Kluwer International Tax Blog

The Contents of Intertax, Volume 48, Issue 11, 2020

Ana Paula Dourado (General Editor of Intertax) · Tuesday, October 20th, 2020

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

Qiang Cai, Luca Cerioni & Xiaorong (Sharron) Li, ***New Taxing Right in the Unified Approach: Old Wine in a New Bottle***

The OECD's 'Unified Approach' (UA) features new taxing rights allocated to market jurisdictions irrespective of the existence of physical presence. While this new taxing right is intended to address tax challenges of a new economic pattern, i.e. the digitalization of the economy, these authors note that similar challenges already existed even before the era of digitalization, particularly with respect to the attribution of profit to the dependent agent permanent establishment (DAPE). The authorized OECD approach (AOA), which hinges the profit attributable to a DAPE upon the significant people function performed by the dependent agent (DA), has been heavily criticized. In this regard, the UA provides a more reasonable and simplified solution: the source state is entitled to tax at least a portion of the residual profit made by the non-resident enterprise from the business undertaken in that state through the DAPE regardless of the extent of the functions performed by the DA enterprise. This approach has indeed already been implemented by certain countries in their domestic tax practice regarding the DAPE profit attribution, albeit couched in traditional transfer-pricing terms. At the same time, these domestic tax practice on the DAPE profit attribution may enlighten the improvement to the UA that has been criticized for its complexity and uncertainty.

Spyridon E. Malamis, ***The Future of OECD Tax Arbitration: The Relevance of Investment Treaty and WTO Dispute Settlement Practice in Promoting a Gradual Evolution of the International Tax Dispute Resolution System***

Unlike the decisive steps that have been made in the international investment and trade regime to promote efficient resolution of pending disputes, in the international tax field, the conventional tax dispute resolution system of state negotiations has vastly remained unchanged ever since its establishment in the beginning of the twentieth century despite the heavy criticism against it by the international business and tax community. Nevertheless, after the introduction of the Anti-Base Erosion and Profit Shifting (BEPS) Project and the recent discussion for the implementation of the

Global Anti-Base Erosion (GloBE) Project to further address base erosion and profit shifting and of a novel Unified Approach to address the taxation of the digitalization of the economy, a rapidly changing international tax environment calls for reconsideration of states' stance towards the implementation of stricter dispute resolution systems in general and of international tax arbitration in particular. By analysing the political objectives of states within the International Tax Dispute Resolution (ITDR) system opposed to the international investment and trade regime through a comparative analysis, this article aims to explore the potential of a gradual evolution of the ITDR in a way that addresses both tax-authorities' and taxpayers' interests in a modern economy.

Peter Koerver Schmidt, *A General Income Inclusion Rule as a Tool for Improving the International Tax Regime – Challenges Arising from EU Primary Law*

The overall concept of the OECD's Global Anti-Base Erosion Proposal is to develop a coordinated set of rules to address ongoing risks from profit shifting and to curb international tax competition. Two important components of the proposal are the income inclusion rule and the switch-over rule and, in this article, these components are examined in consideration of EU primary law. Depending on the final design of the rules, it is concluded that the proposed income inclusion rule – however, probably not the switch-over rule – may end up restricting the fundamental freedoms by treating comparable situations differently. Against that background, a number of policy options for designing the income inclusion rule in accordance with primary EU law requirements are presented, and pros and cons of these design options are discussed.

António Martins, Sandrina Correia & Daniel Taborda, *Group Transactions, Transfer Pricing and Litigation: Evidence from Portugal*

In Portugal, in the wake of the introduction of tax arbitration in 2011, courts have ruled in several cases involving transfer pricing (TP) judicial conflicts. The research questions that this article addresses are: What are the core issues in TP litigation in Portugal? Do they follow international trends? What is the predominant outcome of arbitration rulings, and why do tax authorities experience defeat so many TP cases?

Based on the total (thirty-two) TP arbitration cases decided in Portugal from 2012 to 2017, the authors find that tax administrations (TA) were successful in only three cases. Courts also found that tax audit reports often misused the comparability concept, and the methods that were used were also often disallowed by arbitrators. Therefore, TAs should proceed with caution in audits and seek robust foundations to TP adjustments. Multinational groups must also carefully substantiate their related party transactions in order to minimize audit risk and compliance costs of taxation.

Dominik J. Gajewski & Kamil Jonski, *Procedures of the Polish Tax Authorities and the VAT Gap: Evidence from Administrative Court Files*

The issues of tax compliance and efficiency of tax administrations have gained widespread attention among scholars and policymakers in the aftermath of the global financial crisis. One of

the prominent examples of tax compliance crises in Europe was the Polish VAT gap that was widening over the 2011–2014 period. Although post-crisis recessions in various countries can explain a lot of cross-country variation in tax compliance, the experience of Poland seems unique. Despite uninterrupted economic growth, the size of Poland's VAT gap approached the Greek levels. In other words, the Polish VAT-compliance crisis could not be downplayed as a simple consequence of the downturn; instead, performance of the tax administration seems to be the key factor. Unfortunately, secrecy surrounding tax administrations' activities substantially limits the scope of scientific inquiry into their effectiveness. To overcome this problem, this article introduces a new source of information about their activities – a fulltext database of administrative court verdicts (concerning challenged decisions of the tax administration). A collected sample of 68.2 thousand VAT-related judgments provided an 'opportunity sample' containing information on the procedures of tax authorities, in particular the time elapsed from the underlying economic activity to the issuance of the challenged decision. Results indicate that such a lag averages almost five years. Given the evidence presented in this article, the incentive structure faced by the Polish tax authorities requires further rigorous scrutiny and – perhaps – a reform.

Ay?e Nil Tosun, ***Inheritance Tax and Foreign Spouses in Turkey: A Comparative Study***

In recent years, many countries have either abolished inheritance and estate taxes or exempted spouses from these taxes. However, Turkey still levies inheritance tax on foreign spouses and heirs despite an increase in marriages with foreigners. This study examines thirty-two cases of inheritance in Turkey and compares Turkish inheritance tax policies with another eleven European policies using data from OECD statistics and the 2018 Worldwide Estate and Inheritance Tax Guide. It also examines Turkish laws and court cases and identifies several legal issues that foreign widows encounter when inheriting assets from Turkish spouses. Finally, it discusses the potential implications for Turkey's current tax policies. The results demonstrate that Turkish inheritance tax law is problematic for foreign spouses. Turkey's lack of tax agreements with other countries increases the problems associated with double taxation. The results also identified the lack of provisions for same-sex spouses and couples as well as couples who live together but are not married, and Turkey trails behind many other European countries in this regard. In conclusion, Turkey should, like many other countries, abolish the spousal inheritance tax, or it should conclude agreements with other countries to avoid double taxation of foreign widows and heirs living in Turkey.

Maria R.U.D. Tambunan & Womsiter Sinaga, ***Transfer Pricing and Profit Shifting Practices in a Free Trade Zone: A Case in Batam, Indonesia, Based on a Tax Court Decision***

This study discusses how the offered tax incentives through the establishment of the Batam Free Trade Zone have been overexploited by Multinational Enterprises (MNE)s' manufacturers to minimize their tax obligation. The close geographic location to Singapore, the hub of the world's logistic shipping lane, provides easier access to these practices. The common profit shifting schemes found in the region are transfer pricing and rerouting transactions.

Concerning the transfer pricing practices based on the tax court decisions, it was determined that business entities have reported unreasonable business turnover with years of consecutive loss

despite an increasing number of assets. The rerouting of transactions has specifically been performed by shipping businesses in order to optimize the benefit of not paying types of consumption taxes. They were able to exploit this benefit because the Indonesian Government granted VAT and import duty exemptions to sea transportation businesses for the supply of ships and ship's spare parts. These businesses established shipyards in Batam, and the products were subsequently sold to affiliations in another country. Then, the user entity that is a member of the sea transportation business in Indonesia imported the same products from the country where a member of affiliation is located. To address these challenges, the Indonesian Government has made a measure to minimize tax leakages through persuasive enforcement and a systematic investigation that requires continuous monitoring.

Nicola Sartori, ***The Italian Statute of Taxpayers' Rights: State of the Art 20 Years after Its Enactment***

The Italian Bill of Taxpayers' Rights (so called Taxpayers Statute) is twenty years old. Even if it is formally a primary law, its provisions are deemed to be general principles of the Italian tax system that directly derive from the Constitution. This is why it is the most important set of Italian tax rules. The Statute not only recognizes the main taxpayers' rights, but also provides guidance to both the legislature and tax authorities in tax matters. It dramatically changed the relationship between tax authorities and taxpayers.

During the twenty-year period since its enactment, the effectiveness of the statutory provisions has increased and changed. This is primarily because of the fundamental role of the Supreme Court, that has been a key player in the recognition of taxpayer rights and might also have a fundamental role in the future. The Taxpayers Statute and the literature encouraged the Supreme Court toward an innovative way of thinking and approaching tax cases by looking not only at taxpayer duties but also at their rights.

Alessio Persiani, ***Italian Supreme Court and the Parent-Subsidiary Directive: A Dark Tunnel with a Light at the End?***

The article deals with the recent case law of the Italian Supreme Court in respect of the application of the Parent-Subsidiary Directive. In the timeframe between 2017 and 2019 the Supreme Court issued four judgments which denied the application of the dividend withholding tax exemption regime based on a restrictive and highly disputable interpretation of the 'subject to tax' requirement laid down under Article 2(a) (iii) of the Parent-Subsidiary Directive. The article analyses this interpretative approach and highlights the reasons of its non compliance with the principles underlying the Parent-Subsidiary Directive. Then the article analyses a further and more recent judgment of the Italian Supreme Court in which the Court seems to change its approach, clarifying that the dividend withholding tax exemption regime applies even in cases in which the parent company is merely liable to tax in its State of residence, being not required that the dividends received by the parent company are subject to tax in that State. In the conclusions the author expresses his view on possible amendments to the Parent-Subsidiary Directive which could contribute to a more straightforward application of the regimes provided by the Directive in the different EU Member States.

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This entry was posted on Tuesday, October 20th, 2020 at 4:17 pm and is filed under Intertax
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