

Series Editor's Preface

The LL.M. program in International Tax Law at WU (Vienna University of Economics and Business) is available as either a one-year full-time or a two-year part-time program. Students not only attend a vast number of courses for which they prepare papers and case studies and sit numerous examinations but also write their Master's theses. These theses are a prerequisite for the academic degree Master of Laws (LL.M.).

The program follows a scheme under which the Master's theses of one particular program all look at various aspects of the same general topic. Previous general topics have included: Electronic Commerce and Taxation (1999/2000 full-time program), Partnerships in International Tax Law (2000/2001 full-time program), Transfer Pricing (1999/2001 part-time program), Exemption and Credit Methods in Tax Treaties (2001/2002 full-time program), Permanent Establishments in International Tax Law (2002/2003 full-time program), Non-Discrimination Provisions in Tax Treaties (2001/2003 part-time program), Triangular Cases (2003/2004 full-time program), Tax Treaty Policy and Development (2004/2005 full-time program), Source versus Residence in International Tax Law (2003/2005 part-time program), The Relevance of WTO Law for Tax Matters (2005/2006 full-time program), Conflicts of Qualification in Tax Treaty Law (2006/2007 full-time program), Taxation of Artistes and Sportsmen in International Tax Law (2005/2007 part-time program), Fundamental Issues and Practical Problems in Tax Treaty Interpretation (2007/2008 full-time program), Dual Residence in Tax Treaty Law and EC Law (2008/2009 full-time program), Taxation of Employment Income in International Tax Law (2007/2009 part-time program), The EU's External Dimension in Direct Tax Matters (2009/2010 full-time program), History of Tax Treaties (2010/2011 full-time program), Permanent Establishments in International and EU Tax Law (2009/2011 part-time program), International Group Financing and Taxes (2011/2012 full-time program), Limits to Tax Planning (2011/2013 part-time program), Exchange of Information for Tax Purposes (2012/2013 full-time program), Tax Policy Challenges in the 21st Century (2013/2014 full-time program), Global Trends in VAT/GST (2013/2015 part-time program), Non-Discrimination in European and Tax Treaty Law: Open Issues and Recent Challenges (2014/2015 full-time program), Preventing Treaty Abuse (2015/2016 full-time program), Limiting Base Erosion (2015/2017 part-time program), Taxation in a Global Digital Economy (2016/2017 full-time program), and Arbitration in Tax Treaty Law (2017/2018 full-time program).

The respective Master's theses were published in edited volumes. The general topic for the 2017/2019 part-time program was Transfer Pricing and Value Creation. Giammarco Cottani and Raffaele Petruzzi introduced the students to the subject matter at the beginning of the program. Raffaele Petruzzi and Romero Tavares held seminars in which the structure of the papers and the preliminary results were critically analysed. It was with great commitment that they supported the students who were preparing their Master's theses. Their numerous suggestions helped to improve the quality of these theses and, as a consequence, the quality of the present volume. In my function as both the scientific director of the LL.M. program and the editor of this series, I would like to not only thank those two colleagues for their excellent engagement and efforts but to also express my gratitude to them.

Finally, I am also grateful to the students themselves. They pursued the program with great enthusiasm. This LL.M. program not only gave them the opportunity to interact with academics and scientifically qualified interns from all over the world and to acquire a wealth of knowledge, but they also learned to tackle and solve complex issues using a structured approach. The Master's theses that are now available bear witness to this. I hope that the results of these papers will both influence scientific discussion and be of use to tax practitioners.

Michael Lang

Editors' Preface

The present volume of the "Series on International Tax Law" comprises the Master's theses of the part-time students attending the 2017–19 class of the postgraduate LL.M. program "International Tax Law" at WU (Vienna University of Economics and Business). The general topic this year was "Transfer Pricing and Value Creation". This was a particularly challenging topic as the study of international tax law often fails to address matters that are perceived as interdisciplinary, or facts-based, which are inherent to transfer pricing and to the notion of value creation. Indeed, the academic study of transfer pricing is still rather scarce and fails to address how enterprises, in fact, apply business profits' allocation rules that are derived from tax treaties.

Emerging from the OECD/G20 BEPS Project, this new, somewhat fuzzy notion of value creation came to permeate not only transfer pricing language but also wider allocation rules and anti-abuse provisions in international tax law. Students grappled with these notions and worked to situate them within the law of tax treaties, analyzing terms of the OECD Transfer Pricing Guidelines alongside their factual context. In the introduction to this book, a historical analysis of transfer pricing and of the term value creation describes that bridging legal fiction and economic reality has been at the core of the international tax debate. Global tax policy, whether in a multilateral and cooperative setting at the OECD or unilaterally, demonstrates seemingly irreconcilable positions in respect to the definition and usefulness of value creation as a transfer pricing standard under Article 9 of the tax treaties, as also described in an introductory chapter. The same issues arise in respect to the allocation of profits to permanent establishments under Article 7 in light of this new notion of Value Creation. Whether in a multilateral, cooperative setting at the OECD or unilaterally as evidenced in actions by the EU, the U.S., and China in respect to the application of this new notion, global tax policy dictates how this issue unfolds and how these concepts evolve.

Against this backdrop and with the new value creation language, a new approach surfaces to the economic analysis framed in the OECD Transfer Pricing Guidelines. The "delineation of the actual transaction undertaken" is a reframed approach better understood through those lenses, as are standards for the recognition of such "actual transaction". That is, the notion of "Value Creation" reframes the interpretation and application of the Arm's Length Principle (ALP) embedded in Articles 7 and 9 of the OECD Model Convention. New terms emerge in the

Guidelines concerning Transfer Pricing Methods – whether traditional or profit-based. Accordingly, a new approach emerged to the functional and factual analysis of enterprises, i.e. the legal analysis of their functions, assets and risks that emerges from the Guidelines and is consequential to the allocation of business profits to different countries. Section 2 of this book covers such conceptual developments and sets the stage for a renewed analysis of key enterprise functions.

This new value creation approach informs the understanding of key enterprise functions. This new approach demands the comprehension of Procurement, Manufacturing, Distribution, Research, and Development and Innovation, and overall services that are not rendered as separate, one-sided events or mere transactions but as manifestations of a wider enterprise, as demonstrated herein. Chapters that revisit key enterprise functions consider such functions through this new approach, demonstrating that the “actual transaction undertaken” must, therefore, “regard” how different functional links in a global value chain come together. That is, the Value Creation approach fundamentally requires a multilateral analysis of the enterprise.

Different industry sectors manifest these concepts in a variety of ways – nonetheless, the applicability of the new value creation approach is a constant. In this book, students have endeavored to cover several business sectors. Value creation in sectors as varied as commodities trade, automotive, consumer products, food and beverages, pharmaceutical and life sciences, and telecommunications were the objects of analysis as well as the key topic of value creation in a digitalized economy.

Our LL.M. students had to address issues not explored in legal research and to address factual topics that are relevant for transfer pricing, which proved to be very challenging – their descriptive work and theses had to find support, if not in existing academic literature, then in their professional experience. All students had to address topics that are new to the international tax debate that keep evolving and factual matters that often escape legal research. All of the students deserve our recognition for their great effort in facing this challenging task, and it was our pleasure to provide these talented students with support. We would like to thank all of the students for their commitment and congratulate them on the successful completion of their studies.

Finally, we would like to express our sincere gratitude to the Linde Publishing House for the opportunity to publish this volume, which greatly stimulates our students. Linde has been a longstanding partner providing excellent cooperation, making these projects a success. Our sincere thanks also to Ms. Jenny Hill, who contributed to the completion of this book by revising the Master's theses from a linguistic point of view as well as to Ms. Barbara Ender for all of her invaluable support.

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