



European Tax Report Confédération Fiscale Européenne (CFE)

May 2011 / Edition 5

CFE EVENTS

CFE Amsterdam Conference on 24 June 2011 – The Impact of Changing Global Cross-Border Trade on the EU VAT System

CFE and the Dutch Association of Tax Advisers (NOB) are organising a joint full-day conference in Amsterdam on Friday 24 June 2011. The main purpose of the conference is to identify and remedy cross-border VAT issues in a pan-European, as well as global, environment. Placing the European VAT system in the centre of the discussion, the goal of the conference is to collect evidence of both double taxation and double non-taxation situations. In particular, the conference focuses on double (non) taxation in cross-border intra-Community trade (trade between EU countries) and cross border „extra-Community trade“ (trade between EU and third countries), caused by, or enabled through, disparities in the VAT and GST systems that are currently in place in most countries in the world. The conference is aimed at investigating what measures have already been taken and what measures are still to be taken in order to prevent double (non) taxation.

READ MORE (click to open):

Programme and registration: [EN](#)

Save the date: ECJ Seminar on 20 October 2011

CFE is organising a seminar at the European Court of Justice in Luxembourg on 20 October 2011. The one-day event will include the hearing of a case and discussions with judge Koen Lenaerts, an Advocate-General and a panel of distinguished European tax law experts. The number of participants is limited. An invitation containing the programme will be sent in the following weeks. More information can be obtained at the [CFE Brussels Office](#).

NEWS - DIRECT TAX

CFE comments on cross-border dividends taxation problems

On 4 May 2011, the CFE commented on the European Commission's public consultation on tax problems of cross-border dividend payments to individual and portfolio investors. For details, please consult the [CFE European Tax Report 4/2011](#).

READ MORE (click to open):

CFE response to consultation on dividends taxation: [EN](#)

Out for comments: OECD discussion draft on tax treaty issues related to emission permits trading

On 31 May 2011, the OECD Committee on Fiscal Affairs opened a public consultation on its preliminary analysis of the tax treaty issues related to the trading of emissions permits. The analysis discusses the extent to which different Articles of the Model Tax Convention could apply to profits or gains arising from such trading. The effort to limit emissions related to global warming has led to an increased use and interest in emissions trading programmes as a mechanism to achieve reductions in greenhouse gas emissions in an economically efficient manner. Interested parties can send their comments on this discussion draft by 30 October 2011.

READ MORE (click to open):

OECD news release: [EN](#) [FR](#)

Discussion draft: [EN](#)

Russian transfer pricing rules to move closer to OECD standards

The OECD welcomed the recent proposal of new

draft transfer pricing legislation by the Russian Federation's Ministry of Finance. The proposed draft legislation would make the Russian Federation's transfer pricing rules largely consistent with the internationally accepted OECD standards, thereby providing more legal certainty, a reduced risk of double taxation and a more investment friendly business environment for multinational enterprises. Apart from greater convergence with the OECD standards, the draft new transfer pricing law published on 4 May 2011 aims at improving the efficiency of tax examinations and reducing the possibilities for tax avoidance. If adopted by the State Duma during 2011, the new transfer pricing law will come into effect in January 2012. The Russian Federation is currently negotiating to become a member of the OECD, for which compliance with the international tax standards is a key element in its accession negotiations.

READ MORE (click to open):

OECD news release: [EN](#) [RU](#)

OECD reports rise in average tax burden on workers' earnings

As an OECD report published on 11 May 2011 reveals, the average tax and social security burdens on employment incomes rose in most countries in 2010, reversing a trend toward declining tax burdens seen in previous years. The OECD's annual publication "Taxing Wages" shows that tax burdens rose in 22 of the 34 OECD countries. The Netherlands, Spain and Iceland were among the countries experiencing significant increases, while Denmark, Greece, Germany and Hungary were among those showing the biggest drops.

Taxes on wages, including both employer and employee social security charges, are a key factor in companies' hiring decisions and individuals' incentives to work. To restore public finances without endangering growth, the OECD recommends that governments consider shifting the tax mix away from direct to indirect taxes (e.g. by increasing recurrent taxes on immovable property) and broaden the VAT and personal income tax base by eliminating tax expenditures, rather than increasing personal income tax rates and social security charges.

The report calculates the difference between the total cost to an employer of employing someone and that person's net take-home pay, including child benefits

and other family benefits that are generally available to households. The "tax wedge" is derived as the total taxes paid by employees and employers net of cash transfers received divided by the employer's total payroll costs.

In 2010, France, Belgium and Italy were the highest-tax countries for one-earner married couples with two children earning the average wage, with tax wedges of 42.1% in France, 39.6% in Belgium and 37.2% in Italy. The average for OECD countries was 24.8%. Belgium, France and Germany had the highest tax wedges for single workers without children on average wages, at 55.4%, 49.3% and 49.1% respectively. The average for OECD countries was 34.9%. In Ireland and Greece, the decrease of the tax wedge was due to decreases in the average wage.

Information on "non-tax compulsory payments" (meaning payments that do not have to be made to the state but to a private fund or insurance company) is included in the [OECD Tax Database](#).

Between 2000 and 2009, on average across the OECD, tax burdens fell across all income levels, particularly due to personal income tax cuts; some countries have also decreased employer social security contributions. On average, tax cuts implemented over this period favour households with children most, and lower earners more than higher earners.

READ MORE (click to open):

OECD news release: [EN](#) [FR](#)

Data in Excel sheet: [EN](#)

OECD „Taxing wages“ website: [EN](#)

OECD paper on tax management of repayments

On 23 May 2011, the OECD published a report which is the result of research into the approaches and experiences of ten OECD countries on the management of tax repayments and how they balance the taxpayers' expectations with their responsibility to prevent fraud and error. The countries surveyed in the 100 page document are Australia, Canada, France, Ireland, Korea, the Netherlands, Spain, Turkey, the UK and the USA.

READ MORE (click to open):

OECD paper: [EN](#)

NEWS - DIRECT TAX

Commission requests Belgium to amend discriminatory tax provisions on donations of shares

On 19 May 2011, the European Commission has requested Belgium to amend its tax legislation on donations of shares to comply with its obligations under the EEA Agreement. The legislation in question treats less favourably donations of shares of companies if their seat of effective management is located in Norway, Iceland or Liechtenstein as compared to donations of shares of equivalent companies based in EU member states.

Under Walloon tax law, donation of shares of companies are subject to a higher tax rate if their seat of effective management is located in an EEA country that is no EU country. Such provisions could discourage EU investors from donating shares of companies based in Norway, Iceland or Liechtenstein.

In addition, Brussels region tax legislation provides for a higher tax (normal tax rate plus interest) if the seat of effective management of the company is transferred to an EEA country outside the EU within 5 years following the date of the donation. The Commission is of the opinion that this represents a restriction on the transfer of the company's seat to an EEA country.

The Commission does not see a justification for these restrictions. The requests take the form of two reasoned opinions (second step of EU infringement proceedings and the last step before bringing a member state before Court).

READ MORE (click to open):

Press release: [EN](#) [FR](#) [DE](#) [NL](#)

Commission requests UK to further amend its treatment of controlled foreign corporations

On 19 May 2011, the European Commission has requested the UK to amend its legislation to better take into account the rulings of the ECJ on the tax treatment of controlled foreign corporations (CFCs). Despite the rulings in "Cadbury Schweppes" and "Test Claimants in the CFC and Dividend GLO", the Commission criticised that the UK is still not complying with EU law on freedom of establishment and free movement of capital. In particular, the UK conti-

nues to tax in the UK profits of subsidiaries established in the EU or in member states of the EEA. Under EU law, profits of CFCs - which are subsidiaries of companies established in EU member states or in EEA countries - should not be subject to additional taxation in the country of the parent company if the subsidiaries are engaged in genuine economic activities.

The new provisions allow a UK taxpayer to reduce the taxable basis of a UK-owned CFC under certain restrictive conditions. However, they fail to exclude from the CFC regime all subsidiaries established in EU/EEA member states which are not purely artificial and are not involved in profit-shifting transactions. The Commission considers that the UK provisions may lead, in certain cases, to additional taxation of profits made by subsidiaries engaged in genuine economic activities in other EU member states or EEA countries.

The Commission's request takes the form of a reasoned opinion (second step of EU infringement proceedings) saying that the measures put in place by the UK are not a sufficient response to the mentioned ECJ decisions as a discriminatory restriction of the anti-abuse CFC regime persists.

READ MORE (click to open):

Press release: [EN](#) [FR](#) [DE](#)

ECJ case search (see: Cadbury Schweppes, C-196/04 and Test Claimants in the CFC and Dividend GLO, C-201/05): [Various languages](#)

Commission refers France to Court over dividend tax discrimination against foreign pension and investment funds

On 19 May 2011, the European Commission has decided to refer France to the EU Court of Justice for discriminatory taxation of foreign pension and investment funds. France does not grant an exemption from its of 25% withholding tax (or 15% in case of bilateral treaties) on dividends distributed by French companies to pension and investment funds established in the EU and in the EEA whereas it does grant such an exemption if the pension and investment funds are established in France. Although in 2010, France introduced new legislative provisions under which the income from shares distributed to non-profit organisations (including pension funds) established in France or not, are taxed at a flat rate of 15%, it seems that these changes have not been

NEWS - DIRECT TAX

applied in practice in the absence of more detailed administrative implementing rules.

The Commission considers that the described difference in treatment limits the free movement of capital in Art 63 TFEU and Art 40 of the EEA Agreement. As a result, pension and investment funds based in other EU countries and in the EEA are placed at a disadvantage compared to their French-based counterparts and French customers are therefore liable to enjoy less choice of pension and investment funds. A reasoned opinion had been sent to France in March 2010 (see [CFE European Tax Report 3/2010](#), p.4).

READ MORE (click to open):

Press release: [EN](#) [FR](#) [DE](#)

Council adopts conclusions on Transfer Pricing Forum proposals

On 17 May 2011, the Ecofin Council endorsed the guidelines on low value adding intra-group services and welcomed the report on potential approaches for non-EU triangular cases, both proposed by the EU joint Transfer Pricing Forum. The Council also welcomed the communication from the Commission of 25 January 2011 (see [CFE European Tax Report 1/2011](#), p.4) and the extension of the Transfer Pricing Forum's mandate.

READ MORE (click to open):

Council press release p.23: [EN](#)

Council conclusions: [EN](#) [FR](#) [DE](#)

Commission communication of 25 January 2011: [EN](#) [FR](#) [DE](#)

Council reserved towards Commission communication on removing cross-border tax obstacles for EU citizens

On 17 May 2011, the Ecofin Council adopted its conclusions on the European Commission's com-

munication of 20 December 2010 expressing the Commission's intention to remove tax obstacles for EU citizens (see [CFE European Tax Report 1/2011](#), p.2). The Council appears to be reserved, underlining the sovereignty of member states and demanding that prior to any legislative initiative of the Commission, a detailed impact assessment would have to be made to demonstrate the added value of the intended measure.

READ MORE (click to open):

Council press release, p.23: [EN](#)

Council conclusions: [EN](#) [FR](#) [DE](#)

Discussion over changes to the Parent-Subsidiary Directive recast

Early this year, the European Commission proposed a consolidation of the existing EU Parent-Subsidiary Directive not containing substantial changes. This proposal was discussed at the Ecofin Council of 17 May 2011 which made only minor changes.

Meanwhile, in the European Parliament, German Green MEP Sven Giegold has drafted a report on the Directive recast, criticising multinational groups of treaty shopping to the disadvantage of the society, depriving member states from revenues badly needed to consolidate their budgets and achieve social objectives. Giegold proposed introducing a minimum taxation of 25% on inbound profits of subsidiaries if there is no outbound taxation of these profits in the source country. The draft report also calls for a CC-CTB without any optionality for cross-border groups of companies and a minimum tax rate. After having been on the agenda of the EP's ECON Committee on 24 May 2011, the draft report is scheduled for vote in the ECON on 19 September 2011 and in the plenary session in October 2011.

The Parliament will have no veto in the legislative procedure.

READ MORE (click to open):

Commission proposal COM 2010(784): [EN](#) [FR](#) [DE](#)

Council press release, see p.23: [EN](#)

Council amendments: [EN](#) [FR](#) [DE](#)

Draft report by MEP Giegold: [EN](#) [FR](#) [DE](#)

NEWS - INDIRECT TAX

CFE issues comprehensive Opinion Statement on the VAT Green Paper

On 31 May 2011, the CFE submitted its Opinion Statement on the future of the EU VAT system to the European Commission, in response to a public consultation on this issue opened on 1 December 2011 ("VAT Green Paper"), see [European Tax Report 9/2010](#). The 43-page paper has been prepared by the CFE Fiscal Committee. To be able to include a maximum of views and expertise and to underline CFE's intention to contribute to an open discussion on the best way of regulating VAT, the paper contains diverging views on some of the 33 questions posed by the Commission. Coordinators of the CFE response were Christian Amand, Gottfried Schellmann and Jeremy Woolf.

READ MORE (click to open):

CFE response to a public consultation on the VAT Green Paper: [EN](#)

Commission warns of VAT number dealers

Due to recent unsolicited offers made to companies by VAT number dealers, the Commission has warned against such offers stressing that only tax administrations can issue VAT numbers. The proposals from these dealers have the appearance of an official EU document and require an advance payment. The Commission advises recipients of such suspicious messages to consult their competent tax authority.

Commission refers Spain to Court over reduced VAT rate for medical equipment

On 19 May 2011, the European Commission decided to refer Spain to the EU Court of Justice concerning its application of a reduced VAT rate to general medical equipment, appliances to alleviate animals' physical disabilities and substances used in the production of medicines arguing that these goods do not qualify for a reduced VAT according to the rules laid down in the VAT Directive and the application of a reduced VAT rate may distort competition within the EU. A reasoned opinion had been sent to Spain in November 2010 (see [CFE European Tax Report 9/2010](#), p.7).

READ MORE (click to open):

Press release: [EN](#) [FR](#) [DE](#) [ES](#)

Commission demands that Italy comply with the provisions of the VAT Directive on exemptions for ships

On 19 May 2011, the European Commission has sent a reasoned opinion to Italy asking the country to amend its legislation to bring it into line with the rules on exemptions for ships laid down in the VAT Directive. The Directive provides for exemptions from VAT on supplies of goods for fuelling and provisioning vessels used for navigation on the high seas and on certain services related to such vessels. Italian legislation extends this exemption to inland navigation vessels. Contrary to the Directive, it also excludes some services that should be covered and exempts from VAT vessels intended for public bodies. The Commission stresses that exemptions should, in principle, be applied uniformly as otherwise a disparity between member states is created, because the share of VAT that goes into the EU budget (known as 'own resources') will not then be collected.

READ MORE (click to open):

Press release: [EN](#) [FR](#) [DE](#) [IT](#)

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

Updated OECD Multilateral Tax Convention now open to all countries

The OECD announced that since 1 June 2011, the Multilateral Convention on Mutual Administrative Assistance in Tax Matters is open to all countries, allowing them to take part in cross-border tax co-operation and information sharing. The updated Convention, which incorporates internationally agreed standards for exchange of information in tax matters, is the most comprehensive multilateral instrument available for tax co-operation. The OECD stresses that, like the original 1988 Convention, the update provides a wide range of tools for cross-border tax co-operation including exchange of information, multilateral simultaneous tax examinations, service of documents and

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

cross-border assistance in tax collection, while imposing extensive safeguards to protect the confidentiality of the information exchanged. In the past year, 20 countries have signed the amended Convention. Sweden and Poland are the most recent countries to approve the amended Convention.

READ MORE *(click to open)*:

News release: [EN](#) [FR](#)

Text of the Convention: [EN](#) [FR](#) [ES](#)

In return, AEOs can benefit from customs simplifications.

On 13 May 2011, the European Commission updated the self-assessment for AEOs and the explanatory notes to take account of mutual recognition possibilities. Since 24 May 2011, the mutual recognition of Authorised Economic Operators (AEOs) between the EU and Japan is effective.

READ MORE *(click to open)*:

Press release: Mutual AEO recognition between EU and Japan: [EN](#) [FR](#) [DE](#)

Read about AEOs on the Commission website: [EN](#) [FR](#) [DE](#)

European Customs Information Portal: [EN](#)

CUSTOMS

Commission asks Belgium to review opening hours and fees of customs offices

On 19 May 2011, the European Commission has asked Belgium to bring its customs legislation in accordance with the EU and EEA customs rules. This concerns insufficient customs office opening hours and fees for services by the customs authorities which have been found excessive, being comparable to charges that have an equivalent effect to customs duties which is prohibited. The request takes the form of a reasoned opinion, the second stage in the infringement procedure and the last step before referring Belgium to the ECJ (Art 258 TFEU).

READ MORE *(click to open)*:

Press release: [EN](#) [FR](#) [DE](#) [NL](#)

Commission publishes new consolidated version of explanatory notes to combined nomenclature

When declared to customs in the EU, goods must generally be classified according to the combined nomenclature or CN. Imported and exported goods have to be declared stating under which subheading of the nomenclature they fall. This determines which rate of customs duty applies and how the goods are treated for statistical purposes. An updated version of the Annex I to the CN Regulation is published as a Commission Regulation every year. Such updates take into account any changes that have been agreed at international level.

The EU Official Journal of 6 May 2011 contains a new consolidated version of the explanatory notes to the CN. These notes are considered to be an important aid for interpreting the scope of the various tariff headings but do not have legally binding force.

READ MORE *(click to open)*:

EU Official Journal (available in all EU languages): [EN](#) [FR](#) [DE](#)

Information on the Combined nomenclature on the DG TaxUD website: [EN](#) [FR](#) [DE](#)

News concerning Authorised Economic Operators

For customs purposes, the status of Authorised Economic Operator (AEO) can be granted by member states to an economic operator that ensures compliance, appropriate record-keeping, financial solvency and, where relevant, security and safety standards.

COMPANY LAW

No unanimity in Council for European Private Company

The Competitiveness Council of 30-31 May 2011 failed to reach the required unanimity to adopt the Regulation creating the legal form of European Private Company (Societas Privata Europaea or short SPE), which would be an unlisted limited liability company. The proposal for a European Private Company was made by the Commission as early as in June 2008. The Parliament had backed the (amended) proposal in March 2009.

READ MORE (click to open):

Council press release, p.9: [EN](#)

ACCOUNTING

Council agrees on limited exemption of “micro-entities” from EU accounting requirements

The Competitiveness Council of 30-31 May 2011 reached a political compromise on changes to the 4th Company Law Directive (Accounting Directive) 78/660/EEC which would create a new category of “micro-entities” that would be exempted from some of the obligations under the Accounting Directive. Micro-entities would be limited liability companies with an annual net turnover of not more than 500,000 €, a balance sheet total of not more than 250,000 € and/or not more than ten employees (two of these three criteria are to be met). According to the compromise text, micro-entities would no longer need to publish their annual accounts as long as the information is filed with a public authority and transmitted to a business register. Furthermore, they would no longer have to include certain accruals in their annual accounts.

Compared to the initial Commission proposal of 26 February 2009 which was heavily promoted by the “High Level Group of Independent Stakeholders on Administrative Burdens” chaired by German politician Edmund Stoiber and supported by the rapporteur in the EP, Klaus-Heiner Lehne (EPP, Germany), the agreed changes of the Council are modest. The initial proposal did not only use turnover and balance sheet

total thresholds which were twice as high; its intention was to completely exempt micro-entities from EU accounting rules. This was criticised by organisations of tax advisers, accountants and SMEs who argued that the expected simplifications for small businesses were largely overestimated as micro-entities would still have to file the information for other purposes like statistics and tax.

Austria, Belgium, France and Luxembourg were reported to be against the initial proposal.

In his reaction, Klaus-Heiner Lehne said the EP would insist on a second reading. The EP had voted on 10 March 2010 in favour of the Commission proposal (see CFE European Tax Reports [2/2010](#), p.6 and [3/2010](#), p.7).

READ MORE (click to open):

Compromise text: [EN](#) [FR](#) [DE](#)

Competitiveness Council press release: [EN](#)

Council conclusions on the review of the “Small Businesses Act”: [EN](#)

Council conclusions on “Smart Regulation”: [EN](#)

OTHER TAX POLICY

Current OECD tax agenda

In April 2011, the OECD has released an overview on its current activities in the area of taxation. Among the priorities listed are taxes as a means to improve economic performance, to promote development and to fight corruption and financial crime. Other priorities are offshore voluntary disclosure of illegal tax schemes, mutual administrative assistance, VAT, emission permits trading, tax risks from bank losses and finally tax relief and compliance enhancement.

READ MORE (click to open):

OECD tax agenda: [EN](#)

OTHER TAX POLICY

Council examines reports on Financial Sector Taxation

The Ecofin Council of 17 May 2011 took note of an interim report prepared by the Council presidency. The report examines the options of a Financial Transaction Tax and a Financial Activities Tax. Another report presented was an overview of existing bank taxes in EU member states. The Ecofin Council asked the Commission to present their impact assessment on ways of taxing the financial sector before this summer.

READ MORE *(click to open)*:

Council press release, p.11: [EN](#)

Council presidency interim report on financial sector taxes: [EN](#)

Overview of member states' systems of bank taxes: [EN](#)

EP Financial Crisis Committee for Financial Transaction Tax and more EU competences

The European Parliament's ad-hoc Committee on the Financial, Economic and Social Crisis (CRIS) adopted a non-legislative report on 30 May 2011 demanding that more competences should be shifted to the EU in areas such as energy and transport and more spending should be done at EU level which would increase the EU's competitiveness. The report also proposes introducing Euro-bonds and a Financial Transactions Tax (FTT) and touches on other tax issues like the CCCTB and administrative cooperation. The MEPs believe that the revenue from a FTT should flow into the EU budget and could help to achieve the "millennium" development goals and finance measures to fight climate change.

The report which was drafted by French MEP Pervenche Berès (S&D) was approved with 32 votes in favour, 9 against and 2 abstentions. The plenary vote is scheduled in July 2011, followed by the dissolution of the CRIS Committee.

READ MORE *(click to open)*:

EP press release: [EN](#)

Compromise amendments (final text not yet available online): [EN](#)

EVENTS

VAT Green Paper Conference in Milan

On 6 May 2011, the European Commission held a one-day conference in Milan on the Green Paper on the future of VAT in which Gottfried Schellmann, chairman of the CFE Fiscal Committee, was a panellist. The presentations have been made available on the Commission's website. Concerning the VAT Green Paper, see also the related article in this European Tax Report.

READ MORE *(click to open)*:

Programme: [EN](#)

Presentations and speeches: [EN](#)

Beyond discrimination: the role of the ECJ case-law in the international division of taxing powers in direct taxation

On 19 and 20 May 2011, the Max Planck Institute for Tax Law and Public Finance, the PWC Tax Law Chair of the University of Louvain (UCL) and the Tax Institute of the University of Liège organised a joint conference in Brussels. The event was chaired by tax professors Isabelle Richelle, Edoardo Traversa and Wolfgang Schön. The title of the conference referred to the sea change in the ECJ's case law, which today is giving more weight to the member states' revenue interests, asking whether discrimination was still an adequate and decisive criterion or whether other criteria were needed.

Alfredo García Prats from the University of Valencia described the concepts of source, residence and citizenship in the ECJ's case law which have been playing a particular role since the 1995 landmark judg-

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ment Schumacker (C-279/93) which García Prats called an essentially “modern” case that would not be decided differently today. The problem of lacking coherence in EU tax law could neither be resolved by the ECJ nor by one member state alone; it would have to be done jointly by member states through coordination. He advocated that the proportionality principle should play a more important role in the ECJ case law, applying the notion of “ability to pay” in the treatment of losses generally.

Following him, Marco Greggi from the University of Ferrara examined the role of limited tax liability in EU Tax Law. Concerning the move of the ECJ from an ambitious case law in the 1990s to a cautious case law in the past five or six years, he noted that this coincided with a slowing in the pace of the political European integration process. Greggi summarised the Schumacker judgment and following judgments on cases of limited tax liability. After going back in time to identify the Schumacker rationale in principles of Roman law, Greggi demonstrated that the concept of residence is flexible according to the economic situation in the case at issue and that other factors could grant a non-resident a resident-like status. Consistently with Schumacker, in the case “D” (C-376/03), the ECJ accepted a rule in Dutch law according to which non-resident taxpayers could only qualify for a tax allowance if a majority of their wealth was situated in the Netherlands. The judgment “Centro di Musicologia” (C-386/04) followed this approach for legal bodies but justifiable unequal treatment and prohibited discrimination for reasons of being established in another member state had to be distinguished carefully.

Daniel Gutmann from the Sorbonne in Paris examined how EU law could help avoiding double taxation, pleading for a pragmatic approach as no legislative action could currently be expected from the EU. Regarding the question whether double taxation was an infringement of EU law, Gutmann noted that the TFEU Treaty does not expressly mention double taxation (like Art. 293 EC did before) but considered that the internal market principle and the loyalty principle (Art.26 TFEU and 4(3) EU) could still serve as a basis to eliminate double taxation. This would not even force the ECJ to formally change its case law. Gutmann concluded that often, none of the involved member states are to be blamed for exercising their sovereign taxing powers in a non-coordinated way; this however did not apply where the legislation of a country could be considered “internally inconsistent”, referring to an approach in tax literature. This would be the case where the approach chosen by one country would lead to double taxation if it was adopted by all countries, similar to the idea of Immanuel

Kant’s categorical imperative in moral philosophy. If indeed none of the states concerned could be found responsible for the double taxation, the best solution would be arbitration, allowing member states to find a solution for themselves and applying international practices only if no agreement can be reached.

In his speech on transfer pricing an EU law, Wolfgang Schön (Max Planck Institute) criticised the application of the arm’s length principle to intra-group transactions. In the case-law of the ECJ, he observed a gradual acceptance of the arm’s length principle from the 2002 judgment Lankhorst/Hohorst (C-324/00) via the case C-524/04, (Test Claimants in the Thin Cap Group Litigation) to the 2010 judgment SGI (C-311/08). Despite being widely accepted, the arm’s length principle was far from economic reality as it ignored the fact that intra-group transactions follow completely different reasons than transactions between not-interrelated companies. Consequently, in the US, the arm’s length principle was not used between related parties. In the EU, the allocation of profits between related companies would have to be applied in accordance with Art.49 TFEU.

Isabelle Richelle (University of Liège) reported on cross-border loss compensation and commented on the ECJ’s case-law, first explaining the two concepts of worldwide and territorial taxation and the emergence of cross-border loss compensation as a consequence of the worldwide taxation principle and the “wherewithal to pay” concept. To avoid double loss offsetting, the tax credit in the state of residence is reduced when the state of source allows loss carry-forward. A problem were “exemptions” from worldwide taxation as these exemptions were not clearly defined. Territorial taxation in exempt situations could lead to double loss compensation, therefore “recapture” clauses were required. Isabelle Richelle then analysed the ECJ case law citing the cases AMID (C-141/99), Marks & Spencer (C-446/03), Lidl Belgium (C-414/06) and Krankenhaus Wannsee (C-157/07), extracting the principle that losses must be set off at least once but only if there is no compensation available in the state of source; this loss-offsetting must be effective; finally, the state of residence does not have to grant loss compensation where the state of source does not grant compensation even in profit cases. She questioned whether the ECJ had a misconception of the exemption concept, seeing it as an “allocative” rule.

Tim Hackemann (Ernst & Young, Germany) gave a presentation on group taxation in the EU, explaining first the situation in Germany, the TFEU Treaty provisions and ECJ case law on inbound and outbound group taxation (cases Marks & Spencer (C-446/03), X Holding (C-337/08), Oy AA (C-231/05) and Papillon (C-418/07)) before turning to the OECD Model double tax treaty non-discrimination clause. Finally, he addressed the recent CCCTB proposal of the

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European Commission. His conclusions were that restrictions to cross-border grouping are justified to preserve the allocation of the power to impose taxes between member states but EU law requires deductibility of final losses and proportionate restrictions in inbound situations. As the proposed CCCTB has its own rules on apportionment of the consolidated tax base, the tax allocation to countries would no longer come into play. However, as the CCCTB would be optional, national group taxation provisions would remain important.

Among the other speakers of the conference were Violeta Ruiz Almendral (University Carlos III of Madrid), Edoardo Traversa (UCL, University of Louvain/Belgium) and Ekkehart Reimer (University of Heidelberg). A second part of the conference dealt particularly with the impact of EU direct tax law on the situation in Belgium.

IMPRESSUM



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