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Ana Paula Dourado (General Editor of Intertax) · Thursday, December 6th, 2018

I am delighted to share the contents of Intertax issue 11 with our readers.

My editorial entitled "Profit Splitting and the Aspirational Arm's Length Principle" discusses the (in)adequacy of the arm's length principle, mainly or almost exclusively based on comparable transactions among unrelated parties, in cases where comparable transactions do not exist, in order to achieve an arm's length result. It departs from the *Altera Corporation v. Commissioner of Internal Revenue (Altera Corp.)* case, decided by the US Court of Appeals for the Ninth Circuit on 24 July 2018, and subsequently withdrawn. The case illustrates how the traditional arm's length analysis based on comparable transactions among unrelated parties, to achieve an arm's length result, has been progressively challenged by the US Congress and the US Treasury.

I then compare the reasoning and conclusions in Altera Corporation with the reasoning and conclusion of the CJEU in Hornbach-Baumarkt AG. Differently from the withdrawn decision by the US Court of Appeals for the Ninth Circuit in *Altera Corp.*, the CJEU held that there might be commercial reasons for a parent company to agree to provide capital on non-arm's length terms. Those commercial reasons could be linked to the purpose of continuation and expansion of the business operations of those foreign companies; to the financial success of the foreign group companies, as well as by a certain responsibility of *Hornbach-Baumarkt AG* to finance its subsidiaries.

I hold that, whereas it can be argued that the expansion of the business operations of foreign companies is an internal-market-friendly argument, the responsibility of *Hornbach-Baumarkt AG* in financing the subsidiaries, for no consideration, works against parity in taxable income between controlled and uncontrolled arrangements.

Hannelore Niesten in "Revisiting the Fiscal and Social Security Status of Highly Mobile Workers in the Road and Railway Transportation: Quo Vadis?" submits the fiscal and social security status of international highly mobile workers employed in the road and railway transportation to a critical evaluation. As far as the international taxing rights over cross-border employment income are concerned, most double tax treaties, based on Article 15 of the OECD Model Tax Convention, use "the actual physical place of employment" as the main starting point. However, the criterion of the state where the employee is physically present is insufficiently attuned to the situation of highly mobile workers carrying out activities in the international road and railway transportation.

Because of their mobility and the cross-border nature of their activities, highly mobile workers are exposed to complex interpretation and application problems. An excessive fragmentation of (the

exercise of) the place of employment by multiple working states can increase the exposure to conflicting characterizations of facts, additionally on the basis of differences across domestic laws, thereby giving rise to a greater potential for unrelieved double taxation. Further inconveniences may arise from the fact that the obligations demanded by social security law are not always geographically aligned with those determining the place of employment for tax purposes.

The special focus of the contribution lies in a critical comprehensive, in-depth attitude and evaluation of the interpretation and application problems with regard to (1) the place of exercise of employment of international transportation workers, and (2) the affiliated (dis)coordination between the tax allocation rules (double tax treaties) and the social security law rules (Regulation (EC) No 883/2004). Suggestions are made for a minimization of the detected application and interpretation problems regarding the tax jurisdiction over employment income of international transportation workers and the provision for better coordination between fiscal and social security law.

Christina Dimitropoulou, Sriram Govind & Laura Turcan, in their article "Applying Modern, Disruptive Technologies to Improve the Effectiveness of Tax Treaty Dispute Resolution – Part 1", address how modern, disruptive technologies can be used to improve the effectiveness of tax treaty dispute resolution. The article examines whether the emergence of new and disruptive technologies such as artificial intelligence, shared-data platforms, cloud-based solutions and blockchain could complement the mutual agreement procedure (MAP) and supplementary arbitration and render them more effective by speeding up the resolution, reducing costs and establishing trust between tax administrations and taxpayers.

To answer this question, in Part 1 of this article, the authors briefly analyse the main drawbacks of the existing tax treaty dispute resolution process from the perspective of various stakeholders. Next, the article focuses on the fundamental features of a few significant types of technology and analyses how they could improve this process.

In Part 2 of this article, the authors will use the analysis from Part 1 to make some specific suggestions as to how the technologies discussed can be used to improve the MAP and supplementary solutions, with an aim to encourage the above-mentioned policy organizations to consider the potential of disruptive technologies in their work.

In "(Un)tangling Tax Avoidance under the Interest and Royalties Directive: The Opinion of AG Kokott in N Luxembourg 1", Ivan Lazarov contributes to the discussion by critically examining the issues that arise regarding the anti-abuse rules of the Interest and Royalties Directive and some of the aspects of their interplay with the new general anti-avoidance rule (GAAR) under the Anti-Tax-Avoidance Directive (ATAD). The recent opinion of Advocate General (AG) Kokott, delivered in the case of *N Luxembourg 1*, serves as a foundation of the analysis because of its in-depth assessment of several key elements and the factual background of the case that can play the role of a useful case study to illuminate the conclusions.

In terms of structure, the article first describes the facts of the case to then critically analyse, one by one, the main points raised by AG Kokott. These points can be grouped together into two main categories: the first relates to the beneficial ownership requirement under the Interest and Royalties Directive, whilst the second concerns the anti-abuse doctrine.

Reuven Avi-Yonah and Gianluca Mazzoni debate "BEPS, ATAP, and the New Tax Dialogue: ¿A

Transatlantic Competition?". According to the authors, the Tax Cuts and Jobs Act (TRA17) signed into law by President Trump on 22 December 2017 contains multiple provisions that incorporate the principles of the OECD/G20 Base Erosion and Profit Shifting (BEPS) into domestic US tax law. Together with the changes in the 2016 model US tax treaty, these provisions mean that the US is following the EU in implementing BEPS and in particular its underlying principle, the *single tax principle* (all income should be subject to tax once at the rate derived from the *benefits principle*, i.e. active income at a minimum source tax rate and passive at the residence state rate). The authors claim that this represents a triumph for the G20/OECD and is incongruent with the generally held view that the US will never adopt BEPS.

Adopting a different perspective, Stephen E. Shay (in "The U.S. International Tax Reforms –Competition and Convergence, Pay-offs and Policy Failures") argues that the primary objective of the overall U.S. tax reform was to benefit Republican (GOP) constituencies, including a tax cut for individuals, with benefits skewed to those with higher income, and a substantially reduced corporate tax rate. The legislation's tax reductions were deficit financed. In service of the Trump GOP's "make America great again" (MAGA) campaign theme, the focus of the reform's international tax provisions was to champion U.S. multinational businesses to the extent of available budget space after providing domestic businesses their rate reductions.

The international provisions are a hodgepodge of poorly designed tax benefits and base protections. The tax benefits included providing U.S. multinational corporations a low rate of current tax and relief from future U.S. tax on accumulated offshore earnings, a partial territorial system and a tax reduction for exports. Though most of the base protections are consistent with G20/OECD base erosion and profit shifting (BEPS) action items, their purpose was to pay for revenue lost by MAGA reforms more than to enforce international standards.

Ricardo Marozzi Gregorio writes about the "Brazilian Transfer Pricing Rules: An Analysis of Effectiveness". The author recalls that Brazil is widely recognized as the most significant country that does not follow the international transfer pricing standards. Despite its practicability, there are many evidences that the Brazilian approach is ineffective when it comes to prevent tax avoidance in cross-border transactions. In fact, the predetermined margins combined with the free choice of methods are nothing more than the materialisation of the OECD's warning against 'opening avenues for tax planning'. The country's announced intention of joining the OECD membership is now the great opportunity to amend and improve the current regime.

The reader may also find a Case Note ("ECJ Confirms Function-Based Approach to the VAT Exemption of Transactions Concerning Payments and Transfers") by Charlène A. Herbain, which identifies and reflects upon the criterion used by the Court to reject the classification as 'transaction concerning payments or transfers' within the meaning of the VAT exemption provided by the VAT Directive. It also highlights significant points (some which were ignored by the ECJ) and evaluates these findings, thereby calling into question the correctness of the conclusion reached by the ECJ.

Finally, Guillermo O. Teijeiro reviews the book from Alexandre Alkmim Teixeira, "Tax Sparing: A View of an Underdeveloped Country", D'Placido, 2018; and Manuel L. Hallivis Pelayo and Marcus Livio Gomes review "Ibero-American Tax Law: Under the 2015 CIAT Model Tax Code" ("Derecho Tributario Iberoamericano: A la Luz de la Versión 2015 del MCTCIAT"), Instituto Colombiano de Derecho Tributario/Instituto Colombiano de Derecho Aduanero, 2017.

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