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Ana Paula Dourado (General Editor of Intertax) · Wednesday, June 30th, 2021

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

Robert Danon, Daniel Gutmann, Margriet Lukkien, Guglielmo Maisto, Adolfo Martín Jiménez & Benjamin Malek, *The Prohibition of Abuse of Rights After the ECJ Danish Cases*

Since they were delivered in February 2019 the judgments of the Court of Justice of the European Union (ECJ) in the well-known 'Danish cases' have already been referred to by several courts of EU Member States to tackle alleged cases of directive shopping. In light of the increased convergence between EU and current OECD standards (notably the Principal Purpose Test), the findings of the ECJ will likely also have an impact in tax treaty practice and with respect to corporate structures involving dividends, interest or royalties. Against this background, this article discusses the findings of the ECJ in light of EU law but also contrasts these findings with tax treaty law and practice, including the rules of the Vienna Convention on the Law of Treaties (VCLT). Following an analysis of the prohibition of abuse of rights under EU and tax treaty law, the authors test the indicators of abuse in concrete cases by distinguishing inter alia between wholly artificial (sham) arrangements, on the one hand and 'real' business structures driven by tax motives, on the other hand. Finally, the impact of the ECJ findings on the interpretation of beneficial ownership is considered by taking into account recent tax treaty case law involving the 2014 OECD Commentary.

Eva Escribano, *Day 1 of the Spanish Digital Services Tax: And Now What? A Wave of Tax Policy, Legal Interpretation and Compliance Challenges*

The Spanish Digital Services Tax came into force on 16 January 2021 after a long and turbulent journey with the ambition to serve as an interim measure pending the long-awaited multilateral solution. This article aims to critically analyse the main features of the tax and further reveal and assess the primary challenges that its implementation and day-to-day management are likely to prompt, specifically: the vague delimitation of some of its provisions with the subsequent damage to legal certainty, the (almost) unfeasible access to the data required to calculate the relevant taxable revenues that render the tax ultimately unworkable, and the tax planning opportunities that may be exploited by taxpayers to minimize their tax liabilities, inter alia.

Finally, the doubtful consistency between the design of the tax and the alleged tax policy guideline behind it (i.e., the 'value creation' principle) is assessed. Ultimately, the question remains of whether this path is genuinely worth exploring. Are we really willing to endanger fundamental principles of the rule of law for a temporary patch targeting a few multinationals?

Nupur Jalan & Elvira Misquith, *Comparability Adjustments in Transfer Pricing and the Need for a Digital Data Intensity Adjustment*

A comparability analysis forms the core of transfer pricing and involves the analysis of controlled transactions and the search for the right comparable. However, difficulties often arise in exactly matching the identified comparable to the controlled transaction. Hence, various comparability adjustments (such as the accounting, balance sheet, etc.) are undertaken primarily to eliminate differences and to achieve greater comparability between the comparable transactions/companies selected and the controlled transactions/companies under analysis.

It is pertinent to mention that many of the commonly used adjustments cannot entirely take care of all of the functional and economic variations pre-existing between the comparable and the controlled transactions (one such problem area is the functional variation that occurs due to rapid digital and technological advancements and changes). The authors, therefore, believe there is a need to devise and implement a change (i.e., digital data intensity adjustment that could account for the differences between comparable companies due to these digital/data developments.

In the context of the above background, the paper summarizes some of the existing comparability adjustments; thereafter, it highlights the need for a new adjustment to keep pace with the growth of the digital/data economy along with a case study. Further, certain broad frameworks for this new adjustment are discussed.

Andrey Savitskiy, *The First Tax Treaties: In Search of Origins*

The author seeks to discover sources and predecessors of the first international tax treaties that laid the foundation for the treaties on avoidance of double taxation. In doing so, he explores Russian and foreign bibliography as well as international and national legislation. The article, for the first time, contends that the S.-Petersburg commercial treaty between Russia and France of 31 December 1786 and the Convention between Russia and Saxony of 20 August 1800 may be regarded as the first tax treaties aimed at avoidance of international double direct taxation.

Additionally, the prerequisite for concluding the convention was the situation of international double taxation caused by imposing the duty on the transfer of inherited estates by foreign heirs abroad. The historical method and contextual analysis were additionally employed to reconstruct the genetic development of avoidance of international double taxation. The work posits that the predecessors of the OECD and the UN Models of the twentieth century were much older and of better quality than it might be commonly assumed.

Giacomo Lindgren Zucchini, *The Advocate General Clarifies the Case Law Concerning*

'Composite Supplies'

Advocate General (AG) Kokott recently delivered her opinion in the Frenetikexito (Opinion AG Kokott 22 October 2020, Case C-581/19, Frenetikexito, ECLI:EU:C:2020:855) case wherein she made a commendable effort to systematize and clarify the case law of the Court of Justice of the European Union (the CJEU, the Court) concerning 'composite supplies' in the common system of value added tax (VAT). Most of the conclusions of the AG were subsequently confirmed by the CJEU, implying that the opinion is influential and valuable for assessing composite supplies. This case note explores this opinion in detail by discussing the issues relating to composite supplies, presenting the circumstances of the case, accounting for the opinion, and analysing the details therein. The conclusion is that the opinion, with only some exceptions, illuminates the case law of the Court concerning composite supplies. Thus, the opinion appears to constitute part of a recent trend of clarification together with certain other recent judgments.

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