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EDITORIAL - Guest Editor: Antony Ting

ARTICLES

The Oracle, Transparent Entities and Access to Tax Treaties – Mark Brabazon SC

A puzzling and fundamental paradox underlies the jurisprudence of treaty access for fiscally transparent entities and their income. How can access to treaty benefits be established where the entity is transparent in the residence country of its participants, and therefore not itself resident, but opaque in the source country? Treaty access is clearly intended at the level of policy, but the legal basis of its delivery is generally unclear, and it is not always achieved (as seen in the recent Resource Capital Fund cases). To solve the problem, it is necessary to consider the relevant theory, history, treaty practice and international case law. The paradox is resolved in light of these, at least in respect of a transparent entity clause, by regarding that clause as a contextual adaptation of the general rule on persons covered by a tax treaty (Art 1).

Impact of the Multilateral Instrument on the Interpretation of Australia's Income Tax Treaties – *Peter Stinson*

Deducting Hybrid Mismatch Rules – Fit for Purpose? – Buck Xiao and Anna Bullimore

The deducting hybrid mismatch rules in Subdiv 832G of the *Income Tax Assessment Act 1997* (Cth) were purportedly introduced to combat tax avoidance by large multinational enterprises through duplication of deductions. Its effect is to quarantine certain tax losses. However, its scope, as originally enacted, was broad, with the unintended consequence of affecting many simple and small-scale cross-border transactions. A recent amendment has the effect of scaling down the scope of Subdiv 832G – but it also opens opportunities for tax avoidance. This article argues that both Subdiv 832G and the corresponding OECD recommendations in Action 2 of the BEPS Project wrongly target the hybrid structures as the mischief in question, leading to excessive taxation of economic profit, and that "loss duplication" is the real issue at hand. Consequently, it proposes further amendments under which a tax loss can only be used in either Australia or a foreign country, but not in both countries.

Digital Services Taxes and the Unified Approach under the Pillar One Proposal: Exploring the Nexus Frameworks Through the Example of Alibaba – *Victoria Plekhanova*

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