Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Tuesday, July 13th, 2021

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

Aleksandra Tychma?ska, The OECD as the Future International Tax Organization: An Inevitable Course of Events?

Over the years, the increasing process of tax law internationalization may be observed due to which tax cooperation between states expands and may take various forms. The leading international organization that creates a platform for the cooperation of states on tax matters and provides expertise in the scope of tax law is the Organization for Economic Co-operation and Development (OECD). This article focuses on the role that the OECD performs in the international arena and analyses its increasing significance over the decades as the organization providing platform for states to collaborate on tax matters. Furthermore, considering changes in the international tax landscape, the article examines whether they make the OECD more likely to become an international tax organization and concludes that it is in the gradual process of transformation into a international tax organization.

Louise Fjord Kjærsgaard, The Ability to Pay and Economic Allegiance: Justifying Additional Allocation of Taxing Rights to Market States

The OECD/G20 Inclusive Framework and the UN are working intensively on how to change the allocation of taxing rights to cross border income and to adapt the international tax regime to the digitalization of the economy. A stated aim is that more taxing rights should be allocated to the market states. However, during the process it has become clear that it remains uncertain why the allocation of taxing rights should be changed. In this article, it is argued that the allocation should continue to be justified by the principle of economic allegiance in accordance with the ability of the MNEs to pay taxes. On this basis, it is analysed whether the following three measures are justifiable: the new nexus under the Pillar One Blueprint, the inclusion of software in the definition of royalties in the UN Model Tax Convention and the implementation of a shared taxing right for automated digital services in the UN Model Tax Convention.

Qiang Cai & Spyridon E. Malamis, Digitalization of International Tax Dispute Resolution: Reflection in Light of the Covid-19 Pandemic

The mutual agreement procedure (MAP) has long been criticized. From the perspective of transaction cost theory, the deficiencies of the mechanism primarily reflect three types of transaction costs: agency cost, bargaining cost, and administrative cost, all of which can be economized via the digitalization of international tax dispute resolution (ITDR) processes. The impetus for the development of digital ITDR becomes more prominent considering the current Covid-19 pandemic. Furthermore, compared with dispute resolution mechanisms in many other domains, the ITDR process particularly lends itself to digital facilitation.

However, data from peer review reports under Action 14 of the Base Erosion and Profit Shifting (BEPS) Project shows that the international practice of the digital ITDR still remains at a rudimentary stage. This underdevelopment can largely be attributed to a decentralized approach to the ITDR development at the international level. In this regard, it is proposed that the OECD can play a greater role in leading and coordinating the development of digital ITDR at the global level. In particular, a global digital platform is envisaged to facilitate the digital ITDR processes among competent authorities.

Leonardo Thomaz Pignatari, The Qualification of Technical Services in Brazilian Double Tax Treaties and the Possible Impacts of the Adoption of Article 12B, UN Model Convention

The qualification of income derived from technical services in Brazilian double tax treaties has always been surrounded by significant controversy between tax authorities and taxpayers. This agitation is exacerbated by the challenges inherent to the taxation of the digital economy and its proposed alternatives. The present study aims to examine the possible impacts of including Article 12B, the recent United Nations (UN) proposal for the taxation of the digital economy, in the qualification of technical services in Brazil.

This objective demands a brief historical incursion into the troubled qualification of technical services in Brazil and an overview of the new Article 12B of the UN Model Convention. In addition, the possible impacts of the adoption of such a provision in the Brazilian scenario will be addressed and therefore expose the primary aspects of this new proposal. Ultimately, some conclusions are presented to trace a horizon around the Brazilian service taxation policy in the context of the digital economy.

Gabriela Capristano Cardoso, Balancing Tax Transparency and Tax Certainty: Reporting Obligations for Unilateral Safe Harbours Under DAC 6

The paper analyses the inclusion of unilateral safe harbours as a reportable hallmark under Directive on Administrative Cooperation (DAC) 6. There is uncertainty regarding the scope of this hallmark on the definition of safe harbours and whether internationally accepted safe harbours should be reported. This article addresses these open issues and analyses the conformity of this hallmark with EU primary law and with the objective and purpose of DAC 6. It also discusses whether the inclusion of such a hallmark imposes an unreasonable burden on taxpayers and intermediaries that undermines the objectives of safe harbour rules to achieve simplicity and tax

certainty.

Arne Schnitger, Florian Holle & Madeleine Kockrow, Tax and Transparency: Reporting in Accordance with the Global Reporting Initiative

The issues of ‘sustainability’, ‘transparency’, and ‘taxes’ are linked through the latest addition to the Global Reporting Initiative Standards (GRI 207: Tax 2019) for sustainability reporting. (Global Sustainability Standard Board, GRI 207: Tax 2019, 5 December 2019, https://www.globalreporting.org/standards/gri-standards-download-center/gri207-tax-2019/). The first part of this article deals with the basics of sustainability reporting using the GRI framework, its application, and the incentives for companies to extend it to tax aspects. In the second part, the individual regulatory areas of the standard GRI 207: Tax 2019 published on 5 December 2019 are analysed in detail.

Imeda ?. Tsindeliani, Olga Lyutova, Karina Anisina, Elena Migacheva & Lyudmila Lesina, Current Trends in Counteracting Thin (Insufficient) Capitalization in the Russian Legal System

The purpose of this study is to theoretically substantiate the stages of development of judicial approaches to the application of thin (insufficient) capitalization rules in the tax relations of Russian taxpayers with foreign companies, including transnational corporations, operating in Russia. The development of legal regulation and the corresponding judicial approaches regarding thin (insufficient) capitalization is retrospectively considered.

In particular, the possibility of applying this rule, provided double taxation avoidance, was studied as well as its correlation with the application of other anti-evasive norms of tax law in Russia. In addition, the following was performed: (1) periodization of the stages of judicial practice development on the application of thin (insufficient) capitalization rules by Russian courts; (2) formulation of new approaches contained in the Decision of the Supreme Court of the Russian Federation dated 14 September 2020 in case No. A60-29234/2019 (Mega-Invest Limited liability company (LLC)).

The practical significance of this article consists of proposals for eliminating the inadequacies of judicial practice in the aspect of thin capitalization as well as a recommendation to take into account the direction of development of such judicial practice in the preparation of tax regulatory acts and to prevent illegal methods of tax minimization.

Michal Radvan, Taxation in Democratic Czechoslovakia and the Independent Czech Republic

The taxation system in communist Czechoslovakia was based on the redistributive, regulative, and fiscal functions of taxes. After the Velvet Revolution in November 1989, it was crucial for the economy and economic development to change the tax system. To achieve this, new politicians decided for the slower transformation of Czechoslovakian tax law. Most of the tax acts that were valid in socialist Czechoslovakia remained in force after the Velvet Revolution; however, they were amended in 1990 with regard to the aim of the tax reform being prepared for 1993.

In August 1992, the decision to split Czechoslovakia was announced. It was more of a historical coincidence that the independent Czech Republic's foundation in 1993 was connected with complex tax reform. The reform's primary aims were the link between tax revenues and gross domestic product; tax justice and fair competition; possible foreign investments and general openness to the European and international markets; elasticity and effectiveness of the tax system; and reduction of social criteria in taxation.

The tax reform of 1993 in the Czech Republic is one of the most complex tax reforms globally. Most of the acts adopted at the end of 1992 are still effective. This article aims to introduce the developments in terms of taxation in democratic Czechoslovakia and the independent Czech Republic to international readers.

Reuven Avi-Yonah & Gianluca Mazzoni, Stanley Surrey, the 1981 US Model, and the Single Tax Principle

2021 marks the fortieth anniversary of the 1981 US Model Tax Treaty as well as the fifth anniversary of the 2016 US Model Tax Treaty. The first author has repeatedly argued that the 1981 Model gave life to the single tax principle ('STP'). The 2016 Model updates effectively implemented the principle that cross-border income should be taxed once – that is not more and but also not less than once. For example, the 2016 Model does not reduce withholding taxes on payments of highly mobile income that are made to related persons that enjoy low or no taxation with respect to that income under a preferential tax regime. The aim of this article is to identify with relative certainty the origins of the STP. The purpose is to give a systematic and historical interpretation of the STP by looking at the context during which it was purportedly founded. This article draws extensively on published and unpublished writings of the main architect of US international tax rules, Stanley Surrey, and is the result of archival research conducted at the Historical & Special Collections of Harvard Law School Library. The aim of this article is to show that the origins of the STP, from the perspective of the United States as a source country, can be traced to the eight-year period from 1961 to 1969 when Surrey, a Harvard law professor (1950-1984) became the first US Assistant Secretary of the Treasury for Tax Policy. As far as tax treaties are concerned, Surrey made two major contributions to applying the STP in practice. First, the tax treaties negotiated by Surrey: (1) the Luxembourg-United States Income and Capital Tax Treaty (1962), (2) the 1963 protocol to the treaty with the Netherlands applicable to the Netherlands Antilles, and (3) the Canada-United States Income Tax Treaty (1966) took pains to enforce source-based taxation in cases where there was no residence-based taxation of passive income. Second, it was during Surrey's time at the US Treasury Department that the US delegation wrote two notes to the OECD Fiscal Committee recommending the establishment of a new Working Group which would address the problem of Tax Avoidance through

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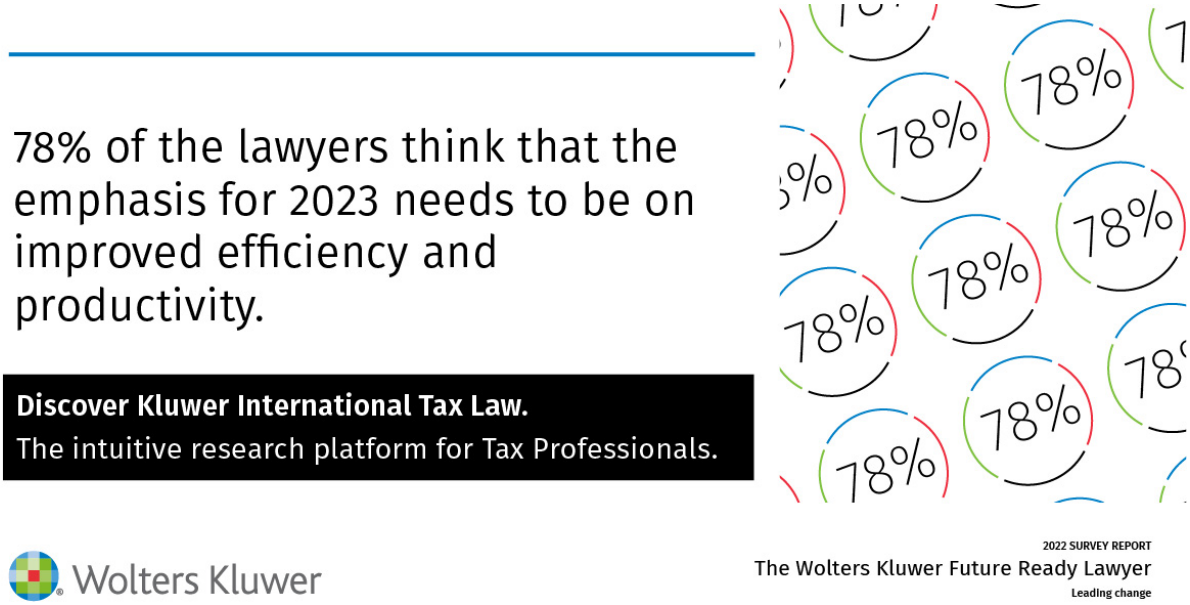

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