Kluwer International Tax Blog

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

Editorial: Pillar 2, Fiat, and the EU Unanimity Rule on Tax Matters

Taxation is one of only a handful of policy areas within the EU where approval of new legislation is still dependent upon unanimous voting. Over the years, there have been several attempts to move away from the unanimity rule, but these have been met with strong resistance from (some) Member States. The difficulties in approving EU tax legislation, resulting from the endurance of the unanimity rule, have led to the development of various alternative circuitous paths to harmonisation, including most recently state aid law and enhanced cooperation. This Editorial considers the current approach of keeping the unanimity rule, whilst at the same time consistently exploring alternative pathways to circumvent it. Its central argument is that this approach is a reflection of the trade-off between (perceived) national tax sovereignty on one hand, and tax efficiency and fairness on the other hand. Whilst keeping this rule arguably ensures higher (although far from absolute) levels of tax sovereignty for Member States, it also results in less efficient, and probably less equitable, tax systems within the Union. Conversely, abolishing it would improve tax efficiency, and probably equity, even if it would also result in lower levels of tax sovereignty. As the recent Court decision in Fiat demonstrates, however, the current approach of keeping the unanimity rule whilst consistently exploring new alternatives to circumventing it, has led to high levels of legal uncertainty, with limited gains for either tax sovereignty, or tax efficiency and fairness.

David Hummel, New Tendencies Regarding the Relevance of *Formal Requirements in VAT Law*

Back in 1858, Rudolf von Jhering, a well-known German legal scholar, said: ‘Form is the sworn enemy of arbitrariness, the twin sister of freedom’. Perhaps this is why Value Added Tax (VAT) law includes many formal requirements before the taxpayer can exercise his right of deduction or can opt for taxation, for example. Concerning these formal requirements, it is not disputed that the Court of Justice of the European Union (CJEU or Court of Justice) has put a stop to excessive formalism in VAT law. However, there are some interesting recent decisions of the Court of Justice, which were dealing with the question as to whether the lack of formal requirements allows the financial administration to deny the right of deduction or the right to opt for taxation, even if

the material conditions are fulfilled. This article shows that there is a recent tendency in the jurisprudence of the CJEU to take more into account the function of formal conditions in the field of VAT law. It seems that the Court has found now a better balance between the rights of the taxable person and the principle of proportionality, on the one hand, and the principle of neutrality and the uniform and simple application of VAT law, on the other.

Stefanie Geringer, The EU VAT Rate Reform 2022 from an Environmental Policy Perspective

In addition to introducing fundamental changes to the structures of the European Union (EU) value added tax (VAT) rate regime, the EU VAT rate reform 2022 was aimed at aligning the EU VAT rate system with other EU policies, such as the European Green Deal. The environment-related measures are accordingly meant to incentivize eco-friendly supplies and, conversely, discourage environmentally harmful consumption patterns. Therefore, the EU lawmakers introduced options to apply zero, super reduced and/or reduced VAT rates, and a mandatory phasing-out of preferential VAT treatment respectively. Based on the empirical evidence from earlier VAT rate reforms, the author argues in favour of a differentiated assessment: While the effective VAT increases on the supply of certain environmentally harmful goods should send the intended price signal, the effectiveness and efficiency of VAT reductions as a means of promoting green consumption is highly questionable. In order to achieve the latter objective, public investments, direct financial aid, regulatory and targeted tax-related measures are identified as more appropriate measures.

Patryk Kowalski, Statistical Picture of the European Court of Human Rights' Tax-Related Cases Containing Separate Opinions

The aim of the study was to select tax-related cases from the European Court of Human Rights (ECtHR) case law in the years 1959–2020 and analyse all such cases using empirical legal studies method, focusing mostly on separate opinions. This analysis led to the selection of research material covering 176 tax-related cases (179 judgments, sixty-nine separate opinions). The most important research findings include, e.g., small number of ECtHR judgments in tax matters, low frequency at which they are issued, the fact that judges submit separate opinion more frequently in a situation when a judgment finding no violation is delivered rather than when a judgment finding violation is delivered. Moreover, the article contains an extensive review of the literature with regard to the undertaken subject.

Fabian Barth, A New Scope for the 'Debt Collection' Carveout as a Post-Brexit VAT Quick Fix?

Following Brexit, the United Kingdom (UK) legislature is in principle free to amend UK Value Added Tax (VAT) law as it deems appropriate, without having to have regard to European Union (EU) Directives. Using the 'debt collection' carveout of the VAT exemption for financial services as an example, the author explores whether there is a case for Post-Brexit 'VAT Quick Fixes' in the UK.

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