LITERATURE REVIEW

Time and Tax: Issues in International, EU, and Constitutional Law, W. Hashlehner, G. Kofler and A. Rust (editors), Kluwer Law International, 2018

1 GENERALITIES

Organizing academic conferences in international or EU tax law in order to produce valuable output is not an uncomplicated task. It requires ascertaining an original theme of research, conducting the team in the right direction like an orchestra, and pushing the contributors towards an outmost level of achievement while avoiding repetitions and following a due time table. This outstanding book is living proof that this is possible and inspires the rest of us to keep on organizing such activities.

My guess is that speakers were not required to address specific questions but were rather guided towards discussing an explicit research field. This results in nice output from the papers in this book where in-depth research was performed in separate fields of legal studies and in a final cross-disciplinary chapter involving public finance theories to which I will return later. However, this also results in separate chapters that are not linked to each other. There is no general introductory chapter nor cross-referencing which, in my opinion, is the only negative comment I can address to the editorial team. A line of thoughts, however, appears in the diverse publication and leads the reader effectively towards its end with a very satisfactory experience.

The underlying question that is addressed in this book is to know how the concept of income relates to time. At some point, it would have been nice to have a mind map first, such as the one proposed by J. Wheeler in Chapter 3, for all of the presented issues in the book. But, I understand that it would reveal the content of the chapters from the beginning and would ruin the surprise for the reader. It is a difficult choice!

It is also challenging for a reviewer such as myself to refrain from revealing too much of these masterpieces that should be read extensively for the sake of understanding the entire exercise. Indeed, this book deals with several problems that taxpayers face in internal and cross-border situations in the search for the applicable source of law. Not only substantial issues arise (accrual versus cash basis, cash-flow disadvantages in cross-border situations, state aid recovery) but also procedural issues (human rights protection, constitutional prohibition of retroactivity).

An important take on this reading is that taxpayers' mobility tends to emphasize the lack of common solutions and the need for the case-by-case approach with the result that the rules of allocation in double tax treaties (DTTs) cannot solve underlying double taxation issues associated with the different temporal application of their relief on both sides of the border, and the CJEU's changing case law does not solve all of the problems either.

Before addressing each chapter on its own merits, I would like to mention that, in French and Belgian tax doctrines (not exposed in that book), the question is not covered under tax law but under budgetary law. To quote Frans Vanistendael[1]:

> *From the principle of legality, some countries have derived the principle of annuality, according to which a tax law can only have effect for one budgetary year. This does not mean that all tax laws have to be voted by parliament every year, but that parliament must annually consent to the government's levying taxes in accordance with existing statutes for the next budgetary year. In most countries, this principle is accepted as a principle of budgetary law, rather than of tax law, and its specific operation will depend on the constitutional provisions and other laws governing the process for adopting the annual budget. And his footnote: See Grondwet {Constitution} Article 174 (BEL); Const. Article 47 (FRA) and Ordonnance No. 59–2 of 2 January 1959, Portant loi organique relative aux lois de finances, Article 4, Dalloz, Législation {D.L.} 175 (1959); Guy Gest & Gilbert Tixier, Droit fiscal 33–34 (4th ed. 1986); Const. Article 81 (ITA); Const. Article 134 (ESP). In the United States, the Constitution requires congressional consent for any spending of public money, US Const. Article 1, § 9, but does not require annual consent for taxation. Accordingly, if Congress withheld its consent to*

Notes

[1] F. Vanistendael, *Chapter 2: Legal Framework for Taxation*, in *Tax Law Design and Drafting*, vol. 1 (V. Thuronyi ed., International Monetary Fund 1996), https://www.imf.org/external/pubs/nft/1998/tlaw/eng/index.htm (accessed 14 Apr. 2020).

public spending, the Government would have to stop spending, but the liability of citizens to pay taxes would remain unaffected.

Therefore, the principles of ability to pay or horizontal and vertical equity in public finances are sometimes limited in space and time and, at the outset, limit the problems of time appraisal in levying taxes. It does not mean, however, that problems disappear in respect of tax law. However, and after reading the last chapter of that book, I think that a deep theoretical analysis of the influence of time over the design of a particular tax system could have been presented at the beginning of it. The analysis could explain that time can sometimes produce positive effects for taxpayers (time appreciation is not taxed under income tax law unless it finds its expression in the tax rules in question, such as capital gain taxation or inflation correction rules). It could also discuss the negative effects (when two applicable rules are not in line with each other or when the law changes without proper adaptation through transition rules). Stated differently, I believe that not all is said about time and taxes despite the considerable efforts of the editors to tackle a wide range of topics. However, I understand that it was also not the purpose of the publication.

The next sections briefly present the essence of the chapters as they are organized chronologically in the book and in the spirit of book reviews presented in Intertax.

2 SOME THOUGHTS ON THE CONTRIBUTIONS

2.1 *Kofler and Rust's Chapter 1 on Time and Distributive Rules in Tax Treaties*

In this chapter, the authors deal with an in-depth analysis of active income articles in the DTT under the OECD Model Convention (Articles 7, 13, and 15) and how a different payment of income in situations of exit can generate double taxation issues. The primary problem presented is the lack of precision in DTTs and the necessary referral to domestic tax law for deciding when an income is considered as 'earned'. Although the authors claim that 'the factual situation at the moment when the activity was exercised should be relevant' and that the moment of payment should not matter, the authors find some interesting issues in domestic (Germany and Austria) tax case law regarding active income taxation. In their footnote 4, the authors explain how double taxation or double non-taxation can occur when, for instance, expenses linked to income that is realized in a departure state may not be acknowledged in the host state where domestic law exempts foreign source income. None of the states, therefore, can take the losses into consideration. In other words, the closure of a permanent establishement (PE), for instance, should not deprive the departing state from the right to tax income arising from the previous activities at a time when the PE was still active.

The chapter is interesting and shows disagreement in German academic publications on how allocation of taxing rights should occur in these situations. The authors produce a very convincing analysis of the problems that are incited by the lack of precision of specific provision in the OECD Model Convention (MC) on capital gain taxation in case of taxpayers' mobility. Indeed, the last resort clause to the mutual agreement procedure can be considered as a missed opportunity to agree on a more substantial solution as accepted by the EU Member States in the Anti-Tax Avoidance Directive (ATAD) (see the authors' remark in footnote 47).

2.2 *Smit's Chapter 2 on Temporal Aspects of Passive Income Under DTTs: Some Examples Based on Dutch Case Law*

This chapter, based on a previous publication by the author, proposes insight into some contradictory domestic law in the Netherlands concerning the 'compartmentalization doctrine' that works as transition rules when the taxpayer's status changes during a period while the law does not or vice versa. The most typical problematic items are analysed and demonstrate how a potential tax treaty override can be avoided. The case of pensions constituted through a tax deductible contribution scheme before the taxpayer's exit perfectly illustrates how the compartmentalization rules in the Netherlands justify a DTT override. This section also mentions the lack of a coherent approach by courts and concludes by suggesting a case-by-case approach; unfortunately, it does not answer the question of how compartmentalization would solve problems on a large scale basis.

2.3 *Wheeler's Chapter 3 on Double Tax Reliefs and Time*

This section deals with a series of generic problems associated with the temporal application of double tax relief commended by the DTT but organized in domestic laws. Beginning with a careful disclaimer that all problems cannot be exposed nor analysed, Wheeler exposes an interesting study of various issues more or less structured around taxpayers' difficulties when claiming for relief of double taxation linked with different interpretation of tax treaties or of taxable basis computed differently in different tax jurisdictions.

The author's effort to generalize the underlying legal issues is not in vain and produces an interesting exposure of what she refers to as 'consequential mismatches' linked to different taxable events. The complexity of the subject provides an excuse for the lack of a conclusive statement concerning the need to interpret domestic and DTT rules coherently. As a reader of the entire book, it is a pity that this chapter did not appear in the beginning of the book because it provides a valuable ua mind-map for approaching the topic.

2.4 *Tenore's Chapter 4 on Timing Issues in the Application of Tax Treaties: Changes in the Applicable Treaty*

This chapter, based on a previous publication by the author, describes how DTT provisions on entry into force and termination based on the 2017 OECD MC may generate unsolved cases of double taxation for both substantial and procedural issues. A taxable event may occur in a transition period when no clear rule applies (i. e. at the moment when new rules are not established while former DTT provisions no longer apply; a type of vacuum). The author produces a number of examples linked to this issue, which raises the question of whether retroactive effects of newly adopted DTTs are acceptable. Lifting the silence of the OECD MC on the effect of successive DTTs, the author demonstrates how some transitional provisions in the practice of Italian DTT solve the problems that can arise in these circumstances. He also raises important questions relating to the extent of information exchange between states under the relevant article of the mutual assistance procedure in the event that successive DTTs are not similar to the DTTs' scope.

2.5 *Bammens' Chapter 5 on Timing Disadvantages and Tax Treaty Discrimination*

This interesting chapter addresses timing differences for taxation of residents and non-residents under Article 24 OECD MC. With the support of several domestic cases in which the prohibition of discriminatory rules for foreign-owned corporate taxpayers applied (Article 24.5 OECD MC), the author indicates that cash-flow inconveniences from domestic law on non-resident taxpayers may be ensconced within the scope of Article 24 even under the heading of PE non-discrimination. He shows, however, that the claim for compensation of non-discrimination under DTT law does not have the same effect as state liability under EU law for breach of non-discrimination, and it remains in the hands of domestic courts. Therefore, even though the author is able to find some clear cases for which the non-discrimination articles in the OECD MC could apply, their effect remains ineffectual.

2.6 *Freija-Peccatti's Chapter 6 on the Value of Precedents in EU Tax Law*

This long chapter reviews many cases rendered by the CJEU during the last thirty years and shows that, over time, many fields of direct taxation have acknowledged a series of events precipitating important changes through either overruling or distinguishing cases, limiting in time the value of precedents that were previously established for the sake of 'social realities'. This is an interesting insider perspective on the change of substantive positions of the CJEU and has a genuine pedagogical characteristic that can easily be used for educational purposes.

2.7 *Garcia Prat's Chapter 7 on the Temporal Aspects of CJEU Judgements Related to Tax Matters*

This chapter proposes a very long descriptive review of the *ex tunc* effect of the CJEU's case law in diverse fields, not only tax law, and attempts to organize the material in two main sections. Either the case law allows for retroactive application as a rule, or the CJEU limits a retroactive application of its rulings under exceptional circumstances. It is not quite clear, however, how the line of division between these two categories should operate and why the CJEU generated various reasonings in different cases.

2.8 *Spies' Chapter 8 on Tax Deferral and Fundamental Freedoms, Exit Tax, Foreign Losses, and Withholding Taxes*

This very relevant contribution chooses three substantial areas (exit tax, foreign losses, and withholding taxes) to determine how timing differences between domestic and cross-border transactions are treated in the CJEU's case law on the Fundamental Freedoms. The author interestingly analyses the court's case law. For instance, she shows that the recent acceptance by the court of staggered payments of exit tax by exiting taxpayers instead of deferred taxation until later realization of capital gains on transferred assets for both individuals and corporate taxpayers can lead to a less extensive administrative follow-up despite the accepted brief time period (five years) that does not correspond to the asset's life cycle. The author then analyses the CJEU's case law on PE final losses and the changing case law, sometimes requiring deduction and recapture and sometimes not, and concludes that such a rule may well end up causing more complications than benefits, urging for a possible choice in the hands of the taxpayer. Likewise, non-resident taxation through withholding tax has been accepted by the CJEU despite its clear cash-flow disadvantage for taxpayers. The author, once again, suggests leaving the decision between cash-flow disadvantage and complexity of turning in resident tax return to the taxpayers themselves. This chapter is a great reading of an analysis of cases selected in a clear, logical manner that supports the author's *de lege lata* solution to problems caused by cash-flow inconveniences of non-resident taxpayers.

2.9 *Webers' Chapter 9 on Tax Rules with Retroactive Effect Versus Legal Certainty and Legitimate Expectations*

The author reviews the CJEU's case law involving the principle of legitimate expectation that can be activated

to protect individuals against changes of legislation in both tax and non-tax situations. The investigation results in a distinction between two main types. Individuals either need or do not need to abruptly change their economic behaviour because of a change of law. It appears to result from the author's finding that only unexpected law changes without any transitional provisions trigger protection under the general principal of legal certainty. Retrospective changes of law remain out of reach of a clear application of this principle, and the author demonstrates how the CJEU leaves the opportunity to decide over the threshold of application to the referring judges. This research is quite extensive and reaches beyond the mere field of taxation, which is interesting, but could have been more closely related to the mere theme of the book on *tax* and time.

2.10 *Boulogne's Chapter 10 on Tax, Time, and the Merger Directive*

The precise moment when shareholders sell their shares arising from a restructuring between two or more companies covered under the Merger Directive is decisive and not only to assess the existence of an abusive situation. The author of this chapter contributes to this statement with highly relevant examples that are induced from the careful drafting of Article 4(1) in the Merger Directive safeguarding Member States' rights to tax the gain arising at the time of the qualifying operation. Several problems occur, however, when the assets underlying a merged or split company are kept on the balance sheet of a permanent establishment remaining in the departure state after the merger in question. Indeed, both the departure state and the arrival state (i.e. by definition, another Member State where the newly created company is established and conducts business) are entitled to tax the gain that would arise from the sale of such asset. Even worse, when a loss is realized at the ultimate moment when the assets are sold, no relief is available under the Merger Directive to ensure that it is acknowledged in the new owner's tax bill. The author illustrates how the Merger Directive is unable to tackle this issue and how the CJEU's case law on exit taxation requiring a staggered instalment payment of five years after the exit from the merged company's state may expose taxpayers to an impossible offsetting of a loss or double taxation of a capital gain. The author also exposes how Article 5 ATAD claiming for a step-up in the arrival state (footnote 24) cannot address situations covered by the merger directive that were previously exposed (PE remaining in exit state). This area of EU tax law is an evolving path, as clearly exposed by the author, anticipating the new line of cases rendered after this chapter was drafted and emphasizing the difficult interaction between primary and secondary EU tax law.

2.11 *Pirlot and Traversa's Chapter on Temporal Application of State Aid Rules to Domestic Tax Measures: A Sensitive Matter*

The authors conduct extensive research into the EU Court's case law and academic publications commenting on state aid recovery in the direct tax field. Two main issues are discussed. Firstly, the authors address the difficult reconstruction of taxable bases when the state aid recovery period (ten years) supersedes the national statute limitation provisions on tax audits or documentation saving obligation (usually shorter in tax law; three to five years). Secondly, they extensively illustrate how re-establishing the status quo prior to unlawful state aid may breach the principle of legal certainty (regarding unlawful state aids to be recovered) or the principle of legitimate expectations (for the notified schemes and the standstill clause). The authors point at the excessive strength on behalf of the EU Courts linked to the frequent restitution of the advantage procured by unlawful tax state aid and argue for a more in-depth investigation of the potential impossibility to establish the correct amount. They conclusively also point at a potential risk area of the EU Commission's changes over time in interpretation of state aid rules. These changes may jeopardize the prudent investor's belief that the state will not offer something beneficial only to later demand its return within a ten year forthcoming period. The extensive research conducted in this chapter brings an interesting perspective to the reader on how the EU law's undisputed supremacy in the field of state aid together with insight into the many cases in which the Member States found a breach of the rules, hence required repaying unlevied taxes, should be understood as a genuine warning against generous and attractive tax breaks that are contemplated and existing in domestic tax policies.

2.12 *Pantazatou's Chapter on Effective Legal Remedies and Fair Trial in Tax and Time*

The human right's case law in the European Court of Human Rights (ECtHR) and in the CJEU provide fertile ground for discussion concerning domestic procedural rules protecting states' financial interest. The challenge of this theme is to present structured material to indicate how tax procedural rules can successfully be challenged at court for a lack of reasonableness. Although many authors have already dealt with this problem at length, the author succeeds here in captivating the reader with an unambiguous structure that avoids repetition and cross-referencing. An interesting conclusion is the lack of clear thresholds for 'unreasonable time' in the cases dealt with by the several courts. However, it remains that the CJEU has no legislative power in that respect, especially when the principal of procedural autonomy governs the matter

at hand. Therefore, it is not surprising that most cases are handled on a case-by-case basis and lead to contradictory results when the very same deadline for filing an appeal can sometimes accord or sometimes not with EU law or the European Convention on Human Rights all depending upon the context. Time remains, nevertheless, and a central element for assessing domestic rules affecting taxpayers' rights as successfully demonstrated by the author.

2.13 *Schroeder's Chapter on Constitutional Limits of Retroactivity in Tax Law*

This author's research compares how Germany and Belgium adequately implement their constitutional requirement of non-retroactivity in taxation, suggesting that Luxembourg would become inspired by its neighbours' best practice and solve some unresolved domestic law issues. He suggests that retroactivity arises in three situations: juridical retroactivity, economic retroactivity, and tax law retrospectivity that seems to be a subcategory of economic retroactivity. He does not refer to previous research performed, for instance, by Gribnau for the European Association of Tax Law Professors (EATLP) commonly referred to, however, it appears that the problem is defined similarly. The new law deprives the taxpayer of the expected benefits that are relied upon at the moment when the investment decision or transaction was made. The author exposes different situations under domestic tax law for which exceptions to the prohibition of retroactive legislation were accepted but no clear delineation of the Luxembourg Supreme Court's cases applied. Comparing Luxembourg's situation with that of Germany and Belgium, the author suggests a possible extension of the prohibition of retroactivity also in cases of economic retroactivity and tax law retrospectivity, which would better protect individuals' private sphere which is a specific feature of Luxembourgian constitutional law.

2.14 *Haslehner's Chapter on Constitutional Versus Economic Perspective*

This contribution proposes an interdisciplinary approach to the question of how a fair tax system should acknowledge (or not) timing differences that necessarily occur between the taxable event and the actual payment of taxes. Indeed, the beginning point of this research deals in the constitutional prohibition of retroactive taxation that may challenge the features of domestic tax systems requiring an annual charge. Indeed, the value of money between the taxable event and the tax charge can be acknowledged, at least economically speaking, as an additional charge breaching the prohibited retroactive taxation.

After exposing the legal obligations of the constitutional requirements applying to tax policy which involve legality and equality, the author exposes the main theories of public finance driving taxation that are based upon either welfare or public choice theories. He finds that the Schanz-Haig-Simons definition of income encompasses time appreciation which is not legally taxed until the realization of the underlying asset rising in value with time, which should be a sound inspiration model even for reaching equalitarian taxation. Indeed, the tax deferral of value appreciation favours a category of taxpayers (wealthy) compared to others (with only salary income, assumed less wealthy). Taxing time appreciation on an accrual basis would resolve this inequality. Whereas the concept is appealing, it builds on the premises that all taxpayers should pay capital gain tax equally. However, in the current international tax world where groups of companies enjoy participation exemptions including capital gains or group taxation regimes erasing taxation intra-group reorganizations, all incentives to invest in assets would have to be cancelled or harmonized across borders. This affords ample opportunity for further research.

3 Conclusion

This book is definitively worth reading for a practitioner and a student or academic writer despite the lack of theoretical analyses of, for instance, the legality principle and the annuality principle explained above. Another interesting issue that could have been covered is the link between time and wealth taxation that is left uncovered here. However, all in all, the book was not meant to provide a main theoretical contribution to public finance academia, and it successfully achieves its target to 'analyse the relationship between time and three key areas of tax: treaties, EU law, and constitutional law issues such as legal certainty and individual rights' as mentioned on the book's back cover.

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