

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Wednesday, May 31st, 2023

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

Jeroen Lammers & Błażej Kuźniacki, *The EU Solidarity Contribution and a More Proportional Alternative: A Study Under EU and International Investment Law*

This paper reviews the EU Solidarity Contribution that was recently introduced by the Council Regulation on Emergency Intervention to Address High Energy Prices and proposes a more proportional alternative. It is argued that the legitimacy of the EU Solidarity Contribution might be disputed. The role that Member States have played in driving up energy prices by filling their natural gas storages much more than the EU's filling trajectory prescribes raises questions as to whether the EU Solidarity Contribution could be in conflict with the proportionality principle and whether all formal requirements of Article 122(1) Treaty on the Functioning of the European Union (TFEU) have been fulfilled. Furthermore, it is argued that the EU Solidarity Contribution may compromise protection of investments under international investment agreements (IIAs) as the current design might entail elements that violate fair and equitable treatment (FET). As an alternative to the EU Solidarity Contribution, the article proposes the following. First, a legal commitment should be introduced for fossil fuel companies to invest 100% of their realized excess profit for decarbonizing the economy under the threat of taxing away those excess profits in their entirety should it become apparent that the investments are not actually realized. Second, in lieu of the EU Solidarity Contribution, the incidental financial support measures for vulnerable households could be financed with the excess (windfall) revenue collected from Value Added Tax (VAT) and excise due to the high inflation in the EU in 2022.

Mark Ørberg & Louise Blichfeldt Fjord, *Enterprise Foundations as 'Non-profit Organizations' Under the EU Pillar Two Directive*

The authors explore the highly debated 15% minimum corporate tax rate better known as Pillar Two. More specifically, the focus is on 'public good enterprise foundations' and the potential applicability of the 'non-profit organization' definition in the EU Pillar Two Directive (2022/2523) from December 2022. A public good enterprise foundation typically controls one or more operating enterprises but can only distribute income to the public good purposes stipulated in the foundation charter. This 'distribution restraint' is supplemented by a 'disbursement duty' as the governing board must make distributions to the foundation's public good purposes. In some instances, the founder has – in addition to one or more public good purposes – explicitly stipulated

ownership of (specific) operating entities for the purpose of raising funds for the public good purposes in the charter. Consequently, whereas corporations make profit for their owners, the public good enterprise foundation's purpose is not to operate for profit-making but instead to operate for promotion of the public good purpose in the foundation charter. Illustrated by Danish public good enterprise foundations (DK: Erhvervsdrivende fonde), it is analysed whether public good enterprise foundations in Europe should be considered as 'non-profit organizations' excluded from the EU Pillar Two Directive despite owning (controlling) interests in operating entities that are conducting commercial business. The impact is significant as this would exclude the income and tax of the public good enterprise foundations (and their holding companies) when calculating the jurisdictional effective tax rate of the group and prevent the application of the income inclusion rule and the under taxed payment rule on their income. While self-owned foundations may be unfamiliar in some Member States, it will have significant impact on other Member States such as Denmark where some of the largest businesses (e.g., Maersk, Novo Nordisk, Carlsberg, and Lundbeck) are owned by such public good enterprise foundations. The authors argue they should be considered as non-profit organizations and therefore excluded entities under the Directive.

Stefano Castagna, *Comparing Comparability: A Study of EU, ISDS, and WTO Tax 'Like' Cases*

This article addresses the fundamental element of non-discrimination provisions, i.e., the comparability analysis. Comparisons of treatment between different persons, goods, services, and capital that are present within a specific market are necessary to ensure a level playing field for competition within a globalized world. Comparability analyses are often the deciding factor of cases, and thus a thorough understanding of how they work is essential for practitioners and academics alike. This kind of test is present within several types of international treaties and is often the subject of intense debate and discussion within case law. This is in spite of the fact that there are few cases in which comparability is assumed without any type of analysis whatsoever. This work performs a comparative analysis of comparability analyses throughout the different international regimens of the European Union, Investor-State Dispute System (ISDS), and World Trade Organization (WTO) within the context of tax disputes. For each, it considers the peculiarities of the system, analysing case law, and proposes a way to further the fairness and specificity of comparability analysis. It also proposes the possible implementation of a different comparability analysis based on the impact on value created by companies from a given measure.

Wojciech Morawski & Radim Bohá?, *In Dubio Pro Tributario/In Dubio Mitius as a Rule of Reasoning in Tax Law Interpretation*

The article is devoted to the principle of *in dubio pro tributario* (the principle of resolving doubts in favour of the taxpayer) as a rule of legal reasoning. The article points out its following two aspects: (1) the evidential aspect whereby it is concerned with resolving uncertainties regarding the proof of facts that are relevant to the determination of the amount of tax and (2) the interpretative aspect whereby it is used to resolve doubts related to the ambiguity of a legal regulation. The article focuses on the second aspect. The authors present how various legal systems have developed different ways of understanding this principle. They point out that it is not a universally applied principle in tax law and that it has been rejected in the case law of the Court of Justice of the European Union (CJEU).

Clifton Fleming, *Acknowledging (Celebrating? Regretting?) Sixty Years of Subpart F*

Deferral of home-country tax on the income of foreign subsidiary corporations produces the twin

evils of business and investment location distortion and profit shifting. In 1961, the Kennedy administration proposed the almost complete elimination of this type of deferral from the US income tax system. Because of strong opposition lobbying, the result was a political compromise commonly known as Subpart F. This article explains why Subpart F was largely a failure, in spite of its being copied to various degrees by the controlled foreign corporation (CFC) regimes of many developed countries. The article also explores the extent to which the 2017 Tax Cuts and Jobs Act (TCJA) has, or has not, cured Subpart F's failure to effectively address location distortion and profit shifting.

Ivan Lazarov, Case Law Trend: Withholding Taxation Under the Fundamental Freedoms

This paper critically analyses recent developments in the CJEU's case law regarding withholding taxes (WHT) and the constraints that fundamental freedoms impose on Member States in this area. It argues that both resident and non-resident taxpayers are universally comparable from a source state perspective, regardless of whether a double tax treaty (DTT) precludes a specific form of domestic taxation in the source state. Furthermore, it asserts that the net taxation obligation should be accessible not only as an ex-post refund but also as an ex-ante option for non-resident taxpayers to file a tax return under the same conditions as resident taxpayers.

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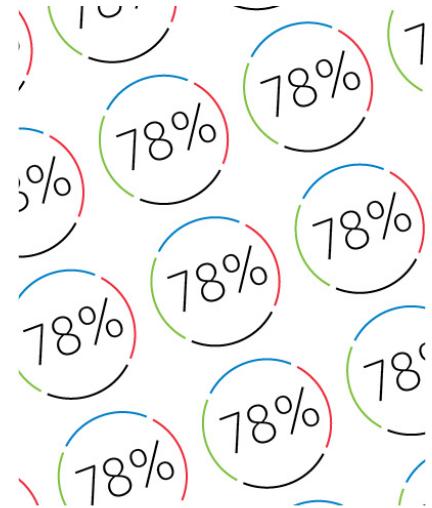
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