
Kluwer International Tax Blog

The Contents of Intertax, Volume 49, Issue 10, 2021

Ana Paula Dourado (General Editor of Intertax) · Thursday, October 28th, 2021

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

Svetislav V. Kostić, A Plea for a Workforce Presence PE Concept in a Post-Covid Digitalized World

This paper begins with the recapitulation of the generally accepted view that the key problem with the current permanent establishment (PE) definition in international tax treaty law, particularly regarding the new digital economy, lies in its dependence on the existence of a fixed place of business in the source state. It continues with invoking what seems to have been the goal of the Base Erosion and Profit Shifting (BEPS) initiative, the BEPS promise, to conduct an extensive revision of the foundations of international tax law, among which the PE principle and the corresponding PE definition hold a prominent place, in order to ensure their endurance in the new digital age. An analysis of the Multilateral Instrument (MLI) provisions shows that, post 2017, the PE definition is exactly where it was in the past as the changes introduced by virtue of the MLI addressed long existing questions that arose in the distant analogous past. The author shows that the quest to compensate the market/user jurisdiction, which is driving the postMLI digital economy taxation debate. It is overly focused on one particular issue and overlooks the problem that digital business models are capable of creating their products and services anywhere without having a fixed place of business in the classical sense. Based on this premise, the paper concludes with a plea for the introduction of a new PE form – the work jurisdiction PE or, to be more precise, a workforce presence PE concept. This appeal also serves to bring the current international tax law debate more in accordance with the interests of developing countries.

Andrés Báez Moreno, How Do ‘The Old’ and ‘The New’ Live Together? The Principal Purpose Test and Other Anti-avoidance Instruments in Tax Treaties

The entry into force of the Multilateral Instrument (MLI) will entail the massive incorporation of a general anti-avoidance rule (the principal purpose test) into a significant number of double taxation conventions. However, these conventions often contain other clauses of different origin that have traditionally been used to deal with the phenomenon of treaty abuse. This article describes the ‘problems of coexistence’ between the principal purpose test and these other clauses when their

conditions of application and legal consequences may be different. Finally, it also offers legal solutions to these conflicts.

Leopoldo Parada, Hybrid Entity Mismatches and the MLI: A Tax Policy Assessment

This article argues that despite its apparent success as a political instrument to achieve global coordination, and particularly referred to hybrid entity mismatches, the multilateral instrument (MLI) has failed. Most notably, the MLI has been incapable of keeping cohesion with the main object and purpose of tax treaties, reinforcing also an unequal distribution of taxing powers between residence and source states. In light of the above, this article explores some prospective alternatives that could not only help with restoring cohesion and equality within tax treaties, but also add certainty and simplicity to the interpretation of the MLI and the issues related to hybrid entity mismatches.

Aitor Navarro, The Multilateral Instrument (MLI) and Transfer Pricing

The Multilateral Instrument (MLI) has a relevant impact on tax treaty measures concerning transfer pricing and the arm's length principle (ALP). This article examines the incidence of five MLI provisions on transfer pricing that pose significantly interrelated issues, specifically, the saving clause of Article 11(1), the preamble enclosed in Article 6(1) expressing the will to eliminate double taxation without creating opportunities for reduced taxation through tax evasion or avoidance enshrined in the principal purpose test of Article 7(1), the corresponding adjustment provision of Article 17(1), and the mutual agreement provisions envisaged in Article 16.

Luís Eduardo Schoueri & Ramon Tomazela, The Influence of the BEPS Multilateral Instrument on Tax Treaties Concluded by Non-signatory Countries

This article intends to assess the impact of the Base Erosion and Profit Shifting Project (BEPS) Multilateral Instrument (MLI) on tax treaties concluded by non-signatory jurisdictions. To achieve this goal, the authors initiated the analysis with forty-four countries that are members the BEPS Inclusive Framework but have not yet signed the MLI. Out of these forty-four countries, the authors focused on those that had tax treaties signed or amended after 2017 which has narrowed down the scope to the following countries: Angola, Botswana, Brazil, Cape Verde, Congo, Maldives, Thailand, and Vietnam. In this context, the article examines the tax treaty-related BEPS measures that were adopted by these countries in their bilateral tax treaties, addressing the merits and potential consequences of the choices made by non-signatory jurisdictions. Based on the findings of the research, the article concludes that the impact of the MLI varies significantly depending on the tax treaty policy of each country and that, thus far, it has been limited primarily to the minimum standards on dispute resolution.

Ivo Vanasaun, Transition from Soviet Union's Tax Regime to Estonia's Own Tax System

Dissolution of the Soviet Union in 1991 resulted in regaining independence for many countries, including Estonia. This caused the urgent need for the country to design its own tax system together with drafting all of the relevant legal acts and implementing them in practice. Both the Estonian Parliament and Government (although both were inherited from the Soviet Union regime, the parliament had not yet been elected by Estonian citizens) initiated this work already in 1990–1991 when the first value added tax (VAT) regulations, personal income tax, and corporate income tax laws were adopted. Significant change has occurred since June 1992 when the referendum on the adoption of the Estonian Constitution was held. According to it, all taxes would need to be stipulated in tax laws approved by the parliament which, thus far, had not often been the case. The next qualitative step was made in 1994 when tax laws that were more advanced entered into force. At that time, Estonia introduced a single flat tax rate for both individuals and companies (having the same flat tax rate both for individuals and companies has enabled Estonia to fully tax fringe benefits (non-monetary income from employment) at the employer level without any need to personalize the exact value of benefit received by each employee.). The corporate income tax system was further redesigned in 2000 when Estonia became the first country in the world where retained profits of companies remain untaxed until they are distributed to shareholders.

Mohammed Mohi Uddin & Paul S. Caselton, *Tax Treaty Exemption Benefits for Students, Trainees, Scholars, and Teachers: An Analysis*

Tax treaties signed between the United States of America and other countries do not define various terms used in the treaties. Absences of such definitions contribute to creating disputes between tax payers and the Internal Revenue Service (IRS). Some of those disputes end up in tax courts. This article critically analyses various income tax exemption benefits available to nonresident alien students, scholars, trainees, and teachers in light of select income tax treaties/conventions. We also evaluate select tax court precedents interpreting various tax treaty benefits and the terms used in these tax treaties as interpreted by the US tax courts.

Perrou, *The Application of the EU Charter of Fundamental Rights to Tax Procedures: Trends in the Case Law of the Court of Justice*

An increasing number of taxpayers rely on the EU Charter of Fundamental rights to challenge various aspects of tax procedures. However, not all cases are included in the scope of application of the Charter; an association with Union law is required. For VAT cases or for complaints relating to the direct application of provisions of EU directives, it is relatively easy to identify such association. This is not always as easy with cases involving direct taxation or those related to the application of purely national legislation that may, however, be a corollary to Union law provisions.

For cases that do not have a connecting element with Union law, protection may be granted under the European Convention on Human Rights (ECHR). Tax procedures, however, are only covered by the ECHR if they relate to a criminal charge, leaving a significant number of normal tax proceedings beyond the scope of fair trial guarantees.

The different scope of application and ambit of protection granted by the two instruments might lead to disparities in taxpayer protection. The entry into force of an advisory opinion mechanism

before the European Court of Human Rights, similar to the preliminary reference procedure before the Court of Justice, may enhance taxpayer protection in the EU. The latter option, however, is to be used with caution: although referring a case that involves Union law to the ECHR is not expressly prohibited, it could arguably amount to a violation of Union law.

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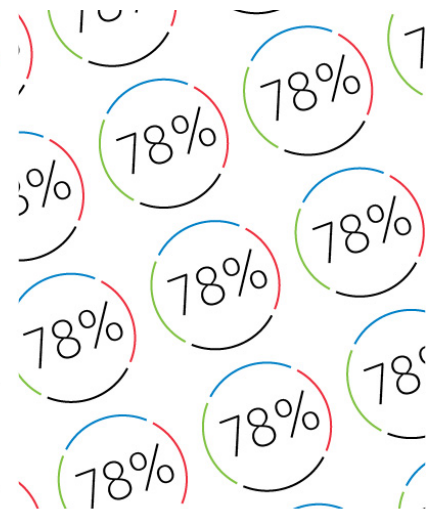
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