

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Wednesday, May 9th, 2018

We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Michael Lang, Double Taxation Conventions in the Case Law of the CJEU

This Essay analyzes the jurisdiction of the CJEU regarding the interpretation of Double Taxation Conventions, by examining the relevant case law of the CJEU. It further investigates the interplay between the Fundamental Freedoms and the Double Tax Conventions.

Stjepan Gadžo, The Principle of ‘Nexus’ or ‘Genuine Link’ as a Keystone of International Income Tax Law: A Reappraisal

In this article, the author analyses the legal status of the so-called ‘nexus principle’, i.e. the requirement that a qualifying connection exists between the state exercising its taxing power on the one hand and taxable subject and/or taxable object on the other. It is argued that the nexus principle forms part of general international law of income tax jurisdiction, since it has attained the status of international custom. Put differently, international customary law prohibits income taxation in the absence of both personal and territorial nexus. In the light of the well-established methodology for ascertaining international customary law, support for such conclusion is found mainly in relevant norms of tax treaty law and domestic tax laws. Accordingly, the nexus principle may be considered as a keystone of international income tax law.

Filip Majdowski & Katarzyna Bronzewska, Revolutionary Changes to the Arm’s Length Principle under the OECD BEPS Project: Have CFC Rules Become Redundant?

Title question of the article is deliberately provocative. The subject of interactions between Controlled Foreign Company (CFC) regulations and transfer pricing (TP) regulations is a complex topic that has been bringing divergent opinions over many decades (In United States, from where both CFC regime and TP regime originated, the literature on this subject has been present at least since 1969, being no more than one year after the introduction of detailed US TP regulations

(1968). CFC regulations – Subpart F – was introduced therein in 1962. See for instance: L. Kauder, ‘Taxation of Domestically Controlled Foreign Corporations: A Comparative Study of Subpart F and Section 482’, 14(2) *Villanova L. Rev.* (1969)). The polemic in this regard has, however, acquired a new dimension together with the OECD’s adoption of modifications to the arm’s length principle as referred to in Article 9 of the OECD Model Convention under the Base Erosion and Profit Shifting (BEPS) project, which led to publishing the 2017 TP Guidelines for Multinational Enterprises and Tax Administration (OECD, 2017 TP Guidelines for Multinational Enterprises and Tax Administration). These amendments, which involve the expansion of the guidelines on the relationship between (1) the legal title to the asset, and (2) the eligibility of a cross-border group of related entities to recognize the corresponding income generated by that asset, has led to an unobservable earlier approximation of the scope of CFC and TP regimes. It is therefore the study question of this article to verify whether the enhanced TP regulations are capable of replacing CFC regulations.

Xiaoqing Huang, Ensuring Taxpayer Rights in the Era of Automatic Exchange of Information: EU Data Protection Rules and Cases

With the automatic exchange of information on tax matters (AEOI) developing into the new international standard, large quantities of information have been or will be subject to cross-border transfer. As a result, data play a significant role in the mechanism. Although the European Union is equipped with various legal sources in data protection, guarantees provided to taxpayers in AEOI legal instruments need to be further developed in order to be consistent with those provided by data protection rules in the European Union. This article analyses taxpayers’ right to data protection by studying the interrelationships between rules in EU Directives regarding administrative administration and those regarding data protection. Moreover, relevant Court of Justice of the European Union (CJEU) case law will be discussed in light of the afore-mentioned rules, highlighting the insufficiencies of prevailing AEOI legislation in ensuring proportionality and taxpayer protection in third countries. Finally, the newly adopted General Data Protection Regulation will be assessed.

Michael D’Ascenzo AO, Integrity: The Keystone to Good Tax Administration

Corruption has a corrosive impact on the wellbeing of a nation, and is especially damaging to tax administrations. The article explores the causes of corruption both from the perspective of the design of tax systems and from the perspective of tax administrations. It outlines a range of generic remedies that can be used to minimize the risk of corruption. In giving life to these generic remedies the article follows the approach taken by the Australian Taxation Office to reinvigorate its integrity framework as a result of the improper conduct of an assistant commissioner (Petroulias) in the late 1990s.

Deborah Tickle, ‘Irregular’ and ‘Wasteful’ Expenditure, Tax, and Fiscal Citizenship in South Africa

The Auditor General of South Africa, in his consolidated audit reports for 2015/2016, reported

ZAR 65.5 billion of ‘irregular’ and ‘wasteful’ expenditure by central, provincial and local government in South Africa, together with ten of the twenty-one state-owned enterprises. This figure was almost double that of the previous year. Against a background of government corruption, significant poverty and a taxpayer base in 2015, whereby 130,000 individuals paid a third of the personal income tax and 616 companies paid two thirds of the corporate income tax, the question arises whether the levels of ‘irregular’ and ‘wasteful’ expenditure result in reduced levels of fiscal citizenship in the country. This article further looks at the general concept of fiscal citizenship and establishes that reduced trust in government results in reduced tax morality and fiscal citizenship. It finds that this rule applies equally in South Africa. The levels of ‘irregular’ and ‘wasteful’ expenditure in the country arise to some extent, and are perceived to arise to a large extent, from corruption. The South African tax authority acknowledges, together with professional commentators and journalists, that the ensuing lack of trust in the State has a negative impact on fiscal citizenship.

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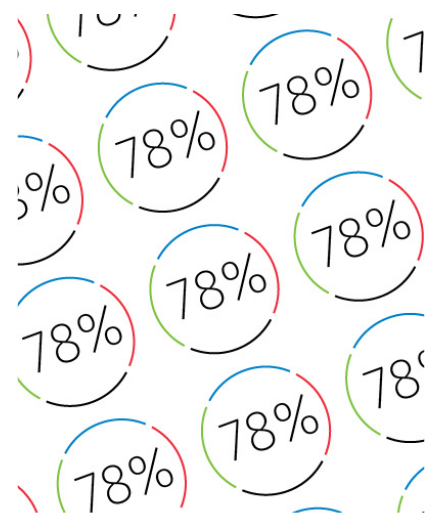
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