European Tax Report
Confédération Fiscale Européenne (CFE)

April 2011 / Edition 4

CFE AMSTERDAM CONFERENCE

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**

CFE NEWS

All CFE members take part in foundation of „new" CFE

At the General Assembly of 8 April 2011, all 30 full member organisations of the CFE took part in the foundation of CFE as an international non-profit organisation under Belgian law, based in Brussels. The new organisation will come into existence on the date of the royal decree on recognition which is expected in the course of this year. The present CFE which is an organisation under French law with seat in Paris will then be dissolved. The General Secretariat of the CFE stays in Berlin.

NEWS - DIRECT TAX

CFE comments on cross-border dividends taxation problems and effective recovery of unlawfully levied taxes

On 4 May 2011, the CFE has sent to the European Commission its "Opinion Statement on effective recovery of taxes levied in violation of EU law" and its related response to the public consultation on taxation of cross-border dividends to individual and portfolio investors. CFE stressed in its response that the problem of judicial double taxation could be solved if no withholding taxes on dividends were levied in the source country. In return, in order to avoid non-taxation of dividends, automatic information exchange between authorities would have to be established. In the Opinion Statement on effective recovery, CFE criticizes how procedural rules in member states make the recovery of unlawfully levied taxes so burdensome that it becomes economically unreasonable.

READ MORE *(click to open)*:

CFE response to public consultation: **EN**

CFE Opinion Statement on effective recovery: **EN**

ECJ rejects Romanian car pollution tax

In its judgment rendered on 7 April in a preliminary ruling procedure (case C-402/09, Tatu) the European Court of Justice decided that the pollution tax introduced by Romanian legislation, levied on vehicles on first registration in Romania, is contrary to EU law. The tax was introduced in 2008. For new cars, it applies irrespectively of whether they were produced in Romania or abroad. For second-hand cars, however, the tax had the effect that only imported cars were taxed but not cars that were previously registered in Romania. Although the depreciation of imported cars was taken into account for the purpose of the pollution tax, the Romanian legislation was found to have the effect of discouraging the import and placing in circulation of second-hand vehicles purchased in other member states, notably for older cars.

READ MORE *(click to open):*

Press release: EN FR DE ES IT PT EL HU PL BG RO

Full text: EN FR DE RO

Commission refers the Netherlands to Court over tax discrimination against foreign charities

On 6 April 2011, the European Commission has decided to refer the Netherlands to the EU Court of Justice. Under Dutch tax law, donations to a foreign charity cannot qualify for tax relief unless the foreign charity has registered itself in the Netherlands. The Commission considers that this treatment of gifts to charities is discriminatory and in breach of EU rules on the free movement of capital as it is liable to discourage Dutch taxpayers from making donations to foreign charities which are not registered in the Netherlands. The Commission had sent a reasoned opinion to the Netherlands on 18 March 2010 (see **CFE European tax Report 3/2010**, p.4). France is also subject to an infringement case on donations to foreign charities (see related **press release**).

READ MORE *(click to open):*

Press release: EN FR DE NL

Five infringement procedures against Belgium: Taxes on property, inheritance, capital gains, foreign investment companies and Icelandic and Norwegian investment funds

On 6 April 2011, the European Commission took a number of decisions on infringement proceedings against Belgium in different areas of direct taxation, some of which still take the form of reasoned opinions, the second step in infringement proceedings, while in other cases the Commission decided to refer Belgium to the EU Court of Justice.

Property tax

The Commission has formally requested Belgium to amend its tax legislation which provides for tax exemption of certain types of real estate located in Belgium so as to ensure its compliance with EU rules on the free movement of capital. Under Belgian tax law, revenues from real estate used by organisations active in the health or educational sectors or that are leased under special types of contracts are exempt from tax. On the contrary, Belgian residents are taxed on the revenues they get from comparable real estate located abroad. The Commission considers that the current rules are discriminatory and are liable to discourage Belgian residents from investing in other EU member states, constituting an unjustified restriction on the free movement of capital.

Inheritance tax

Another reasoned opinion sent concerns two aspects of the Belgian inheritance tax legislation considered discriminatory for non-resident heirs or recipients of gifts and for foreign organisations. Under Belgian gift tax and succession duties legislation, foreign heirs or recipients of gifts of movable assets located in Belgium have to provide a guarantee. In case they do not provide this guarantee, they can have the totality of the succession or donation assets blocked by the Belgian authorities. In addition, inheritance legislation as applicable in Wallonia, grants certain Belgian organisations such as public bodies and non-profit organisations an exemption or a reduction from succession duties and gift tax while their foreign equivalents have to pay the normal tax. The Commission is of the opinion that both provisions are discriminatory and constitute unjustified restrictions on the free movement of capital. These rules could discourage citizens from moving to another EU country and from assigning an inheritance or a gift to an equivalent organisation located in another EU member state. The Commission does not see any possible justification for this discrimination.

Icelandic and Norwegian investment funds

As Belgium did not comply with a reasoned opinion sent on 30 September 2010 requesting Belgium to end the discriminatory tax treatment of Icelandic and Norwegian investment funds (see **CFE European Tax Report 8/2010**, p.1), the Commission decided to take Belgium to Court. Belgium does not grant an exemption from capital gains tax for sales of shares from certain collective investment funds established in Iceland and Norway whereas it does grant such exemptions in the case of shares from equivalent collective investment funds established in the EU which do not qualify for the European passport according to Directive 85/611/EEC. Collective investment funds established in Iceland and Norway are taxable regardless of their status with respect to the European passport. The Commission considers that this difference in treatment limits the free movement of capital and the freedom to provide services, Art.36 and 40 of the European Economic area Agreement.

NEWS - DIRECT TAX

Investment funds established in Liechtenstein (also part of the EEA) are excluded from the scope of the infringement procedure since Liechtenstein does not exchange information on income from such investment funds with the Belgian tax authorities.

Taxation of capital gains

Another reasoned opinion was sent due to the discriminatory treatment of capital gains. Under the Belgian income tax law, capital gains on fixed assets such as buildings, equipment or machinery are not immediately taxed if a reinvestment is made in assets used in Belgium. However, such a rule does not apply if the reinvestment is made in assets used outside Belgium. In this case, capital gains are immediately taxed. As a consequence, companies cannot benefit from delayed taxation on capital gains if they invest in assets in other EU or EEA countries. The Commission considers that assets outside Belgium are discriminated against which breaches basic EU Single Market rules (freedom of establishment, freedom to provide services and free movement of capital).

Foreign investment companies

Lastly, the Commission has decided to refer Belgium to the ECJ because of its taxation of foreign investment companies. Under Belgian law, domestic investment companies do not in practice pay tax on their Belgian-sourced interest and dividend income as they get a refund for any Belgian withholding taxes paid on their Belgian-sourced interest and dividend income. However, foreign investment companies pay withholding taxes of 15 or 25 % on their Belgian-sourced interest and dividend income and cannot claim a refund. Such discrimination is considered to be in breach of EU Single Market rules on the free movement of capital and freedom of establishment. A reasoned opinion which was sent on 3 June 2010 requesting Belgium to put an end to such discrimination (see **CFE European Tax Report 6/2010**, p.3) had not been complied with.

READ MORE *(click to open):*

Property tax legislation: **EN FR DE NL**

Inheritance tax: **EN FR DE NL**

Icelandic and Norwegian investment funds:
EN FR DE

(more links follows above)

Capital gains: **EN FR DE NL**

Foreign investment companies: **EN FR DE NL**

EU and US discuss the US Foreign Account Tax Compliance Act

In a letter sent to the US tax authorities on 6 April 2011, the Hungarian Presidency of the Council of the European Union and the European Commission invited the US authorities to engage in a dialogue on how to best achieve the objectives of the US Foreign Account Tax compliance Act (FATCA). FATCA is a US legislation intended to ensure that US tax authorities obtain information on investments by US residents in foreign financial institutions, including European financial institutions. In this regard, it pursues goals similar to those of the EU Savings Tax Directive which provides for an exchange of information between tax authorities of EU Member States. However, FACTA could impose a significant compliance burden on EU financial institutions (including banks, investment funds and insurance companies). In light of the information exchange tools that already exist between tax administrations, and given the ongoing discussions on extending the scope of the Savings Tax Directive which is a priority for the Hungarian Presidency and the Commission the Hungarian Presidency and the Commission invited the US authorities to consider exploiting possible synergies to achieve their common goals in a cost-effective and business-friendly way.

Since the adoption of FATCA on 18 March 2010, EU business and financial associations have expressed concerns about the legislation, in particular the costs of compliance and penalties that it will entail in case of non-compliance.

The EU Savings Directive, like FATCA, imposes obligations on financial intermediaries requiring paying agents to report information on interest income paid to individual investors to tax authorities. A revision of that Directive, in order to expand its scope, is at an advance stage. EU tax authorities also exchange information with each other under the EU Directive on Administrative Cooperation and with third countries, including the US, under information exchange clauses in bilateral double taxation treaties.

Under FATCA, foreign financial institutions with U.S. customers and foreign non-financial entities with substantial U.S. owners must disclose information regarding U.S. taxpayers directly to the IRS (Internal Revenue Service). Failure to disclose information will result in a requirement on non-U.S. financial intermediaries to withhold a 30% tax on U.S.-source income.

NEWS - DIRECT TAX

The European financial industry estimates that the costs of modifying their IT systems and the administrative burden of ensuring compliance with FATCA would be significant.

OECD opens public consultation on changes in the OECD Model Convention concerning the term "beneficial owner"

The OECD seeks to prevent double taxation and non-taxation resulting from different interpretations of Art.10-12 of the OECD Model Tax Convention by courts and tax administrations. Comments on the OECD discussion draft can be sent until 15 July 2011. Those will be looked at at the September 2011 meeting of the Working Party 1 on Tax Conventions and Related Questions.

READ MORE *(click to open):*

OECD news release: **EN** **FR**

Discussion draft: **EN**

NEWS - INDIRECT TAX

Commission undertakes review of energy taxation

As one of its twelve priorities in the legislative package entitled "Single Market Act", the Commission, on 13 April 2011, proposed a review of the Energy Taxation Directive.

The new rules aim to restructure the way energy products are taxed to take into account both their CO2 emissions and energy content. This way, the Commission wants to promote energy efficiency and consumption of more environmentally friendly products and to avoid distortions of competition in the Single Market. The proposal shall help member states to redesign their overall tax structures in a way that contributes to growth and employment by shifting taxation from labour to consumption.

Taxation of energy products is to a certain extent harmonised at EU level. The Energy Taxation Directive sets forth minimum rates for the taxation of energy products used as motor fuels and heating fuels as well as electricity.

Essentially, the Commission proposes splitting the minimum tax rate into two parts:

• One would be based on CO2 emissions of the energy product and would be fixed at €20 per tonne of CO2.

• The other one would be based on energy content, i.e. on the actual energy that a product generates measured in Gigajoules (GJ). The minimum tax rate would be fixed at €9.6/GJ for motor fuels, and €0.15/GJ for heating fuels. This will apply to all fuels used for transport and heating.

For social reasons, member states will have the option to completely exempt energy consumed by households for their heating, irrespective of which energy product is used.

• According to the new proposal, the tax disadvantage of renewable energy sources such as biofuels compared to [fossil fuels] will be removed.

• As regards the reduction of greenhouse gas emissions, the revised Directive aims to complement the existing EU emission trading system by applying a CO2 tax to sectors that are currently out of its scope (transport, households, agriculture and small industries). These account for half of the EU's CO2 emissions.

The revised Directive would enter into force as of 2013. The gradual introduction of the new energy tax rules foresees transitional periods until 2023.

READ MORE *(click to open):*

Press release: **EN** **FR** **DE** (available in other languages)

Directive proposal: **EN** **FR** **DE**

Related Commission Communication: **EN** **FR** **DE**

Impact assessment: **pt 1** **pt 2**

Impact assessment summary: **EN** **FR** **DE**

Presentation: **EN**

Questions and answers: **EN**

Citizens summary: **EN** **FR** **DE** (available in other languages)

NEWS - INDIRECT TAX

Commission publishes study on VAT in the public sector and exemptions in the public interest

The study was conducted by Copenhagen Economics for the Commission and published by the Commission on 12 April 2011. It analyses and measures the consequences of the current VAT treatment of public bodies and activities carried out in the public interest. Issues identified are distortions of competition to the disadvantage of private operators that compete with public entities and lacking incentives for the administration to outsource activities to private companies. The study suggests that the economy would benefit from reductions of this special treatment.

READ MORE *(click to open):*

Study: **EN**

Commission proposes to allow Sweden to apply reduced taxation to shore-side electricity

The aim of this measure proposed on 8 April 2011 which still has to be approved by EU member states is to reduce noise and air pollution in Swedish ports caused by vessels that produce their electricity on board.

READ MORE *(click to open):*

Press release, pt 7: **EN**

Commission requests Germany to extend VAT exemptions for sharing costs of services

On 6 April 2011, the European Commission has formally requested Germany to amend its VAT legislation so as to extend the scope of the exemption from VAT for services supplied by independent groups of persons to their members with no right to deduct VAT. German legislation restricts this possibility to services in the medical and health care sector, whereas EU law requires such VAT exemptions to be available in all sectors. As a consequence, taxpayers in other sectors who set up a cost sharing grouping currently have to pay VAT on their shared services. The VAT Directive exempts from VAT services that cost sharing groups can supply to their members under a series of conditions: the members‘ activities should be exempt from VAT, the shared services should be directly necessary to the members‘ activities, the group should claim for exact reimbursement of each member‘s share of the joint expenses and finally, such exemption should not cause distortions of competition. The Commission‘s request takes the form of a „reasoned opinion“ (second step of EU infringement proceedings). In the absence of a satisfactory response within two months, the Commission may refer Germany to the ECJ.

READ MORE *(click to open):*

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

Commission requests Cyprus to modify excise duty rules for imported second-hand motorcycles

On 6 April 2011, the European Commission has formally requested Cyprus to amend its legislation on depreciation scales for the calculation of excise duties on second-hand motorcycles because it considers that the current rules discriminate against imported motorcycles. The ECJ has found on 22 February 2011 in the Gomes Valente case (**C-393/98**) that a tax treatment similar to the Cypriot rules was in breach of EU rules. The Commission´s request takes the form of a reasoned opinion.

READ MORE *(click to open):*

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

ADMINISTRATIVE COOPERATION AND FIGHT AGAINST TAX FRAUD

OECD Global Forum´s work progressing

On 14 April 2011, the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes announced the publication of new reports assessing its members´ ability to stop international tax evasion. Reports on **Aruba**, **the Bahamas**, **Belgium**, **Estonia** and **Ghana** evaluate their legal and regulatory frameworks for the exchange of information. Reports on **Canada** and **Germany** assess both the legal frameworks and their implementation in practice.

The Global Forum was created on the initiative of the G20 to promote international standards of transparency and information exchange in tax matters. It aims at ensuring full tax cooperation, adoption of the international standards including exchange of bank information, among its members through an in-depth peer review mechanism. Until now, the Global Forum has published reports on 25 of its members and aims at completing another 35 by November 2011 for the G20 summit in Cannes.

Belgium was found to have made progress in developing its exchange of information network. The ongoing but yet unsuccessful efforts to form a government in Belgium have led to a standstill in putting in force concluded exchange of information agreements. If there will be progress in ratification, a phase 2 peer review is scheduled for the second half of 2012.

Germany, according to the report, exchanges information for international tax matters with a large network of jurisdictions around the globe but response times were not fully to the reviewers´ satisfaction.

Meanwhile, the number of members of the Global Forum reached 101 jurisdictions, after Ghana, Georgia and Nigeria recently joined. This means that more than half of all countries have become members.

READ MORE *(click to open)*:

OECD news releases:
- Global Forum groups 101 juridictions (13 Apr.): **EN** **FR**
- Global Forum keeps up pressure (14 Apr.): **EN** **FR**

Full schedule of reviews: **EN**

STATE AID

ECJ Advocate General: Harmful tax measures are not automatically state aid

According to Niilo Jääskinen, Advocate General at the European Court of Justice (ECJ), harmful tax measures cannot be classified automatically as unlawful state aid. In order to qualify as state aid, a measure would have to give a selective advantage to its beneficiaries. There was however no selectivity where, within one tax system, all cases were treated in the same manner. Unlike the Commission had stated, a tax system could not be "inherently discriminatory" as there was no European reference tax system it could be compared to. The Advocate General´s opinion which was rendered on 7 April 2011 confirms a decision of the European General Court (previously Court of First Instance) annulling a European Commission decision on the system of corporate tax in Gibraltar (C-106/09 P and C-107/09 P). The ECJ is not bound by the Advocate General´s opinion.

READ MORE *(click to open)*:

Press release: **EN** **FR** **DE** **ES** **FI** **SV**

Full text of the opinion statement soon available: **EN**

CFE FORUM

CFE Forum 2011 on Permanent Establishment

The CFE Forum 2011 which took place on 7 April in Brussels attracted 142 participants, mostly tax practitioners, from all over Europe, including guests from the European Commission and the EU Council. Both the morning and the afternoon session dealt with the concept of Permanent Establishment (Fixed Establishment respectively in VAT) and the related practical issues.

Recent changes both in EU legislation and OECD rules will have an impact on the treatment of dealings with PEs: For the attribution of profits to permanent establishments, the OECD has revised Art.7 of the Model Tax Convention last year. At EU level, the

CFE FORUM

CCCTB (common consolidated corporate tax base) directive proposal of 16 March 2011 (**COM(2011)121**) follows a different approach. For indirect taxes, the VAT Implementing Regulation **(EU) 282/2011** adopted on 15 March 2011 seeks to provide grater clarification for businesses, advisers and administrations.

In view of these very recent changes, ***Piergiorgio Valente*** from Valente Associati GEB Partners, Italy who moderated the direct tax session, described Permanent Establishment as both a very old and brand new topic. The great majority of more than 3000 tax conventions worldwide contain PE rules, most of them in the spirit of Art.5 and 7 of the OECD Model Convention.

Hans Pijl from the Netherlands, owner at Deloitte, described the OECD approach to PEs which is a separate entity treatment.

All tax treaties currently in place relate to the old, pre-2010 version of Art.7 of the OECD Model Convention while the 2010 version of Art.7 is meant to apply to future tax treaties only. Accordingly, also the OECD Commentary contains a pre-2010 and a 2010 version.

Despite contrary OECD Recommendations, most courts view references to Art.7 as static, not as dynamic references, meaning that the treaty would refer to the version of Art.7 that was in place at that time, as only that version has parliamentary justification. If changes are mere clarifications, courts also apply the new Commentary. This however was different with the new capital attribution rules: As prior to 2008, such rules had not been provided for, the rules are a material change which should not be applied unless they are put into law by countries.

In spite of the before-mentioned, the Dutch government had decided by decree of 15 January 2011 that the 2010 version of Art.7 should be applied, even to older treaties, creating confusion in interpreting tax treaties.

Georg Geberth, Director Tax Policy at Siemens, Germany, explained that avoiding having PEs in other countries is a way for multinationals to keep their tax policy simple. This is done by delivering directly to local companies and to act as subcontractor for them.

Mr Geberth then turned to the cross-border compensation of PE losses and the relevant case law of the ECJ (C-414/06, Lidl Belgium) and subsequently of the German Federal Tax Court which requires that losses become final for business reasons and not for reasons of foreign tax law like limitations to loss-carrying-forward. To the businesses´ surprise, the Federal Tax Court had allowed loss compensation not just for corporate tax but also for the local trade income tax. Nevertheless, in practice, fiscal authorities almost never let losses become final as they apply this requirement so strictly. This can be prevented if the foreign PE has a domestic parent company which is shut down simultaneously (and before foreign losses forfeit under the tax law of the country of the PE).

The attribution of assets to foreign PEs can no longer be taxed in Germany as this would be an exit tax. A crucial question was whether hidden reserves could be taxed. According to the Federal Tax Court, this is the case if they are realised through the sale of the asset. In essence, this corresponds to the EU Council **Resolution of 2 December 2008 on coordination of exit taxation** which could make this an EU-wide acceptable practice.

Georg Kofler, professor at the University of Linz, Austria, shed a light on the interrelation of EU law and OECD rules. Mr Kofler argued that the EU Interest & Royalties Directive should also apply to fictitious payments between head office and PEs and that the EU Parent-Subsidiary Directive should apply to branch profit taxes. If, pursuant to the OECD approach, a PE is considered a separate entity, this would entail the application of the EU Arbitration Convention. Mr Kofler said that in practice, the Arbitration Convention proved a very useful tool, as the time to reach a mutual agreement was limited to three years. This would put pressure on administrations to come to an agreement as they were worried that the arbitration body would take less favourable decision.

EU law requires that the attribution of profit rules for PEs and subsidiaries do not differ. EU and OECD rules finally conflict where assets are transferred from a PE to the head office. Under the OECD separate entity approach, profits may be deemed realized, resulting in immediate taxation in the state of the PE which could be considered an exit tax under EU law, in contradiction to the fundamental freedoms.

Uwe Ihli from the European Commission (DG Taxation and Customs Union, Head of Section Corporate Tax Directives and CCCTB) explained that as the EU corporate tax directives contain no own definition of PE, the PE concept commonly used is the OECD concept. Consequently, any changes to Art.7.2 of the OECD Model Convention will affect the scope of the EU directives.

A change is foreseen due to the CCCTB proposal of the Commission whose main characteristics Mr Ihli presented. The CCCTB would bring the advantage of simplifying the issues of cross-border loss offset and transfer pricing. There could be no general presumption whether the amount of tax to be paid would lower

CFE FORUM

or increase.

While the concept of permanent establishment in the OECD Model Convention and the CCCTB proposal are in line, the attribution of profits is dealt with in a fundamentally different way: In a CCCTB group, the profits of the PEs are not treated separately but the group would be considered one single integrated business, following the economic reality. By contrast, applying the OECD rules, it is difficult to judge when a profit is realised in a fully integrated group. The difference in profit attribution through OECD and EU rules would create issues of non- or double taxation, therefore more formal requirements for cross-border dealings, the denial of application of the Interest & Royalties Directive and withholding taxes within the group were to be expected.

Erik Scheer, principal at Baker&McKenzie from the Netherlands was moderator of the indirect tax part of the conference. In his introduction to the indirect tax session, he described the Fixed Establishment (FE) as a tool which existed only when it was needed.

This role of FE was further explained by ***Pia Michelsen*** from the European Commission, DG Taxation and Customs Union. A FE was used to identify where and whom to tax. Although the concept has existed ever since there is EU VAT legislation, there had not been a proper legal definition of FE. Further insight had to be derived from the case law of the European Court of Justice following the Berkholz case (C-168/84).

Pursuant to the new EU rules on the place of supply of services, introduced through the 2008 VAT package, for most cross-border business-to-business services, a reverse charge mechanism applies, considering the business establishment of the customer as the place of supply. However, if the services are provided to a FE of the customer located elsewhere, the location of this FE would be the place of supply. This is not changed if the supplier has a FE in the member state of supply, unless this FE intervenes in the supply. Hence, it is essential to determine what presence constitutes a FE and when this is deemed to intervene. Further clarification on this has been provided by the nearly adopted Implementing Regulation.

Jan Körner, Vice President Taxes and Duties from BASF, Germany, stressed that the tax planning of a multinational required a holistic approach, covering direct and indirect taxes. His presentation contained a comparison of the differing concepts of fixed versus permanent establishment.

Where neutrality and destination principles are fully applied, a FE for VAT purposes is not needed for the supply of goods, as their physical movement creates a nexus to a geographical location.

This however is different for services. While the taxation of business-to-business services follows the destination principle, business-to-consumer services follow the origin principle. For services that have a physical nexus to a geographical location, no FE concept is necessary if the taxation at place of consumption principle is fully applied. For intangible services with no such physical link, however, the FE concept remains indispensable, as it would where customers are not eligible for full VAT deduction.

Mr Körner concluded that the concepts of PE for direct taxation and of FE for indirect taxation serve different purposes: While the purpose for direct taxation was to ensure taxation at the source of a profit generating unit, the FE concept seeks to prevent distortions of the principles of destination and neutrality of VAT. It is therefore justified to maintain two different concepts in both areas of tax.

Andrea Parolini from Maisto e Associati, Italy, cited three cases to analyse the concept of FE, notably the Italian “Philip Morris” case of 2002 in which the Italian Supreme Court had held that a joint company of non-resident parent companies in Italy that supervised the distribution of tobacco products through the state monopoly was a FE because the tasks of this structure contained management functions and were not merely auxiliary. Mr Parolini criticised that the FE concept has been used exclusively to make the company liable to tax. Uncertainty about the concept of FE in Italy and a strict interpretation by the tax administration entailed a high risk of non-compliance and, as a result, non-deductibility and/or severe penalties (in one case, at that time, up to 240% of the VAT due) for businesses. He welcomed that the Implementing Regulation has reduced legal uncertainty.

Further complications for businesses exist through requirements to pay 50% of the tax assessed upfront when a case is brought before an Italian court.

The contribution of Mr Parolini gave rise to a lively debate among practitioners, touching also on issues like interest for unpaid or excess VAT or the general requirement to provide invoices for VAT deduction.

A more detailed report on the CFE Forum 2011 written by Dr. Tigran Mkrtchyan will appear in European Taxation issue 6/2011.

CFE will also publish a booklet on the Forum in summer 2011, containing contributions from the speakers.

READ MORE *(click to open):*

All presentations: **CFE Website**

IMPRESSUM

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