Book Reviews

In each issue, JATA publishes reviews of textbooks and other books of interest to tax scholars. All book reviews are solicited by the Associate Editor. However, if you know of a book that you would like reviewed, or if you are interested in reviewing a book, please contact the Associate Editor.

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Professor Avi-Yonah’s Advanced Introduction to International Tax Law is part of the Elgar Advanced Introductions series. It aims to “pinpoint essential principles of a particular field, and to offer insights that stimulate critical thinking.” The books in the series are designed to be “accessible introductions” for graduate and undergraduate students and provide “well-informed, nuanced critiques” for advanced students. This book provides an overview of international tax rules in Part I and discusses advanced contemporary issues in Part II. A brief synopsis of the contents of each chapter follows, concluding with an overall critique of the work.

Part I, Overview of the International Tax Regime

Ch. 1, Introduction: The International Tax Regime

Chapter 1 discusses the provenance of international tax rules from a report prepared by four economists for the League of Nations in 1923. The report is the “foundation stone” of the international tax regime (ITR), with its principles contained in over 3,000 tax treaties and in tax laws of the major economies. The main principles, which are referred to throughout this work, are (1) the taxation rights of the source jurisdiction take precedence and the residence jurisdiction has the burden of preventing double taxation (the “first bite of the apple” principle), (2) the right to tax passive income is ceded to the residence jurisdiction but maintained in the source jurisdiction for active income (the “benefits principle”), and (3) double taxation and double nontaxation must be avoided by the imposition of one tax at the rate derived under the benefits principle (the “single tax principle”).

Ch. 2, Jurisdiction to Tax and Definitions

Chapter 2 expands upon the bases of taxation of source and residence introduced in Chapter 1, both of which generally are incorporated in a country’s laws. Residence taxation is the right of a country to tax its residents; source taxation is the right to tax income a person derives from that country. Current tax laws that will continue for the “foreseeable future” incorporate both bases. To determine residence taxation, it is necessary to define “residence,” which takes up the remainder of the chapter. Of particular note is the fact that the United States is unique in applying a residence system of taxation for individuals based not only on residence, but also on citizenship, a position that is “unlikely to be changed.” For corporations, the United States considers a corporation a U.S. resident based on where it is incorporated, while other countries may tax based on the location of management and control, a difference that presents opportunities for achieving residency in no jurisdiction.
Ch. 3, The Source Rules

The basics of source taxation and allocating and apportioning deductions are contained in Chapter 3. “Formal” source rules generally apply to passive income and “substantive” source rules to active income. Formal source rules are bright-line rules that can be controlled by the taxpayer, while substantive source rules follow the economic source of the income. The text lays out the source rules for various types of income and discusses the “serious issue” of different source rules in jurisdictions for the same type of income.

Ch. 4, Inbound Taxation: Passive Income

Chapter 4 explains that passive income of nonresidents is generally taxed by withholding in the source jurisdiction. Although the U.S. rule of requiring a 30-percent withholding tax on “fixed or determinable, annual or periodic” income of nonresidents is quite broad, there are numerous exceptions such that there is actually very little withholding on this income. U.S. residents have taken steps to be considered nonresidents to avoid tax on passive income. Attempts have been made to reduce this opportunity through the U.S. Foreign Account Tax Compliance Act (FATCA) and related intergovernmental agreements, the OECD’s Multilateral Agreement on Administrative Assistance in Tax Matters (MAATM) [sic], and the Common Reporting Standard (CRS). Professor Avi-Yonah expresses skepticism as to whether these efforts will succeed in the absence of withholding.

Ch. 5, Inbound Taxation: Active Income

Under the benefits principle, active income, the subject of Chapter 5, should be taxed at source. Determining the amount of taxation depends on whether the activities in a jurisdiction go beyond a minimum threshold that would subject the income to taxation—a trade or business under U.S. tax law and a permanent establishment under tax treaties. In addition to determining if the minimum threshold is met, the amount of income subject to tax must be calculated (i.e., “effectively connected” to a U.S. trade or business or “attributable to” a permanent establishment). This chapter also concisely introduces special rules for taxation of real estate, branch profits tax, thin capitalization, as well as the U.S. base erosion and anti-abuse tax (BEAT) enacted by the Tax Cuts and Jobs Act (TCJA) in 2017, each of which raises potential issues under the nondiscrimination provisions of tax treaties.

Ch. 6, Transfer Pricing

Chapter 6 addresses methods of allocating income and deductions among members of a group of related corporations (i.e., transfer pricing). The classical and profit-based methods of the arm’s length standard are briefly presented. Professor Avi-Yonah states that the present transfer pricing methods are not “working effectively,” specifically pointing to cost sharing agreements and advance pricing agreements. He posits that formulary apportionment would likely “yield a much more administrable and enforceable system,” but notes that the OECD is currently opposed to seriously evaluating formulary approaches.

Ch. 7, Outbound Taxation: Passive Income

Chapter 7 contains a short discussion of foreign investment funds, including the passive foreign investment company regime. It discusses laws in various countries regarding controlled foreign corporations and comments particularly on the defects of the U.S. subpart F regime that, due to numerous exceptions, have made it much weaker than similar regimes in other countries and has allowed U.S. corporations to accumulate $3 trillion in low-tax jurisdictions. Chapter 7 ends with a brief discussion of measures enacted by the TCJA to respond to deficiencies of the U.S. antideferral regimes, including the transition tax, participation exemption, GILTI (global intangible low-taxed income) inclusion, and FDII (foreign derived intangible income) deduction.

Ch. 8, Outbound Taxation: Active Income

Foreign tax credits are the focus of Chapter 8, which briefly presents direct and indirect foreign tax credits. Under the benefits principle, income is taxed at source with the residence country preventing double taxation through a participation exemption or foreign tax credit. Noting that the participation exemption can result in double nontaxation, Professor Avi-Yonah advocates for retaining the foreign tax credit.

Ch. 9, The Tax Treaty Network

Chapter 9 contains facts on tax treaties: there are over 3,000 tax treaties in force, about 80 percent of the text of any two tax treaties is the same, treaties can be considered to constitute an ITR, the main purpose of tax treaties is to shift tax on passive
income to the residence country, and tax treaties increase investment into developing countries. The chapter summarily covers the basic provisions of tax treaties. Current developments on exchange of information provisions and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (MLI) (of which the United States is not a party) are also presented.

Part II, Selected Contemporary Issues

Ch. 10, Three Steps Forward, One Step Back? Reflections on “Google Taxes” and the Destination-Based Corporate Tax

Chapter 10 is the first of the contemporary issues chapters, all of which contain discussions of the OECD Base Erosion and Profit Shifting (BEPS) project. This chapter recaps three taxes enacted by countries to reach companies that exploit the market in a country yet avoid corporate income tax (CIT) because the company has no permanent establishment: the diverted profits tax of the United Kingdom, the Australian multinational anti-tax avoidance law, and the Indian equalization levy on certain digital transactions. Professor Avi-Yonah notes the “clearly obsolete” permanent establishment rules that were not resolved by the BEPS project and advocates for a destination-based corporate tax, which “may well be the twenty-first century way to protect the CIT base against BEPS.”

Ch. 11, Evaluating BEPS

Throughout this book, reference has been made to the benefits principle as one of the main principles of the ITR. Professor Avi-Yonah attacks this principle in Chapter 11, stating that it should be reconsidered “in light of the reality of globalization.” The criticism goes even further as the author maintains that the problems of BEPS come from reliance on this principle. Instead of taxing active income at source and passive based on residence, this should be reversed with active income taxed based on residence and passive at source.

Ch. 12, BEPS, ATAP [sic] and the New Tax Dialogues: A Transatlantic Competition?

Chapter 12 begins with a recognition that the TCJA incorporates many principles of the BEPS project, including its underlying principle—the single tax principle with taxation at the minimum rate of the source state for active income and at the residence state rate for passive income. Professor Avi-Yonah does not agree with observers who maintain that the United States abandoned the BEPS effort, and instead finds that the United States has followed the European Union, which implemented BEPS through its Anti-Tax Avoidance Directive (ATAD). The chapter discusses the appropriateness and issues with three new provisions enacted by the TCJA: the transition tax, GILTI, and BEAT. The United States’ rejection of the “principal purpose test” to deny treaty benefits if one of the principal purposes of a transaction is to obtain treaty benefits (BEPS Action 6) is comprehensively discussed. Two anti-hybrid provisions of the TCJA (IRC §§ 245A(e) and 267A) that implement BEPS Action 2 are critiqued in detail. Because the United States adopted many BEPS measures, Professor Avi-Yonah concludes that the project was “not in vain” and that a “new and better ITR is on the horizon.”

Ch. 13, Full Circle? The Single Tax Principles, BEPS, and the New U.S. Model

Chapter 13 begins with a detailed historical discussion of the single tax principle, particularly regarding elements of U.S. international tax rules that are consistent with this principle. The chapter then proceeds with an acknowledgment of the impact of FATCA to prevent double nontaxation. A summary of each BEPS action follows, concluding that although the project fell short, it demonstrated the commitment by the G20 and the OECD to the single tax principle. New provisions of the U.S. model tax treaty are also consistent with this principle; a brief discussion is included of provisions regarding treaty-exempt permanent establishments, expanded limitation on benefits provisions, anti-inversion rules, special tax regimes, and subsequent changes.

Ch. 14, A Global Treaty Override? The New OECD Multilateral Tax Instrument and its Limits

Sixty-eight countries (not including the United States) signed the MLI in 2017, which will “transpose” results from the BEPS project to more than 2,000 tax treaties. Chapter 14 summarizes the main provisions of the MLI, considers whether tax treaties are even necessary in the twenty-first century, and posits that treaties could be improved by adding a most-favored nation clause. Professor Avi-Yonah concludes that the MLI is an “important innovation” and an “ingenious solution.”

Overall Review

I found Professor Avi-Yonah’s book to be extremely interesting and highly informative. Instead of stating tax rules on a detailed and technical basis, the general aspects of the rules are placed in the theoretical context of international tax principles.
My view, however, is that undergraduate and J.D. students would find the discussion difficult to comprehend without at least some background in international tax rules. For example, Chapter 1 presents relevant historical background that, without a basic understanding of international tax principles, would not be meaningful to the neophyte student. Also, throughout the book, while specific transactions and cases are succinctly presented, they would be difficult to follow without a fairly sophisticated understanding of international tax.

The book would be a tremendous component of a seminar course at the graduate tax level after basic international tax rules have been covered in prior classes. Part II, which covers almost two thirds of the text, is especially valuable in the current environment of changing tax principles that follow from the expansive study and recommendations of the BEPS project. In particular, Chapter 12 is a must-read chapter for U.S. international tax students, as it ties the BEPS project and concerns in the international tax arena to what steps the United States has taken. The book could also be effectively used to teach international tax rules if combined with technical instruction by the professor and a set of problems that illustrate the application of international tax rules.

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Recent debate among policy makers and academic researchers alike has focused on analyzing the design of pension systems around the globe and proposing a variety of reforms to increase their effectiveness. In this collection, The Taxation of Pensions, Robert Holzmann and John Piggott compile a variety of topics relating to the expansive topic encapsulated in the tome’s brief title. The authors’ self-admitted purpose in doing so is to compile existing research to aid those interested in exploring this topic, while also highlighting areas in which additional research will likely be required. Combining tax and pension system history with theory, they provide a comprehensive overview of the present state of related literature from a variety of international sources.

The book itself is an edited series of pieces spanning 508 pages, organized into four parts, consisting of 15 chapters. Of the 15 chapters, only the introduction is written exclusively by the editors, with Holzmann and Piggott contributing to two other chapters. The first four chapters, including this introduction, form Part I, “Setting the Stage,” which provides a general overview of the theoretical foundation for taxing pensions around the globe. Part II, “Country Issues and Research Questions” and Part III, “Country-Calibrated OLG/CGE Models,” which constitute the main body of the piece (10 of the 15 chapters), provide an in-depth analysis of the pension system history of a wide array of nations: Denmark and Sweden (Chapter 5), Portugal (Chapter 6), Australia (Chapters 7 and 14), Germany (Chapter 8), the United Kingdom (Chapter 9), the United States (Chapter 10), Switzerland (Chapter 12), and Finland (Chapter 13). Each chapter, although written by a different author, follows the same general pattern: first laying out the current system in place in each nation, then analyzing each system in depth from a theoretical standpoint, and concluding with broad generalizations about the significance of the results from each nation. The final part, Part IV, “Cross-Border Taxation of Pensions” consists of only a single chapter and provides an in-depth exploration of the current regime for taxing pensions between nations and its impact on individuals seeking to take advantage of the global economy. As a whole, the piece provides a thorough analysis of each nation’s pension system and the theory behind it.

Clearly, the piece’s ultimate strength lies in its detail and diversity. With basically every chapter written by a different author and exploring a unique facet of the pension system in their respective country of choice, this work holds a vast amount of information for any researcher seeking to analyze the pension system. Whether it is the taxation system pertaining to the mandatory superannuation pension system of Australia or the intricacies of taxing Roth IRAs in the United States or Riester pensions in Germany, each author sets out a useful and in-depth perspective of how pensions are taxed, providing a world-wide view. Focusing primarily on taxation at the three phases of the pension life cycle—contribution, income accumulation, and distribution—and whether it is exempt or taxed, each chapter outlines the implications these varying characteristics hold for the overall viability and effectiveness for each nation’s pension regime. Providing a definitive list of what is and is not working in each country, the conclusions drawn by each piece are valuable to any researcher seeking to analyze that nation’s pension regime.
While it is undeniable that *The Taxation of Pensions*’ detailed insights into each country’s system will serve as a useful research tool, the contrasting voices/stances of the authors and the frequent repetition of the theoretical foundation obscures any coherent thesis the editors set out to further in creating this work. For example, in Chapter 4, Feher and Jousten state that they “could find no proof that the taxation of pensions could in any way alter behavior in active years,” while later chapters explore in depth how certain systems, namely those of the Nordic countries and Portugal, could influence workers’ propensity to save for their retirement. In addition to the contradictory nature of certain statements, the individual pieces are unsuccessful at integrating into the larger piece. While the authors’ motivation in writing the piece—to rigorously analyze the relationship between taxation and pension systems around the globe in hopes of advancing the debate regarding the most effective combination thereof—is strong throughout the first four theoretical-based chapters, it is simply lost as the individual pieces are added. While, arguably, it is necessary to layout such a great deal of details in order for the reader to understand each country’s system and the lessons it may hold for the larger debate, the piece fails to provide the necessary tools to abstract the information to provide broad generalizations about effective pension regimes.

Each analysis is limited by the nature of the subject at hand. As a general axiom, tax systems and pension systems are tied to the countries they serve. While some overarching themes are prominent, such as the idea that taxation and pension systems should work together to promote theoretical “neutrality” between the taxation of income during working years and tax during retirement, as well as the income-smoothing and redistributive characteristics of both types of regime, the authors of each chapter frequently admit that their generalizations will likely be limited to countries exhibiting similar, if not identical, economic and demographic characteristics. As a whole, these pieces demonstrate that the taxation of pensions is a complex topic, one that is likely impossible for a single work to capture in its entirety.

Overall, *The Taxation of Pensions* provides a valuable resource for launching further debate into the most effective means of establishing a tax and pension system that serves public policy goals. The insights provided are valuable on their own and, with a little further development, may lead to concrete policy reforms. While it is undoubtedly a valuable contribution to literature regarding pension taxation, due to its heavy use of modeling and theory, some arguments may prove inaccessible to researchers who are not well versed in economics. At the same time, many of those charged with assessing the tax or public policy do not fit into this category. Holzmann and Piggott have certainly provided a strong theoretical foundation for beginning the debate around the most effective means of taxing pensions. More work is needed in finding a suitable means of presenting how these theories can be practically applied to institute actual reforms.

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