

CCCTB

Selected Issues

Edited by
Dennis Weber



Wolters Kluwer
Law & Business

EUCOTAX Series on European Taxation

CCCTB

Selected Issues

Edited by

Dennis Weber



Wolters Kluwer
Law & Business

Published by:

Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:

Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:

Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

Printed on acid-free paper.

ISBN 978-90-411-3872-9

© 2012 Kluwer Law International BV, The Netherlands

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without written permission from the publisher.

Permission to use this content must be obtained from the copyright owner. Please apply to: Permissions Department, Wolters Kluwer Legal, 76 Ninth Avenue, 7th Floor, New York, NY 10011-5201, USA.
Email: permissions@kluwerlaw.com

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

EUCOTAX Series on European Taxation

CCCTB

EUCOTAX Series on European Taxation

VOLUME 35

Series Editors:

Prof. Dr Peter H.J. Essers

Prof. Dr Eric C.C.M. Kemmeren

Fiscal Institute Tilburg/Center for Company Law, Tilburg University

Prof. Dr Dr h.c. Michael Lang

WU (Vienna University of Economics and Business)

The titles in this series are listed at the back of this volume.

List of Contributors

Prof. Daniel Gutmann	Professor at the Sorbonne Law School (University Paris-1)/Of counsel CMS Bureau Francis Lefebvre
Prof. Peter Harris	University of Cambridge.
Prof. Walter Hellerstein	Shackelford Professor of Taxation and Distinguished Research Professor, University of Georgia Law School, Athens, Georgia, US.
Imme Kam	Loyens & Loeff.
Theo Keijzer	International Chamber of Commerce.
Antonio Russo	Baker & McKenzie Amsterdam.
Dr. Ronald Russo	Tilburg University.
Thies Sanders	Loyens & Loeff, Amsterdam.
Paul H.M. Simonis	Loyens & Loeff, Rotterdam.
Rita Szudoczky	ACTL.
Dr. Mario Tenore	Maisto e Associati.
Prof. Bertil Wiman	Uppsala University.
Dr. Jan van de Streek	ACTL Ernst & Young.
Mark van Graafeiland	Loyens & Loeff.
Matthijs Vogel	Loyens & Loeff/University Leiden;
J.A.R. van Eijdsen	Ernst & Young Belastingadviseur, Rotterdam.
Dr. Hein Vermeulen	ACTL/PwC.
Prof. Dennis Weber	ACTL/Loyens & Loeff.
Prof. Joann Martens Weiner	The George Washington University and Bloomberg Government, Washington, DC.

Preface

This book is the result of a conference organised by the Amsterdam Centre for Tax Law (ACTL), on 10 and 11 June 2011. I wish to thank all those who contributed to this successful conference and, in particular, our sponsor Loyens & Loeff.

Prof. Dr Dennis Weber (director Amsterdam Centre for Tax Law)

Summary of Contents

List of Contributors	xix
Preface	xxi
Chapter 1 Consolidation in the CCCTB Proposal <i>Thies Sanders</i>	1
Chapter 2 Relevant Aspects When Entering the System/CCCTB Group <i>Paul H.M. Simonis</i>	11
Chapter 3 Business Reorganisations within the Group <i>Bertil Wiman</i>	45
Chapter 4 Leaving a Group <i>Jan van de Streek</i>	53
Chapter 5 CCCTB: General Principles and Characteristics <i>Ronald Russo</i>	67
Chapter 6 Depreciation Rules under the Proposed CCCTB Directive <i>Hein Vermeulen</i>	79

Chapter 7

**Is the CCCTB Proposal in line with the Principle of Subsidiarity?:
Negative Opinions Submitted by National Parliaments
in the ‘Yellow Card Procedure’**

93

Rita Szudoczky

Chapter 8

**The One-Stop-Shop Approach: A Discussion of the Administrative
and Procedural Aspects of the CCCTB Draft Directive**

127

J.A.R. van Eijssen

Chapter 9

Appeals

171

Daniel Gutmann

Chapter 10

**The Common Consolidated Corporate Tax Base and the
Future of Taxation**

181

Theo Keijzer

Chapter 11

Withholding Taxes and Relief for Double Taxation

191

Matthijs Vogel

Chapter 12

**Common Consolidated Corporate Tax Base: The Sharing
Mechanism, Some General Considerations**

207

Antonio Russo

Chapter 13

**Tax Planning under the CCCTB’s Formulary Apportionment
Provisions: The Good, the Bad and the Ugly**

221

Walter Hellerstein

Chapter 14

**CCCTB and Formulary Apportionment: The European
Commission Finds the Right Formula**

253

Joann Martens Weiner

Chapter 15

The CCCTB GAAR: A Toothless Tiger or Russian Roulette?

271

Peter Harris

Chapter 16	
CFC Rule	299
<i>Mario Tenore</i>	
Chapter 17	
CCCTB: Selected Issues – A Summary	313
<i>Mark van Graafeiland & Imme Kam</i>	

Table of Contents

List of Contributors	xix
Preface	xxi
Chapter 1	
Consolidation in the CCCTB Proposal	1
<i>Thies Sanders</i>	
1. Introduction	1
2. Voting and Ownership Rights	2
3. Formation of a Group	5
4. Timing	8
5. Insolvency	8
6. Consolidating Tax Bases	9
Chapter 2	
Relevant Aspects When Entering the System/CCCTB Group	11
<i>Paul H.M. Simonis</i>	
1. Introduction	11
2. Opting into the System (Articles 44–47 Directive)	12
3. Joining the CCCTB Group (Articles 61–64 Directive)	19
4. Pre-CCCTB Losses	26
5. CCCTB Tax Period	30
6. Other Transitional Questions	31
7. Some Final Remarks	42

Table of Contents

Chapter 3	
Business Reorganisations within the Group	45
<i>Bertil Wiman</i>	
1. Introduction	45
2. Main Rule on Business Reorganisations within a Group	46
3. Transfers Out of the CCCTB Area	48
4. Reorganisations and the Formula	49
5. Incorporating Assets with Subsequent Share Sale	51
6. Concluding Remarks	52
Chapter 4	
Leaving a Group	53
<i>Jan van de Streek</i>	
1. Introduction	53
2. The Main Rule on Leaving a Group: No Taxation	54
3. Consolidation Losses and Hidden Reserves on Leaving a Group	55
3.1. Consolidation Losses	55
3.2. Hidden Reserves in Fixed and Financial Assets	56
3.3. Hidden Reserves in Self-generated Intangible Assets	58
4. Termination of a Group	59
5. Business Reorganisations	61
5.1. Reorganisations within a Group	61
5.2. Business Reorganisations between Two or More Groups	62
6. Conclusions	64
Chapter 5	
CCCTB: General Principles and Characteristics	67
<i>Ronald Russo</i>	
1. Introduction	67
2. General Characteristics	67
3. Profit and Loss Account Approach	68
4. Tax Base and Corporate Income Tax	68
5. Relationship between Delegated Acts and the Directive	69
6. Independent Concept of Profit/No Fall Back System	69
6.1. General Principles	70
6.2. Concrete Rules	72
6.2.1. Roll Over Relief (Article 38)	72
6.2.2. Hedge Accounting (Article 28)	74
6.2.3. Stock versus Material Fixed Assets	75
6.2.4. Provisions	75
7. No Fall Back System	76
8. Concluding Remarks	77

Chapter 6
Depreciation Rules under the Proposed CCCTB Directive **79**
Hein Vermeulen

1.	General	79
2.	Relevant Depreciation Provisions	80
3.	Why Is Depreciation Relevant?	81
4.	Chapter VI of the Proposed CCCTB Directive	81
4.1.	Fixed Asset Register	82
4.2.	Depreciable and Non-depreciable Assets	82
4.3.	Depreciation Base	83
4.4.	The Position of Article 14(1)(j) of the Proposed CCCTB Directive	84
4.5.	Depreciation Method	84
4.5.1.	Individually Depreciable Assets	85
4.5.2.	Pooled Assets	86
4.6.	Improvement Costs	87
4.7.	Entitlement to Depreciate	87
4.8.	Exceptional Depreciation	88
4.9.	Timing	89
4.10.	Roll-Over Relief	89
4.11.	Delegated Acts	90
5.	Conclusions	91

Chapter 7
Is the CCCTB Proposal in line with the Principle of Subsidiarity?:
Negative Opinions Submitted by National Parliaments
in the ‘Yellow Card Procedure’ **93**
Rita Szudoczky

1.	Introduction	93
2.	The Principle of Subsidiarity in the Commission’s Practice and the Court’s Case Law	95
2.1.	The Definition of the Principle of Subsidiarity	95
2.2.	The Commission’s Application of Subsidiarity in Initiating Union Legislation	97
2.3.	The Court’s Interpretation of Subsidiarity in the Judicial Review of Union Legislation	99
2.4.	Proportionality Instead of Subsidiarity?	102
3.	Control Mechanism under the Protocol	105
4.	The Commission’s Justification of the Proposal	109
5.	Reasoned Opinions on the Proposal	110
5.1.	Union Competence and Legal Basis for Adopting the Proposal	111
5.2.	The Compliance of the Proposal with the Principle of Subsidiarity and Proportionality	115
6.	Conclusions	125

Chapter 8

The One-Stop-Shop Approach: A Discussion of the Administrative and Procedural Aspects of the CCCTB Draft Directive

127

J.A.R. van Eijdsen

1.	Introduction	127
2.	Relevant Definitions	128
3.	Opting for Application of the CCCTB System	129
3.1.	Notice to Opt	129
3.2.	Tax Year	132
3.3.	How the Tax Authorities Process the Notice to Opt	132
3.4.	Termination of a Group	136
4.	Tax Returns	136
4.1.	Rules Governing the Returns of Single Taxpayers	137
4.2.	Rules Governing the Returns of Principal Taxpayers	138
4.2.1.	Most Important Parties in the Filing Process	138
4.2.2.	Filing Deadline	138
4.2.3.	Content of the Tax Return	138
4.2.4.	Failure to File a Tax Return, or Failure to Meet the Filing Deadline	139
4.2.5.	Obligation to Notify Errors in the Return	140
5.	Assessments and Payment of Taxes	141
5.1.	Rules for Single Taxpayers	141
5.2.	Rules for Principal Taxpayers	141
5.2.1.	Formal Assessment of the Tax Liability	141
5.2.2.	Appeals against the 'Assessment'	142
5.2.3.	Collection: A Purely National Matter	143
5.2.4.	Determination of Losses	143
5.2.5.	Interest on Tax Liabilities and Late-Payment Interest	143
6.	Issuance of Amended Assessments	144
6.1.	Rules for Single Taxpayers	144
6.2.	Rules for Principal Taxpayers	144
6.2.1.	Verification of the Return by the Principal Tax Authority	144
6.2.2.	Only One Amended Assessment per 12 Months	144
6.2.3.	Consultation with Other Tax Authorities	145
6.2.4.	Scenarios and Thresholds	146
6.2.5.	Deadlines for Issuing an Amended Assessment	148
6.2.5.1.	Normal Situation	148
6.2.5.2.	Deliberate or Grossly Negligent Misstatement	148

6.2.5.3.	Criminal Proceedings	149
6.2.5.4.	Extraordinary Situations	150
6.2.6.	Interest on Tax Liabilities and Late-Payment Interest	150
6.2.7.	Collection	151
7.	Tax Penalties	151
8.	Legal Protection	152
8.1.	Rules for Single Taxpayers	152
8.2.	Rules for Principal Taxpayers	152
8.2.1.	Objection/Appeal in Connection with the Consolidated Tax Return and Enforcement Instrument	152
8.2.2.	Closed System of Legal Protection	153
8.2.3.	Administrative Appeal	154
8.2.4.	Judicial Appeal	158
8.2.5.	Allocation of the Burden of Proof	159
9.	Requests for Information and Tax Audits	159
9.1.	Requests for Information	160
9.2.	Audits	161
10.	Rulings	162
11.	Record-Keeping Obligation/Central Data Base	164
12.	Secrecy Clause	165
13.	Disagreements between Member States	166
14.	Miscellaneous	167
14.1.	Communication between Tax Authorities	167
14.2.	Language	168
14.3.	Matters for Which the Draft Directive Does Not Provide	168
14.4.	Forum Shopping	169
14.5.	Mutual Agreement or Arbitration Procedures with Third Countries	169
15.	Conclusion	169

Chapter 9

Appeals

171

Daniel Gutmann

1.	Disagreements between Member States	172
1.1.	Conditions	172
1.2.	Procedure	174
2.	Appeals by a Principal Taxpayer	175
2.1.	Conditions	175
2.2.	Effects	177
2.3.	Procedure	178
2.3.1.	Administrative Appeals	178
2.3.2.	Judicial Appeals	179
3.	Conclusion	180

Table of Contents

Chapter 10

The Common Consolidated Corporate Tax Base and the Future of Taxation

181

Theo Keijzer

1. Global Tax Landscape: Today 181
2. Common Consolidated Corporate Tax Base and Its Role in the Future Tax Landscape 185
 - 2.1. A Report to the European Council 188
3. Conclusion 189

Chapter 11

Withholding Taxes and Relief for Double Taxation

191

Matthijs Vogel

1. Introduction 191
2. Withholding Taxes 192
 - 2.1. Relevant Provisions 192
 - 2.2. Choices and Suggestions 193
 - 2.2.1. Intra-group 193
 - 2.2.2. Outside the Group 193
3. Relief for Double Taxation 196
 - 3.1. Relevant Provisions 196
 - 3.2. Choices and suggestions 198
 - 3.2.1. Exemption with Progression 198
 - 3.2.2. Tax Credit 201
4. Third Country Tax Credit 203
 - 4.1. Issue: Sharing versus Arm's Length 203
 - 4.2. Solutions 205
5. Final Remarks 205

Chapter 12

Common Consolidated Corporate Tax Base: The Sharing Mechanism, Some General Considerations

207

Antonio Russo

1. The Proposed Directive: Provisions on the Apportionment of the Consolidated Base 207
2. From the ALP to Formulary Apportionment: A Paradigm Shift 209
3. What Is in a Formula? 213
4. Conclusive Considerations: Is There an Alternative? 217

Chapter 13**Tax Planning under the CCCTB's Formulary Apportionment Provisions: The Good, the Bad and the Ugly****221***Walter Hellerstein*

1.	Introduction	221
2.	The CCCTB's Apportionment Mechanism	223
2.1.	Apportioning Income to States versus Apportioning Income to Taxpayers	223
2.2.	Overview of the CCCTB Apportionment Mechanism	226
2.2.1.	The Sales Factor	227
2.2.2.	The Labour Factor	230
2.2.3.	The Asset Factor	231
2.2.4.	The Anti-abuse, Safeguard, and Implementing Rules Provisions	232
2.2.4.1.	The General Anti-abuse Rule	232
2.2.4.2.	The Safeguard Clause	232
2.2.4.3.	Commission Rulemaking Authority to Calculate Factors	232
3.	Tax Planning under the CCCTB's Apportionment Rules: 'The Good'	233
4.	Tax Planning under the CCCTB's Apportionment Rules: 'The Bad'	234
4.1.	The Sales Factor	234
4.1.1.	Sales of Goods	234
4.1.2.	Supplies of Services	237
4.1.3.	Exempt, Intangible, and Extraordinary Revenues	237
4.2.	The Labour Factor	241
4.2.1.	Assigning Labour to the Appropriate Group Member	241
4.2.2.	Independent Contractors	243
4.3.	The Asset Factor	245
5.	The Anti-abuse, Safeguard, and Implementing Rules Provisions: 'The Ugly'	248
5.1.	The General Anti-abuse Rule	248
5.2.	The Safeguard Clause	249
5.3.	Commission Rulemaking Authority to Calculate Factors	251
6.	Conclusion	252

Chapter 14**CCCTB and Formulary Apportionment: The European Commission Finds the Right Formula****253***Joann Martens Weiner*

1.	The Journey to the CCCTB	253
2.	Steps Along the Way	255