Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Wednesday, December 19th, 2018

Intertax issue 12 is available and I am delighted to share with the reader the topics dealt with in the issue.

In my editorial, "Taxes and Competiveness: How Much Competitive Is European Tax Competition?", I critically address some of the topics discussed on the *Platform for Tax Good Governance* at its meeting after the summer break, namely, whether taxation the tool for competitiveness; how can Europe become competitive in the post-BEPS era, and in the absence of corporate income tax harmonization; how can competitiveness help building communication and trust among tax players, NGOs, the media and the taxpayers; and whether competitiveness is equivalent to tax competition. This discussion is also based on recent tax reforms in Belgium, the Netherlands and Sweden.

Jérôme Monsenego, in his article entitled "The Independent Agent Exception and Group Membership" considers the independent agent exception to the dependent agent PE rule in tax treaties. The author analyses the impact of group membership on the availability of the independent agent exception under the 2014 and 2017 versions of Article 5(6) of the OECD Model. Whereas the 2014 version did not explicitly take into consideration group membership, the 2017 update marks a shift in policy as the quasi-exclusivity of the action of an agent on behalf of closely related enterprises now excludes the independent agent exception. After analysing in depth the Commentary on the two versions of Article 5(6), the author investigates the policy reasons justifying this shift, in particular the possible presumption of tax avoidance that seems to be pinned on multinational enterprises.

Christina Dimitropoulou, Sriram Govind, Laura Turcan, in Part 2 of their article, entitled "Applying Modern Disruptive Technologies to Improve the Effectiveness of Tax Treaty Dispute Resolution" suggest a flexible, tech-based model for MAP and arbitration with a view to improve the effectiveness of tax treaty dispute resolution as regards cutting costs, speeding up resolution and guaranteeing security of information exchanged. The examined technological options range from the use of video conferencing and electronic filing to artificial intelligence and blockchain. Despite the significant benefits of such technological upgrade of MAP process, implementation concerns remain. These require a global, coordinated approach, which, according to the authors, should be spearheaded and managed by international organizations such as the OECD and the UN".

Leopoldo Parada ("Hybrid Entity Mismatches and the International Trend of Matching Tax

Outcomes: A Critical Approach"), provides a critical approach both as regards the diagnosis of the problems and the remedies proposed to issues concerning hybrid entity mismatches. As to the diagnosis, the author argues that the artificial attempt to match transactions involving hybrid entities and double non-taxation not only disregards the fundamental issue regarding hybrid entity mismatches (i.e. the disparate tax characterization of entities), but also carries with it the risk of creating presumptions of abusive practices. As to the remedies, the author argues against the complexity, excessive reliance on foreign laws and potential economic double taxation that the implementation of linking rules might cause, questioning also the improper interaction between linking rules and other anti-base erosion provisions, such as interest limitations and CFC rules. The article ultimately concludes that a re-orientation in the international debate regarding hybrids entities is crucial in order to open the door for more fundamental and coordinated solutions.

Ricardo André Galendi Júnior, in "State Aid And Transfer Pricing: The Inherent Flaw Under A Supranational Reference System" deals with the theoretical problem of whether the arm's length principle could be derived from EU law and whether such principle would offer a single answer to the allocation of synergy rents. The author puts forward two main arguments. First, he asserts that, under ECJ case law, unless a deviation from the general tax system set forth by domestic law of the Member State (reference system) is identified, transfer pricing cases will be generally an issue of tax disparity. Therefore, the alleged advantage would not attributable to the Member State. Second, the author holds that deriving an EU law arm's length principle from Article 107(1) of the Treaty on the Functioning of the European Union means to build up a supranational reference system. Such reference system is not an obvious derivation from the equality principle, but a matter of allocation of taxing rights among jurisdictions, with significant and contingent tax policy impacts. If the ECJ chooses to follow this path, it will tie future direct tax decisions to the manifold consequences of the policy elected – which currently seems to be the OECD/G20 BEPS Project 'value creation' trend. Both arguments are illustrated through an analysis of the Belgian excess profit regime. The article is not a defense of the Belgian system, but merely uses it as an example, stressing the inconsistencies that arise from the supranational reference system argument.

Giangiacomo D'Angelo, in "New frontiers in the EU VAT Regime for Public Bodies", reflects about the regime for public bodies, which has always been problematic in the overall system of EU VAT. In recent years the Court of Justice of the European Union (CJEU) has handed down rulings leading to unexpected developments in this connection. These rulings cast light on the scope of the economic activity and relevant transactions carried out by public bodies as well as on the activity of bodies controlled and funded by the public sector. The CJEU has ruled that in certain cases bodies established as private companies may be considered 'other bodies governed by public law', and narrowed the 'major distortion of competition' exception set forth in Article 13 CSVD. These developments indicate a general orientation of the CJEU adapting the provisions in the Directive to the current economic scenario where the distinction between public and private is increasingly difficult to draw.

Thomas Vanhee & Thaís Cunha write a case note entitled "A Noncumulative Single Stage Sales Tax Does Not Infringe on the VAT Directive's Prohibition to Introduce a Turnover Tax".

Their case note reflects on the decision adopted on 7 August 2018, the Court of Justice of the European Union (CJEU), in case C-475/17, and interpreting Article 401 of the VAT Directive in respect of the sales tax imposed by the Tallin City Council, Estonia. The CJEU was requested by the Supreme Court of Estonia (Riigikohus) to clarify as to whether the Tallin sales tax complied with the aforementioned Article 401.

The CJEU debated the nature and concept of a turnover tax, the prohibition of maintenance or implementation of national taxes that resemble the same nature of VAT, as well as the essential characteristics of VAT

Roland Ismer reviews Alice Pirlot's book, "Environmental Border Tax Adjustments and International Trade Law: Fostering Environmental Protection", Edward Elgar: New Horizons in Environmental and Energy Law Series, 2017.

Pirlot deals with border tax adjustments (BTAs), i.e. charges applied to goods imported into a country and corresponding reliefs for goods exported. She examines three research questions, namely (1) the rationale for BTAs, (2) design issues and (3) the legal framework, both for traditional BTAs and for environmental BTAs. In this impressive and thought-provoking book, Pirlot convincingly argues that BTAs can be implemented if and to the extent that they serve legitimate (environmental) aims rather than protectionist goals.

Two more reviews are published in this issue: Reuven S. Avi-Yonah and Gianluca Mazzoni review the book by Jogaran Sunita, "Double Tax Treaties & the League of Nations", Cambridge University Press, 2018. And Jerôme Monsenego reviews "Transactional Adjustments in Transfer Pricing", IBFD, 2018.

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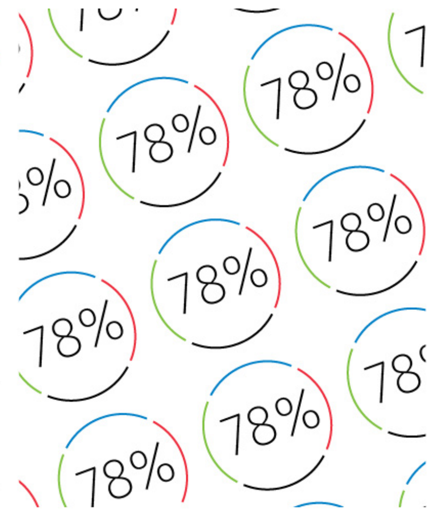

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