Kluwer International Tax Blog

The Contents of EC Tax Review, Volume 28, Issue 2, 2019

Ben Kiekebeld (General Editor EC Tax Review and tax adviser at Ernst & Young Belastingadviseurs LLP) · Friday, April 19th, 2019

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

Carlo Garbarino, *The Relevance of the Procedural Framework Principles in the Direct Tax Cases of the CJEU*

The European Court of Justice (hereinafter the 'CJEU' or the 'Court') has developed a judicial approach in which it has judged whether domestic direct tax measures (income or corporate taxes) violate the principle of non-discrimination found in the Treaty, as reflected in the so called fundamental freedoms: free movement of goods, free movement of workers, freedom of establishment, free movement of services, and free movement of capital. Commentators have developed an in-depth analysis of tax discrimination or restrictions, but have devoted scant attention to procedural non-tax issues that play a very important role in shaping the actual decisions of the Court in tax matters. Te Court has relied on its judicial tradition in the broad sense, particularly in respect to procedural issues. This process resulted in a discernible set of criteria that are defined here as 'framework principles'. The first of these principles is that in spite of the fact that Member States retain their tax sovereignty, there can be actual breaches of EU tax law that are sanctioned by the Court. The second principle is that, in spite of the fact that there are national tax interpretive traditions, there are indeed common guidelines for uniform interpretation in tax cases. A third framework principle is that national courts have a monopoly over relevant tax questions which must be referred to the CJEU, a principle that results in a judicial network that connect different adjudicative agents. A final framework principle in tax cases is that Member States as a result of rulings by the Court must refund taxes to taxpayers and this poses major problems particularly in the current climate of budget restrictions.

Madeleine Merkx, *VAT and Blockchain: Challenges and Opportunities Ahead*

Blockchain is best known as the technology behind the popular cryptocurrency bitcoin, but the application of blockchain is much broader. In this article the author outlines opportunities and challenges for application of blockchain in VAT. She also analyses in detail what aspects of the VAT legislation and its implementation may be affected by blockchain in the future.

Hein Vermeulen & Vassilis Dafnomilis, *Case C-28/17 NN A/S v. Skatteministeriet: A CJEU Judgment that Raises 'Fresh Questions'*

On 4 July 2018, the Court of Justice of the European Union ruled in Case C-28/17 NN A/S v. Skatteministeriet on the compatibility of paragraph 31(2)(2) of the Danish Corporate Income Tax Code with the freedom of establishment (Article 49 of the Treaty on the Functioning of the European Union). Under this rule, a loss incurred by a Danish permanent establishment in Denmark could be deducted in Denmark only if such a loss could not be used for purposes of foreign taxation. In this contribution, the authors provide a summary of the CJEU judgment in NN and focus on some selected aspects of the CJEU judgment, i.e. (1) the difference of the NN case with the Philips Electronics case (C-18/11), (2) the 'removable' difference in treatment, (3) the 'conditional' objective comparability assessment, (4) the risk of the double use of losses as an overriding reason in the public interest and (5) the reference of the CJEU to losses that are practically impossible to be deducted abroad.

Ward Willems, *Withholding Taxes Within the Internal Market After Sofina: Chronicle of a Death Foretold?*

On 22 November 2018 the European Court of Justice ('CJEU') ruled in Case C-575/17 on the French rules for taxing dividends distributed to companies in deficit. Dividends distributed to non-residents are subject to withholding tax, while distributions to resident beneficiaries are exempt from withholding tax ('WHT') but subject to corporate income tax ('CIT') instead. While non-resident companies are subject to immediate taxation, resident companies could benefit from a cash-flow advantage when they remain in deficit, or even a permanent exemption when they liquidate before becoming profitable (in absence of a positive CIT base). The former violates the freedom of capital according to the Court. The importance of the present judgment can hardly be underestimated, as it may severely complicate the further application of existing WHT regimes in the many Member States applying such rules. The judgment is furthermore remarkable for several reasons which will be discussed in the present article. Perhaps the most striking element of the judgment concerns the comparability analysis, where the existence of a foreign deficit was taken into account to influence the tax treatment of a non-resident in the source state (thereby departing from the principle of territoriality).

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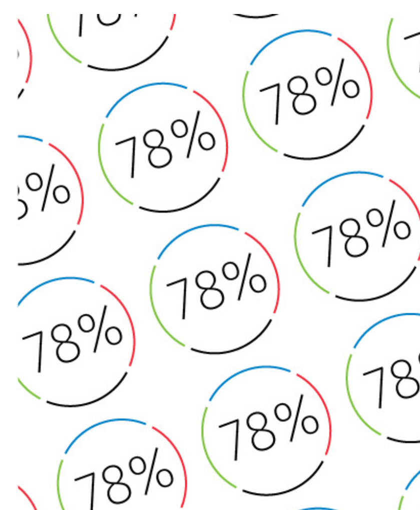

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