Kluwer International Tax Blog

The Contents of Intertax, Volume 44, Issue 5, 2016

Fred de Hosson (General Editor Intertax and Of Counsel at Baker McKenzie) · Monday, June 6th, 2016

Volume 44, Issue 5 contains:

ARTICLES:

Roland ISMER, Sophia PIOTROWSKI, 'A BIT Too Much: Or How Best to Resolve Tax Treaty Disputes?'

Abstract: State to state disputes under tax treaties are increasingly open for mandatory arbitration when intergovernmental negotiations do not reach a timely agreement. The present contribution seeks to understand this procedure. It also examines what institutional architecture ensures the best resolution of such disputes. It argues that the current mechanism works fairly well and that, while some incremental improvements seem warranted, arbitration clauses should be adopted more widely in tax treaties concluded by industrialized countries and countries with emerging economies. It then proposes a more ambitious novel approach which would seek a comprehensive solution binding on all parties involved, i.e., on the states and on the taxpayers. By contrast, the article is very sceptical of the potential of investor-state-arbitration for resolving tax treaty disputes. It contends that such arbitration under international investment agreements is incompatible with the structure and the aim of tax treaties. A clause that excludes such arbitration for tax treaty disputes should therefore be inserted in these treaties.

Marie LAMENSCH, 'The OECD International VAT/GST Guidelines: Completion of a (First) Major Step towards Global Coordination of Value-Added-Tax Systems'

Abstract: Through the adoption of 'International VAT/GST Guidelines', the Organisation for Economic Co-operation and Development (OECD) has taken up the ambitious challenge of prompting international consensus on how Value Added Tax (VAT)/GST systems should be designed and implemented with the aim of reducing the risks of double taxation and unintended non-taxation created by inconsistencies in the application of VAT/GST systems to cross-border trade in goods, services and intangibles. In 2014 and 2015, more than 100 countries endorsed several chapters of these guidelines, which concern basic neutrality principles and place of taxation and collection rules for supplies of services and intangibles (thus leaving supplies of goods aside for the moment). This article retraces the context in which the International VAT/GST Guidelines started developing and provides for a detailed and critical analysis of the recently adopted chapters.

Werner HASLEHNER, ‘‘*Avoir Fiscal*’ and Its Legacy after Thirty Years of Direct Tax Jurisprudence of the Court of Justice’

Abstract: On occasion of the thirty-year anniversary of the Court of Justice of the European Unions (CJEU’s) landmark judgment Commission v. France, 270/83 (‘Avoir Fiscal’), this article reviews the decision of the Court and its lasting impact on EU tax law. It finds that most of the principles developed in that case remain relevant in current doctrine. At the same time, several questions that were left open in 1986 are still unresolved today.

Alexander BOSMAN, ‘Causality under Tax Treaties’

Abstract: This article examines the concept of causality, a somewhat underexposed aspect of categorizing income under the distributive rules of tax treaties. The author gives his views on causality under tax treaties, and suggests a method of approaching this concept.

Marc M. LEVEY, Imke GERDES, Aliss MANSFIELD, ‘The Key BEPS Action Items Causing Discussion in the United States’

Abstract: In late 2015, the Organisation for Economic Cooperation and Development (“OECD”) released its final Base Erosion Profit Shifting (“BEPS”) Reports. Although the United States has been generally supportive of the general policies surrounding the BEPS proposals, it has been more skeptical than any other country concerning certain suggested recommendations. Also, the United States believes that few or no changes are required under domestic law to be aligned with the BEPS proposals the United States supports, because of strict laws that are already in place. At the same time, the United States Treasury’s main goal is to prevent other countries from taxing what it views to be “its” tax base or “nowhere income” through the BEPS proposals. This article seeks to review the main action items that have been of contention in the United States, namely Actions 7-10, 13 and 15 and the United States Treasury’s position on these items.

Reinout KOK, ‘The Principal Purpose Test in Tax Treaties under BEPS 6’

Abstract: In report 6 of the BEPS action plan, Preventing the Granting of Treaty Benefits in Inappropriate Circumstances, the Organisation for Economic Co-operation and Development (OECD) proposes (amongst others) to include a principal purpose test (PPT) in tax treaties. Under this test a treaty benefit shall not be granted if it is reasonable to conclude that obtaining that benefit was one of the principal purposes of any arrangement or transaction (subjective test), unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the treaty (objective test). The subjective test is, from the viewpoint of the tax authorities a relatively ‘easy’ test. The objective test, however, can provide for some relief for taxpayers. In this article the PPT is being investigated and discussed. Especially, attention is given to the objective test. An attempt is being made to develop practical guidance to interpret the PPT, based on Dutch case law and doctrine.

Alvin T’NG, ‘The Modern Marketplace, the Rise of Intangibles and Transfer Pricing’

Abstract: This article explores the place of Transfer Pricing in modern marketplace and focuses on the effect of intangibles thereupon. It frames Transfer Pricing as a solution to the need to allocate

profits between jurisdictions – a direct result of the conflict of residenceand source-based taxation in the globalized marketplace – and the more specific problem of Book Profit Shifting. It further contemplates the effect of the digitalization of markets and the increased use of Intangibles the on effectiveness of Transfer Pricing as such a solution. It then attempts to locate the underlying factors of Book Profit Shifting and with the latter analysis in mind, suggests a destination-based regime instead.

E. POELMANN, 'ECHR Melo Tadeu: A Tax Case Which Should Bring on More Carefully Selected Criminal Procedures'

Abstract: The European Court of Human Rights (ECHR) judged in the Melo Tadeu case that the refusal of the authorities to undo the seizure of assets after a criminal acquittal, is disproportional, regardless whether the appeal was too late. The Melo Tadeu judgment implies mainly that the presumption of innocence remains in full force after a criminal acquittal. In this article the author discusses the Melo Tadeu judgment of the ECHR.

This entry was posted on Monday, June 6th, 2016 at 11:30 am and is filed under Intertax
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