Kluwer International Tax Blog

Current Issue of EC Tax Review

Ben Kiekebeld (General Editor EC Tax Review and tax adviser at Ernst & Young Belastingadviseurs LLP) · Thursday, April 28th, 2016

Volume 25 (2016) issue 2 contains:

EDITORIAL:

MICHAL AUJEAN, 'Some Twenty-Seven Years after…'
Abstract: When I started writing this editorial a question quickly came to my mind: what have I been doing all these years that I devoted to taxation and more specifically to European tax policy? Then I thought it was time to say how I saw this period, what was my vision of the job(s).

ARTICLES:

Bart PEETERS, 'Kieback: When Schumacker Emigrates . . .'
Abstract: When taxing a non-residents income, a source state does not have to grant tax correctives on account of civil status or family responsibilities, applicable for its own residents, unless the income is the almost exclusive taxable income of the non-resident. This socalled Schumacker-principle, although dating from 1995, still raises questions. This article critically analyses the judgment of the Court of Justice in the Kieback-case, where the Court had to decide about its application for the deduction of costs, linked to a foreign immovable property, in case of a non-resident earning all his taxable income during a part of a tax year in the source state and then moving to a third state. The court insisted that the Schumacker-principle can include costs which, according to the tax legislation of the source state, are in particular linked to foreign income, the possibility of discrimination has to be considered exclusively from a tax perspective, but the comparison can be made taking into account an entire tax year. Based on these premises the Court concluded that the foreign negative income did not have to be taken into account in the source state.

Karin SPINDLER-SIMANDLER, 'Dividend Withholding Taxes after Miljoen, X and Société Générale'
Abstract: The judgment in the cases Miljoen, X and Société Générale is the latest of various judgments regarding dividend taxation and withholding taxes. The ECJ has confirmed its line of reasoning on many issues and given insights on its understanding of other ones. Concerning the deductibility of non-residents' directly linked expenses, which have to be granted a deduction according to previous case law, the ECJ held that the direct link must exist to the actual payment of the income. Moreover, the Court confirmed its previous case law according to which residents and non-residents find themselves in comparable situations regarding the tax amount levied by the

source state. The possibility of neutralizing different treatment by the source state under application of a double tax treaty was again affirmed by the ECJ. In the particular cases, however, it could not be clarified whether such neutralization could be achieved. A unilateral neutralization by the residence state was not accepted by the ECJ. Regarding neutralization in subsequent years, i.e., a carry-forward, the ECJ did not give a judgment due to the hypothetical question.

Geoff HIPPERT, 'The TFEU Eligibility of Non-EU Investment Funds Subjected to Discriminatory Dividend Withholding Taxes'

Abstract: Non-EU or third-country investment funds may be subjected to final withholding taxes on their dividend income earned in various Member States within the EU. Such dividend withholding taxes may be discriminatory in nature given that EU or Member State investment funds may not be subjected to them. This raises the question whether, and to what extent, third-country investment funds could access the fundamental freedoms (like the free movement of capital) – enshrined in TFEU – in order to gain some measure of tax relief from discriminatory dividend withholding taxes.

This article examines what terms of comparability the European Court of Justice ('ECJ') has developed in its recent case law in determining whether a restrictive dividend withholding tax is discriminatory vis-à-vis a third-country investment fund as compared to a Member State investment fund.

In particular, the article examines how the ECJ considers compliance with UCITS (as well as other regulatory frameworks) in its determination of whether restrictive dividend withholding taxes are discriminatory.

Regarding grounds of justification, the article considers ECJ case law that – within a third-country context – establishes that some forms of justification (like the need to guarantee fiscal supervision) could very well justify a discriminatory dividend withholding tax under certain circumstances.

Karina PONOMAREVA, 'Tax Law of the Eurasian Economic Union: Substance and Ways of Using of the European Experience'

Abstract: The study considers principal features of the Treaty on Eurasian Economic Union (hereinafter – EAEU) in the light of modern international tax law, its legal nature, its place and functions in the regulation of Eurasian integration. The study describes the main features of tax law under the EAEU Treaty as the foundation treaty of two kinds: establishing international organization for integration (EAEU) and the economic and legal space (the Customs Union and the Common economic space). The important aspect of the proposal is the comparative study of development of tax law in the EAEU and the European Union (EU) as a model of integration which has already shown great results during decades.

The objective of this study is to provide an evaluation of development of tax law in EAEU in comparison with EU. The EAEU and the European Union have incomparable historical experience: ten and sixty years respectively.

We suppose that some elements of EAEU are similar to EU, and namely the next ones: the unity of institutional structure; aims of vanguard countries correspond to basic direction of development of the whole Union; there is a possibility for rearguard countries to join vanguard countries in case they are ready to carry out extra obligations.

The scope of the study is closely connected to the following evaluation problems: tax sovereignty;

the effects of the major recent tax policy initiatives for the Union and Member States; ways of tax harmonization in the EAEU and the role of the Court of the EAEU (with using of experience of the European Court of Justice in the area of European tax law); ways of absorbing the enlargement of the EAEU.

Daniel S. SMIT, 'International Juridical Double Non-taxation and State Aid'
Abstract: On 3 December 2015, the European Commission (EC) reported in a press release that it has opened a formal probe into Luxembourg's tax treatment of McDonald's.1 Following the press release, the EC is currently investigating whether two consecutive tax rulings issued by the Luxembourg tax authorities in 2009 have granted McDonald's an advantageous tax treatment in breach of EU State aid rules.

In this contribution, I will examine the EC's concerns in more detail. To this end, I will firstly elaborate on the content of the rulings insofar the content can be derived from the press release (section 2). Next, I will briefly recall the applicable European legal framework on state aid (section 3). On that basis I will subsequently provide a preliminary assessment of the EC's formal probe (section 4), concluded by a couple of final remarks (section 5).

This entry was posted on Thursday, April 28th, 2016 at 12:05 am and is filed under EC Tax Review, Uncategorized
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.