

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Friday, April 14th, 2023

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

Rachna Matabudul, The Multilateral Instrument in Africa: A Strategic Analysis

The Multilateral Instrument (MLI) was launched under Action 15 of the Base Erosion and Profit Shifting (BEPS) Project in November 2016 under the joint collaboration of the Organization for Economic Cooperation and Development (OECD) and the G20 in order to update existing bilateral tax treaty provisions to counter BEPS more effectively. Despite the benefits that the MLI presents for updating the African treaty network, the analysis in this contribution reveals that its provisions addressing certain high priority BEPS issues such as the artificial avoidance of permanent establishment (PE) status under Action 7 and even the minimum standard provisions under Action 14 for improving the mutual agreement procedure (MAP) were implemented rather poorly in less than 40% of the eligible African treaties. The exception to this are the minimum standard provisions under Action 6 that modified more than 75% of the treaties to counter treaty shopping. This paper elaborates on the resulting policy implications and offers a number of normative recommendations for maximizing the benefits of the MLI implementation in the African context which could also be relevant in light of the proposed Pillar Two reform.

Leonardo Thomaz Pignatari, The Taxation of 'Digital Nomads' and the '3 W's': Between Tax Challenges and Heavenly Beaches

Work mobility is not something new, but it certainly received an important boost with the COVID-19 pandemic as many people began working remotely which reflected on their lifestyle. In this context, the objective of the present study is to analyse the challenges imposed by what is known as 'digital nomads' from the exclusive perspective of individual taxation. The first part aims to understand the first 'W', i.e., who the 'digital nomads' are and the factors that favour the choice for this type of work. Subsequently, it examines the impacts caused by the 'digital nomadism' in determining the tax residence (second 'W' – where) and presents the measures, albeit incipient and indistinguishable, adopted by some countries in relation to this phenomenon. The third section delves into the taxation of income obtained by 'digital nomads' through either an employment relationship or the provision of services (third 'W' – what). Based on the analysis of examples and the presentation of some alternatives, this study seeks to demonstrate the need to adapt the tax residence rules at both of the levels of domestic law and double tax treaties (tiebreaker rules). The rules on the taxation of income from employment and the provision of

independent services also demand modifications that detach them from the strict need for a physical presence.

Eva Escribano, The Arrival of the New BEPS PE Clause in Actual Tax Treaties via the MLI: Impact, Risks and Need for Further Regulatory Changes (Particular Focus on Spain)

The present article seeks to analyse the overall potential impact that the new permanent establishment (hereinafter PE) concept that has emerged from the Base Erosion and Profit Shifting (hereinafter BEPS) Project is expected to have as it is gradually incorporated into actual tax treaties worldwide by using Spain as an illustrative example. Firstly, the role that the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent BEPS (hereinafter MLI) is playing in the implementation of the new rule in tax treaties will be analysed (section 1). Secondly, the wording and scope of the new PE clause will be scrutinized, highlighting its obvious resemblance to ideas foreseen in both prior versions of the Commentaries to the Organization for Economic Cooperation and Development Model Convention (hereinafter OECD MC) and certain domestic administrative resolutions and judgments (e.g., the ‘Spanish PE approach’, a doctrine widely held by the Spanish tax administration and some courts advocating for a singular interpretation of the PE clause and the rules attributing profits to it) (section 2). Thirdly, there will be an attempt to advance the effects of the arrival of the new clause in actual tax treaties in terms of the expected volume of affected treaties, the expected reaction of tax administrations and courts (in respect of unaffected treaties keeping the classic version of the PE concept), the potential coexistence between the new treaty PE rule and current domestic PE rules and, lastly, the expected (extra) tax revenues for jurisdictions hosting these new forms of PEs (section 3). The intention throughout the contribution is to portray the risks derived from the implementation of this new rule and the need for further regulatory modifications to counteract such risks. Finally, some final remarks will be put forward (section 4).

Jan Weissbrodt, Disaggregation of Financial Instruments in International Tax Law

Disaggregation is the technique of decomposing a facts pattern into components and their separate legal subsumption. As a pre-step to prepare a legal case, it is an all too practical problem and therefore seems to be rather neglected in the high art of jurisprudence. This contrasts with the great importance of the substance over form doctrine in legal practice, being a universal and timeless issue in all fields of law dealing with economic subjects and in all jurisdictions. At the example of financial instruments as the ‘burning lens’ of tax law and the OECD Model Tax Convention (OECDMTC) as the ‘tax system for tax systems’, this article contributes a discussion base for a methodologically supported concept to disaggregation. Inspired by U.S. federal tax policy, finance theory and International Financial Reporting Standards (IFRS), the author takes the liberty of a progressive and unconventional approach. Its centrepiece is an iterative process of identifying, decomposing, and eliminating economic risk types utilizing findings from portfolio theory and option pricing.

Reuven Avi-Yonah, The 1923 Report and the International Tax Revolution

The centennial of the four economists’ Report on Double Taxation (1923) (League of Nations, Economic and Financial Commission, Report on Double Taxation Submitted to the Financial Committee by Professors Bruins, Einaudi, Seligman and Sir Josiah Stamp, E.F.S.73. F.19 (League

of Nations 1923) (the Report).) provides a good opportunity to reflect on the extent the international tax regime (ITR) that was founded on the Report has changed in the past decade. While on the surface the changes brought about by the Base Erosion and Profit Shifting (BEPS) project seem radical enough to consider them an ‘international tax revolution’, this article will argue that the principles developed in the Report are still influential a hundred years later.

Rita Szudoczky, Foreign Permanent Establishment Losses Under the Fundamental Freedoms: Does W AG Bring an End to a Rollercoaster Ride?

The article discusses the W AG case and the Court of Justice’s (the Court) previous cases on the cross-border deduction of foreign permanent establishment (PE) losses. The inconsistency of the case law is highlighted by demonstrating first the conflicts that remain in the case law regarding the status of final PE losses in the enterprise’s residence state, second, by the arbitrary use of comparability criteria by the Court when comparing the situation of domestic and foreign PEs. The article examines the consequences of the W AG decision with regard to the remaining questions on foreign PE losses, the potential impact on foreign subsidiary losses, and the damaging effect of the inconsistency of the Court’s methodology on the quality of its case law.

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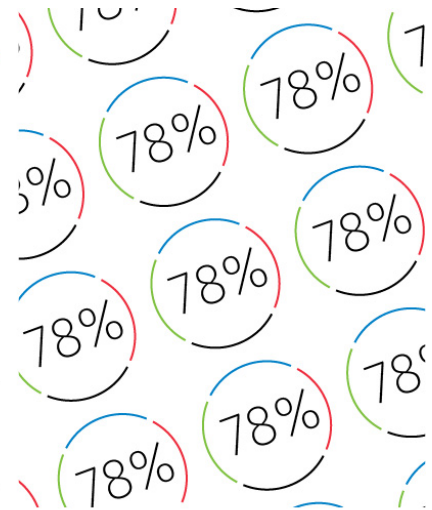
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