

Kluwer International Tax Blog

The Contents of Intertax, Volume 50, Issue 1 (January 2022)

Ana Paula Dourado (General Editor of Intertax) · Thursday, January 6th, 2022

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

Nevia Žižn-Šain & Joachim Englisch, DAC 7: An Entire New Framework for Joint Audits in the EU: How Do the Taxpayers Fare?

Joint audits have the potential to facilitate tax collection and at the same time enhance tax certainty for taxpayers. However, the several European Union (EU) pilot projects initiated by certain Member States made it evident that a better regulatory framework was urgently needed. The EU legislator therefore used the opportunity of the sixth amendment of the Directive on administrative cooperation, known as DAC 7, to devise a new legal framework for joint audits. In this contribution the authors discuss this latest development. They analyse some key clarifications and novelties to be found in the new Article 12a DAC regarding joint audits. The article furthermore highlights the remaining open issues and inadequacies of the joint audit provisions in DAC 7, with a particular focus on taxpayer rights.

Among the issues that are analysed in depth in this article are the initiation of joint audits at the taxpayer's request, the possibility to conduct a joint audit without the taxpayer's consent, and the legal instruments at the disposal of the taxpayer against the initiation of a joint audit or certain audit activities. Further issues concerning the applicable law, data protection standards as well as legal instruments against the findings ensuing from a joint audit are also part of the analysis.

J.J.A.M. Korving & J.C. van der Have, Brexit: The Direct and Indirect Effect of the EU-UK Trade and Cooperation Agreement

The United Kingdom (UK) is no longer part of the European Union (EU). The new relationship between the two parties has led to a trade and cooperation agreement (TCA). While the agreement contains some specific tax provisions and ensures the freedom of movement, in principle, it has no direct effect. This raises questions about the actual impact of this agreement for taxpayers. The authors discuss the direct and indirect effect of the agreement, concluding that courts may, in accordance with World Trade Organization (WTO) law, still be held to interpret their domestic (tax) laws in compliance with the principles from the agreement, including comparably formulated

fundamental freedoms.

Anna Drywa, Taxpayer's Right to Privacy?

In the last decade, one of the most important tax challenges has been the fight against tax evasion and tax crime. In response to these phenomena, a number of initiatives have been undertaken that have a side effect of reducing the privacy of taxpayers. In view of the many undoubtedly important observations made in the context of the fight against taxpayers' dishonesty, this discussion seems to be overly biased and should be balanced by a reflection on the need to protect the rights of taxpayers, among others, and the right to privacy. Attention should be paid to the legislator's visible tendency to overstep the boundaries of their privacy. Most amendments to tax law are dramatically demonstrating how much of their privacy they have already surrendered.

The article approaches the topic from a broad perspective beginning with the meaning and scope of the right to privacy from a constitutional perspective. Reflecting on privacy is never easy as it is a dynamic concept with fluid boundaries. The regulations introducing the right to privacy are of a general nature. The decisions of the courts in that regard are inherently fragmentary and do not allow a general understanding to be decoded. Nor has a universally accepted definition of privacy or the right to privacy been developed. Against this background, the extent of taxpayers' privacy has been considered. A number of factors have been discussed that demonstrate a change in views in tax law and a trend towards restricting taxpayers' privacy. The question is whether a taxpayer has a genuine right to privacy or whether they only have a substitution of such protection.

Katerina Pantazatou, The Implementation of the ATAD in Luxembourg

This article examines the implementation of the Anti-Tax Avoidance Directive (ATAD) in Luxembourg. Specifically, it analyses all the additions and amendments that had to be made into Luxembourg law, due to the ATAD. It does so in an analytical and critical manner by going through all ATAD anti-avoidance provisions and examining the way they were implemented into Luxembourg law and how they differentiate from the previous rules (if they existed at all). It also critically assesses whether these changes have given rise to any inconsistencies or remaining questions.

Céline Martin, Vikram Chand & Natassia Burkhalter, Arm's Length Principle from a Swiss Perspective: Profit Allocation to Inbound and Outbound Permanent Establishments

Switzerland continues to be one of the most preferred locations for many businesses when setting up a headquarters or permanent establishment (PE) structures. Thus, obtaining tax certainty and predictability is crucial for such structures. Swiss tax law does not provide for detailed rules for international profit allocation and particularly the arm's length principle (ALP) for the determination of an enterprise's profit. Therefore, the Swiss tax authorities and courts largely rely on general national tax law principles for their assessment of the allocation and calculation of the taxable profit of a company or a PE in Switzerland. They have developed a sophisticated system of profit correction in order to determine the relevant taxation basis, in particular when prices

between related entities or within PE relationships are deemed to not be set at arm's length. This practice is continuously evolving, and the Authorized OECD Approach (AOA) is increasingly integrated in the assessment of each individual case. Against this backdrop, the present contribution discusses the application of the ALP from a Swiss tax treaty and Swiss national law perspective as applicable to transactions among separate entities as well as to head office and PE relations. With respect to the latter, the reader will find an overview of the profit allocation rules applicable in domestic and international cases. Moreover, for illustration, two case studies are developed and analysed for cross-border relations with fixed place PEs (inbound and outbound cases) and an example is provided for the interaction between international and domestic profit allocation.

Rita Szudoczka & Balazs Karolyi, The CJEU's Approach to the Objectives of Progressive Turnover-Based Taxes: Respect for the Member States' Fiscal Sovereignty or Authorization for Circumventing EU Law?

The article demonstrates that the objective of the tax system plays a crucial role in the non-discrimination assessment in the context of both EU State aid and fundamental freedoms analyses. Despite the fact that the objective of the underlying tax system/tax measure is decisive in respect of the outcome of these non-discrimination tests, there are plenty of uncertainties in the Court of Justice's case law regarding the scrutiny of the objectives of tax measures. The article sheds light on them, first, by examining the allocation of competences among national authorities – national courts – and the EU adjudicatory bodies with regard to the determination of the objective of the tax system. Then, the required standard of consistency between the declared objective and the design of the tax system is scrutinized in the context of the recent progressive turnover-based tax cases, suggesting a stricter standard of consistency that is based on the principle of proportionality. The article also attempts to disentangle the blurred relationship between the objective of the tax and the intent of the legislator, and argues that the Court's inquiry should not be directed at the legislature's intent rather at the objective of the tax, as the former is difficult to identify. Finally, the question of abuse of rights by the Member States is discussed, that is, Member States can circumvent EU law by enacting seemingly neutral taxes the actual objective of which is to discriminate or selectively favour certain groups of taxpayers.

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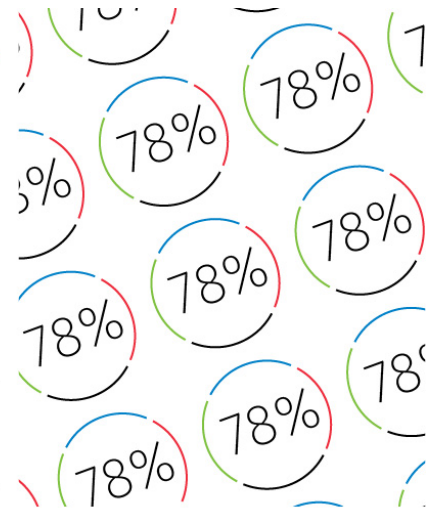
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