SUSI BAERENTZEN

Review of Christian Schwartz, Cross-border taxation of workers – *New ways of working*, Licentiate, Lund University, February 2022

1 INTRODUCTION

On 3 February 2022, Christian Schwartz presented his research on *Cross-border taxation of workers – New ways of working* at the Department of Business Law, Lund University School of Economics and Management, and obtained his licentiate. This milestone on the way to obtaining his LL.D in the future was in several ways symbolic and extraordinary to witness, and I am pleased to be able to share my accounts from the point of view as opponent on his assessment panel.

2 THE BRAVE NEW WORLD OF TAXATION FOR CROSS-BORDER WORKERS

The overarching theme of the research is how to reconcile a very modern world in which workers have endless possibilities for remote working with an international tax system that is built for a static employment structure. Coincidentally, the topic is perhaps more relevant than ever in the post-pandemic world, in which remote working and flexibility has been the norm. In addition, this topic is particularly relevant for the tax treatment for the numerous workers who commute in the Öresund Region between Sweden and Denmark, which has provided for a whole new world of remote working. The seminar for Christian Schwartz was a fitting example of this topic, with a mixture of Swedes, Danes and foreigners joining together in person and online during the pandemic to discuss the work.

Modern features working possibilities like this are bound to clash with the global tax system, which are in many ways built for a much more traditional world view in the allocation of taxing rights between the states with the first OECD Model Tax Treaty in 1963 based on principles, which are even older.

In his work, Christian Schwartz deals with the overall issue that even though several international overhauls have been introduced in terms of

taxation of legal entities, a corresponding development for natural persons is missing. The work revolves around Article 15 of the OECD MC on income from employment and is based on the notion that this article has remained largely the same throughout the different versions of the MC over the years.

3 THE ESSENTIAL POINTS IN A NUTSHELL

3.1 A new way of researching cross-border taxation of workers

Christian Schwartz' thesis is a compilation of articles composed as part of his academic work at Lund University and with a simultaneous employment as a practitioner at a Deloitte corporation. While there may be a tradition for the legal profession, and tax law in particular, to prefer pure academic career paths and a traditional monograph for dissertations like these, Christian Schwartz' thesis is a great example of why combining theory and practice can be a great idea to further more practically applicable research, and why opting for an article based publication method can aid in getting newsworthy topics covered continuously in due time rather than waiting for the final publication of a monograph.

The thesis consists of five articles all dealing with how employment income is treated in the international tax regime, and these articles are divided into three different groups. The first group deals with new rules on temporary work in Sweden, the second with taxation of international consortium workers, and the third with taxation of remote work. Altogether, the five articles provided for a fruitful debate during the seminar, which I am pleased to be able to share with the readers here.

3.2 New rules on temporary work in Sweden – the notion of "economic employers"

One of the most valuable contributions of Christian Schwartz' thesis is the work related to the notion of "economic employers" and how this is introduced in Sweden and clashes with the traditional 183- days rule, as this is an issue, which many states are faced with. According to the main rule in Article 15(1), only the state of residence has the right to tax income for work in the place of residence state, but the income from work performed in another state may also be taxed in the source state.

In an article co-authored with his colleague Mato Saric, Schwartz deals with this issue in relation to the interpretation of the general term of em-

ployer in Article 15(2) of the OECD MC in relation to the Swedish shift from a formal notion to the concept of economic employer concept and the associated legislation regulating the withholding of taxes. The focus is on the impact that such a shift of the interpretation of the term may have in relation to already concluded tax treaties, as the concept was introduced into the OECD MC in 2010. From a Swedish perspective, this is particularly interesting as it is a country with a vast network of DTTs, and since a lot of them were concluded prior to 2010.[1]

Schwartz' work highlights the interesting fact that the Swedish Supreme Administrative Court have stated that tax treaties should be interpreted in accordance with the Vienna Convention on the Law of Treaties when interpreting tax treaties, and that, consequently, there is reason to assume that the contracting states intended to achieve a result recommended by the OECD. The court has also stated that in cases where the OECD commentary has undergone a change since the treaty was concluded, there might be reason to use the old version (static approach) rather than the current one (ambulatory approach) if the change to the commentary is not merely a clarification. As the interpretation of the term employer might be regarded as a change of more substantive character, it is possible that the shift to an economic employer notion may potentially be troublesome.

In a second article within this topic[2], Christian Schwartz and his colleague Mato Saric deals with the introduction of withholding taxes for foreign employers and Swedish principals in relation to the introduction of the concept of the economic employer. The main issue surrounding the rule is its general character, which means that tax is due to be withheld not only in situations when a final tax liability exists but also in situations when the income subject to withholding tax is tax exempted in Sweden, which particularly affects cross-border commuters between Denmark and Sweden. Essentially, the rules entail that for Danish employers employing Swedish commuters to comply with the Swedish tax withholding, they are obliged to register for employer purposes in Sweden and conduct monthly reporting. Likewise, Swedish companies are obliged to withhold tax on payments to foreign companies performing work in Sweden even

1 C. Schwartz, *Cross-border taxation of workers – New ways of working*, Lund University, February 2022, p. 8. and C. Schwartz & M. Saric, *Förslaget om övergång till ekonomisk arbetsgivare vid tillfälligt arbete i Sverige*, *tillfälligt arbete i Sverige*, Svensk Skattetidning no 5, 2018, p. 341 ff.

2 M. Saric & C. Schwartz, *Skatteavdrag på skattefri inkomst – förändrade skatteregler vid tillfälligt (och "otillfälligt") arbete i Sverige*, Svensk Skattetidning no 4, 2018, p. 388 ff.

though the foreign companies' presence in Sweden do not constitute a taxable presence. Schwartz highlights the issue that is both a tedious practice, which puts administrative burdens on the employers and the employees, and that it also involves a very complex assessment.

Overall, both articles raise important questions on the justification for obligations to withhold tax at source in general, and more specifically in relation to the cashflow disadvantages and administrative burdens associated with these types of taxes in relation to cross-border commuters between Sweden and Denmark. As both articles are co-authored, it was of the outmost importance for the assessors to make sure that Schwartz was indeed able to account for alle aspects and findings of the articles. For this reason, the co-authorship was an excellent occasion to thoroughly test Schwartz' knowledge on every case and every theoretical and practical example I could think of. I am pleased to report, that he passed this part with flying colors as well and that the debate was both exciting and inspiring.

3.3 Taxation of International consortium workers

One of the more specific parts of Christian Schwartz' thesis is his analysis of international consortiums, in which different states collaborate on cross-border projects, and how the workers are taxed in these situations.[3] The focus is on a specific sort of collaborations, namely the so-called ERICs; *European research Infrastructure Consortium*, which is based on a finance model called ESS; European Spallation Source. The ESS is co-hosted by Sweden and Denmark, and this particular finance model gives rise to numerous questions about how its employees are taxed.

The focus of the work is how these ERICs are treated in relation to the OECD MC, as the concept was only created by the European Union in 2009 in order to support and develop the European infrastructure. The largest one of the 22 in place today, is the ESS located in Lund, employing a vast number of employees from numerous states.[4]

What makes these ERICs so highly relevant in today's international tax world is very much the fact that they consist of in-kind contributions of goods and labor from the various Member States of the ERIC. While the

3 C. Schwartz, *In-kind Contributions: Taxation of International Consortium Workers*, Intertax no 5 2021, p. 424 ff.

4 C. Schwartz, *Cross-border taxation of workers – New ways of working*, Lund University, February 2022, p. 9.

objective is no doubt laudable, the construction itself gives rise to numerous questions about which state has the right to tax the employees, and spillover effects about potential value creation and potential future taxation of this value.

In terms of the employees, the financing of the ERIC entails that part of the employed staff would have been engaged both by private employers and public employers of the ERIC member states making the in-kind contributions. Article 15 in general and article 19 on government employees are the main rules in the OECD MC allocating the taxing right to the income between the residence state and the source state respectively. As Christian Schwartz rightfully points out in his analysis, these rules leave a lot of uncertainty about how the income of the ERICs should be taxed, and this uncertainty may ultimately prove to be an obstacle in relation to the overall goal, i.e. to support and facilitate collaboration in European research.

In addition, these collaborations may give rise to specific issues related to social security contributions, which Christian Schwartz deals with in a specific article on the Danish-Swedish division of the ESS.[5] As he explains, the challenges arise because the main part of the ERIC is placed in Lund, Sweden, while the data management and software center has been placed in Copenhagen, Denmark, but the employees are likely to perform work at both sites, although they are employed in one country.

Using Denmark-Sweden as an example is interesting because an agreement exists, regulating the social security affiliation of the cross-border workers, which in turn governs in which country social security contributions are due. The idea being that the right to tax the income should be allocated to the same state where social security contributions are due, and ideally the system should simplify matters in this regard. As concluded by Christian Schwartz, this is not always the case as small changes in work patterns may result in significant tax consequences for both employees and employers.

3.4 Taxation of remote work

The truly noel part of Christian Schwartz' thesis consists of a not yet published article solely authored by himself, comprising an analysis on the taxation of remote workers, raising the question whether the allocation of

5 T. Persson & C. Schwartz, *ESS in the Öresund Region – Taxation in Cross-Border Situations*, Chapter 9 in Big science and the law by U. Maunsbach & A. Hilling, Ex Tuto, 2021, p. 227 ff.

taxation rights is in line with the benefits principle. The focus in this analysis is the taxation of the increasingly growing workforce that can perform their work remotely, which has been accelerated by the recent pandemic. The analysis is based on the presumption that employers are now able to recruit globally instead of just locally, meaning, that the taxing rights to the employee's income might shift as well.

In analysing how the OECD MC deals with the allocation of taxing rights to employee income in remote working situations, Christian Schwartz also deals with how bilateral frontier workers provisions and the recommendations for interpretation of the OECD MC during the pandemic can be used going forward. The analysis strives to answer whether the outcome of the allocation rules in situations of remote work is in line with the benefit principle, i.e. whether or not the states involved are able to sufficiently tax the income from remote work in line with the benefits received by the employee.[6]

This issue highlights a classic debate about the allocation of taxing rights between source and residence states, and whether or not this system is still relevant in today's world with a high degree of mobility. As Christian Schwartz rightfully points out, all articles of the OECD MC dealing with employment income will allocate the taxing right to the residence state if the employee is performing all of the work from home, except for Article 16, which also allocate taxing rights to the state with the place of effective management of the employer.

Relying on the benefit principle, the sole allocation of taxing rights to the residence state is questionable since the state of employment is not granted any taxing rights to the income, which raises the question about a need for a more equitable solution.

4 FINAL REMARKS AND RECOMMENDATIONS

Much has been said and written about cross-border taxation of workers, but with recent developments I would argue that the topic has never been more relevant. During the pandemic, new ways of working have arisen and a whole new world of recruitment opportunities have emerged. Alongside all of this, new, tough questions about the allocation of taxing rights have emerged as well, and there is a dire need for answers.

6 C. Schwartz, *Taxation of remote workers – is the allocation of taxation rights in line with the benefit principle?* (forthcoming).

Christian Schwartz' thesis is obviously written by someone who not only masters the art of interpreting the tax legislation, but someone who is also really experienced in applying it in practice. It is well written and novel, and I highly recommend it to anyone wanting to research this topic further.

For his future endeavors towards a LL.D, I hope that Christian Schwartz will expand the scope of his research and include an EU tax law aspect. While the current delimitation focusing on the Öresund Region and international tax law and the interpretation of double tax treaties, many of the questions raised will be particularly important to assess in light of EU tax law as well.

In addition, these tough questions require the consideration of several potential solutions in order to find an answer, and the thesis would greatly benefit from expanding its scope of international law, for example to include an analysis of how the issue of nexus is dealt with here, as an alternative to a sole focus on the benefit principle as a solution.

It is about time that the international framework for cross-border taxation of workers is updated and perhaps even reinvented, and in doing so it will be necessary to come up with viable solutions that also work in practice. In doing so, it is important to remember that states will inevitably compete for income, and as the possibilities for doing so decreases in terms of corporate taxation, the taxation of individuals will become ever more relevant.

Consequently, I foresee that this topic will become even more relevant in the future, and I want to take this opportunity to thank Christian Schwartz for our interesting discussion during his seminar and once again congratulate him on his licentiate.

Susi Baerentzen holds a Ph.D in international tax law and economics and is a Carlsberg Foundation Postdoctoral Fellow at the IBFD in Amsterdam.