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Fred de Hosson (General Editor Intertax and Of Counsel at Baker McKenzie) · Thursday, October 13th, 2016

Volume 44 (2016), Issue 8/9 contains:

EDITORIAL:

Andreas **OESTREICHER**, 'To See or Not to See: That Is Not the Question'

ARTICLES:

Georg **KOFLER**, 'Some Reflections on the 'Saving Clause''

Abstract: Action 6 of the Organization for Economic Co-operation and Development (OECD) Base Erosion and Profit Shifting project deals with tax treaty abuse and proposes inter alia, the inclusion of a seemingly innocuous 'saving clause' as new Article 1(3) OECD Model Tax Convention (OECD MC). This clause is aimed at preserving the taxing rights of the residence State. While it changes little with regard to the basic set-up of the OECD MC in one-taxpayer situations, it opens the doors for both Contracting States to tax their residents specifically in two-taxpayer situations which may arise, for example, in cases involving hybrid entities, Controlled Foreign Companies regimes, and transfer pricing adjustments. This article reviews the background of this new OECD MC provision, its longstanding use in US treaty policy, as well as some aspects of its breadth, impact and – intended and arguably unintended – consequences.

Franziska **SIXDORF**, 'Common Interpretation as a Method for Interpreting Double Tax Conventions in Germany: Theoretical Foundation and Results of Empirical Research'

Abstract: With ninety double tax conventions with respect to taxes on income and on capital (DTC) in force as of 1 January 2016 Germany is among those countries with the densest treaty network. The author depicts the status of DTC within the German legal system and analyses how DTC are interpreted in Germany. In doing so, the author emphasises the method of common interpretation, which was proclaimed by Klaus Vogel already in 1986. Based on an analysis of current German case law the author shows that this method is still not fully implemented within the methods utilized in Germany for interpreting DTC. Subsequently, the author shows the respective reasons and analyses selected current international and domestic developments for their usefulness in establishing this method.

F.P.G. **PÖTGENS**, M.J.E. **STRAATHOF**, 'Establishment and Substance of Intermediate and

Other Holding Companies from an EU Law Perspective'

*Abstract:*This article examines the conditions European Union law imposes on the meaning of 'establishment' as defined in Articles 49 and 54 Treaty on the Functioning of the European Union, particularly with regard to intermediate and other holding companies. The material requirements for the establishment of intermediate or other holding companies are relatively marginal. An essential element is the link that a company has with the host Member State through its pursuit of genuine economic activities, where 'genuine economic activities' must be interpreted widely.

Oktavia **WEIDMANN**, 'Beneficial Ownership and Derivatives: An Analysis of the Decision of the Swiss Federal Supreme Court Concerning Total Return Swaps (Swiss Swaps Case)'

Abstract: The recent decision of the Swiss Federal Supreme Court in the Swiss Swaps Case dealt with the question of beneficial ownership in relation to dividends which were economically passed on to third parties by way of derivatives. The court denied a Danish bank, which was the physical holder of the shares and the recipient of the dividends, a withholding tax refund under the Switzerland/Denmark Double Taxation Convention (1973) on the basis that it was not the beneficial owner of the dividends. The court assumes a factual obligation of the Danish bank to pass on the dividends to the total-returns-waps counterparties and suggests an 'interdependence' between the receipt of the dividends and passing on the dividends to the swaps counterparties. The court's decision raises the question whether beneficial ownership should be denied to a person who is the physical holder of the shares and the recipient of the dividends but passes on the benefits of the dividends in the context of a derivatives transaction. After an in-depth analysis of the case, this article illustrates the legal and practical difficulties in attributing beneficial ownership of the dividends to a derivatives counterparty which is neither the legal owner of the shares nor the direct recipient of the dividends beyond clear-cut cases of nominees, agents and conduit companies.

Lisette van der Hel – van **DIJK**, Maarten **SIGLÉ**, 'Cooperative Compliance: Tax Risk Management and Monitoring'

Abstract: Prompted by the global economic crisis, the attention for tax compliance behaviour of large businesses increased significantly in recent years. Worldwide, stakeholders request more tax transparency from large businesses. Tax authorities use 'transparency' as a starting point in so-called cooperative compliance strategies. Tax risk management seems to be an indispensable factor in these strategies. We note that both in the Netherlands and abroad the design of a so-called tax control framework by businesses as well as its use by tax authorities does not seem to be clear. In this contribution we seek to reduce this obscurity around the tax control framework by focussing on the element of 'tax monitoring', for which we use the Dutch horizontal monitoring program as a case study.

Dhruv **SANGHAVI**, 'The Interaction of Articles 6, 7 and 21 of the 2014 OECD Model Tax Convention: A Historical Analysis'

Abstract: The discussion regarding the interaction between Article 6 (Income from Immovable Property), Article 7 (Business Profits) and Article 21 (Other Income) of the OECD Model is not new. However, the historical documents of the Organisation for European Economic Co-operation and the Organisation for Economic Co-operation and Development, which have now been made available, throw new light on the issue. It has been argued that Article 6(4), and not Article 7(4), governs the relationship between Articles 6 and 7, therefore excluding the possibility of applying

Article 7 to any income from immovable property. Therefore, it is argued, that Article 21 is the only correct distributive rule to apply in cases where the bilateral scope of Article 6 is not satisfied. This article traces the evolution of Article 6, as evidenced by the historical documents, which reveals a different intention underlying Article 6(4).

Albert H. **BOMER**, 'From *Skandia to Larentia*: National Jurisdiction to Deviate from the VAT Directive'

Abstract: In the Skandia case the European Court of Justice has decided that, despite Skandia being one legal entity, there are taxable transactions between a head office in the United States and a fixed establishment that is part of a Vat group in Sweden. Those Member States which have implemented the Vat grouping in national law have done so using their individual methodology. This decision raises the question of whether a Member State can deviate from the Value Added Tax (VAT) Directive in its national legislation. The recent Larentia case makes clear that it is possible to do so if the provision is optional. This Article analyses the interpretation given by the European Court of Justice concerning national jurisdiction to deviate from the VAT Directive.

Piergiorgio **VALENTE**, 'Italian Perspective on BEPS and Focus on Implementation of Action 13 of the BEPS Action Plan'

Abstract: Italy has been paying special attention, to recent developments in the struggle against tax evasion and avoidance. Many of the provisions recommended by the Organization for Economic Co-operation and Development within the context of the Base Erosion and Profit Shifting Project were introduced into, and enacted by, the National tax system, in particular, by effect of Legislative Decree No. 147 of 14 September 2015, which contained 'Provisions setting forth measures for the development and the internationalization of enterprises', and of Law No. 208 of 28 December 208 setting for 'Provisions for the drawing up of the yearly and multi-year State Budget'.

Francisco Antonio Vaquer **FERRER**, 'The Concept of 'Permanent Establishment' at the Spanish Courts: Special Reference to the *Roche* and *Dell Cases*'

Abstract: An accurate definition of the concept of permanent establishment is crucial to the application of the distributive rules provided by the Double Taxation Treaty, particularly, on business profits. In Spain, the cases of Roche and Dell have been very much talked about since the decisions of the Courts brought about a construction of the figure of permanent establishment far from the prevailing orthodox approach to the Commentaries of the Organization for Economic Co-operation and Development Model Tax Convention. The purpose of this broad interpretation of the concept of permanent establishment seems, then, clear: to avoid, with varying degrees of success, that multinational companies carrying on sizable business activity in Spain fail to pay taxes by means of a fabricated business structure scheme. This article shall, therefore, analyse this concept in the light of the Court's decisions in the above mentioned cases.

Marlous **VERHOOG**, Almut **BREUER**, 'Hybrid Entity Issues in a Tax Treaty Context: OECD Approach versus Actual Tax Treaties'

Abstract: In this article the authors describe the issues relating to hybrid entities in a tax treaty context and the solution to these issues as proposed by the Organization for Economic Co-operation and Development (OECD) in the context of Base Erosion and Profit Shifting Action 2. The OECD solution and possible improvements thereto are analysed in light of the international

tax treaty practice of the Netherlands and Germany.

Jette **THYGESEN**, 'VAT on Arbitration'

Abstract: The value added tax (VAT) classification of services provided in connection with arbitration proceedings will be illustrated on the basis of the law and practice in Denmark, Germany and Sweden. Since VAT is a tax that has been harmonized in the European Union, the VAT position ought to be the same for similar services in all Member States, unless a Member State has a standstill clause.1 The VAT treatment of services does not appear to be the same in these three countries. In Germany and Sweden it is agreed that services provided in connection with arbitration proceedings are subject to VAT, but in Denmark they are not regarded as subject to VAT. For the background to why VAT is not levied on services connected with arbitration proceedings in Denmark, it is necessary to look at some past rulings of the Danish VAT Tribunal (Momsnævn). These decisions were made prior to the amendment of the Danish VAT Act in 1994 and so they are based on the old rules. The question is whether the amendments to the Danish VAT Act in 1994 ought to have led to these services concerned being subject to VAT in Denmar*k.*

Parul **JAIN**, 'Issues in Reforms of Union Taxes in India'

Abstract: The correction of fiscal imbalances in India should focus on the root cause of disequilibrium – the government not being able to balance its consumption outlays with revenue receipts. Restructuring of public expenditure seems to be very difficult under the present circumstances. Hence, significant improvement will hinge increasingly on improvement in revenue collection through direct and indirect taxes. There is need for comprehensive reforms in direct and indirect taxes through decisive action in many crucial areas rather than marginal improvement on all fronts.

Broadening of the tax base is necessary to ensure growth of revenue. In direct taxes, there is a need to analyse the extent to which taxpayers actually belong to the higher slabs than they reveal in their tax returns and non-filers should be brought into the tax net. In the case of central excise and service tax, there is need to build a strong mechanism to ensure filing of returns by all registered taxpayers. To improve tax collections, it would be desirable to ask firms and companies to pay tax in equal instalments and adopt 'family' as a unit of assessment. The exemption/threshold limit should not be raised from the present level and Indian tax system should have smooth progression The Indian tax system incorporates a number of tax preferences/incentives to promote different activities which result in huge tax expenditure in case of both direct and indirect taxes. Tax expenditures, despite their drawbacks, need to be retained in the Indian tax system. However, they should be well targeted and be linked to performances. There is also a need to check the problem of increasing tax avoidance and evasion through stricter imposition of penalties and following of vigorous prosecution policy.

Efficient tax administration calls for building up of a professional cadre of administrators who may implement the tax system more equitably and efficiently. It is desirable that voluntary compliance be encouraged and non-compliance be penalized. There is need to minimize arrears of assessment and collection, pendency of appeals, issue quick refunds, and so on. The main challenge at the present juncture is to integrate the large number of Central and State taxes to address the problem of multiplicity of taxes. The introduction of the Goods and Service Tax would be a significant step in the field of indirect tax reform in India and pave the way for a national common market.

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