Kluwer International Tax Blog

The Contents of Intertax, Volume 44, Issue 2, 2016

Fred de Hosson (General Editor Intertax and Of Counsel at Baker McKenzie) · Saturday, March 5th, 2016

Volume 44 (2016) Issue 2 contains:

EDITORIAL

Dennis WEBER, 'The New Common Minimum Anti-Abuse Rule in the EU Parent-Subsidiary Directive: Background, Impact, Applicability, Purpose and Effect'
Abstract: Due to an amendment of the Parent-Subsidiary Directive, the EU Member States must include a 'common minimum anti-abuse rule' in their legislation for situations that fall under the Parent-Subsidiary Directive (dividend payments between EU subsidiaries and EU parent companies) by 31 December 2015 at the latest.1 With this amendment, it is the first time that it has become mandatory to incorporate a General Anti-Abuse Rule (GAAR) in the tax legislation of the EU Member States. In this paper, I deal with the background, impact, applicability, purpose and effect of the amendment.

ARTICLES

Charles BEHAGG, 'Tax Inversions: Time to Take a Look in the Mirror Reflections on the Inversion Phenomenon'
Abstract: This article aims to utilize the evolution of the inversion phenomenon and its countermeasures as a mirror which can be held to the current tax regime, both globally and locally, in order to highlight some of the issues which it faces. Whilst the US has typically favoured a direct, reactive method of countering inversions, the UK has largely relied on more generalized anti-avoidance principles to achieve the same aim. Although the inversion phenomenon seems to have slowed, it remains to be seen whether these differing approaches have eradicated the practice completely. This article posits that the story of the inversion phenomenon up to this point is illustrative of many of the problems which the tax regime must deal with both presently and in the future. In particular, it is suggested that the allure of tax competition seems too strong for the optimism of increased international cooperation, notably in the form of the BEPS project, to overcome in the near future.

Christian KAHLENBERG, 'Hybrid Entities: Problems Arising from the Attribution of Income Through Withholding Tax Relief – Can Specific Domestic Provisions be a Suitable Solution Concept?'
Abstract: The steadily increasing globalization of markets creates an immediate need to make adjustments to international tax law. At the same time, the lack of harmonization among national

regulations fosters aspirations to achieve international tax arbitrage. In recent years, hybrid entity structures have been mentioned as effective means of tax avoidance or tax evasion. To respond to this development in a coordinated way, the BEPS project was initiated, and the OECD was put in charge to design viable solutions for a total of fifteen trouble spots that had been identified. The goal was to make sure that all states would act in sync. Recently – on October 5th – the final reports were published. Within the scope of Action 2, the particular focus is on hybrid entity structures. The present article uses the current developments at OECD level as an opportunity to scrutinize the addressed regulation for hybrid structures and to point out remaining loopholes. Subsequently, potential solutions are presented which also anticipate the risk of the treaty shopping.

Frank P.G. PÖTGENS, Pieter van OS, Pierre-Henri DURAND, Anne ROBERT, Aliénor DONY, Matthias SCHEIFELE, Gunther WAGNER, Andrea SILVESTRI, Lucia LANCOLLETTI, Filipe ROMÃO, António Castro CALDAS, Paulo PICHEL, Guillermo CANALEJO LASARTE, David LÓPEZ POMBO, Tony BEARE, 'The Compatibility of Exit Tax Legislation Applicable to Corporate Taxpayers in France, Germany, Italy, The Netherlands, Portugal, Spain and The United Kingdom with the EU Freedom of Establishment – Part 2'
Abstract: This three-part article discusses the compatibility of exit tax legislation applicable to corporate taxpayers in France, Germany, Italy, the Netherlands, Portugal, Spain and the United Kingdom with the EU freedom of establishment, especially in the light of the ECJ's landmark National Grid decision. In part 1, which was published in the previous Intertax issue, the authors scrutinized whether a company transferring its tax residence or effecting an outbound cross-border conversion has access to Articles 49 and 54 TFEU under the laws of the Member State. It also addressed whether these laws restrict Article 49, and, if so, whether the restriction can be justified and is appropriate to ensure the attainment of its objective. Part 2 provides a general overview of the proportionality test in connection with exit tax legislation under Articles 49 and 54 TFEU, and subsequently discusses whether the exit tax legislation in France, Germany, Italy and the Netherlands is proportional. Part 3 of this article, to be published in the next Intertax issue, reviews whether the exit tax legislation in Portugal, Spain and the United Kingdom is proportional, addresses which other transactions the ECJ's exit tax principles apply to, and provides conclusions and recommendations.

Daniele de CAROLIS, 'Jurisdiction of the Italian Tax Judge on Administrative Acts Denying Access to the Arbitration Convention on Transfer Pricing: Towards a Dispute Resolution Procedure Ever More Independent of State Control'
*Abstract:*The Court of Cassation's orders n. 12759 and 12760 of 2015, in acknowledging jurisdiction of the Italian tax judges on administrative acts denying access to the Arbitration Convention on Transfer Pricing, represent two fundamental decisions for the development of this Convention towards a dispute resolution regime which is more and more independent of State control. In order to illustrate the extreme importance of these decisions, this article first provides a synthesis of their contents, then it analyses the debate within the Joint Transfer Pricing Forum on the denial of access to the Arbitration Convention: this debate will allow some reflections on the role which the issue of denial of access to the Conventions plays, together with the improvement of the arbitral phase, in the process of rendering the dispute resolution regime envisaged by the Convention more efficient and, at the same time, ever more independent of State control.

Peter Koerver SCHMIDT, 'Taxation of Income in Foreign Trusts: Denmark Introduces a New Anti-avoidance Rule Targeting the Use of Foreign Trusts'

Abstract: Denmark has introduced a new provision that states that Danish settlors of foreign trusts, under certain circumstances, must include the trust's income in their own taxable income. The provision forms part of the Danish legislator's recent attempts to prevent international tax evasion/avoidance, and the underlying aim of the provision is to make the rules concerning foreign trusts easier to administrate and enforce by the Danish tax authorities. Based on an analysis of the provision's area of application and legal effects, it is concluded that the new provision seems to be effective in mitigating the use of foreign (family) trusts for tax evasion/avoidance purposes. However, it is also concluded that there is reason to question whether the new provision is sufficiently precise and whether the aim could have been reached in a more expedient way.

Roberto SCALIA, 'Thoughts on the Qatar Financial Centre Sc. 'Concessionary Rate' for, Captive Insurers and Reinsurers'

Abstract: In a recent article on the Qatari income taxation and theQatar Financial Centre (QFC) Tax Regulation1 I have been addressing, among the others, the optional tax regime named 'Concessionary Rate'. The regime is provided for in the QFC Tax Regulations (QFC-TR). Captive Insurance and Reinsurance business opting to be charged according with the relevant regime, will be subject to a zero per cent2 tax rate conditional upon the payment of the 'concessionary rate' charge.3 The election to be charged at the Concessionary rate charge shall be made within six months from the end of the first Accounting period and, once made, shall remain in force in respect of the three subsequent Accounting periods.4 The Concessionary Rate shall be regarded as a derogation to the statutory 10% tax rate, charged in the QFC on whatever business. The study of the Concessionary rate regime can be undergone grounding upon the historical evolution of the QFC Tax Regulations.

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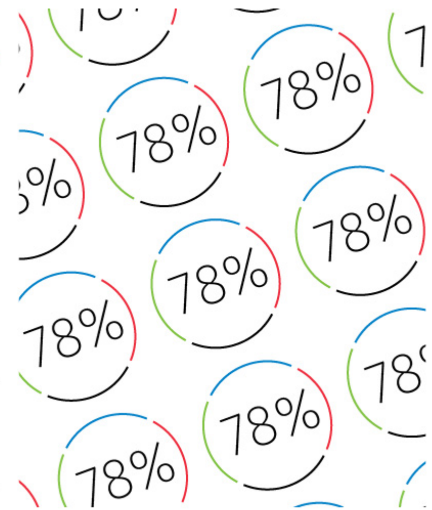

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