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Ana Paula Dourado (General Editor of Intertax) · Friday, April 17th, 2020

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

An editorial, ***Taxes and Regulation*, by Alice Pirlot and myself**, critically analysing the role of regulatory taxes, with reference to the articles published in this special issue.

Johanna Hey, *Effectiveness of Regulatory Taxes: Control Through Proceedings v. Judicial Control: A German Constitutional Perspective*

Effectiveness control is key for any evidence-based tax policy. This applies in particular to regulatory taxes. Often, however, there is a lack of systematic monitoring of the achievement of objectives. The present article examines the legal consequences of failing to achieve the objectives and discusses which legal instruments can be used to ensure that legal evaluations are carried out.

Janet E Milne & Marta Villar, *Renewable Electricity and Tax Expenditures: Lessons from Two Countries*

Both the United States (US) and Spain have offered tax expenditures to support use of wind and solar power to generate electricity at the utility scale. These tax expenditures provide an opportunity to consider design issues, the relationship between tax expenditures and other non-fiscal policy instruments and the influence of legal frameworks. The article explores tax expenditures that have been in effect in the US and Spain. In the US, the federal government since 1992 has provided an income tax credit for the production of electricity from renewable sources, and more recently the alternative of an investment tax credit. In Spain, since the 1990s there has been an important debate on the best way to promote renewable energies; different tax incentives, subsidies, and regulated prices have been used in one way or another over time. Drawing on these two case studies, the comparative analysis highlights lessons that emerge about the role of taxation as a regulatory instrument and its consistency with other policies in shifting from fossil fuels to renewable energy in order to reduce greenhouse gas emissions that contribute to climate change. These lessons can transcend national boundaries and contribute to an understanding of tax expenditures more generally.

Leyla Ates, Moran Harari & Markus Meinzer, *Positive Spillovers in International Corporate Taxation and the European Union*

The international spillover effects of specific domestic policies and practices have been subjected

to increasing scrutiny from a range of international organizations, academia, and civil institutions with tax policy and practice both central in this discussion. Nevertheless, the extant international tax spillover analyses explore a limited set of spillover pathways or indicators that have been criticized in the literature for not being sufficiently inclusive. The focus of this article is on a newly launched index that includes a comprehensive set of plausible pathways in which spillovers occur. The Corporate TaxHaven Index (CTHI) explores twenty key tax spillover indicators under five categories and assesses sixty-four countries' tax systems in order to identify policies that should be considered for corporate tax reform to mitigate cross-border tax spillovers. This article particularly aims to highlight international corporate tax spillover pathways in the European Union Member States' domestic tax laws, regulations and documented administrative practices but limits its scope to domestic tax rules that dispense with positive spillovers. Finally, it analyses Member States' current performance and concludes with recommendations for future tax reforms in the European Union.

Alice Pirlot, ***The Vagueness of Tax Fairness: A Discursive Analysis of the Commission's 'Fair Tax Agenda'***

Unless treaties are read in very liberal terms, the European Union (EU) is not competent for defining the construct of a fair tax system and determining who should pay taxes and in which proportion within the EuropeanUnion.Yet, the European Commission has increasingly been using references to tax fairness in its tax policy discourse. This raises questions on the future of EU tax law, the commission's role in responding to European citizens' concerns, and achieving tax fairness.

By exploring six case studies, this contribution argues that the commission's narrative on tax fairness remains vague and ambiguous which might indicate that it is not taking tax fairness – as a procedural and/or distributive issue – seriously. The commission uses fairness somewhat loosely to cover three main types of objectives including trade objectives that differ from what has traditionally been linked to tax fairness in the political philosophy literature. Building upon the work of legal scholars and economists, this article then concludes that the commission's 'fair tax' agenda will, at best, achieve objectives in terms of procedural fairness.

Carlo Garbarino, ***How Countervailing Measures Could Be Used to Limit Strategic Tax Competition. An International Overview***

The paper focuses on possible policy responses that imply forms of multilateral governance to address tax competition that go beyond the current bilateralism of tax treaties. After clarifications on the nature of countervailing measures in the area of direct taxation, the paper develops a discussion of the impacts of tax competition on the global and local level and an inquiry about the shift from value creation to global taxation of multinational enterprises (MNEs), minimum standards for the taxation of MNEs in light of the fact that these entities fragment their tax liabilities across different territorial jurisdictions while their profits are truly planetary. The article then extends to issues of institutional design and develops an analysis of potential avenues for promoting multilateral policies aiming at the establishment of defensive coalitions of Governments again the impacts of tax competition.

Stjepan Gadžo & Šime Jozipovi?, ***International Corporate Tax Regime Post-BEPS: A Regulatory Perspective***

Among the other rationales underlying the existence of corporate income tax (CIT) as a standalone tax on the profits derived by legal entities, some scholars have underlined its regulatory function, i.e. its potential to steer the behaviour of private sector actors. In this regard, it has to be noted that significant constraints on the use of CIT as a regulatory tool have emerged in the aftermath of the base erosion and profit shifting (BEPS) project. One example may be found in the new 'modified nexus approach' with regard to tax incentives for R&D activities. This article takes a regulatory perspective regarding the recent attempts to overhaul the 'international corporate tax regime', resulting in the adoption of new hard- and soft-law rules. The regulatory perspective is understood here as the capacity of the rules of international tax law to affect the behaviour of both corporate taxpayers in arranging their cross-border activities and the States in designing their CIT systems. The BEPS initiative, being an unprecedented exercise in tax coordination aimed at widespread avoidance practices, serves as a prime example of how international tax law fulfils its regulatory function, by guiding the behaviour of both governments and taxpayers. Accordingly, the paper argues that the international corporate tax regime post-BEPS exhibits two sides of the same regulatory coin: on the one hand, taxpayers are disincentivized to resort to particular types of international tax planning; on the other, the incentives for individual States to engage in corporate tax competition are significantly reduced. It is further argued that the most far-reaching proposal in this area relates to 'global minimum tax', drawn under Pillar Two of the 'BEPS 2.0' initiative.

Irma Johanna Mosquera Valderrama, ***Regulatory Framework for Tax Incentives in Developing Countries After BEPS Action 5***

The aim of this article is to assess the regulatory framework of Base Erosion Profit Shifting Project (BEPS) Action 5 in order to evaluate tax incentives in the form of preferential tax regimes that provide benefits to geographically mobile business income in developing countries. To conduct this assessment, this article first addresses the use of preferential tax regimes considering BEPS Action 5. Thereafter, and taking into account the concerns expressed by international organizations, regional tax organizations and scholars, the author contends that the evaluation of tax incentives in light of BEPS Action 5 results in additional burden for developing countries. Countries will need to assess their tax incentives considering the factors provided by the 1998 OECD report and BEPS Action 5. Since there are no terms of reference for the application of these factors, the country will have to assess its own tax incentives, which brings increased uncertainty and compliance burden for developing countries. In order to provide some guidance in this evaluation, the author provides a list of the factors used by the 1998 OECD report and BEPS Action 5 and their application to tax incentives. Subsequently, this article will assess the legitimacy of the application of BEPS Action 5 to developing countries and will demonstrate that its assessment framework is ambiguous and prevents developing countries from enacting legitimate tax incentives. Finally, this article will conclude and provide some recommendations for further research.

Pawe? Miku?a & Florian S. Zawodsky, ***EU VAT in Jeopardy: Clues from the Unitel Case (C-653/18)***

The Court of Justice of the European Union (CJEU or the Court) has had multiple opportunities to rule on the issue of fraud associated with value added tax (VAT). For instance, in the Missing Trade Intra-Community Fraud context, exemplarily with the United Kingdom: CJEU 12 January 2006, Joined Cases C-354/03, C-355/03 and C-484/03, Optigen and Others, ECLI:EU:C:2006:16, or in cases when only invoices confirmed that transactions took place, see exemplarily HU: CJEU 21 June 2012, Joined Cases C-80/11 and C-142/11, Mahagében and Dávid, ECLI:EU:C:2012:373.

While many aspects of the concept of fraud have already been clarified in the Court's jurisprudence, some of them remain to be specified and clarified. In the Polish case Unitel, the Court further elucidated the consequences of fraud for (innocent) parties in the supply chain (PL: CJEU 17 October 2019, Case C-653/18, Unitel, ECLI:EU:C:2019:876.). In particular, the case clarified when tax authorities may deny the right to zero-rate exports.

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