Kluwer International Tax Blog

The Contents of Intertax, Volume 47, Issue 4, 2019

Ana Paula Dourado (General Editor of Intertax) · Friday, April 26th, 2019

I am happy to inform you that issue 4, 2019, of the journal is available and includes, among others, the following contributions:

My editorial, entitled "The Commission Proposal to Replace Unanimity for a Qualified Majority in the Tax Field", focuses on the European Commission Communication to the European Parliament, the European Council and the Council, "Towards a more Efficient and Democratic Decision Making in EU Tax Policy", in which the Commission proposes to replace the unanimity vote on harmonization of taxes by a qualified majority. A shift to ordinary legislative procedure would benefit from the European Parliament input, and therefore increase democratic accountability. In the editorial I claim that in order to avoid the various frictions, several alternatives should be carefully weighted.

For example, qualified majority should be limited to the three first steps of the road map for the transition, namely:

Measures that have no direct impact on Member States' taxing rights, bases or rates, but are critical for combating tax fraud, evasion and avoidance and in facilitating tax compliance for businesses in the Single Market. Measures primarily of a fiscal nature designed to support other policy goals. This may include in particular the fight against climate change, protecting the environment or improving public health or transport policy. In general, a proposal to shift tax harmonization to qualified majority would be interesting if new taxes, including those with regulatory nature, would become EU resources targeted to implement EU policies.

The third step would be to focus on areas of taxation that are already largely harmonized, and which must evolve and adapt to new circumstances. A qualified majority voting in these areas, including direct taxes, would be easier to achieve if there would be opt-in and opt-out clauses, as well as sunset clauses in respect of more controversial measures. The latter would force Member States to decide whether a certain regime had proven well or ought to be changed.

If unanimity is kept in the cases mentioned in the fourth step ("…other initiatives in the taxation area, which are necessary for the Single Market and for fair and competitive taxation in Europe", such as the Common Corporate Consolidated Tax Base (CCCTB), opt-in and opt-out clauses, as well as sunset clauses are also advisable, in order to facilitate the required consensus.

Our Guest Editorial by Jeremy Cape assesses three possible scenarios on Brexit and Taxes: one scenario will occur in case the UK parliament ratifies the Withdrawal Agreement concluded

between the UK government and the EU – the UK will then enter a transition period, which would last until at least 31 December 2020; The UK parliament does not ratify the Withdrawal Agreement, in which case the UK leaves the EU, and does not enter into a transition period; The UK government requests an extension of the Article 50 period beyond 29 March 2019, or unilaterally revokes the Article 50 notification. All three situations have different implications in respect of custom duties, VAT and direct taxes, as discussed by Jeremy Cape.

Whether "Brexit may provide a catalyst for social and economic change that facilitates the UK attempting to become more like low-tax Singapore than Sweden", is another open issue.

Alexander Haller & Vikram Chand, in their article entitled "Application of the Arm's Length Principle to Physical Cash Pooling Arrangements in Light of the OECD Discussion Draft on Financial Transactions" contend that although cash pooling arrangements are one of the most important tools to facilitate efficient liquidity management within multinational enterprises (MNEs or group companies), the application of the arm's length principle to these arrangements has not been sufficiently explored as yet. Against this background, the article critically discusses the transfer pricing aspects of physical cash pooling arrangements, especially in the light of the OECD's recent Discussion Draft on Financial Transactions. Specifically, the article discusses the application of the arm's length principle to cash pooling borrowings and deposits, guarantees issued in the context of the pooling arrangement, remuneration of the cash pool leader (CPL) as well as allocation of the cash pool benefit, in particular, the netting benefit and the volume discount. The authors also provide comments on the impact of the negative interest rate environment on cash pooling arrangements.

In "Permanent Establishments and BEPS Action 7: Perspectives in Evolution", Carlo Garbarino suggests that the judicial reasoning adopted within judicial trends developed at national level has been used in shaping evolving perspectives about the concept of permanent establishment adopted in the OECD Model. The article strives to achieve fuller comprehension of the issues raised by the Commentary in 2017, addresses different perspectives which can be adopted about preparatory/auxiliary activities that might prove useful in understanding the anti-fragmentation rule now introduced in Article 5(4.1) of the OECD Model and then focuses on the concept of the agency permanent establishment 'PE' in light of the functional analysis developed by the OECD, with particular attention to the concrete use of the concept of 'authority to conclude contracts' within the functional approach now adopted by the OECD Model, particularly with regard to commissionaire strictures.

In his article "Geotaxation and the Digital: Janus in the Mirror", Piergiorgio Valente focuses on international tax relations and their development under the influence of geographical factors, considering, for example, collaborations among states, the international impact of national or local tax policies etc. Today geotaxation is required to expand to new spaces, where human activity is evolving, such as the cyberspace. Different from all other geotax subjects, cyber-reality is challenging established social structures and norms and international relations, including in the tax area. On these premises, this article explores the changes that cyberspace and modern geotaxation imply for the state and the potential development of the international tax scenario.

"Online Platforms: A Marketplace for Tax Fraud?", by E.C.J.M. van der Hel-van Dijk & M. A. Griffioen deals with the rapid acceleration of developments in the world of e-commerce and the tax risks that are manifesting at the same pace. The authors conclude that the current legal EU measures appear to cover only some of these risks. Tax authorities will have to collaborate with

online platforms to adequately address e-commerce tax risks, as online platforms play a crucial role in e-commerce and could (unintentionally) become a breeding ground for tax fraud if they do not actively step up as gatekeepers to combat tax non-compliance.

Aikaterini Savvaidou and Vasiliki Athanasaki, in "General and Specific Anti-Tax Avoidance Measures under Recent Tax Reform in Greece" aim at presenting the anti-tax avoidance legislation that is currently in force in Greece, comprising from both a general anti-avoidance rule (GAAR) and several specific anti-avoidance rules (SAARs). It also specifically refers to the issue of the interaction of the Greek GAAR with the Greek SAARs enacted in Greece, following the recent tax reform that took place, as a response to the severe economic crisis that hit the country.

In this issue, the reader can also find a Case Law Note on the Volkswagen Financial Services Case, by Ward Lietaert and Amaury Geernaert; and in the literature review section, two reviews: one on "A Global Analysis of Tax treaty Disputes (E. Baistrocchi, eds.)" by Frans Vanistendael; and another one on "Combating Tax Avoidance and Cooperation in Direct Taxation (J. Manuel Almudí Cid, J.A. Ferreras Guutiérrez & P.A. Hernández González-Barreda (eds)" by Daniel Smit.

Happy reading!

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