

# Vienna LL.M. News



Prof. Bertil Wiman



Panel discussion



Mr. Edwin Visser

## **KLAUS VOGEL LECTURE 2022 – WHO SHOULD BE IN THE DRIVER'S SEAT IN DEVELOPING INTERNATIONAL TAX NORMS? CIVIL SERVANTS OR NATIONAL PARLIAMENTS?**

Bertil Wiman, Professor of Fiscal Law at Uppsala University, Sweden, delivered the Klaus Vogel Lecture titled "Who should be in the driver's seat in developing international tax norms?" Prof. Wiman began by noting the difference between the responsibility to adopt and to develop them. He mentioned the practice in the EU which has been that the development of direct taxation occurs at the national level. However, there seems to be a shift in the development of BEPS that indicates a transfer of authority to the OECD and the EU. This has altered the balance between them, on the one hand, and the national parliaments on the other hand. The broad objectives of the BEPS Project have justified the fast-paced shift in focus from taxation where value is created to the reallocation of taxing rights to market jurisdictions. He noted that a change in focus without analyzing the impact of recommendations already implemented might be a cause for concern especially in the EU where the directives are binding. Despite the EU acknowledging the importance of involving national parliaments, for smaller countries such as Sweden, this involvement may not be felt in the BEPS 2.0 Project. He noted that it would be important for national parliaments to feel involved as their lack thereof may push them to not enact recommendations. He emphasized the importance of reducing the distance between developing norms at the OECD and EU level and their enactment at the national parliaments' level. Moreover, offering opportunities for national parliament participation may serve as an opportunity to decelerate changes and afford sufficient time to monitor the impact of the implemented recommendations. In his concluding remarks, Prof. Wiman emphasized the need to strengthen the position of national parliaments who should have the center stage even when the EU and the OECD develop the norms.

### **Comments**

As a follow-up to the lecture, Mr. Edwin Visser, Tax Policy Leader EMEA at PwC commented. He noted the "democratic deficit" faced because of little to no participation of national parliaments in the development of international tax norms. He emphasized the importance of parliamentary oversight and discussed a number of options on how national parliament involvement can be improved and concluded that this should be done from the very beginning including when carrying out impact assessments.

### **Discussion**

The presentations were followed by a panel discussion with speakers Dr. Arne Schnitger, Partner, PwC Germany, and Prof. Michael Lang along with Prof. Wiman and Mr. Visser. The panel elaborated on the impact of the fast-paced changes to international tax norms and minimal participation by national parliaments in the process.

### **Ruth Wamuyu**

**Teaching and Research Associate  
Institute for Austrian and International Tax law WU**

The next Klaus Vogel lecture is scheduled for  
October 13, 2023. Please save the date.

# In Class

## TAX LUNCH TALKS – A SERIES TO BE CONTINUED

A series of Tax Lunch Talks were held in the previous months bringing together LL.M. students and researchers

of the Institute for Austrian and International Tax Law. They covered recent tax developments in Brazil and Costa Rica:

## GENERAL ANTI-AVOIDANCE RULE IN BRAZIL: RECENT DEVELOPMENTS FROM THE SUPREME COURT

### Background



- The existence of a GAAR in Brazil is controversial;
- Sole paragraph of Article 116 of the Brazilian National Tax Code (Complementary Law N. 104/2001):

*“The administrative authority may disregard legal acts or transactions carried out with the purpose of disguising the occurrence of the taxable event or the nature of the constitutive elements of the tax obligation, according to the procedures to be established in ordinary law”*

- Provisional Measures N. 66/2002 and N. 685/2015: both regulations were extremely vague and imprecise and were widely criticized by Scholars. The provisions were vetoed and are not further effective.
- No ordinary law is in force.

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The existence of a general anti-avoidance rule (GAAR) in Brazil has always been controversial. Although the rule was declared constitutional by the Brazilian Supreme Court, its effects are still being debated.

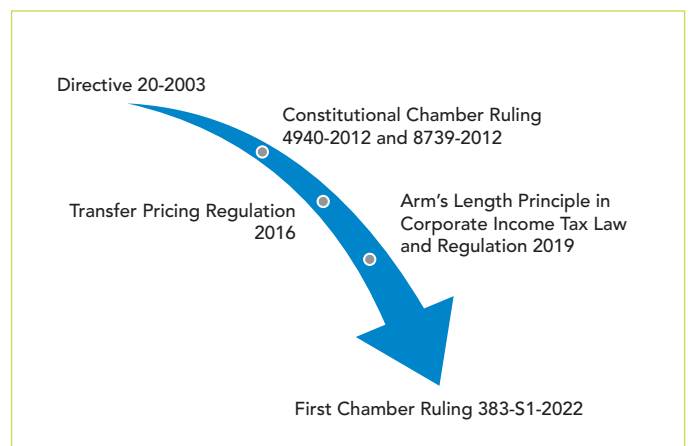
The case analyzes the constitutionality of the sole paragraph of Article 116 of the Brazilian National Tax Code that allowed the tax administration to *“disregard legal acts or transactions carried out with the purpose of disguising the occurrence of the taxable event or the nature of the constitutive elements of the tax obligation, according to the procedures to be established in ordinary law”*.

According to this provision, abusive tax planning could be disregarded provided that the tax authorities comply with the criteria and procedures regulated by law. However, after more than 20 years since the introduction of this rule in the Brazilian tax legislation, no ordinary law is in force, and the subject remains unregulated. Under this scenario, it was argued that such a rule is considered a GAAR and should be applied regardless of any regulation in the case of legal acts that are constructed or transactions that are carried out strictly for the purpose of saving taxes (no business purpose). As decided by the Supreme Court, the sole paragraph of Article 116 does not prevent the taxpayers from performing their activities in a less expensive way and seeking a reduction of taxes. Therefore, it is considered an anti-evasion rule instead of an anti-avoidance rule. By contrast, the latter is intended to conceal the taxable event of a transaction (fraud). Moreover, it was considered unapplicable until an ordinary law was enacted because the sole paragraph of Article 116 did not provide clear and precise parameters. Although the paragraph remains unregulated, the performance record of the administrative jurisprudence constitutes a strong indication that the tax authorities tend to debate the validity of tax planning. There is still another legal basis on which the tax administration could ground its assessment.

**Carolina Prado von Zuben, Brazil**  
**Full-time Program 2022/23**

## TRANSFER PRICING IN COSTA RICA

Costa Rica’s first transfer pricing dates from 2003 when the tax administration issued Directive 20-03. In that instance, it issued the directive for the application of a transfer pricing approach when the tax administration applied the GAAR under the tax code. The reason behind this directive was to prevent the tax administration from disregarding the transactions between related parties; these would instead be regulated by the OECD Transfer Pricing Guidelines. Henceforth, the Arm’s Length Principle was incorporated under the Corporate Income Tax Law in the 2019 reform, and the OECD Guidelines were incorporated under the Corporate Income Tax Law Regulation thereby giving the taxpayer legal certainty.



# In Class / Alumni

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Under case law, the Constitutional Chamber of the Supreme Court studied the constitutional validity of Directive 20-03 in the rulings 4940-2012 and 8739-2012. In that occasion, the chamber ruled that the OECD Guidelines are categorized as a “technical norms’ concept under the Costa Rican Administrative Code and can be applied by the tax administration.

In 2022, the First Chamber of the Supreme Court issued 383-S1-2022 that studied the assessment made to a taxpayer from a transfer pricing study. Under the facts of the case, a pharmaceutical company sold their products to both related and unrelated regional distributors in Central America. It charged a lower price to the related distributors because the logistical costs were assumed by the pharmaceutical company. During the judicial procedure, the taxpayer filed evidence that the correct method to be applied was the transactional net margin method (TNMM) and not the comparable uncon-

trolled price (CUP) method because the transactions cannot be compared internally due to differences under the conditions of sale to related and unrelated parties. The court, in this author’s opinion, erroneously decided not to study the evidence provided by the taxpayer because it was not provided during the audit process. Instead, the application of the CUP method by the tax administration was correct considering the information provided by the taxpayer.

In other rulings by the Tax Administrative Court, it has been nullifying tax assessments by the tax administration because the latter is not applying the transfer pricing methodology when there are related party transactions.

**Johnny Pacheco Castro, Costa Rica**  
**Full-time Program 2022/23**

## IFA TAX TALK

In September 2022, the 74th IFA congress was held in Berlin that brought together academics and practitioners from all over the world. As in previous years, the Institute for Austrian and International Tax Law organized a Tax Talk during the congress, and participants were fortunate in that the Austrian Embassy in Berlin hosted the event.



P. Baker, R. Szudoczky, C. Staringer, A. Rust, R. Mason

It was entitled “The two pillars support a sustainable international tax architecture” with renowned experts on the panel: Philip Baker (Visiting Professor, Oxford University), Ruth Mason (Professor, University of Virginia, School of Law), Alexander Rust (Professor at the Institute for Austrian and International Tax Law, WU), Claus Staringer (Professor at the Institute for Austrian and International Tax Law, WU), and Rita Szudoczky (Associate Professor at the Institute for Austrian and International Tax Law, WU).

Many alumni of the LL.M. Program in International Tax Law and international tax experts engaged in the Tax Talk and contributed to the heated debate. Immediately following the session, they had the opportunity to meet and exchange views with the panellists at the LL.M. reception.

The next IFA Congress is scheduled for 22-26 October 2023 in Cancun, Mexico with another Tax Talk and LL.M. reception. We are looking forward to seeing you there!

# Alumni

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## ANOTHER BOOK PUBLISHED

Students not only attend a vast number of courses for which they prepare papers and case studies as well as sit numerous examinations, but they also write their master's theses. These 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 examine various aspects of the same general topic.

## MASTER THESES FULL-TIME 2021/22 – JUSTICE, EQUALITY, AND TAX LAW

This volume in the "Series on International Tax Law" includes the master's theses of the full-time students attending the 2021-22 class of the postgraduate LL.M. programme in international tax law at WU. The general topic for this group was "Justice, Equality, and Tax Law". The questions regarding the legal meaning of equality and justice in tax law – and also in other areas of law – and how these postulates can be achieved are well-known topics. This volume aims to develop (critical) academic insights and enable in-depth analyses of the specific aspects of this topic.

At the beginning, the reader obtains a general overview of how the understanding of fairness in tax law has changed within the last years as well as the regulatory developments and proposals in the OECD and on the EU level to create fairer legal systems. In addition, in this part, the ability-to-pay principle that is a fundamental principle at both an international level and mostly on a national level will be described. This principle is intended to ensure that taxpayers with the same amount of income pay an equal amount of taxes and is often included by courts as part of the decision-making process.

In the second part, the focus is placed on international tax law aspects in light of the general topic. For that, in particular, tax treaty developments that have occurred since the publication of the BEPS Project and are interesting from a justice and equality perspective will be elaborated. Following the interpretation of the general prohibition of discrimination under Article 24 OECD MC, specific issues such as the MLI, arbitration, and general/specific anti-avoidance rules that have been increasingly expanded by national legislatures in recent years are addressed.

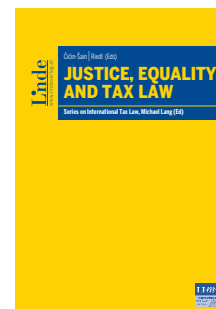
The third part deals specifically with current EU issues that gain significance from the perspective of the general topic. In doing so, the requirements of equal treatment that can be especially found in the Charter of Fundamental Rights of the

European Union (CFR) and the Treaty on the Functioning of the European Union (TFEU) are accentuated. In this context, the reader also gains comprehensive insight into the case law of the CJEU that interprets the respective relevant provisions in the treaties and has also developed a general principle of abuse in tax law.

The fourth part addresses the general topic from a procedural point of view. Both at the OECD and EU levels, new measures have been taken to ensure and strengthen tax compliance. In particular, measures have been taken to increase cooperation between individual countries. Examples include the Directive on Administrative Cooperation (DAC) adopted by the EU legislature that provides for the exchange of information between Member States and other instruments that enable cooperation between two or more countries (e.g. cooperative compliance programs, improved audit procedures). However, a number of these measures have been met with criticism in some quarters as they partially restrict the fundamental rights of taxpayers. For this reason, the legal limits of such measures should also be conveyed to the reader.

In part five, the role of the VAT/GST in the modern tax system is being investigated. In this context, the principles of justifying taxation of consumption at origin or at destination as well as the importance of legal certainty for the taxpayer in determining tax obligations vs. the right of the administration to requalify the facts are addressed. Finally, the latest developments in the field of the VAT, such as the OSS and the intermediary collection model, are being scrutinized in view of their role as tools for achieving more tax justice.

**Nevia Cicin-Sain, Mario Riedl, editors**



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## IMPRINT

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