
Kluwer International Tax Blog

The Contents of EC Tax Review, Volume 29, Issue 1, 2020

Ben Kiekebeld (General Editor EC Tax Review and tax adviser at Ernst & Young Belastingadviseurs LLP) · Thursday, January 30th, 2020

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

The editorial by Roland Ismer on *A Union that Strives for More Also in the Area of Taxation: Tax Measures in the Incoming Commission's Political Guidelines*.

Marco Greggi, *Rise and Decline of the Westphalian Principle in Taxation: The Web Tax Case*

The article analyses the crucial impact that the digital economy is having on international taxation and argues that the traditional taxing rules are inadequate to address the way that multinational enterprises are conducting business on the Internet and how value is created on the Web. The cornerstone of this analysis consists of the observation that, while the power of the states to tax is intrinsically connected to territory (thus, to a physical element), the Internet economy is not as it takes places in a virtual space (a Terra Incognita) which is, in legal terms, still uncharted.

This situation is challenging the intimate connection between the power to tax and the territory state Sovereignty can be exercised on, *superiorem non recognoscens*. This is the Westphalian Principle, as commonly understood in History, and it is the pillar states have been built on since the mid-seventeenth century, in Europe. This article eventually considers the most recent development to overtake this impasse, in particular, the digital tax proposal as suggested by the European Commission in 2018. In this respect, it concludes that, while the European strategy is positive in terms of policy, in a purely legal perspective, it might initiate possible retaliation from qualified international stakeholders (including States such as the US) that would see their potential taxable base eroded by foreign unilateral measures and without any previous agreement in this sense.

Claudio Cipollini, *Special Tax Zones and Proportionality: A New Parameter for the Necessity Test*

The judgement of proportionality under the variables of fundamental freedoms and State aid rules is a process that often fails to promote legal certainty with respect to the necessity test, especially when the review involves tax measures of a Special Tax Zone (STZ).

The central idea of this article suggests the possibility of a new parameter for the necessity of territorial tax measures in order to limit the discretionality of the EU institutions and contribute in terms of legal certainty.

For this purpose, the concept of ‘fiscal residue’ is presented, giving evidence of its possible implementations in the context of STZs as an objective parameter for the necessity test, for both fundamental freedoms and State aid rules.

The discussion of the results covers the EU law and national law perspectives as well as the possibility of a system of EU governance for the use of the fiscal residue with respect to STZs.

Finally, the new outlook of the necessity test is focused on the equalization of the fiscal residue, opening doors for a more comprehensive idea of European Union, including the value of social cohesion at the territorial level.

Giulia Letizia, The Recent Restrictive ECJ Approach to Exit Tax and the ATAD Implementation

The article discusses the development of the European Court of Justice approach to exit tax and the perspective adopted by ATAD (Anti-Tax Avoidance Directive) exit tax provisions.

Following a first European Court of Justice (ECJ) orientation according to which Member States were allowed to tax corporations on latent capital gains at the time of the transfer of the place of effective management to another Member State, but deferring the collection until the actual realization of the assets to five yearly instalments, the more recent ECJ approach allows an exit tax imposed upon the transfer regardless of the actual realization, payable over a five-year period.

On the lines of the second ECJ approach, ATAD provides a mandatory harmonized exit tax imposed at the moment of the exit, allowing a deferral over five yearly instalments. It represents the **first form of income taxation provided by a EU Directive**, which does not take into account if some EU Member State did not have any exit tax.

The **ECJ shifting and the restrictive ATAD approach on exit tax** may determine a wider rethinking of the movement of companies within the EU having the ATAD exit tax provision partially emptied the content of the freedom of establishment principle.

Cihat Öner, Comparative Analysis of the General Anti-Abuse Rule of the Anti-Tax Avoidance Directive: An Effective Tool to Tackle Tax Avoidance?

The primary aim of this article is to question whether the general anti-abuse rule (GAAR) of Anti-Tax Avoidance Directive (ATAD) is an effective tool to tackle tax avoidance. By using a comparative technique as a method, other directives that include a GAAR will be analysed as a companion to the ATAD to identify whether there is a common understanding of the concept of abuse of tax laws within the EU legal order. Then the general consequences of the application of the GAAR of the ATAD will be exposed. The difficulties which could be encountered in the application procedure will be explained around some potential scenarios, based on simple models developed by the author.

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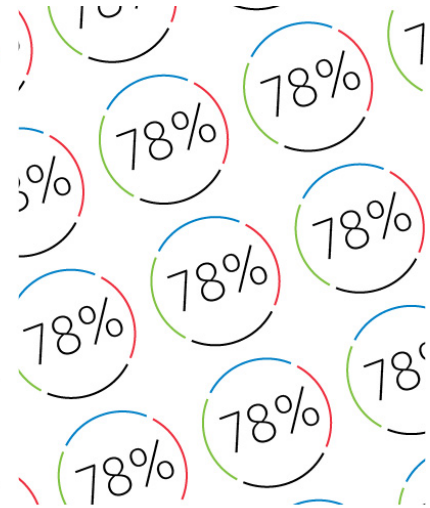
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