
Table of Contents

Chapter 1: General Report: The Tax Treatment of CIVs and REITs	
<i>Hein Vermeulen</i>	1
1.1. Introduction	1
1.2. Opening	2
1.3. CIVs in general	3
1.4. CIVs in a domestic context	4
1.5. CIVs in a cross-border context	7
1.6. The first panel: OECD CIV report	8
1.7. The second panel: OECD REIT report	9
1.8. The third panel: EU law aspects	11
1.9. The fourth panel: Future developments	13
1.10. Poster programme	15
1.11. Concluding remark	15
Part One	
OECD 2010 Update on Collective Investment Vehicles (CIVs)	
Chapter 2: Fifty Years of Tax Uncertainty: The Problem of International Neutrality for Collective Investment Vehicles	19
<i>Patricia A. Brown</i>	19
2.1. Introduction	19
2.2. The role of CIVs in the international financial market	22
2.2.1. Achieving economies of scale	22
2.2.2. Differing tax treatment of CIVs	25
2.3. The problem of uncertainty	27
2.3.1. The problem of personhood	28
2.3.2. Who decides who is a resident?	29
2.3.3. What does it mean for a CIV to be transparent?	32
2.3.4. Who is the beneficial owner – The CIV, the investors or no one?	35
2.4. Overview of the new Commentary on CIVs	36
2.4.1. Tax rules matter in determining who is a “person”	38
2.4.2. New dividing lines (but some open questions) regarding the meaning of “resident”	38

Table of Contents

2.4.3.	The CIV normally will be the “beneficial owner” of the income it receives	39
2.4.4.	Resolving the open issues through new agreements	40
2.5.	Conclusion	43

Chapter 3: The 2010 Update of the OECD Commentary on Collective Investment Vehicles

Gijs Fibbe 45

3.1.	Introduction	45
3.2.	Background to the 2010 Update on CIVs	46
3.2.1.	Introductory remarks	46
3.2.2.	What is a CIV?	47
3.2.3.	Tax neutrality between direct investments and investments via a CIV	50
3.3.	The 2010 Update of the OECD Commentary	52
3.3.1.	Is a CIV a “person”?	52
3.3.2.	Does a CIV qualify as treaty “resident”?	54
3.3.3.	CIV; “conduit” or “beneficial owner”?	56
3.4.	The OECD approaches to CIVs	60
3.4.1.	Introductory remarks	60
3.4.2.	First scenario: The “in its own right” approach	60
3.4.3.	Second scenario: The “partial in its own right” approach	62
3.4.4.	Third approach: The “partial look-through” approach	64
3.4.5.	Fourth approach: The full look-through approach	65
3.5.	Relief from double taxation for income derived from CIVs	67
3.6.	Conclusions	71

Chapter 4: Dutch Tax Treaty Policy for Pooled Investment Vehicles

Arnaud de Graaf 73

4.1.	Introduction	73
4.2.	Brief description of Dutch PIV regimes and their tax treatment	73
4.3.	Application of the OECD Model to Dutch PIV regimes	76
4.3.1.	Introduction	76
4.3.2.	First tier: Can the vehicle be considered a person?	76
4.3.3.	Second tier: Can the vehicle be considered a resident?	77
4.3.4.	Third tier: Can the vehicle be considered as the beneficial owner?	82
4.4.	Dutch PIV regimes and the ability to claim treaty benefits	84

4.4.1.	Introduction	84
4.4.2.	FBIIs and treaty benefits	85
4.4.3.	VBIIs and treaty benefits	86
4.4.4.	LFMAIs and treaty benefits	88
4.5.	Summary	92

Part Two

OECD 2008 Update on Real Estate Investment Trusts (REITs)

Chapter 5: Directly Held vs Indirectly Held Real Estate Investments

Stefano Simontacchi 95

5.1.	Introduction	95
5.2.	Definitions	97
5.2.1.	Scope of article 6 of the OECD Model	97
5.2.2.	Definition of immovable property	98
5.2.3.	Definition of situated	98
5.3.	Article 13(4) of the OECD Model	101
5.3.1.	Purpose and nature	101
5.3.2.	Geographical scope	103
5.3.3.	Value test	106
5.3.4.	Direct or indirect derivation of value	108

Chapter 6: The Tax Treaty Treatment of REITs – The Alternative Provisions Included in the Commentaries on the 2008 OECD Model

Luis Nouel 111

6.1.	Introduction	111
6.2.	Background	111
6.3.	Definition of REITs	112
6.4.	Treaty entitlement of a REIT	114
6.5.	Distributions from REITs	116
6.6.	Treatment of capital gains on interests in a REIT	121
6.7.	Cross-border income of REITs	123
6.8.	Treaty practice	129
6.9.	Conclusions	130

Table of Contents

Chapter 7: European REITs and Cross-Border Investments	
<i>Ronald J.B. Wijs</i>	133
7.1. Introduction	133
7.2. Cross-border issues for European REITs	134
7.3. REITs and foreign shareholders	135
7.4. REIT status for foreign REITs	138
7.5. Summary and conclusions	142
Part Three	
Impact of EU Law	
Chapter 8: Comparability of Different CIVs under EU Law	147
<i>Tomi Viitala</i>	147
8.1. Purpose and scope	147
8.2. Importance of comparability	148
8.3. Theoretical approaches to comparability	149
8.3.1. UCITS test	149
8.3.2. Legal form test	150
8.3.3. Regulation test	151
8.3.4. Purpose and activity test	151
8.3.5. Tax treatment	152
8.4. Relevant case law of the ECJ	152
8.4.1. <i>Aberdeen</i>	152
8.4.2. <i>Santander</i>	154
8.4.3. <i>Commission v. Belgium</i>	155
8.5. Finnish case law and tax practice	156
8.5.1. SICAV	156
8.5.2. Norwegian contractual fund	157
8.5.3. FCP	158
8.5.4. US RIC	160
Chapter 9: Investment Funds, Dutch Dividend Withholding Tax and EU Law Developments	
<i>Erwin Nijkeuter</i>	161
9.1. Introduction	161
9.2. Non-resident investment funds and Dutch dividend withholding tax	161
9.2.1. Introduction	161
9.2.2. High Court of Amsterdam on objectively comparable	

situations and withholding tax	162
9.2.3. High Court of Den Bosch on comparability of investment funds	163
9.3. Next level of taxation	164
9.3.1. Dutch credit against withholding tax (outbound dividend)	165
9.3.2. Dutch credit against withholding tax (inbound dividend)	166
9.4. Conclusion	167

Chapter 10: The Tax Treatment of CIVs and REITs from a State Aid Perspective: Limits on National Tax Policy

Sjoerd Douma 169

10.1. Introduction	169
10.2. The notion of selectivity	170
10.3. Discussion of three selected cases	173
10.3.1. <i>Fineco</i>	173
10.3.1.1. The Italian tax regime at issue	173
10.3.1.2. Judgment of the EU Court of First Instance	174
10.3.2. Commission Decision on the Finnish residential REITs tax scheme	176
10.3.2.1. The Finnish tax regime at issue	176
10.3.2.2. The Commission's Decision	177
10.3.3. Joined Cases E-17/10 and E-6/11 <i>VTM Fundmanagement</i>	178
10.3.3.1. The Liechtenstein tax regime at issue	178
10.3.3.2. The judgment of the EFTA Court	179
10.3.4. Conclusions	179
10.4. Limits for national policymakers	180
10.5. Final remarks	181

Part Four
Future Developments

Chapter 11: Domicile Issues Arising from the Management Company Passport – A Comparison of the UCITS Regulatory Framework and Tax (Treaty) Law

R.P.C. Adema 185

11.1. Introduction	185
11.2. The organization of (partly) remote-managed UCITS	188

Table of Contents

11.2.1.	Introduction	188
11.2.2.	The duties of the management company	188
11.2.3.	The Management Company Passport and the depository	189
11.3.	Tax residence	190
11.3.1.	Introduction	190
11.3.2.	Necessity of special tax regulations regarding the domicile of remote-managed funds	191
11.3.3.	Strengthening the position of domestic management companies	192
11.3.3.1.	Uncoordinated approach to removal of tax obstacles to MC passport	192
11.3.3.2.	Spontaneous harmonization	192
11.3.3.3.	Continued effect of national regulations to tax treaties	195
11.3.4.	On purpose or by accident improvement of the position of foreign management companies of domestic UCITS	196
11.3.4.1.	Hurdles to manage resident funds abroad	196
11.3.4.2.	The EU seems – for the use of the Management Company Passport – to be divided into groups	196
11.4.	Avoidance of dual residence under tax treaty law	197
11.4.1.	Introduction	197
11.4.2.	Importance of the tiebreaker rule for tax treaty purposes	197
11.4.3.	Place of effective management	198
11.4.4.	Not eligible to the tiebreaker rule	199
11.4.4.1.	Introduction	199
11.4.4.2.	Tax-transparent UCITS	199
11.5.	Conclusion	200
Chapter 12: Collective Investment Vehicles and VAT in a Changing Environment		
	<i>Gert-Jan van Norden</i>	201
12.1.	Introduction	201
12.2.	Current legal framework	203
12.3.	Purpose of the exemption	204
12.4.	Case law developments	207
12.4.1.	Scope of the services	207

12.4.2.	Scope of the concept of special investment funds	209
12.5.	Future developments - Changing regulatory environment	212
12.5.1.	VAT implications of AIMFD	213
12.5.1.1.	Alternative Investment Funds and VAT	213
12.5.1.2.	Depository functions and VAT	216
12.5.2.	VAT implications of the UCITS initiatives	220
12.5.2.1.	Proposal for UCITS V and VAT	220
12.5.2.2.	Consultation paper for UCITS VI and VAT	222
12.6.	Future developments – Redesign of VAT legislation	223
12.6.1.	FS VAT proposals	223
12.6.2.	An alternative for redesign of VAT legislation	225
12.7.	Conclusion	226

Part Five
Code of Conduct and CIVs

Chapter 13:	The State of Play of Recent Work of the EU Code of Conduct Group on Tackling Harmful Tax Competition and Aggressive Tax Planning	
	<i>Martijn Nouwen</i>	231
13.1.	Introduction: The current tax avoidance debate	231
13.2.	The EU Code of Conduct Group on Business Taxation	233
13.3.	One-country issues	234
13.3.1.	Standstill and rollback	234
13.3.2.	Guernsey’s zero-ten corporate tax regime	234
13.3.3.	Gibraltar’s Income Tax Act 2010	235
13.3.4.	Examination of special tax regimes for investment funds	236
13.3.5.	Preparation of guidance and application notes	237
13.4.	Two-country issues	237
13.4.1.	Administrative practices: Cross-border rulings subject to spontaneous exchange of information	237
13.4.2.	Anti-abuse: Countering international tax mismatches caused by hybrid instruments, hybrid entities and (hybrid) permanent establishments	241
13.5.	Third-country issues	244
13.5.1.	Introduction	244
13.5.2.	Increased pressure on Switzerland since 2012	244
13.5.3.	Negotiations with Liechtenstein ongoing	248
13.6.	Final words	249