# CARIBBEAN TAX LAW JOURNAL


05 Aruban Real Estate Transfer Tax Reform

10 The OECD Global Tax Deal and Developing Countries

15 Tax Incentives for Non-Resident Remote Workers Offered by Sint Maarten

23 EU Customs Reform in 2023: The Data-Driven Approach



Edition 4

2023

# INDEX


04 Letter from the editor

05 Aruban Real Estate Transfer Tax Reform and its Impact on M&A and Restructuring

10 The OECD Global Tax Deal and Developing Countries: Where do we stand?

15 Tax Incentives for Non-resident Remote Workers Offered by Sint Maarten

19 Pillar-two Solution: how should Caribbean SIDS respond?

23 EU Customs Reform in 2023: The Data-Driven Approach

28 The (limited) Effect of Directives on the Application of Tax Treaties under Public International Law and European Union Law

**Publisher**
Stichting Caribische Belasting en
Europawinkel

**Editor-in-Chief**
Germaine Rekwest

**Editors**
Leopoldo Parada
Hans Ruiter
Wessel Geursen

**Design**
Isabelle Kuipers

**Thanks to our partners**
University of Curaçao
Grant Thornton Aruba
Grant Thornton Curaçao
HBN Law & Tax Curaçao

**Contact**
germaine.rekwest@uoc.cw
www.caribbeantaxlawjournal.com

**ISSN NUMBER**
2949-9356

**Disclaimer**
Caribbean Tax Law Journal is Intended to provide a general  guide and cannot be a substitute for professional advice. Neither the authors nor the publisher accept responsibility for loss occasioned by to any person acting or refraining from acting as a result of material contained in this publication.

# LETTER FROM THE EDITOR

Welcome to the fall edition 2023 of the Caribbean Tax Law Journal!

The publication of this 4th issue comes at a time of great turbulence in the international corporate tax landscape. The international agreement on a global minimum corporate tax rate is a tremendous change to global tax policies. Countries are struggling to enact the international tax rules in their domestic legislation to adopt the global minimum tax proposal. Yet, some are convinced that the global minimum tax will only benefit developed countries.

This edition presents articles from authors who seek to analyze the effects of evolving global power dynamics in the international and European, but also in the Caribbean tax scenery. Our Caribbean authors shed some light on a variety of issues, from the amendment to the real estate transfer tax of Aruba by Jourainne Wever to the tax incentives for non-resident remote workers offered by Sint Maarten by Quincy Lont. In my contribution 'Pillar-two solution: how should Caribbean SIDS respond?' I argue that the consequences of the OECD Global minimum tax are very interesting for the Caribbean jurisdictions such as Curaçao, Barbados and Bermuda because the economic model of these Caribbean SIDS is mostly based on tax-related financial services. Leopoldo Parada provides in his contribution a broader account of the impact of the OECD Global Tax Deal for developing countries. He disputes the narrative that the current international tax reforms under the OECD two-pillar solutions are a zero-cost option for any countries, and especially for developing countries. Later in this issue, Mees Vergouwen explores the effect of directives on the application of tax treaties under public international law and European Union law, whilst Shu-Chien Chen's contribution focusses on how the EU Customs Reform Package will address the problem of under-levy of custom duties of imported goods, especially low-value goods from non-EU jurisdictions via online marketplace platforms, such as eBay.

Members of the Editorial Board are crucial in facilitating the Editors' desire to maintain high standards of excellence in the work we publish, and we are extremely grateful for the invaluable work of our Editorial Board in contributing both to our peer-review system and to the strategic development of the Journal. We are delighted to welcome Leopoldo Parada to our editorial board, whose experience across the breadth of disciplines related to international tax policy will allow us to reach a broader and more diverse audience with quality contribution. We would like to extend a big thank you to all the authors that contributed to this edition. A special word of thank you goes to Martijn Schippers and Wessel Geursen for peer reviewing the article(s) of this edition. To our readers, we hope you enjoy!

*Germaine Rekwest*

# ARUBAN REAL ESTATE TRANSFER TAX REFORM AND ITS IMPACT ON M&A AND RESTRUCTURING

*By Jourainne Wever, Director Tax at Grant Thornton Aruba*

On January 1, 2023, an amendment to the real estate transfer tax came into force in Aruba. This amendment introduces inter alia a new regulation concerning the taxation of transfers of shares in companies that own real estate situated in Aruba. This amendment has a direct impact on best practices with respect to business acquisitions by means of the transfer of shares in companies that own real estate situated in Aruba. This amendment also impacts restructuring transactions, especially any share issuance transaction regarding shares in companies that own real estate situated in Aruba, so it looks at the moment.

## REAL ESTATE TRANSFER TAX BEFORE 2023

Real estate transfer tax was traditionally only levied on the transfer[1] of the legal ownership of real estate situated in Aruba and of ships[2] belonging to Aruba[3]. This implied that the transfer of only the beneficial ownership of a real estate situated in Aruba and of a ship belonging to Aruba was not subject to the real estate transfer tax. Nor was this the case for transfers of shares in companies that own real estate situated in Aruba and of ships belonging to Aruba.

## REFORM OF THE REAL ESTATE TRANSFER TAX

As of January 1, 2023, this situation changed. As of January 1, 2023, the real estate transfer tax was reformed to include both the transfer of shares in companies that own real estate situated in Aruba and the transfer of the beneficial ownership of real estate situated in Aruba as taxable events. This is in addition to the regular taxable events of the real estate transfer tax, being the transfer of the legal ownership of real estate situated in Aruba and of ships belonging to Aruba. Both new regulations explicitly exclude ships belonging to Aruba. Therefore, according to the text of the new regulations and its explanatory notes, it can be concluded that no real estate transfer tax will be due on the transfer of the beneficial ownership of ships belonging to Aruba and the transfer of shares in companies that own such ships.

As of January 1, 2023, the real estate transfer tax tariffs also changed. Whilst more recently a distinction was made in the real estate transfer tax tariffs between real estate as main residences and other real estate and ships, as of January 1, 2023, all real estate and ships will be subject to the same real estate tax tariff scheme which is 3% over the first Afl. 250,000 of the real estate and/or the ship, and if a real estate and/or ship value more than that amount, 6% over the remaining value of the real estate and/or the ship.

This article will only elaborate on the effects of the amendment to the real estate transfer tax to tax the transfer of shares in companies that own real estate situated in Aruba.

## TRANSFER OF SHARES

At first glance, the context of the terms 'transfer of shares' seems obvious. In the explanatory notes to this amendment to the real estate transfer tax and the advice of the Council Board in this regard is reflected that this amendment most often will regard the actual sale of the shares in a company that owns real estate. This seems also a main target of this amendment.

Thinking through, however, the effects of this amendment go further than only taxing the sales of shares in companies that own real estate. Transactions accustomed to the business restructuring practice by means of in example issuance of new shares in a company that owns real estate to its existing shareholders, or the issuance of bonus shares in the case of the tax-free repayment of contributed capital to the shareholders of a company that owns real estate, will as of January 1, 2023, also be subject to the real estate transfer tax since these transactions are also considered as transfers of shares for the purposes of the real estate transfer tax. With this amendment it is fair to say that the impact of this amendment to the real estate transfer tax for future business acquisitions and restructuring transactions is potentially significant. But is it fair and reasonable for the corporate practice to subject every movement of shares in companies that own real estate to the real estate transfer tax?
This question can certainly be asked when issuing new shares in a company that owns real estate to its existing shareholders in the same participation percentages already owned by the shareholders. In such cases no actual value will be transferred supporting a taxable transfer for the real estate transfer tax since each shareholder will still indirectly own the same percentage of the real estate owned by the company.

The law on the transfer tax in the European part of the Netherlands provides, contrary

to Aruba, for special regulations in which specific taxable transactions related to companies that own real estate are facilitated (upon fulfilment of certain conditions), for the sake of the act of fairness and reasonableness. The Dutch government issued for example a special regulation regarding the facilitated treatment (upon fulfilment of certain conditions) of amongst others the issuance of new shares to existing shareholders in the same participation percentage for the purposes of the transfer tax. In this regard relief can be granted in the amount of the transfer tax due or a part thereof.
The Aruban government has not provided for similar special regulations. As such, at this moment, in principle all transactions entailing a transfer (read: movement) of shares in companies that own real estate will be subject to the real estate transfer tax.

## COMPANIES THAT OWN REAL ESTATE

The introduction of this new taxable event for the real estate transfer tax has brought a change that has considerable implications for the practice of movements of shares in companies that own real estate. The main question that presents itself is when a company can be considered as a 'company that owns real estate' in the context of the real estate transfer tax.
Not all companies that own real estate will qualify as companies that own real estate for the purpose of the real estate transfer tax. Real estate transfer tax will only be levied from the transfer of shares in a company that owns real estate if two conditions are fulfilled. First, the assets of the company must consist of at least 30% of real estate situated in Aruba. This is the possession requirement.
Second, the real estate must aim primarily (70% or more) to acquire, to transfer, or to exploit real estate. This is the purpose requirement.

The possession requirement goes without saying. Relevant is that for the real estate transfer tax, the possession requirement not only refers to the possession of actual real estate. As real estate also qualifies the shares held in companies that own real estate (fictitious real estate), the rights to which real estate or fictitious real estate is subjected, and the beneficial ownership of

such real estate or rights. In the case that a company owns 100% real estate of which only 20% is situated in Aruba, per its literal text, the possession requirement will not be fulfilled since the 30% threshold will not be met.

The more difficult requirement is the purpose requirement because the question arises when does a company aim primarily at obtaining, transferring, or exploiting real estate? In practice, the answer to this question is not always obvious and certainly, the exploitation component of this requirement can cause headaches. Take as an example the hotel business: does the company that owns the hotel aim primarily at the exploitation of real estate or is it providing other services to its guests? In my view, it is peculiar that the Aruban government introduced the transfer of shares in companies that own real estate as a taxable event for the real estate transfer tax with the intention to specifically target transfers of shares in companies that own hotels. This because the basis for this same amendment to the real estate transfer tax

is the very similar article in the transfer tax in the European part of the Netherlands and the applicable Dutch case law that ironically explicitly excludes companies that own hotels from aiming at primarily at the exploitation of real estate.
The Aruba government appears as such to consider companies that own hotels as companies exploiting real estate in the context of the purpose requirement and as such as companies that own real estate for the purpose of the real estate tax, without verifying whether the purpose requirement is met by companies that own hotels.

Dutch literature and the numerous Dutch case law established regarding this subject prescribe that companies that own hotels cannot be considered as exploiting a real estate in the context of the very similar purpose requirement in the Dutch transfer tax legislation. In the European part of the Netherlands the standpoint is taken that the exploitation element is not present since in the hotel business it is not the real estate that is being exploited, but services to guests is the core of the hotel business. As such, in cases where real estate is needed to carry on a business that does not consist of acquiring, transferring, or exploiting real estate, the purpose requirement is not met.

The Dutch legislative history even mentions the hotel business specifically as not fulfilling the purpose requirement. As the Council Board indicates in its reaction on the proposal of this amendment to the real estate transfer tax, this amendment shows a large similarity with the Dutch transfer tax. If applied in accordance with the Dutch legislation, the standpoint can be taken, that upon applying the legislation which is very similar to the Dutch article in this regard, supported by the established case law regarding this matter, does a hotel in fact qualify as a company that owns real estate for the purpose of the real estate transfer tax? This uncertainty is taken away by the Aruban government in its reaction to the recommendations of the Council Board. The Aruban tax department also explicitly and expectedly agreed to this view in answer to this question. The Aruban government bodies take the position that the purpose requirement is met by a company that owns a hotel. However, in my view the question remains if this view is correct. Undoubtedly future case law will provide a final answer to this question.

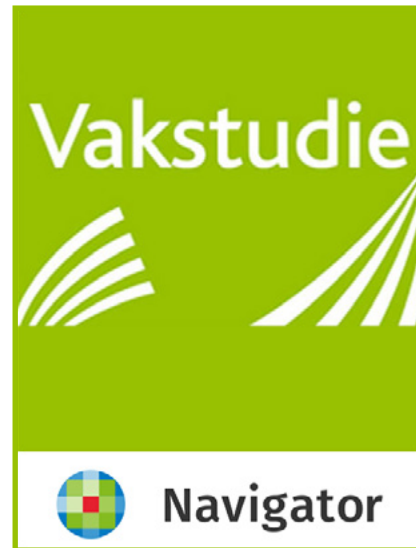
The Aruban government certainly has the authority to also cover the transfer of shares in companies that own hotels with this amendment to the real estate transfer tax. It is in my view however contradicting if this same amendment would only apply upon fulfillment of specific requirements that companies that own hotels might not meet. In any way, this observation of the Aruban government bodies leaves in my view room for a different interpretation. The impact of this amendment to the real estate transfer tax for business transactions in general and the hotel business specifically is significant. In my view regretfully, the changes in the real estate transfer tax legislation have created new uncertainties with respect to the taxability of transactions for the real estate transfer tax. In this article I only touched upon one of the uncertainties. I hope that Aruba will follow The Netherlands with respect to the policies which The Netherlands applies to its similar tax.

**Jourainne Wever**

[1]The real estate transfer tax provides for equivalences to a transfer in article 3 of the State Ordinance transfer tax.
[2]Qualifying ships are ships belonging to Aruba, measuring at least 20 cubic meters gross capacity. We will not elaborate further on the aspect of belonging to Aruba.
[3]Per July 2018 the real estate transfer tax also applied to acquisitions under inheritance law of real estate located in Aruba and of ships belonging to Aruba. This additional taxable event is abolished from the real estate transfer tax in the reform of 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.




Some people talk about tomorrow. We shape it.

For more information, scan the QR code below:

Advisory | Audit | Tax | Business Process Solutions

# THE OECD GLOBAL TAX DEAL AND DEVELOPING COUNTRIES: WHERE DO WE STAND?

*By Leopoldo Parada, Associate Professor in Tax Law at University of Leeds*

## 1. INTRODUCTION

On 11 July 2023, the OECD announced that 138 countries of the Inclusive Framework (IF), representing around 90% of the global GDP, agreed on an outcome statement recognising the progress made towards a major reform of the international tax system, the so-called "OECD two-pillar solution".[1] The outcome statement comes out right on time when many sceptical voices have been raised, especially regarding the likelihood of achieving a multilateral agreement on Pillar One (MLC) by the end of this year, and when the critical mass endorsement of Pillar Two cannot be absolutely guaranteed either.[2]

This article argues that unlike the OECD's recent attempt to demonstrate that the two-pillar solution is still alive as a package, the fate of the project will ultimately depend on the individual trade-offs that countries face when opting for endorsing it either fully or partially, or not at all. This is particularly relevant for developing countries, which are generally torn between international cooperation and non-cooperation, on the one hand, and the eternal promise of additional tax revenues versus simplicity and ease of administration, on the other. The timing could not be better to dig into these matters again.

## 2. PILLAR ONE AND TWO AND THE TAX REVENUE NARRATIVE

If we recall, the two-pillar solution consists of a response elaborated within the OECD/IF, and which addresses two different issues. Pillar One, on the one hand, aims to reallocate business profits generated by the most profitable MNEs around the world to countries where sales take place (the so-called "market countries"), responding at least indirectly to the challenge derived by the taxation of business profits in a modern business world that is substantially more digitalised. Pillar Two, on the other hand, appears as a response to corporate income tax (CIT) competition and aims to ensure that all corporate profits of a large multinational group (MNE group) are subject to a minimum level of effective CIT somewhere.[3]

From a technical perspective, Pillar One introduces a semi-formulaic approach to reallocate 25% of the business (excess) profits generated by these highly profitable MNEs among all market countries, and subsequently, using specific sourcing rules, to determine the individual allocation for each one of them. This reallocation of excess profits is known as Amount A. The second part of Pillar One, known as Amount B, is unrelated to the reallocation of MNEs excess profits, and simply aims at fixing a price for marketing and distribution activities among related parties.[4] Pillar Two, on the other hand, establishes a minimum level of effective CIT rate of 15% through a "top-up" approach that operates with two domestic rules that act in a coordinated manner, that is, taxing with priority in the country of the ultimate parent entity (UPE) of a MNE group when taxation of its foreign subsidiaries was below that minimum (known as Income Inclusion Rule or IIR), or, in case the IIR does not apply, allowing a country of a subsidiary of the MNE group to tax the profits of the other foreign subsidiaries of the MNE group, or those of the UPE, when they are taxed below the minimum. This rule is known as Undertaxed Profit Rule or UTPR. The proposal also contemplates the possibility to exclude from the scope of the rules certain activities represented by a percentage of tangible assets and payroll,

as well as it allows countries to introduce a "domestic minimum tax", resembling both the IIR and UTPR rules, to be considered as a qualified domestic minimum top-up tax or QDMTT.[5] This latter option turns the priority to tax from the IIR to the domestic minimum tax, theoretically allowing countries to keep the revenues at home.[6]

It is evident from the above that both pillars attend to complete different aims. However, they share an important element in common, and this is the revenue narrative installed mainly to increase the global adherence to the OECD two-pillar solution. Indeed, for example, under Amount A market countries are offered an allocation of additional revenues that, despite the current uncertainty as to the final per-country numbers, is presented as a superior alternative in comparison to any other unilateral measures, including digital services tax (DST). A similar tendency can be noticed regarding Pillar Two. In fact, the design of the global minimum tax — i.e., granting taxing rights to some countries as a penalty for the under-taxation in others— is the best demonstration of it, because countries are sold the idea of acting as "default revenue collectors" whilst, at the same time, they ensure a minimum level of effective CIT globally.[7] This feature is even more evident after the introduction of the QDMTT in the Pillar Two project, which is presented as an effective revenue tool for low-tax countries (i.e., those taxing below the minimum) to keep at home the revenues that should primarily go to countries where the UPE of the MNE group is located.[8]

The narrative of additional revenues is attractive, and why not do say it, too, strategically convincing. First, it ensures that an effective international tax cooperation can ultimately take place. It should not a surprise to anyone that both pillars need an important number of participant countries to ensure their ultimate success. Indeed, Pillar One needs a Multilateral Convention (MLC) to be implemented soon, and Pillar Two needs a so-called "critical mass" of countries to introduce the proposed domestic rules to guarantee its aim of limiting CIT competition.[9] Second, it is also realistic since it recognises that pure altruism will not be convincing enough for countries to endorse such an international tax reform, especially when countries must still attend to individual interests, including domestic budgets, public needs, and

local elections. However, the cost of the revenue narrative seems to be very high, too, particularly when one recognises that a good or bad tax policy for a country is not only dependent on how much revenues are collected, but also on how simple or less administratively burdensome the whole tax system may become. This is the current position of many developing countries, which are usually torn between international cooperation and non-cooperation, on one hand, and the eternal promise of additional tax revenues versus simplicity and ease of administration, on the other. This is precisely what the rest of this work will grasp upon.

## 3. THE CURRENT TRADE-OFFS FOR DEVELOPING COUNTRIES

As noted already, the current international tax reforms under the OECD two-pillar solutions are not a zero-cost option for any countries, and especially for developing countries. Indeed, there are evident policy trade-offs, which are represented in this case by the classic dichotomy between international cooperation versus non-cooperation, on one hand, and additional revenue collection versus simplicity and administrability, on the other.

Let me take the example of Pillar One and the MLC to illustrate the above. If developing countries decided to endorse the MLC, this could be seen as a very positive sign that can end up in further steps towards more inclusivity, positively affecting those cooperative countries in the future. However, the main trade-off is associated again to the idea of revenue collection. Indeed, most of the developing countries that have already in place a unilateral measure to tax digital services will have to give it up, even if the allocation under Amount A provides substantially lower revenues than the unilateral measure in place. That seems to be the idea not only behind the series of political statements and public compromises on this matter, but also from the draft of Article 37 and 38 of the MLC.[10]The trade-off is therefore important and developing countries will be torn when deciding to grant a full adherence to Pillar One.

Nevertheless, a careful reading of the draft of Article 38 gives us some hope to reduce this trade-off. Indeed, as per the literal wording of the draft article, countries would keep an option to maintain their unilateral measures in place, having consequently —as a penalty— a zero allocation under Amount A during that "period".[11] Although the draft of the MLC is not entirely clear, the word "period" seems to refer to any period in which a country has in place a DST or similar unilateral measure, i.e., either in the past, present or future.[12] If this interpretation is correct, developing countries could find a window to lower the costs of cooperating by signing the MLC, but making use of Article 38 as a sort of "escape clause" to protect their domestic revenue interest at any point.

The other classic dichotomy faced by developing countries is related to the trade-off between revenues versus simplicity and administrability. Let me illustrate this using now the example of Pillar Two. As argued already in this work, Pillar Two offers countries a new source of revenues since they can now act as default revenue collectors. In other words, the inaction of one country to tax sufficiently triggers the taxing rights in another country who can now collects what remains to complete that minimum. Moreover, the introduction of a QDMTT does not only promise revenues loosely, but it ensures that these revenues stay at home. This is a very powerful argument to convince developing countries to implement Pillar Two. However, the argument of additional revenues is not only illusory in many cases, but also it carries with important trade-offs in the form of limitations and administrative costs, especially for those countries willing to attract effective foreign direct investment (FDI).[13]

It is not easy to ascertain without any chances of mistakes the magic formula that developing countries must follow right now regarding the OECD two-pillar solution. However, it is evident that no option comes at zero cost, and any decision must consider the individual policy interest and economic reality of the countries individually, also including a degree of flexibility, which can be translated in the form of additional carve-outs and FUTURE review processes.[14] This will allow all countries, but particularly developing countries, to reduce their trade-offs when opting for a more effective international tax cooperation.

## 4. FINAL REMARKS

Although the OECD remains optimistic that the two-pillar solution can be implemented as a package by countries around the world, the reality is rather different, and depends ultimately on the individual trade-off that countries face when opting for a full, partial, or simply no endorsement at all. These trade-offs are particularly evident in the case of developing countries, which are normally torn between cooperation and non-cooperation at the international level, and revenues versus simplicity and ease of administration, on the other. This simple logic should not be underestimated, because regardless the recent outcome statement representing 138 countries of the IF, and 90% of the global GDP, the ultimate success of the OECD initiative, at least among developing countries, will depend on a simple cost-benefit analysis. Therefore, reducing alternative costs for developing countries can be indeed a good alternative to achieve a success outcome.

**Leopoldo Parada**

[1]OECD/G20, Outcome Statement on the Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (OECD Publishing, 11 July 2023).
[2]The adoption of the EU Directive on Pillar Two, however, represents an important step towards that "critical mass" adoption. See Council Directive (EU) 2022/2523 on ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union, 14 December 2022. For the concept of "critical mass" and Pillar Two, see M. Devereux, J. Paraknewitz and M. Simmler, Empirical Evidence on the Global Minimum Tax: What is a critical mass and how large is the Substance-Based Income Exclusion? Oxford University Centre for Business Taxation, Working Paper 2022-23.
[3]Ruth Mason refers to the idea that all a company's income is taxed somewhere as "full taxation". See R. Mason, The Transformation of international Tax, Am. J. Int'l Law 114:3, 353 (2020). For a normative criticism of full taxation, see L. Parada, Full Taxation: The Single Tax Emperor's New Clothes, 24(2) Florida Tax Rev. (2021).
[4]OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (OECD Publishing, 8 October 2021). See also, OECD, Statement on a Two-Pillar Solution to Address the Tax Challenges Arising from the Digitalisation of the Economy (OECD Publishing, 1 July 2021).
[5]Id.
[6]For the debate on whether a QDMTT can always guarantee revenues at home, see N. Noked, Designing Minimum Taxes in Response to the Global Minimum Tax, Intertax 50(10) (2022). In contrast, L. Parada, Tailoring Developing Country Advice: A response to Noam Noked, Tax Notes Int'l 105 (2022) (arguing that elasticities of investment and competitive advantages must be considered to determine who is better off).
[7]L. Parada, Global Minimum Taxation: A Strategic Approach for Developing Countries (forthcoming/under review), 2023, available at SSRN.
[8]See Noked, supra n. 5. See also, Parada, supra n. 5.
[9]Devereux, Paraknewitz and Simmler, supra n. 2.
[10]OECD, Public Consultation Document/ Pillar One–Amount A: Draft Multilateral Convention Provisions on Digital Services Taxes and Other Relevant Similar Measures (OECD publishing, 20 December-20 January 2023).
[11]Article 38 states: "Any Party for which a digital services tax or relevant similar measure, or a measure listed in Annex A (List of Existing Measures Subject to Removal), is in force and in effect during a Period: [...]". Id., at 4.
[12]The OECD public consultation document also states that "Article 38 applies to all measures that are in force in a Party and that meet the definition of a DST or relevant similar measure, an existing measure that is not listed in Annex A could also subject to review on the same terms as future measures". Id., at 2.
[13]See more on this argument in: Parada, supra n. 6 (arguing that the promise of revenues is not such when the analysis considers the elasticities of investment as well as the competitive advantages of the countries implementing a QDMTT).
[14]Also arguing for more flexibility in the context of international tax cooperation, see L. Parada, Response to the UN Resolution A/RES/77/244 on Promotion of Inclusive and Effective Tax Cooperation at the United Nations, 3 June 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4452268

# TAX INCENTIVES FOR NON-RESIDENT REMOTE WORKERS OFFERED BY SINT MAARTEN

*By Quincy N. Lont, Tax Partner Taxxa Curaçao*

*Foto by Elodie Kint, TipsCuracao.nl*

## INTRODUCTION

The Government of Sint Maarten introduced a tax exemption for non-resident remote workers employed by international companies and temporarily deployed in Sint Maarten as part of a set of amendments of law that entered into effect in February 2023. This tax exemption can also be applied by digital nomads, who typically tend to be more independent and thus would not be in employment with one specific employer.

This article provides a breakdown of the applicable tax legislation and the amendments that were made to the pre-existing legislation for implementation of this tax exemption.

## HISTORY

The text of the personal income tax ordinance (in Dutch: "Landsverordening op de Inkomstenbelasting") applicable in Sint Maarten is derived from the text that was applicable under the Netherlands Antilles until October 10, 2010. Therefore, at present all previous constituents of the dismantled Netherlands Antilles have similar stipulations in their income tax legislation based on which any foreigner (non-resident) that performs labor within the country's jurisdiction and receives payment for this labor will be subject to personal income tax. In principle, there is no minimum number of days for this labor to be subject to personal income tax. The income tax ordinance makes reference to a wage tax exemption that can be granted by the Minister of Finance for qualifying projects with a duration of less than 3 months, upon request of the non-resident employer.

Prior to the introduction of the aforementioned amendments the income tax ordinance in Sint Maarten stipulated that any individual performing labor against payment would be subject to personal income tax in Sint Maarten, provided that the labor takes place in Sint Maarten. In the wake of the devastation caused by hurricanes Irma and Maria in 2017 and the assistance received from foreign organizations during the subsequent years required to rebuild the country, the Government of Sint Maarten saw the need to reduce the tax burden for foreign professionals employed by the various international organizations of which the World Bank is the primary example. This goal has been accomplished by establishing clear parameters under which the labor performed by the foreigners deployed by such organizations would not be subject to tax in Sint Maarten.
Following implementation of the amendment of law with reference number A.B. 2022, no. 61, foreign individuals can perform labor against payment in Sint Maarten for a period of up to 6 months within a 12-months period without incurring any personal tax incidence in

Sint Maarten, provided that the labor is paid for by a foreign entity. In principle, if all conditions are met the applicant is not required to submit any requests to the tax authorities. The income tax exemption applies by virtue of law.

## 6-MONTHS PERIOD (183-DAYS)

The remote workers that are desirous of staying in Sint Maarten longer than 6 months would have an interest in knowing if there is room for interpretation of this 6-months term. First it should be noted that in the text of the law this 6-months term is not mentioned, instead reference is made to a 183-days period. In the explanatory notes to the amendment of law, the legislator makes reference to the OECD Model convention and more specifically the commentary to the OECD Model Tax Convention, in which the 183-days period is extensively discussed. Noteworthy is the reference to the anti-fragmentation rules, of which member states have their own variations and the final text has not yet been ratified at OECD level. However, since the common goal of these anti-fragmentation rules is evident, it is not illogical for the legislator to anticipate on these impending anti-abuse rules and pro-actively incorporate some form of these rules in the tax legislation of Sint Maarten. In essence, the anti-fragmentation rules aim to avoid non-taxation in case activities of foreign entities in a jurisdiction are artificially divided into multiple phases to accommodate the term of 183 days (6 months) within a 12-months period.
To determine the duration of the stay of a remote worker that would be applying this income tax exemption, the count of the 12-months period starts on the day of entry (first arrival). It is important noting that in the event the remote worker would opt to exit and re-enter the island before the period of 6-months has lapsed, the count would not be interrupted or affected in any manner.

For instance, if a Digital Nomad with Canadian nationality would arrive on October 15th, 2023, and would leave in December for two weeks of Christmas and Year-end celebrations, this person would be allowed to apply the income tax exemption provided that his or her stay in Sint Maarten after the interruption for the Year-end

*Foto by Elodie Kint, TipsCuracao.nl*

celebrations would not extend beyond April 15th, 2024. In effect, the tax exemption would apply only if the stay would be limited to 6 months after arrival on October 15th and payment for this labor is for the account of a non-resident employer.
Remote workers being deployed to Sint Maarten on behalf of different international organizations are recommended to seek certainty in advance from the tax authorities of Sint Maarten on the applicability of the income tax exemption. For instance, if a remote worker would be deployed to Sint Maarten for a project that has a total duration of 10 months, and the remote worker forms part of a team of foreign professionals that will be each rotating and working for a couple of weeks in Sint Maarten, the duration of stay of the other team members shall be also taken into account. The latter is the outcome of the anti-fragmentation rules and might lead to tax disputes if the tax authorities make incorrect assumptions

about the collaborative efforts of the various international organizations and deployment of the same individuals for projects that might appear a continuation of previous projects.

Fortunately, the explanatory notes to the new text of article 17 paragraph 5 of the Income Tax Ordinance provide sufficient guidance and make reference to the OECD Model Tax Convention, which should facilitate discussions with the tax authorities of Sint Maarten on specific situations, if and when required.

Immigration and labor law aspects
The tax incentive for remote workers aligns perfectly with the applicable immigration laws and as such the implementation of this tax incentive did not require any amendments to the existing immigration laws and related aspects of the labor laws for non-residents. Sint Maarten welcomes visitors hailing from many countries (approximately 80 countries) without any visa requirements. The visa procedures for nationals of the remaining countries are quite transparent and can be accessed online on the website of the Immigration Department that resorts under the Ministry of Justice. The Digital Nomad that would like to travel to Sint Maarten to work remotely for a certain period of time could access this information online and initiate

entry procedures online, if necessary.
In principle all tourists are allowed to stay up to 30 days. Dutch nationals and American nationals are allowed a stay of up to 6 months. Nationals of Canada, Australia, New Zealand, and Japan are allowed a stay of 3 months. The same applies to nationals of all member states of the European Union.

In this respect, it should be noted that tourists are not allowed to work in employment during their stay in Sint Maarten. The definition of the term employment for taxation purposes differs from its definition in immigration and labor laws. However, in the amendment of law for introduction of the income tax exemption for temporary work conducted by non-residents great emphasis is put on the condition that the remote worker should be paid by a non-resident party, in order to qualify for this income tax exemption.

## AMENDMENTS IN THE TEXT OF THE LAW

To address the issue of double taxation of income earned with short term employment by remote workers the legislator added a new paragraph to article 17 of the Personal Income Tax Ordinance. The objective of article 17 in the Personal Income Tax Ordinance is to determine and list the sources of income and activities of non-residents that are subject to income tax in Sint Maarten. According to article 17, paragraph 1, sub d, of the Income Tax Ordinance, activities related to labor executed within the territory of Sint Maarten (Dutch part) would be subject to income tax in Sint Maarten.
With the addition of paragraph 5 clear parameters are introduced in the local income tax legislation, to limit the situations in which labor performed within the jurisdiction of Sint Maarten would lead to income tax liability. This approach by the legislator is commendable since it does not require tax treaties to obtain this clarity in cross-border situations and Sint Maarten does not have many tax treaties on avoidance of double taxation.

Traditionally, clarity on points of double taxation would be arranged in either the unilateral policies and decrees or tax treaties on avoidance of double taxation.

### Article 17, paragraph 5, sub a, of the Personal Income Tax Ordinance

The first sub stipulates that in case the non-resident performs labor for a period of less than 183 days within a 12-months period and this labor is not paid for by a local employer. In this respect, the local employer includes (i) a permanent establishment as defined in the Profit Tax Ordinance and (ii) an enterprise or profession executed by individuals in Sint Maarten forming part of non-resident collaboration forms.

### Article 17, paragraph 5, sub b, of the Personal Income Tax Ordinance

In sub b the latter category of deemed employer is further defined, since this is terminology is not common in our Dutch Caribbean tax legislation and especially a novelty in the Sint Maarten tax legislation. This construct is based on the anti-fragmentation rules and targets the collaboration forms such as (limited) partnerships between individual consultants that would take-on an assignment amongst each other. If members of these collaboration forms would work in Sint Maarten, the tax authorities would be able to apply the total count of each member's stay for the 183-days mark, and or the 12-months period. More specifically, the tax authorities would assess the duration of the main contract concluded by the respective collaboration form and disallow the tax exemption to the extent that individuals working in Sint Maarten are being paid by this collaborative effort.

### Article 17, paragraph 5, sub c, of the Personal Income Tax Ordinance

In the last sub, the legislator included a clause to address the situation in which contractors in the construction industry would have non-resident employees performing labor in Sint Maarten for a short period of time. This tax exemption does not apply to the latter category. In the explanatory notes to the amendment of law, reference is made to article 4 paragraph 4 and article 21a of the Wage Tax Ordinance, which acts as a safeguard for the tax authorities when foreign sub-contractors are being engaged for construction works in Sint Maarten.

## COMPARISON TO ARUBA AND CURAÇAO

As previously mentioned in this article, the other Caribbean countries within the Dutch Kingdom have a similar stipulation as Sint Maarten has in article 17 of the Personal Income Tax Ordinance, in their income tax ordinance based on which non-resident remote workers can become subject to personal income tax in these countries. Aruba and Curaçao also introduced Digital Nomads-programs and launched these programs aggressively through their respective tourism marketing agencies during the pandemic. However, there is no clarity on the tax implications for the digital nomads that wish to work in neither Aruba nor Curaçao. In absence of an extensive tax treaty network, non-resident applicants interested in temporary work in Aruba or Curaçao would have to obtain tax advice to interpret the different unilateral tax policies and decrees on avoidance of double taxation in their specific cases.
In this respect, the Department of Fiscal Affairs of Sint Maarten, is a frontrunner within its Dutch Caribbean peers by providing clarity on the exact circumstances under which digital nomads can perform labor in Sint Maarten, without incurring any personal income tax liabilities in Sint Maarten.

**Quincy N. Lont**

# PILLAR-TWO SOLUTION: HOW SHOULD CARIBBEAN SIDS RESPOND?

*By Germaine Rekwest, affiliated with the University of Curaçao Dr. Moises da Costa Gomez and Leiden University.*

## 1. INTRODUCTION

In 22-24 November 2022, a regional meeting organized by Caricom in collaboration with the Jamaican tax authorities and the OECD was held in Kingston, Jamaica. Several Caribbean jurisdictions participated, including Jamaica, Saint Kitts and Nevis, Saint Lucia, Barbados, Suriname, Guyana, Belize, Antigua and Barbuda, Turks, and Caicos and Curaçao. During one of the sessions the main challenges of the OECD Pillar-two solution for Caricom jurisdictions were discussed. The OECD's Pillar-two solution —the so-called GloBE rules or minimum tax –ensures that large multinational enterprises (MNEs) pay a minimum level of tax, aiming to solve the problem of tax avoidance by MNEs. The minimum effective corporate income tax rate is set at 15%. Qualifying subsidiaries of MNEs are often located in the Caribbean region in the context of international financial services. During the regional meeting in Jamaica, it became very clear that all the Caribbean jurisdictions face similar challenges due to the lack of capacity of well-trained professionals and the fact that their economies show little diversity by focusing mainly on tourism and the financial services sector. Indeed, the specific characteristics of the Small Island Developing States (SIDS) – in particular their small scale – generally have a negative impact on the economy of these jurisdictions. The consequences of the Pillar-two solution for the SIDS will be particularly interesting for the Caribbean SIDS such as Curaçao, Barbados, Bermuda, the British Virgin Islands, because the economic model of these Caribbean SIDS is mostly based on tax-related financial services. Low taxes policy is key to Caribbean SIDS to attract investment they desperately need. Thus, Caribbean SIDS are extremely vulnerable in an economic and social way.

At the end of the regional meeting in Kingston, the Caribbean jurisdictions expressed the need for support from the OECD to better comprehend the pillars. Moreover, the Caribbean jurisdictions agreed to follow up upon new sessions in 2023 to discuss with OECD the necessary steps to implement the two pillars successfully.

Even though the Inclusive Framework members, such as Curaçao, are not obliged to adopt the GloBE rules due to the status of 'common approach', it is likely that most Caribbean SIDS will implement the complex rules of Pillar-two. This is especially worrisome as the Caribbean jurisdictions are already coping with limited resources to comply with the ongoing international standards set by the OECD and the EU. Therefore, how should Caribbean SIDS respond to these developments?

## 2. PILLAR-TWO IMPACT ON CARIBBEAN SIDS

Caribbean SIDS will probably consider increasing their effective tax rate to the minimum of 15%. While Caribbean jurisdictions will intend to levy any top-up tax, it seems to me that zero tax or low-tax Caribbean jurisdictions will be reluctant to raise the corporate income tax rate. After all, in such a case, subsidiaries that are not part of a qualifying MNE will also be taxed at a higher profit tax rate. A realistic option is to increase the tax burden to 15%, but only for subsidiaries of qualifying MNEs or introducing a local and qualifying 'top-up' tax (QDMTT) for situations where these subsidiaries are taxed below the effective 15%. As a result, additional levies will no longer take place elsewhere, but SIDS will collect the GloBE tax themselves.

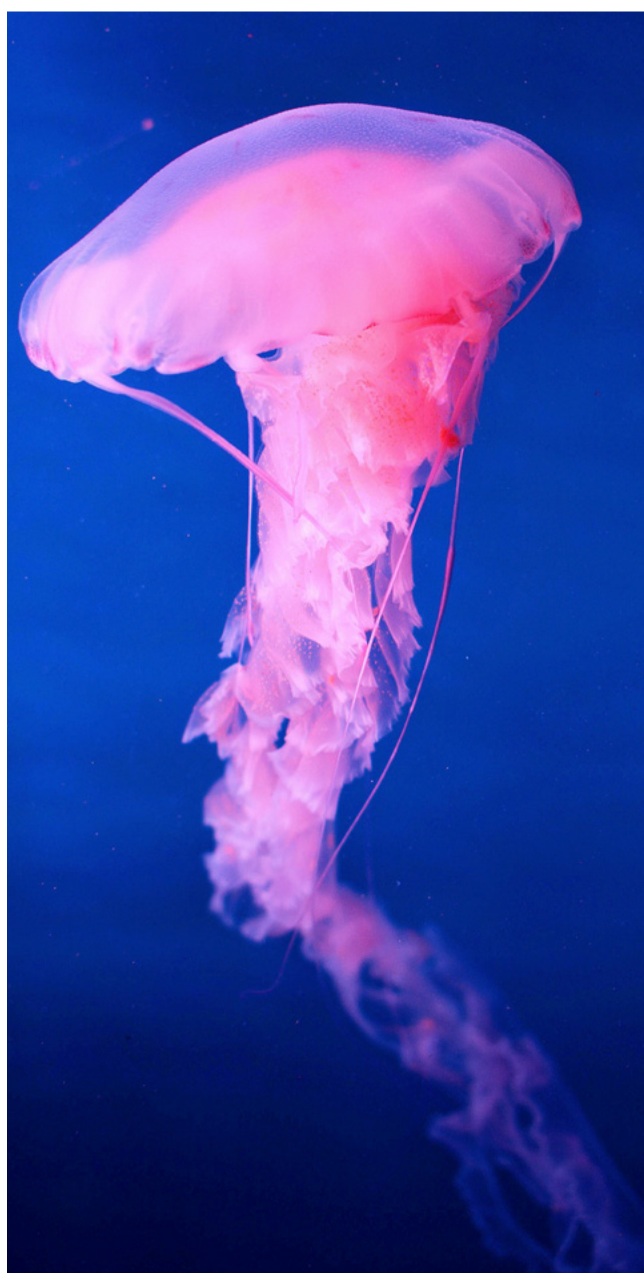
However, it is highly unlikely that Pillar-two will generate the promised additional global tax revenues, as already pointed out by Leopoldo Parada in his contribution "The OECD Global Tax Deal and Developing Countries: Where do we stand?". This is true, especially for the Caribbean SIDS. Qualifying MNEs rarely have their ultimate parent entity in a Caribbean jurisdiction. The annual turnover threshold of € 750 million is too high to affect most businesses operating in the Caribbean SIDS. Moreover, any additional taxation based on the so called 'Undertaxed Payments Rule' (UTPR) depends on the degree of substance present in the companies in those jurisdictions in relation to the total substance in the group, and ultimately on the non-application of an Income Inclusion Rule (IIR). MNEs often do not have sufficient substance in Caribbean SIDS. Therefore, no significant tax income for these Caribbean jurisdictions will be expected while the very complex UTPR calculation will be a great challenge.

## 3. IMPLEMENTATION CHALLENGES

As mentioned already, SIDS participating in the Inclusive Framework of the BEPS-project have significant capacity and resource constraints to comply with the ongoing international standards set by the OECD and the EU. One must keep in mind that the underlying reason for SIDS to participate in the Inclusive Framework is mainly to be removed from the so-called blacklists and to show their commitment to cooperate internationally. However, adopting the Pillar-two solution will proof to be an additional challenge for the SIDS as the Pillar-two rules are very complex. A key question is whether the Caribbean SIDS have other options as they are facing the dilemma of endorsing a minimum effective corporate income tax of 15%. Implementing the complex QDMTT will proof to be an extra burdensome for tax administrators in the Caribbean SIDS. They must assess whether their respective tax administrations will be able to provide them with the requisite support so that they are able to apply the rules. The way out of this may be the bold Bermuda strategy.

## 4. THE BERMUDA PLAN AND OTHER STRATEGIES

On 8 August 2023, Bermuda announced that it is considering the implementation of a new corporate income tax regime. Bermuda seeks to incorporate an income tax that will qualify as a Covered Tax for purposes of the GloBE Rules, such that the Bermuda corporate income tax would mitigate the amount of Top-Up Tax payable to other jurisdictions with respect to profits earned in Bermuda. Bermuda intends to design a corporate income tax that includes features that will maintain the competitiveness and reputation for quality of Bermuda. Consistent with the GloBE Rules, the Bermuda corporate income tax will only apply to MNE Groups with revenues of € 750 million or more. By establishing a corporate income tax (CIT), Bermuda will certainly avoid the burdensome of analysing, understanding, and implementing the Pillar-two rules. Instead, it will focus on a simple and compliant CIT system while avoiding high administrative costs.



Apart from the Bermuda plan, it would be worth considering a cost/benefit analysis and reshaping the plan to attract foreign investors, by emphasising the advantages of expertise gathered over the years of providing international financial services. For example, Curaçao is now making a fresh start by designing and publishing its Tax Treaty Policy. The financial sector is a central pillar of the Curaçao economy and, worldwide, there has been a dramatic increase in the use of investment institutions for both private and institutional investors, but also for private equity. By concluding treaties with OECD-approved provisions for so-called Collective Investment Vehicles, Curaçao can contribute to preserving financial services in its territory. Furthermore, Curaçao intends to approach countries with which Curaçao has more intensive (trade) relations with a view to concluding a convention for the avoidance of double taxation, because such a convention will make it easier to capitalise on the relations between both countries, as well as both countries' regulations. It will also allow for a better division of double taxation accommodation. Thus, conventions may play an instrumental role in fostering economic relations between countries.

## 5. CLOSING REMARKS

The introduction of a global minimum tax rate will certainly make competing at tax rates below 15% more challenging. Even so, it is unlikely that the Caribbean SIDS will give up on tax related incentives. Caribbean SIDS should consider reviewing the whole set of corporate income tax incentives they offer, analysing the effectiveness of the corporate tax incentives under the GloBE rules and elaborating a strategic approach if the idea of a minimum tax is ultimately endorsed. In this regard, the introduction of a simple CIT, such as the one in Bermuda, appears as an option that deserves attention. Ultimately, such an option could lower the administrative costs associated to the OECD Pillar-two whilst reinforcing the competitive advantages of Caribbean SIDS, including marketing their financial services and strong banking infrastructure. Similarly, other options such as building a tax treaty network and entering bilateral investment treaties are also options to consider. In the overall, Caribbean SIDS should team up within the Inclusive Framework to advance their joint cause, as no island can stand up alone. For sure, there is still a lot to consider.

**Germaine Rekwest**

# EU CUSTOMS REFORM IN 2023: THE DATA-DRIVEN APPROACH

*By Shu-Chien Chen, independent researcher*

## 1. INTRODUCTION: FROM THE EU VAT REFORM TO THE EU CUSTOMS REFORM

In May 2023 the European Commission released the proposal of reforming the EU Customs Union. This reform proposal is the most ambitious and comprehensive reform since 1968.[1] The EU Customs Reform Package in 2023 has several policy objectives: (1) Providing traders an EU-level centralized electronic interface 'EU Customs Data Hub' (in the impact assessment report it is called EU Customs Data Spaces) so traders can upload information and have the overview of the whole supply chain and reduce compliance costs; (2) Establishing a new EU Customs Authority to perform more harmonized customs controls and risk management (3) Providing a tailored solution for e-commerce imports, especially transactions via online platforms.

The EU Customs Reform Package addresses the ultimate dilemma faced by customs authorities. On the one hand customs are expected to ensure EU's financial interests by correctly levying duties, whereas it is impossible nor plausible to conduct checks on every single imported item, because over-excessive checks will hinder trade flows and waste customs' administration resources. The rapid development of e-commerce makes it even more difficult for customs authorities to strike this balance because the volume of the product flow and data flow in the digital economy easily exceed traditional customs' capacity.

The essential step to seek healthy balance in the digital economy is to effectively collect and process data. The European Commission refers this rationale as 'the data-driven approach' and emphasizes it as the new paradigm that collecting the data as early as possible, and all the simplification measures also aim to facilitate the data collection process.

This paper inquires how the EU Customs Reform Package will address the problem of under-levy of custom duties of imported goods, especially low-value (up to EUR 150) goods from non-EU jurisdictions via online marketplace platforms (such as eBay, Amazon, AliExpress). This aspect is also where customs law, VAT legislation and the platforms' reporting obligations in the field of direct taxation (DAC 7) intersect closely.

The structure of the paper is designed as follows: Section 2 explains the key elements in the EU Customs Reform Package. Section 3 discusses experiences from implementing EU VAT since the EU VAT reform is a claimed success that EU Customs Reform Package is based upon. Section 4 concludes this paper.

## 2. THE PROPOSED MEASURES AGAINST UNDERVALUATION OF LOW VALUE IMPORTED GOODS

### 2.1 Online Marketplace Platforms Become Deemed Importers

The rapid development of e-commerce results in not only the problem of under-levying VAT on distant sales of goods imported from non-EU jurisdictions, but also under-levy of customs duty.[2] This is the so-called VAT gap and customs duty-gap. Customs duty-gap largely resulted from undervaluation of low value (under EUR 150) imported goods.

In order to address this issue, he EU Customs Reform package defines online platforms as 'deemed importers' i.e. they will bear the obligation to declare and pay customs duties of imported goods when EU customers use online marketplace platforms to order goods from non-EU jurisdictions.

The strategy of deemed importers is comparable to the EU VAT reform in 2021 that defines online platforms as 'deemed suppliers' to have the obligation to collect VAT. In addition to the reporting and collection obligations in the EU VAT Directive, online platforms will also have to report import data and collect customs duty.

### 2.2 Simplification Measures With The Aim Of Collecting Data

There are several simplification measures proposed in EU Customs Reform Package. The first proposed simplification is to remove the current duty exemption threshold of EUR 150. In other words, all goods are subject to customs duty. The incentives to (abusively or fraudulently) declare low value of imports should be reduced after the removal.

Moreover, EU Customs Reform Package proposes to expand the applicable scope of the I-OSS (Imported One Stop Shop) for VAT. With the I-OSS number, VAT is levied when the suppliers or online platforms sell the imported products and the subsequent import will be exempted from VAT, so the declaration and payment will be simplified. Currently, the I-OSS is only applicable for distant sales of low value goods shipped from non-EU jurisdiction. After removing the duty exemption threshold, the I-OSS option is also open for all e-commerce goods.

For calculating the customs duties, a simplified tariff for the low value goods of distance sales will be adopted. The low value goods will only be subject to different tax rates according to the four-tier bucketing system. Therefore, it would be easier to decide the tariff and reduce traders' compliance burden accordingly. For valuation, while still using the transaction value method as the main method, the EU Customs Reform Package also have simplified customs valuation rules for low value imported goods. The traditional concept of intrinsic value that means the actual value of good will no longer apply to low value imported goods. Apart from increasing revenue and reducing compliance burden, an important goal of adopting these simplified administration measures is to increase the data submitted from traders to the customs authorities. The benefit of making use of simplification measures becomes an incentive to increase traders' cooperation to customs data collection. This underlying rationale is reiterated throughout the proposal.

### 2.3 EU Customs Data Hub: The Game Changer?

The need to collect more customs data is urgent because the size of customs duty gap of European Union is hard to estimate due to lack of data. According to Wise Persons Group (WPG) that provides advice to the European Commission on EU Custom Reform, 'Efforts at calculating the Customs Gap by the Wise Persons Group have failed due to the poor quality of data and the absence of methodology. It is of particular concern as one cannot manage what one cannot measure.'[3] This is also the reason that the data collection has been the centre of the EU Customs Reform package and creating EU Customs Data Hub is the policy priority.

The proposed ‘EU Customs Data Hub’ is one single harmonized EU-level electronic interface to replace the current 111 separate systems across EU for all traders to submit their customs declarations and to reduce the compliance costs.

More importantly, the EU Customs Data Hub can provide the necessary IT infrastructures so the customs controls could be conducted strategically, and EU-level risk management can be performed consistently, and monitors can take place even before the goods’ arrival.[4] The EU Customs Data Hub is expected to become a data space where AI and machine learning algorithms can function 24/7 to conduct risk analysis.

EU Customs Data Hub is also technically inclusive for different stakeholders: it will accept any type of data formats and raw data, so data can be re-used for other purposes. The burden of submitting the same data would be reduced accordingly. The ideal EU Customs Data Hub looks promising, but the proposed implementation timeframe is unfortunately quite long. EU Customs Data Hub is expected to be launched in 2028 for e-commerce goods importers, become optional for all traders in 2032 and become mandatory for all traders in 2038. While acknowledging the depth of reform, the proposed reform timeframe is still too slow considering the speedy development of technology.

## 3. THE DATA-DRIVEN APPROACH: CHALLENGES AND OPPORTUNITIES

### 3.1 The Reflections From Implementing EU VAT Reform 2021

It is widely accepted that the VAT reform on e-commerce platforms must be consistent with Customs law.[5] At the same time, the experiences of the EU VAT reform can also provide insights for the EU Customs law reform. Despite of the claimed success of the EU VAT Reform, there have been concerns from both national customs authorities and taxpayers after implementation.

When EU VAT Reform imposes new reporting and record keeping obligations for platforms for distant sales of goods, it increases the number of declarations received by national customs. It will inevitably need (new) technology to deal with the increased workloads.
Even for an EU Member State, like Estonia, that is famous for being technology savvy, Estonian customs also experienced difficulties and raised serious concerns about the data quality because the one (online platforms) submitted the data under the EU VAT Directive did

not even the one (sellers using online platforms) looking into the content of the consignment.[6]

The Poland experiences also indicate that adopting new technology to implement the EU VAT Reform has the undesirable impacts of making taxpayers bear extra costs and potentially block taxpayers' business operations.[7] The Bulgarian customs face the problem that 'the customs formalities currently in force do not sufficiently cover the risks of fraud and error'.[8]

Besides concerns from national governments, scholars are critical with the EU VAT Reform for creating too heavy burden to online platforms.[9] The new obligations for online platform required from EU VAT reform include invoicing, VAT-reporting and remitting, and record keeping. For smaller-scale platforms, EU VAT Reform has created disproportionately heavy administrative burden. For example, the reporting obligations of online marketplace platforms of DAC 7 and EU VAT Reform are not completely consistent with each other; the joint reporting of DAC 7 and EU is not possible either since the reporting period and the way of levying income taxes and VAT also differ.

Since the EU Customs Reform Package results in extra obligations for online platforms in addition to DAC 7 and EU VAT Reform, a similar concern will also arise. Even with all the simplification measures, it is undeniable that online platforms can still experience extra burdens. Therefore, more alignment and efficiency for reporting data required from different laws is necessary.

### 3.2 The Key To Enhance Efficiency: The Way Of Collecting And Processing Data

It is noticeable that the EU Customs Data Hub provides a more comprehensive exchange of information than the EU VAT Reform. Unlike DAC7, data collected due to EU VAT Reform are not automated exchanged as EU VAT system only allows exchange information upon request. The EU Customs Data Hub is expected to function as a real-time data space so collected data are automatically exchanged. If the EU Custom Data Hub can be integrated with the IT infrastructure with EU VAT and DAC 7, it will streamline platforms' reporting obligations.

A comprehensive automatic exchange of information mechanism does not necessarily result in too heavy administrative burden for traders but reduce burden. When data can be naturally collected in the process of business activities, it will not create too heavy administrative burden and won't block business operations either.

Besides, maintaining a database at the EU level functioning 24/7 can relieve the burden due to 'retention obligation of data'. If the EU Customs Data Hub can accommodate data submitted by online platforms so they do not need to keep digital records themselves. In this regard, EU Customs Data Hub can further reduce the administrative burdens due to implementing the EU VAT Reform.

In my view, there could be another incentive for traders to actively cooperate with the EU Customs Data Hub when traders can benefit also from the fruits of data analysis. Data is the new resources in this era of digital economy but not all the economic operators are able to access and process the business data. Provided EU GDPR rules are fully complied, traders should have the access to the database of the EU Customs Data Hub. The IT

infrastructure not only for fulfilling their compliance obligations but also getting data and industrial overview and insights.

### 3.3 Using Statistical Values Method For Correcting Undervaluation Of Imported Goods

In addition to the simplified tariff and value method indicated in Section 2.2, in my view, the EU Customs Reform Package may consider going a step further to accept the statistical valuation method of the low value goods, since EU Customs Data Hub will be able to collect enormous business data.

The problem of 'undervaluation of imported goods' is quite common for levying customs duties on not only on the e-commerce imported goods but also traditional imports, because valuation of imported goods mainly depends on self-declared transaction value.

There is a noticeable trend that both WTO and EU's Court of Justice started to accept 'the statistical value' retrieved from various databases for similar goods to decide the value of imported goods instead of the transaction value (that are usually recorded in the invoices).[10]

The statistical valuation method will not replace the transaction value completely but can function as a correct mechanism or a detection mechanism. In my view, the EU Customs Data Hub provides new opportunities and resources for customs authorities use the statistical valuation method. The new EU customs authorities to be as well as national customs should be brave enough to embrace this new trend.

## 4. CONCLUSION

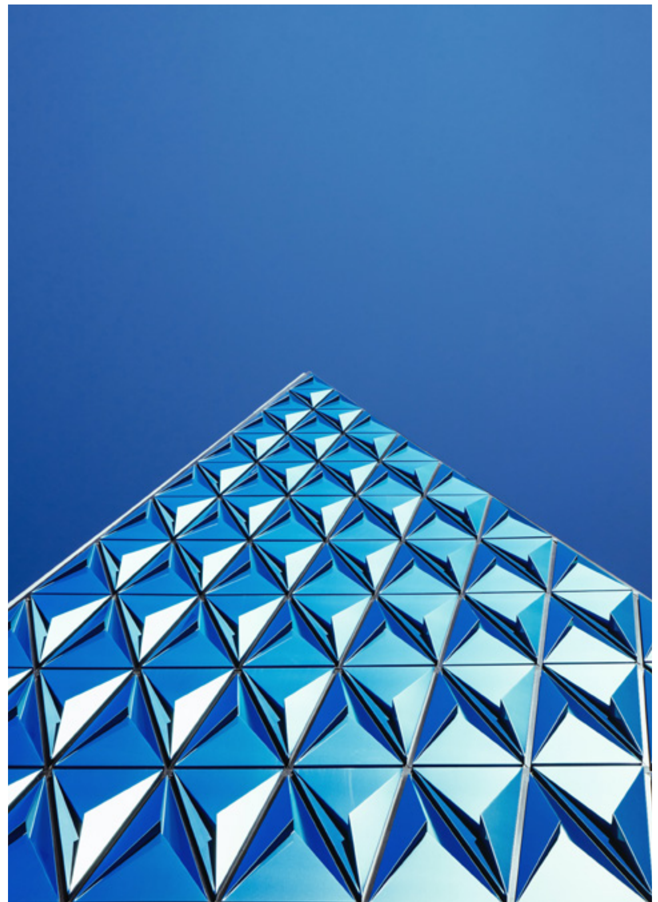
EU Customs Reform Package has provided a promising picture: in the short term, VAT and customs duty gaps due to e-commerce can be reduced. In the long term, the data-driven approach can help EU customs authorities and businesses to build a healthy partnership with each other. When data collection is not only for customs authorities' enforcement but also for increasing traders' business insights, it could be a win-win scenario, for the customs authorities and all traders, especially the compliant traders.

**Shu-Chien Chen**

[1]https://taxation-customs.ec.europa.eu/customs-4/eu-customs-reform_en (accessed on 20/08/2023)
[2]European Court Of Auditors, Special Report no 12/2019: E-commerce: many of the challenges of collecting VAT and customs duties remain to be resolved, 2019.
[3]European Commission. Putting more Union in the European Customs. Ten proposals to make the EU Customs Union fit for a geopolitical Europe. Report by the Wise Persons Group on the reform of the EU Customs Union, 2022; Walsh, T. (2022). Putting More Union in European Customs. World Customs Journal, 16(2).
[4]Currently, the EU Customs Union does not have a consistent risk management framework. The criticism, see European Court of Auditors, Special Report: Customs controls: insufficient harmonisation hampers EU financial interests 2021, p.30-37.
[5]Brondolo, J. And Konza, M. (2021). Administering the Value-Added Tax on Imported Digital Services and Low-Value Imported Goods. International Monetary Fund.
[6]Liutkevičius, M., Pappel, K. I., Butt, S. A., & Pappel, I. (2020). Automatization of Cross-Border Customs Declaration: Potential and Challenges: A Case Study of the Estonian Customs Authority. In Electronic Government: 19th IFIP WG 8.5 International Conference, EGOV 2020. Springer International Publishing.
[7]Toczek, E. (2022). The Use of New Technologies as a Means to Reduce the VAT Gap: The Entrepreneur's Perspective, in Dmoch, W., Kołodziej, B., Mioduszewski, M., & Mudrecki, A. eds. (2022). Harmonisation of VAT in the European Union: Present and Future. Akademia Leona Kozminskiego.
[8]Antov, M. (2023). Challenges to Customs Imposed by the New European Union Value Added Tax Rules on Cross-Border E-Commerce–the Case of Bulgaria. World Customs Journal, 17(1).
[9]See Lamensch, M., Merkx, M., Lock, J., & Janssen, A. (2021). New EU VAT-Related Obligations for E-Commerce Platforms Worldwide: A Qualitative Impact Assessment. World Tax Journal, 13(3), 441-479; Leenders, M., & Merkx, M. (2022). Platforms, a Convenient Source of Information Under DAC7 and the VAT Directive: A Proposal for More Alignment and Efficiency. EC Tax Review, 31(4).
[10]Schippers, M., & de Wit, W. (2023). The Use of Statistical Values to Combat Undervaluation in the European Union. Journal of World Trade, 57(2).

# THE (LIMITED) EFFECT OF DIRECTIVES ON THE APPLICATION OF TAX TREATIES UNDER PUBLIC INTERNATIONAL LAW AND EUROPEAN UNION LAW

*By Mees Vergouwen, Associate professor at Leiden University and tax advisor at De Brauw Blackstone Westbroek, Amsterdam*



## 1. INTRODUCTION

As of the amendment of the Parent-Subsidiary Directive in 2014, directives in the area of direct taxation may contain an obligation for the EU Member States to tax income. Such an obligation to tax income would be incompatible with obligations under tax treaties if such treaties contain an obligation to refrain from taxing that same income. In the event of such an incompatibility, the question arises as to which obligation must be given effect to by an EU Member State in practice: the directive's obligation to tax or the tax treaty's obligation to no tax.[1]

In formulating an answer to this question, reference may be made to the rules of public international law, domestic law, and European Union law.[2] In this article, the conclusions, based on the analysis set out in the book 'The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties', regarding the question which obligation must be given effect to by an EU Member State under the rules of public international law (section 2) and European Union law (section 3) are set out.[3] In that respect, the focus is on setting out the conclusions regarding the question whether a directive is able to render an incompatible tax treaty inapplicable under public international law or the laws of the European Union. This article ends with a conclusion (section 4).

## 2. PUBLIC INTERNATIONAL LAW

For the purposes of determining the effect of directives on the application, in terms of applicability, of tax treaties concluded by the EU Member States, a distinction must be drawn between tax treaties concluded by an EU Member States with another EU Member State ("Intra-EU Treaties") and tax treaties concluded with a third state ("Extra-EU Treaties"). The reason for drawing this distinction is that, under the conflict rules of public international law, a directive may only take precedence over a tax treaty that has been concluded between parties that have expressed, directly or indirectly, their consent to be bound by that directive. As third states have not expressed their consent to be bound by (article 288 of) the TFEU or the adoption of a directive within the Council, directives should, in accordance with the principle of pacta tertiis, not be able to affect the application of Extra-EU Treaties.[4]

As a consequence, EU Member States are required to give effect to an Extra-EU Treaty that would be incompatible with a directive under public international law.[5]
Whereas a directive would not be able affect the application of Extra-EU Treaties under the general conflict rules of public international law, this is different for Intra-EU Treaties. As the EU Member States have expressed their consent to be bound by a directive, either directly by voting in favour of its adoption or indirectly by entering into the TFEU, it is conceivable that the general conflict rules of public international could result in the application of tax treaties concluded between them being affected by the directive as a decision of an international organization.[6]
Under the codified general conflict rule of public international law, i.e., the lex posterior conflict rule of article 30 Vienna Convention 1969, this is conceivable if the adoption of a directive is regarded as relevantly similar to the conclusion of an Intra-EU Treaty.[7] If relevantly similar, it is arguable that the lex posterior conflict rule of article 30 Vienna Convention 1969 may be applied (by analogy) to a conflict between a directive and an Intra-EU Treaty. If applicable (by analogy), a directive sets aside an incompatible Intra-EU Treaty if (i) the directive has been adopted after the conclusion of the incompatible Intra-EU Treaty and (ii) the subject matter of the directive is the same as that of the earlier, incompatible Intra-EU Treaty. Whereas it might seem straightforward to determine whether the directive is later as compared to the Intra-EU Treaty, it is less so the case with respect to the sameness of their subject matter; the sameness of subject matter requires an assessment of the topic or substance dealt with by the directive and the incompatible Intra-EU Treaty on an overall basis. Based on assessment of the topic of the directives adopted up to an including 30 October 2022,[8] it is considered arguable that such directives relate to the same subject matter as Intra-EU Treaties based on their similarities with Intra-EU Treaties in terms of topics or substance dealt with. There are, however, also differences in topics or substance dealt with that would make it arguable that they do not relate to the same subject matter. Hence, the sameness of subject matter is not a given.[9] Consequently, it is only arguable – and not a given – that a

later directive takes precedence over an earlier Intra-EU Treaty on the basis of an (analogous application of) the lex posterior conflict rule of public international law.

In addition to the codified general conflict rule of public international law, reference may also be made to the lex specialis conflict rule that, although not codified, is considered a widely accepted conflict resolution rule under public international law.[10] Pursuant to this conflict rule, a directive, as a decision of an international organization, would render an Intra-EU Treaty inapplicable if the directive provision that is incompatible with (a) provision(s) of an Intra-EU Treaty relates to the same subject matter as that (those) provision(s) and in a way that is more precise.[11] In order to apply the lex specialis conflict rule, a sameness of subject matter test applies at provision-level (instead of an overall-level for the purposes of the lex posterior conflict rule). Based on the partial overlap in subject matter dealt with directives and Intra-EU Treaties in general and the understanding that directives generally have a more limited scope, it would seem that the lex specialis conflict rule is capable of resulting in a directive (provision) setting aside incompatible Intra-EU Treaty provision(s) in the event of a conflict. With respect to this conclusion two caveats must be made to not overstate its importance. First, it should be acknowledged that the lex specialis conflict rule, although having been applied to conflicts between different, yet equally ranked, sources of public international law, has not yet been applied to a conflict between a decision of an international organization and a treaty.[12] Second, the applicability of the lex specialis conflict rule depends on assessment of the subject matter dealt with by the relevant directive provision and the subject matter dealt with by the incompatible provision(s) of an Intra-EU Treaty.
Hence, its effect may vary from one conflict

to another. As such, it is merely arguable – and not a given – that a directive provision is capable of setting aside an incompatible provision of an Intra-EU Treaty on the basis of the lex specialis conflict rule.

## 3. EUROPEAN UNION LAW

For the purposes of determining whether a directive is able to render an incompatible tax treaty inapplicable under European Union law, the starting point is that a directive enjoys primacy vis-à-vis such a tax treaty. Based on such primacy, national courts are, in principle, required to set aside provisions of tax treaties that are incompatible with provisions of a directive.[14]

Whereas this primacy-based conflict rule might seem to indicate that tax treaties must be rendered inapplicable to the extent incompatible with directives, the following caveats must be made. First, the primacy-based conflict rule does not apply with respect to those Extra-EU Treaties that have been concluded by an EU Member State before its accession to the European Union if that setting aside entails that rights of, or obligations towards, third states would be affected (see article 351 TFEU (as interpreted by the Court of Justice of the European Union in Generalstaatsanwalt München)[15]). [16] Second, if applicable to a conflict between a directive and a tax treaty, the primacy-based conflict rule must also be 'enforceable' or 'reliable'. In order for the primacy-based conflict rule to be 'enforceable', it must be established that the directive provision that is incompatible with the provision(s) of a tax treaty has direct effect and that the setting aside of the tax treaty's provision(s) does not result in the imposition of an (additional) obligation for the taxpayer (prohibition of reverse vertical direct effect).[17] Within the context of conflicts between directives that impose an obligation to tax income and tax treaties that impose a duty to not tax income, the prohibition of reverse vertical direct is highly relevant because the setting aside of a provision that prevents taxation of income in order to tax that income would result in a higher tax burden. If the setting aside results in a higher tax burden, the primacy of a directive would not be 'enforceable' before a national court in the sense that such a court is not required, as a matter of EU law, to set aside the incompatible tax treaty. As such, the primacy of a directive vis-à-vis a tax treaty does not in and of itself entail that each and every tax treaty that is incompatible with such a directive must be set aside by a national court. Such primacy is, essentially, a one-way street[18] that may only result in the setting aside of tax treaties if that would be beneficial for a taxpayer; if and to the extent that the tax treaty provides for a lower tax burden than would be the case if set aside by a directive, the directive's primacy is not enforceable as a result of the prohibition of reverse direct effect.[19]

## 4. CONCLUSION

With respect to the question whether a directive is able to render an incompatible tax treaty inapplicable under public international law or the laws of the European Union, the following may be concluded. First, under public international law, directives may only be able to render tax treaties between EU Member States inapplicable on the basis of the lex posterior and lex specialis conflict rules; tax treaties with third states may not be affected. Second, under public international law, the extent to which a directive may be able to set aside a tax treaty between two member states requires an assessment of the timing of the adoption of the directive vis-à-vis the conclusion of the relevant tax treaty and a comparison of subject matter on an overall level (lex posterior) or a comparison of subject matter on a provision-level (lex specialis). Depending on the outcome of such an assessment, a directive can render a tax treaty between EU Member States inapplicable under

public international law. Third, under the laws of the EU, the primacy of a directive obliges a national court to, in principle, render inapplicable incompatible tax treaties concluded by the EU Member States, unless this would result in the rights of, or obligations towards, third states under pre-accession tax treaties with third states being affected. Fourth, the obligation to render such tax treaties inapplicable needs to be enforceable. In order to be enforceable, a directive provision that is incompatible with a tax treaty needs to have direct effect while the setting aside of the tax treaty may not result in the imposition of a higher tax burden due to the prohibition of reverse vertical direct effect. Within the context of a conflict between a directive that requires taxation of income and a tax treaty that requires non-taxation of that same income, the prohibition of reverse vertical direct effect effectively entails that the tax treaty cannot be set aside on the basis of the primacy-based conflict rule of the laws of the EU. As such, a directive that is aimed at increasing the tax burden of a taxpayer may enjoy primacy vis-à-vis an incompatible tax treaty, but such primacy would, in fact, not be enforceable and would not be able to render inapplicable such a tax treaty in practice.

**Mees Vergouwen**

[1] For more background, see T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 1.2.
[2] Regarding the interaction between the three perspectives, see T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 1.4.
[3] T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023.
[4] In this respect, it is noted that there are Extra-EU Treaties that contain subordination clauses that provide that the obligations of EU Member States would not be affected by the relevant Extra-EU Treaty. If such a subordination clause is included in an Extra-EU Treaty, this entails that a directive would be able to affect the application of the relevant Extra-EU Treaty in such a way that it is inapplicable under public international law. If the Extra-EU Treaty would be inapplicable under public international law, the EU Member State concerned would no longer face conflicting obligations and should only comply with the obligations arising from the directive. See, to this effect, T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 6.4.2.3 and 6.4.5.
[5] For more background, see T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 20233, para. 6.2, 6.3, 6.4.2.3.4 and 6.5.
[6] Regarding this characterization of a directive, see T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, chapter 2.
[7]Regarding the need for an analogous application of the lex posterior conflict rule of article 30 Vienna Convention 1969, see T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 6.4.2.2.1.
[8]See T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 6.4.2.2.4 for this assessment.
[9]See T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 6.4.2.2.4.ix.
[10]See, to this effect, inter alia, ILC, 2006, Fragmentation of International Law: Difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission (Finalized by Martti Koskenniemi), A/CN.4/L.6, p. 34, par. 56, I. Sinclair, The Vienna Convention on the Law of Treaties, Manchester: Manchester University Press 1984, p. 396, P. Merkouris, Article 31(3)(c) of the VCLT and the Principle of Systemic Integration, London: Queen Mary University of London 2010, p. 131 and J. Finke, Regime-collissions: Tensions between treaties (and how to solve them) in: Research Handbook on the Law of Treaties (C.J. Tams, A. Tzanakopoulos & A. Zimmermann), Cheltenham: Edward Elgar Publishing 2014, p. 422, P. Niemelä, The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration, 2017, p. 27 and Broekhuijsen, D.M., A Multilateral Tax Treaty: Designing an Instrument to Modernise International Tax Law, Alphen aan den Rijn: Kluwer Law International 2018, p. 174.
[11]See, to this effect, T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 6.4.3.
[12]See T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 6.4.3.6.
[13]See T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 7.2.1 and case law referred to there.
[14]For this obligation to set aside incompatible provisions in general, see, for example, Court of Justice of the European Union, 24 June 2019, Case C-573/19 (Poplawski), para. 58 and Court of Justice of the European Union, 18 January 2022, Case C-261/20 (Thelen Technopark Berlin), para. 30.
[15]See Court of Justice of the European Union, 28 October 2022, Case C-435/22 PPU (Generalstaatsanwalt München).
[16]See, regarding article 351 TFEU, T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 7.2.2.1.
[17]Regarding the conditions for enforceability of the primacy-based conflict rule, see T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 7.3.
[18]See G.W. Kofler, Direct Applicability and Direct Effect in: Principles of Law: Function, Status and Impact in EU Tax Law (C. Brokelind), Online: IBFD 2014, para. 12.2.3.
[19]See T.M. Vergouwen, The Effect of Directives in the Area of Direct Taxation on the Interpretation and Application of Tax Treaties, Kluwer Law International 2023, para. 7.3.5.

Always there

*We live, work and do business in a world that is changing faster and faster. Moving along to stay relevant is the motto for all ambitious organizations and individuals. HBN Law & Tax is no different. The Legal and Tax segment is constantly changing, often with far-reaching consequences for our clients and the HBN team that advises them. We all benefit from a solid collaboration that is agile and future-proof.*

**Today. Tomorrow. Together.**
From the start in 1938 we have worked on our ambition. Even though our environment is changing, our mindset is steady. We will always be there for our customers - and for each other. The constant quality we strive for requires continuous attention and commitment. Make collaboration fun, then good work is the logical consequence, we are convinced of that. In this way, we have grown into the largest and best performing Legal and Tax service provider in our region, of which Suriname and other South American countries are also part today.

**Always close by**
In addition to our offices on Aruba, Bonaire, Curaçao, Sint Maarten and Suriname, we also have offices in Amsterdam. Together we help various multinationals, organizations, governments and entrepreneurs with full-service services, especially in commercial areas of law. Good to know: as the only firm in the region, we have a large team (formerly KPMG Meijburg & Co. Caribbean) that specializes in Tax Law.

**Great place to grow**
HBN Law & Tax continuously welcomes student interns and new legal or tax talent with open arms. Is that you? Do you want to give your career and your life color? Pack your bags, pack the plane and seek adventure at HBN Law & Tax. Check us on hbnlawtax.com/careers.

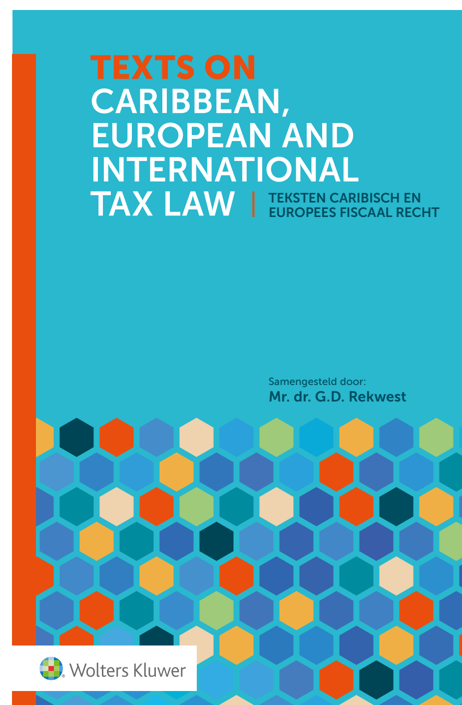
**hbnlawtax.com**

hbn | law & tax

# TEXTS ON CARIBBEAN, EUROPEAN AND INTERNATIONAL TAX LAW

This book is the first edition of Texts on Caribbean, European and International tax law. It contains a unique selection of legiaslation and regulations, case-law and policy.

**Author: dr. G.D. Rekwest**
Order through Kluwershop:
www.shop.wolterskluwer.nl



# NEXT EDITION

**Expected Online Appearance Date: 28 Febuary 2024**