Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Monday, September 17th, 2018

I am delighted to inform you that the latest issue (Issue 10) of the journal is available online.

My editorial focuses on the recently published OECD Financial Transactions Discussion Draft, Ruth Mason discusses the Wayfair case, and the debate on whistleblowers and taxes is followed up by Alain Steichen. You can read and select many other interesting topics under articles, case-notes, and literature review. Herewith the highlight to the outstanding peer-reviewed articles, and three case-notes:

Qiang Cai, *A Package Deal Is Not a Bad Deal: Reassessing the Method of Package Negotiation Under the Mutual Agreement Procedure*

Traditionally, most international tax disputes among jurisdictions have been resolved through the mechanism of the mutual agreement procedure (MAP). A long-standing concern with MAPs is that competent authorities might pursue a so-called package deal, whereby a certain taxpayer's interests would be sacrificed as part of a larger trade-off between the competent authorities. This article argues that, contrary to this common belief, a package deal under the MAP is not necessarily a bad deal; indeed, it even has the potential to strengthen the MAP mechanism. Specifically, this package deal method helps to reduce the average costs of handling MAP cases; expands the space for cooperation between competent authorities; and, if properly devised, helps to foster a stable fiscal climate. In a broader sense, the method of package negotiation also has implications for the mechanism of international tax mediation. This article adopts an interdisciplinary approach, combining the topic of the MAP with transaction cost theory.

Cosima Gerlach & Nicola Niemeyer, *The New Tie-Breaker-Rule for Companies According BEPS Action Point 6: A (Too) Radical Change?*

This article investigates whether the general introduction of a Mutual Agreement Procedure under Article 4 section 3 OECD Model through BEPS Action Point 6 is more capable of effectively and practically breaking the tie for dual resident companies than the former place of effective management criterion. Based on an empirical analysis of the tie-breaker-rule in treaty practice in more than 2,000 Double Tax Conventions concluded by the OECD Member and Partner States it is demonstrated that the place of effective management criterion is still predominant in treaty practice

and that the application of a Mutual Agreement Procedure under Article 4 section 3 OECD Model only slightly increased following the MLI implementation process. Furthermore, it is shown that the cautious implementation of the new tie-breaker-rule can be explained due to various procedural shortcomings of the Mutual Agreement Procedure with respect to the core requirements that Article 4 section 3 OECD Model has to fulfil. Based on the empirical and theoretical assessment further suggestions for improvements to enhance the application of both, the MAP and place of effective management criterion, on a standalone basis, are provided. A combined application of both tie-breaker-rules within a two-step hierarchical test is presented as the preferred solution.

Jan Karol Szczepa?ski, ***The Dual System of OECD Model Tax Conventions from the Evolutionary Perspective***

This article attempts to analyse, from the evolutionary perspective, the dual system of OECD Model Tax Conventions that arguably came into existence as a result of a tax policy choice that was introduced from the very beginning of works on bilateral model solutions concerning the elimination of international juridical double taxation. So far, this duality has attracted little attention in the literature despite its theoretical importance. This article attempts to fill in this research lacuna. The presented analysis is also important to consider a much needed shift in the tax policy of the OECD towards taxes on gratuitous wealth transfers mortis causa and inter vivos.

Baron & E. Poelmann, ***The Principle of Ne Bis in Idem: On the Ropes, but Definitely Not Defeated***

In the A. and B. v. Norway case decided by the European Court of Human Rights (ECtHR) on 15 November 2016 (24130/11 and 29758/11), the principle of ne bis in idem suffered a significant blow. Via the Luca Menci (C-524/15), Garlsson Real Estate (C-537/16) and Di Puma (C-596/16 and C-597/16) cases, the European Court of Justice (ECJ) was confronted with a challenging decision: either stay with the path set out by the ECJ on 26 February 2013 in the Åkerberg Fransson case (C-617/10) or follow the ECtHR and thereby strike a knockout blow to the right that is guaranteed by the principle of ne bis in idem. In its judgments of 20 March 2018, the ECJ came up with a surprising solution.

Ruth Mason, ***Implications of Wayfair***

By now everyone knows about the US Supreme Court’s blockbuster decision in South Dakota v. Wayfair (US: Supreme Court 21 June 2018, No. 17-494, Wayfair v. South Dakota), which overruled decades of precedent to declare that the Constitution did not bar a US state from imposing obligations on remote sellers to collect tax on sales they made into the state, even if they had no physical presence there.

Wayfair was hailed in US tax-policy circles for laying to rest an erroneous decision that had led to significant competition distortions between online and retain stores. It likewise has been cited as confirmation of the correctness of the OECD’s and EU’s movements to modernize the nexus standard for corporate tax, including by introducing changes to the definition of a permanent

establishment (PE) that would make it easier for states to tax companies engaged in digital activities with no physical presence. This article describes Wayfair and provides some cautions about what it means for the US states and the rest of the world, especially Europe.

Elien van Malder, *ECJ Clarifies Conditions for VAT Exemption on Import Followed by Intra-Community Supply or Transfer in Enteco Baltic Case*

In the recent Enteco Baltic case, the Court of Justice of the European Union confirmed the application of the VAT exemption on the import of fuel from Belarus to Lithuania, which was then dispatched or transported to other Member States, without adhering to all the formalities provided for in Article 143(2) of Council Directive 2006/112/EC (the VAT Directive) as amended by the Council Directive 2009/69/EC (Directive 2009/69). Thus, the Court, once again, grants priority to material conditions over formal conditions.

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