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The Contents of Intertax, Volume 44, Issue 4, 2016

Fred de Hosson (General Editor Intertax and Of Counsel at Baker McKenzie) · Wednesday, May 18th, 2016

Volume 44, Issue 4 contains:

ARTICLES:

Lisette van der HEL – van DIJK, Menno GRIFFIOEN, 'Tackling VAT-Fraud in Europe: A Complicated International Puzzle'
Abstract: In Europe, the fight against VAT fraud has attracted a lot of attention since the introduction of the current VAT system. The reason for this is simple: VAT fraud leads to significant distortion of the internal market, creates unfair competition and leads to missing tax revenues in the Member States. The latter can also lead to 'skewness' in the contribution of Member States to the EU budget. The European Commission (EC) has presented in the last decade numerous measures to combat VAT fraud. An analysis of these measures shows that Member States seem to address this 'European' problem mainly on a national level. The consequence hereof is that problems are not resolved at a European level and fraudsters have a 'free play', despite the flood of measures.

F. DEBELVA, N. DIEPVENS, 'Exchange of Information. An Analysis of the Scope of Article 26 OECD Model and Its Requirements: In Search for an Efficient but Balanced Procedure'
Abstract: In this article, the authors examine the requirements contained within Article 26 OECD Model. The focus lies on the scope of the article and the principles of relevance, subsidiarity, sovereignty and reciprocity, and the limitations relating to trade secrets and information contrary to public policy.

Christoph MARCHGRABER, 'Conflicts of Qualification and Interpretation: How Should Developing Countries React?'
Abstract: From October 27 to 31, 2014, the tenth session of the United Nations (UN) Committee of Experts on International Cooperation in Tax Matters was held at the Palais des Nations in Geneva. During this meeting, it was, inter alia, discussed whether the OECD's approach regarding conflicts of qualification and conflicts of interpretation shall be incorporated into the UN MC and the respective commentary. Whereas the Committee agreed on adopting the OECD's interpretation of Articles 23 A(1) and 23 B(1) OECD MC (partly referred to as the "new approach"), some members argued that "including paragraph 4 of Article 23A of the OECD Model in the UN Model would not be desirable" or even "detrimental to the interests of the source state". This article takes up these considerations by analyzing the OECD's approach regarding conflicts of qualification and conflicts of interpretation in the light of the UN MC's attempt to generally favor "retention of

greater so called ‘source country’ taxing rights under a tax treaty – the taxation rights of the host country of investment – as compared to those of the ‘residence country’ of the investor”.

Christian KAHLENBERG, ‘The Interplay between the OECD Recommendations of Actions 2 and 3 Regarding Hybrid Structures’

Abstract: On 5 October, the Organisation for Economic Co-operation and Development (OECD) submitted a package of measures for the BEPS project (‘Base Erosion and Profit Shifting’) for a comprehensive and coordinated reform of international tax regulations. The final reports relating to all fifteen action points have now been issued. It is clear that coordination among the individual measures is necessary in order to implement efficient preventive tools in the fight against harmful tax activities of internationally operating companies. The OECD is addressing this fact in an open and direct manner. The postulated coordination is necessary in particular to ensure that the fundamental goal of avoiding double taxation is not undermined. Whether such coordination with respect to hybrid structures is happening, especially in the areas of Actions 2 (Hybrid Mismatch Arrangements) and 3 (Controlled Foreign Corporation (CFC) Rules), is subject to this article.

Jan ELBERS, ‘Challenging Prejudice to Creditors Involving Abuse of Separate Identities in Tax Matters; a Dutch Approach’

Abstract: Separateness of identities implies that (juristic) persons are exclusively liable for own debts. This concept, however, could result in prejudice to creditors or might even lead to such prejudice involving abuse of separate identities of (juristic) persons. When a director (A), with the help of a juristic person (B) who is affiliated to a tax debtor-juristic person (C), frustrated recovery against (C), the tax collector in the Netherlands has the power to invoke several means of legal redress. The tax collector could hold (A) liable for specific tax debts, on the basis of Article 36 Tax Collection Act 1990. However, if the claim cannot be recovered from (A), the tax collector would prefer to hold (B) liable. Normally, in such cases, liability provisions in the Tax Collection Act 1990 do not offer a sufficient solution. The tax collector could, however, on the basis of the so-called “open system” (Article 124 of Book 4 of the General Administrative Law Act) invoke “piercing the corporate veil”, in order to extend liability to (B). The author makes an assessment of the question as to whether “piercing the corporate veil” for tax collection purposes in the Netherlands is “lawful” within the meaning of Article 1 of Protocol No. 1 to the ECHR (the peaceful enjoyment of one’s property).

Sergio André ROCHA, ‘Countries’ Aggressive Tax Treaty Planning: Brazil’s Case’

Abstract: In the international taxation sphere, countries are channelling efforts and resources in the fight against ‘aggressive tax planning’ by enterprises and individuals. However, it is not unusual that countries will also use aggressive tax schemes to increase tax revenues, through measures that exceed internationally accepted standards. Brazil might be considered such a violator, at least from a moral standpoint. The Country has been creating tax-like contributions to tax transactions with non-residents beyond the thresholds established in tax treaties. The objective of this article is to analyse whether discussions regarding morality in taxation can also be applied to State behaviours, demonstrating that shortcomings in ethics are not just the privilege of taxpayers.

Pernilla RENDAHL, ‘The Functionality of VAT: A Swedish Perspective’

Abstract: The Swedish value added tax (VAT) is based on the VAT directives at EU level. Sweden became a Member State of the EU on 1 January 1995, but the VAT in Sweden was introduced in 1969. A new VAT Act came into force in 1994 and several changes have been made both since 1969 and 1994. The VAT at EU level is generally considered a consumption tax, based on Article 1.2 in the VAT directive from 2006. The similar point of departure in the Swedish implementation

of the directive is not found in the VAT Act and vaguely found in the preparatory works to the Swedish VAT Act. It has been discussed whether or not the Swedish VAT is a consumption tax from a legal perspective. One conclusion drawn in the study described in this article is that the Swedish VAT is a hybrid tax, burdening both business and consumption.

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