European Tax Report
European Professional Law Report
December 2013

CFE NEWS

SAVE THE DATE - CFE FORUM 2014 “Policies for a sustainable tax future”

Thursday 27 March 2014, in Brussels

As Europe is struggling with cross-border tax evasion and tax avoidance, it seems time to put an end to blaming multinationals and financial markets and start moving forward with a well-designed plan to tackle the problem at the EU and global level. It is vital that the right questions are addressed in order to close the existing gaps, mismatches and loopholes of the EU tax systems and to find alternative sources of revenue. In doing so, the EU has to align with the other key global players to preserve its competitiveness in the field of taxation. By addressing the OECD´s “Base Erosion and Profit Shifting” (BEPS) Action Plan and the EU proposal for a Financial Transaction Tax, the CFE Forum 2014 will consider two blueprints which will have a major impact on treasuries, and, most of all, on businesses.

More details about programme and registration will follow shortly.

READ MORE *(click to open):*

CFE website: **EN**

DIRECT TAX

CFE comments on ECJ´s Ettwein judgment on personal tax benefits in Germany for Swiss residents

On 13 December 2013, the CFE published Opinion Statement ECF-CF 4/2013 on the judgment of the European Court of Justice in the case Katja Ettwein, C-425/11 on the availability of the German income splitting regime for German citizens working in the Germany but living in Switzerland. In its judgment of 28 February 2013, the ECJ found that the Agreement between Switzerland and the European Community on the free movement of persons precludes the refusal of “splitting” on the sole ground that the taxpayers’ residence is in Switzerland. The CFE´s ECJ Task Force who prepared the Opinion Statement welcomed the judgment.

READ MORE *(click to open):*

CFE opinion statement: **EN**

ECJ rules on discriminatory nature of Dutch car and motorbike registration tax for imported vehicles

On 19 December 2013, the European Court of Justice gave its judgment in case C-437/12 on the question whether the obligation in Dutch law to pay passenger car and motorcycle tax (“BPM”) when registering in the Netherlands a used car from another member state was discriminatory. BPM only has to be paid when a passenger car or motorcycle is first registered in the Netherlands. According to the ECJ, such tax is discriminatory if and in so far as the amount of that tax levied on used imported vehicles upon their registration in the Netherlands exceeds the lowest residual amount of BPM incorporated into the value of similar used vehicles already registered in the Netherlands.

READ MORE *(click to open):*

Judgment: **All EU languages**

DIRECT TAX

Swiss government adopts negotiating mandate on savings tax agreement with the EU

On 18 December 2013, the Swiss Bundesrat (federal government) adopted a mandate for negotiations with the European Commission on the revision of the EU-Swiss savings tax agreement. The negotiations are set to start at the beginning of 2014. Reportedly, the revised agreement would allow for a choice of taxpayers between voluntary disclosure and a withholding tax. In the gridlocked discussion in the EU Council, Austria and Luxembourg demand that Switzerland and four small non-EU countries (Andorra, Liechtenstein, Monaco and San Marino) agree to similar standards on information exchange as the EU before the two countries would lift their veto to the revision of the Savings Tax Directive proposed in 2008.

INDIRECT TAX

EU Financial Transaction Tax is legal: Commission lawyers contradict EU Council

In early December 2013, following the leakage of an opinion of the EU Council´s legal services in September 2013, according to which the European Commission´s proposal for an EU Financial Transactions Tax by way of enhanced cooperation of 11 member states was contrary to EU law, an opinion of the European Commission´s legal services was leaked, stating that the proposal was in fact in conformity both with customary international law and the EU Treaties and does not lead to any inadmissible extraterritorial effects of the FTT. The opinion refers to the arguments brought forward by the Council´s legal services, dismissing them.

As the Commission´s document states, "The Opinion of the Council (legal service) is based almost entirely on the proposition that a state has no tax competence in circumstances where another state has a „more relevant interest". There is no such principle in public international law generally or in the law relating to tax competence in particular,". According to the Commission, the FTT provision "has no impact on the freedom of non-participating member states to exercise their own tax competence in whatever manner they see fit," and that it "does not give rise to discrimination among financial institutions nor to distortion of competition between such institutions in the EU, since it merely concerns the allocation of taxing powers." A disparity between different national tax regimes would not result in discrimination.

Commission reports on functioning of Excise Movement and Control System

On 3 December 2013, the European Commission adopted a report on the functioning of the Excise Movement and Control System (EMCS). From the information gathered through surveys of stakeholders and interested parties, the Commission concludes that the current rules are working satisfactorily. The Commission names the linkage of EMCS with customs applications and more standardisation of the fall-back documents as improvements to the current system it intends to proceed with. It announces a more comprehensive review of the EU excise system in 2015, possibly in the context of a legislative initiative.

READ MORE *(click to open)*:

Report COM(2013)850: **All EU languages**

Staff working document: **EN**

Commission reports on VAT and excise duty exemption for persons travelling into the EU

On 3 December 2013, the European Commission published its report on the exemption from VAT and excise duty of goods imported by persons travelling from third countries to the EU. To gather the information on which the report is based, the Commission sent questionnaires to the member states. The Commission concludes that theres is no convincing case for legislative action at this stage and will rather endeavour to tackle the issues identified by a minority of member states via Committee procedures, exchange of best practice and practical administrative guidelines and tools.

READ MORE *(click to open)*:

Report COM(2013)849: **All EU languages**

INDIRECT TAX

ECJ: Failure to export goods within a 3-months time limit may not lead to the loss of VAT exemption

On 19 December 2013, the European Court of Justice ruled in preliminary ruling case C 563/12, BDV Hungary Trading, upon reference by the Hungarian Kúria that national legislation, in the context of a supply for export, may not provide for the definitive loss for the taxable person of the right to exemption in relation to a supply for the sole reason that the goods intended to be exported from the EU have not left the territory of the EU within a fixed period of three months or 90 days following the date of supply.

READ MORE *(click to open):*

Judgment: **All EU languages**

ECJ: "Green fee" to be paid by non-members of a golf club must be VAT-exempt

On 19 December 2013, the European Court of Justice delivered its judgment in preliminary ruling case C-495/12, West Dorset Golf Club, upon reference of the UK´s Upper Tribunal (Tax and Chancery Chamber) on the exemption from value added tax (VAT) of the "green fee" paid by players who are not members of that club. According to the ECJ, a supply of services consisting in the grant, by a non-profit-making body managing a golf course and offering a membership scheme, of the right to use that golf course to visiting non-members of that body, is covered by the exemptions granted by the VAT Directive. A member state may not decide to make such service VAT-taxable.

READ MORE *(click to open):*

Judgment: **All EU languages**

ECJ rules on the taxable amount for VAT on TV advertising

On 5 December 2013, the European Court of Justice rendered its judgment in joined cases, C-618/11, C-637/11 and C-659/11, TVI, upon reference by the Portuguese Supremo Tribunal Administrativo, that the Portuguese 'screening tax' levied for the benefit of the cinematographic and audiovisual arts must be included when calculating the taxable amount of the VAT payable on commercial advertising.

READ MORE *(click to open):*

Judgment and Opinion of Advocate-General: **All EU languages**

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

EP votes in favour of extended automatic information exchange

On 11 December 2013, the European Parliament voted in favour of the European Commission´s proposal of June 2013 to amend the Directive on Administrative Cooperation in Tax Matters 2011/16/EU, extending the categories of information to be exchanged automatically (see **CFE European Tax & Professional Law Reports June 2013**).

In the plenary vote, the recommendation of the EP´s Economic and Monetary Affairs Committee' that the "availability principle", whereby a country need only exchange income data which it itself decides to collect, should be maintained.

The MEPs suggest that the automatic information exchange regime should become part of the global model based on the standard currently developed by the OECD. The Directive should also take account of the implementation of FATCA. To ensure coherence of automatic information exchange agreements, the EP is asking the member states to concede the Commission the exclusive right to negotiate automatic exchange of information agreement with third countries.

It is worth mentioning that the MEPs have placed particular emphasis on the respect of taxpayers´ procedural rights, their right to privacy and the proper use of the information exchanged.

The EP has only consultative powers in this dossier.

On 12 December, the plenary voted a non-legislative "Call for a measurable and tangible commitment against tax evasion and tax avoidance in the EU", calling for the tax gap (difference between what should and is collected) to be halved by 2020 and

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

asking the Commission to introduce a set of tangible targets for reducing it. The Commission is also asked to establish a standardised set of indicators for measuring tax evasion and avoidance.

READ MORE ***(click to open):***

Press release: **EN** (All EU languages)

Legislative resolution of 11 December 2013 on automatic exchange of information: **EN** (all EU languages)

Resolution of 12 December 2013: **EN** (all EU languages)

Commission draws conclusions on the first year of its anti-fraud and –evasion action plan

On 5 December 2013, the European Commission gave an overview on the state of play in fighting tax fraud and evasion as well as aggressive tax planning. The report demonstrates that the Commission has been busy making legislative proposals (extension of automatic exchange of information in June, standard VAT return in October, Parent-Subsidiary Directive revision in November) and promoting "soft" instruments such as expert groups (Platform for Tax Good Governance since June, Taxation of the Digital Economy since December) and recommendations (country-specific recommendations in the context of the European Semester) but also shows standstill in a number of areas, particularly in tax legislation (Savings Tax Directive, CCCTB). Progress however has been achieved in VAT where the Council adopted the possibility for a facilitated reverse charge mechanism as well as a "Quick Reaction Mechanism" and in the Accounting Directive where an obligation for large extractive and logging companies to report country-by-country the payments they make to governments, also on a project-basis, has been introduced.

Soft law actions envisaged for 2014 include a Taxpayers' Code and an EU Tax Identification Number. Moreover, the Commission has tried to ensure that the global standard for exchange of information currently developed by the OECD for the G20 is compatible with EU law (e.g. data protection), so as to avoid any unnecessary difficulties for businesses.

READ MORE ***(click to open):***

Press release: **EN**

OTHER TAX POLICY

OECD publishes BEPS timetable for stakeholder input

On 3 December 2013, the OECD published a calendar on the timing of planned consultations in the context of its BEPS (base erosion and profit shifting) Action Plan (see **CFE European Tax & Professional Law Report November 2013**).

READ MORE ***(click to open):***

BEPS / G20 Project: Calendar for planned stakeholders' input 2013-2014: **EN**

Expert group on taxation of the digital economy holds its first meeting

On 12 December 2013, the European Commission´s expert group on taxation of the digital economy held its first meeting. It was observed that digitalisation of the economy is questioning many fundamental distinctions in taxation like domestic vs. foreign, tangible vs. intangible, goods vs. services, direct vs. indirect taxation and consumption vs. production. Consideration must be paid to the application of existing rules to new business models and to the design of stable and robust future tax rules. The group decided to work in close alignment with the OECD and G20.

READ MORE ***(click to open):***

Meeting summary: **EN**

Agenda
Rules of Procedure
General Issues
Scoping the Work
Roadmap

OTHER TAX POLICY

Discussion on UN tax agenda available on-line

The WU Vienna University has posted a discussion between (Ex-OECD) Jeffrey Owens and Michael Lennard, Chief of the United Nations´ International Tax Cooperation Section, on the (emerging) role and function of the UN Tax Committee, its priorities for the upcoming year, the UN Model Convention and the UN Transfer Pricing Manual, exchange of information, the UN and BEPS, as well as the UN's Committee on natural resource taxation.

READ MORE *(click to open):*

Webstream: **EN**

OECD publishes comments on digital taxation issues

In November 2013, a request for input on the tax challenges of the digital economy was published on the OECD website. The OECD has now published all comments received.

READ MORE *(click to open):*

All comments: **EN**

Tax-to-GDP ratio keeps rising across OECD countries

On 17 December 2013, the OECD has published its annual revenue statistics and a related on-line tool, providing for an overview of the OECD members countries´ tax-to-GDP ratio and tax structure between 1990 and 2012 (the full publication goes back until 1965). Countries can be compared to the OECD average. The figures reveal that not only tax revenues but also the tax-to-GDP rate continues to rise since the 2008/2009 bottom of the economic crisis which, as the OECD explains, is due to the progressivity of tax systems. The average tax revenue to GDP ratio in OECD countries was 34.6% in 2012, compared with 34.1% in 2011 and 33.8% in 2010. The ratio of tax revenues to GDP rose in 21 of the 30 countries for which 2012 data is available, and fell in only 9 countries. The largest increases in 2012 occurred in Hungary, Greece, Italy and New Zealand. The largest falls were in Israel, Portugal and the United Kingdom.

READ MORE *(click to open):*

News release plus on-line tool: **EN** (FR available)

Revenue Statistics 1965-2012: **EN/FR**

PROCEDURAL LAW

ECJ dismisses UK rule depriving taxpayers of a remedy for recovering tax levied contrary to EU law

On 12 December 2013, the European Court of Justice decided in case C-362/12, Test Claimants in the Franked Investment Income Group Litigation, that EU law precludes UK legislation whose effect is to deprive taxpayers, without notice and retroactively, of a remedy for recovering tax levied in breach of EU law. The Court specifies that the fact that a second remedy is available to taxpayers for recovering that tax does not counteract the negative consequences of removing the more favourable remedy.

Under English law, as it stood before 24 June 2004, two remedies were available for recovering tax levied in breach of EU law. The first, the 'Woolwich cause of action' was an action for recovery of tax unlawfully levied, for which the limitation period was six years from the date of payment of the tax. The second, the 'Kleinwort Benson cause of action', permitted the restitution of sums paid under a mistake of law. The limitation period for that action was six years from the date the claimant discovered the mistake of law or could with reasonable diligence have discovered it.

In 2004, the UK adopted legislation stating that the limitation period for the 'Kleinwort Benson cause of action' was not to apply in relation to a mistake of law relating to a taxation matter within the remit of the Commissioners of Inland Revenue. The new rule applied retroactively to actions brought on or after 8 September 2003, the date on which the United Kingdom Government had announced its intention to adopt the legislation.

By a judgment delivered in 2001, the Court of Justice held that certain UK tax provisions which applied until 1999, were incompatible with the freedom of establishment and the free movement of capital.

Following that judgment, a company introduced a

PROCEDURAL LAW

claim on 8 September 2003 on the basis of the 'Kleinwort Benson cause of action', seeking to recover tax wrongly paid before 1999. The limitation period applicable to that action began to run on the date in 2001 on which the ECJ gave its ruling on the compatibility with EU law.

Due to the retroactive application of the legislation of 2004, the company was precluded from bringing its claim for recovery on the basis of the 'Kleinwort Benson cause of action'.

The UK Supreme Court asked the Court of Justice whether it is compatible with the EU law principles of effectiveness, legal certainty and the protection of legitimate expectations to remove the 'Kleinwort Benson cause of action' without notice and retroactively.

The ECJ finds, first, that the limitation period of six years applicable to the 'Woolwich cause of action', which starts to run on the date of payment of the tax, is, in itself, compatible with the principle of effectiveness, which prohibits the application of national rules which make it impossible or excessively difficult to recover tax levied in breach of EU law.

The Court recalls that the principle of effectiveness does not prevent, in principle, the retroactive application of a new period for bringing proceedings which is shorter than the period previously applicable, where such application concerns actions for the recovery of tax which have not yet been commenced by the time the new period enters into force but which relate to sums paid whilst the old period was still applicable.

However, the new national rules must include transitional arrangements allowing an adequate period after the enactment of the legislation for lodging the claims for repayment which persons were entitled to submit under the previous legislation. This is necessary where the immediate application would have the effect of retroactively depriving some individuals of their right to repayment, or of allowing them too short a period for asserting that right.

Consequently, national legislation curtailing, retroactively and without any transitional arrangements, the period within which repayment could be claimed of sums collected in breach of EU law is incompatible with the principle of effectiveness.

The Court observes that the fact that two legal remedies are available to taxpayers for recovering the tax unlawfully levied does not necessarily counteract the negative consequences of removing one of those remedies.

Lastly, for the same reasons, the Court finds that the domestic legislation also infringes the principles of legal certainty and the protection of legitimate expectations.

READ MORE *(click to open):*

Press release: **EN** **FR** **DE** **ES** **EL** **IT**

Judgment: **all EU languages**

STATE AID

Commission investigates into privileges of certain Spanish football clubs

On 18 December 2013, the European Commission has opened three in-depth investigations to verify whether various public support measures in favour of certain Spanish professional football clubs are in line with EU state aid rules. None of the measures had been notified to the Commission. The Commission has concerns that these measures provided significant advantages to the beneficiary clubs to the detriment of the clubs which have to operate without such support. The opening of an in-depth investigation gives Spain and interested third parties an opportunity to comment on the measures under examination; it does not prejudge its outcome.

The Commission will firstly investigate possible tax privileges for Real Madrid CF, Barcelona CF, Athletic Club Bilbao, and Club Atlético Osasuna. The other inquiries deal with a land transfer between the City of Madrid and the club Real Madrid CF and guarantees given by a state-owned financial institution to football clubs undergoing financial difficulties.

READ MORE *(click to open):*

Press release, including a list of the advantages granted to different football clubs: **EN** **FR** **DE** **ES**

Cases in state aid register: **SA.29769**, **SA.33754** and **SA.36387**.

STATE AID

Commission opens investigation into tax exemptions for innovative Belgian companies

On 4 December, the European Commission has opened an in-depth investigation to determine whether Belgium's implementation of a system of support for innovative companies is in line with EU rules on state aid. The Commission will examine in particular the terms on which a certain number of Belgian companies have benefited from tax relief. The opening of an in-depth investigation gives third parties an opportunity to comment on the measure under assessment. It does not prejudge the outcome of the investigation.

In 2006 the Commission approved a support scheme for research and development that exempted 'Young Innovative Companies' from paying payroll tax on part of the remuneration paid to their scientific personnel. However, to date, Belgium has not introduced in its legislation a clear definition of which companies are eligible for the aid, which could have conferred an undue advantage on the beneficiary companies, contrary to EU state aid rules.

Moreover, the Belgian authorities failed to notify the Commission when they tacitly renewed the scheme after its expiry in July 2011 and increased the level of tax relief.

READ MORE *(click to open):*

Press release: **EN** **FR** **DE** **NL**

ACCOUNTING

EP JURI Committee votes against country by country disclosure of tax payments – CFE publishes Opinion Statement

On 13 December 2013, the CFE published Opinion Statement FC 6/2013 on mandatory country-by-country disclosure of tax payments by large EU undertakings, to be included in the current revision of the EU Accounting Directive 2013/34/EU, as proposed by a number of MEPs . The CFE considers that disclosure of tax payments will not provide any indication on whether a company has been complying with the law or on whether arrangements entered into are aggressive or not but create prejudice through –intentional or non-intentional- misinterpretation of data. Publication of detailed information on tax planning, as proposed by some MEPs, would force companies to publish business secrets, damaging the competitiveness of EU businesses. Instead of publication of tax data, CFE suggests that reporting of information to tax authorities and cross-border exchange of information be improved. Progress should be closely coordinated with the OECD.

The opinion of the European Parliament´s Economic and Monetary Affairs (ECON) Committee was published on 9 December 2013.

The responsible Legal Affairs (JURI) Committee voted on 17 December 2013 against an obligation to disclose tax payments in the current review of the Accounting Directive, as suggested by CFE, while supporting an obligation for large undertakings to disclose a comprehensive set of non-financial information.

The European Council, consisting of the EU countries´ heads of state or government, called in its conclusions of 20 December 2013 for further progress on the disclosure of non-financial information by large groups, not specifically mentioning tax information, as it had done in its conclusions of 23 May 2013.

See also **CFE European Tax & Professional Law Reports October** and **November 2013** on this topic.

READ MORE *(click to open):*

ECON Opinion of 9 December 2013: **EN** (**other languages**)

CFE Opinion Statement: **EN**

Text voted by JURI: **EN**

EP press release: **EN** (FR available)

European Council conclusions: **EN** (see no.27)

EVENTS

OECD will inform on BEPS progress in live webcast

On 23 January 2014, from 15:00 to 16:00 CET, the OECD will give, via webcast, an update on the development of the measures envisaged in the BEPS Action Plan. Questions to the panel can already be submitted.

EVENTS

READ MORE *(click to open):*

News release: **EN**

PROFESSIONAL QUALIFICATIONS

New Professional Qualifications Directive in force

On 28 December 2013, the revised Directive on Recognition of Professional Qualifications was published in the Official Journal of the EU (see CFE European Tax & Professional Law Reports **October 2013** and **November 2013**). Member States will have to implement the Directive by 18 January 2016.

READ MORE *(click to open):*

Text of the Directive 2013/55/EU: **All EU languages**

Tax advisers not among the professions foreseen for "European Professional Cards"

In October 2013, the European Commission called for expressions of interest from European professions for the introduction of "European Professional Cards" which would speed up the recognition process where professionals seek to operate in another (regulated) member state. This possibility is provided for by the new Professional Qualifications Directive 2013/55/EU (see **CFE European Tax & Professional Law Reports October 2013**).

According to the Commission´s conclusions from this consultation published on 9 December 2013, tax advisers are not among the professions considered for the introduction of a European Professional Card (indeed none of the professions in the areas of law or accountancy is). As the annex to the document shows, no tax adviser organisation has expressed interest in the Card.

This makes the introduction of European Professional Cards for tax advisers highly unlikely in the foreseeable future. CFE has argued against the introduction of such card for tax advisers, in its 2012 **Opinion Statement on the proposal for a modernised Professional Qualifications Directive.**

READ MORE *(click to open):*

Communication: **EN**

ANTI MONEY-LAUNDERING

ECON/LIBE Committee proposes 500+ amendments to AML Directive

Until 5 December 2013, the members of the European Parliament´s ECON and LIBE Committes introduced another 454 amendments to the European Commission´s proposal for a revision of the EU Anti Money Laundering Directive, in addition to the 93 amendments already proposed by the two rapporteurs, Judith Sargentini (NL, Greens) and Krišjānis Kariņš (LV, EPP). Some of these amendments aim at making the AML Directive a tool not only against crime including tax fraud, but also against tax arrangements which are legal but considered aggressive. The CFE will voice its concerns over these and other proposals by issuing an Opinion Statement in mid-January 2014. The two responsible EP Committees´ vote is scheduled for 22 January, the EP plenary vote is envisaged for 11 March 2014.

READ MORE *(click to open):*

Booking and further information: **EN**

AUDIT

EU institutions reach agreement on audit reform, prohibiting the provision of tax services for the audited public interest entity

On 17 December 2013, the European Commission, Parliament and EU Council have reached an agreement on the revision of the legal framework for statu-

AUDIT

tory audit in the EU, consisting of a revision of the Audit Directive and a new Regulation for audits of public interest entities (PIEs). The text of the compromise is not yet public. Formal adoption of the text by the EP and Council will take place in the coming months.

The new legislation will impose mandatory rotation of auditors of PIEs after a period of 10 years. Member states may allow the auditor or audit firm to continue audit of the same PIEs up to the maximum duration of 20 years where a public tendering is conducted and up to 24 years in case of a joint audit, undertaken by more than one audit firm.

In order to avoid conflicts of interests and threats to independence, a number of non-audit services, such as tax, consultancy and advisory services will be forbidden to be provided to the audited entity. Options for member states as to which non-audit services may be provided remain.

The total fees of non-audit services (other than those prohibited) provided to one PIE will be limited to 70% of the average of the fees paid in the last three years.

READ MORE *(click to open):*

Press release (Council): **EN**

IMPRESSUM

CONFEDERATION FISCALE EUROPEENNE

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