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The Contents of EC Tax Review, Volume 32, Issue 02, 2023

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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:

Eric C.C.M. Kemmeren, Taxing Interest in the Debtor State as an Alternative to DEBRA

Basically, a company can be financed by debt or equity. The general national tax systems are that interest, the compensation paid for funds put at disposal by means of a loan, are deductible and that the compensation for funds put at disposal by means of equity is not. In this context, the question often arises of whether this different treatment is justified. Or should they be treated (more) the same? The European Commission has proposed a directive to tackle to debt-equity bias by introducing a notional allowance on equity, on the one hand, and a new limitation on interest deduction, on the other hand (DEBRA). This editorial raises the questions of whether the tax treatment of the remuneration paid on loans (interest) by companies and the remuneration on their equity (profits) as proposed in DEBRA is sufficiently based on principles to contribute to a sustainable tax system with regard to company financing, and if not, what an alternative would be that better complies with those principles. The author concludes that DEBRA is another stopgap for flaws in the current tax systems, which has the potential to further distort the capital markets. He suggests an alternative system based on the principle of origin to remove the debt-equity bias.

Mikolaj Kondej & Mateusz Wicher, May a Country Tax a Subsequent Restructuring Under the Merger Directive?

The article concerns the compatibility with the merger directive of Polish regulations introduced as of 1 January 2022, according to which a restructuring (merger, demerger or exchange of shares) is not tax neutral for a given shareholder if it involves allotment of shares in exchange of shares which were obtained as a result of a prior restructuring. For the purpose of this analysis, the authors take a deep look at the nature of deferral provided in Article 8 of the merger directive and summarize the case law and the doctrine views. While they acknowledge many areas of dispute around the concept of the deferral, they conclude that irrespective of the approach adopted, taxation of shareholders solely because they exchange shares granted to them as a result of a previous restructuring is not in line with the directive. Regardless of the above, the authors also

discuss whether Article 8(6) of the directive provides for a right of a Member State to tax gain which arose until the moment of the restructuring if, as a result of the restructuring, the taxing right under a double taxation treaty (DTT) is transferred to another Member State.

Marco Greggi, Shades of Transparency: DAC6 and the Client-Attorney Privilege

Tax Law has become more and more a data-centric discipline through the years. The struggle against international tax avoidance and evasion has pushed the European union to pass a number of directives regulating the exchange of information and the taxpayers' duty to disclose information and data concerning their business and investments.

The article considers DAC6 (Directive on Administrative Cooperation, Council Directive 2018/822) a qualitative change in this scenario, as it appears to erode the client-attorney privilege. It imposes, for the first time, a duty of transparency to intermediaries such as consultants and (potentially) lawyers which is in collision with fundamental rights, eventually casting a shadow on the due process clause and (indirectly) the rule of law.

The central part of the article focuses on the extension of the privilege in tax law, trying to strike a balance between the need to curb tax avoidance and to preserve the due process clause. The findings are that the client-attorney relationship is one of the pillars the rule of law is built on, it should be preserved in the field of taxation too and eventually that no directive or regulation have the power to waive it.

The conclusion is that DAC6 is to be considered a step in the wrong direction by the European legislator as the first ruling of the CJEU (Court of Justice of the European Union) seems to confirm.

Thomas Bieber & Denise Schmaranzer, Excise Duty Directive 2020/262: Towards a Digitalized and Customs Oriented Excise Law

The provisions of the Excise Directive 2020/262 to be applied as from 13 February 2023 aim to link excise and customs law more closely and to further advance the digitalization of excise processes. The authors argue that, notwithstanding the recast of the Directive, harmonization has not yet reached its full potential due to numerous options granted to the Member States. Furthermore, the linkage between excise and customs law raises fundamental questions regarding the justification of an automated incurrence of an excise duty debt in cases of a customs debt incurred through non-compliance. Finally, the authors show that the Excise Directive 2020/262 does not conflict with the planned recast of the Energy Tax Directive presented as part of the Green Deal in July 2021.

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This entry was posted on Monday, March 6th, 2023 at 10:00 am and is filed under DAC6, DEBRA, EC Tax Review, Excise duties
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