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Fred de Hosson (General Editor Intertax and Of Counsel at Baker McKenzie) · Wednesday, August 10th, 2016

Volume 44 (2016) issue 6/7 contains:

EDITORIAL:

Ana Paula **DOURADO**, 'The EU Anti Tax Avoidance Package: Moving Ahead of BEPS?'

ARTICLES:

Félix Daniel **MARTINEZ LAGUNA**, 'Institutional Hybrid Financial Instruments and Double Non-taxation under Domestic Rules and Tax Treaty Law: The Example of Spain'

Abstract: Attention has been paid to double non-taxation resulting from contractual hybrid financial instruments, which are instruments that share debt and equity features in their very design. This article focuses on a specific Institutional Hybrid Financial Instrument instead. Institutional Hybrid Financial Instruments are equity instruments that could equally lead to conflicts of qualification and double non-taxation considering certain level of legal deductibility from a tax perspective according to a tax policy decision. The analysis deals with the application of the Spanish exemption method to Brazilian Juros sobre o Capital Próprio from a domestic law and tax treaty perspective. Moreover, the implementation of linking rules and its implications regarding hybrid financial instruments are also under consideration.

Luca **CERIONI**, 'The Quest for a New Corporate Taxation Model and for an Effective Fight against International Tax Avoidance within the EU'

Abstract: The European Commission's Action Plan for a Fair and Efficient Tax System within the EU, and the subsequent 'Anti-Tax Avoidance Package' (ATAP), set out a number of short-term initiatives aimed at achieving an optimal corporate tax system and at fighting international tax avoidance within the EU. Pending the desired introduction of the Common Consolidated Corporate Tax Base (CCCTB) as a long-term goal, these initiatives have been considered as capable of stabilizing Member States' revenues and of allowing corporate taxation where profits are really generated. Since specific suggestions made in the academic literature – namely, the suggestions for a 'destination-based corporation tax', for a 'corporation tax 2.0' and for a 'new common consolidated tax base' – have the same objectives, this article critically discusses these suggestions

and it analyses whether they can be considered as more consistent or as less consistent with the common objectives than the Commission's initiatives. It also elaborates the hypothesis for a solution capable of both collecting the key input offered by these suggestions and being complementary to the CCCTB.

Justus **EISENBEISS**, 'BEPS Action 7: Evaluation of the Agency Permanent Establishment'

Abstract: The article is devoted to one of the most controversial items of the Base Erosion and Profit Shifting (BEPS)-Project – Action 7, particularly the agency Permanent Establishment (PE) of Articles 5(5) and 5(6). Marking the threshold for source-state taxing rights, the PE has been at the centre of an entrenched debate since the concept's emergence in the nineteenth century. Thus, working on the agency PE the OECD soon found itself caught between a rock and a hard place. With strong national interest for a high threshold on the one side and the increasing need to rebalance taxing rights due to globalization and the emergence of modern business models on the other side. This conflict shaped the consolations process and final output of Action 7. Ultimately, the Final Report settled for much less than the initially pursued globally supported holistic approach. The need for a substantial reform, however, remains and becomes more pressing with the introduction of unilateral measures. Moreover, with the agency PE in the spotlight, attention will inevitably be directed to the attribution of profits, an issue neglected in the BEPS Project. The inadequacies of the current attribution rules are examined in the second part of this article and a proposal is put forward.

Lisette van der Hel – van **DIJK**, Menno **GRIFFIOEN**, 'Tackling VAT Fraud in Europe: The International Puzzle Continues…'

Abstract: The G20, the Organisation for Economic Co-operation and Development (OECD) and the EU have taken several initiatives to improve transparency and exchange of information to combat tax avoidance and tax evasion, including VAT fraud. A coordinated international approach seems to be the only solution to effectively fight VAT fraud within the EU. An analysis of the developments in international cooperation, however, shows that Member States (MS) seem to underuse other means of international cooperation that exist besides the exchange of information. The exchange of information on its turn seems to be mainly used within the national context. We conclude that due to a lack of coherence in the 'control' systems of MS and due to the fact that 'coordination' does not always mean 'collaboration', MS still seem to address this 'European' problem mainly on a national level which does not lead to a substantial decrease of the level of VAT fraud (including a lower tax gap) within the EU.

W.J.G. **PAARDEKOOPER**, M. van de **VEN**, A. van **ESDONK**, Y.C. **CATTEL**, 'Tax Considerations for the European Union's Digital Single Market Strategy'

Abstract: In this article, the authors analyse the EU concept of the Digital Single Market from an Indirect Tax and Direct Tax perspective. The analysis will focus on the current status quo and will discuss the recently proposed EU plans to design robust Indirect Tax and Direct Tax rules, as well as regulations for the future. The authors propose ideas and solutions that can be taken into account by the Commission and various stakeholders in an open debate to optimize the legislation for all parties involved. These ideas share the same common ground for Indirect Tax and Direct Tax. Where deemed necessary, the authors include Organisation for Economic Co-operation and Development (OECD) initiatives as well.

Manoj Kumar **SINGH**, 'Conflict of Source versus Residence-Based Taxation in India with Reference to Fees for Technical Service'

Abstract: Highly internationalized trade and commerce, in wake of globalization, is a contemporary reality. However, the increasing porosity of national boundaries has not changed the fact that every country has the sovereign right to tax income accruing, arising or received in it, on account of activities carried on in its territory. Yet, an important change with internationalization is that increasingly there are more than one sovereign nation entitled to claim 'right to tax'. This sovereign right to impose tax, as is well known, can be exercised by either the country from where the income is sourced (source country) or the country where the taxpayer resides (residence country). However, in current times, where it is common for individuals or businesses to have activities connected to two or more than two countries, exercise of this 'right to tax' by each nation has given rise to a complex situation of individuals or business entities being faced with the problem of being subjected to the rigors of double taxation. The concept of 'residence jurisdiction' and 'source jurisdiction' are two fundamental concepts in the domain of International Taxation. While conflict between these two concepts of taxation is a problem in the international arena, interestingly in India, this preference for one over the other has been a bone of contention between legislature and judiciary of the country. While judiciary has been showing preference for 'residence jurisdiction', the legislature has been in favour of a regime based on the concept of 'source jurisdiction'. This article explains the contours of this conflict as played out between the legislature and the judiciary in India. While endorsing the idea of tilt towards 'source jurisdiction' as a more appropriate regime for a developing country like India, this article argues that the need of the day is for taxation regime which contains adequate mixture of elements from both 'residence jurisdiction' and 'source jurisdiction'.

Diheng **XU**, 'Prospects on the Relationship between Chinese Direct Tax Incentives and Subsidy Rules of the World Trade Organization'

Abstract: After the accession to the World Trade Organization (WTO), China encountered an increasing number of international trade disputes with other Members with respect to Subsidies and Countervailing Measures (SCM). Among all the countervailing investigations towards China, the main complaints were Chinese tax incentives such as specific tax reductions and exemptions, or tax preferences related to export or import. This article introduces the general situation of Chinese direct tax incentives, and their compatibility with subsidy rules in the WTO. Further, it attempts to find out tensions between the Chinese direct tax incentives and the WTO's subsidy rules, and the main reasons behind the tensions. Consequently, it provides recommendations for China to alleviate the tensions. On the other hand, it offers further prospect for the WTO with respect to its subsidy rules and its role in regulating taxation. This article finds out that there are tensions between the Chinese tax incentives and the WTO's system. China has a state-oriented attitude towards tax incentives, and there is a lack of internal legal control over the granting of them. Therefore, Chinese tax incentives can easily cause tensions with the WTO's subsidy rules. Moreover, the tensions can be explained by the differences of the relationship between the government and the market, and the differences on the rule of law in China and the WTO system. Consequently, this article suggests a common platform based on the common objects and purposes of Chinese tax systems and the WTO to alleviate tensions.

Samira **VARANASI**, Meyyappan **NAGAPPAN**, 'Financial Budget for 2016–2017: Has India Put Its BEPS Foot Forward?'

Abstract: This article analyses the first attempt made by the Indian government, through the Finance Budget of 2016–2017, to implement the measures proposed under the OECD / G 20 BEPS Action Plan released on 5 October 2015. It closely examines the Equalization Levy, a unilateral measure that has been taken by the Indian government to address Base Erosion and Profit Shifting (BEPS) in the digital economy, from an international tax perspective. It also analyses the constitutionality of this levy. Further, it examines issues relating to the legal protection of the confidentiality of information reported under the Country-by-Country Reporting requirements as adopted in India. The impact of other measures, including the newly introduced test of residency for companies and the rationalization of certain tax rates through the Finance Budget of 2016–2017, have also been examined in light of the objectives of the BEPS Action Plan.

Arthur W. **HOFMAN**, Shie Yee Au **YEUNG**, 'Recent Developments in the Dutch Loss Carry Over Restrictions for Holding and Intercompany Financing Entities'

Abstract: Based on Dutch tax law, losses resulting from holding and financing activities are ring-fenced in such a way that these losses can only be offset against profits derived from similar activities. Recently, two developments took place with regard to those rules. First, the Dutch tax law was changed in reaction on a verdict of the Dutch Supreme Court. Second, the European Court of Justice (ECJ) ruled a verdict that could have an impact on the rules. In this article, the authors describe those developments and they discuss the current scope of the relevant Dutch legislation.

Piergiorgio **VALENTE**, 'Transfer Pricing: An Overview of the Italian Supreme Court's Recent Rulings'

Abstract: Rulings on transfer pricing matters issued in the last few years by Italian Courts covered various themes. Among these, the Tax Authorities frequently challenged the selection and application of transfer pricing methods, comparability analyses developed by taxpayers supporting intercompany policies, the analysis of special transactions such as intercompany loans and services as well as transactions related to intangibles. The lack of a frame of reference, on the one hand, and the (perceived) uncertainty of the subject, on the other hand, engendered difficulties as to the crafting of a uniform jurisprudential orientation, leading Judges oftentimes to settle disputes through a line of reasoning, not always consistent with the Organisation for Economic Co-operation and Development (OECD's) arm's length principle.

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