

Table of Contents

About the Author	vii
List of Figures	xvii
List of Tables	xix
List of Abbreviations	xxi
Acknowledgements	xxiii
CHAPTER 1	
Introduction	1
§1.01 General Frame	1
§1.02 Scope and Delimitation	3
§1.03 Methodology	6
§1.04 Motivation	7
§1.05 Research Question	8
§1.06 Structure of the Book	9
CHAPTER 2	
Locating the Main Concepts	11
§2.01 Definitions	11
[A] The Concepts of Financial Instrument and Derivative	11
[B] Risk-Based Rules and Expected Return	13
§2.02 Financial Engineering Giving Rise to Complex Instruments	14
[A] The Use of Synthetics and the Hedging Relationship	14
[B] Non-traditional Financial Instruments	16
[C] Hybrid Financial Instruments: The Debt and Equity Quandrum	17
[1] When the Sweeter Equity Is Really Debt	17
[2] The Case for the International Alchemy of Financing	24
CHAPTER 3	
Discussion on the Tax Assessment of Cross-Border Financial Instruments	33

Table of Contents

§3.01	Methods towards a Consistent Substantive Approach	35
	[A] Principle of Tax Neutrality: Establishing a Benchmark	35
	[B] Economic Substance versus Legal Form	36
	[C] Proposal for Expected Return Taxation under Common Tax Accounting Principles	40
§3.02	Assessment of Tax Arbitrage with Cross-Border Financial Instruments	41
	[A] Tax Neutrality and Cross-Border Tax Arbitrage	42
	[B] From Coordination Rules to Circularly Linked Rules	45
	[C] Rating and Multinational Enterprises	47
	[D] Regulatory Arbitrage	47
	[E] Embedded Derivatives and IFRS Bifurcation versus Integration	49
	[F] Timing Arbitrage: The Principles of Realization and Accrual	51
	[G] Arm's Length Principle in Intercompany Financial Transactions: <i>The Impact of Group Affiliation on Intra-group Financial Risk</i>	54
	[1] Introduction	54
	[a] General Aspects	54
	[b] Main Question	56
	[2] Analysis	56
	[a] The Arm's Length Principle	56
	[b] Intercompany Financial Transactions	57
	[i] Intra-group Services	57
	[ii] Implicit and Explicit Support	58
	[iii] Intra-group Financing: Risk Allocation	59
	[iv] Should Implicit Support Be Accounted for at Arm's Length?	60
	[v] Determining the Arm's Length Guarantee Fee	60
	[c] Case Law Analysis	63
	[i] <i>DSG Dixon Group</i> STC [2009] – UK	63
	[ii] <i>Diligentia</i> [2010] – Sweden	64
	[iii] <i>General Electric Capital</i> [2009] – Canada	65
	[iv] <i>(C-311/08) SGI (BE)</i> – CJEU	67
	[v] <i>(C-524/04) Test Claimants Thin Cap Group Litigation (UK)</i> – CJEU	68
	[3] Conclusion	68
	[a] Final Clarifications	68
	[b] Overall Conclusions	69
	[H] Notes on OECD's Action Plan on Base Erosion and Profit Shifting	70
§3.03	Comparative Analysis	72
	[A] Reducing the Difference in the Taxation of Debt and Equity	73
	[1] Belgium: Notional Interest Deduction	73
	[2] Brazil: Interest on Capital	74
	[3] Conclusion	76

Table of Contents

[B]	Tax Qualification of Instruments: Substantive Approaches	76
[1]	Australia: ‘More Likely Than Not’ Rules	76
[2]	United States: ‘Multifactor Test’	77
[3]	Conclusion	80
[C]	Taxation of Cross-Border Hybrid Instruments: Repos	80
[1]	United Kingdom	84
[2]	United States	85
[3]	Conclusion	86
[D]	Taxation of Cross-Border Derivatives: Total Return Swap	87
[1]	Introduction	87
[a]	General Aspects	87
[b]	Outline	88
[c]	Transaction Structure	88
[d]	Motivation of the Parties/Benefits	89
[e]	Valuation	90
[f]	Distinction from Other Derivatives	91
[g]	Risks	93
[2]	Tax Aspects of Luxembourg and Portugal	94
[a]	Tax Treatment of Residents and Non-residents under a TRS: Luxembourg	94
[b]	Tax Treatment of Residents and Non-residents under a TRS: Portugal	96
[c]	Common Tax Aspects of a Total Return Swap Luxembourg-Portugal	98
[3]	Total Return Swap: Tax Treaty Aspects and the DTC LU-PT	99
[a]	Income from a Total Return Swap under the OECD MC	99
[b]	Income from a Total Return Swap under the DTC LU-PT	101
[c]	Permanent Establishment Risk	102
[i]	Anti-abuse under the Treaty LU-PT	103
[ii]	Anti-avoidance under the Treaty LU-PT	104
[d]	Beneficial Ownership under the Treaty	105
[4]	Example: Structure of a Non-standard Total Return Swap	106
[5]	Conclusion: Abridged Highlights	110
CHAPTER 4		
	International Tax Arbitrage	111
§4.01	Tax Treaties on Income from Hybrid Instruments	112
[A]	Model Tax Conventions on the Characterization of Income	112
[B]	<i>Dividend</i> and <i>Interest</i> Articles	114
[1]	Introduction	114
[2]	Treaty Concepts: Dividend	114

Table of Contents

	[3] Treaty Concepts: Interest	116
[C]	Conflicts of Qualification	119
[D]	Key Tie-Breaking Factors on the Characterization of Income	121
	[1] Treaty Interpretation: ‘Corporate Rights Test’	121
	[2] Treaty Interpretation: ‘Debt-Claim Test’	122
	[3] Treaty Interpretation: Discussion and Conclusions	126
[E]	<i>Capital Gains</i> Article	134
[F]	<i>Other Income</i> Article	135
[G]	The Principle of Non-discrimination under Article 24(4)(5) of the OECD MC	136
	[1] Non-discrimination under the OECD MC and EU Law	136
	[2] Article 24(4) of the OECD MC – Non-discrimination regarding the Deductibility of Interest, Royalties and Other Disbursements	137
	[3] Article 24(5) of the OECD MC: Non-discrimination of Shareholders	139
§4.02	EU Law on Income of Hybrid Instruments	140
	[A] The Interaction of the Interest and Royalties and the Parent-Subsidiary Directives regarding the Yield from Hybrid Instruments	141
	[B] EU Law on Cross-Border Tax Arbitrage in Relation to Hybrid Instruments	147
CHAPTER 5		
	Conclusion	151
§5.01	Benchmark for International Neutrality in the Taxation of Financial Instruments	151
§5.02	Financial Engineering Exploring International Tax Arbitrage	153
	[A] Taxation of Cross-Border Finance	153
	[B] Legitimacy of Cross-Border Tax Arbitrage	153
	[C] Basic Building Blocks	154
	[D] Synthetic and Non-traditional Financial Instruments	154
	[E] Case for Expected-Return Taxation	154
	[F] Rating, Regulatory and Transfer Pricing Aspects	154
	[G] Tax Accounting	155
	[H] Country Comparative Analysis	155
	[I] Tax Treaties	155
	[J] EU Law	156
ANNEX I		
	Maximum Rates of Withholding Tax at Source under Different Model Tax Conventions	157

Table of Contents

ANNEX II	
Graphic Representation of the Relation between Two Interpretations of the Notion of Debt-Claim under Tax Treaty Law	159
ANNEX III	
Fundamental Freedoms and Compliance with European Law	161
ANNEX IV	
Cross-Border Financial Instruments – Tax Arbitrage Chart	163
Bibliography	165
Table of Jurisprudence	179
Index	181

