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LETTER FROM THE EDITOR

Welcome to the first issue of 2023!

As we enter our second year of publication, I open by emphasizing our goal to be a forum for interaction and debates on the international tax developments, with a focus on the Caribbean region. In this issue, we cover a great variety of topics. Just a short summary of what to expect in this issue:

Rafael Barbosa de Sousa sheds some light on the rationale behind the limited cooperation of Brazil with Caribbean jurisdictions on tax matters, and in particular with signing double-tax treaties.

Shu-Chien Chen discusses the formulary apportionment system in the European Union and argues that a three-factor formula for small jurisdictions such as Caribbean islands is fairer than a single sales factor formula.

Tax law students at the University of Curaçao have engaged in an exclusive interview with Mr. Javier Silvania, the Minister of Finance of Curaçao in which the Minister elaborates on the need to increase the tax base while the tax burden can be lowered when everyone is paying their taxes.

On top of that the following articles are presented: Tax consideration arising from IFRS17 by Vivian Pieters, Taxation in Guyana by Nicole Duyvelshoff, Transfer Pricing, Fair Taxation and Ethical Issues by Clive Jie-A-Joen and Monique van Herksen, Real Estate Rental and the new legislation in Curaçao regarding online rental platforms by Giordy Janga and Rejauna Rojer and Effective Pension Information for Mobile Citizens by Sander Kramer.

No magazine is possible without a team that is motivated and committed to make it happen. We would like to offer a warm word of gratitude to our readers, contributors, reviewers and partners, who are part of the Caribbean Tax Law Journal team and who have put lots of enthusiasm in making this edition happen.

We sincerely hope you enjoy reading the articles in this issue.

Germaine Rekwest

REAL ESTATE RENTAL: REGULAR ASSET MANAGEMENT OR ACCOMMODATION ENTERPRISE?

By Giordy Janga and Rejauna Rojer, HBN Law & Tax

INTRODUCTION

In March 2022 the Curaçao Minister of Finance announced that in order to combat sales tax evasion, new legislation should be introduced in which online rental platforms (e.g. Airbnb, Booking, Micazu) shall be assigned as collectors and remitters of sales tax if they facilitate the rental[1] of accommodations in Curaçao. Even though as of the time of writing this article no draft legislation related to the topic has been presented to Parliament, it can already be anticipated that such legislation can provide the Tax Authorities with information for imposing additional tax assessments, such as i.a. income tax and it's subsequent collection. Sales tax returns and other disclosure requirements[2] could provide the Tax Authorities with new data that can reveal the nature of the activities performed in relation to the rental activities.[3] This data can in turn be used as contra-indication for imposing additional assessments on (non-) resident taxpayers. Given that differentiation between regular asset management and entrepreneurship is surrounded with uncertainty, this contribution aims to provide certain pointers to assist private accommodation landlords to better ascertain their income tax position.[4]

KEY PREMISE

For Curaçao income tax purposes, income derived from immovable property can be classified as either proceeds from:
(1) regular asset management or
(2) accommodation enterprise.
Based on the internationally recognized situs-principle, Curaçao levies income tax on income derived from immovable property located in Curaçao. Conversely, where a permanent establishment is deemed present, Curaçao levies income tax on income derived from a fixed place of business that actively partakes in its economy. Thus, (non-)residents[5] who own and rent accommodations located in Curaçao are liable for income tax for the income derived from these properties. It is important to differentiate between the two sources of income, considering that the qualification of the activities in either category (1) or (2) will ultimately determine the income tax implications.

PROCEEDS FROM REGULAR ASSET MANAGEMENT

Income is classified as proceeds from regular asset management[6] if the rent is merely the compensation for contractual usage of an asset. The immovable property is the proverbial fruit-bearer, since value is not being created but the rental income is derived from the asset itself. Only certain costs can be deducted from the gross proceeds, such as resident charges. After the deduction of these costs, a fixed 65% of the proceeds minus interest and costs arising from loans pertaining to the asset shall be subject to tax.[7] The fixed 65% currently acts as a de facto tax stimulus for private real estate investors, as the remaining 35% is excluded from taxation. The following example can help illustrate this notion.

Example

An individual owns and rents out several properties with a total market value of NAf 850,000. The resident charges amount to NAf 10,000. The interest paid on a loan to acquire the properties amounts to NAf 16,000. The properties are rented for residential purposes for longer than 1 year and the gross proceeds amount to NAf 100,000 per year.

The rental activities do not go beyond regular asset management, as long-term rental brings about less managerial tasks than short-term rental would.[8] *The labor performed in the scope of the rental activities is ought to be aimed at the conservation of the asset, thus also not going beyond regular asset management.*[9] *After the deduction of resident charges, 35% of NAf 90,000 is tax free. The income tax due on 65% of NAf 90,000 amounts to NAf 4,550 (rounded off). The rental income is merely the consideration for the contractual usage of the asset.*

PROCEEDS FROM AN ACCOMMODATION ENTERPRISE

The exploitation of real estate can only be classified as an enterprise if the profitability is the result of labor that, given its nature and extent, is unmistakably aimed at achieving a higher yield from the asset than would usually result from regular asset management. A direct link is required between the labor performed and the intended return. To be more specific, the labor performed in the scope of the rental activities should be aimed at the creation of added value in addition to the income generated by the immovable property.
If the exploitation is classified as an enterprise, more costs can be deducted than would be the case if the income is deemed as proceeds from regular asset management.

Example

An individual rents out several apartments to tourists (short-stay respectively vacation rental). As part of the rental arrangement, the host is tasked with (the supervision of) the housekeeping; the bedsheets are regularly changed and brought to a launderette. Room-service as well as airport pick-up and drop-off are additional services provided.

The generated income shall qualify as proceeds from an enterprise. The profitability does not stem from merely the contractual use of the asset but is the clear result of labor performed in the scope of the rental activities. The fact that the individual offers a 'self-composed' service on the market, implies the intent to create added value and consequently income. As the gross proceeds are classified as proceeds from enterprise, all costs relating to the business can be deducted and the resulting net profit shall be subject to taxation.

PRACTICAL TOOLS

As most literature on the matter suggests, the qualification of rental income into the two categories of income is casuistic. Nevertheless, case law provides certain pointers to the relevant facts that need to be considered. These include but are not limited to:

The duration and frequency of the activities

As opposed to long-term rental, sustained short-term rental seems to give rise to more labor-intensive activities than are performed in the scope of regular asset management. Furthermore, please note that long-term[10] rental results in sales tax exemption, which could result in less contra-information.

The existence of additional services rendered
The continued presence of non-negligible services rendered, whether discounted in the compensation or not, can be an indication as to the nature and extent of the labor performed in relation to the rental activities.

Take into account that additional contra-information can lead to possible assessments for other levies. Some of these levies (e.g. social insurance premiums) are modelled after the income tax, thus resulting mutatis mutandis in the same treatment of the income.

FINAL REMARKS

As proposed in the introduction, assigning online rental platforms as collectors and remitters of sales tax could lead to additional tax assessments for income tax purposes, among others. If immovable property in Curaçao is rented out via an online platform we recommend consulting a tax advisor, as the duration and frequency of the rental activities combined with the presence of additional services provided in relation to the rental activities are relevant factors when determining the income tax position.

Giordy Janga

Rejauna Rojer

[1]Note that the term "rental" of real estate is used for short-term (shorter than 1 year) and "leasing" is used for longer than 1 year. For the purposes of this article, the term "rental" shall be used referring to both short-term rental as well as long-term rental.
[2]Article 45 of the General Tax Ordinance (in Dutch: Algemene Landsverordening Landsbelastingen).
[3]In the Antilliaans Dagblad of December 21, 2022 an article was published stating that the SBAB recommends to require visitors to Curaçao to disclose an invoice and the address details of their accommodation in the Digital Immigration Card System. It is unclear if this requirement will be part of the proposed legislation and if not, if there will be any legal basis for this requirement. Furthermore, other tax aspects, privacy aspects and date of effect of mentioned recommended requirement remain unaddressed.
[4]Alternatively, corporate structuring of real estate activities remains an alternative, which is not discussed in this contribution.
[5]Resident countries can provide either a tax exemption or tax credit for tax paid in the source country.
[6]In Dutch: "normaal vermogensbeheer". Reference is made to
[7]ECLI:NL:OGHACMB:2020:27, r.o. 5.6.3. ECLI:NL:OGEAC:2020:218
[8]Reference is made to: ECLI:NL:OGHACMB:2020:27, r.o. 5.6.3
[9]Cf. ECLI:NL:RBAMS:2021:6796, r.o 15 -16 and ECLI:NL:PHR:2020:1205, nr. 4.9.
[10]For sales tax purposes, "long-term" means longer than 12 months.

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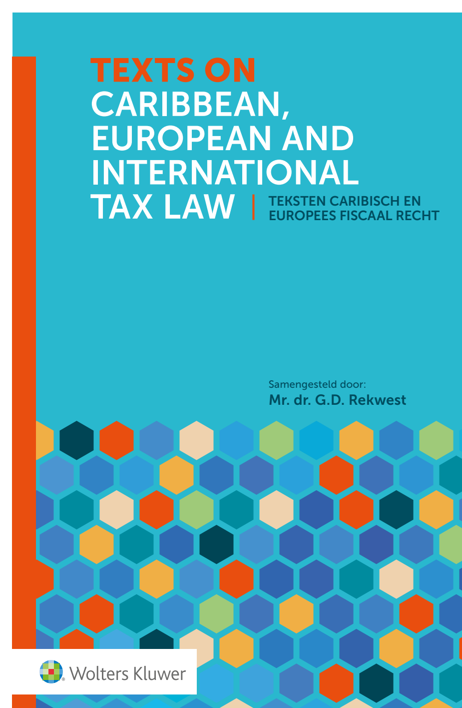


TAX CONSIDERATION ARISING FROM IFRS 17

WHAT INSURANCE COMPANIES LOCATED IN CURAÇAO, ST. MAARTEN, ARUBA AND CARIBBEAN NETHERLANDS NEED TO KNOW!

By Vivian Pieters, Tax Partner at Taxxa

IFRS 17 is the newest accounting standard for insurance contracts and replaces IFRS 4. IFRS 17 becomes effective for annual periods beginning on or after January 1st, 2023. It can be considered as one of the most significant accounting changes for insurance companies of the past decade, with a broad impact on the operational, financial, tax and reporting functions of insurance companies.

IFRS 4 allowed entities to continue to use their accounting practices that existed prior to their first adoption of IFRS 4. This entails that insurance companies were using different accounting policies. IFRS 17 changes the accounting practices because it requires consistent accounting for all insurance contracts. Mainly to make the financial statements simpler to compare across insurance companies.

ACCOUNTING TREATMENT IFRS 17

IFRS 17 requires that profit is offset with a liability, the so-called Contractual Service Margin ("CSM"). Under IFRS 17, the insurance contracts are reviewed, and the CSM is calculated of all unearned profit from the insurance contracts. The CSM is gradually released over the term of the contract, so that the profit from the contract is realized by the insurer over multiple future accounting periods as it provides services under the contract.

The new requirements may significantly affect the amount of insurer's annual profit. Insurers will generally need to calculate the CSM at the transition date when they adopt the new standard, applying the new rules with adjustments in the retained earnings. Under this approach, an insurer restates its financial statements to recognize and measure insurance contracts as if IFRS 17 has always been applicable and recognize the net difference from the old rules in equity on the transition date. The portion of profit previously recognized in retained earnings for contracts issued prior to transition, that are still unearned at the time of transition, will be included in the CSM and realized over future accounting periods.

In effect, this framework pretends that IFRS 4 never existed. The effect of IFRS 4 is completely reversed under IFRS 17. This could entail that insurance companies have already paid profit tax under IFRS 4, so they may face double taxation. The same profit could be recognized twice, under IFRS 17 and under IFRS 4.

The challenge is that for each insurance contract it is necessary to consider how profit, liabilities and assets were calculated under IFRS 4. We cannot consider IFRS 4 a uniform accounting standard, since all insurance companies applied their "own" accounting practices that existed prior to their first adoption of the IFRS 4 standard.

LOCAL TAX LEGISLATION AND REGULATIONS FOR INSURANCE COMPANIES

Tax implications concerning the implementation of IFRS 17 depends on local tax legislation and regulations. In some countries, the taxation of income from premiums received or earned is based on specific rules. In other countries, the taxation could be aligned with the accounting standards.
The following tax legislation and regulations are applicable for Curaçao, St. Maarten, Aruba and Caribbean Netherlands.

Curaçao and St. Maarten

If a company conducting an insurance business is established in Curaçao or St. Maarten, the profit is determined on the basis of the regular profit calculation method for the profit tax. However, there is the possibility to opt for the premium turnover method for a period of five years. The premium turnover method means that a certain percentage of what is received in premiums and capital in any fiscal year is considered the profit of the insurance company. For life insurance, this percentage is set at 10 percent, while for other insurance this percentage is set at 20 percent.

For the profit of a foreign company conducting an insurance business through a permanent establishment in Curaçao or St. Maarten, it is in principle mandatory to use this premium turnover method for the profit calculation. It is also possible for a permanent establishment of a foreign company conducting an insurance business to use the premium fraction method. Under this premium fraction method, the premiums and capital received in Curaçao or St. Maarten are divided by the total amount of worldwide premium and capital turnover, and then multiplied with the worldwide taxable income.

Aruba

For Aruba, almost the same applies as for Curaçao and St. Maarten regarding the regular profit calculation and the premium turnover method for the profit tax.

The difference between Aruba on one hand, and Curaçao and St. Maarten on the other hand, is the fact that Aruba has abolished the premium fraction method for calculating the profit of insurance companies. The Tax Authorities of Aruba require the permanent establishments located in Aruba of foreign insurance companies to use the premium turnover method for profit calculation.

Caribbean Netherlands

If the insurance company is established in the Caribbean Netherlands (for tax purposes), IFRS 17 has in principle no tax consequences for the company. This is because no profit tax applies in the Caribbean Netherlands.

If insurance entities apply and continue to apply the premium turnover method, IFRS will have no impact on the calculation of the taxable income. However, for insurance companies that apply the normal profit calculation method and the premium fraction method, IFRS can have significant impact on the taxable income. Therefore, we will continue to focus on insurance companies that apply these methods.

The tax treatment of IFRS 17 depends on whether local tax laws and regulations could follow IFRS 17. This means whether the normal profit tax calculation method could follow IFRS 17 or not. This has not been announced by the local Tax Authorities yet.

If IFRS 17 is in line with the local tax legislation and regulation, the transition to this new accounting standard will be less complicated for the insurance companies established in Curaçao, St. Maarten or Aruba.

We will chart both cases, if Tax Authorities choose to follow IFRS 17 or not.

TAX TREATMENT FOLLOWS ACCOUNTING TREATMENT IFRS 17

In this case, insurance companies should have the current tax position assessed by an expert to determine the extent to which profit tax has already been charged based on IFRS 4. The latter is to avoid double recognition of profit under IFRS 17. Thus, to prevent double taxation.

TAX TREATMENT DOES NOT FOLLOW ACCOUNTING TREATMENT IFRS 17

If IFRS 17 is not followed for profit tax purposes, insurance companies face a change in their deferred tax positions. If IFRS 17 is not followed, no retroactive prior liability will be recognized on the insurance company's balance sheet for tax purposes. Consequently, there will be a temporary difference, changing the insurance companies' deferred tax position.

In both cases, whether IFRS 17 is followed for profit tax purposes or not, we recommend that you have the current, deferred and uncertain tax positions reviewed by experts in the field. You can certainly avoid paying profit tax on the same profit twice.

Vivian Pieters

INTERVIEW WITH THE CURAÇAO MINISTER OF FINANCE: JAVIER SILVANIA

By Tashana Johannes & Michiel Jansen, University of Curaçao

On December 21, 2022, the students of the Master Caribbean Tax Law of the University of Curaçao were given the opportunity to conduct an interview with the Minister of Finance of Curaçao, Javier Silvania. The interview was held at the Ministry of Finance in Pietermaai, Curaçao.

The Minister addressed several topics. After starting on a personal note on why the Minister chose a career in the tax practice, the status of the implementation of the agreed reforms in Curaçao under the Caribbean Body for Reform and Development (COHO) was discussed, as well as other proposed changes to several National Ordinances to broaden the tax base, increase the collection of taxes and improve the economy of Curaçao.

As Mr. Silvania has affinity with both economics and law, the Minister chose to study Fiscal Economy and Fiscal Law in the Netherlands. After starting his career at the Tax Authority in the Netherlands, he returned to his country of birth working as the head of the department of Fiscal Affairs. Since three years Mr. Silvania decided to enter politics resulting in his current position as Minister of Finance of Curaçao.

When asked for the Minister's advice for the students at the University of Curaçao, the Minister encourages students to acquire relevant working experience while studying. "If you only have your diploma, it's more difficult to stand out when applying for your first position", the Minister pointed out. Even working as a volunteer as the Minister did himself at the Stichting Belastingwinkel, a foundation that helps those without financial means with filing their taxes free of charge, can help you stand out when applying for a position.

Javier Silvania

Just recently the Ministry of Finance has hired almost 30 new employees and he is currently employing several former students from the University of Curaçao.

REFORMS UNDER COHO

The tax reforms Curaçao has to implement include the necessity of a robust tax system. According to the Minister this implies that Curaçao needs to increase the tax base. At the moment, tax payers feel that the tax burden is too high. In other words, we need to ensure that all of our residents pay their taxes. Once this is realized, the relative tax burden can be lowered. At this moment the Ministry of Finance is working on a proposal to achieve this goal, as well as the strengthening of Stichting Belasting Accountants Bureau (SBAB), the Government Audit Service in Curaçao to ensure everyone pays their taxes.

When asked for an example of the proposed tax reforms, the Minister mentioned the re-introduction of a deduction for maintenance costs for home owners in their income taxes. These costs can only be deducted if the taxpayer discloses information about the contractor. This will provide the Tax Office with a tool to combat the underground economy in that area of the economy. More generally speaking, the Minister's aim is to foster a higher tax morale amongst tax payers. "People need to see that the government is spending the taxes they receive wisely, for instance how will you convince people to pay their road tax when roads are full of potholes? These are the kinds of issues that the government needs to address", the Minister explained.

The reforms also mention the need for an Adequately Equipped Tax Authority. In this regard, the Minister states that Curaçao needs to ensure that the Tax Authority has its own building again as soon as possible, with further investments in infrastructure, ICT and people. This will contribute to being able to provide a higher level of service to the taxpayers as well as making sure that matters are dealt with in a timely manner. Furthermore, as stated in the coalition agreement, the ultimate goal is to integrate the Tax Inspection, Tax Collection and SBAB into one organization.

The Tax Authority will also further automate the processing of the tax returns and the software will be improved. The current delay in processing tax objections must be resolved. According to the Minister, the Tax Authority needs to be able to focus on current affairs. The Minister is therefore looking into adopting a policy to award objections under a certain amount of money or objections that haven't been ruled on for a long period.

ASSISTING TAXPAYERS

The Minister was also asked about the current policy of due diligence by the Tax Authority going back five years. In many cases a new entrepreneur will be focused on making his or her business a success and might not have the expertise or resources to administer the business correctly. If after 5 years it turns out mistakes were made, this can have major consequences for the entrepreneur. The students asked if the Minister agrees that it would be a good idea for the Tax Authority to monitor these taxpayers at an earlier stage to ensure that they are administering their business correctly. In response, the Minister points out that it is the responsibility of the entrepreneur to ensure all the owed taxes are paid. Although the Ministry of Finance is working on providing more general information through the website of the Tax Authority, for specific advice for their business, the entrepreneurs need to seek tax advice if required.

GAMING SECTOR

With regards to the proposed changes of the legislation in the online gaming sector, the Minister expressed his wish to include more protection for the online players, adding more responsibility to the operators in the gaming sector, to ensure that players will receive their winnings, but also to protect players who might suffer from gaming addiction. The legislation also includes measures to combat money laundering and to create more employment opportunities in Curaçao. At the moment, companies with a sublicense for a gaming business in Curaçao do often not employ any local workers in Curaçao. In line with the proposed changes, these companies will need to hire at least three local employees in key positions, for instance a local compliance officer. In contrast to the tourism sector, working in the gaming sector is usually well paid and the gaming sector will contribute to the diversification of our economy.

TERRITORIAL TAX SYSTEM

When asked about his thoughts on the territorial tax system, as implemented in the Profit Tax Ordinance in 2020, the Minister mention that the territorial tax system is very complicated. Perhaps even too complicated for a small country such as Curaçao to be successfully implemented. However, as there are many other priorities to focus on, there are no current plans to make any changes in this system any time soon.

TAX TREATIES

At present, Curaçao only has one tax treaty with Norway. Expanding the tax treaty network of Curaçao has a high priority for the Minister. The tax treaty with Malta has already been negotiated but still needs to be ratified. The Ministry of Finance has appointed external advisors to help finalize this process and start negotiations with other countries.

THE TAX RELATIONSHIP BETWEEN BRAZIL AND THE CARIBBEAN

By Rafael Barbosa de Sousa, Municipal Tax Auditor for the City of São Paulo and international tax specialist. Appointed to serve as Administrative Tax Judge in the Municipal Board of Tax Appeals for the 2022/2024 Term.

1. OVERVIEW

The Federative Republic of Brazil is the fifth largest country in the world measured by total land area and has the world's sixth highest population, estimated to be at over 210 million people as of the time of writing.

Economically, the country is a global powerhouse, with the 8th largest GDP (PPP) in the world as of October 2022, according to an estimate by the International Monetary Fund . It is the largest economy in Latin America and the second largest in the Americas, after the United States.

However, in spite of its significant economy, large consumer market and geographic proximity to the Caribbean, Brazil has a relativity limited economic exchange with Caribbean nations, including those that form the Dutch Caribbean. Though the reasons for this somewhat circumspect joint economic activity are varied and complex, cultural differences, linguistic barriers and a strong economic presence in the Caribbean by the United States and Western European countries (thus possibly crowding out other global participants) are some of the contributing factors.

From a Brazilian standpoint, Caribbean jurisdictions are often utilized by Brazilian corporations and foreign MNEs with permanent establishments in Brazil as domiciles for holding companies, financial/insurance subsidiaries and investment vehicles. These entities are often incorporated to serve tax-planning purposes, in order to reduce the share of their total income subject to taxation in Brazil, which is considered to have high tax rates for a developing country. As a result, there is perhaps a generally cautious attitude towards strengthening cooperation with

Caribbean jurisdictions on tax matters, and in particular with signing double-tax treaties (DTTs) with such countries, as there may be concern with regards to the potential abuse of any such provisions by taxpayers resident in Brazil with the aim of unfairly and artificially reducing the share of their corporate income subject to taxation in the country.

This more conservative attitude also extends to other matters of tax cooperation as a whole. Exchange of tax information and high-level interchange between Brazilian and Caribbean authorities appears to be relatively limited. It can therefore be said that there is significant room for an intensification of the tax relationship between Brazil and the Caribbean, both in terms of implementing a robust DTT network and of creating a framework for increased cooperation between Brazilian and Caribbean authorities on tax matters.

2. CURRENT SCENARIO: LIMITED TOOLS FOR TAX COOPERATION AND THE PREVENTION OF DOUBLE TAXATION

The Brazilian DTT network is quite limited considering the size and global relevance of its economy; as of the time of writing, the official website of the Brazilian Federal Revenue Service[2] lists only 37 (thirty-seven) DTTs active and in force between Brazil and foreign jurisdictions. In addition, Brazilian authorities signed in December 2022 new DTTs with Norway and the United Kingdom, but these treaties must yet be ratified by the Brazilian Congress and therefore are still not in force.

From a legal standpoint, the prevalence DTTs over domestic legislation in Brazil can be inferred from the joint interpretation of Article 5, Paragraph 2, and Article 150, caput, of the Brazilian Constitution. Paragraph 2 of article 5 provides that domestic law must observe fundamental rights and guarantees assured by the international treaties to which Brazil is a party.
The caput of Article 150, which deals with limitations on the power to tax, qualifies taxpayer rights as fundamental rights. Moreover, article 98 of the National Tax Code ("Código Tributário Nacional" – CTN – Federal Law n° 5.172/1966) expressly determines that international tax treaties and conventions must prevail over domestic legislation. Decisions of the Brazilian superior courts – i.e., the Federal Supreme Court ("STF") and the Superior Court of Justice ("STJ") – applying article 98 of the National Tax Code acknowledge the prevalence of DTTs over domestic legislation.

Therefore, DTTs in force must be observed by Brazilian domestic legislation and supersede its application in the event of conflict.

It is of particular notice that, whilst Brazil does have an active DTT with the Netherlands[3], the territorial effects of such treaty are explicitly limited to the European part of the Kingdom of the Netherlands and do not cover neither the special municipalities of Bonaire, St. Eustatius and Saba (BES Islands); nor the constituent countries of Aruba, Curaçao and St. Maarten (CAS Islands).

The treaty, however, defines "nationals" for the effects of its applications as all natural persons who are nationals of either State, according to the laws of that State. As people born in both the BES and the CAS islands are Dutch nationals according to the Dutch Nationality law, one can infer that they may benefit from the treaty, for income taxable in the European Netherlands, as long as they are considered a resident of the European Netherlands for tax purposes in accordance to the residence provisions of the treaty.

The only DTT in force between Brazil and a Caribbean country is that signed with Trinidad and Tobago in 2008, ratified by the Brazilian Congress in 2011 and promulgated by the Brazilian Presidency in 2014[4]. Some noteworthy highlights of this treaty include:

- The treaty explicitly applies to the following Trinidadian taxes: corporation tax, income tax, unemployment levy, petroleum profits tax and the supplemental petroleum tax;
- The only Brazilian tax which explicitly falls under the purview of the treaty is the Federal Income Tax ("Imposto Federal sobre a Renda"), which applies both to personal and corporate income;
- Notwithstanding the express indication of the taxes mentioned above, the treaty shall apply to any future taxes of a substantially similar nature, enacted after its celebration, either in addition to or in substitution of the expressly covered taxes;
- The method of choice to avoid double taxation is the Credit Method, as opposed to the Exemption Method;
- Income derived by a resident of one State from Real Estate located in the other State may be taxed by that other

State, and such tax owed shall be deductible from the tax owed to the residence State;
- Profits from the operation of ships or aircraft in international traffic are taxable only in the State in which the place of effective management of the enterprise is situated;
- Dividends paid by a company resident of one State to a company resident in the other State may be taxed by that other State, but may also be taxed by the State of residence of the paying company. However, if the company receiving such dividends is their beneficial owner, the maximum tax rate which can be levied by State of residence of the paying company is limited to 10% (ten per cent) if the beneficial owner holds directly or indirectly at least 25% (twenty-five per cent) of the capital of the paying company, and 15% (fifteen per cent) in all other cases;
- Interest and royalties arising in one State and paid to a resident of the other State may be taxed in that other State. However, such interest and royalties may also be taxed in the State in which it arises, but, if the beneficial owner of the interest and royalties is a resident of the other State, the tax so charged shall not exceed 15 per cent of the gross amount of the interest and royalties;
- Visiting professors and researchers from one State residing in the other State for a period not exceeding two years are exempt from tax levied by that other State on their income derived from such activities, provided that the payment of such remuneration is derived by him from a source outside that State; and
- A Limitation of Benefits (LOB) Clause excludes treaty benefits with regards to income benefitting a company resident of either State when its beneficial owners are residents of other jurisdictions, and the amount of tax imposed on such income is substantially lower than what would have been levied had the beneficial owners had been residents of that State.

Brazil has a history of willingness to stray from the rigidities of both the OECD and the UN Model Conventions on Tax in order to safeguard what it sees as critical national interests and prevent treaty abuse. Such straying can be seen in the treaty signed with Trinidad, and the author believes this DTT will serve as a model for any future treaties negotiated with Caribbean jurisdictions (including the BES and CAS islands), in particular since that treaty was drafted and negotiated by Brazil under President Luis Inacio Lula da Silva, who has once again assumed the Presidency, and has brought back several members of the economic and foreign policy teams which assisted him during his first Administration.

3. NORMATIVE INSTRUCTION N° 1.037/2010 OF THE BRAZILIAN FEDERAL REVENUE SERVICE: CARIBBEAN TAX HAVENS

Caribbean-based tax professionals interacting with Brazil and the Brazilian tax authorities should be cognizant of the content of Normative Instruction n° 1.037/2010[5], issued by the Federal Revenue Service of Brazil ("Receita Federal do Brasil"), which lists foreign jurisdictions considered by Brazil has having favorable or privileged tax regimes – tax havens.

A significant number of Caribbean jurisdictions are listed. As of the time of writing, these were:
- Anguilla;
- Antigua and Barbuda;
- The CAS islands (Curaçao, Aruba and St. Maarten);
- The Bahamas;
- Barbados;
- Belize;
- Bermudas;
- The Cayman Islands;
- Dominica;
- Granada;
- Saint Lucia;
- Saint Christopher and Nevis;
- Saint-Pierre and Michelon;
- Saint Vincent and the Grenadines;
- The Turks and Caicos Islands;
- The US Virgin Islands; and
- The British Virgin Islands.

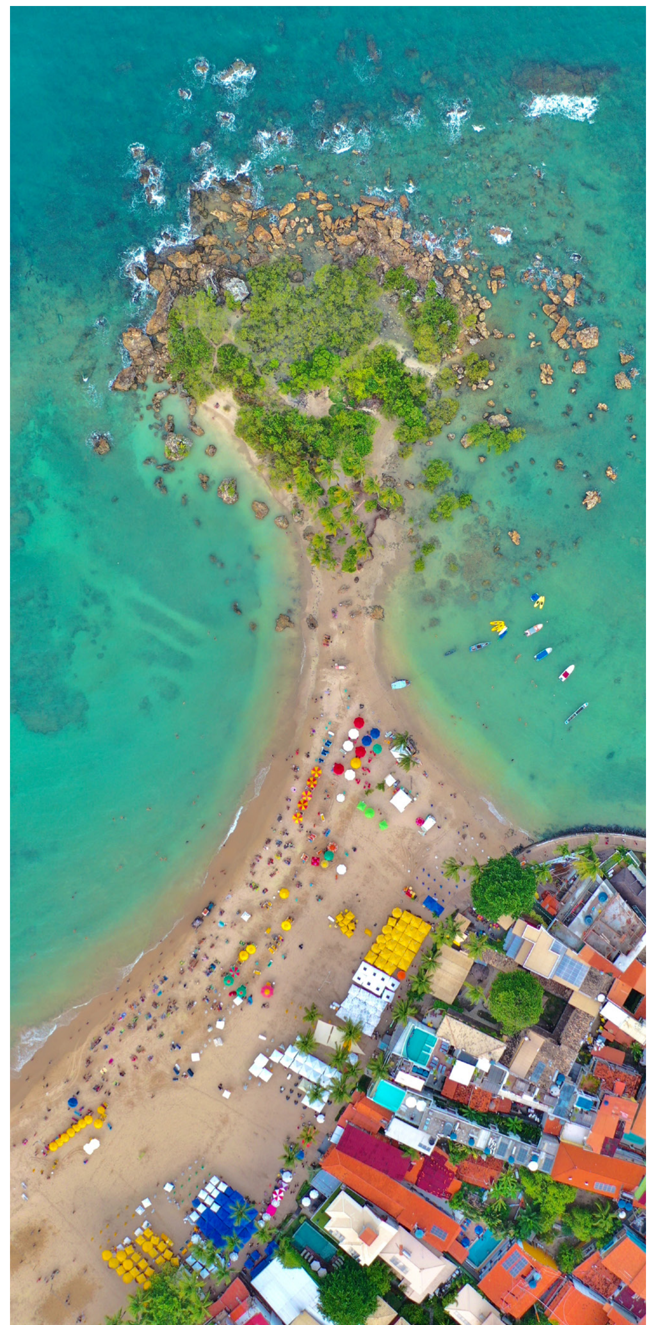
According to Brazilian law, tax havens are defined as jurisdictions which meet at least one of the following requirements:

a) Does not tax income or does so at a maximum rate of less than 20% (twenty per cent);

b) Grants tax benefits to non-resident natural and/or legal persons without requiring such persons to carry out substantive economic activity in that jurisdiction; and

c) Refuses access by foreign tax authorities to information relating to corporate structuring and ownership; the persons holding the underlying rights to goods, services and other economically significant assets; and the parties to transactions of an economic nature.

The consequences for a foreign jurisdiction of being listed as a tax haven by Brazilian Authorities is the increase in Corporate Income Tax (CIT) rates on remittances of capital gains and yields from 15% (fifteen percent) to 25% (twenty-five percent), additionally to the enforcement of special and more rigorous Transfer Pricing rules.



4. PROSPECTS FOR THE FUTURE

Though the current scenario leaves room for improvement in terms of effective tax cooperation between Brazil and Caribbean nations – and the prevention of double taxation or double non-taxation – there is cause for optimism.

As previously mentioned, President Luis Inacio Lula da Silva was inaugurated on 1 January 2023 to serve his third non-consecutive term as President of Brazil, following his victory in presidential elections held in late 2022. In his two previous presidential terms, Lula developed a strong record of accomplishments in deepening the political and economic relations between Brazil and nations of the so-called "Global South", with a particular emphasis on Latin America.

Furthermore, economic exchange between Brazil and the Caribbean though still far below its potential, has been growing rapidly, spurred by Brazilian investment in Caribbean enterprises, strong and growing financial services and logistics sectors in the Caribbean region, and an increasing flow of Brazilian tourists to destinations such as Aruba, Curaçao and the Dominican Republic.

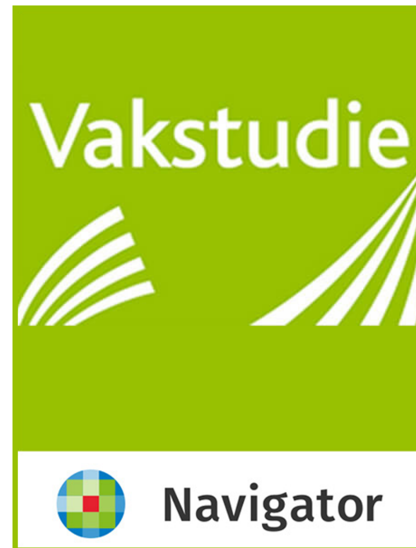
As a result, one can anticipate economic and financial flows to increase over the upcoming years, which, when combined with an expected greater attention by the Brazilian government to its developing neighbors in the Americas, bodes well for a strengthening of the tax relationship between Brazil and the Caribbean, with opportunities for new DTTs and a deepened cooperation between tax authorities.

Rafael Barbosa de Sousa

[1]World Economic Outlook database: October 2022. Available at https://www.imf.org/en/Publications/WEO/weo-database/2022/October/weo-report accessed in December 2022.
[2] https://www.gov.br/receitafederal/pt-br/acesso-a-informacao/legislacao/acordos-internacionais/acordos-para-evitar-a-dupla-tributacao/acordos-para-evitar-a-dupla-tributacao#trinidadetobago accessed in January 2023.
[3]"Convention between the Kingdom of the Netherlands and the Federative Republic of Brazil for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income.", promulgated in Brazil by Federal Decree nº 355/1991. Article 3, Section 1, Item c: "the term 'the Netherlands' means the part of the Kingdom of the Netherlands that is situated in Europe including the part of the seabed and its subsoil under the North Sea, to the extent that that area in accordance with international law has been or may hereafter be designated under Netherlands laws as an area within which the Netherlands may exercise certain rights with respect to the exploration and exploitation of the natural resources of the seabed or its subsoil;" English version authentic.
[4] Convention Between the Government of the Republic of Trinidad and Tobago and the Government Of the Federative Republic of Brazil for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and for the Encouragement of Bilateral Trade and Investment", promulgated in Brazil by Federal Decree nº 8.335/2014. English and Portuguese versions equally authentic.
[5]Instrução Normativa RFB nº 1037, de 04 de Junho de 2010. Full text available at http://normas.receita.fazenda.gov.br/sijut2consulta/link.action?naoPublicado=&idAto=16002&visao=anotado accessed in January 2023.

DE VAKSTUDIE – THE DUTCH CARIBBEAN ENCYCLOPEDIA

In the Netherlands, many tax professionals turn to "De Vakstudie", when it comes to looking up case law and literature on tax matters. De Vakstudie, by Wolters Kluwer, is a very extensive encyclopedia, divided into 16 different chapters. Chapter 16, the last part, but certainly not the least, contains information about Caribbean Tax Law. There is legal history, but also recent case law, commented on by a team of authors, all tax professionals who have earned their spurs in Caribbean tax law.



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TRANSFER PRICING, FAIR TAXATION AND ETHICAL ISSUES

By Clive Jie-A-Joen and Monique van Herksen[1]

1. SETTING THE SCENE: WHAT IS FAIR?

In the last decade or so, tax avoidance has attracted significant attention from the media, politicians, non-governmental organizations and other stakeholders. Scandals such as the Luxembourg Leaks (2014), Panama Papers (2016), Paradise Papers (2017) and Pandora Papers (2021) disclosed how globalization and incoherent domestic tax rules opened up the opportunity to engage in tax avoidance and minimizing the tax burden through base erosion and profit shifting ("BEPS"). All this has led to negative publicity and reputational damage for business and tax advisors and international efforts to curb such avoidance have ramped up. Tax havens, including Caribbean tax jurisdictions, were also named and shamed, because they were suspected of contributing to BEPS in light of the use of artificial structures / shell companies (existing only on paper, with no substance) located in their jurisdictions. Several organizations publish a list of tax havens. For example, the European Union regularly publishes and updates a list of non-cooperative jurisdictions for tax purposes, which contains the Caribbean countries Trinidad and Tobago and the Bahamas in the October 2022 version.[2] Previously, the US Virgin Islands were included, as were Anguilla and Dominica, but those are currently removed.

The OECD/G20 BEPS project, which led to 15 BEPS actions in October 2015, served to reduce the possibility by multinational enterprises ("MNEs") to avoid taxation. The OECD estimated that BEPS contributed to losses in global corporate income tax

revenue of about USD 100 to 240 billion annually through amongst others aggressive tax planning, lack of relevant information at level of tax administrations, harmful tax practices and domestic tax rules that are not coordinated across borders. A consequence of this is that less money is available for public finances and that other taxpayers who play by the rules and pay their fair share in taxes, essentially need to pay more tax. As a result, ordinary citizens have become sensitive to the issue of fair taxation.

BEPS is referred to by the OECD as "tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity or to erode tax bases through deductible payments such as interest or royalties"[3] or "tax planning strategies that exploit gaps and mismatches in tax rules to make profits 'disappear' for tax purposes or to shift profits to locations where there is little or no real activity but the taxes are low, resulting in little or no overall corporate tax being paid."[4] Indeed, the transfer pricing related BEPS Actions 8-10 address transfer pricing guidance to ensure that transfer pricing outcomes are better aligned with value creation of the MNE group.

Nowadays 137 countries and jurisdictions of the OECD/G20 Inclusive Framework on BEPS, including Caribbean jurisdictions Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bermuda, Curaçao, Dominican Republic, Grenada, Haiti, Jamaica, St. Kitts and Nevis, St. Lucia, St. Vincent and Grenadines, Trinidad and Tobago, are collaborating to implement BEPS measures.[5] BEPS represents a change of mindset aimed at ensuring fairness and changes to tax rules and guidance. The OECD provides in relevant part that while some of the schemes used are illegal, most are not. This undermines the fairness and integrity of tax systems because businesses that operate across borders can use BEPS to gain a competitive advantage over enterprises that operate at a domestic level. Moreover, when taxpayers see multinational corporations legally avoiding income tax, it undermines voluntary compliance by all taxpayers." Importantly, many tax avoidance schemes used prior to the BEPS action plans were regarded as perfectly legal, yet nevertheless unfair, because they distort competition with domestic companies and provide the wrong example for other taxpayers.

The COVID-19 pandemic, the Ukraine crisis and high inflation (e.g., high energy prices) have required governments to provide financial support to business and society, which support is essentially funded by domestic revenue mobilization, a.k.a. taxation. As such, tax avoidance is not appreciated.

As a result, today there is increased pressure on MNEs to consider fairness in developing their tax and transfer pricing policies. When is tax avoidance fair? What is a fair intercompany price? Mere legal compliance apparently is not enough. Ethics is the study of morality and is regarded as a part of philosophy. Ethics is thinking critically about what is (morally) right to do. Ethical taxation or transfer pricing as such is not based on law.

For taxpayers, the ethical thing to do is in any case to at least comply with the law. Often tax avoidance is considered ethically acceptable, while tax evasion is not. The former does not necessarily undermine the integrity of the tax system. But if the ethical thing to do is to contribute a “fair share” of taxation, so that public services (e.g., healthcare, education and investment in infrastructure) can be funded, tax avoidance may be less acceptable and unfair. What is a ‘fair’ tax contribution is subjective and is difficult to define such that all stakeholders agree, however.

2. FAIR TRANSFER PRICING

Tax fairness means different things to different stakeholders.

In the context of transfer pricing (“**TP**”), which is the pricing of intercompany ("**IC**") transactions between associated enterprises of a MNE group, note that transfer pricing is mandatory part of international business. IC transactions need to be priced. The 2022 OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (“**OECD TPG**”) provide that there is international consensus that the arm’s length principle (“**ALP**”) should govern the evaluation of transfer prices for tax purposes.[6] The ALP also presents the nearest comparative of how the open market operates.[7] The starting point of the arm's-length principle is that associated enterprises for tax purposes are presumed to act among themselves under the same conditions as independent parties would under similar circumstances. In this respect, we consider that the ALP in particular intends to accomplish fair taxation through reference to conditions in commercial or financial relations which would be applied between independent enterprises. This means that a result must be achieved in which the taxable profit that associated companies make on their mutual transactions is comparable to the profit that independent companies would achieve under similar circumstances with similar transactions.

In the general discussion on fair taxation, what is “fair” is not defined, vague and as a result, subjective. The ALP tries to objectively determine transfer prices for intercompany transactions through conducting a comparability analysis.

A comparability analysis is at the heart of applying the ALP and can consist of the following steps:
- Step 1: Determination of covered years;
- Step 2: Broad-based analysis of the taxpayers' circumstances (industry analysis);
- Step 3: Understanding of controlled transactions (five comparability factors);
- Step 4: Review of any internal comparables;
- Step 5: Determination of available sources for external comparables (if required);
- Step 6: Selection of most appropriate transfer pricing method;
- Step 7: Identification of potential comparables;
- Step 8: Determination of and making of comparability adjustments where appropriate; and
- Step 9: Interpretation and use of collected data and determination of arm's length remuneration

Granted, in following the 9-step approach, there can be different views and interpretations between the various stakeholders on amongst others:

a. the facts and circumstances of the intercompany transaction (e.g., characterization of the associated enterprises: can the manufacturing entity be regarded as a routine manufacturer based on the functions performed, risks assumed and assets used?);

b. the selection of the TP method to evaluate the intercompany transaction at issue (the taxpayer can choose between five OECD TP methods);

c. the application of the selected TP method (are the identified comparables really comparable, what is the arm's length range? and should comparability adjustments be performed to increase the reliability of range resulting from the analysis?).

As regards the ethics of it all, from a TP technical perspective there are various stakeholders to be considered, including:

- each of the group entities involved in the intercompany transaction (e.g., a manufacturer sells manufactured products to a related party distributor);
- the parent company who can be involved with determining the TP policy;
- the tax authority of the related party manufacturer's jurisdiction; and
- the tax authority of the related party distributor's jurisdiction.

While the ALP intends to accomplish fair taxation objectively, its application may be subject to different interpretations and choices made during the performance of the comparability analysis. This may lead to disagreement among the stakeholders. In our view, taxpayers should ask themselves when these situations arise whether the selected approach / solution is right, fair, logical, a defensible position or appropriate, the reason for selecting that TP approach in dealing with the specific issue (why has this approach been selected) and then document this. In addition, taxpayers should understand the weaknesses of their selected approach (counter arguments) and think about other / better options. The next section describes some ethical theories that can help in this respect.

3. ETHICAL THEORIES

The following ethical theories can help to justify and reflect on decisions that need to be made:

a. Utilitarianism: a moral theory that focuses on the results or consequences of actions. It suggests that all actions should be directed towards achieving the greatest happiness / welfare for the greatest number of stakeholders. In that case, focusing on the results or consequences of actions is the ultimate way to reach fair taxation. The outcomes justify the means. Does the selected TP approach lead to the most positive consequences for the greatest number of stakeholders?

b. Deontology: Rather than focusing on whether the consequences of an action is good, in deontological ethics an action is viewed as morally good due to some characteristic of the action itself. Deontological ethics provides that some actions are moral obligations in spite of their consequences for human happiness / welfare. Duties and rules are important to differentiate right from wrong ("Don't lie, Don't steal, Don't cheat"). The outcomes may not justify the means. Is the selected TP approach in line with (formal) rules and duties?

c. Virtue ethics: a moral theory that focuses on what type of person (or organizations) we should be. The value of virtuous qualities is important rather than formal rules or useful results. Virtue is a skill that can be learned through experience and is dependent on the situation. Does the selected TP approach match with what type of person or company you would like to be?

The next section presents some TP examples in which ethical theories can provide lines of argumentation in justifying and reflecting upon when making decisions.

4. TRANSFER PRICING EXAMPLES IN THE CONTEXT OF FAIRNESS AND ETHICS

4.1 Functional analysis (including risks assumed and assets)

The ALP attempts to objectively bring about fairness through determining an arm's length compensation based on functions performed (in particular decision-making), risks assumed and assets used. Contractual arrangements provide the starting point for delineating the transaction. In case of material differences between contractual terms and conduct of parties, however, the functions actually performed, the assets actually used and risks actually assumed, ultimately determine the factual substance and accurately delineate the actual transaction.[8] Considering that the decision-making functions of many MNEs historically resides with developed countries rather than with developing countries, this analysis may lead to a disproportionate allocation of welfare between countries. One can therefore nevertheless question whether the outcome of the -objectively conducted- analysis, is ethical / fair. Due to demographical and other developments (e.g., the ageing population of developed countries, the rise of African, Asian and East European countries), the balance may be restored in the near future, however. If and when that happens, can that be considered ethical / fair?

4.2 Fairness under the OECD TPG

The OECD TPG refers to fairness in the following context:

- In order to be fair to taxpayers and tax administrations, all aspects of a system relevant for a TP case should be considered to balance the interests of the parties (see Preface of OECD TPG, #18). For example, although the burden of proof may lie with the tax administration in a TP case, it is reasonable that the taxpayer is required to provide relevant information.

- It is unfair to apply a TP method based on information undisclosed to taxpayers (paragraph 3.36 OECD TPG).

- There should be clear procedural rules in a fair application of the arm's length principle so that taxpayers are adequately protected and to ensure that profits are not shifted to jurisdictions with excessive hard procedural rules (paragraph 4.4 OECD TPG).

- The fairness of the penalty system should be examined with respect to whether the penalties are proportionate to the offence. (paragraph 4.27 OECD TPG).

4.3 Change of transfer prices to minimize taxes

A MNE group headquartered in the Netherlands has a Dutch manufacturing entity selling manufactured goods to its related party distributors in the USA and Canada. The latter resell the goods to third party customers. The TP has been agreed at the start of the year between the managers of the manufacturing entity and the two

distribution entities. At the end of the 2nd quarter, the managers were informed by headquarters that the TP of the goods will increase as of the 3rd quarter.

The managers of the distribution entities complained that their bonuses depend on the distribution entity's operating profit and that a higher TP will decrease this profit and therefore their bonuses. Is this fair? They also were concerned that this higher TP will decrease the taxable profits of the distribution entities and will consequently attract the attention of the local tax authorities. The parent company's management explained that the reason to increase the TP is that the Dutch manufacturer is making losses and has carry forward losses. A TP increase will not lead to corporate income tax for the manufacturer. The distributors will earn lower taxable profits, but their margins will still lie within the arm's length range of benchmarked margins earned by comparable independent distributors, which will be documented in a TP report. Is this morally good / fair?

4.4 Using safe harbors
The above MNE group also has related party distributors in Africa, which buy goods from the related party Dutch manufacturer for resale to local customers. The transactional net margin method is selected as the most appropriate TP method to evaluate the margins earned by the related party African distributors. No comparable companies can be identified in African countries, because data is unavailable.

The OECD decides to introduce a concept called "Amount B" which serves to simplify and streamline the pricing of in-country baseline marketing and distribution activities. The intention is to determine the arm's length results for baseline marketing and distribution activities. In implementing Amount B, the OECD contemplate i) to design Amount B as a safe harbor or ii) to prescribe Amount B as the interpretation of applying the ALP to baseline marketing and distribution activities.

Is option i) / option ii) morally good?

4.5 Cash box
An IP company located in Curacao licenses a valuable patent to related party manufacturers for which it receives royalty payments. The IP has been developed pursuant to an R&D services agreement under which a related party Dutch R&D company renders R&D services for which it receives a cost-based remuneration from the IP company. Under the R&D services agreement, all developed IP will be owned by the IP company. The Dutch tax authorities commence a TP audit for the year 2013. They argue that the IP company is a cash box, because it does not employ personnel conducting so-called DEMPE (i.e. Development, Enhancement, Maintenance, Protection and Exploitation) functions. Rather, it is the Dutch R&D company that performs the key DEMPE functions. The IP company only financed the R&D activities. The Dutch tax authorities therefore argue that the IP company is only entitled to a risk-free return.

Is it ethical / fair to apply the DEMPE concept, which was introduced in the 2017 OECD TPG following the results of the BEPS action plan 8, to the TP audit for the year 2013?

4.6 Intra-group loan

A company located in country X (corporate income tax rate of 25%) obtains an intra-group loan from its parent company located in country Y (corporate income tax rate of 5%) at an interest rate of 0%. To comply with the ALP in country X, a benchmarking analysis is conducted, which provides that the interquartile range of interest rate falls between 2% and 8%, with a median of 5%. Which of the following approaches is morally good / fair?:

a. An interest rate of 8% is selected, which lies within the interquartile range;
b. The related party borrower states in its CIT return an interest rate of 8%, which leads to a downward adjustment of its taxable profits. The related party lender does not report the interest revenue.

4.7 Profit split method

In applying the profit split method, a certain part of the relevant profits will be split based on the relative contributions of the parties to the intercompany transaction.It could be that this split cannot be based on comparable uncontrolled transactions, but based on internal data of profit splitting factors, such as assets

(relative value of intangibles owned by the parties to the transaction), capital or costs (e.g., relative salary costs of employees of the parties to the transaction).

Because the ALP intends to accomplish fair taxation by reference to conditions in commercial or financial relations which would be made between independent enterprises, the question arises whether the aforementioned use of internal data on profit splitting factors will result in fair taxation.

5. CONCLUDING REMARKS

Levying taxes results by law and the legislator must deal with this properly. Taxpayers need to comply with the tax laws. Yet in recent years, the ethics of taxation and TP, and the topic of fair taxation have attracted the attention of many stakeholders.

As regards TP, our view is that the ALP is a principle that intends to objectively determine proper intercompany pricing and fair taxation. It enjoys international consensus and its reference to conditions in commercial or financial relations which would be made between independent enterprises serve to result in fair taxation.

However, its application may be subject to different interpretations and choices made during the performance of the comparability analysis, which consists of several steps. This may lead to disagreement among the stakeholders. What can you do?

1. Consider the arguments in choosing an approach based on ethical theories:

a. Utilitarianism: what are the consequences of my actions?
b. Deontology: what is my duty?
c. Virtue ethics: what type of person (or organizations) do you want to be?

2. Understand the weaknesses of the selected approach based on ethical theories;

3. Consider other options;

4. Document your choices.

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[2]https://www.consilium.europa.eu/en/policies/eu-list-of-non-cooperative-jurisdictions. To be cooperative for tax purposes, jurisdictions are evaluated based on tax transparency, fair taxation and anti-BEPS measures.
[3]https://www.oecd.org/tax/beps/about/#mission-impact.
[4]https://www.oecd.org/tax/beps/faq/.
[5]https://www.oecd.org/tax/beps/oecd-g20-inclusive-framework-members-joining-statement-on-two-pillar-solution-to-address-tax-challenges-arising-from-digitalisation-october-2021.pdf as of 16 December 2022.
[6]OECD TPG, paragraph 1,14.
[7]OECD TPG, paragraph 1.14.
[8]This also fits with the goal of BEPS action points 8, 9 and 10 which is to better align TP outcomes with value creation of the MNE group.

TAXATION IN GUYANA

By Nicole Duyvelshoff, Director Tax at Grant Thornton Aruba, Member of Bonaire and Guyana desk

GENERAL

Guyana, "land of many waters" and officially the Co-operative Republic of Guyana, is the only country in South America in which English is the official language. However, the majority of the population speaks Guyanese Creole as their first language. Guyana's culture reflects Amerindian, Nepalese, Indian, Chinese and African influences, as well as British, Dutch, Portuguese and Spanish.

Guyana is located on the northeastern coast of South America and borders the Atlantic Ocean, Venezuela, Suriname and Brazil. Although located in South America, Guyana is considered a Caribbean country. Its culture, especially on the coast, is very similar to that of the West Indies. The total area is about 214,969 square kilometers (83,000 square miles). Guyana is divided into ten administrative regions with the city of Georgetown as its capital and has approximately 800,000 inhabitants of which 90% live on the coastal strip. The currency is the Guyanese Dollar (GYD) (1 USD is approximately 209 GYD).

Guyana was a colony of the Netherlands until 1814 followed by Great Britain until 1966. On 26 May 1966 Guyana became independent and became a republic on 23 February 1970 within the British Commonwealth. The legal system of Guyana is mainly based on the English common law. However, vestiges of a Roman-Dutch legal system remain, especially in the area of land tenure. Guyana is also a member of the Caribbean Community (CARICOM).

NATURAL RESOURCES

Guyana was once one in the poorest countries of the world. However, Guyana's development prospects have significantly shifted since the discovery of large offshore oil deposits in 2015. Since 2015, more than ten billion barrels of oil and gas have been discovered and the country is expected to produce one million barrels per day by the end of the decade. The major oil companies (Exxon, Hess and CNOOC) are well-established and managing the exploration and production process. In 2021 Guyana exported 116,900 barrels of oil per day. Most of the oil was sold to Asian countries, including China and India, while shipments to Europe accounted for about 16% of the total. By 2022, that dynamic has changed dramatically. Although Asian buyers remain important, Europe has bought the majority of Guyanese crude. Between January and early September 2022, shipments to Europe, at an average of 110,000 barrels of oil per day, contributed 49% of the Caribbean country's oil exports. In addition, on October 26, 2022, ExxonMobil announced two new oil discoveries in Guyana, in the Sailfin-1 and Yarrow-1 reservoirs in the Stabroek Block offshore Guyana, confirming that Guyana's oil industry is developing at a pace well above the industry average. Guyana is expected to reach an average of 360,000 barrels of oil per day by the end of the year 2022.

Besides the oil and gas industry that Guyana has encountered in the last few years, the main economic assets of Guyana have always been its natural resources. Mainly its rainforests, plantations, rice fields, bauxite and gold reserves.

TAX - INDIVIDUALS

Resident individuals are subject to tax on their worldwide income. Non-resident individuals are subject to tax on his/her income from Guyana. In Guyana income is defined as any salaries, wages, earnings, gains and profits.

Resident individuals are entitled to a personal deduction of GYD 780,000 (USD 3,750) or 1/3 of their income per year, whichever is greater. Individuals with taxable income of less than GYD 1,560,000 (USD 7,500) per year pay tax at a rate of 28%. If their taxable income exceeds GYD 1,560,000 per year, a tax rate of 40% applies to their taxable income above GYD 1,560,000 per year.

TAX - COMPANIES

Subject to corporation tax are resident companies and non-resident companies. A resident company is a company in which the control and management are exercised in Guyana. The resident company shall be chargeable to corporation tax on all its profits wherever arising. A non-resident company is considered a company of which the control and management are exercised outside Guyana. In the case of a non-resident company any income directly or indirectly accruing in or derived from Guyana is chargeable with corporation tax. There are no formal provisions on the permanent establishment in the law. The residency of an entity is determined based on the location of actual management and control.

The general tax year is the calendar year, other accounting periods may be allowed upon request. Corporation tax returns must be filed electronically through eServices, where supporting

documents can be uploaded as well. Audited financial statements must accompany the corporation tax return. If the financial statements are not audited, the corporation tax return will be considered incomplete pending the submission of audited financial statements. The due date for the corporation tax return is April 30 following the fiscal year and corporate advances are due quarterly during the tax year on March 15, June 15, September 15, and December 15. These payments are based on the previous year's information, but the Guyana Revenue Authority may require a company to calculate payments based on that year's estimated income.

The corporation tax rates are as follows:
- 45% for telephone companies.
- 40% for commercial companies other than a telephone company.
- 25% of the chargeable profits of any other company.
- 25% for small business engaged in manufacturing and construction services (must be registered with the small business bureau).

If a company is engaged in both commercial and non-commercial activities a dual rate of 25% and 40% will apply. 25% for the non-commercial activity and 40% for the commercial activity of the company. A commercial company is a company that derives at least 75% of its gross income from goods not manufactured by it or that is engaged in telecommunications, banking or insurance. Any company that does not fall within the definition of commercial company would be regarded as a non-commercial company, including manufacturers and service companies. Commercial companies (except insurance companies) are subject to tax at the rate of 40% of taxable profits or 2% minimum corporation tax of the sales (whichever is higher).

The excess of the minimum corporation tax over tax at a normal rate can be carried forward to offset income tax payable in future years, but it cannot reduce the tax payable in any year to less than 2% of the sales.

Dividend distributions received by a resident company from another resident company are exempt from corporation tax based on the participation exemption. Distributions received from non-resident companies are subject to corporation tax as ordinary income. However, the profits of an investment company are exempt from corporation tax. The income of any local authority (in so far as that the income is not derived from a trade or business carried on by the local authority) is also exempt from corporation tax.

A branch (a non-resident corporation registered in Guyana) is subject to tax in Guyana on all income arising directly or indirectly from or derived from its operations in Guyana. The tax rates for branch profits are the same as for corporation profits. In addition, branch profits, net of corporation tax and reinvestment, are subject to a 20% withholding tax. The withholding tax rate may vary based on applicable double tax treaties. Also, for a branch the financial statements must be audited for corporation tax purposes. If the financial statements are not audited, the corporation tax return will be considered incomplete pending the submission of audited financial statements.

Additionally, there are no provisions for consolidated group taxation (fiscal unity) for corporation tax purposes. All companies are taxed separately. There is no specific legislation on transfer pricing or CFC rules in the Corporation Tax Act, but the Corporation Tax Act contains general anti-avoidance provisions and the Guyana Revenue Authority monitors “at arm’s length” principles for intra-group transactions.

Furthermore, withholding tax is payable on interest, dividends and royalties as well as net profits (net of corporation tax and reinvestments) from branch income. The withholding tax is imposed on payments under contracts for non-resident companies at a rate of 10%. The 10% withholding tax must be retained by the resident principal and must be remitted to the Guyana Revenue Authority within 30 days of making the payment. Currently the withholding tax rates are as follows:

Payment	Non-treaty	Canada DTT	United Kingdom DTT	Caricom
Royalty	20%	10%	10%	15%
Interest	20%	25%	15%	15%
Dividends	20%	15%	10% or 15%	0%

The capital gains tax rate is 20%. Capital gains tax is payable on the net taxable gain from the disposal of capital assets. If the disposal of an asset occurs within 12 months of its acquisition, the gain is treated as ordinary income and subject to corporation tax at the applicable rate. Capital gains losses can be offset for 24 years.

The general VAT rate is 14%. An exemption or a 0% rate may apply to the supply of financial services, the rental of housing, the supply of essential foodstuffs, the export of goods and the supply of certain services to non-residents. Registration is required when taxable activities exceed GYD 15,000,000 (USD 72,500). Import duties may apply; rates range from 5% to 150%.

Nicole Duyvelshoff

TAX WORKSHOP FAIR TAXATION IN A DIGITAL ECONOMY

10 March 2023 | 9.30 – 14.30 | University of Curaçao | English | ANG 650 lunch incl.

Digitalisation creates considerable challenges for international taxation and ensuring fair and effective taxation remains a key priority for the EU and OECD. This workshop focusses on the international tax developments and tax challenges arising from digitalisation.

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Presentations

- Dr. Germaine Rekwest (University of Curaçao): Introduction Fair Taxation in a Digital Economy
- Dr. Leopoldo Parada (University of Leeds): International Tax developments (Pillar 1 & 2)
- Dr. Shu-Chien Chen (Erasmus University Rotterdam): Rethinking digital nexus and digital economy.

13.00-14.30
Introductions and panel discussion

- EU's Formulary Apportionment by dr. Shu-Chien Chen
- Digital taxes in the EU by dr. Leopoldo Parada

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TOWARDS A NEUTRAL FORMULARY APPORTIONMENT SYSTEM IN REGIONAL INTEGRATION: A CRITICAL INQUIRY

By Shu-Chien Chen, visiting lecturer at Erasmus University Rotterdam

1. INTRODUCTION

The traditional international tax regime faces challenges in the digital economy and is criticised for not fairly allocating taxing rights over the profits of multinational enterprises (MNEs)' cross-border economic activities. Allocating taxing rights based on value creation is an urgent reform imperative. OECD's Base Erosion and Profit Shifting (BEPS) project in 2015 is a reform effort to address this problem.

Since 2021, OECD's Pillar One has established the "new" taxing rights of the market jurisdiction. OECD's Pillar One uses a formula approach to decide the profit allocation. Such development shows that "formulary apportionment" (FA) could be a feasible option for tax reform. However, the core question remains: How should a fair FA be designed to allocate taxing rights? The article especially discusses the FA system in the European Union (EU).[1] In my view, a fair FA should be part of the EU's recent taxation policy which aims at pursing a fair tax framework.[2]

Section 2 elaborates on the normative framework combining the public benefit principle and market neutrality to design a transnational tax regime. Section 2 also discusses how the formulary apportionment should be designed for the EU to allocate taxing rights between EU Member States. Section 3 explains three critical reflections when seeking lessons from the US state taxation experiences. Section 4 concludes.

2. A FORMULARY APPORTIONMENT SYSTEM AS THE MARKET-NEUTRAL TAX REFORM OPTION

2.1 combining the benefit principle and market neutrality to represent "value creation."

We can observe the relationship between economic activities and taxation from two perspectives. On the one hand, levying tax inevitably causes economic deadweight loss. When the deadweight loss exceeds some extent, such tax discourages economic activities. On the other hand, taxation is essential for the public revenue that supports public infrastructures and maintains a healthy market. So public benefit is understood broadly as the precondition for conducting economic activities. The more economic activities take place, the more public benefits are utilised. The optimum is the balance between as minimum deadweight loss as possible and sufficient public revenue to maintain a well-functioning market for conducting economic activities.

These two perspectives also reflect the two taxation principles: efficiency and equity. Moreover, the first coincides with the famous economist Michael Devereux's market neutrality[3]; the second coincides with the classical theory to justify levying the tax, the benefit principle.[4] When using the public benefit as the baseline to assess market neutrality, capital import neutrality (CIN) and capital export neutrality (CEN)[5] can conceptually be achieved simultaneously. This combination is "benefit-based market neutrality".

Benefit-based market neutrality can also be a normative framework for creating a fair international tax regime. Double taxation should be eliminated to reduce deadweight loss to pursue tax neutrality. Taxing rights should be allocated to jurisdictions providing public benefits. Unfortunately, the traditional treaty-based international tax regime focuses too much on eliminating double taxation with an all-or-nothing rationale, adopts a residence-source dichotomy. This ultimately results in BEPS problems.

Instead, when including the benefit principle into the normative framework, allocating taxing rights should differ from the all-or-nothing rationale like the traditional international tax regime. All the involved jurisdictions which provide different types of public benefits to MNE taxpayers contribute to the value creation chain. Consequently, all of them should be entitled to taxing rights on MNE taxpayers' cross-border profits. I consider this status to be fair, because taxing rights are in line with the corresponding public benefits provided in these jurisdictions. In other words, benefit-based market neutrality is consistent with the goal of OECD's BEPS project: aligning taxation with value creation.

2.2 The three-factor formula is benefit-based market neutral

An FA system functions like a knife and divides the cross-border taxable pie of MNE taxpayers. A benefit-based market neutral formula should include the sales factor, the asset factor and the labour factor, being weighted equally. The sales factor represents the public benefits of maintaining the customers' market; the labour factor represents the public benefits of maintaining the labour market; the asset factor represents the

public benefits of providing local non-human resources. Such a formula can represent equally different aspects of MNEs' economic activities and utilised public benefits.

2.3 EU's effort to formulary apportionment regime proposals: from CCCTB to BEFIT

In 2001, the European Commission started to draft a group-based FA system with the working title "Common Consolidated Corporate Tax Base" (CCCTB). If adopted, CCCTB could reduce compliance costs and replace bilateral tax treaties between EU Member States. While preparing the CCCTB Directive Proposal draft, the European Commission consulted experts from the US to seek the best practice.

In 2011 and 2016, the European Commission released CCCTB Directive proposal(s) respectively[6], but the Council never agreed upon both proposals. The European Commission is scheduled to release a renewed formulary apportionment proposal, the "Business in Europe: Framework for Income Taxation" (BEFIT)[7], in 2023. The EU's FA regime, BEFIT, is expected to reduce BEPS problems too so it has multiple policy goals simultaneously, which makes the reform effort more challenging.

Therefore, the BEFIT proposal should carefully reconsider the options in the existing CCCTB Directive Proposals, because several options are not consistent with the benefit-based market neutrality. The sales factor in the CCCTB Directive Proposals does not consistently implement the sales by destination principle. Moreover, the asset factor in the CCCTB Directive Proposals does not include comprehensively all the intangibles that contribute to innovation. Furthermore, EU policy discussions might wrongly be influenced by the trend from US state taxation, and result in lost-in-translation issues (discussed below).

3. METHODOLOGY CHALLENGES: SEEKING INSIGHTS FROM THE US

3.1 The First Reflection: the trend of the single sales factor formula is not suitable for the EU

The US states and Canada adopt a formulary apportionment system approach at the sub-national level.[8] US states have especially extensive experience in adopting different formulas for levying state corporate taxation on cross-border activities.

The European Commission's working documents demonstrate that CCCTB is a legal transplantation attempt from the US to the EU. The 2011/2016 CCCTB Directive Proposals are similar to the recommendations from the Multistate Tax Commission (MTC, an intergovernmental organisation to streamline multistate tax, similar to OECD)[9] in the US to adopt the three-factor formula.[10]

Despite MTC's recommendations, it is worth noticing that there has been a trend among the US states that the sales factor is heavily weighted or has become the only factor in the formula since mid-1980 until now, and some scholars claim the single sales factor formula will be the future of Europe.[11] OECD's Pillar One also emphasises the "new" taxing rights of the market jurisdiction.

However, the EU should in my view not follow the trend of the single sales factor formula in the US state taxation. As I stated elsewhere,[12] the two main reasons to support the single sales factor formula for a state are (1) to believe that the single sales factor has the build-in effect of encouraging MNE to invest more in labour; (2) to believe that the single sales factor formula is easier and simpler for tax administration.

Both reasons are myths and should be reconsidered. First, the empirical research published in 2001 that claims the employment-encouraging effect of adopting the single sales factor formula for US states, is negated by another empirical research in 2015 and different states' surveys.[13] Second, the US state experiences show extreme complexity regarding designing the sales factor. In other words, the claimed advantages of adopting the single sales factor formula are exaggerated. The EU policymakers should be cautious about this policy option.

3.2 The Second Reflection: Constitutionality is not Equal to Market-Neutral

US Supreme Court provides ample experience in assessing formulary apportionment in state taxation against the US constitution clauses. The Commerce Clause in the US constitution is comparable to the internal market provision of the Treaty on the Functioning of the European Union (TFEU).[14] The key four-prong criterion of the Commerce Clause reflects the spirit of the benefit principle:

1. The tax must be applied to an activity that has a substantial nexus with the state;
2. The tax must be fairly apportioned to activities carried on by the taxpayer in the state;
3. The tax must not discriminate against interstate commerce; and
4. The tax must be fairly related to the services the state provides.[15]

For deciding "fair apportionment", US Supreme Court further developed the external consistency test and internal consistency test. The regime is unconstitutional when a formulary apportionment regime lacks external or internal consistency.

For European readers, the external consistency test can be understood as comparable to the territoriality principle. The external consistency test examines whether the state has taxed only the portion of the cross-border activities that reasonably reflects the intra-state

component. The internal consistency test first hypothesises that all 50 states adopt the discussed same formulary apportionment regime and then assesses if more than 100% of the tax base from cross-order activities is taxed. The second step of the internal consistency test is similar to a hybrid of the non-discrimination test and the market restriction test developed by CJEU.[16]

The Commerce Clause case-law is not quite strict for US states. With the same case fact, being constitutional in the US is not necessarily EU law compliant.[17] For example, the US Supreme Court affirms that the single sales factor formula adopted by Iowa is constitutional and presumably valid. A three-factor formula is not a condition of constitutionality in the US.[18]

Suppose the Council unanimously adopted the single sales formula as the EU formulary apportionment regime in the BEFIT Directive Proposal (although it might feel impossible politically). In my view, such an FA regime is contrary to the solidarity principle[19] because it would exclusively allocate taxing rights to the Member States with the customer market but ignores the contribution from the Member States with the labour market.

Still, the most valuable lessons from the US case-law are reaffirming the benefit principle and recognising the diversity of each state's economic and social conditions. Moreover, the internal consistency test demonstrates the possibility of combining the non-discrimination test and the market restriction test. The US case-law could be useful for CJEU to adjudicate future disputes from the EU's FA regime.

3.3 The Third Reflection: lost in translation?

As indicated above, US States have wide policy discretion in deciding their formulas. Diverse formulas in the US sometimes create more puzzles than insights for EU policymakers. When drafting CCCTB Directive Proposal(s), the European Commission sometimes misunderstood and over-implemented the US experts' opinion. For example, the European Commission mistakenly copied California's formula specific for a mixed group for a purely financial institution group.[20] The European Commission invented the "sales by origin" rule for the

oil and gas industry but ignored the core logic of the sales factor.[21] Moreover, the European Commission neglected all the US formulas for transportation industries and referred to the OECD model without any reasoning.[22] These lost-in-translation issues are not easily identified immediately.

I believe the diversity of formulas in US state taxation is a valuable database. The European Commission could have made good use of the creativity of US state taxation and designed the most suitable system for the EU internal market. When drafting CCCTB Directive Proposal(s), the European Commission picked options from the US and the international tax regime (such as using a permanent establishment as the taxable nexus). Still, such a random mixture resulted in complexity in CCCTB Directive Proposal(s). When drafting BEFIT Directive Proposal, the European Commission should take the chance to make a better selection.

4. CONCLUSION: TOWARDS A PRACTICAL BUT CRITICAL APPROACH

Selecting the US state taxation as the reference is the right direction. However, EU policymakers should ask more "why" questions than "what" questions while seeking lessons. Not only are solutions being searched, but also the potential problems from the US state taxation. The contexts and original rationales for adopting a specific formula are as important as the technical contents of legislation and case-law results. The EU must be critical and open-minded to its legal transplantation effort. Balancing different aspects of the value creation chain is crucial in search for a fair system.

The normative framework of benefit-based market neutrality is thus suitable for the EU's FA regime because such a framework aligns with taxation and economic activities. It is consistent with the concept of value creation. The formula's equally weighted sales, asset, and labour factors represent different phases of the value creation chain, including the labour market and the customer market. A benefit-based market-neutral FA regime accepts that all

jurisdictions involved could be a source jurisdiction and abandons the all-or-nothing rationale of allocating taxing rights in the traditional international tax regime. In other words, a fair FA will include three equally weighted factors from both the market (output) side and the production (input) side, to represent the different public benefits to support different stages of economic activities

For smaller jurisdictions within the EU, such as Caribbean islands or Malta or Cyprus, a three-factor formula is fairer than a single sales factor formula. Although the sales factor might be smaller for these jurisdictions, these jurisdictions still have the asset factor, including the intangibles, so they could have a portion of taxing rights on MNEs. Moreover, digital nomads who stay in these islands and work remotely could be attributed to the labour factor of these islands too. In my view, a three-factor formula is fair because it is diverse sufficiently to reflect the diverse features of different tax jurisdictions.

Shu-Chien Chen

[1]This article is based on the PhD dissertation successfully defended on 15 September 2022 at Erasmus University Rotterdam. The embargo version can be accessed at the university library website https://pure.eur.nl/en/publications/towards-a-neutral-formulary-apportionment-system-in-regional-inte
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EFFECTIVE PENSION INFORMATION FOR MOBILE CITIZENS: WHERE PENSION AND TAX LAW INTERSECT

By Sander Kramer – Researcher at ITEM / Institute for Transnational and Euregional Cross Border Cooperation and Mobility and the Maastricht Centre for Taxation, Maastricht University

From different perspectives, and due to a variety of circumstances, the need for cross-border pension information seems ever-increasing. The author discusses these circumstances and elaborates on how these circumstances underline the need for cross-border pension information. Nevertheless, the provision of cross-border pension information seems to be hampered by a number of tensions and paradoxes. The author addresses these and argues that they should be given more attention.

THE MOBILE WORKER-PHENOMENON AND EFFECTIVE PENSION INFORMATION

It is becoming increasingly important for (mobile) participants to get a grasp of their pension status-quo, and engage in pension planning in order to secure an adequate retirement income. In this regard, effective cross-border pension information constitutes a first step towards financial resilience in old-age, potentially tackling a European-wide societal predicament. This predicament relates to a wide range of developments and phenomena, which have put pension systems, their sustainability, and the benefits under pressure. Moreover, risks pertaining to the pension's adequacy have been increasingly shifted towards (mobile) individuals. Parallel to these developments, states' pension systems and financial markets grow more complex, and individuals are confronted with highly complex and often irreversible economic decisions. It follows from this that it is becoming increasingly important for (mobile) participants to get a grasp of their pension status-quo, and engage in pension planning in order to secure an adequate retirement income.

The central role of pension information in planning for retirement gains importance in cross-border situations. In case of working cross-border, accordingly pension entitlements will be accrued across the varying (former) working, and/or residence, states. These pension entitlements will, in principle, be dispersed over these different states and possibly different jobs. What is more, mobile individuals – who avail(ed) themselves of their European freedoms of movement – see themselves confronted with a wide range of diverging pension vehicles, schemes, retirement products of all sorts, arising from statutory, occupational and individual pension systems in each of the different (former) working states, and/or residence states. By being mobile, they enter the field of the intersections between different

multi-level legal systems (national, EU and international/bilateral) and the interaction of poorly coordinated legal domains (pension and tax law), which can all be interwoven in a personal mobile work situation. This fragmentation of pensions is further exacerbated by the high diversity in the methods of tax treatment of statutory, occupational and individual pensions in each state, as each state may have different tax rules in place for each of these arrangements. While the relevance of cross-border pension information appears to be evident, the path towards achieving the provision of this cross-border pension information seems intricate.

Ideally, these mobile workers should have an overview of their pension rights, pension entitlements and pension payments. This overview should further contribute to providing better access to information, and thereby increase people's ability to make informed decisions, which best cater for their interests and, eventually, secure or foster their financial resilience at retirement, i.e. secure their pension adequacy. In order to establish such an aggregated overview, similar pieces of information – such as figures and data – about other (foreign) sources of pension income, retrieved from different pension providers, are required.

TENSIONS IN PENSION INFORMATION PROVISION

The provision of pension information inevitably leads to tensions between four principles delineating information's effectiveness: the understandability, (legal) correctness, personal relevance and trustworthiness of the information provided. Understandability of information ensures that the participant also understands how much pension he/she can expect after retirement, taking into account personal characteristics such as financial literacy. This is often at odds with the (legal) correctness of pension information as pension information providers tend to overload the participant with a multitude of information regarding his pension in order to avoid being held liable for incorrect or incomplete information. In order to avoid civil liability for incorrect/incomplete pension information, pension information is often provided with a disclaimer, stipulating, for example, that no rights can be derived from the information provided. The inclusion of such a disclaimer in turn has a negative effect on the credibility of the information. As a result, readers will tend to rate the value of the information lower and feel as if they are still not fully informed. Finally, personal relevance of pension information increases readers' involvement in their own pension situation. Indeed, research findings support the proposition that pension participants are more inclined to study the information if its personal relevance is higher.

EFFECTIVE PENSION INFORMATION PROVISION: WHAT IT REQUIRES IN TERMS OF THE UNDERLYING LEGAL SYSTEMS

Providing, on an aggregated level, mobile individuals information about their pension requires a complex process of incorporating all types of diverging pension vehicles, schemes, products of all sorts, arising from statutory, occupational and individual pension systems in each of the different (former) working states, and/or residence states. Moreover, it requires observing/applying all relevant domains of fragmented (national) legislation. For instance, it is pivotal that the accrued pension entitlement and the pension to be achieved are calculated in the same way. This requires a process of converging these deviating systems into standardised/uniform information provision, while upholding the information's effectiveness. Putting this dispersed puzzle together also poses considerable challenges in terms of information provision.

This amounts to observing, and 'translating' the intersections between different multi-level legal systems (national, EU and international/ bilateral) and the interaction of poorly coordinated legal domains (pension and tax law), which can all be interwoven in a personal mobile situation, into effective pension information. In sum, it must be possible to compile the amounts accrued with different pension providers/schemes so that they can be processed in a standardised manner.

For instance, in order to uphold (legal) correctness, combined with understandability, of information, national legal systems need to be aligned in terms of coherence. In addition, to ensure the information's correctness and – in the long run – trustworthiness, regulatory frameworks need to adhere to legislation's foreseeability. This elucidates how the realms of empirically-gained insights from behavioural economics, economic psychology and cognitive psychology,

and the realm of multi-level legal systems are related. As the OECD puts it, laws and regulations should be considered as an 'information system' linking (government) administration and citizens. Furthermore, a variety of difficulties may make it difficult for governments to translate new laws and rules into reality. These difficulties relate to complexity, inconsistency, lack of coordination, and lack of information on the effects of laws.

TAX LAW AS PART OF EFFECTIVE CROSS-BORDER PENSION INFORMATION

As has been addressed in the above, by availing themselves of their European freedoms of movement, mobile individuals see themselves confronted with a wide range of diverging pension vehicles, schemes, retirement products of all sorts, arising from statutory, occupational and individual pension systems in each of the different (former) working states, and/or residence states. While incorporating the tax treatment of (cross-border) pensions plays a central role in effective cross-border pension information this incorporation is highly complex and may induce considerable tensions in information provision.

The mobile workers' fragmented pension is for tax purposes treated differently per Member State, while the fiscal treatment in turn depends on the qualification of the pension as such. This fiscal treatment depends on a wide variety of factual circumstances, such as his working status during his/her working period, i.e. for instance, was he/she a posted worker or cross-border worker? Furthermore, in these cases the complexity grows due to the vast differences in the national tax treatment of pensions, mainly due to the lack of harmonization or poor coordination of pension tax law between Member States. The national tax systems offer different modalities as regards tax benefits, relief, reductions, exemptions, compensation, deferrals and other fiscal advantages.

However, to some extent, these systems have been 'aligned' and brought in conformity with the European Single Market, as a result of 'negative integration' (CJEU's infringement procedures) and 'positive integration' (European Commission's Communications). It should be noted in this regard that this is not akin to harmonization of these tax systems. Moreover, in cross-border situations several systems/levels of legislation are interconnected and interaction has nested, e.g. domestic law, international tax treaties, and a supra-national level of European law. This also holds with regard to the application of Caribbean tax legislation. For instance, when it comes to the Caribbean part of the kingdom of the Netherlands, the belastingregelingen (tax regulations) take a central role pertaining to the distribution of taxing rights on income, including pension benefits. Like tax treaties, these regulations take precedence over domestic law and, moreover, the structure is not much different from a treaty. Despite that these tax regulations qualify as state laws (Rijkswetten), there are also significant differences between these different tax regimes that render the provision of effective

pension information difficult. For instance, where art. 17, para 1 of the Belastingregeling Nederland-Curaçao (as well as the Belastingregeling Nederland-Sint Maarten) provides that pension benefits shall, in principle, be taxable in the residence state, para 3 provides that these pension benefits may be taxed in the source country. However, if such payments are periodic in nature, the source state-taxation shall not exceed 15 percent of the gross amount of the payments. What is more, art. 15, para 4 of the Belastingregeling voor het Koninkrijk stipulates that pension benefits shall be taxable in the residence state. The same holds for art. 2.9 para 1 of the Belastingregeling voor het land Nederland, setting out that pensions shall be exclusively taxable in the residence state. These fiscal peculiarities may have a potential detrimental effect on the ambition to provide effective pension information.

Moreover, in this complex multi-layered system, each of the different layers of legislation have adapted to new and different challenges, for instance on a societal, political or economic level. What is more, provisions of these different fields of legislation may also conflict with each other, and each level may have a particular effect on a personal mobile situation. Since pension (tax) systems are as diverse as countries themselves, finding a common way of communicating about pensions is not an easy task. When it comes to communicating about pensions, it is certainly true that 'one size does not fit all'.

CONCLUSION

The need for effective cross-border pension information seems unquestionable. The lack of a comprehensive overview of the pension situation of mobile workers seems anachronistic in an era of an increasingly complex pension field and increasingly difficult financial decisions. Despite promising research, its development is lagging behind. The challenges and obstacles to cross-border pension information are multifaceted and discussed in this article, and are characterised by tensions and paradoxes. These tensions and paradoxes deserve profound attention in future research and the ongoing developments in the domain of (cross-border) pension information.

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