

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Tuesday, February 28th, 2023 · Intertax

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

Leonie Fischer, Jessica M. Müller & Christoph Spengel, The Distorting Effects of Imputation Systems on Tax Competition in the EU

The design of corporate income tax systems and thus the taxation of (cross-border) dividends are encompassed within the sovereignty of the Member States of the European Union (EU). However, these rules are restricted by the EU regulatory framework and the case law of the European Court of Justice (ECJ) which prohibit discrimination of foreign- against domestic-sourced dividends. Therefore, five EU Member States abolished their discriminatory imputation systems in favour of shareholder relief systems between 1999 and 2019 which had not only legal but also economic implications. In this simulation study, the authors assess how and to what extent the abolishment of discriminatory imputation systems in the EU Member States affected a country's tax location attractiveness for capital investments and tax competition. The analysis is based on the cost of capital (CoC) and effective average tax rates (EATR) using the Devereux/Griffith methodology. Overall, under the discriminatory imputation systems, the authors find lower CoC and EATR for investments located in the shareholder's residence country compared to foreign investment alternatives. The advantageousness is, on average, reversed after the switch to the shareholder relief systems and places additional tax competition pressure on the affected Member States.

Begoña Pérez Bernabeu, State Aid Through Arbitration Awards: EU Law as a Ground for Non-enforcement

The relationship between international investment law (IIL) and EU law is not without problems as evidenced by the Achmea ruling. These tensions have become more evident in the Micula case in which the commission resorted to the state aid rules in order to attack arbitration awards arising from intra-EU Bilateral investment treaties (BITs) (deeming its enforcement as state aid). Despite its two rulings relating to the Micula saga, the Court of Justice of the European Union (CJEU) has not yet validated (or not) the application of state aid rules to the enforcement of intra-EU awards. Hopefully, the upcoming general court's judgment shall rule on the merits of the Micula case thereby dispelling doubts. Nevertheless, it is foreseeable that further clarifying judgments will be

required concerning the recognition and enforcement of intra-EU awards in non-EU jurisdictions. This article reviews the current situation to show that, while state aid rules could adequately prevent the enforcement of an intra-EU award within EU borders, they lack effectiveness for blocking enforcement beyond its borders.

Carli Botha, Roshelle Ramfol & Odette Swart, *The Impact of Multilateral and Unilateral Measures on Profit-Shifting from South Africa to Mauritius*

The Mauritian global business sector's favourable tax regime, combined with its extensive treaty network, has made it an attractive investment hub for investments into Africa. Aggressive tax planning strategies targeted at shifting profits to lower tax jurisdictions such as Mauritius, have eroded many higher tax jurisdictions' tax bases. An exodus of (taxable) funds from South Africa to Mauritius is evident from South Africa's listing as one of the top five contributors to Mauritius's foreign direct investments (FDIs). While the base erosion and profit-shifting (BEPS) action plan is aimed at curbing profit-shifting practices, limited research is available on the successful implementation of the BEPS action plan. This article conducts a review of the implementation of the BEPS action plan by both jurisdictions, namely Mauritius (as a low tax jurisdiction) and South Africa (as a high tax jurisdiction). The success of the BEPS action plan in curbing profit-shifting practices from South Africa to Mauritius is measured in conjunction with the South African anti-avoidance legislation. The findings highlight that only Action 5 has been successfully adopted by both South Africa and Mauritius. A preliminary analysis was conducted which indicates that the implementation of the BEPS action plan will not result in less profit-shifting, due to gaps in the South African anti-avoidance legislation that facilitates these profit-shifting practices. It is suggested that the implementation of the BEPS action plan by higher tax jurisdictions should be prioritized. This article contributes to scholarship on evaluating the effectiveness of the BEPS action plan minimum standards for African countries.

Loan Pham, *A Study of Vietnam's Double Tax Treaties: Patterns of Treaty Growth and Shifting Treaty Policy*

This article reviews the growth of Vietnam's tax treaties and shifts in its treaty policies over the thirty-year period since the country created opportunities to attract foreign investment. It follows the incorporation of the Model Tax Treaties of the Organization for Economic Co-operation and Development (OECD) and the United Nations (UN) into its bilateral treaties and considers the limited apparent connection between treaties and foreign direct investment (FDI). A particularly interesting finding is the extent to which Vietnam's treaties from the outset favoured the use of the UN Model provisions with respect to the definition of permanent establishments (PEs) and capital gains on the disposal of immovable property, particularly in its treaties with OECD members. This is ironic as measures from the OECD Model precedents are more likely to be found in treaties with non-OECD members. Nevertheless, it is clear that the treaties overall favour the allocation of taxing rights to Vietnam as a capital importing jurisdiction. These findings, when considered along with the country's success at attracting FDI, suggest that developing economies can retain taxing rights and attract foreign investment at the same time.

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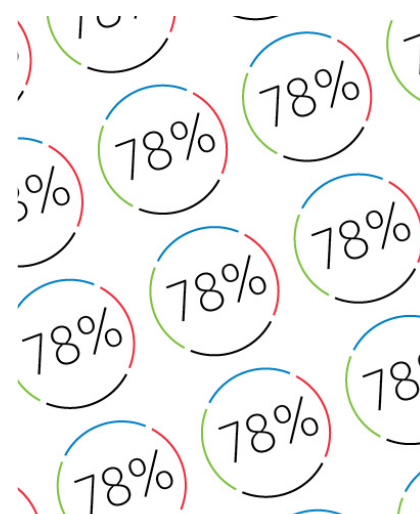
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