EUROPEAN UNION CORPORATE TAX LAW

CHRISTIANA HJI PANAYI

CAMBRIDGE UNIVERSITY PRESS
CONTENTS

Introduction 1

1 The historical background to EU corporate tax law 3
  1.1 Introduction 3
  1.2 The historical background 9
    1.2.1 The Neumark Report 9
    1.2.2 The Segrè Report 11
    1.2.3 The Program for the Harmonisation of Direct Taxation 13
    1.2.4 The Van den Tempel Report 13
    1.2.5 The Commission's 1975 proposal and its aftermath 14
    1.2.6 The Ruding Report 18
  1.3 Recent developments 21
    1.3.1 Harmful tax competition and the tax package 21
    1.3.2 The 2001 Company Tax Study 22
    1.3.3 The aftermath to the 2001 Company Tax Study 25
    1.3.4 Good governance in tax matters 27
  1.4 The future of EU corporate tax law 29

2 EU corporate tax legislation 31
  2.1 The Parent-Subsidiary Directive 31
    2.1.1 Profit distribution 33
    2.1.2 Eligibility requirements 36
    2.1.3 Taxing the profit distribution 41
    2.1.4 What is a withholding tax? 45
  2.2 The Merger Directive 50
  2.3 The Interest and Royalties Directive 51
CONTENTS

2.3.1 Eligible companies, permanent establishments and beneficial ownership 53
2.3.2 Interest, royalties and excluded payments 57
2.3.3 The taxation of the payer/debtor 62
2.3.4 Reform of the Interest and Royalties Directive 64
2.4 The Savings Directive 65
2.5 The Arbitration Convention 70
2.6 The Code of Conduct on Business Taxation 75
2.7 The Mutual Assistance Directives 76
2.8 The Draft Directive for Cross-Border Loss Relief 78

3 The Common Consolidated Corporate Tax Base 81
3.1 Introduction – unanimity or enhanced cooperation? 81
3.2 Key features of the Draft CCCTB Directive 84
  3.2.1 Eligibility and membership test® 84
  3.2.2 Optionality: coexistence of domestic regimes and the CCCTB 88
  3.2.3 The new tax base 90
  3.2.4 Consolidation and other benefits 93
  3.2.5 The administration of the CCCTB 98
3.3 Taxation of inbound and outbound payments 102
  3.3.1 Inbound payments 102
  3.3.2 Outbound payments 105
3.4 Anti-abuse rules 108
  3.4.1 The GAAR 108
  3.4.2 Controlled foreign companies 109
  3.4.3 Thin capitalisation 112
3.5 Formulary apportionment 117
3.6 The future of the CCCTB 120

4 The Court of Justice and the development of EU corporate tax law 123
4.1 Tax litigation in the Court of Justice 123
4.2 Fundamental freedoms, state aid and direct taxation 129
  4.2.1 Free movement of goods 129
  4.2.2 Free movement of persons 129
  4.2.3 Freedom to provide services 132
  4.2.4 Free movement of capital 135
  4.2.5 Citizenship rights 142
  4.2.6 The state aid prohibition 144
## CONTENTS

4.3 Methodology of the Court of Justice  148
  4.3.1 Finding the relevant freedom  148
  4.3.2 Discrimination and restriction approach  151
  4.3.3 Tax treaties and double taxation  157
  4.3.4 Overall or per-country approach?  165
4.4 Conclusion  169

5  Tax obstacles to the cross-border movement of companies: direct investment  171
  5.1 Company residence  171
  5.2 Issues with the taxation of corporate groups  175
    5.2.1 Expenses in foreign holdings  177
    5.2.2 Cross-border loss relief  182
    5.2.3 Controlled foreign companies  196
  5.3 Issues with the taxation of permanent establishments  196
    5.3.1 Defining permanent establishments  196
    5.3.2 The different treatment of permanent establishments and companies  198
    5.3.3 Rules for the attribution of profits and expenses  207
    5.3.4 Notional payments and expenses  212
    5.3.5 Cross-border loss relief  214

6  Tax obstacles to cross-border portfolio investment  229
  6.1 Double taxation relief mechanisms  229
  6.2 The taxation of inbound dividends  235
    6.2.1 The early cases: individual shareholders  237
    6.2.2 Later cases: corporate shareholders  238
    6.2.3 Economic and juridical double taxation – the home state perspective  249
  6.3 The taxation of outbound dividends  252
    6.3.1 The early cases – *Fokus Bank, ACT GLO, Denkavit* and *Amurta*  252
    6.3.2 Later cases – consolidation of the Court’s principles  257
    6.3.3 The relevance of tax treaties – neutralisation of host state taxes?  264
    6.3.4 Economic and juridical double taxation – the host state perspective?  268
    6.3.5 Taxation on gross basis or net basis?  270
    6.3.6 Other developments  273
  6.4 The taxation of interest and royalties  275
7 Reorganisations under EU tax law 282
   7.1 Corporate reorganisations and the Merger Directive 283
      7.1.1 The scope of the Merger Directive 284
      7.1.2 Reliefs under the Merger Directive 286
      7.1.3 Case law on the Merger Directive 290
   7.2 Corporate migration 299
      7.2.1 Corporate law restrictions 299
      7.2.2 The transfer of tax residence 306
         7.2.2.1 Exit taxes 307
         7.2.2.2 The case law of the Court of Justice: emigrating individuals v. emigrating companies? 310
      7.2.3 The EU's corporate vehicles 326
   7.3 Transfer of assets 328
8 Tax avoidance and EU law 333
   8.1 An EU principle of abuse of tax law? 333
   8.2 Anti-deferral regimes 338
      8.2.1 CFCs in international tax law 339
      8.2.2 CFCs in EU tax law 342
   8.3 Thin capitalisation 349
   8.4 Transfer pricing 360
9 EU corporate tax law: interim conclusions and thoughts 365

Index 385