Wednesday, August 30

Seminar E: IFA/OECD

Chair: Wolfgang Schön (Germany)

Speakers: Pascal Saint-Amans (OECD), Maikel Evers (OECD), Mike Williams (UK), Guglielmo Maisto (Italy), Johann Hattingh (South Africa)

Secretary: Selina Reif (Germany)

The timing of the 71st IFA Congress at Rio coincides with the initiation of the Brazil's accession to OECD. In this regard, **Mr. Pascal Saint-Amans** expressed that it would be very significant if Brazil joins OECD. Mr. Amans clarified that Brazil would need to comply with OECD's instruments, including those relating to taxation which includes transfer pricing guidelines. He remarked that from tax perspective it would be extremely interesting in the months to come and invited comments from the tax practitioners on the Brazilian tax regime. Finally, he commented that "*Brazil becoming full member is very exciting part of the new world order*" and also informed that 6 countries were in the process of joining OECD.

Inclusive framework:

Mr. Pascal Saint-Amans described the inclusive framework as the new global governance of the international tax issues. Mr. Amans quipped that "*There were apprehensions on inclusive framework, but it is working*". He stated that the focus for the next two years will be on BEPS implementation and that the review process of regimes has already started by the inclusive framework. On the Automatic Exchange of Information (AEOI) front, Mr. Pascal apprised "*50*

countries will be exchanging the financial information automatically in the next few days under the AEOI framework."

Digital Economy:

On digital economy, **Mr. Amans** stated that the unilateral actions are being undertaken by countries because there is multilateral consensus. He however observed that "VAT on *crossborder e-services will be effective in more than 100 countries post new guidelines very soon.*" Also, regarding the report on digital economy which is expected to be produced by April 2018, he opined that "*I am not sure if it will be conclusive, but I am hopeful that in the long term there will be solution, if not globally, at least regionally*." He further indicated that the public consultation on the draft is likely to take place in the first week of November at San Francisco (USA) instead of Paris.

Tax certainty:

Mr. Pascal Saint-Amans said that "*Tax certainty was a very hard sell for us before BEPS*". In this context, he also stated that things are now different and referred to the OECD International Compliance Assurance Program (ICAP) which is being developed that will allow tax authorities to jointly perform risk assessments as a new dispute prevention tool, mainly to process country-by-country (CbC) reporting information under the BEPS Action 13. He added that we have never had that level of cooperation among the tax administrations.

On the arbitration, Mr. Amans stated that "*Arbitration is nuclear weapon and to be used as a weapon of last resort.*"

Multilateral Instrument (MLI):

The panel noted that member countries of OECD and Inclusive Framework are not obliged to sign MLI and are free to fulfill BEPS Minimum Standards in another fashion. **Mr. Mike Williams** added that "*MLI is an instrument and not an obligation, obligation is BEPS commitment.*" **Mr. Pascal Saint-Amans** added that "*MLI allows to kills many birds with single action.*" **Mr. Johann Hattingh** however cited examples of countries such as Germany, Switzerland and Mauritius, which signed and notified only about half of their treaties as covered tax agreements under the

MLI. It was also stated that Brazil was the only G20 country besides USA that had not signed the MLI, but Mr Amans hastened to add that USA is already largely compliant with BEPS.

Regarding the legal issues for application of MLI, it was clarified that MLI signatories are not obliged to have all their tax agreements with other signatories covered by the MLI. Also, they cannot decide it in an arbitrary fashion. On the question whether jurisdictions are entitled to 'agree' through bilateral negotiations instead of having their respective Double Tax Agreements covered by the MLI, the Panel answered in affirmative, however added that MLI was more efficient. Mr. Pascal illustrated that "*If Mauritius does not notify India, India will need to initiate bilateral discussions". He further added that "The asymmetries will be reviewed during the peer review process.*"

The panel discussed series of questions involving MLI application & interpretation.

One of the issue discussed was in respect of Article 35 para 7 of the MLI, wherein signatories can delay entry into effect of the MLI for individual tax agreements until it has completed its internal procedures for the entry into effect of the provisions of this Convention with respect to that specific Covered Tax Agreement. **OECD's Maikel Evers** clarified that the objective was to provide flexibility to the countries so that they can notify the countries even gradually. The Panel chairman **Mr Wolfgang Schön** commented that "*MLI can go only as far as international public law. Vague notion of internal procedure can mean anything. The process is complete only after notice is given to OECD.*"

Another technical issue discussed during panel was on production of consolidated text of the treaties before MLI takes effect. The Panelist discussed 3 set of countries, first being countries like Sweden where the Parliament needs to see the consolidated version of the treaties. The second set would cover countries like United Kingdom, where there was no need for consolidation, but in practice, tax administration will voluntarily consolidate. The third set would include countries like Australia where administration will not produce consolidated version. On question of whether signatories could agree on bilateral protocols or administrative agreements to clarify their bilateral relations and their common understanding of provisions and concepts under the MLI, Mr. Amans answered that "*Countries can do what they want most countries will provide common comments on the MLI, to provide explanation.*" Mr. Amans referred Switzerland's practice as an exception.

The panelists also highlighted following options available if a jurisdiction intends to walk away from its obligations under the MLI:

- Internal Legislation (Treaty Override)
- Termination of the MLI (Art.37 MLI)
- Withdrawal of submitted notifications (solely for specific tax agreements)
- Filing of reservations not exercised before?
- Amendment of the bilateral tax agreement with another signatory.

Responding on this issue, OECD's Maikel Evers warned that if jurisdictions are walking away from MLI through the internal legislation, then they will not be fulfilling international obligations. The Panel Chairman **Wolfgang Schön** observed that all parties have opted for "Principle Purpose Test" (PPT) but the key challenge would be to secure consistency in PPT application and domestic GAAR. Mr Maikel Evers informed that all 71 signatories to MLI has opted for the principal purpose test (PPT), whereas 12 jurisdictions have opted for simplified LOB but only 4 have accepted the simplified LOB.

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DTS & Associates Take:

MLI has a component of great uncertainty – even the experts and the creators of the concept do not agree on how to interpret it & what happens with existing treaties etc. Accordingly, what is most concerning is that it appears to be creating lack of legal certainty for taxpayers. Another issue is about how countries will react to MLI, especially in a country in India, we expect to see constitutional challenges as India does not go to the Parliament for approval of MLI but to the Cabinet Committee of the Govt. Therefore, when 1 country adopts the process through the Cabinet and the other through Parliament and one complete set of documents is not presented, challenges are bound to crop up. Every country will have to prepare separate tax bilateral documents with each country, which is going to be a major issue. Further, even if both parties to a bilateral treaty consent to the MLI, one will have to see whether the elections coincide / match & how they want issues to be resolved, which in all probability will be through bilateral negotiations. Mauritius therefore has not notified India under its Covered Tax Agreements for the simple reason that Mauritius-India treaty was renegotiated just a year back and Mauritius has indicated its intention to re-sign the new treaty under the bilateral route & not go down the MLI route at all. Further, MLI is an instrument and the modality is that the domestic law of each country will have to adopt that to make it effective. Once domestic law adopts it, it becomes a domestic rule but because treaty documents are superior, it will necessitate adoption of treaty documents as well.

Seminar F: Economic Crisis and Protection of Taxpayers' Rights – Tax Morality?

Chair: Ricardo Escobar (Chile)

Speakers: Diego Quiñones (Colombia), Philippe Martin (France), Christian Kaeser (Germany), Michael O´Connor (Canada)

Secretary: Antonio Luis da Silva Jr. (Brazil)

Starbucks, Apple, Amazon, Google etc. are the ones courtesy whom the 'tax morality' or 'fair tax' debate started a few years ago. The noise has now reached a crescendo and touched the IFA shores, where it saw an intense, if not an heated discussion yesterday afternoon.

Mr. O'Connor kicked off the panel proceedings with some heavy charts on the fair tax math and outlined a 5 step program for the countries who wanted to implemented this concept; among them - cap or scrap a tax benefit if you think it is unfair, provide fixed rate tax credits rather than deductions at graduated rates, lower marginal rates alongwith simultaneous widening of tax base, scrapping all tax treaties and applying withholding taxes on deductible outbound payments. One of the panelists interjected, stating that it might be unwise to increase the tax burden on "99%" taxpayers, mainly comprising the middle class and doing so might infact make the tax regressive.

French tax court judge Mr. Philippe Martin acknowledged that fair share of tax can a legal issue but as regards CbCR, he opined that it is statistical information which won't have a legal impact. Siemens Tax Head Mr. Christian Kaeser lambasted what he called the "hypocrisy of the general public", who according to him, do not shy away from using dubious tax saving schemes but yet demand of MNCs to pay their fair share of tax. He went on to comment that while fairness is a measure of the system, morality is a measure of behaviour.

Morality & Interpretation of Tax Law:

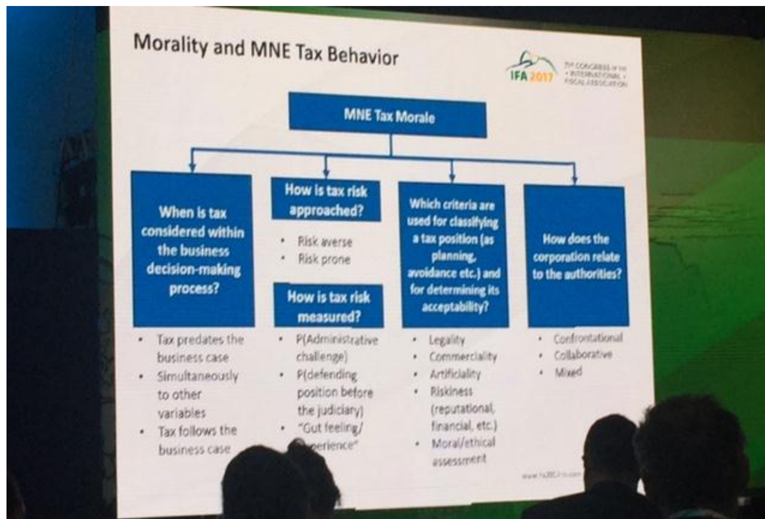
Mr. Martin played it straight when he said that morality is present in judicial debate, often as a 'background' argument but to prevail, it must be connected to judicial/constitutional principles. He gave an example of French courts having held that bribes are deductible expense if proven that they were useful for business. He also added that a "shocking" tax scheme may work if the legal text is clear. Mr. Diego Qionones quipped that tax rules are based on principles that reflect the moral & ethical preferences of the lawmakers and, to an extent, of the regulatees. He however cautioned that the interpreter's own moral or ethical rules shouldn't determine a tax obligations' existence. He also urged not to confuse 'purposive' interpretation with moral judgment. This led Mr. O'Connor to quote the legendary Oscar Wilde, who once said "Morality is an attitude we adopt towards people we dislike..."

GAARs & Protection of Taxpayer Rights:

Mr. Kaeser set the ball rolling by making a strong case for GAARs to be less subjective/open ended and felt that a mere saving of tax should not trigger GAAR provisions. The panel discussed how GAARs could end up creating uncertainty on account of vague language, substantial purpose, relevance of reasons, economic reality etc. They also added in good measure that this probably was GAAR's biggest strength as the uncertainty, while being welcomed by tax authorities, acts as deterrent for taxpayers to create new ideas/structures. The panel also felt that GAARs should not be applied to matters in the scope of SAARs. With respect taxpayer rights, one panelist opined that GAARs ignore that because of its inherent character taxpayers often cannot clearly judge whether behaviour is considered abusive or not. Mr. Martin stated that GAAR cannot be connected to morality and that GAAR must use legal tests.

Morality & MNE Tax Behaviour:

The panel discussed the various macro & micro level variables that affect MNE's tax morale including the industry in which the company operates, board involvement, characteristics of an in-house tax team, ownership structure etc. Mr. Martin stated that from the point of view of tax judiciary, whether an MNC is big or small, is not relevant to legal tests.



Mr. Christian Kaeser had the final word, saying as a matter of fact that only a minuscule % of company staff is involved in tax planning, that it is a task in itself to collect benefits available publicly. His concession - "Yes at times we are aggressive but legal." He also added that they discuss tax positions openly with the tax authorities in certain jurisdictions.

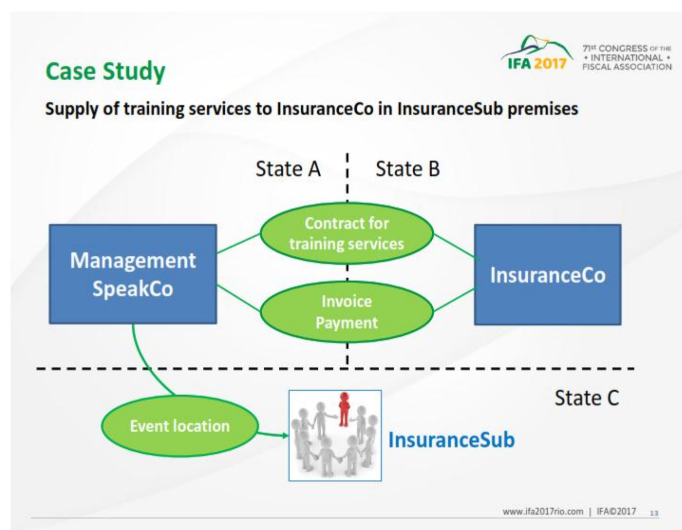
Seminar G: International Indirect Taxation of Enterprise Services: Multilateral, Internal or Bilateral Approach

Chair: Joachim Englisch (Germany)

Speakers: Piet Battiau (OECD), Rebecca Millar (Australia), Rita De La Feria (UK), Yan Xu (PRC)

Secretary: Karoline Spies (Austria)

The panel focussed on the indirect tax implications of cross-border business-to-business (B2B) supply of services. While the essence of the destination principle is to tax at the place where the services are used; the panel, however, noted that the inconsistent implementation of the destination principle globally is resulting in double-taxation as well as double non-taxation.



In this regard, the panel illustrated a case study where training services are supplied by Management Speaker Co. (in State A) at the Insurance Sub-premises (in State C) of Insurance Co. (in State B). Highlighting several inconsistent scenarios, the panel stated that State A might claim VAT because conditions for zero-rating are not met. Another scenario would be that State B might claim VAT because of business customer location. The third scenario would be that State C might claim VAT because of place of performance / use and enjoyment. They further discussed the possible tax outcome in jurisdictions such as China, Australia and EU.

The panel then deliberated on the multilateral coordination efforts lead by OECD resulting in the International VAT/GST Guidelines, which have been adopted by over 100 jurisdictions. VAT neutrality in international trade is the main objective of these guidelines and they provide general and specific "rules" for implementing the destination principle. The panel described this as a 'soft law' document while discussing the pros and cons of this approach. According to OECD's Piet Battiau, *"Guidelines though a soft law, express a strong political commitment, which means countries commit best efforts to align their laws based on guidelines"*.

The panel also delved into a few specific guidelines. Referring to Para 3.1 and 3.2 of OECD's General Rules, they urged that *"All place of taxation rules should seek to implement the destination principle".* The guidelines also state that the jurisdiction in which the customer is located has the taxing rights over internationally traded B2B services or intangibles.

However, expressing apprehensions in practice, Rita de la Feria (University of Leeds, UK) put forth the *"tax policy fallacy*" argument in the context of B2B services. She cited that even though there are guidelines, the effectiveness depends upon the actual enforcement. She expressed the big challenge in VAT refunds, while presenting a statistical analysis of percentage of refunds and disparity between developing and developed countries. The analysis showed that Canada's refunds are about 50%, followed by EU at around 38%. However, in case of Asia (without Singapore) or Africa, the refund percentage is very low, at only 6-7%. According to her, *"refusal of VAT refund results in dysfunctional destination based tax principle*".