

Kluwer International Tax Blog

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Ana Paula Dourado (General Editor of Intertax) · Thursday, November 14th, 2024

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

Luc De Broe & Dieter Bettens, *Earth to OECD: Exercise Restraint in Marking a Home Office as PE*

One of the trends brought about by digitalization is teleworking. Increasingly, people are working from home instead of at their employer's office. This presents a number of challenges from a tax perspective. Amongst others, a point of debate is whether a home office can constitute a permanent establishment (PE) if an employee works from there. This article sets out the traditional legal framework to determine the existence of a PE on the basis of the OECD Model Convention. The focus lies on material PEs. Subsequently, this framework is applied to home offices. The article finds that the OECD's guidance on this point remains rather vague and that different countries have a different practice in recognizing home office PEs. Finally, the article makes several recommendations for possible clarifications on how the home office PE could be fit within the current legal framework of Articles 5 and 7 of the OECD Model Convention in light of the objectives of Article 7.

D.R. Post & A. Vvedenskaya, *Income Tax Considerations Pertaining to Decentralized Autonomous Organizations (DAOs)*

Over the last couple of years, an increasing number of organizations have arisen that are native to blockchain technology. Recent data shows that these decentralized autonomous organizations (DAOs) that are essentially 'living on the blockchain' are becoming increasingly popular. They are attracting substantial amounts of funds, operating both in the Web3 space and off-chain, and creating a significant source of novel tax issues. The existing tax academic research on DAOs is often limited to US domestic tax issues following from the DAO's legal treatment. This article outlines (part of) the existing income tax landscape for the DAOs and some of the arising income tax challenges. The focus is on the general principles of domestic and international income tax systems. The authors argue that the DAOs create fundamental and practical tax issues potentially leading to income taxed 'nowhere'. Existing tax frameworks cannot fully embed the DAOs and allow them to maintain their distinguishing features. The incorporation of DAOs does not necessarily solve the tax issues and even exacerbates them in certain cases. The authors call upon domestic and international legislators and policymakers to aim for more tax certainty for shareholders and further tax research of the DAOs.

Monique T. Malan, *The De Minimis Exclusions in the ATAD's CFC Rules: A Normative Analysis*

This study undertakes a normative analysis of the four de minimis exclusions in the controlled foreign company (CFC) rules of Article 7 of the European Union's (EU's) Anti-Tax Avoidance Directive (ATAD). In the EU, CFC legislation inherently restricts either the freedom of establishment or the free movement of capital. Case law from the Court of Justice of the European Union (CJEU) confirms that, for this restriction to be permissible, the scope of application of CFC legislation must be limited to only capture income from wholly artificial arrangements. First, this study evaluates the design of the four different de minimis exclusions in Article 7 against their stated objective to limit the administrative burden and compliance costs in order to ascertain their (relative) effectiveness. Second, the normative coherence of these provisions is evaluated in the context of the limited application – only to cases of abuse – of the CFC rules in the EU. The study finds that the de minimis exclusions pertaining to Model A (in Article 7(3)) are only effective to a limited extent in achieving their objective and could be redesigned to improve their effectiveness. Further, those pertaining to Model B (in Article 7(4)) are not normatively coherent in an EU context. Therefore, their inclusion cannot be justified, and it is recommended that they be deleted.

Till Scheider, *How Did Anti-tax Avoidance Measures Affect ETRs and Profit Shifting?*

This study examines the impact of anti-tax avoidance measures on the effective tax rates (ETR) and profit shifting activities of multinational enterprises (MNEs) across several key countries. It employs a two-pronged approach to evaluate the effectiveness of the base erosion and profit shifting (BEPS) Actions 3 and 13 in particular. First, the study analyses the generally accepted accounting principles (GAAP) ETRs of large listed firms. Second, the data from tax reconciliation is utilized to investigate ETR items. The findings show a significant increase in ETRs since 2017 which suggests a reduction in profit shifting due to implementing CbCR and controlled foreign company (CFC) rules. However, the effectiveness of these measures in terms of profit shifting varies across countries. France and Germany have demonstrated substantial improvements while Sweden has exhibited positive but volatile results. In contrast, Switzerland and the United Kingdom have presented outcomes that are more complex and nuanced. The study highlights the necessity for continuous fiscal vigilance and implementing adaptive tax policies in order to effectively combat tax avoidance.

Reuven Avi-Yonah, *Should the Arm's Length Standard Be Codified?*

There has been a recent proposal in the United States to codify the arm's length standard (ALS), which is currently only found in regulations as well as in US treaties. This article argues that this proposal is misguided because as long as the ALS is not codified, the US is free to adopt Pillar 1 without changing its domestic tax law by ratifying the Multilateral Tax Convention (MLC). Moreover, the history of the ALS from when it was first introduced in the 1932 US-France tax treaty shows that it was always intended to protect the interests of US multinationals at the expense of the fisc, and should be discarded.

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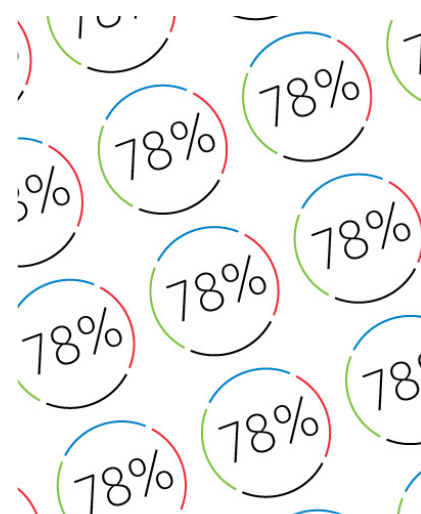
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