JUDICIAL REVIEW OF TAX LEGISLATION

Yoseph Edrei

A review of the Israeli and American case law reveals a reluctance to subject tax legislation to judicial review.

1. The possible reason for such reluctance.
2. "Tax legislation": imposing tax, determining its rate, changing the rate. The importance of the distinction.
3. "Pure tax," Pugouvian tax, and tax incentives. The significance of the distinction – judicial review.

A GLOBAL TREATY OVERRIDE? THE NEW OECD MULTILATERAL TAX INSTRUMENT AND ITS LIMITS

Reuven S. Avi-Yonah

Haiyan Xu

On June 7, 2017, sixty-eight countries met in Paris for the official signing ceremony for a new multilateral tax instrument (MLI). The MLI is an important innovation in international law. Hitherto, international economic law was built primarily on bilateral treaties (e.g., tax treaties and BITs) or multilateral treaties (the WTO agreements). The problem is that in some areas, like tax and investment, multilateral treaties proved hard to negotiate, but only a multilateral treaty can be amended simultaneously by all its signatories.

The MLI provides an ingenious solution: A multilateral instrument that automatically amends all the bilateral treaties of its signatories. If the MLI succeeds, it can be a useful model in other areas, such as investment, where a multilateral agreement was not successful, but there is a growing consensus about the need to adjust the terms of BITs to address investor responsibilities and the definition of investment comprehensively.

Whether the MLI will succeed remains to be seen. While ratification by 68 countries (with more to come) is an achievement, the absence of the US is important, and other OECD members have agreed to only a limited set of provisions. On the other hand, the MLI may prove more appealing to developing countries because it enhances source-based taxation and limits treaty shopping.

Even a limited MLI would be a step forward. The current tax reform proposals in the US pose a significant threat to the ITR, because they would sharply reduce the US corporate effective tax rate to attract investment from other jurisdictions. Countries that wish to limit the damage

would be wise to accede to the MLI this year and prevent a massive race to the bottom that could ensue if the US becomes (from the perspective of the rest of the world) a giant tax haven.

THE MYTH OF CORPORATE TAX RESIDENCE

David Elkins

The issue of corporate residence has recently attracted a great deal of attention in both the popular press and in academic discourse, primarily because of the phenomenon of corporate inversions. The consensus among commentators is that the root of the problem is a flawed definition of corporate residence, and they have therefore proposed replacing the current definition, which relies upon place of incorporation, with another that relies upon control and management, home office, customer base, source of income, or the residence of shareholders.

The thesis of this article is that the concept of tax residence is inapplicable to corporations. Residence in tax law delineates the boundaries of distributive justice, and whereas corporations cannot be parties to a scheme of distributive justice, corporate residence is a misnomer. Furthermore, the incongruity of corporate residence along with the fact that residence is a fundamental concept in international taxation is one reason that the current international tax regime has proven unviable.

The article then goes on to describe in broad outline an international corporate tax regime that focuses on shareholders instead of on corporations.

IN DEFENSE OF ENTREPRENEURSHIP: HUMAN CAPITAL, KNOWLEDGE SPILLOVER, AND INNOVATION INCENTIVES

Mirit Eyal-Cohen

Recently, scholars questioned whether certain innovation tax incentives indeed spur additional research that otherwise would not have been taking place. Moreover, they argued it is not clear how R&D tax incentives solve the market failures of innovation. Who are the agents of innovation and how can we preserve their motivation? The literature exploring innovation-spending programs has paid little attention as to how to harmonize them with entrepreneurship theory.

This Article hopes to fill this gap. It begins by providing the taxonomy of innovation agents. In the private market, most individual-entrepreneurs are creative individuals who are alert to certain opportunities of discovering new combinations, technologies, and processes. Yet, these advances may also be achieved through intrapreneurship. The later signifies discovery of innovations by employees in established conglomerates.

After examining the pillars of innovation agency, the Article proceeds to demystify the problems of intrapreneurial firms. It posits that a market failure may exist in connection with human capital spillover. Intrapreneurial firms serve as major greenhouses for future individual-entrepreneurs. Yet, they also experience increased dissemination of intangibles through migration of their talented labor. Employee-intrapreneurs often aspire to begin their own independent journey. They leave secured positions and high salaries to pursue their ideas autonomously and take with them valuable knowledge and experience. While this phenomenon is beneficial to society it can be detrimental to intrapreneurial firms so as to encourage them to tlock-in their human capital in restrictive and wasteful arrangements.

As a solution, this Article proposes refining current R&D policies more accurately to match the kind of innovation agent they seek to foster. More specifically, it proposes to redesign the R&D

tax credit to compensate firms that train, but also “frees” talented employees, for its investment in human, rather than tangible capital.

THE GLOBAL MARKET FOR TAX AND LEGAL RULES

Tsilly Dagan

The canonical literature in law and economics argues that tax laws are more efficient than other areas of law (such as private law) in redistributing income. Focusing on two basic features of globalization—marketization of the state-constituent relationship and the fragmentation of sovereignty—the Article challenges this conventional wisdom. In the globalized economy, (some) people and businesses can pick and choose the laws applicable to their activities: they can reside in one jurisdiction, do business in another, register their IP in a third, invest under the rules of a fourth, and pay taxes, if any, in a fifth. Thus, in determining which rule is a better platform for efficient redistribution, states should look beyond their domestic dynamics and respond to the elasticity of taxpayers' choices among jurisdictions. Tax rules, with the many opportunities they offer to (particularly well-off) taxpayers to opt out of the taxing jurisdiction, lose their a-priori advantage over non-tax rules as a framework of redistribution.

TAXING THE DIGITAL ECONOMY POST BEPS: THE WITHHOLDING OPTION

Yariv Brauner

This paper develops a withholding tax solution in the context of BEPS, making a concrete proposal how should countries approach the taxation of the digital economy, whether in coordination or independently. The paper demonstrates the superiority of the withholding solution in the current circumstances over other discussed solutions, and its compatibility with actual countries responses to these challenges. A withholding approach directly tackles the phenomenon of stateless income as it ensures that some, even if minimal taxation is imposed on all base eroding payments. In addition, the immediate relations of such payments to market countries support the second goal of this paper: the achievement of a fairer allocation of tax bases among productive jurisdictions.

Ruling the World: Generating International Tax Norms in the Era of Globalization and BEPS

Rifat Azam

The challenges of international taxation in the era of globalization are difficult to surmount. Governments continue to use unilateral domestic instruments to handle these challenges. The contribution of bilateral treaty law is important and rising. Multilateral instruments are developing, but they continue to be soft law instruments mainly and the hard law instruments are limited. Few multilateral soft law instruments, such as the Model Treaty on Income and Capital, The Standard for Automatic Exchange of Information, which includes the Common Reporting Standard (CRS) as well as the Model Competent Authority Agreement, were very influential and had a lot of impact on domestic and treaty law. However, other multilateral soft law instruments, such as the Ottawa e-commerce taxation framework and the 1998 guidelines on harmful tax competition, failed in terms of implementation and impact. Several factors determine the formation, implementation, compliance and effectiveness of multilateral soft tax law, but the most important factor is the position of the United States as all case studies revealed. The OECD played an important role in the development of most multilateral instruments as it provided the platform and the professional support for multilateral discussions on the different topics and issues of international taxation. However, the agenda of the OECD was ultimately determined by the most powerful countries within the OECD. The civil society, the media and the public together with other several factors, influenced the agenda as well, and contributed to the emergence of the BEPS project and its outcomes. The prospects of the BEPS multilateral soft law are very complex and depend on several determinants. In my opinion, Country-by-Country Reporting is being accepted and implemented widely and rapidly by the United States, Europe and many other countries. However, in terms of impact, I am not sure that CbC would limit corporate tax avoidance since the problem is not lack of information but lack of intervention tools. Similarly, The MAP have high prospects and they would improve

the procedures. All the other soft law proposals in the BEPS project might be partially implemented, at most, while treaty based disclosure and transparency norms are more likely than domestic law based substantive and antiavoidance norms. But, their impact on limiting corporate tax avoidance is expected to be limited to the best of my understanding. The hardcore of corporate tax avoidance and tax competition will continue to prevail after BEPS and different responses are needed. I might be right or wrong concerning the prospects of the BEPS. However, hopefully, this comprehensive, interdisciplinary and innovative paper contributed to better understanding of the patterns of international tax law making in the era of globalization and would contribute in bringing a new reform that better fits the twenty first century. Ruling the world in the 21st century is not easy at all and appropriate "regulation spectrum" is needed. Generating appropriate international tax norms in the era of globalization is one essential step to preserve humanity and democracy. Two different choices are currently on the table: The OECD BEPS choice and the United States Corporate Tax Cut choice. The choices of the leaders of the world would determine the future of taxation and democracy in the 21st century.