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Ana Paula Dourado (General Editor of Intertax) · Friday, October 21st, 2022

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

Brown & G. Jackson, Interpretation of Multi-Lateral Treaties: The Purposive Approach and Multiple Parties Through the Lens of the UK Courts

In this article the authors consider how to interpret the multilateral provisions in relation to tax administration such as the Common Reporting Standard (CRS), Base Erosion and Profit Shifting (BEPS) and the Mandatory Disclosure Regime, the pace of adoption of which continues to accelerate. They discuss whether the pre-existing framework provided by the Vienna Convention on The Law of Treaties is either adequate or appropriate in its application to the interpretation of such multi-later instruments. In light of this analysis the authors consider what principles of interpretation are found in case law and whether the principles ennunciated in Fowler v. Revenue and Customs Commissioners [2021] 1 All ER 97, could be used to remedy any deficiency in the Vienna Rules. This includes an examination of the dangers of the use of commentary in the interpretation of multi-later instrument and the importance of principles that allow the interpretative tradition of the relevant jurisdiction to override commentary. Having examined these difficulties and the inadequacies in the modern interpretive code, they propose methods of approach to ease the interpretative issues created by multi-lateral instruments, including the possibility of an internal code of interpretation for such multi-lateral instruments.

B?a?ej Ku?niacki, European Union Law and Global Investment Regime: Unshell Proposal as a Next (Mis)step of the EU Against Investment Treaty Arbitration?

This article addresses a largely unchartered interdisciplinary research area of the global investment regime and European Union (EU) law with an emphasis on the prevention of international tax avoidance in the EU. It focuses on the intersections between newly proposed anti-tax avoidance legislation by the European Commission that is known as the Unshell Directive (UD) and international investment agreements (IIAs). In this article, the author sets a stage for the intersections by discussing the Court of Justice of the European Union (CJEU) case law and the commission's actions aimed against the most powerful enforcement tool in the global investment regime, i.e., the investor-state dispute settlement (ISDS) mechanism, by attempting to render it illegal and ineffective within the EU. The corresponding reactions from the arbitral tribunals are also addressed. The discussion evolves to identify and analyse the interplay between the proposal of the UD (also the Unshell Proposal or UP) and the IIAs to reveal that the impact of the former on

the latter is ambiguous by design in order to minimalize legal certainty vis-à-vis protection of foreign investment in the EU via shell entities. This constitutes a foundation for potential, seismic tensions between the UD and the global investment regime that are not beneficial for marketing and development of the EU internal (single) market and may thus weaken the EU's global competitiveness in the area of foreign investments.

Peter Denk, Tax Competition and the EU Anti-Money Laundering Regime

Member States engage in tax competition to expand their tax bases thereby risking a 'race to the bottom' in corporate tax revenues. The global minimum tax under Pillar Two is expected to contribute significantly to curbing this practice. Assuming that minimum taxation eliminates competition in statutory tax rates, tax competition is likely to continue. This is because countries then lower their effective tax rates by reducing tax enforcement. As audit strategies, unlike statutory tax rates, are not publicly observable, other countries cannot easily observe and can never verify them. However, countries reducing their tax enforcement adhere to a policy that implicitly encourages tax evasion. Hence, enforcement and observability problems can also be addressed indirectly by targeting their outcome – tax evasion. In most Member States, tax evasion is a predicate offence for money laundering that effectuates a very effective EU anti-money laundering (AML) regime. Its instruments cannot only serve as a tool to adequately address foreign tax evasion but also to reveal, monitor, and control, at least indirectly, other Member States' efforts in the fight against tax evasion. AML legislation can therefore help to close a still unnoticed loophole in curbing tax competition that will not be addressed by introducing minimum taxation.

Alessandro Turina, Some Notes on Luigi Einaudi and the Legacy of His 'Principles of Public Finance'. A Fiscal Mythoclast in Retrospect

This year marks the ninetieth anniversary of Principî di scienza della finanza by Luigi Einaudi. This work is one among many by this prominent Italian fiscal polymath, yet it is especially illustrative of many of his more remarkable contributions to the public finance and tax law discourse. As such, it can be considered an important chapter in Einaudi's work if not a milestone. In this respect, the book offers the opportunity to revisit some of his most well-known and influential contributions along with a reconsideration of certain idées reçues that appear to surround his legacy. In either direction along these reading itineraries, it is impressive how many of the propositions emerging from the pages of the Principî appear to be topical and, in some way, refreshing in connection with much of the ongoing (international) tax policy debate. Einaudi actually had a penchant for debunking myths and illusions, an exercise which has not lost its topicality and relevance.

Prabhash Ranjan, Retroactive Taxation, Investor-State Dispute Settlement, and India: Life Comes a Full Circle

After amending the Income Tax Act (IT Act) in 2012 to impose taxes retroactively on indirect transfers involving non-residents, India recently nullified this law. Towards the end of 2020, two investor-state dispute settlement (ISDS) tribunals under the India-Netherlands and India-United Kingdom bilateral investment treaties (BITs) found India's retroactive tax in breach of India's BIT obligations. These arbitral defeats incited India to eliminate the infamous 2012 retroactive amendment to the tax laws. This article documents and analyses the sordid saga of nine long years by explaining the origin, evolution, and culmination of India's retroactive tax misadventure. Considering the increasing number of instances for which foreign investors use the ISDS

mechanism to challenge the host state's sovereign taxation measures as BIT breaches, the ISDS rulings against India, especially by the tribunal in Cairn Energy v. India, assumes significance. A more comprehensive reading of the tribunal's reasoning in Cairn Energy v. India elucidates that, while taxation measures are indeed an integral part of the state's sovereign right to regulate, it has to be exercised reasonably and proportionately when furthering a public purpose. The exploitation of the power to tax disproportionately may prove to be detrimental to the state.

Jeffrey Owens & Sabina Hodži?, Blockchain Technology: Potential for Digital Tax Administration

Currently, blockchain is one of the most innovative emerging digital technologies. As such, it can undermine traditional business models and revolutionize tax administration. This objective of this article is to present the potential of blockchain technology in the administration of specific tax categories such as payroll taxes, value added tax, international taxes, and customs. It also analyses blockchain technology's strengths, weaknesses, opportunities, and threats (SWOT) with a focus on tax administration. As a generator of a substantial amount of information, tax administration requires reliable and efficient technology for processing and storing the information that is generated. The results of the analysis showed strengths such as a lower cost of fulfilling tax liabilities, a direct connection with taxpayers without the need of third parties. a higher degree of efficiency, and threats such as insufficient funds for modernization, knowledge and skills of employees, and willingness to adapt and high investment costs related to implementation. Moreover, it will modernize accounting and tax payments.

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