

# 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, November 24th, 2016

Volume 25 (2016) issue 4 contains:

### EDITORIAL:

Han **KOGELS**, ‘Base Erosion and Profit Shifting and Value Added Tax in the Digital Economy’

### ARTICLES:

Pieter van **OS**, ‘Interest Limitation under the Adopted Anti-Tax Avoidance Directive and Proportionality’

*Abstract:* This article scrutinizes the compatibility of the interest limitation rule the European Union (EU) legislature included in its anti-tax avoidance directive adopted on 12 July 2016 with the proportionality principle. Under its settled case law concerning domestic interest limitation rules restricting a fundamental freedom for purposes of combating tax avoidance practices, the European Court of Justice (ECJ) holds that such measures do not comply with the principle of proportionality if they, amongst others, either do not provide the taxpayer with an opportunity to substantiate the commercial reasons for not entering into an arm’s length loan arrangement, or restrict the deductibility of more interest than an arm’s length interest. As the rule does neither adhere to the counterevidence rule nor to the arm’s length principle, it is questionable whether its status as secondary EU law suffices for purposes of disregarding the aforementioned limitations set by the ECJ. Amongst others, the author takes the view that on the basis of ECJ case law, the interest limitation rule may be considered incompatible with the proportionality principle.

Arnaud de **GRAAF**, Klaas-Jan **VISSER**, ‘ATA Directive: Some Observations Regarding Formal Aspects’

*Abstract:* In this article the authors analyse to what extent the objectives of the Council of the European Union (EU) and the EU Commission are effectively realized through the ATA Directive. Authors believe that the choice for a Directive is likely not the most effective, while for a substantial period potentially resulting in legal uncertainty regarding the scope of the Directive’s terminology and provisions. The relationship with existing international (tax) treaty obligations is complex as well as with existing income tax Directives. Moreover, the choice for a Directive puts the tax authorities – who have the primary initiative in applying its provisions – in a relative weaker position since under EU law they cannot unlike taxpayers directly apply the Directive’s

provisions. Finally, it can be questioned where local tax authorities have the initiative, whether the EU Commission review and monitoring process will be sufficient to safeguard a consistent application of the Directive's provisions within the EU, creating a level playing field. In view of this, authors conclude that a Regulation or alternatively a peer review mechanism may result in less legal uncertainty and a more effective mechanism to realize the Council of the EU and the EU Commission's objectives.

Gert-Jan van **NORDEN**, 'State of Play in Respect of the Skandia America Corporation Case'

*Abstract:* On 7 September 2014 the European Court of Justice delivered its landmark decision in the Skandia America Corporation case (C-7/13). The judgment deals with the Value Added Tax (VAT) treatment of services provided by a foreign head office to its fixed establishment, which is included in a VAT group. The case has a huge potential impact not only in the financial services sector, but in cross-border business in general. Now, almost two years after the decision was taken, the author reflects on the judgment, taking into account the views of various stakeholders. The different approaches of Member States will be outlined as well as the potential way forward.

Bret N. **BOGENSCHNEIDER**, 'The European Commission's Idea of Small Business Tax Neutrality'

*Abstract:* The European Commission recently announced a competition policy of what might be called 'small business tax neutrality' in several of its state aid rulings. Simply put, states may not grant tax benefits that create a tax advantage to multinational firms in comparison to small and medium enterprises (SMEs). As explained in detail here, the United States (US) is engaged in tax competition yielding a structural advantage in favour of US multinationals against European SME's including by facilitating the avoidance of European tax, which also notably reduces the foreign tax credit offset upon repatriation of earnings to the US. Also, US tax laws grant US multinationals tax incentives on US earnings including special incentives for R&D and domestic manufacturing which are incremental to the lax enforcement of US tax laws on corporate audits especially with respect to transfer pricing. The anticompetitive effect is that US multinationals enjoy a significant trade advantage against their competitors of all stripes and are able to seize market share from European SME's (just as also occurred in US domestic markets where SME's were significantly reduced as competition in the US domestic markets over the past decade). Several policy options are provided herein to reduce the competitive advantage of US multinationals in the respective European markets and particularly with respect to European SMEs.

Carri **GINTER**, Nele **LAIWEE**, Albert **LINTAM**, 'The 'Specific Purpose' Exception of the European Union Excise Tax Regime: Testing the Boundaries of Member States' Tax Autonomy'

*Abstract:* This article focuses on 'specific purpose' originating in the European Union (EU) excise tax rules and the illegal nature of the local sales tax of Tallinn, capital of Estonia and the related EU law. In the beginning the legislative background of the term is discussed. Thereafter the legality of the Tallinn sales tax is addressed.

Mirugia **RICHARDSON**, 'The Task Force for Greece, Tax Evasion and the Shadow Economy'

*Abstract:* This article argues that a strategic approach to tax evasion in Greece requires ensuring that measures for reforming Greece's tax system and tax administration dovetail with policies to reduce Greece's shadow economy. Studies indicate that the size of Greece's shadow economy is a key factor contributing to tax evasion. The objectives of this article are, therefore, twofold. First, it

discusses the link between the Greek shadow economy and tax evasion in Greece. The second objective is to investigate the role the Task Force for Greece had in reforming Greece's tax administration.

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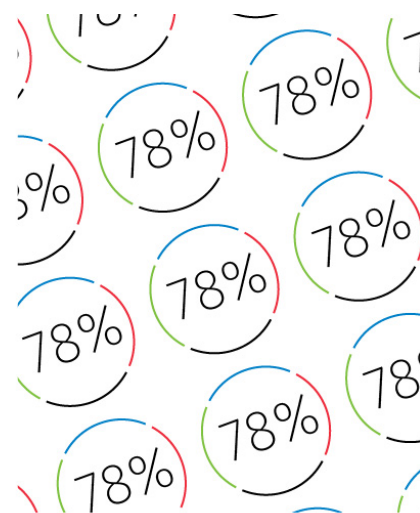
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