

Kluwer International Tax Blog

The Contents of Intertax, Volume 48, Issue 1, 2020

Ana Paula Dourado (General Editor of Intertax) · Tuesday, January 28th, 2020

We are happy to inform you that the issue 1, 2020, of the journal is now available and includes the following contributions:

My editorial, on *The OECD Unified Approach and the New International Tax System: A Half-Way Solution*.

A Guest Editorial by Maarten Floris de Wilde: *On the OECD's 'Unified Approach' as Frankenstein's Monster and a Dented Shape Sorter*.

Bart Peeters & Lars Vanneste, *The Hybrid Financial Instruments: The Effects of the OECD BEPS Action 2 Report and the ATAD*

This contribution critically assesses the complex hybrid mismatch rule concerning financial instruments as developed under the OECD BEPS action 2-proposal and subsequently implemented in the Anti-Tax Avoidance Directive (ATAD). Both approaches are compared, starting with a profound analysis of the OECD initiative. Given their obligation to implement the European initiative in domestic tax law by 1 January 2020, domestic legislators now have to deal with the exact meaning of the Directive. However, the ambiguous text incites uncertainties and will definitely raise incoherencies between the several EU-Member States.

Both international initiatives clearly rather aim to counter tax avoidance, instead of creating coherencies: only double non-taxation is envisaged and the taxpayer is confronted with a rather technical, hierarchical set of rules increasing his tax burden, because of an objective incoherent outcome. The solution is hardly inspired by the fundamental idea of BEPS to tax income where it has been generated. Given this rather mechanical approach the question is finally raised whether restrictions on the freedom of establishment and the free movement of capital can be justified. However, as this article focuses on the task for domestic legislators, this ultimate question has not been substantially investigated.

Rita Szudoczky & Balázs Károlyi, *The Troubled Story of the Hungarian Advertisement Tax: How (Not) to Design a Progressive Turnover Tax*

The provisions of the Hungarian Advertisement Tax stirred up many legal debates regarding the potential breach of EU law, including State aid rules and EU fundamental freedoms, respectively, as well as the violation of the non-discrimination provision of double tax conventions. The implications of these legal questions go beyond the Hungarian tax system and have special

relevance on international and EU levels.

This article analyses the compatibility of progressive turnover-based taxes with EU law that is of paramount importance now when Member States unilaterally introduce similarly designed digital taxes. Furthermore, the article also sheds light on the application of the non-discrimination clause of double tax conventions and the EU fundamental freedoms to procedural rules designed to enforce taxes on taxpayers who are likely not to be physically present in the taxing jurisdiction.

Piergiorgio Valente, *Advance Pricing Arrangements: Optimal Tool – Optimal Framework?*

Advance Pricing Agreements (APAs) are a diffused tool for taxpayers to obtain certainty in relation to the tax impact of their cross-border activities through an agreement with a tax administration in advance of such activities. APAs can be unilateral, bilateral, or multilateral depending on the number of national tax administrations involved, the latter two promising that the agreement made shall not be questioned in the other affected tax jurisdiction. Departing from the enhanced mutual agreement procedure (MAP) framework recently established among Member States through the Tax Dispute Resolution Directive, a future EU legislative initiative could outline a robust framework for MAP APAs in the Single Market.

Annet Wanyana Oguttu, *Challenges of Applying the Comparability Analysis in Curtailing Transfer Pricing: Evaluating the Suitability of Some Alternative Approaches in Africa*

This article asserts that transfer pricing is perhaps the greatest profit shifting problem facing the international tax system. Thus, countries have historically been keen on preventing transfer pricing and on finding effective and efficient methods for allocating revenue that are administratively cost effective for both taxpayers and tax administrators. However, the problem as articulated in this article is that the comparability analysis that underpins the application of the arm's length principle (ALP) which is applied internationally to curb transfer pricing, continues to be a vexing problem for developing countries due to various conceptual, policy, legislative, administrative and capacity challenges in finding comparable data. Acknowledging these problems, various international bodies have recommended alternative approaches that are considered simpler and less administratively burdensome, that developing countries may adopt in certain cases so as not to carry out a fully fledged comparability analysis. This article explains the operation of some of these alternative approaches and it evaluates the advantages and drawbacks of each of them. The article provides examples of some African countries that have adopted the alternative approaches and the positions of others that have not adopted these approaches. Recommendations are then provided as regards the competing policy options that countries have to consider when adopting the alternative approaches. It is hoped that the article will be found useful by African tax administrations and policy makers when they consider whether to adopt the alternative approaches.

Muhammad Ashfaq Ahmed, *UN MTC Article 8: Was the Source Rule Surrender on Article 8 a Blunder? The Case Study of Pakistan*

The United Nations Model Tax Convention (UN MTC) Article 8 allocates taxing rights on international traffic to the state of effective management. Article 8 (Alternative B), however, to the extent of shipping, conditionally allows some taxing rights to source state, too. The study posits that by surrendering source rule on Article 8, UN MTC ditched developing countries. This allowed airlines and shiplines stationed in developed countries not only generate large sums of revenues by hitting developing countries' ports but also repatriate them tax free to a sustained disadvantage to

the developing countries. The costs of the source rule surrender for the developing countries were realized on account of soft outflow of hard-earned foreign exchange, foregone revenues, and stunted growth of critical communication industries. It is argued that Pakistan's aviation and maritime industries' decent rise through 1950s, 1960s, 1970s and 1980s, and their abject descend into chaos through 1990s, 2000s and 2010s is explainable in terms of double taxation agreements (DTAs) obtaining Article 8 it signed. The insights gleaned are generalizable to other similarly circumstanced developing nations whose aviation and maritime industries failed to keep pace with their overall development. The UN MTC's surrender on Article 8, it is posited, promoted mass-scale injustice at inter-state level, and therefore, needs correction.

Peter Wattel, *Starbucks and Fiat: Arm's Length Competition Law*

The EU Commission may have lost Starbucks on the burden of proof, but it has clearly won that State aid case on principle: the Commission is competent to check autonomously whether cross-border intragroup transactions conform to conditions that would obtain in open competition between independent legal entities, irrespective of whether any arm's length principle has been incorporated in the national law of that State. Even agreement with OECD transfer pricing methods does not per se produce immunity from Commission scrutiny, as in State aid law, the arm's length principle is not so much a principle of international division of taxing jurisdiction to protect a State's tax base against BEPS, but rather a principle of competition law to safeguard inter-entrepreneurial and interstate equality, preventing EU Member States from selectively allocating away tax base into voids in order to attract multinationals. Apple and Ireland have thus already lost their cases on principle, but may still win on the burden of proof and the evaluation of the evidence adduced. The Starbucks and Fiat cases seem contradictory as regards the acceptability of residual calculation.

Marco Greggi, *Neutrality and Proportionality in VAT: Making Sense of an (Apparent) Conflict*

Neutrality and proportionality are two features of the European VAT that often come into play when judiciary is requested to rule on alleged frauds to the tax. According to the well settled case law of the European Court of Justice (ECJ) the right to deduct VAT can't be granted when such a fraudulent operation occurs. In the EN.SA. case, to the opposite, the Court rules that neutrality is to be preserved even when the operation invoiced did not actually take place, if very specific circumstances are met: namely, that no loss for the national budget occurred, that the company invoiced was not actually planning to erode its tax liability for VAT purposes and that the non-existent operation was simulated for other commercial purposes (not directly affecting the tax due). This conclusion is made possible making the principles of proportionality (and reasonableness) to prevail over a mechanical application of the tax that would otherwise prevent the right to deduct the tax charged.

You may also read two literature reviews: one by Alice Pirlot on *Alberto Majocchi, European Budget and Sustainable Growth, The Role of a Carbon Tax, Peter Lang, 2018 & Gilbert E. Metcalf, Paying for Pollution: Why a Carbon Tax is Good for America, OUP, 2019*; and the other one, from Alexandra Miladinovic, on *European State Aid and Tax Rulings, Liza Lovdahl Gormsen (Editor), Edward Elgar Publishing, 2019*.

As usual, you may find the *Peer Reviewer list of 2019*. This is an acknowledgment to the peer reviewers' great work enhancing the quality of our journal.

And you may also find the [Index](#) regarding the 2019 published contributions.

Enjoy, and have good readings in 2020!

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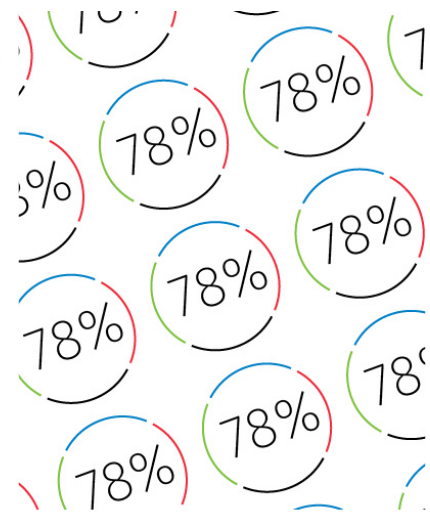
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