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Ana Paula Dourado (General Editor of Intertax) · Tuesday, March 5th, 2019

I am happy to inform you that issue the first issue of 2019 is available and includes, among others, the following contributions:

My editorial, which is entitled "In Search of an International Tax System in a Post-BEPS Tax Competition Setting". It claims that the future of the international tax system will depend on how successful states ultimately are in structuring the principles of taxation. The focus is on the legitimacy to tax profits; the meaning of the benefit principle in the framework of the increasingly digitalized economy; and whether it is still possible for a state to tax global income.

Stefan Schwibinger, *Developing a Uniform Understanding of Income Classification: Everyone's Business? – A Review of Business Income and the Criterion of Asset Management in Tax Treaty Interpretation*

The author claims that the conflicts of qualification under tax treaties may result from the lack of a clear borderline between business income and investment income, with potential remedies existing to resolve this problem. To analyse the problem, this article first highlights the general roots of the distinction between different income categories and then specifically addresses the categories of business income and investment income by initially outlining their general characteristics and then reviewing their different understanding in a tax treaty context for selected countries. The issue is especially relevant for borderline cases, in which specific and unique case law has developed in each jurisdiction with respect to asset management that may cause conflicts of classification in cases where a tax treaty is applied. The article then introduces and evaluates two approaches that aim to resolve conflicts of classification, namely the principle of common interpretation and the new approach to Article 23A/B OECD-MC, with regard to their applicability in the field of income classification. The approaches are then applied to case studies, followed by a discussion of the results and potential limitations.

Leopoldo Parada, *Hybrid Entity Mismatches: Exploring Three Alternatives for Coordination*

Parada starts by claiming that the OECD pragmatic approach regarding hybrid entity mismatches is questionable. According to him, equally questionable is the absence of alternatives solutions proposed by either academics or tax policy makers , which demonstrates a sort of conformism as regards both the diagnosis of the problems and the solutions thereto, as if matching tax outcomes and taxing income somewhere – no matter where – were indeed the only possible path to deal with hybrid entity mismatches.

In an attempt to break this inertia, Parada's article argues for coordination in the tax characterization of entities as a straightforward and suitable alternative to replace the current OECD linking rules, and perhaps also, the consequentialist OECD approach to hybrid entity mismatches. For this purpose, three specific alternatives are explored for coordination in the tax characterization of entities, which include (1) supremacy of the tax characterization rules of the source state, (2) supremacy of the tax characterization rules of the residence state and (3) supremacy of the tax characterization rules of the home state. The analysis of these alternatives includes both hypotheticals and specific examples from domestic and supranational laws that are used to illustrate and support their effectiveness. The ultimate aim of this article is to demonstrate that coordination in the tax characterization of entities appears to be not only a more preferable path when compared to the OECD approach of matching tax outcomes, but also a more coherent and less costly alternative for both taxpayers and tax administrations.

Natassia Burkhalter-Martinez, ***BEPS Action 4 and Its Compatibility with the Principle of Non-Discrimination Under Article 24(4) of the OECD Model Convention***

The final reports of the OECD Base Erosion and Profit Splitting (BEPS) Project were published in October 2015. The OECD's recommendations include an approach to address the risks of base erosion and profit shifting caused by the deduction of interest and other financial payments, namely by implementing a fixed ratio rule, which can be complemented by a group ratio rule. The implementation of the BEPS Action 4 recommended approach could lead to certain issues related to its compatibility with domestic law and with tax treaty obligations. This article addresses one of these issues by analysing the compliance of the BEPS Action 4 recommended approach with tax treaty obligations, mainly with the principle of non-discrimination under Article 24(4) of the OECD Model Convention.

Marcus Livio Gomes, ***The DNA of the Principal Purpose Test in the Multilateral Instrument***

This article provides a comprehensive analysis of the framework of the principal purpose test (PPT) included in the Multilateral Convention (MLI) designed by the OECD as part of the Base Erosion and Profit Shifting (BEPS) Action 6 Final Report, 'Preventing the Granting of Treaty Benefits in Inappropriate Circumstances', included in the BEPS Project. This article maps the primary and secondary elements generally used in a general antiavoidance rule (GAAR) to check the feasibility of these concepts in the PPT. Potential weaknesses are pointed out, as well as challenges for its legal implementation, application and interpretation. The article assesses the feasibility of the main features of the PPT as a general anti-treaty avoidance rule (GATAR) to be included in the tax treaties of the states and jurisdictions that joined the MLI. From this perspective, whether the PPT will prevent treaty abuse, treaty avoidance or aggressive tax planning without creating uncertainty and shifting too much discretionary power to tax administrations is one of the issues. Ultimately, the strengths of this provision will depend on the legislatures and courts in the near future.

Giorgio Beretta, ***Cross-Border Mobility of Individuals and the Lack of Fiscal Policy Coordination Among Jurisdictions (Even) After the BEPS Project***

Cross-border mobility of individuals has serious implications for states, irrespective of whether they are the emigration country or the immigration country and use citizenship or residence as the relevant criterion to exert their fiscal jurisdiction over the worldwide income of an individual taxpayer. This article illustrates in detail the various tax policies that a country can adopt to deal

with cross-border mobility of individuals. The article first contrasts citizenship-based taxation with citizenship-by-investment programmes. Then, defensive strategies adopted by the emigration country against outward mobility of resident individuals are considered in parallel with preferential tax regimes for inward expatriates enacted by the immigration country. Next, the limited role – even after the Base Erosion and Profit Splitting (BEPS) Project – of tax treaties and other international tax instruments to curb competing fiscal policies of states is discussed. Finally, as a possible remedy to such clash of policies, the author tentatively proposes the abandonment of the long-established connecting factors of citizenship and residence and, in their place, the adoption of a new jurisdictional nexus based on the actual physical presence of an individual in the territory of a state, determined with the help of geo-localization technologies, which would lead to a proportional allocation of taxing rights among the countries interested in individual mobility.

Pawe? Miku?a, ***Consistency of ECJ Case Law: Formal Requirements in VAT Matters***

The Court of Justice of the European Union (ECJ or the Court) has, on many occasions, considered the question of the formal requirements under VAT law. Its approach has remained consistent and can be summarized as follows: the taxpayer's degree of liability should not be higher solely on the grounds that the taxpayer did not fulfil a formal requirement. Member States should not condition their taxpayers' VAT burden on the satisfaction of a formal requirement if all the related substantive conditions have been met. This approach has been persistently upheld by the three most recent judgments relating to this matter, namely the Siemens Gamesa (RO: ECJ, 12 Sept. 2018, Case C-69/17, Siemens Gamesa Renewable Energy România SRL, formerly Gamesa Wind România SRL v. Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Solu?ionare a Contesta?iilor, Agen?ia Na?ional? de Administrare Fiscal? – Direc?ia General? de Administrare a Marilor Contribuabili, ECLI:EU:C:2018:703.) TGE Gas Engineering (PT: ECJ, 7 Aug. 2018, Case C-16/17, TGE Gas Engineering GmbH – Sucursal em Portugal v. Autoridade Tributária e Aduaneira, ECLI:EU:C:2018:647.) and Enteco Baltic (LT: ECJ, 20 June 2018, Case C-108/17, UAB 'Enteco Baltic' v. Muitin?s departamentas prie Lietuvos Respublikos finans? ministerijos, ECLI:EU:C:2018:47.) cases. This note will provide an overview of those newest decisions in light of the previous judgments of the Court.

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