

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Tuesday, December 14th, 2021

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

Polyvios Nikolaou, *Mandatory Binding Arbitration: Avoiding Stalemates Over the Tax Chessboard*

The resolution of tax treaty disputes under the Mutual Agreement Procedure (MAP) mechanism is inherently problematic. This article examines how the introduction of final-offer arbitration (FOA) can improve dispute resolution using a game-theoretical approach. It will be argued that arbitration introduces an element of finality that was demonstrably absent in the MAP while also contributing to the speedier resolution of disputes which is beneficial to all international stakeholders. After demonstrating the advantages of arbitration, the paper considers how its institutional design can be optimized in the tax context. It makes proposals regarding the publication of arbitral decisions to address concerns of countries that are still sceptical about whether or not to endorse it.

Magdalena Schwarz, *Can the Switch-Over Rule and the Role of Permanent Establishments be Considered the Neglected Stepchildren of the GloBE Proposal?*

As has already been learned as children from the fairy tales of grandparents, neglecting a child or, as is usually the case in these stories, a stepchild, will have long-term negative consequences. However, in the author's opinion, this seems to be, at least to some extent, what the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) has been doing thus far with the role of the switch-over rule (SOR) and permanent establishments in general under Pillar Two of the OECD. This can be seen particularly by the fact that, so far, only minimal information was provided on the concrete design and role of the SOR especially compared to the other three instruments under Pillar Two. The following contribution therefore aims at a more comprehensive examination of the SOR for GloBE purposes and how (low-taxed) permanent establishments are generally dealt with under the GloBE proposal.

Saturnina Moreno González, *Implementation of the EU ATAD in Spain: Outstanding Issues of a*

Partial Transposition

The purpose of this work is to critically analyse the transposition of the Anti-tax Avoidance Directive (ATAD) (1 and 2) into the Spanish tax system. To do so, a distinction is made between the rules that are transposed (exit taxation, controlled foreign companies (CFCs) and hybrid mismatches) and those that are not (limitation on interest deductions and general anti-abuse clause). This analysis will highlight the main differences between the directive and Spanish law and examine whether such discrepancies may be the source of problems of application and even uncertainties about the alignment of Spanish regulations to the directive itself or to EU primary law.

Dora Pimentel Mendes de Almeida & Michell Przepiorka, CFC Conundrum: How Brazil Has Safely Harboured Individuals in Its Efforts to Combat Tax Avoidance

This article discusses the general purpose of controlled foreign corporation (CFC) rules and how countries have extended them to individual taxpayers to combat the effects of base erosion and profit shifting. It also addresses how Brazil does not currently have CFC rules applicable to individuals in its tax system which has allowed for abusive tax planning and tax avoidance. Finally, this article discusses whether there are valid restrictions on the implementation of CFC rules that are applicable to controlling individuals in Brazil.

Himanshu Raghuwanshi, Abolition of DDT in India: A Treat for Foreign Investors?

The Indian government eliminated the much maligned dividend distribution tax (DDT) through Finance Act 2020. The abolishing of the DDT marks a return to the shareholder regime of dividend taxation (hereinafter ‘shareholder regime’). Foreign enterprises (generally multinational corporations) aiming to do business in India through subsidiaries or enterprises that already have subsidiaries in India can benefit from this change. This article analyses the tax impact of this change when an Indian subsidiary distributes its profits to its parent or holding company. Thus, the paper presents a tabular representation of taxation in the DDT regime and the shareholder regime and compares them. To present the complete scenario, the paper also analyses different profit distributing mechanisms other than dividends that are used by companies – specifically, the buyback of shares and share capital reduction. Finally, limited liability partnership (LLP) firms offer another vehicle for companies to conduct business in India. Thus, the paper also analyses the taxation aspects of an LLP distributing profits to its partner company.

The return to the shareholder regime will allow non-residents to avail beneficial tax rates provided for dividend taxation in double taxation avoidance agreements (DTAAs) signed by India with other countries. Thus, the final section of this article discusses the mechanisms that are in force to prevent treaty shopping. The principal purpose test (PPT) brought in by the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS) (Multilateral Instrument or MLI), the threshold of beneficial owners found in most DTAAs, and India’s domestic general anti-avoidance rule (GAAR) are analysed to determine the essential requirements of these mechanisms.

Agnieszka Franczak, Recent Trends in the Jurisprudence of the CJEU Regarding the Right to Deduct Input Tax

The Court of Justice of the European Union has recently delivered interesting judgements on the right to deduct input tax in relation to taxable persons' investments. In those judgements, the court raises insightful arguments that may serve as guidance in determining whether a taxable person is entitled to an input VAT deduction in relation to construction work (consisting of an extension of a municipal road which was the condition to allow for mining activities) regarding services from which third parties would also benefit and concerning consultancy services relating to an intended, although unrealized, acquisition of shares.

Andrea Purpura, Protection of Taxpayers' Personal Data and National Tax Interest: A Misstep by the European Court of Human Rights?

The relationship between taxpayers' privacy, tax law, and tax assessments carried out by national financial administrations is extremely debated. It is because, at the base of every possible consideration, there would seem to be essentially one question: What is the limit to the achievement of the national tax interest? It is possible to imagine, in the era of digitization, that the disclosure of taxpayers' personal data does not represent a limit to the taxation interest of the state both when this has the purpose of prevention of tax evasion or whether it involves the protection of commercial relations between economic operators? These are some of the questions that emerge from reading the Case of L.B. v. Hungary issued by the European Court of Human Rights (ECHR) on 12 January 2021. Here, in fact, the court considered the conduct of the Hungarian tax authorities that has materialized in the publication on its website of the personal data of Hungarian tax evaders compatible with the European Convention on Human Rights, and specifically with Article 8.

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