing different expectations and needs of stakeholders. Providing an example of its application, it proposes the use of differentiated levels of transparency according to stakeholders' interests to ensure efficiency and fairness of outcome. The article employs principles of data protection regulations as a means to propose changes, drawing inspiration from comparable dispute resolution regimes that deal with taxation matters (Investor-State Dispute Settlement, International Commercial Arbitration and World Trade Organization dispute resolution mechanism). It concludes by providing proposals to render more efficient the current EU and OECD tax dispute resolution mechanisms.

Melani Dewi Astuti, *Implementation of BEPS Recommendations in Indonesia's New APA and Transfer Pricing Rules*

Indonesia has recently updated its Advance Pricing Agreement and transfer pricing regulations in order to capture the development in the business and transfer pricing. It is also aimed to align with the Base Erosion and Profit Shifting (BEPS) recommendations. The new regulation has made substantial changes to the old advance pricing agreements (APAs) and transfer pricing regulations. With regards to transfer pricing, the new regulation has made some changes pursuant to the related parties' definition, transfer pricing methods, comparability analysis procedures, special transactions, and intangibles. The transfer pricing guidance also provides guidance on the financial transactions and introduces the value creation concept.

The new definition of related party is broader by providing more example on the ownership based on control. The regulation also allows the use of other transfer pricing methods other than the five OECD methods. Moreover, the intangible provisions have been modified to reflect the changes in the OECD Transfer Pricing Guideline 2017, to cover development, enhancement, maintenance, protection, and exploitation (DEMPE) activities and the economic owner. The guidance on financial transaction could also be useful for taxpayers and tax administration.

Meanwhile, in terms of APA, the new regulation has provided a longer period of APA implementation, included a roll-back provision and modified the requirements regarding the submission of APA. Based on the new APA regulation, to submit an APA, a taxpayer cannot propose a lower profit than profit reported in the tax return.


In general, the new regulation is in line with the BEPS 8-10 recommendations, albeit some differences are found, those are considered minor. The new regulations are expected to provide more certainty and simplicity for the taxpayers.

A.D.M. Janssen, *International Trade, a Never-Ending Trend*

This article describes the recent developments in international trade and VAT. International trade has become an integral part of our economy and the judicial calendar of the EU Court of Justice. An interesting case regarding the intra-Community transport of goods is the *Herst* case. This case is an example of how the case law of the EU Court of Justice provides some guidance regarding VAT rules concerning the intra-Community supply of goods and chain transactions prior to 1 January 2020. As of 1 January 2020, the new provisions established with the 2020 Quick Fixes are applicable that establish rules, among others, for the attribution of the intra-Community transport of goods to one of the supplies within a chain transaction. Despite the guidance of the EU Court of Justice provided in the *Herst* case, there continues to be much uncertainty. Although the Quick Fixes seem to provide harmonization and simplification of the EU VAT rules, the strengths and weaknesses of the Quick Fixes will have to be demonstrated in practice. This is also valid with respect to the distance selling rules. In the *KrakVet* and the *Healthspan* case, preliminary questions are referred to the EU Court of Justice regarding the transport

requirement. This author expects that many new cases will follow. International trade as a trend in EU VAT case law will probably never end.

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