Kluwer International Tax Blog

The Contents of Highlights & Insights on European Taxation, Issue 6, 2024

Giorgio Beretta (Amsterdam Centre for Tax Law (ACTL) of the University of Amsterdam; Lund University) · Wednesday, July 3rd, 2024

Highlights & Insights on European Taxation

Please find below a selection of articles published this month (June 2024) in Highlights & Insights on European Taxation, plus one freely accessible article.

Highlights & Insights on European Taxation (H&I) is a publication by Wolters Kluwer Nederland BV.

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– ***Autoridade Tributária e Aduaneira*** **(C-312/22)**. EU Law precludes Portuguese taxation of interest income paid by a Swiss bank. Court of Justice

(comments by **Alexander Fortuin**) (*H&I* 2024/158)

The outcome of the case at hand will not be surprising to tax practitioners and scholars. The Court settled this case without an Advocate General's (AG) Opinion which already provided an indication thereof. Nevertheless, given that EU law continues to evolve, it is always good when cases and principles that seem clear cut are reconfirmed. Below, I will address some elements that I feel are worthy of note.

The free movement of capital is clearly applicable to the payment of interest on bonds and debt instruments. However, the freedom to provide services also applies to the services rendered by the Swiss bank. Given that the freedom to provide services does not apply to third countries, it is important to ascertain which freedom prevails. In this case, the provision of services is clearly secondary to the free movement of capital – so far so good for the taxpayer.

Under the Portuguese legislation, identical income is treated differently according to whether or not it is paid by a paying agent resident in Portugal or outside of Portugal (EU or Third Country). On that basis, the Court can simply conclude in Considerations 24-28 that a difference in treatment is present which makes cross-border investment less attractive. The situations of domestic and cross-border investment for an individual taxpayer are objectively comparable. No justification ground can be found present.

The next question is whether the Standstill clause could still remedy the infringement. The Court sees no indication that it can, which makes sense given that the interest income from bonds and debt instruments does not relate to direct investments. Bonds and debt instruments do not give a decisive influence on the underlying debtors/borrowers.

In summary, the case feels like a trip back to memory lane, which is not odd given that the fact pattern stems from 2005, i.e., almost twenty years ago.

Alexander Fortuin

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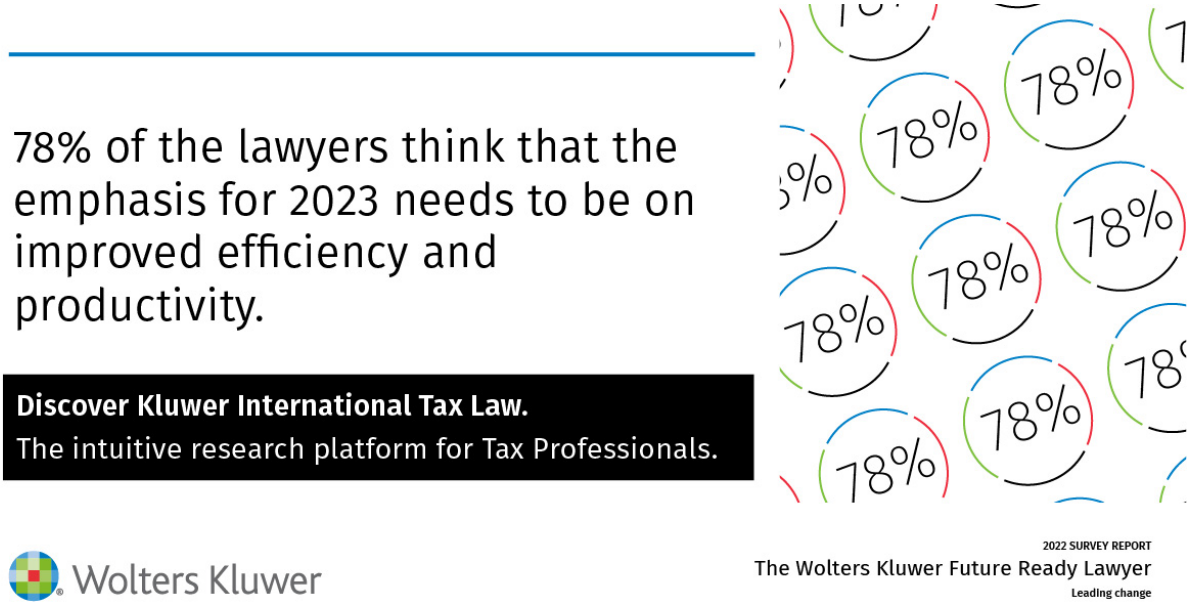

This entry was posted on Wednesday, July 3rd, 2024 at 10:00 am and is filed under Customs and Excise, Direct taxation, EU law, Indirect taxation
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