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Report of the Proceedings of the Twelfth Assembly of the International Association of Tax Judges Held in Budapest, Hungary on 9 and 10 September 2022

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This report summarizes the proceedings of the twelfth assembly of the International Association of Tax Judges, which was held in Budapest, Hungary on 9 and 10 September 2022.

1. Introduction

On 9 and 10 September 2022, the twelfth assembly of the International Association of Tax Judges (IATJ) was held in Budapest, Hungary. The proceedings took place at the premises of the *Kúria* (Supreme Court, Hungary), and was organized by the Hungarian judiciary. The assembly was attended by 60 judges from countries of all continents. Chief Justice András Zs. Varga (Hungary) welcomed the audience and expressed his appreciation of the IATJ and its mission and the participation of the Hungarian judges. Chief Justice Eugene P. Rossiter (Tax Court of Canada, TCC) and President of the IATJ thanked the Hungarian judiciary for their hospitality and opened the assembly. Wim Wijnen, chairman of the IATJ Programme Committee, presented the agenda of the assembly. The following seven topics were on the agenda:

(1) beneficial ownership (*see* section 2.);

(2) case management – adversarial versus inquisitorial (*see* section 3.);

(3) tax procedures in Hungary (*see* section 4.);

(4) recent case law on tax treaty entitlement (*see* section 5.);

(5) recent case law on exemption from value added tax (VAT) and/or goods and services tax (GST) in respect of hospital and medical care (*see* section 6.);

(6) tax procedures in the aftermath of the COVID-19 pandemic (*see* section 7.); and

(7) "exotic" topic: "the curious case of *Túró Rudi*" (*see* section 8.).

2. Session 1: Beneficial Ownership

2.1. Panel composition and agenda

The session was chaired by Justice Philippe Martin, President of a section of the *Conseil d'Etat* (Supreme Administrative Court, CE), France. The panel consisted of Justice Peter Cools, *Hoge Raad* (Supreme Court, HR), Netherlands; Justice Raphael Gani, *Tribunal Administratif Fédéral/Bundesverwaltungsgerichts* (Federal Administrative Court, TAF/BVGer), Switzerland; Justice Pramod Kumar, Income Tax Appellate Tribunal (ITAT), India; and Justice Don Sommerfeldt, Tax Court of Canada (TC), Canada.

Martin introduced the topic of beneficial ownership, which he believed had not lost much of its relevance today, even if it had already been subjected to much discussion in the past. This is explained by the fact that the practical consequences for taxpayers of the interpretation and application of the concept of beneficial ownership are often significant. Moreover, in recent times the interpretation and application of the concept is further complicated given the difficult interaction of the concept of beneficial ownership and other anti-avoidance rules, such as (domestic law and treaty) general anti-avoidance rules (GAAR).

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2.2. The source of the concept of beneficial ownership

2.2.1. Opening comments

Across jurisdictions, the source of law where concept of beneficial ownership finds its legal ground can differ. Beyond tax treaties or EU directives, in a number of countries the source of the concept of beneficial ownership is domestic tax law. For national courts, the question is how much leeway they have when applying the concept and whether they can recognize the existence of an implicit beneficial ownership condition in tax treaties when the beneficial ownership language is not expressly included in the relevant treaty provisions.

2.2.2. France

Martin observed that, in France, the concept of beneficial ownership is used for the application of rules in tax treaties and EU directives dealing with passive income, i.e. dividends, interest and royalties. In French, the term used in those instruments is "*bénéficiaire effectif*", which does not literally translate as beneficial ownership, and, as such, sometimes gives rise to interpretation difficulties. The term is not used in French domestic tax law. It is used in French tax treaties in line with the OECD Model,[1] which has included the concept of beneficial ownership in articles 10, 11 and 12 since the OECD Model (1977).[2] With regard to older tax treaties that do not incorporate the beneficial ownership language, the CE held in *Diebold Courtage* (1999)[3] that the notion of income "paid to" a resident in those tax treaties contains an implicit beneficial ownership condition, and requires verification that the recipient of the income is the real beneficiary for the treaty benefit to apply. Martin also noted that, in France, the beneficial ownership requirement in tax treaties is perceived as an income attribution issue that prevails over questions regarding the formal recipient of the income (for example, a bank) or whether the applicable tax treaty contained a beneficial ownership requirement. In this sense, the French view is rather extreme.

2.2.3. Canada

According to Sommerfeldt, in Canadian law, the concept of beneficial ownership is rooted in the ability at common law to differentiate between legal ownership and equitable or beneficial ownership. The origins of the two types of ownership trace back to two parallel court systems (i.e. common law courts and courts of equity) before reforms in the 19th century blended the two systems.

For instance, under Canadian trust law, the trustee is the legal owner, and the beneficiary of the trust is the equitable owner or beneficial owner of the trust property. A person may be both the legal owner and the beneficial owner of a particular property. However, in the Province of Quebec, the concept of beneficial owner does not exist in its civil law. Rather, in Quebec, trusts are defined as a separate patrimony, and not in terms of beneficial and/or legal ownerships.

2.2.4. Switzerland

Gani explained that ,in line, with the jurisprudence of the Swiss *Bundesgericht/Tribunal fédéral* (Federal Supreme Court, Bg/Tf), the concept of beneficial ownership is to be found in the relevant tax treaty. As the concept is an expression contained in an international agreement, it is to be interpreted in line with the interpretation rules in the Vienna Convention on the Law of Treaties (the "Vienna Convention") (1969).[4] In this interpretation exercise, attention is paid to the relevant provisions in the, as amended, Commentaries on the OECD Model (2014).[5]

With regard to the question of whether the beneficial ownership condition is implicitly present in tax treaties that do not incorporate the beneficial ownership language, Gani noted that in *X ApS* (2005),[6] the Bg/Tf applied an unwritten abuse-of-law principle derived from international law to deny a Danish company a refund of Swiss dividend withholding tax under article 10 of the Denmark-Switzerland Income and Capital Tax Treaty (1973),[7] even though that tax treaty did not contain specific anti-abuse rules (SAARs) or beneficial ownership clauses. The decision refers to the good faith principle contained in article 31 of the Vienna Convention (1969), and not for the purpose of interpreting a particular treaty provision but to conclude that a general unwritten anti-abuse rule applies in the application of an international agreement, as in the tax treaty in question. The Bg/Tf also referred to the Commentaries on the OECD Model,[8] but did so without considering its status under the interpretation rules in

1. Most recently, *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Treaties & Models IBFD.
2. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Treaties & Models IBFD.
3. FR: CE, 13 Oct. 1999, Decision No. 191191, *Diebold Courtage SA*, Case Law IBFD.
4. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties & Models IBFD.
5. *OECD Model Tax Convention on Income and on Capital: Commentaries* (26 July 2014), Treaties & Models IBFD.
6. CH: Bg/Tf, 28 Nov. 2005, Decision No. 2A.239/2005, *X ApS*, Case Law IBFD.
7. *Convention between the Swiss Confederation and the Kingdom of Denmark for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (unofficial translation) (23 Nov. 1973) (as amended through 2009), Treaties & Models IBFD.
8. Most recently, *OECD Model Tax Convention on Income and on Capital: Commentaries* (21 Nov. 2017), Treaties & Models IBFD.

the Vienna Convention (1969) and without taking into account the fact that the relevant tax treaty was signed in 1973 before the inclusion of the concept of beneficial ownership in the OECD Model (1977).

Subsequently, in a decision given in 2015, the Bg/Tf confirmed that the beneficial ownership condition was deemed implicitly included in the Denmark-Switzerland Income and Capital Tax Treaty (1973). The Bg/Tf based its reasoning on the Denmark-Switzerland Protocol (2009),[9] which had modified the passive income provisions to be in line with the beneficial ownership language in the OECD Model. The Bg/Tf held that these alterations were not a change but merely added "clarifications" of the Denmark-Switzerland Income and Capital Tax Treaty (1973), a view which is coherent with the Commentaries on the OECD Model (2014).[10] As a result, the beneficial ownership condition also applied in relation to passive income paid in tax years before the Denmark-Switzerland Protocol (2009) entered into force. Gani added that the Bg/Tf's view regarding the implicit inclusion of the beneficial ownership condition in Swiss tax treaties is shared by the majority of Swiss scholars.

2.2.5. India

Kumar observed that the concept of beneficial ownership is not defined under the Indian tax law. The government of India has the statutory power to unilaterally define undefined treaty terms by way of a notification. It has not exercised this power with respect to the concept of beneficial ownership. India is not an OECD member country, but its judicial bodies have frequently referred to and followed the Commentaries on the OECD Model. The OECD Commentaries may not contain a positive definition of the concept of beneficial ownership, but it has provided Indian courts with the elements for a working definition of the term.[11] In a 2022 decision, the Mumbai bench of the ITAT held that the concept of beneficial ownership, being a *sine qua non* for treaty benefits cannot, in the absence of a specific provision to that effect, be inferred or assumed.[12]

2.3. The relationship between the concept of beneficial ownership and anti-abuse principles and/or statutory GAARs

2.3.1. Opening comments

A question that frequently arises regarding the relationship between anti-abuse rules and the concept of beneficial ownership and whether the former is absorbed by the latter or whether both can be applied independently. For instance, can anti-abuse principles be used by tax authorities to disregard an apparent beneficiary and claim that another person or entity is the beneficial owner of the income in question? Absorption appears to be unlikely from the perspective of tax authorities as there is a clear preference for keeping as many tools as possible in the toolbox of anti-avoidance.

For the EU Member States, the question arises as to whether the recent Danish beneficial ownership cases decided by the Court of Justice of the European Union (ECJ)[13] have an influence that goes beyond the EU directives (i.e. the EU Parent-Subsidiary Directive (2011/96)[14] and the EU Interest and Royalties Directive (2003/49))[15] in relation to which they have been decided).

2.3.2. France

Martin referred to the case of *Bank of Scotland* (2006),[16] which was the first major case decided by the CE, in which the beneficial ownership condition and the abuse of law doctrine coincided. In its decision, the CE made use of the court-made notion of "*fraude à la loi*" (part of "abuse of law" in French case law) to set aside a usufruct agreement by which a US parent company had sold to a UK bank the usufruct of shares issued by its French subsidiary. The CE held that the contract entailed an artificial scheme disguising a loan to the US parent company, repaid by delegation of dividends to the bank, with the purpose of the scheme being to obtain the refund of the then applicable French "*avoir fiscal*" tax credit granted to UK residents

9. *Protocol between the Swiss Confederation and the Kingdom of Denmark amending the Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, Signed at Berne on 23rd November 1973, as Amended by the Protocol Signed at Copenhagen on 11th March 1997* (21 Aug. 2009), Treaties & Models IBFD.
10. CH: Bg/Tf, 5 May 2015, Decision No. 2C_364/2012, Case Law IBFD.
11. *See*, for example, IN: ITAT, 28 Aug. 2019, Decision No. 6958/Mum/2017, *Golden Bella Holdings Ltd. v. DCIT*, Case Law IBFD; IN: ITAT, 4 July 2014, Decision No. 80/Del/2013, *JC Bamford Investments v. DDIT*, Case Law IBFD; and IN: ITAT, 31 Jan. 2011, ITA No. 6063 and 9034/ M/ 2004; 2304 and 5064/ M/ 2006, *Universal International Music BV v. ADIT*, Case Law IBFD.
12. IN: ITAT, 17 May 2022, Decision No. 1725/Mum/2021, 138 taxmann.com 328, *Blackstone FP Partners Mauritius V Ltd. v. DCIT*.
13. *See* DK: ECJ, 26 Feb. 2019, Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16, *N Luxembourg 1 v. Skatteministeriet*, Case Law IBFD and DK: ECJ, 26 Feb. 2019, Joined Cases C-116/16 and C-117/16, *Skatteministeriet v. T Danmark*, Case Law IBFD.
14. Council Directive 2011/96/EU of 30 November 2011 on the Common System of Taxation Applicable in the Case of Parent Companies and Subsidiaries of Different Member States, OJ L 345 (2011), Primary Sources IBFD [hereinafter the EU Parent-Subsidiary Directive (2011/96)].
15. Council Directive 2003/49/EC of 3 June 2003 on a Common System of Taxation Applicable to Interest and Royalty Payments Made between Associated Companies of Different Member States, OJ L157 (2003), Primary Sources IBFD [hereinafter the EU Interest and Royalties Directive (2003/49)].
16. FR: CE, 29 Dec. 2006, Decision No. 283314, *Bank of Scotland v. Ministre de l'Economie, des Finances et de l'Industrie*, Case Law IBFD.

under the France-United Kingdom Income Tax Treaty (1968).[17] After setting aside the usufruct agreement and concluding that the transaction was in fact a loan by the UK bank to be repaid by the US parent company in the form of dividends derived from the French subsidiary, the CE held that the beneficial owner of these dividends was the US parent company and not the UK bank, and that it was the beneficial ownership condition in the France-United Kingdom Income Tax Treaty (1968), which prevented the application of the dividends article that gave rise to the refund.[18]

With regard to the effect of the ECJ's Danish beneficial ownership cases,[19] Martin noted that, in *Stés Eqiom et Enka* (2020),[20] the CE had recognized that the beneficial ownership condition is implicit and not contrary to the EU Parent-Subsidiary Directive (2011/96), in line with the ECJ's decision in *T Danmark* (Joined Cases C-116/16 and C-117/16).[21] As such, beneficial ownership status is a condition to obtain dividend withholding tax relief under the EU Parent-Subsidiary Directive (2011/96). This is in line with the view of the French legislator, which had included a beneficial ownership condition in the statutory provisions, implementing the EU Parent-Subsidiary Directive (2011/96) into French domestic law.

The CE also interpreted the ECJ's decision in *N Luxembourg* (Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16)[22] by holding that the implicit beneficial ownership condition is distinct from the anti-abuse principles. This ties in with the Commentary on Article 10 of the OECD Model (2017), which provides that the beneficial ownership condition is distinct from the treaty GAAR. As such, a recipient being the beneficial owner of the income received does not preclude application of the GAAR.[23] For the CE, it was furthermore clear that the ECJ's interpretation of the beneficial ownership condition expressly included in the EU Interest and Royalties Directive (2003/49) also applies to the implicit beneficial ownership condition in the EU Parent-Subsidiary Directive (2011/96), according to the ECJ's decision in *T Danmark*.[24]

Finally, Martin referred to the decision in *Performing Rights Society* (2021),[25] which concerned the application of French withholding tax on royalties earned in France by members of the UK collection society for musicians. The society filed for a refund of the French tax under the France-United Kingdom Income Tax Treaty (2008),[26] which exempts royalty recipients from French withholding tax on royalties if they are UK residents and the beneficial owners of the royalties. The CE held that the society was not the beneficial owner of the royalties, as, under the contract between the society and the UK musicians it represented, it was stated that the royalties must "in principle" be distributed to its individual members. Eighty per cent of the royalties was effectively distributed. Martin observed that, in this decision, the CE had applied an autonomous beneficial ownership concept in a situation in which there was no suspicion of treaty shopping or abuse.

2.3.3. Canada

In Canada, the domestic GAAR has generally supplanted beneficial ownership challenges in treaty-shopping cases. In *Alta Energy* (2021),[27] the Supreme Court of Canada (SCC) provided guidance on how the domestic GAAR might apply in treaty abuse cases. In the future, the GAAR in the OECD's "Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting" (the "Multilateral Instrument", or the MLI) (2017)[28] might be applied in treaty abuse cases. The effect of its broad anti-avoidance rule in the form of the principal purpose test (PPT) remains to be seen. Here, it should be noted that, in two recent decisions of the TCC, the attempt of the Canadian tax authorities to use the concept of beneficial ownership as an anti-avoidance tool has not been upheld.

2.3.4. Switzerland

In Switzerland, it is necessary to distinguish cases of abuse of tax treaties (which occurs at conventional level) that could imply or not problematic beneficial ownership issues from cases of abuse of purely internal rules (internal level). Within that meaning, SAARs rules in tax treaties, beneficial ownership clauses and internal GAARs are three parts of the "anti-abuse policy", yet the scope and the abuse targeted by the individual rules differs. Treaty-based abuse rules cover situations of abuse of tax

17. *Convention between the United Kingdom of Great Britain and Northern Ireland and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (22 May 1968) (as amended through 1987), Treaties & Models IBFD.
18. Id., at art. 9(6)(b).
19. *See N Luxembourg 1* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 13 and *T Danmark* (C-116/16 and C-117/16), *supra* n. 13.
20. *See* FR: CE, 5 June 2020, Decision No. 423809, *Stés Eqiom et Enka*, especially para. 111.
21. *T Danmark* (C-116/16 and C-117/16), *supra* n. 13.
22. *N Luxembourg 1* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 13.
23. *See* paragraph 12.5 of the *OECD Model: Commentary on Article 10* (2017).
24. *T Danmark* (C-116/16 and C-117/16), *supra* n. 13.
25. FR: CE, 5 Feb. 2021, Decisions Nos. 430594 and 432845, *Performing Rights Society Ltd. v. Ministre de l'Economie, des Finances et de l'Industrie*, Case Law IBFD.
26. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* (12 June 2008), Treaties & Models IBFD.
27. CA: SCC, 26 Nov. 2021, *Alta Energy Luxembourg v. The Queen*, No. 2021 SCC 49.
28. OECD, *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017) [hereinafter the "*Multilateral Instrument*", or MLI), Treaties & Models IBFD.

treaties, such as in the case of treaty shopping or treaty rule shopping. The Swiss domestic GAAR doctrine is based on the so-called "*Altreservenpraxis*" ("old reserves") doctrine. The practice is based on a schematic asset and/or liability test. If there are distributable reserves and/or retained earnings prior to the transfer of shares from a jurisdiction with a higher residual rate of withholding tax to a jurisdiction with a lower one, the previous higher rate still applies to these reserves and/or retained earnings. The doctrine was applied recently by the Bg/Tf in a decision concerning the sale by a Paraguayan company of a Swiss company to another Swiss company in a transaction which instead of giving rise to the domestic withholding tax rate of 35% where no tax treaty applied, benefitted from a 0% rate under a tax treaty.[29]

2.3.5. India

Kumar noted that the GAAR provisions in the Indian Income Tax Act (IITA) (1961)[30] overrode the provisions of a tax treaty, and, as such, these are the dominant anti-abuse provisions under domestic tax law. These provisions can also be invoked to disregard an apparent beneficiary and claim the beneficial owner is some other person. It should be noted that the concept of beneficial ownership is much narrower than the concept of anti-abuse reflected in the GAAR, and is primarily confined to passive income situations, whereas the GAAR and other treaty-based anti-abuse provisions cover much broader areas. In this regard, the concept of beneficial ownership is considered to be one of many anti-abuse provisions with a limited field of application.

Furthermore, the concept of beneficial ownership in tax treaties is limited to the narrow concept of beneficial ownership of income, rather than beneficial ownership of a structure or an income-yielding asset. A domestic law GAAR and the PPT under the MLI extend anti-abuse rule application to beneficial ownership of structures and income-yielding assets. Consequently, the concept of beneficial ownership does not target impermissible avoidance arrangements or even treaty shopping in general. It only applies to treaty shopping by adding a conduit structure for specific passive incomes.

2.4. Test to be applied when using the concept of beneficial ownership (other than anti-abuse)

2.4.1. Opening comments

Another issue with regard to the application of the concept of beneficial ownership is the tests to be applied to determine whether a person or entity is a beneficial owner. Some inspiration can be found in the Commentaries on the OECD Model and the Commentaries on the UN Model,[31] but the question then arises as to whether courts are willing to apply this guidance, and if they do, whether they do so literally or have a certain margin of appreciation.

Three types of tests can be envisioned. First, a legal test focuses on the legal obligation of the recipient of the income to forward it to another person or entity. Second, a functional test assesses the function of the recipient of the income with regard to the all of the structure and the economic reality of its operation. Third, and finally, a factual test takes into account aspects of the flows of income, such as timing and amounts forwarded. In this respect, it should be noted that the OECD Commentaries do not provide much clarification of which type of test should have priority.

2.4.2. France

Martin noted that French courts generally do not make explicit references to the Commentaries on the OECD Model for the purpose of applying the concept of beneficial ownership. This could be explained by the fact that the relevant provisions of the OECD Commentaries are not static, and tend to be updated frequently.

In *Performing Rights Society*, the lower courts had held that the royalty receiving UK society was the beneficial owner based on the fact that the latter's articles of incorporation indicated that the artists were selling their royalty rights to the society and that the society had the right to decide between redistribution to the musicians or financing projects in the general interest of the musicians. However, the CE decided otherwise, combining factual analysis (the effective redistribution of 80% of the royalties) and essential purpose of the entity (the redistribution "in principle").[32]

29. CH: Bg/Tf, 29 July 2021, Decision No. 2C_80/2021, *A SA*.
30. IN: Income Tax Act (IITA) (1961).
31. Most recently, *UN Model Double Taxation Convention between Developed and Developing Countries: Commentaries* (1 Jan. 2021), Treaties and Models IBFD.
32. Decisions Nos. 430594 and 432845, *Performing Rights Society* (2021), *supra* n. 25. For the decisions of the lower courts, *see* FR: Cour Administrative d'Appel, 12 Mar. 2019, No. 17VE01940

2.4.3. Canada

Sommerfeldt reiterated that the beneficial ownership condition is essentially a common law test, meaning that the tests used to apply it are largely based on court opinions. For instance, in *Prévost Car* (2008 and 2009),[33] Justice Rip stated that:

> In my view the "beneficial owner" of dividends is the person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received. The person who is beneficial owner of the dividend is the person who enjoys and assumes all the attributes of ownership.[34]

In *Velcro* (2012),[35] Rossiter described the four elements of beneficial ownership as being: (i) possession; (ii) use; (iii) risk; and (iv) control, which is ultimately a legal test, rather than a functional test. The TCC did not find that a conduit or agency existed. If a holding company has discretion concerning the use and application of funds received, the TCC generally does not pierce the corporate veil. Rossiter noted by way of intervention that in *Velcro* the recipient had the obligation to pay on 90% of the passive income received, which did not disqualify it as the beneficial owner of the income, as not all income was forwarded. This contrasts with the French decision in *Performing Rights Society*, in which a de facto payment of 80% was held sufficient to exclude the beneficial ownership status of the recipient.[36]

It was noted further that the Commentaries on the OECD Model can be a persuasive source of interpretation for the Canadian courts, provided that the relevant paragraphs were included in the OECD Commentaries before, or contemporaneously with, the negotiation of the tax treaty in question. Subsequent additions to the OECD Commentaries that contradict views previously expressed are not helpful. As such, the Commentaries on the OECD Model (2003),[37] which added that the concept of beneficial ownership ought not to be used in a "narrow technical sense", was likely a contradiction of previous OECD commentaries, and, therefore, was not well-received in Canada.

2.4.4. Switzerland

Gani stated that three landmark cases decided by the Bg/Tf provide insight in the matter of the tests to be applied to determine beneficial ownership status. In the *"total return swap"* case (2015),[38] the Bg/Tf focused on the de facto obligation of the Danish recipient of dividends to transfer these to an upstream entity, and on not the legal or contractual obligation. The transaction was structured as a swap arrangement, meaning that from an economic point of view, there was an obligation to pay on the dividends. The shares in question were systematically purchased before dividend maturity, to pass on dividends net of Swiss withholding tax to counterparties outside of the treaty states, i.e. Denmark and Switzerland. This interdependence was held to be sufficient to conclude that the Danish bank was not the beneficial owner. The Bg/Tf also held that the "*Nutzungsberechtigter*" (the German term equivalent of beneficial ownership) should not be understood in a narrow technical sense, but, rather, it is necessary to take into account the economic circumstances of the transaction. In the Bg/Tf's view, the beneficial ownership test requires assessing whether there is an effective restriction of the power to dispose of the received income. This is the case if: (i) there is a causal link between the receiving of the income and the obligation to transfer it to a third party; and (ii) the obligation to transfer to a third party must depend on the existence of the income.

In the "*securities lending*" case (2019),[39] the Bg/Tf confirmed that, once again, not only contractual but also factual obligations to pass on dividends result in a loss of beneficial ownership. In this case, a Luxembourg borrower of Swiss shares was held to make manufactured payments to the UK lender in respect of the dividend payments on the underlying Swiss shares for an amount of 85% of the gross dividends. Beneficial ownership status of the borrower was refused with regard to the withholding tax refund under the Luxembourg-Switzerland Income and Capital Tax Treaty (1993),[40] given that the latter was unable to make full use of the dividends and fully enjoy them. The Bg/Tf observed that only a legal or contractual obligation to pass on income can prevent beneficial ownership status. A de facto obligation to pass on the income in itself is not enough to exclude beneficial ownership status, but it can serve as an indication of the existence of an (implicit) contractual obligation. The Bg/Tf also confirmed in this case that the treaty term regarding beneficial ownership should be interpreted dynamically in line with the most recent version of the Commentaries on the OECD Model, even if this version was adopted after the conclusion of the relevant tax treaty.

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33. CA: TCC, 22 Apr. 2008, *Prévost Car Inc. v. Her Majesty the Queen*, Nos. 2004-2006(IT)G and 2004-4226(IT)G, 2008 TCC 231, A10D, Case Law IBFD, affirmed in the decision of the Canadian Federal Court of Appeal (CFCA) in CA: CFCA, 26 Feb. 2009, *Prévost Car Inc. v. Her Majesty the Queen*, 2009 FCA 57, Case Law IBFD.
34. *Prévost Car* (2008), *supra* n. 33, at para. 100.
35. CA: TCC, 24 Feb. 2012, *Velcro Canada v. The Queen*, No. 2012 TCC 57, Case Law IBFD.
36. Decisions Nos. 430594 and 432845, *Performing Rights Society* (2021), *supra* n. 25.
37. *OECD Model Tax Convention on Income and on Capital: Commentaries* (28 Jan. 2003), Treaties & Models IBFD.
38. Decision No. 2C_364/2012 (2015), *supra* n. 10.
39. CH: Bg/Tf, 19 May 2020, Decision No. 2C_880/2018, Case Law IBFD.
40. *Convention between the Swiss Confederation and the Grand Duchy of Luxembourg for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* (unofficial translation) (21 Jan. 1993) (as amended through 2012, Treaties & Models IBFD.

Finally, in the "*derived*" case (2020),[41] the BG/Tf held that article 15(1) of the European Union-Switzerland Savings Directive Agreement (2004),[42] which requires Switzerland to refund dividend withholding tax paid to EU companies must be interpreted in line with the ECJ's decisions in the Danish ECJ beneficial ownership cases.[43] As such, even if the provision does not contain an express beneficial ownership condition, such a condition is implied. The European Union-Switzerland Savings Directive Agreement (2004) does contain a provision, which reserves the application of national legislation or conventions aimed at preventing fraud or abuse in Switzerland and the Member States. In contrast to the lower court,[44] the Bg/Tf Court approached the case from the angle of an abusive restructuring and "old reserves" practice (*see* section 2.3.4.). Gani noted that this begged the question of whether, except for the scope of application, there is a difference between beneficial ownership clauses and anti-abuse clauses in tax treaties. In the Danish beneficial ownership cases, the ECJ has introduced indicators of abuse, such as the obligation to repay the income within a very short period of time or the lack of power to dispose of the income economically. These are very similar to the tests applied in Swiss jurisprudence to assess beneficial ownership status. Martin remarked that it was quite puzzling why the ECJ, in its decision, had listed the tests to identify abuse, including tests that overlap with the concept of beneficial ownership, but the ECJ does not apply the tests to the facts at hand. It merely answers the preliminary questions raised regarding the law. Conceiving a test to identify beneficial ownership status in the form of an anti-abuse test, as in the ECJ's decisions, adds a new layer to the concept of beneficial ownership, which is not currently present in the OECD Model and the Commentaries on the OECD Model

2.4.5. India

In India, the test usually applied by the courts is the legal test (i.e. assessing the legal rights and obligations of the apparent beneficiary of the income) and the factual test (i.e. assessment of the timing of the flow of income and amounts forward). The functional test by which the entrepreneurial functions of the apparent beneficiary are tested is not applied. Kumar believed, however, that, recently, there was an emerging trend of a gradual moving of the judiciary towards applying the functional test.

2.4.6. Netherlands

Cools observed that, in the Netherlands, there is generally little attention paid to the concept of beneficial ownership in the national doctrine, and there is also little relevant jurisprudence on the issue. This is explained by the fact that the Netherland historically does not levy withholding tax on outbound interest and royalty payments. The country does levy a withholding tax on outbound dividend payments. As such, the concept of beneficial ownership has been debated in the context of "dividend stripping" constructions. "Dividend stripping" usually entails a sale of shares by a foreign shareholder to a local corporate shareholder just before dividend date. The latter claims the tax credit and dividend withholding exemption, and subsequently the shares are sold back to the foreign shareholder shortly after dividend date (for example, on the basis of a put option), thereby creating a profit for the foreign shareholder. Cools noted that dividend stripping is problematic when the original seller of the shares holds on to the economic interest, while the (temporary) buyer has a more favourable right to a withholding tax reduction or to a tax credit under a tax treaty or Dutch domestic law, given that the domestic tax law also incorporates the beneficial ownership condition. The economic interest of the original shareholder is usually preserved by a combination of the selling and/or lending of the shares and issuing put- or call options. Cools noted that this type of dividend stripping has occurred in the past by the selling of Dutch source dividends to a Dutch company, a strategy known as "Holland routing". It can also occur by selling the dividends to another foreign shareholder in a country with a favourable tax treaty with the Netherlands. In such a case, the arrangement most likely entails treaty shopping.

Cools noted that the question has arisen as to whether the concept of beneficial ownership can be a remedy to counter dividend stripping, both in domestic law and in treaty context. In a case decided in 1975, the Netherlands HR held, inter alia, that the beneficial ownership status of the recipient of dividends should be assessed when the dividends are payable and that the ownership of the underlying shares is not a requirement for the recipient of the dividend to be the beneficial owner.[45] In a case decided in 2001, which concerned dividend stripping via "Holland routing", the HR confirmed that its conclusions on the case of 1975 also applied in a purely domestic case, even if the main purpose of the buying and selling of dividend coupons was the avoidance of the Dutch dividend tax.[46] The decision led some commentators to claim that the HR had effectively abolished the Dutch dividend withholding tax. The Dutch tax authorities responded by issuing a proposal for an administrative guideline which stated that dividend recipients who claim a credit or a refund of Dutch withholding tax and subsequently alienate the underlying shares within three months after receiving the dividends are not considered the beneficial ownership of these dividends. The proposal was withdrawn after negative response to it by the market.

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41. CH: Bg/Tf, 20 Apr. 2020, Decision No. 2C_354/2018.
42. Agreement between the European Community and the Swiss Confederation Providing for Measures Equivalent to Those Laid Down in Council Directive 2003/48/EC on Taxation of Savings Income in the Form of Interest Payments, OJ L 385 (2004), Primary Sources IBFD.
43. *See N Luxembourg 1* (C-115/16, C-118/16, C-119/16 and C-299/16), *supra* n. 13 and *T Danmark* (C-116/16 and C-117/16), *supra* n. 13.
44. CH: Federal Administrative Court, 28 Feb. 2018, No. A-7299/2016.
45. NL: HR, 25 June 1975, ECLI:NL:HR:1994:ZC5639.
46. NL: HR, 21 Feb. 2001, ECLI:NL:2001:AB0156.

Cools noted that, since 2001, the Dutch *Wet Inkomstenbelasting 2001* (Income Tax Act, WiB)[47] provides who is not the beneficial owner of dividends received. A person is not deemed to be the beneficial owner when he or she, in connection with receiving the dividends, has been involved in a consideration as part of a combination of transactions whereby it is plausible that:

(1) the dividends have been wholly or partly benefited directly or indirectly to a person who is entitled to a lesser extent to reduce, refund or set-off dividend tax than the person who made the consideration; and

(2) that person retains or acquires, directly or indirectly, a position with regard to the shares that is comparable to their position with regard to similar shares prior to the moment when the combination of transactions commenced, where the burden of proof to demonstrate that the recipient is not the beneficial owner lies with the tax authorities.

Cools observed that this rule has rarely been applied, and there is little jurisprudence on the matter. Nevertheless, proposals have been made to reinforce the concept.

With regard to the interpretation of the treaty concept of beneficial ownership, Cools noted that it is an open question as to whether the concept should be interpreted by application of the equivalent article 3(2) of the OECD Model in the relevant tax treaties and, as such, in line with the meaning under Dutch domestic law, or in line with the autonomous meaning based on the Commentaries on the OECD Model and international doctrine and jurisprudence. Here it should be noted that the relevant cases in this regard are *Royal Dutch Shell/Market Maker* (1994),[48] *Indofood* (2004)[49] and *Prévost Car*.[50]

2.5. Procedural issues when applying the concept of beneficial ownership

2.5.1. Opening comments

If both SAARs and GAARs are available as well as the beneficial ownership condition, the question arises as to whether the tax authorities have a free choice in deciding which rule to apply. If the application of both rules is argued before a court, does the court have to give priority to one rule over the other? Further, how is the burden of proof divided in relation to the application of the application of the concept of beneficial ownership?

2.5.2. France

Martin noted that these issues were not yet settled in France. Based on the jurisprudence, it is clear that the French tax authorities can choose between various anti-avoidance provisions and principles, provided that the legal tests for the chosen path are met. Strictly speaking, the beneficial ownership rule is merely a legal condition for treaty entitlement, but, in reality, it operates also like an anti-avoidance rule to the extent that it is a tool to discern the reality of the taxpayer's actions over appearances.

With regard to the burden of proof, the CE held in *Stés Eqiom et Enka*[51] that the taxpayer and the tax authorities must submit the elements that are available to them and may lose if they fail to clarify a point of fact about which they are supposed to be able to provide evidence.

2.5.3. Canada

In Canada, the tax authorities are free to choose with regard to a challenge to beneficial ownership between Canada's domestic GAAR or a treaty GAAR if available to reassess taxpayers. Sommerfeldt believed that in light of *Prévost Car*[52] and *Velcro*,[53] it is possible to conclude that the GAAR has proven to be the more effective tool. Subject to the burden on a taxpayer to refute assumptions of fact made by the tax authorities, the burden of proof lies with the party pleading a particular fact.

2.5.4. India

Kumar shared his view that, if both anti-abuse and beneficial ownership provisions can be applied, the strict technical position appears to be that the general provisions have to make way for the specific provisions ("*generalia specialibus non-derogant*"). He believed that such situations were rather limited. As the provisions of the GAAR and a PPT are much more comprehensive, the tax authorities are less likely to use the beneficial ownership provisions on a standalone basis. The burden of proof under

47. NL: *Wet Inkomstenbelasting 2001* (Income Tax Act, WIB), at article 9.2.(2).
48. NL: HR, 6 Apr. 1994, Decision No. 28638, BNB 1994/217, Case Law IBFD.
49. *See* the decision of the UK Court of Appeal of England and Wales (CAEW) in UK: CAEW, 2 Mar. 2006, *Indofood International Finance Limited v. JPMorgan Chase Bank NA, London Branch*, A3/2005/2497, Case Law IBFD.
50. *See Prévost Car* (2008), *supra* n. 33, as affirmed by *Prévost Car* (2009), *supra* n. 33.
51. Decision No. 423809, *Stés Eqiom et Enka* (2020), *supra* n. 20.
52. *Prévost Car* (2008), *supra* n. 33, as affirmed by *Prévost Car* (2009), *supra* n. 33.
53. *Velcro* (2012), *supra* n. 35.

the Indian domestic GAAR lies substantially with the taxpayer. In a treaty beneficial ownership situation, the burden of proof is much less onerous inasmuch as there is no deeming fiction to be proven.

2.6. Reconstruction of the situation when the beneficial owner is identified

2.6.1. Opening comments

A final question that frequently arises in practice is whether treaty benefits should be granted to the identified beneficial owner (a resident in the same country or in a third country) if that person is not the original apparent beneficiary. In some countries, taxpayers might encounter procedural issues that make it difficult to claim the benefit of a second tax treaty in place of the tax treaty with the country of the apparent beneficiary.

2.6.2. France

Martin noted that in *Diebold Courtage*,[54] the CE applied the same France-Netherlands Income and Capital Tax Treaty (1973)[55] to the beneficial owner that was a different entity to the apparent beneficiary. In the case of a triangular situation in which the identified beneficial owner resides in a third country and not in the country of the apparent beneficiary, the CE held in *Société Planet* (2022)[56] that the tax treaty with the state of the beneficial owner had to be applied, even if the income – royalties in the case in question – were paid to an intermediary in a third state which turned out not to be the beneficial owner. The CE based its decision on the purpose of tax treaties, which is to avoid double taxation and on the Commentaries on the OECD Model. In the CE's opinion, the tax authorities must apply the tax treaty relevant to the situation. No negative consequences (such as the not granting of any treaty benefits) are to be drawn from the terms "paid to" in the treaty provisions in case the recipient of the income is not the beneficial owner.

2.6.3. Canada

According to Sommerfeldt, this issue has not appeared before the Canadian courts. Generally, where a shareholder or a beneficial owner resides does not affect treaty benefits. Recent amendments have been made to the Canadian Income Tax Act (CITA),[57] targeting back-to-back loans and other arrangements. These amendments were enacted to address the perceived abuses in *Prévost Car*[58] and *Velcro*.[59]

2.6.4. Switzerland

In Switzerland, the same questions were being asked as in France, although the answers were markedly different. In a notable decision of 2020, the Bg/Tf held that, where it has been established that the transaction is abusive, the consequences of the abuse must be drawn from international tax concepts.[60] This led the Bg/Tf to conclude that, if due to the abuse, no refund of withholding tax is due under a tax treaty or an EU law instrument, the taxpayer is also not entitled to a partial refund under another instrument following the recharacterization of the transaction in line with the economic reality. Gani noted that the Bg/Tf's all-or-nothing approach has been criticized in the Swiss doctrine.

2.6.5. India

Kumar noted that in *Bamford* (2014),[61] the ITAT had held that the beneficial ownership of the income in question was entitled to treaty benefits, given that he resided in the same country as the apparent beneficiary to whom the income was paid. As such, the benefits were derived from the application of the same tax treaty.

Where the beneficial ownership is located in a third country, the tax treaty with the country where the apparent beneficiary is a resident cannot be applied. The application of the tax treaty with the country of the beneficial owner can be considered for application. However, before the tax authorities, there might be procedural constraints for a taxpayer to make a fresh claim for the application of a second tax treaty after the application of the first tax treaty had been denied.

The ITAT, which is the final fact-finding authority in direct tax matters, has wide powers in this regard. Kumar believed that in Indian international tax jurisprudence in general, there is an emerging trend of decisions being made in tune with the best practices globally. Foreign court decisions, particularly from European and North American courts, are finding a place in Indian

54. Decision No. 191191, *Diebold Courtage* (1999), *supra* n. 3.
55. *Convention between the Republic of France and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (16 Mar. 1973), Treaties & Models IBFD.
56. FR: CE, 20 May 2022, Decision No. 444451, *Société Planet*.
57. *See* CA: Income Tax Act (CITA), sec. 212(3.1)-(3-94).
58. *Prévost Car* (2008), *supra* n. 33, as affirmed by *Prévost Car* (2009), *supra* n. 33.
59. *Velcro* (2012), *supra* n. 35.
60. Decision No. 2C_354/2018 (2020), *supra* n. 41.
61. *Bamford* (2014), *supra* n. 11.

jurisprudence. As such, the concept of beneficial ownership in Indian jurisprudence is expected to develop in harmony with the international standards, particularly those set in western countries, which, in turn, are more likely to be influenced by the OECD approach on the issue. Accordingly, Indian judicial forums are making a significant contribution to a consistent, predictable and globally acceptable international tax jurisprudence.

2.7. Final observations

Martin concluded the session by reiterating that beneficial ownership remains a "hot topic" after all those years. He believed there was a clear need for additional guidance to be provided by the OECD, particular in relation to the tests to be applied to identify the beneficial ownership of income, the priority rules of the different anti-abuse rules including the beneficial ownership rule, and the consequences of the application of the beneficial ownership rule in the source state and the residence state(s) where the apparent beneficiary is not the beneficial owner. This issue is especially pressing in triangular situations involving the possible application of a tax treaty with a third state.

3. Session 2: Case Management – Adversarial versus Inquisitorial

3.1. Panel composition and agenda

The session was chaired by Chief Justice Robert Jan Koopman, HR, Netherlands. The panellists were Judge Susanne Tiedchen, *Finanzgericht* (Fiscal Court, FG) *Berlin-Brandenburg*, Germany; Justice Michael Wigney, Federal Court of Australia (FCA), Australia; and Justice EuiYoung Lee, High Court (KHC), Korea (Rep.).

Koopman noted that a tax court's case management strategy usually depends on the following two factors. First, the strategy differs in courts with adversarial procedures as opposed to courts with inquisitorial procedures. Second, it also depends on the instance, with first instance courts being confronted with different case management issues than those that courts face in the final instance.

3.2. Germany

Tiedchen noted that the German tax courts operated under an inquisitorial system. There are two instances. The FGs (the local tax courts) are the fact-finding instance. Appeals are made to the *Bundesfinanzhof* (Federal Fiscal Court, BFH) is possible if leave to appeal is granted because the case is of general interest, a decision by the higher court is required to ensure consistent application of the law, or if the lower court's decision is based on a procedural mistake. At the level of the FG, the judge's role is to give advice to the parties as to what information should be provided, to obtain information he or she deems necessary or to set a formal deadline within which the information must be provided. The system is of an inquisitorial nature to the extent that the judge steps in if the necessary documents are not provided by the parties, and/or the judge fails to be provided with the information deemed necessary. The burden of proof lies with both parties, with each party providing evidence for the facts in their favour.

Judges at the tax courts have a number of instruments at their disposal to manage the case load at the court. First, they can give a preliminary opinion regarding the outcome of a case, which could tempt the taxpayer to withdraw the claim or the tax authority to grant the taxpayer's claim. Second, informal meetings with the parties are organized without being a formal hearing. These meetings can lead to a mutual understanding of the facts (but not the tax due). Third, parties can agree to a decision by a single judge instead of the whole chamber. They can also agree to waive their right to a formal hearing. Tiedchen noted that, due to the effectiveness of the case management instruments, only a little more than half of the cases ends up being settled before a formal hearing is undertaken. Seasoned lawyers usually tend to obtain an agreement between the parties before the formal hearing.

3.3. Australia

Wigney gave an overview of the Australian judicial system, which is an adversarial judicial system comprising common law and statutory law. With regard to case management, he noted that its objectives facilitate the just resolution of disputes according to the law as quickly, inexpensively and efficiently as possible. This requires the development of alternative procedures with a view to expedite case resolution wherever possible. Relevant measures have been taken to achieve early identification of the real issues in disputes, to establish a docket system by which a particular judge is assigned to a case from the early stage to the final hearing and or to foster party-cooperation during the proceedings.

Wigney noted that in adversarial systems it is typically left to the parties to define the issues. However, the parties tend to keep their options open, and make limited or no concessions. As such, mechanisms to narrow the issues have been adopted, including sanctions and costs assignment.

Koopman wondered if courts are actively steering the parties to narrow the issues, which makes the procedure inquisitorial in a sense. Wigney agreed and believed that limiting the scope of information – the parties often submit voluminous documentary material in tax cases – was the only way to keep the judges' case workload manageable. This implies that parties have to be able to identify the core problem of the case. However, fundamentally, the Australian court system employs an adversarial procedure.

3.4. Korea (Rep.)

EuiYoung Lee observed that, in Korea (Rep.), tax cases (i.e. the revocation of tax assessments) are heard in first instance by the KHC, which deals with both questions of facts and questions of law. The Korean system is an adversarial system. The courts decide on issues that have been brought up by the parties. The *ex officio* examination of certain elements occurs only in limited instances, and only if the underlying matter has already been introduced in the court records by the parties. In recent years, the Korean Supreme Court (KSC) has been confronted with increased caseloads and greater complexity of cases, including cases without clear precedents. In addition to employing more judges, one of the options considered is the extensive use of an electronic (e)-filing system which would facilitate the early sorting of cases and the use of preparatory hearings with a judge if necessary. Future challenges and opportunities in the field of case management are the prospect of relying on artificial intelligence (AI) to write judgments more efficiently and speedily, and exploring the creation of new venues to permit judges in different panels with similar cases to communicate better.

Case management at the KSC is a different matter. The KSC only decides on points of law on appeal to decisions by the KHC. The full bench of the KSC decides between 20 to 30 cases a year only. The remaining 90% of cases that is submitted to it are dismissed without further review. The KSC also takes various factors into account in deciding on the admissibility of a case, such as the existence of precedents or the existence of clear issues relating to the appreciation of the facts.

3.5. The Netherlands

Koopman noted that the Dutch judicial system is of an inquisitorial nature. Nevertheless, in reality, it is up to the parties to supply the facts of the case that underly the legal questions. The purpose of the Dutch HR is threefold: (i) to secure the unity of the application and interpretation of the law; (ii) to undertake development of the law where needed; and (iii) to ensure adequate legal protection of the citizens. The HR has to ensure that it focuses its attention on the cases that matter to serve its purposes. The tax chamber of the HR consists of 11 judges. Instead of expanding the number of judges to deal with growing case numbers, emphasis is put on the adequate selection of cases. The Advocate Generals (AGs) to the HR are extremely important in this regard. AGs write opinions on relevant cases, based on their own selection. Currently, four AGs are active in writing opinions on tax cases. These opinions are very instrumental in pinpointing the relevant points of law that need to be addressed by the HR. Koopman noted that another tactic of the HR to keep caseloads manageable is the fact that it is entitled to declare a case inadmissible without any explanation or motivation, often much to the taxpayer's dissatisfaction. Koopman noted that such a case of a taxpayer, in any case, has been heard at two lower instances before it reaches the HR. If a case before the HR has been the subject of an AG opinion, the case is heard by a panel of five judges. In other cases, the panel consists of three judges. Full chamber referral is possible for complicated cases that would ordinarily be heard by five judges. Full chamber deliberation means that the case is heard by a five-judge panel, but that deliberations take place among the full tax chamber of 11 judges. In some cases, the tax chamber might decide to seek opinions of other HR chambers, such as the civil or criminal chamber. Koopman noted that it could be argued that these deliberations raise questions regarding the right of taxpayers to a fair trial. A taxpayer could argue that they have the right to be present in these exchanges of opinions on their case.

3.6. Final observations

In a final question to the panellists, Koopman asked how much of the core work of judges, such as the writing of court decisions, could be delegated to a judge's clerks across jurisdictions. Michael Beusch observed that, in Switzerland, court clerks are highly involved in the drafting of court decisions. Clerks tend to be very skilled and trained, and without them courts would not function properly. Koopman noted that, in some respects, the preparatory work of the clerks in Switzerland is reminiscent of the task performed by the AGs at the Dutch HR. Koopman wondered, however, if a judge's core task of deciding cases was not interfered with too much if they were constantly managing a team of clerks preparing the decisions. Beusch agreed that it was important to find a balance between the managerial aspects of the job and the adjudication of cases. But, for the sake of safeguarding an efficient functioning of the courts, judges cannot ignore the managerial aspect. He admitted that because of the rising case numbers in Switzerland, judges might be becoming too dependent on their clerks, which is not good either. EuiYoung Lee noted that, as in Switzerland, in Korea (Rep.), court decisions (or at least the first draft of decisions) are essentially written by the clerks.

The same is not true in Australia, however. Wigney noted that Australian judges spend most of their time in the courthouse effectively writing court decisions. The clerks assigned to a judge – currently two clerks, in the past just one – spend most of their time resolving administrative issues. Rossiter observed that, in Canada, the same philosophy was strictly adhered to at the TCC, i.e. the clerks do not write the decisions. Eighty percent of the cases at the TCC are fact-driven and judges need to consider evidence in every case. A clerk can assist in finalizing the details of a decision, but the judges are expected to have the first attempt at drafting the decision. Rossiter believed that the public expects judges to write the decisions, such that, at the TCC, there is a strict adherence to this principle.

Koopman wondered whether the general acceptance of clerks in the writing of decisions depended on the fact of whether the court in question was a court that considered facts, or a court that only dealt with questions of law. If a court only deals with questions of law, the involvement of law clerks may be more relevant and/or acceptable. Beusch noted that, in Switzerland, involvement of clerks in the adjudication of cases has a statutory basis. This demonstrates how the Swiss system differs fundamentally from the Canadian approach before the TCC. He also agreed that the situation at courts where there is no fact-finding and where only questions of law are considered – such as in the Swiss Bg/Tf – the use of clerks is more relevant. Some judicial systems, like the Dutch one, have embraced the use of an AG. This is not the case in Switzerland. Furthermore, he noted that the Swiss legislator has decided against a leave to appeal system to the Swiss *Bundesgericht*/*Tribunal fédéral* (Federal Supreme Court, Bger/TF), meaning that that court is forced to spend time on addressing non-cases. Law clerks are very useful in dealing with this aspect of the system. He believed that if expanding the number of judges is not considered to be an option, it was, in any case, better to have what some would call a “law clerk judiciary” than a judiciary that collapses under the weight of incoming cases.

4. Session 3: Tax Procedures in Hungary

4.1. Panel composition and agenda

The session was chaired by Judge Christopher McNall, First-Tier Tribunal (FTT), United Kingdom. The panel consisted of Justice Márta Stefancsik, *Kúria*, Hungary; Justice Ildikó Figula, *Kúria*, Hungary; and Nóra Cserpák, the tax authority, Hungary. McNall presented the agenda of the session which consisted in an overview of the Hungarian tax procedure, both regarding the administrative phase and the judicial phase.

4.2. Tax assessment procedures in Hungary

Cserpák provided an overview of the Hungarian tax assessment procedure. The procedure is two-tiered, permitting a taxpayer to lodge an administrative appeal with the superior tax authority against the decision of the first-level tax authority.

Apart from mandatory audits, taxpayers are selected for an audit based on a selection system that relies on risk analysis. The risk analysis takes into account various data points, such as the tax returns in question, data disclosures, past tax authority records, previous audit experiences, publicly available information, etc. Once the risk analysis has singled out a taxpayer, a supporting procedure is started which calls on the taxpayer for a self-audit. Based on a report, the taxpayer can be selected for further auditing, and, if necessary, the criminal authorities are informed so that they can explore certain crimes.

On the audit, the tax authority is liable to clarify and prove the facts on which the tax assessment is based, unless the law provides that this is the taxpayer’s obligation. Any circumstance not supported by evidence cannot be used against the taxpayer. Specific rules on admissible evidence, the burden of proof and the rights of the taxpayer related to the audit (such as the right to access the documents and the right to respond to tax authority findings) are set by government decree and in the Hungarian *Az adóhatóság által foganatosítandó végrehajtási eljárásokról szóló* (Law on Tax Enforcement Procedure, LTEP) (2017).[62]

Decisions on assessments can be appealed to the tax authority that issued the decision. If an appeal is lodged, the collection of tax under the decision is suspended. The appeal is heard by the superior tax authority, which, after a complete investigation confirms, alters or annuls the decision of the lower tax authority. An administrative appeal is a prerequisite for a subsequent judicial review.

4.3. Procedures before the administrative courts (first instance)

Figula provided overview of the Hungarian judicial system, which consists of, from lowest to highest instance, district courts, general regional courts, regional courts of appeal and the *Kúria*. Tax cases are heard by the general regional courts in first instance. There is no appeal procedure available, only a review procedure before the *Kúria*. She noted that, in their judgments,

62. HU: *Az adóhatóság által foganatosítandó végrehajtási eljárásokról szóló* (Law on Tax Enforcement Procedure, [LTEP]) (2017).

Hungarian courts must not only consider statutory law but also interpretation of the law in published decisions of the *Kúria*. Precedents in *Kúria* jurisprudence can serve as an independent group for appeal.

4.4. Procedure before the *Kúria*

Stefancsik observed that the admission of a petition for judicial review by the *Kúria* is only granted on limited grounds. Appeal is admitted, for example, if hearing the case is necessary to ensure the uniformity or improvement of the application of the law or if the legal issue raised has special weight or social significance. In addition, (alleged) breaches of procedural rules affecting the merits of the case and the divergence of a lower court decision with a published *Kúria* decision are grounds for an admissible petition.

One of the issues in which the *Kúria* has been taking position recently is the legal status of bilateral and multilateral conventions, and soft law instruments issued by international organizations (such as the OECD Transfer Pricing Guidelines[63]). The *Kúria* has held that the content of these sources of law must be taken into account when interpreting the relevant Hungarian laws, and that these sources of law are binding only if the national law expressly includes the provisions they contain.[64]

5. Session 4: Recent Case Law on Tax Treaty Entitlement

5.1. Panel composition and agenda

The session was chaired by Judge Caroline Vanderkerken, *Hof van Beroep* (Court of Appeal, HvB), Belgium. The panel consisted of Judge Emilie Bokdam, CE, France; Chief Justice Robert Jan Koopman, HR, Netherlands; Justice Peter Cools, HR, Netherlands and Judge Pramod Kumar, ITAT, India.

Vanderkerken noted that the issue of treaty entitlement is a broad topic that raises a range of issues. For instance, in two recent cases by the Italian *Corte Suprema di Cassazione* (Supreme Court, SCdC), the benefit of a lower withholding tax rate on dividends received by two entities established in Luxembourg and the United Kingdom, respectively, was denied because the recipients were deemed not to be resident of treaty partner state due to the lack of a place of effective management (PoEM) in state in question.[65] The fact that the entity disposed of a certificate of residence did not alter the SCdC's conclusion that there was no entitlement to treaty benefits.

Vanderkerken observed that cases like these appear part of a trend across courts to put a stronger emphasis on requiring substance for a taxpayer to be entitled to receive treaty benefits, and not just in case of the reception of passive income. She referred to a recent case in which the HvB *Antwerpen* (Antwerp) had refused to acknowledge the existence of a taxpayer's permanent establishment (PE) in Luxembourg. The taxpayer formally disposed of a place of business, but failed to provide evidence of a link between the carrying on of the business and the physical place in Luxembourg.[66] There are various other examples in recent case law that demonstrate the breath of the treaty entitlement topic. In conclusion, Vanderkerken noted that the session consisted of an in-depth analysis of several recent cases involving issues related to tax treaty entitlement.

5.2. Treaty entitlement and residency status

Bokdam presented in two parallel recent decisions given by the French CE, which affected the domestic law exemption regimes regarding the qualification of taxpayers as residents for treaty purposes.[67] Both cases concerned two French companies that had paid for services provided by Tunisian companies. As the latter had no PEs in France, the French tax authorities had concluded that withholding tax was due on the payments, in line with article 182 B of the French *Code Général des Impôts* (General Tax Code, CGI).[68] The French companies, which were held liable to pay the withholding tax disputed this conclusion, and argued that the Tunisian companies were residents of Tunisia under the France-Tunisia Income, Inheritance, Registration and Stamp Tax Treaty (1973),[69] and that without the presence of a French PE, article 7 of the CGI prevented France from taxing the business profits of the Tunisian companies.

63. Most recently, OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2022), Primary Sources IBFD.
64. *See*, for example, HU: *Kúria*, 5 Oct. 2019, Decision No. Kfv.I.35.504/2018/6, '*APA Ktf*' and HU: *Kúria*, 1 Dec. 2021, Decision No. Kfv.V.35.306/2021/9 ('*G.K. Ktf*).
65. IT: SCdC, 10 Oct. 2019, Decision No. 25490, Case Law IBFD and IT: SCdC, 21 June 2019, Decision No. 16697, Case Law IBFD.
66. BE: HvB *Antwerpen* (Antwerp), 12 Feb. 2019, Decision No. A.300117416, Case Law IBFD.
67. FR: CE, 2 Feb. 2022, Decision No. 443018, *Ministre de l'économie, des finances et de la relance v. Observatoire d'économie appliquée*, Case Law IBFD and FR: CE, 2 Feb. 2022, Decision No. 446664, *CEGID*.
68. FR: *Code Général des Impôts* (General Tax Code, CGI).
69. *Convention between the Government of the French Republic and the Government of the Tunisian Republic for the Avoidance of Double Taxation and the Establishment of Rules for Reciprocal Administrative Assistance with Respect to Taxes* (unofficial translation) (28 May 1973), Treaties & Models IBFD.

However, the French tax authorities rejected the claim that the Tunisian companies were residents of Tunisia for the purpose of the France-Tunisia Income, Inheritance, Registration and Stamp Tax Treaty (1973). The French tax authorities did so on the grounds that the companies did not pay any income tax in Tunisia as they benefitted from a tax exemption regime for special exporting companies. Under this regime, companies were allowed, for a period of ten years, to deduct from their taxable profits all of the profits derived from the export of goods or services. In the case of the Tunisian companies in question, this meant that their taxable profits were effectively reduced to zero.

The *Tribunal Administratif* (Administrative Court of First Instance, TA) accepted the taxpayers' claim that the Tunisian companies were treaty residents.[70] On appeal by the tax authorities, the *Cour Administrative d'Appel* (Administrative Court of Appeal, CAA) overturned the lower court's decision.[71] The taxpayers appealed to the CE.

Bokdam noted that, in prior case law, the CE had dealt with various aspects of the effect of exemption regimes on treaty residence. In *Santander Pensiones* (2015)[72] and *Landesärztekammer Hessen* (2015),[73] the CE held that being "liable to tax" in the treaty article on residence not only implies falling within the legal scope of the tax, but also requires submission to the tax understood as not being subject to structural tax exemption. The CE's interpretation was guided by the purpose of tax treaties, which is to avoid double taxation. A taxpayer that generates income, but that is subject to a structural exemption from tax on that income, is not exposed to the risk of double taxation.

In *Bich* (2020),[74] the CE held, however, that the extent of the tax liability to which a taxpayer is subject in a state is, in itself, irrelevant for the qualification of resident under a tax treaty if the resident article in the tax treaty does not stipulate that the term "resident of a contracting state" "does not include any person who is liable to tax in that State in respect only of income from sources in that State or capital situated therein".[75] As such, when a tax treaty is silent on the limited or unlimited scope of tax liability, confuse the principle and cause of tax liability in on state, on the one hand, and the tax base resulting from the application of the tax base assessment rules, on the other, should not be confused.

Finally, in *Reggazzacci* (2012),[76] the CE held that treaty residence simply requires a person being liable to tax without being totally tax exempt by reason of one's status or activity. It is the liability that gives rise to the risk of double taxation, such that the application of a tax treaty is justified, even if this risk has not materialized in reality.

Bokdam noted that the application of these precedents in the case of the Tunisian export companies led to a conundrum. If such a company only carried out export activities, all of its profits would be exempt from tax and in line with the decision in *Santander Pensiones*,[77] this would exclude the company from being a treaty resident due to a structural and total tax exemption. However, under the regime, export companies were entitled to carry on domestic activities to a certain extent and, in certain circumstances, this would entail that export companies were effectively generating taxable profits under given scenarios. Full exemption was completely dependent on the location of the individual company's clientele. The CE concluded that, as such, the Tunisian export company regime could not be considered rightfully to be a structural full exemption regime. As a partial tax exemption regime, it was not covered by the exclusion in *Santander Pensiones*.[78] For these reasons, the CE overruled the decision by the CAA. Accordingly, France was not entitled to levy a withholding tax on the outbound service payments.[79]

5.3. Treaty entitlement and most-favoured nation clauses

5.3.1. India: *Concentrix* (2021)[80]

Kumar explained that the only thing a treaty most-favoured-nation (MFN) clause achieves is that if a treaty state provides any concession to any country in a "parity group", the same concession will also have to be extended to treaty partner state in question. The parity group can be any jurisdiction, or it can be a neatly defined group, as with OECD member countries, as is commonly used in Indian tax treaties. A prime example here is the India-Netherlands Income Tax Treaty (1988).[81] The

70. FR: TA,5 June 2018, No. 1712188/1-2.
71. FR: CAA, 30 June 2020, No. 18PA02724.
72. FR: CE, 9 Nov. 2015, Decision No. 371132, *Santander Pensiones*.
73. FR: CE, 9 Nov. 2015, Decision No. 370054, *Landesärztekammer Hessen Versorgungswerk (LHV) v. Ministre de l'Economie, des Finances et de l'Industrie*., Case Law IBFD.
74. FR: CE, 9 June 2020, Decision No. 434972, *Bich*, Case Law IBFD.
75. *See* article 4(1), *final sentence* of the *OECD Model* (2017).
76. FR: CE, 27 July 2012, Decision No. 337656, *Reggazzacci*.
77. Decision No. 371132 (2015), *Santander Pensiones*, *supra* n. 72.
78. Id.
79. Decision No. 443018 (2022), *Observatoire d'économie appliquée*, *supra* n. 67 and Decision No. 446664 (2022), *CEGID*, *supra* n. 67.
80. *See* the decision of the High Court of New Delhi (HCND) in IN: HCND, 22 Apr. 2021, *Concentrix Services Netherlands B.V. v. ITO*, W.P. (C) 9051/2021 and W.P.(C) 882/2021, Case Law IBFD.
81. *Convention between the Kingdom of the Netherlands and the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (30 July 1988), Treaties & Models IBFD.

MFN clause in the protocol of the India-Netherlands Income Tax Treaty (1988) provides that, if after the tax treaty was signed, under any Indian tax treaty with "a third State which is a member of the OECD", India should limit source taxation on dividends, interest, royalties and fees for technical services and equipment to a rate lower or a scope more restricted than in the India-Netherlands Income Tax Treaty (1988), the same rate or scope will also apply under the latter tax treaty.[82]

Using OECD membership as the parity group has historically been justified based on the fact the OECD member countries tend to be a homogeneous group of mostly capital exporting countries. As such, it makes sense to uphold similar source tax levels throughout the parity group. However, in the last two decades, the OECD membership has become more broad-based. With the accession to the OECD of countries such as Chile, Colombia, Costa Rica, Mexico and Slovenia, it is clear that the membership of the OECD is no longer homogeneous. In some of India's tax treaties, the OECD membership requirement of the MFN parity group is also fixed in time, but this is not the case in the India-Netherlands Income Tax Treaty (1988).

Kumar noted that, in India, administrative circulars and notifications are usually issued to inform taxpayers of treaty MFN clauses that have effect. In a number of judicial rulings, it has been held that in the absence of treaty-based requirements to the contrary, such a notification was not required for the MFN clause to have effect. In this context, the government of India issued a circular on 3 February 2022, which provides that as a domestic law requirement, each treaty amendment, including those having effect through the application of an MFN clause, must be notified to be legally effective.[83] Kumar observed that this proposition has not yet been tested in the Indian courts.

In *Concentrix*,[84] two Dutch companies received dividends from its Indian subsidiary, which were subject to 10% withholding tax, in line with the India-Netherlands Income Tax Treaty (1988). They requested the application of the MFN clause contained in the protocol to the India-Netherlands Income Tax Treaty (1988), which, as noted previously in this section, stated that, if India and an OECD Member country agreed on a lower rate on dividends, that lower rate also applied in relation to the Netherlands. The two Dutch companies argued that this had been the case with regard to the Colombia-India Income Tax Treaty (2011),[85] the India-Lithuania Income and Capital Tax Treaty (2011)[86] and the India-Slovenia Income Tax Treaty (2003).[87] These tax treaties provided for a withholding tax on participation dividends of only 5%. The three tax treaties were all signed after 1988, when the India-Netherlands Income Tax Treaty (1988) was signed but at a time when the three countries had not yet acceded to the OECD. The taxpayers argued that the subsequent accession of the three countries to the OECD had triggered the Dutch MFN clause. The Indian tax authorities disagreed on the ground that the MFN clause referred to the entering into a tax treaty with an OECD member country when the India-Netherlands Income Tax Treaty (1988) was signed, i.e. in 1988.

The High Court of New Delhi (HCND) decided in favour of the taxpayers. The HCND emphasized that the MFN clause in the protocol was an integral part of India-Netherlands Income Tax Treaty (1988) and did not need separate official notification by the government to have effect. The clause referred to the future signing of tax treaties between India and a third state "which is a member of the OECD", meaning that the clause referred to the OECD membership not at the time of signing the India-Netherlands Income Tax Treaty (1988) but when a taxpayer requested the application of the MFN clause. The HCND emphasized the importance of the principles of a common interpretation of a tax treaty in both contracting states. In line with these principles, the HCND also took into consideration a communication issued by the Dutch tax authorities following the accession of Slovenia to the OECD, which expressed the view that the Slovenian accession triggered the MFN clause in the India-Netherlands Income Tax Treaty (1988).[88]

Kumar noted that the HCND's willingness to adhere to a common interpretation is shared by the Indian tax authorities. In a circular issued on 3 February 2022, the Indian tax authorities categorically rejected the relevance of unilateral interpretations by a treaty partner state on the matter, given that these "unilateral decree/bulletin/publication do not represent shared understanding of the treaty partners on applicability of the MFN clause".[89]

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82. Id., at protocol, IV, Ad Articles 10, 11 and 12.
83. IN: Central Board of Direct Taxes, Circular No. 3/2022 of 3 February 2022, available at https://incometaxindia.gov.in/communications/circular/circular-3-2022.pdf (accessed 15 May 2023).
84. *Concentrix* (2021), *supra* n. 80.
85. *Agreement between the Government of the Republic of India and the Republic of Colombia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (13 May 2011), Treaties & Models IBFD.
86. *Agreement between the Government of the Republic of Lithuania and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (26 July 2011), Treaties & Models IBFD.
87. *Convention between the Government of the Republic of Slovenia and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (13 Jan. 2003) (as amended through 2016), Treaties & Models IBFD.
88. NL: Decree of 28 February 2012, No. IFZ 2012/54M, available at https://zoek.officielebekendmakingen.nl/stcrt-2012-4742.pdf (accessed 15 May 2023).
89. Circular No. 3/2022 of 3 February 2022, *supra* n. 83.

5.3.2. Netherlands and South African cases

5.3.2.1. Dutch HR 17/04584 (2019)[90]

Cools and Koopman discussed a recent decision by the Dutch HR regarding an MFN clause in the dividends article of the Netherlands-South Africa Income and Capital Tax Treaty (2005).[91] Under the Netherlands-South Africa Income and Capital Tax Treaty (2005), dividends were initially subject to a withholding tax of 15%.[92] As a result of the Netherlands-South Africa Protocol (2008),[93] the rate was reduced to 5% for dividends paid on substantial share participations ("participation dividends") and 10% in all other cases. The Netherlands-South Africa Protocol (2008) added an MFN clause to the dividends article of the Netherlands-South Africa Income and Capital Tax Treaty (2005). This stated that, if, in a tax treaty with a third country, South Africa limited source taxation on dividends to a lower rate than that in the amended Netherlands-South Africa Income and Capital Tax Treaty (2005), the same rate, exemption or reduced taxable base as provided in the tax treaty with the third country automatically applied in the relationship between Netherlands and South Africa from the date of entry into force of South Africa's tax treaty with the third country.[94]

Cools noted that the old Netherlands-South Africa Income Tax Treaty (1971)[95] provided for a 0% rate of withholding tax in respect of participation dividends. The Netherlands has a participation exemption regime, such that any source tax levied on dividends paid to Dutch companies can be regarded as an additional cost. Accordingly, for reasons of international competitiveness and to ensure a level playing field between Dutch and other foreign companies active in the same market, obtaining a 0% rate on participation dividends is an important objective in Dutch treaty negotiations. In the Netherlands-South Africa Income and Capital Tax Treaty (2005), the Netherlands accepted a 5% withholding tax on participation dividends. In should be noted that, in the past, South Africa did not levy a dividend withholding tax under its domestic law, which explains the 0% rate in the Netherlands-South Africa Income Tax Treaty (1971). Instead, South Africa levied a so-called secondary tax on companies (STC) of 12.5%. This tax was levied as additional tax on company profits, applied only on the distribution of profits. In 2007, South Africa decided to change its corporate tax policy in dividends. The STC was abolished and replaced by a traditional dividend withholding tax of 10%. South Africa's tax treaties with a 0% rate for participation dividends were to be renegotiated to incorporate a withholding tax rate of 5%.

The taxpayer pointed out that the South Africa-Sweden Protocol (2010)[96] to the Sweden South Africa-Sweden Income Tax Treaty (1995)[97] was signed, by which a source withholding tax of 5% on participation dividends was applied. However, it was agreed that the old 0% rate would continue to apply as long as South Africa still had other tax treaties in force with a 0% rate.[98] When the South Africa-Sweden Protocol (2010) entered into force, South Africa did have several tax treaties still in place which provided for a 0% rate, notably with the Cyprus-South Africa Income and Capital Tax Treaty (1997),[99] the Kuwait-South Africa Income Tax Treaty (2004)[100] and the Oman-South Africa income Tax Treaty (2002).[101] The South African tax authorities had confirmed in a binding private ruling that this implied that participation dividends paid to Swedish companies were also exempt from source withholding tax, at least for the time being. Koopman noted that it looked as if Sweden had been more aggressive in their renegotiations with South Africa. Sweden had only accepted a 5% withholding tax after all of the other treaty partners of South Africa had also given up the 0% rate, whereas the Netherlands accepted the 5% rate on the condition that, in the future, no more 0% rates would be granted to other treaty partners. This does not necessarily mean that Sweden got a better deal. In treaty negotiations, every (higher) benefit has a (higher) price. Sweden might have paid for the benefit with concessions elsewhere in the Sweden South Africa-Sweden Income Tax Treaty (1995).

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90. NL: HR, 18 Jan. 2019, Decision No. 17/04584, Case Law IBFD.
91. *Convention between the Republic of South Africa and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (10 Oct. 2005) (as amended through 2008), Treaties & Models IBFD [hereinafter the *Neth.-S. Afr. Income and Capital Tax Treaty* (2005)].
92. Id., at art. 10(2).
93. *Protocol Amending the Convention between the Kingdom of the Netherlands and the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, with Protocol* (8 July 2008), Treaties and Models IBFD [hereinafter the *Neth.-S. Afr. Protocol* (2008)].
94. *See* article 10(2) and (10) of the *Neth.-S. Afr. Income and Capital Tax Treaty* (2005), as amended by the *Neth.-S. Afr. Protocol* (2008).
95. *Convention between the Government of the Kingdom of the Netherlands and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (15 Mar. 1971), Treaties & Models IBFD.
96. *Protocol Amending the Convention between the Kingdom of Sweden and the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (7 July 2010), Treaties & Models IBFD [hereinafter the *S. Afr.-Sweden Protocol* (2010)].
97. *Convention between the Kingdom of Sweden and the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (24 May 1995) (as amended through 2010), Treaties & Models IBFD [hereinafter the *S. Afr.-Sweden Income Tax Treaty* (1995)].
98. *See* article 10(6) of the *S. Afr.-Sweden Income Tax Treaty* (1995), as amended by the *S. Afr.-Sweden Protocol* (2010).
99. *Agreement between the Government of the Republic of Cyprus and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (26 Nov. 1997) (as amended through 2015), Treaties & Models IBFD.
100. *Agreement between the Government of the State of Kuwait and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (17 Feb. 2004), Treaties & Models IBFD.
101. *Agreement between the Government of the Republic of South Africa and the Government of the Sultanate of Oman for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (9 Oct. 2002) (as amended through 2011), Treaties & Models IBFD.

In the case in question,[102] the taxpayer had argued that the entry into force of the South Africa-Sweden Protocol (2012) to the South Africa-Sweden Income Tax Treaty (1995) had effectively triggered the MFN clause in article 10(10) of the Netherlands-South Africa Income and Capital Tax Treaty (2005) such that the Dutch 5% withholding tax paid had to be reimbursed. The MFN clause expressly stated that this exemption equally applied in both the Netherlands and South Africa.

The Dutch tax authorities refused to refund the withholding tax, arguing that the 0% rate in the South Africa-Sweden Income Tax Treaty (1995) was not a newly agreed 0% rate, as it already applied before the South Africa-Sweden Protocol (2012) was signed. In its decision of 17 August 2017, the *Gerechtshof* (Court of Appeal, Gh) *'s-Hertogenbosch*[103] held in favour of the taxpayer. The tax authorities appealed to the HR.

In his opinion, AG Peter Wattel advised the HR to uphold the cassation appeal of the tax authorities, as this interpretation was most in line with the text and context of the provision, even though he accepted that a "mechanical" interpretation of the provision would trigger the MFN clause.[104] The MFN clause also provided that South Africa had to "limit" source taxation in any future tax treaty. In the pre-existing South Africa-Sweden Income Tax Treaty (1995), the relevant rate was already set at 0% so it is difficult to see how the South Africa-Sweden Protocol (2012) "limited" this rate if it just confirmed that the 0% rate should apply. Nevertheless, the HR did not share the AG's opinion and rejected the appeal of the tax authorities.[105] The HR held that for the purpose of the Dutch MFN clause, the Swedish protocol of 2012 had to be considered as a later tax treaty between South Africa and a third country. The fact that in practice the South Africa-Sweden Protocol (2012) simply continued the 0% rate was irrelevant. The HR observed that its interpretation of the MFN clause was not contradicted by any public indication of a joined intent by the signatory states. As such, the interpretation could not be held to be breaching the principle of good faith.

5.3.2.2. Tax Court of South Africa, *ABC Proprietary* (2019)[106]

Cools and Koopman discussed a case decided by the Tax Court of South Africa (TCSA). This case dealt with the same issue as that considered by the Dutch HR, but that concerned the inverse case of a South African company paying participation dividends to a Dutch shareholder.

As with the Dutch HR, the TCSA decided in favour of the taxpayer and held that the latter was entitled to 0% rate withholding tax by application of the MFN clause in article 10(10) of the Netherlands-South Africa Income and Capital Tax Treaty (2005). The TCSA observed that it was difficult, but necessary, for it to refrain from expressing views at the unforeseen consequences of South Africa's fiscal well-being on the effect of the interpretation upheld. It noted that it could not rewrite the international treaties concluded by South Africa and other countries to remedy a problem that had arisen.

5.3.2.3. Further discussion

Wijnen noted that all of the cases examined in sections 5.3.2.1 and 5.3.2.2. related to Netherlands tax treaties, which gives the impression that MFN clauses are part of the regular Netherlands treaty policy. However, nothing could be further from the truth. MFN clauses reduce (or even freeze) the flexibility of the treaty policy of a treaty partner in future negotiations, and, therefore, in a way are counterproductive. In Netherlands treaty policy, such clauses only play a role as a last resort, if at the end of the negotiations no other solution appears to be available. When at the very end of the negotiations with India, it turned out that India continued to insist on very high withholding rates (dividends 15%, interest 15% and royalties 20%, including technical services for which no withholding tax had been accepted before), the Netherlands reverted to the MFN clause to arrive at a compromise, based on the concept that India, in building its treaty network, would agree sooner or later to lower withholding rates. The MFN clause could have covered all countries of the world. It was limited in the end to OECD member countries. Not too long after the conclusion of the India-Netherlands Income Tax Treaty (1988), the Germany-India Income and Capital Tax Treaty (1995)[107] was signed, which included lower withholding rates that triggered the MFN clause in the India-Netherlands Income Tax Treaty (1988) for the first time. The situation in *Concentrix*,[108] originating in the expansion of the OECD over the years, was evidentially not foreseen, neither by the Netherlands delegation nor the Indian delegation. Cools noted that the same analysis applied to the Netherlands-South Africa Income and Capital Tax Treaty (2005). This was that the prospect of growing investment in South Africa necessitated the inclusion of the MFN clause to ensure that the Netherlands could benefit in the future from a level playing field with third countries. Kumar believed that given the current diverse composition of OECD membership, an MFN clause with OECD member country parity group makes little sense.

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102. Decision No. 17/04584 (2019), *supra* n. 90.
103. NL: Gh 's-Hertogenbosch, 17 Aug. 2017, Decision No. 15/01361 and BRE 15/395, Case Law IBFD.
104. NL: HR, 20 Feb. 2018, Decision No. ECLI:NL:PHR:2018:181 conclusion of AG Wattel.
105. Decision No. 17/04584 (2019), *supra* n. 90.
106. ZA: TCSA, 12 June 2019, *ABC Proprietary Ltd. v. The Commissioner for the South African Revenue Services*, No. 14287, Case Law IBFD.
107. *Agreement between the Federal Republic of Germany and the Republic of India for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital* (19 June 1995), Treaties & Models IBFD.
108. *Concentrix* (2021), *supra* n. 80.

6. Session 5: Recent Case Law on Exemption from VAT/GST in Respect of Hospital and Medical Care

6.1. Panel composition and agenda

The session was chaired by Justice Henry Visser, TCC, Canada. The panel consisted of Justice Dagmara Dominik-Ogínska, *Wojewódzki Sąd Administracyjny* (*Voivodship* Administrative Court, WSA), Poland; Justice Csilla Heinemann, *Kúria*, Hungary; Judge SeuYeong Kim, KHC, Korea (Rep.); and Chief Judge Mikko Pikkujämsä, *Korkein hallinto-oikeus* (Administrative Court of Northern Finland, KHO).

6.2. Canada

Visser noted that the Canadian GST/harmonized sales tax (HST) is a VAT-style tax system. Under the GST/HST rules, which are set out in Part IX of the Canadian Excise Tax Act,[109] there are the following three types of supply: (i) taxable supplies (subject to rates of 5%, 13% and 15%); (ii) zero-rated supplies (subject to a rate of 0%); and (iii) exempt supplies, which are not taxable. Unlike suppliers of taxable and zero-rated supplies, suppliers of exempt supplies are not entitled to input tax credits. GST/HST applies to taxable supplies of goods and services "made in Canada", meaning that the supply takes place in Canada under the detailed place of supply rules or it consists of an import of goods and services into Canada.

Visser stated that, as in many VAT systems, the general rule in Canadian GST/HST is that all medical supplies made in Canada are taxable at the ordinary rates, unless they are specifically exempted or zero-rated. Medical supplies made outside of Canada are generally not subject to GST/HST, but may be subject to GST/HST on import. Exempt medical supplies include most health, medical and dental services performed by licensed medical professionals for medical reasons. It does not include medical supplies made for cosmetic reasons. The supply of prescription drugs and specific medical devices, such as prescription glasses, are examples of zero-rated medical supplies.

Visser next provided an overview of relevant recent cases of interest. In *Vocan Health Assessors* (2021),[110] the TCC held that the service of making off-site medical assessments and reports for insurance companies and law firms were not institutional health care services, and, therefore, not exempt from GST/HST. In *Kevin Davis Dentistry* (2021),[111] the TCC decided that exempt dental services that came with the provision of zero-rated orthodontic appliances give rise to input tax credits at a rate of 35%. The last decision contradicts to some extent a prior decision by the same court in *Brian Hurd* (2017),[112] in which the TCC held that an orthodontist's services were a single exempt supply. In *Santa Cabrini Hospital* (2015),[113] the TCC held that a contract to provide nurses was not a contract for nursing services. As such, the service was not exempt from GST/HST. In *Westcoast Energy* (2020),[114] the TCC decided that massage, acupuncture and homeopathy related services were subject not exempt medical services. In *Filiatrault* (2017),[115] the same was said to be true for psychotherapeutic services provided by a licensed psychologist. The services provided were subject to GST/HST because he was not a practitioner of psychology, the profession for which he had obtained the licence. Visser noted that some of the TCC decisions referred to are currently under appeal to the Canadian Federal Court of Appeal (CFCA). Finally, in *Hedges* (2016),[116] the CFCA held that medical marijuana sold to Compassion Club Society, a dispensary whose members suffer from various ailments, was taxable because the sale was illegal and unlawful sales cannot be zero-rated. Leave to appeal to the SCC was denied.

6.3. The EU VAT regime

Heinemann referred to the preamble of the EU VAT Directive (2006/112), which provides that:

109. CA: Excise Tax Act (CETA), Pt. IX.
110. CA: TCC, 6 Aug. 2021, *Vocan Health Assessors Inc. v. The Queen*, 2021 TCC 49, available at https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/511205/index.do (accessed 15 May 2023).
111. CA: TCC, 25 Mar. 2021, *Dr. Kevin L. Davis Dentistry Professional Corporation v. The Queen*, 2021 TCC 25, available at https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/494789/index.do (accessed 15 May 2023).
112. CA: TCC, 26 July 2017, *Dr. Brian Hurd Dentistry Professional Corporation v. The Queen*, 2017 TCC 142, available at www.canlii.org/en/ca/tcc/doc/2017/2017tcc142/2017tcc142.html (accessed 15 Apr. 2023).
113. CA: TCC, 28 Oct. 2015, *Hôpital Santa-Cabrini v. The Queen*, 2015 TCC 264, available at https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/120722/index.do (accessed 15 May 2023).
114. CA: TCC, 28 Oct. 2020, *Westcoast Energy Inc. v. The Queen*, 2020 TCC 116, available at https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/487861/index.do (accessed 15 May 2023).
115. CA: TCC, 22 Nov. 2017, *Filiatrault v. The Queen*, 2017 TCC 232, available at https://decision.tcc-cci.gc.ca/tcc-cci/decisions/en/item/301442/index.do (accessed 15 May 2023).
116. CA: CFCA, 25 Jan. 2016, *Hedges v. Canada*, 2016 FCA 19 and [2016] G.S.T.C. 61 (SCC), available at https://taxinterpretations.com/content/365918 (accessed 15 May 2023).

> The common system of VAT should, even if rates and exemptions are not fully harmonised, result in neutrality in competition, such that within the territory of each Member State similar goods and services bear the same tax burden, whatever the length of the production and distribution chain.[117]

As in Canada (*see* section 6.2.), the EU VAT Directive (2006/112) exempts transactions involving the provision of hospital and medical care in the exercise of medical and paramedical professions.[118] In general, the supply of medical goods and services should not be granted exemption. However, if (i) the supply is not essential to the exempted transactions, or (ii) the basic purpose of the supply is to obtain additional income through transactions that are in competition with those of commercial enterprises subject to VAT, VAT is levied.[119]

Heinemann noted that the medical care exemption is one of many exemptions from VAT on activities in the public interest with a view of facilitating access to certain goods and services by avoiding the added cost of VAT. One of the issues is that the EU VAT Directive (2006/112) does not define some of the crucial terms used in the exemption provisions, such as “medical care” or “closely related activities”. As such, the scope of these provisions has been specified in the jurisprudence of the ECJ.

Heinemann noted that there has been a very great number of ECJ cases on the VAT exemption for medical services. Based on the jurisprudence, it is clear that the concept of “the provision of medical care” is intended to cover services that have as their aim the diagnosis, the treatment and, in so far as possible, the cure of diseases or health disorders. An important criterion is the place where the services are provided. The EU VAT Directive (2006/112) contains separate exemption rules for services supplied in a hospital environment on the one hand, and medical services provided outside a hospital environment on the other.

Heinemann provided a number of examples of ECJ decisions that clarified the scope of the medical exemption. For instance, in *PFC Clinic* (Case C-91/12),[120] the ECJ held that certain plastic surgery and other cosmic treatments were held to be services intended to diagnose, treat or cure diseases, which, therefore, fell under the VAT exemption for medical services. Also covered by the exemption are medical tests carried out by a laboratory governed by private law outside a hospital,[121] and services consisting in compiling an individual file, including the user’s clinical record closely related to medical care.[122]

Heinemann gave also examples of cases in which the ECJ held that the activities did not fall within the exemption. Such was the case for the transportation of human organs and samples of human origin for the purpose of medical analysis for clinics and laboratories by a third party.[123] Similarly, the ECJ has held recently that the nutrition monitoring services provided by a certified and authorized professional in sports facilities were not exempt from VAT.[124] With regard to the physical location criterion, Heinemann noted that a laboratory governed by private law and a private clinic had been recognized as establishments of a similar nature to a hospital where exempt medical services were provided.[125]

6.4. Hungary

Heinemann discussed a recent case on the VAT exemption on medical services in Hungary. The applicant’s main activity was specialized outpatient medical care. Since 2008, it had been authorized to carry out general surgery and aesthetic plastic surgery. The tax authorities had issued a notice of deficiency in respect of unpaid VAT due on services provided between 2010 and 2013. The higher tax authority confirmed the assessment and added a penalty, concluding that it was for the applicant to provide evidence that he fulfilled the conditions for the VAT exemption in section 85(1)(b) or (c) of the Hungarian *Törvény az általános forgalmi adóról* (Law on Value Added Tax, LVAT).[126] This exemption may be granted in respect of plastic surgery services if the surgical intervention is a medical intervention and is not a taxable cosmetic treatment. This is the case if the intervention is not connected with the cure or restoration of a specific disease or health disorder, nor serves a purpose for maintaining health. The tax authorities had repeatedly requested the applicant to provide evidence, but the taxpayer failed to do so, especially on the ratio between the two types of activity – (i) medical surgeries and (ii) cosmetic treatment – provided. The taxpayer appealed to the courts, arguing that the plastic surgery procedures are not separable and that there are no parameters on the basis of which plastic surgery procedures can be identified. The *Fővárosi Törvényszék* (Court of First Instance, FT) decided in favour of the taxpayer. At the time of writing this article, the case was pending before the *Kúria*. Heinemann noted that the *Kúria* had already issued decisions on this issue, and would probably not deviate from these. These past decisions greatly relied on ECJ jurisprudence. As with the EU VAT Directive (2006/112), the Hungarian LVAT provides

117. Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L 146 (2006), recital 7, Primary Sources IBFD [hereinafter the EU VAT Directive (2006/112)].
118. Id., at art. 132(1).
119. Id., at art. 134.
120. SE: ECJ, 21 Mar. 2013, Case C-91/12, *Skatteverket v. PFC Clinic AB*, Case Law IBFD.
121. DE: ECJ, 8 June 2006, Case C-106/05, *L. u. P. GmbH v. Finanzamt Bochum-Mitte*, Case Law IBFD.
122. PT: ECJ, 13 Jan. 2022, Case C-513/20, *Autoridade Tributária e Aduaneira v. Termas Sulfurosas de Alcafache, S.A.*, Case Law IBFD.
123. BE: ECJ, 2 July 2015, Case C-334/14, *Belgian State v. Nathalie De Fruytier*, Case Law IBFD.
124. PT: ECJ, 4 Mar. 2021, Case C-581/19, *FRENETIKEXITO – UNIPESSOAL, LDA v. Autoridade Tributária e Aduaneira*, Case Law IBFD.
125. *L.u.p.* (C-106/05), *supra* 121 and DE: ECJ, 7 Apr. 2022, Case C-228/20, *I GmbH v. Finanzamt*, Case Law IBFD.
126. HU: *Törvény az általános forgalmi adóról* (Law on Value Added Tax, LVAT).

for an exemption for medical services, there is a connection with the public interest nature of the medical activity. The tax exemption granted on the basis of the public interest nature of the activity is linked to the purpose of the activity. As such, the taxpayer must demonstrate entitlement to the exemption, where appropriate, by documenting the professional criteria and the decisions of the medical practitioner in question.

6.5. Finland

Pikkujämsä discussed a case decided by the Finnish *Korkein hallinto-oikeus* (Supreme Administrative Court, LHO) in 2013.[127] The case concerned the leasing of staff which included medical doctors. The lessor company did not run a hospital nor provide the medical care, nor was it responsible for the patients. It only sold staffing services to the medical hospital. The KHO held that the activity was exempt from VAT. It based its conclusion on the observation that medical doctors are legalized and registered professionals, whose work constitutes an end in itself, and not only a means of better enjoying any principal services provided by the lessor.

Pikkujämsä noted that the case had gained additional interest in light of a recent decision by the Swedish *Högsta förvaltningsdomstolen* (Supreme Administrative Court, Hf) in which the latter came to the exact opposite conclusion with regard to the leasing of medical care.[128] The Hf held that VAT is to be levied on a staffing agency's contracting of qualified medical care personnel. In order to reach this conclusion, the Kf referred, inter alia, to the ECJ's jurisprudence on the hiring out of teachers and social workers.

Pikkujämsä believed the divergence is remarkable, given that Finland and Sweden are countries with common legal and cultural history and similar welfare systems, and given that the decision is essentially based on the implementation of the same legal rules pertaining to EU law, i.e. articles 132(b) and (c) of the EU VAT Directive (2006/112). With regard to the question of whether such a divergence in national case law is permitted, he noted that the Treaty on the Functioning of the European Union (TFEU) prescribes that national courts may submit preliminary questions to the ECJ in case of questions concerning the interpretation of EU law.[129] In *Consorzio Italian Management* (Case C-561/19),[130] the ECJ held that where a national court of final instance is made aware of the existence of diverging lines in the case law of national courts, the court in question must be particularly vigilant in its assessment of whether there is any reasonable doubt as to the correct interpretation of the provision.

6.6. Poland

Dominik-Ogínska discussed a decision by the Polish *Naczelny Sąd Administracyjny* (Supreme Administrative Court, NSA) regarding the provision of services by a cooperative to entities which conducted medical activities. Based on the service contracts it was clear that the services primarily concerned the cleaning of hospital premises. The cooperation had applied the VAT exemption for medical care services. The tax authorities refused to grant the exemption, based, inter alia, on the contention that the services agreements lacked any provisions indicating that the staff also performed direct patient care services. If the cooperation could provide evidence this was the case, the cleaning services were to be assessed as related to medical care, and they had duly been exempted from VAT. No such evidence was provided. The *Wojewódzki Sąd Administracyjny* (Administrative Court of First Instance, WSA) rejected the appeal by the taxpayer and confirmed the position by the tax authorities. It held that the object of the services was clearly related to the infrastructure and equipment of medical facilities, and not the patients of these facilities. The fact that the personnel might occasionally undertake tasks in the field of direct service to patients (such as the transfer of patients) or the provision of assistance with patient care, did not imply that the services were exempt from VAT. On appeal by the taxpayer, the NSA overturned the decision by the lower court, holding that the exemption for medical services depended on the qualification and location of the recipient of the services and not the service provider.[131] Under the exemption provision in article 43(1)(18) of the Polish *Ustawa o podatku od towarów i usług* (VAT Law, Uptu),[132] medical care services are those services that are provided to medical entities on the premises of their medical facilities where medical activities are performed. In the case in question, the cleaning services therefore fell within the scope of the exemption. The NSA added that, even if cleaning services are not closely related to the provision of medical services in the strict sense, they served the purpose of the proper performance of patients care and the preparation of medical treatment.

127. FI: KHO, 7 Mar. 2013, KHO:2013:39, available at www.kho.fi/fi/index/paatokset/vuosikirjapaatokset/1365151049560.html (in Finnish) (accessed 15 May 2023).
128. SE: Hf, 7 June 2018, HFD 2018 ref. 41, available at www4.skatteverket.se/download/18.190ee20e163797380b111756/1539757133485/HFD%202018%20ref.%2041.pdf (accessed 15 May 2023).
129. Treaty on the Functioning of the European Union (TFEU) (as amended through 2008), art. 267 OJ, C 115 (2008), Primary Sources IBFD.
130. IT: ECJ, 6 Oct. 2021, Case C-561/19, *Consorzio Italian Management and Catania Multiservizi SpA v. Rete Ferroviaria Italiana SpA*.
131. PL: NSA, 19 Dec. 2018, No. FSK 2118/16.
132. PL: *Ustawa o podatku od towarów i usług* (VAT Law of 11 March 2004, Uptu), last amended 29 April 2022, Dz.U. 931/2022.

6.7. Korea (Rep.)

SeuYeong Kim noted that in the Korean Value Added Tax Law (VATL)[133] "medical and health services (including veterinary services) prescribed by Presidential Decree [the VAT Decree]" are exempt from VAT. The VAT Decree further defines "medical and health services" and the term also includes funeral services. In its jurisprudence, the KSC has had ample opportunity to clarify the scope of the exemption. In a first case from 2013, the issue concerned a peculiarity under Korean law by which only visually impaired persons can be registered massage therapists and provide services that are exempt from VAT.[134] The KSC held that, if a visually impaired person and a non-visually impaired person ran a massage shop jointly and hired visually impaired therapists, the massage services provided by the business would not be exempt from VAT. In a second case, the KSC had to consider whether services incidental to (VAT exempt) funeral services, such as food-serving at funerals, were also exempt from VAT.[135] The KSC held that incidental food serving at funerals was exempt from VAT. It based its decision on the legislative intent of the exemption for funeral services and on Korean funeral custom. A third case, heard by the Seoul High Court (SHC), concerned the issue of whether visiting massage services to mothers in postnatal care centres were exempt from VAT.[136] Under the VATL, services provided in postnatal care centres are exempt from VAT. However, massage services do not fall under the definition of ordinary services provided in such a facility. The SHC held that, as such, the massage services were not exempt from VAT. They were a separate and optional service from the usual postnatal care. Only services directly provided by or in the postnatal care centre qualified as VAT exempt services.

6.8. Final observations

Martin noted that VAT/GST is a general tax on consumption. Accordingly, exemptions should be interpreted in a limited way, as a wide exemption is simply contrary to the principle of a general tax on consumption. He wondered whether in the case of medical and health care, courts might be tempted to deviate from the narrow construction of VAT exemptions. He also noted that the issue of outsourcing of activities also arises in the field of the VAT exemption on financial services. Under the financial services exemption, the case law on expanding the VAT exemption appears more restrictive than that on medical services.

Visser believed that, in Canada, the VAT exemption of outsourcing was a big issue, both in the financial and in the medical services industry. Canadian courts did not give special consideration to the medical services industry due to the specific public interest nature of medical care. He believed that empathy should not be taken into consideration from judicial perspective. Outsourcing the services of a nurse or outsourcing the services of a cleaner should be adjudicated in the same manner. Pikkujämsä noted that, in the settled case law of the ECJ, the outsourcing of services in the financial sector can be exempt if these services are essential to the ultimate financial services provided. He noted that, for some reason, the ECJ appears not to have adopted the same reasoning in respect of medical services.

7. Session 6: Tax Procedures in the Aftermath of the COVID-19 Pandemic

7.1. Panel composition and agenda

The session was chaired by Justice Peter Panuthos, Tax Court (USTC), United States. The panel was composed of Justice Akin Ajibola, Tax Appeal Tribunal (TAT), Nigeria; Judge Pierre Collin, CE, France; Justice Jennifer Davies, FCA, Australia; Justice Manuel Hallivis-Pelayo, *Tribunal Federal de Justicia Administrativa* (Federal Court of Administrative Justice, TFJA), Mexico; Judge Anette Kugelmueller-Pugh, BFH, Germany; and Justice Christopher McNall, First-tier Tribunal (FTT), United Kingdom. The session was based on providing the answers to the following seven questions, which related to changes necessitated by the COVID-19 pandemic.

7.2. Question 1: What changes, if any, have tax courts made in processing cases and dealing with taxpayers and the tax authorities?

Davies of the FCA noted that her court is a general court, and not a specialized tax court. However, specialist tax judges usually get to hear the tax cases. During the COVID-19 pandemic, the decision was taken to not shut down the courts. She believed that was a good decision. If the courts had closed down, it would have had a very significant effect on litigants. The primary effect of the pandemic was the immediate change from in-person hearings to virtual hearings in February 2020. This was a consequence of the general stay-home orders in the State of Victoria. Judges were not permitted to go to court and working from home was compulsory. Davies believed the fact that the FCA is well resourced generally was very fortunate.

133. KR: Value Added Tax Law (VATL).
134. KR: KSC, 9 May 2013, 2011Du5834, available at www.kci.go.kr/kciportal/ci/sereArticleSearch/ciSereArtiView.kci?sereArticleSearchBean.artiId=ART001871576 (in Korean) (accessed 15 May 2023).
135. KR: KSC, 28 June 2013, 2013Du932, available at https://legalengine.co.kr/cases/en/iIhl8BIdqYYVvoXUNeA2hw (in Korean) (accessed 15 May 2023).
136. KR: SHC, 9 Jan. 2020, 2019Nu44264.

The e-filing system was already in place before the pandemic. Every judge received computer screens, docking stations, etc. and other necessary equipment to work from home in a comfortable way. She noted that the right to a hearing and the public aspect of hearing are crucial aspects of the adversarial nature of common law. Accordingly, remote systems were put in place to facilitate this. All hearings took place remotely, but were publicly accessible. Davies noted that a remarkably high number of members of the public were attending the virtual hearings, simply because the virtual modus is such an easy way for people to get an insight in the judicial procedure. Virtual hearings worked very well, but there were disadvantages. Judges were looking at screens and not at the legal practitioners and vice versa, so there is no body language input, which is an important source of information for a judge. Practitioners were also not very familiar as to how to conduct virtual hearing. But it worked because of the high willingness of all stakeholders to cooperate and to make it work, and because of the administrative efforts of the staff of the courts to pre-empt problems by spending time in setting up sessions and checking the technology and the connections, etc. Regardless of the smooth operation, Davies believed that virtual hearings gave rise to some (technology) stress and (screen) tiredness that are not found at in-person hearings.

Ajibola stated that the experience in Nigeria's tax courts was not as good. Even if the number of COVID-19 infections and casualties is generally taken to be reasonably low in Nigeria, the anxiety in society was as high as in any other country. However, facilities to deal with the issues and the level of preparedness were lower than in most countries. Presidential orders were issued, which stopped all activities in the country. As such, between March and July 2021, judicial activity in Nigeria came to halt. Subsequent guidelines were issued by the Chief Justice, according to which courts and tribunals could only hear urgent or high importance matters. Interestingly, few people thought tax matters to be urgent.

In Nigeria, there were, and are, no statutory rules on virtual hearings. Judicial courts are statutory creations, so statutory rules are needed to change their procedures. In practice, this meant that the access to courts and tribunals was reduced, the number of pending cases fell, and there was a slow-down in the pace at which cases were heard. Only at a later stage, when the pandemic was mostly over, was legislation adopted that permitted virtual hearings and e-filings.

McNall noted that before the COVID-19 pandemic struck, a pilot programme for video hearings was running at the UK FTT and the Upper-tier Tribunal (UTT), so that, when the pandemic struck, relevant structures and ideas were in place. During the pandemic, the initial digital platform for court proceedings was updated to increase its functionality. McNall was not sure what would have been the fate of the pilot programme if the pandemic had not happened, as it was clearly a catalysator for wide-scale adoption of digitalized court proceedings.

Kugelmueller-Pugh revealed that the situation at the German BFH was completely different. The German procedural code does not permit virtual hearings. Virtual deliberations between judges on a bench are possible, but for giving a decision, five judges must be present in the courthouse. This did not change during the pandemic.

7.3. Question 2: With regard to changes, have tax courts been able to effectuate changes on their own, or have they required the legislature to intervene and make changes?

Hallivis-Pelayo noted that the Mexican tax courts have been using an e-filing system since 2010. The system is compulsory for the government, but not for taxpayers. During the pandemic, the system has been upgraded to make it more user-friendly. Capacity building programmes were initiated, and the appropriate legislation was put in place. Hallivis-Pelayo believed sufficient tools were at the disposal of the tax judges to ensure a continuous serving of justice during the pandemic.

In France, the fundamental principles of the judicial procedure are included in statutory law. Collin noted that executive ordinances can give greater specificity to statutory rules. In order to deal with the pandemic, the French Parliament authorized the executive branch to issue the necessary ordinances. A first set of rule changes were put into place in March 2020. Under the new rules the time limit extended for the parties to submit cases as well as the time limit for judges to decide. The thresholds for cases that could be heard by just one judge were lowered. Certain alterations of the practical rules of court operation could be made by judges themselves based on the theory of exceptional circumstances. However, Collin believed legislative or regulatory backing of rule changes is preferable.

In Germany, it was the courts who drove the change of rules to continue working through the pandemic. For instance, taxpayers have the right to consult the files of the case, but such inspection must take place "in chamber", meaning physically at the premises of the court. The German courts have an e-filing system. Consequently, the remote inspection of files is technically possible, and it is permitted in exceptional cases. As such, during the early pandemic, the BFH allowed files to be sent to taxpayers and to be consulted remotely. Another example is the use of witnesses at the court. Out-of-country witnesses were forbidden to travel to Germany to provide evidence. Normally, this would imply the court concluding that the witness is unavailable. Nevertheless, during the pandemic, the BFH held that, instead of declaring the witness unavailable, courts should postpone the hearing until the witness could travel. Around mid-2020, at a later stage of the pandemic, witness refusal to travel to the court on the ground as the risk of infection was no longer accepted as a valid reason by the courts. Kugelmueller-

Pugh noted that the courts did continuously take sufficient safety measures to prevent infections. As such, requiring physical presence was justified.

7.4. Question 3: What technological innovations did courts use during the pandemic, and what challenges have the courts faced?

Hallivis-Pelayo believed that, as Mexico is a civil law country, there are no fundamental obstacles to the implementation of "e-trial" procedures before the tax courts. The challenge is to get the taxpayers accustomed to it, given that they have the option to use it or not. Taxpayers appear to distrust the only application. Another aspect of the implementation of e-trials is the need to train and retain staff who are up to date both with the new technologies and the new legal framework.

The same problem arose in Nigeria. Ajibola noted that an e-filing platform had been introduced at the tax courts, but that taxpayers would not necessarily use it, given that its use was not compulsory. As a result, courts had to juggle different methods of operation. In addition to the e-filing platform, some taxpayers continued to present their files in physical form, but others presented files on a physical data carrier. In certain instances, the counsels of taxpayers would abuse these very open-ended procedural rules. With regard to the use of remote evidence given in court via videoconferencing, it turned out to be necessary to issue "zoom etiquette" rules, such as on the proper identification of the speaker, the muting of microphones when not speaking, a dress code, etc.

With regard to the taking of virtual evidence from witnesses located in other jurisdictions, Greg Sinfield of the UK UTT noted that one of the challenges faced was caused by the limitations in the application of The Hague Evidence Convention (the "Convention").[137] The Convention establishes methods for the provision of testimony and documents between signatory states when evidence is sought in another signatory state where the evidence is located for use in judicial proceedings in the requesting state. The Convention has been signed by over 60 countries, but does not apply to administrative courts. In many jurisdictions, tax courts are considered to be administrative courts. If the Convention does not apply, the permission of individual countries is necessary to obtain evidence (with regard to the establishment of the facts) from a person located in that country. One additional issue is that, in respect of remote evidence provided digitally, a court cannot readily ensure where the person is located. This raises procedural issues regarding the validity of the evidence if no individual permission is given by the relevant jurisdiction. If evidence is obtained without the right permission, this can lead to a diplomatic incident. Sinfield noted that a number of countries had been given advance consent for the UK courts to obtain cross-border evidence. One country has backtracked on its advance consent, and is now requesting individual consent for each calling of a witness. In principle, the country in question will always consent, but the administrative burden created is regrettable.

Davies added that one of the issues relates to the fact that, in order to give sworn testimony, witnesses have to take an oath. However, if the witness is located in another sovereign state and that state has a bad record with regard to free speech, it might not always be possible for the witness to tell the truth. Panuthos agreed that it is not straightforward for judges to accept sworn testimony from witnesses that are physically located in another jurisdiction. The pandemic has exacerbated this issue. Cools noted that the membership of the Convention is limited. For instance, Belgium and Canada have not signed the Convention. So, when a court in the Netherlands asked a court in Belgium to take evidence from a person in Belgium who was willing to travel to the Netherlands because of the pandemic, the Belgian court refused the request, as the Convention did not apply. McNall added that a final issue in this regard is the streaming of national court proceedings online, with the stream being accessible in other countries. In the United Kingdom, a law firm was reprimanded for streaming a UK court session to its US office without having obtained permission from the UK authorities to do so.

7.5. Question 4: Have the judges and the public (both lawyers and self-represented taxpayers) responded well to the new technologies?

Panuthos stated that, as a judge, he considers the court room to be a sacred place which is not comparable to a home office, which is essentially just a screen to look at. He believed that this has been the general reaction. He had found that being locked in a home office is not particularly pleasant. Lawyers had mixed feelings, as they appeared to like being spared from the burden of travelling to the courthouse. At the USTC, 70% of the cases involve self-represented taxpayers. Taxpayers appeared to like the possibility to give evidence from their kitchen tables. Accordingly, the USTC will continue to use the systems that were put in place during the pandemic, as an option for the taxpayer.

Kugelmueller-Pugh believed that the abrupt change during the pandemic from full physical presence at the courthouse to nearly fulltime remote work had had a great effect on the judges and the staff, but had been very well received. The BFH is located in Munich, and the judges and staff enjoyed not having to travel to the city on a daily basis. Consequently, getting staff back to a

137. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, signed on 18 March 1970 and effective as of 7 October 1972.

fulltime physical presence after the pandemic turned out to be difficult, if not impossible, especially for the younger staff who are keen to establish a better work-life balance. The BFH will have to find a compromise in this regard.

Heinemann noted that the possibility for remote work had improved dramatically her work-life balance, simply because she could save on commuting time. More importantly, working from home appeared to give her more time to dedicate to the core tasks of a judge, which is to reflect on decisions and allow more time to revise decisions, etc. Panuthos agreed that working from home as a judge did not affect his productivity. He did consider the timing of the pandemic to be "lucky" in a sense, given that all of the remote activities required advanced information and communications technology (ICT) infrastructure. Such ITC infrastructure was in place in 2020, but none of it would have been possible if the pandemic had struck ten years earlier.

Davies emphasized the relief she and others at the FCA felt when the decision was taken to move back to face-to-face interactions at the court. She found the lack of interactions with colleagues during the lock-down to be soul destroying at times. In her view, collegiality among judges is what makes the job. Without this, a judge's focus is solely absorbed by the cases, which tilts the work-balance scale in the opposite direction. Practitioners are also expressly requesting in-person hearings. The flexibility gain of remote work is great, but it should not become the default rule.

7.6. Question 5: What are the downsides for judges, staff and the public in not coming to the courthouse to work and deal with cases?

Ajibola believed every human being craves human interaction. Judges are no different in this respect. Self-represented taxpayers tend to be greatly helped by in-person meetings, as they can raise practical questions concerning the procedure. All of this is much more difficult in virtual hearing system. McNall believed that personal interaction is not always an upside. Some people are naturally solitary persons. For taxpayers in the United Kingdom, there was a very practical upside to virtual hearings, as they did not need to queue in the courthouse.

Davies believed the advantages and disadvantages depended very much on the nature of the work carried out by the court. In substantial tax disputes, face-to-face interactions are very useful. The lack of engagement by counsel with judges in virtual hearings is problematic. Counsel cannot read the body language of judges and vice versa. Experience also demonstrates that, in virtual trials, judges tend to ask fewer questions. Oral hearings are perfect for testing and clarifying. For this reason, practitioners did not like virtual hearings, as they could not ascertain whether the judge was following their reasoning.

7.7. Question 6: Has the workload of courts been influenced by the pandemic? Have proceedings been delayed or lengthened as a result of COVID-19?

Anette Kugelmueller-Pugh noted that, before the pandemic, a judge of the German BFH would have six to seven oral hearings a day. There is the possibility to decide cases without oral hearings, but only if the parties agree. During the lock-down, this approach was turned upside down. As a default rule, there were no oral hearings, but parties had to option to request to have one. A backlog arose, as the lower courts were slow at embracing the change. This, in turn, affected incoming cases at the BFH. The BFH hears approximately 2,000 cases a year. Thanks to the measures and the willingness of parties to waive their right to an oral hearing, the case completion rate only dropped by 10% during the first lock-down of 2020-2021. Given that the lower courts were still allowing oral hearings which created delays, the backlog subsequently shifted to the BFH with the decision-making numbers going down with 30% in 2021. Most of this fall in numbers was caused by the fact that parties were not keen to surrender their right to have an oral hearing. Individual case completion times have not really increased during the pandemic, though. In normal times, the BFH would grant compensatory damages to taxpayers if a case is not finalized with a reasonable time. The pandemic was held to be an exceptional circumstance that could not be attributed to the government, so no damages were due in case of delays due to COVID-19.

Panuthos noted that, in the United States, mail was not being delivered at some point during the pandemic. Seventy percent of the cases at the USTC involve self-represented taxpayers, so not receiving mailed court documents was a great problem. After a while, the mail services resumed, but all documents were delivered at once, so a huge bottleneck was created at the courts, which, at the same time, were also facing staff shortages. The tax authorities also completely shut their doors for a few months, but the statutes of limitations for taxpayer compliance were still running and running out. Consequently, when the tax authorities resumed activities, they started sending notices of deficiency in bulk. This meant that, in 2022, the number of petitions at the USTC reached a level unseen before, simply because of the bunching effect of the individual cases.

According to McNall, similar bunching up effects could be seen in the United Kingdom, especially at the appeal level. In general, at the FTT, there were no delays and on average the same case time scales were met as before the pandemic. For the most complex cases, the turnover time even fell by around a third, with most cases being processed under two years, which is the "undue delay limit".

Davies noted that the workload of the individual judges did rise during the pandemic because of the working from home scenario, which provided little distraction. When the ordinary turn of affairs at the courts resumed after the pandemic, there was a clear sense of exhaustion among the judges.

7.8. Question 7: If a court used virtual proceedings during the pandemic, will it continue to use the same? Is the court ready for the next pandemic?

Collin stated that, in France, there was a practical interest in moving towards virtual court hearings, but one is weary of the downsides. For instance, hybrid trials are difficult to reconcile with the rights of the taxpayer. The CE had held that remote hearings should only be used if physical presence is impossible. The *Conseil Constitutionnel* (Constitutional Court, CC) has held that in criminal tax cases, videoconferencing can only be used if the parties agree to it. Accordingly, virtual hearings are not meant to be used as the default rule in France. For conferencing between judges on the bench, virtual sessions were commonplace during the pandemic, and this practice will stay for the long run. The resumption of full-time physical presence of judges and staff at the courthouse is not foreseen.

Panuthos believed the USTC gained a great deal of insight during the pandemic on the adequate use of technology. The pandemic also presented an opportunity to optimize the technological means. These means are not useful in every case, and judges need to pick and choose which cases are appropriate for its use. The example of replacing physical hearings in remote locations by the itinerant court with a virtual session is an obvious example of smart use of technology. Panuthos noted that self-represented taxpayers are often keen to have a paper filing and an in-person hearing. Judges will not shy away from this practice either, as they tend to cherish the physical interaction with taxpayers, staff and fellow judges.

8. Exotic Topic: “the Curious Case of *Túró Rudi*”

Heinemann presented the audience with the famous “*Túró Rudi*”, a Hungarian candy bar, and one of the most recognized brand names in Hungary. A single *Túró Rudi* weighs 51 grams and is five inches long and one inch high. Depending on the way you look at it and your preference for either curd or chocolate, it is a curd snack with an outer coating of chocolate or a chocolate snack with curd filling.

How the *Túró Rudi* looks and is savoured turned out to be especially relevant for customs qualification purposes. In the 1990s a dispute arose as to whether *Túró Rudi* was a curd snack and a low customs tariff applied, or a chocolate snack subject to a higher tariff. Official snacking experts were of the opinion that it was, in fact, a curd snack. The tax authorities – clearly preferring chocolate over curd – disagreed and defined *Túró Rudi* as a chocolate candy bar with curd filling. Ultimately, the Hungarian courts were asked to issue a tariff clarification. Of course, the proof of the pudding is in the eating, and the court’s own eating of *Túró Rudi* proved that it was a curd snack. The *Kúria*, which is never shy in revising the work of the lower courts, agreed. Following an extensive full bench tasting session, a unanimous decision was taken. In addition to being delicious, it was held once and for all that *Túró Rudi* was a curd snack with a chocolate coating.