Report of the Proceedings of the Tenth Assembly of the International Association of Tax Judges Held in Cambridge, England, on 13 and 14 September 2019

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This report summarizes the proceedings of the tenth assembly of the International Association of Tax Judges, which was held in Cambridge, England, on 13 and 14 September 2019.

1. Introduction

On 13 and 14 September 2019, the tenth assembly of the International Association of Tax Judges (IATJ) was held in Cambridge, England. The proceedings took place at the premises of Magdalene College in Cambridge and was organized by the judiciary of the United Kingdom. The assembly was attended by 75 judges from countries of all continents.

Greg Sinfeld, President of the First-Tier Tribunal (UKFTT), United Kingdom, opened the assembly and congratulated the IATJ on its tenth anniversary. Chief Justice Eugene P. Rossiter, Tax Court of Canada (TCC) and President of the IATJ, welcomed everyone to the tenth Assembly in Cambridge, England. He advised that the tenth Assembly was a very special occasion in the history of the IATJ and its development over the previous ten years. He reviewed how the IATJ came into being and developed its place in the international tax community through annual Assemblies held in Europe and North America, its quarterly newsletter to IATJ members, publications and the sharing of information between tax jurisdictions with many presentations by IATJ members as speakers and panellists at conferences around the world. The IATJ has grown to 140 members representing over 40 countries, including judges from Europe, North and South America, Australia, India, the Pacific Rim countries and Africa. Chief Justice Rossiter thanked all of the members of the IATJ for their continued and ongoing support and emphasized that it is only through their support that the IATJ has been so successful to date.

IATJ Scientific Program Committee Chairman Wim Wijnen presented the agenda of the assembly. He referred to the unique special edition of the IBFD *Bulletin for International Taxation* , authored by numerous IATJ members, which was to be published on the occasion of the celebration of the tenth anniversary under the title “Precedent in Tax: Guiding Light or Straightjacket?”.[1]

On the agenda were six substantive sessions. The proceedings were closed by a presentation on an “exotic” topic. Accordingly, the following topics were covered:

(i) Penalties (*see* section 2.);

(ii) Legal reasoning (*see* section 3.);

(iii) Tax procedures in the United Kingdom (*see* section 4.);

(iv) Recent case law on partnerships and beneficial ownership (*see* section 5.);

(v) Recent case law on banking and financial services in VAT/GST (*see* section 6.);

(vi) Soft law (*see* section 7.); and

(vii) An “exotic” topic: “The Tax Judge and the Saucy Stage Gear” (*see* section 8.)

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1. *Precedent in Tax: Guiding Light or Straightjacket?* , 73 Bull. Intl. Taxn. Special Issue 8 (2019), Journal Articles & Papers IBFD.

2. Session 1 – Penalties

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 Chief Justice Maarten Feteris, President of the *Hoge Raad* (Supreme Court, HR), the Netherlands; Judge Maurice B. Foley, US Tax Court (USTC), United States; Judge Anthony Gafoor , Superior Court, Trinidad & Tobago; Judge Raphaël Gani, *Bundesverwaltungsgericht/Tribunal administratif fédéral* (Federal Administrative Court, BVGer/TAF), Switzerland; Justice Anette Kugelmüller-Pugh, *Bundesfinanzhof* (Federal Tax Court, BFH), Germany; and former Judge Luis Flávio Neto, *Conselho Administrativo de Recursos Fisciais* (Administrative Court of Tax Appeals, CARF), Brazil.

2.2. Diversity of tax penalties

Martin opened the session by emphasizing the diverse nature of tax penalties across different jurisdictions. Tax penalties can be defined as all forms of punishment for violations of tax law that would usually be inflicted by tax administrations and that would fall under the jurisdiction of tax courts. Criminal penalties are to be distinguished from administrative penalties. The former are inflicted by courts and the latter are levied by tax authorities and can be challenged before the courts.[2] Various types of administrative punishments exist, which range from fines to public naming and shaming and the denial of government licences or exclusion from public procurement. Also, the calculation of the total of administrative fines varies. The amount can be fixed, can be levied at a fixed rate applied to the tax due, can be levied according to a scale of fixed amounts and can possibly be topped off by a maximum amount.

Four issues were discussed by the panellists: (i) the relationship between tax and criminal penalties (*see* section 2.3.); (ii) access to the court (*see* section 2.4.); (iii) application of legal principles governing punishment (*see* section 2.5.); and (iv) methods for judicial review of tax penalties (*see* section 2.6.).

2.3. The relationship between tax and criminal penalties

Gani discussed the relationship between tax penalties and criminal penalties under Swiss law. He identified a scale of taxpayer conduct ranging from: (i) "tax optimization", i.e. the rightful use of legal opportunities to save tax; (ii) "tax avoidance", i.e. the (mis)use of opportunities to save tax but without breach of law; (iii) "tax evasion", i.e. tax savings achieved by breaching the law; to (iv) "tax fraud", i.e. the use of false deeds to evade taxes deliberately. Only in cases (iii) and (iv) are penalties handed out, and only in the case of tax fraud could the penalty be of a criminal nature and involve imprisonment.

An important aspect of the coexistence of administrative and criminal penalties in tax is in respect of the *ne bis in idem* principle, enshrined in article 4 of Protocol No. 7 to the European Convention on Human Rights (ECHR), which holds that a person cannot be criminally prosecuted or punished twice for the same offence. Under Swiss tax law, this generally accepted legal principle is reflected in, inter alia, the fact that minor offences are absorbed into bigger ones. Tax fraud in indirect taxes, therefore, encompasses tax evasion.[3] Exceptions exist with regard to income tax and wealth tax. The Swiss *Bundesgesetz über die direkte Bundessteuer* (Federal Direct Tax Law) explicitly states that a punishment for tax fraud does not exclude separate punishment for tax evasion.[4] Additional fines for administrative duty infringements can also be imposed because the legally protected objectives are different. Administrative penalties are levied to compel the taxpayer to comply with administrative injunctions, whereas the penalties for tax evasion itself are levied to protect the tax debt, it being a public asset.

The Swiss *Bundesgericht/Tribunal fédéral* (Federal Supreme Court, Bger/TF) has confirmed that punishing a taxpayer for tax fraud and tax evasion does not, in itself, constitute a violation of the *ne bis in idem* principle.[5] Gani questioned whether this interpretation of Swiss law was compatible with the jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ). In recent decisions, the ECJ seems to have come to the conclusion that, under certain conditions, the *ne bis in idem* principle does not preclude national legislation enabling the duplication of administrative and criminal procedures both resulting in penalties.[6] The ECtHR has held that the principle provides a prohibition of prosecution or trial for a second "offence" insofar as the latter arises from an substantially identical fact pattern. Duplication of criminal proceedings and

2. In the common law tradition, administrative penalties are also referred to as "civil penalties" because they are not inflicted by the court. In the civil law tradition, "civil penalties" are generally understood to be penalties inflicted by civil courts for the infringement of civil law, and not tax law.
3. Compare CH: Bundesgesetz über die Verrechnungssteuer [Federal Withholding Tax Law], [1965], art. 61 with regard to withholding tax and CH: Bundesgesetz über die Mehrwertsteuer [Federal VAT Law], [2009], art. 101 with regard to VAT.
4. *See* CH: Bundesgesetz über die direkte Bundessteuer [Federal Direct Tax Law], [1990], art. 186(2).
5. *See* CH: Bger/TF, 13 February 1991, Case ATF 122 I 257 and CH: Bger/TF, 23 March 2018, Case ATF 144 IV 136.
6. IT: ECJ, 20 Mar. 2018, Joined Cases C-524/15 and C-537/16, *Criminal proceedings against Luca Menci, intervening parties: Procura della Repubblica* , Case Law IBFD.

penalties with administrative proceedings and penalties of a criminal nature, against the same person and with regard to the same facts, can constitute a limitation of the *ne bis in idem* principle.[7]

Foley noted that the issue of "duplication" was not a concern in the US system. In case of tax evasion, the criminal courts would first consider the case. After a conviction for tax evasion, the tax courts would deal with the imposition of the tax, which is considered a totally separate matter. Criminal courts also do not generally administer fines; rather, they impose prison sentences.

Feteris observed that the Netherlands has not ratified Protocol No. 7 to the ECHR. However, the *ne bis in idem* principle is respected in the Netherlands by means of the domestic law rule of *una via* . Once a tax penalty has been handed out, there cannot be a criminal prosecution regarding the same facts, and vice versa.

2.4. Access to the court

With regard to the question of whether tax penalties can be challenged in a tax court together with the tax itself or must be challenged separately, Gafoor explained that, in Trinidad and Tobago, penalties are generally dealt with as a separate issue via negotiation with the tax authorities and are usually not litigated before the courts. Often, the settlement of a matter by way of consent is held back pending the waiver of penalties and interest to be determined by the tax authorities. Where the courts are required to rule on a substantive matter, the parties do not include the issue of penalties and interests, unless these were unduly extravagant. In such a case, the courts can interfere.

Feteris observed that, in the Netherlands, administrative penalties may be challenged in the courts. Foley noted that, in the United States, once a penalty comes to the tax court, the court determines only whether or not the taxpayer is liable to pay the amount. Generally speaking, the discretion of the tax authorities is based on what the facts were and the court will not interfere with the exercise of this discretionary power.

The tax authorities can grant a waiver of tax penalties. Taxpayers are keen to avoid penalties and, in recent times, three amnesty programmes, i.e. invitations to declare previously unreported income without penalties or with lowered penalties, have been very successful. In Trinidad and Tobago, administrative tax penalties are generally considered to be an instrument of leverage in the hands of the tax authorities to resolve tax disputes, a matter that does not trouble the courts.

With regard to the question of whether a denial by the tax authorities of the application for discretionary relief on penalties can be challenged in court, Gafoor observed that the statutory basis for the waiver of penalties and interests resided with the tax authorities. As with any other administrative body, if such discretion was unreasonably exercised or an application for waiver was denied, the taxpayer may seek a judicial review of that decision. This review will not relate directly to the imposition of the assessment and, therefore, may be unlikely to fall under the TTTC's jurisdiction.

2.5. Application of legal principles governing punishment

Feteris explained that, in the Netherlands, settled jurisprudence by the HR provided that penalties of up to 100% were not regarded as compensation but as punishment.[8]Article 6 of the ECHR applies to tax penalties and, as such, the taxpayer is entitled to a fair trial before an independent court with regard to the application of the penalty.[9]The principles of criminal law are not automatically applicable to tax penalty cases. In various tax cases, however, the courts have applied those principles as unwritten principles of national law.[10]Feteris observed that the Netherlands does not have automatic penalties. Maximum penalty rates are determined by the law, and it is for the tax authorities and, ultimately to the courts to set the correct (lower) rate, based on, among other things, the taxpayer's behaviour. For instance, in the case of tax avoidance, the tax authorities and courts could accept that the taking away of the undue tax benefit is sufficient as a corrective measure, depending on the degree of knowledge on the taxpayer's part that his tax return was incorrect and on the degree of subjective intent. Martin observed that France has a markedly different approach. If the tax authorities and courts conclude that there has been an abuse of law, a penalty of 80% is applied automatically.

Flávio Neto gave an overview of the range of tax penalties applied at the Brazilian federal level, which range between 20% of the amount of tax due in case of late payment to (an aggregated penalty rate of) 275% in the event of tax fraud (150%) combined with lack of pre-payment of tax (50%) and failure to submit documents (75%). Court decisions regarding such matters are part of a historical tradition in which the Brazilian judiciary has played an active role in the determination of the maximum penalties applied in practice. Some decisions of the *Supremo Tribunal Federal* (Supreme Federal Court, STF) on this matter are based on

7. RU: ECtHR, 10 Feb. 2009, *Sergey Zolotukhin v. Russia* , 14939/03.
8. NL: HR, 4 Jan. 1950, B. 8718.
9. NL: HR, 19 June 1985, BNB 1986/29 and NL: HR, 24 Jan. 1990, BNB 1990/287.
10. Examples of principles of criminal law applied with regard to the application of tax penalties are the principle of no penalty in the absence of guilt (*see* NL: HR, 21 Oct. 1987, BNB 1988/02); the *ne bis in idem* principle with regard to the imposition of administrative penalties (*see* NL: HR, 30 Aug. 1996, BNB 1996/53); the requirement for the necessity and proportionality of tax penalties (*see* NL: HR, 4 Dec. 1991, BNB 1992/221); and the presumption of innocence (*see* NL: HR, 15 July 1988, BNB 1988/270 and NL: HR, 25 Apr. 2011, BNB 2011/207).

the non-confiscation principle. Martin observed that, in the European tradition, the non-confiscation principle, derived from the right of property, is usually applied solely to taxes, excluding penalties.

Flávio Neto referred to the principle of non-confiscatory taxation and proportional punishment and pondered whether, for the application of these principles, penalties were to be considered in isolation or whether the entire burden on the taxpayer had to be considered. In a famous STF case of 2000 regarding the ability to pay principle, the introduction of a new tax into the Brazilian tax system was not analysed in isolation but rather as an additional layer of burden on the taxpayer; the additional burden was found to be unreasonable and the new tax was not implemented. With regard to income derived by a Brazilian taxpayer, this could entail considering the aggregate burden of the income tax, social contributions, other taxes and penalties to decide if the amount is confiscatory and proportional.

Flávio Neto further observed that, under Brazilian tax law, tax evasion is typically met with a penalty, whereas tax avoidance should not be. However, in recent years, tax jurisprudence has indicated that the boundaries between avoidance and evasion are blurred, which leads to the practical conclusion that tax planning in Brazil is a difficult business. This issue could be solved by the STF setting strict criteria to distinguish tax avoidance and tax evasion.

2.6. Methods for judicial review of tax penalties

Foley explained that, in the United States, a taxpayer can try to reach an agreement with the tax authorities before using the court system, either through an "examination" by the tax authorities, via the Office of Appeals of the tax authorities, or post-appeal through mediation. The USTC may review penalties before reviewing the tax assessment when the penalties are based on an item subject to deficiency procedures, such as the failure to file a tax return in a timely manner, to pay the amount shown on the return or to properly withhold taxes. With regard to the post-assessment review, the USTC may review immediately assessed penalties by means of the so-called "collection due process" (CDP) hearing with the Office of Appeals. Examples of immediately assessable penalties are the promotion of abusive tax shelters, aiding and abetting the understatement of tax liability and the filing of a frivolous income tax return. The USTC can impose penalties on its own in certain instances, such as in response to the raising of frivolous arguments or in case of contempt of court. Generally, penalty defences by taxpayers are limited to reasonable cause and good faith. The USTC considers these on a case-by-case basis, taking into account all the facts and circumstances. The most important factor is the extent of the taxpayer's effort to determine his proper tax liability for the year.

Foley observed that interest may accrue on penalties. Interest, in itself, is not a penalty, but reflects the cost of money. Interest is generally charged from the original due date of the return until the date of the payment and continues to accrue even when the case is pending before the USTC. A ten-year statute of limitation applies with regard to the collection of the interest. Taxpayers may stop the accrual of interest if they make a deposit to the tax authorities, subject to certain requirements.

Kugelmüller-Pugh reflected on the judicial review of tax penalties in German tax law. She noted that, in Germany, tax penalties were levied (i) during the tax assessment procedure, for example, in the case of late filing of a return or the non-presentation of a document; (ii) after the tax assessment, for instance, in respect of late payment of the tax; and (iii) in relation to administrative acts other than the tax assessment, for example, coercive payments for cooperation in cross-border procedures. Tax penalties are reviewed by the tax authorities. Their decision can be appealed with the court of first instance.

The *Bundesfinanzhof* (Federal Tax Court, BFH) has dealt with tax penalties of all kinds. For instance, in its decision of 17 March 2017,[11]the BFH declared a penalty for late filing illegal because the request of the tax authorities to file the return before a certain date was not accompanied by a written justification. In its decision of 24 April 2014,[12]a fine for delayed action by the taxpayer was annulled because the discretionary powers of the tax authorities had not been exercised correctly. The court took the view that penalties could not be imposed automatically in the event that requested documents were not provided on time without examining the individual reasons for the non-compliance by the taxpayer. In its decision of 22 November 2017,[13]the BFH annulled a penalty for late payment imposed on a taxpayer who had become insolvent. The tax had been paid by the taxpayer, but had to be reimbursed by the tax authorities during the insolvency procedure. Instead, the tax due was registered in the insolvency table. The BFH held that, in this case, there was no actual non-payment of the tax and the penalty for late payment was, therefore, illegal.

Martin raised the question of whether the courts behaved differently depending on the type of penalty that was subject to judicial review. Late filing penalties are easily considered in a binary way, but other penalized behaviours are not as black and white. Kugelmüller-Pugh believed that, in Germany, courts generally trust the decisions of the tax authorities as to whether a penalty is necessary, and only the amount of the penalty is considered by the court in view of the principle of proportionality.

John Owen of the Tax Court of Canada raised the question of whether, in any jurisdiction, the standard of "beyond reasonable doubt" usually applied in criminal cases was also applied in tax cases dealing involving the consideration of penalties. Martin

11. DE: BFH, 17 Mar. 2017, Case VIII R 52/14.
12. DE: BFH, 24 Apr. 2014, Case IV R 25/11.
13. DE: BFH, 22 Nov. 2017, Case XI R 14/16.

observed that, in France, courts dealing with tax cases operate like criminal cases in a way. The burden of proof regarding penalties lies with the tax authorities, even if, with regard to the determination of the tax base, the burden might be shared between taxpayer and tax authorities. In such cases, the meeting by the tax authorities of the higher standard of proof in establishing the taxpayer's wrongdoing that attracted the penalty might affect the court's overall view of the case, including of its consideration of any required adjustment of the tax base.

3. Session 2 – Legal Reasoning

3.1. Panel composition and agenda

The session was chaired by Judge Malcolm Gammie, Upper Tribunal (Tax & Chancery) (UKUT), United Kingdom. The panel consisted of Judge Emmanuelle Cortot-Boucher, CE, France; Chief Justice Peter Darak, *Kúria* (Supreme Court, Kuria), Hungary; Judge EuiYoung Lee, Korean Supreme Court (KSC), Korea (Rep.); and Justice Vesa-Pekka Nuotio, *Korkein hallinto-oikeus* (Supreme Administrative Court, KHO), Finland.

The session focused on four elements of the procedures before the tax court: (i) the composition of the court; (ii) an oral or a written process; (iii) the burden of proof; and (iv) the process of legal reasoning. By way of introduction, the panellists discussed the composition of their respective courts, those courts' jurisdictions and the type of appeals the courts heard. The panellists then moved onto to discuss certain aspects of proceedings before these courts (*see* sections 3.2. to 3.5.)

3.2. Adversarial or inquisitorial proceedings in written or oral format

Before the UK tax courts, the proceedings are usually adversarial. Both parties – the tax authorities and the taxpayer – are present at a hearing. Small cases might be dealt with "on the papers". The tax authorities supply the details of the dispute together with a written statement and the taxpayer has the opportunity to provide a written statement. The judge decides solely on the basis of these papers. However, the taxpayer always has the right to an oral hearing.

Before the French CE, tax proceedings are inquisitorial and based on written submissions by the parties. When submissions are unclear, a judge can undertake an "investigation in court" and ask the parties to address his questions, but only with regard to the facts. Oral interactions are written down and exchanged and might trigger new exchanges of arguments. A case is called to an audience with the judge when "the investigation is closed"; new arguments or details of facts can no longer be raised at that point.

Before the Hungarian Kuria, most tax cases are decided on the grounds of documentary evidence and there are no oral hearings, unless the court considers it necessary to hear parties that request it. Generally, if neither party has requested an oral hearing, the Kuria decides the administrative matter solely on the basis of written statements.

Before the KSC, the procedure is adversarial. Oral hearings take place in every tax case at the trial courts, i.e. the Korean Administrative Court (KAAC) and the Korean District Court (KDC) as the first instance and the Korean High Court (KHC) as the second instance.

In Finland, appeals to the KHO are decided on the papers. If an oral hearing is arranged, it is typically arranged at a lower court level.

3.3. Definition of legal issues and burden of proof

In most UK tax appeals, the burden of proof is on the taxpayer, who must demonstrate to the court why the tax that the tax authorities are seeking to recover is not due. In penalty cases, the tax authorities may have to prove that the taxpayer's alleged failure has occurred. The taxpayer may have to show how the failure arose and why he had a reasonable excuse for failure.

In France, the rules of evidence in tax cases are stable and derived from case law. There is a presumption in favour of the taxpayer if the taxpayer had opposed the tax assessment from the earliest occasion. If the taxpayer did not do so, the tax authorities are presumed to have handled the assessment correctly. Generally, elements of proof can only be asked from the party who owns them. It cannot be expected of the tax authorities that they should provide the invoices proving that a deducted business expense had no direct purpose for the business. In such a case, the tax authorities must be able to provide the indications on which their conclusion is based, and it is the taxpayer who must provide evidence to the contrary.

In Hungary, the rules regarding burden of proof depend on the type of procedure. In an *ex officio* assessment procedure, it suffices for the taxpayer to show that it is likely that the facts of the case are wrong, incomplete or contrary to documentary evidence. If a taxpayer is seeking a tax reward or challenges the lawfulness of the actions of the tax authorities, the burden of proof lies with the taxpayer.

In the proceedings before the South Korean trail courts, the burden of proof generally lies with the tax authorities, which, as a governmental agency, must show the legality of their acts. Where the dispute concerns facts that can be proved exclusively by evidence in the possession of the taxpayer, the burden of proof is transferred to the latter.

The same is the case in Finland. In practice, the burden of proof lies with the party that is more capable of providing the required piece of evidence. The principle of *in dubio contra fiscum* applies only in theory. In practice, cases are often resolved based on whether the appellant has provided enough evidence.

3.4. Decisions on facts

In the United Kingdom, the tax courts must reach a decision both as to the facts of the case and the law. Generally, only the UKFTT decides on the facts and a higher appeal is on an issue of law only. In many cases, there will be either a dispute about the facts or the taxpayer will have to prove particular facts to show that the tax demanded is not due. Generally, factual evidence is provided through documentary evidence to be produced by each party. Oral witnesses can give evidence as to the facts and will usually be cross-examined. Before the supreme administrative courts of France, Hungary and Korea (Rep.), issues regarding facts are not considered. Facts are generally assumed as described by the lower trial court. In exceptional cases, for example, grave misconceptions regarding the facts, the courts might deal with factual issues. In Finland, the KHO determines which facts are under dispute and whether the appellant has provided enough evidence to prove that his version of the facts is correct.

3.5. Legal reasoning

Having reached a conclusion on the facts of the case, the UK tax courts then decide how the law applies to those facts and whether, on those facts, the tax claimed by the tax authorities is due as stated. This involves both interpreting the legislation and considering its application to the taxpayer *in casu* . In reaching a decision on the law, the courts are guided by two approaches. First, they can apply the established rules for construing legislation. These rules establish what sources may be consulted to arrive at a conclusion on its meaning. The second guiding principle is judicial precedent. If a higher court has already considered and pronounced on the meaning of the legislation, then the lower court is bound to adopt that meaning, unless it can distinguish the case before it on the facts. Sometimes judicial precedent has established certain principles that indicate to the lower court the approach it should be adopting.

In France, the CE reaches a decision on the law by starting from the written provision. The CE looks at precedents and applies them if relevant, but it can change the line of jurisprudence and choose to apply a new interpretation of the law. In a next step, the CE decides on whether the facts, as described by the lower court, fall within the scope of the law. The scope of the law refers to the *ratione personae, ratione loci* and *ratione materiae* .[14]A different issue is whether the conditions set by the law are fulfilled. If the CE observes that one of the conditions of the law is not fulfilled but no party mentions it, the court should refrain from taking action. Scope and conditions of the law are often difficult to distinguish, but the frontier between the two notions does impact the resolution of the case. The CE does have an element of discretionary appreciation. If the application of a legal provision leads to a manifestly unfair solution, the CE may decide that such outcome cannot have been desired by the parliament and will steer away from this interpretation of the law. For obvious reasons, this occurs only in cases of blatant injustice.

In Hungary, during the socialist era, the courts tried to achieve independence by establishing a style of legal reasoning bound to the grammatical meaning of legal provisions. Over time, a teleological approach to the construction of legal provisions has been adopted. The Fundamental Law of Hungary,[15]which is effective from 1 January 2012, provides that legal norms should be construed primarily in accordance with their aim and with the provisions of the Fundamental Law. The latter provides that, when searching for the aim of legal norms, the preamble and the explanatory materials are to be considered first. Materials published by the tax authorities have no binding power. In line with the civil law tradition, previous judicial decisions have no binding power in Hungary. Nevertheless, Kuria decisions and selected lower court decisions have a strong authoritative power. “Decisions in principle” by the Supreme Court of Hungary and “rulings in principle” by the lower courts are binding for future cases considered by the Supreme Court. Courts generally do not have the power to overrule discretionary decisions, but they can establish that the exercise of discretion was unlawful due to the failure to examine all of the relevant criteria.

Before the KSC, establishing the law is primarily a matter of the interpretation of parliamentary legislation and treaty provisions. Judges start with the ordinary meaning of the text, definitions included in the legal instrument, if any, and the context. The relative organization of articles in the same instruments also plays a role, as does the object and purpose of the legislative act. Regulations or rules issued by the tax authorities are not law. The KSC has the power to make a final review on the legality of these. The most useful and reliable materials for the interpretation of the law are precedents set by superior courts, i.e. decisions of the KSC, and previous decisions by the KHC and the KAC in similar cases are also frequently submitted by both parties. However, judges

14. For instance, in France, the CE annulled a decision by the *Cour Administrative d’Appel* (Administrative Court of Appeal, CAA), as the CAA had applied a tax treaty relating to direct taxes to a VAT case. As such, the decision violated the *ratione materiae* of the tax treaty. *See* FR: CE, 24 July 2009, Case 309279.

15. HU: Magyarország Alaptörvénye [Fundamental Law of Hungary], 2011.

are not formally bound by precedents because statutory law is the primary source of law. In practice, lower courts respect KSC precedents, although they can challenge these according to their professional conscience. In areas in which the tax authorities are granted a legitimate discretionary power, "abuse of discretionary power" rules apply, as in any area of administrative law. The exercise of the discretion by the tax authorities is open to judicial review by the courts.

In Finland, the regional administrative courts aim to decide in accordance with the published case law of the KHO, unless these courts can distinguish the case on the facts. At present, the highest court precedents are expressly mentioned in the reasonings of the regional administrative courts.

4. Session 3 – Tax Procedures in the United Kingdom

4.1. Panel composition and agenda

The session was chaired by Peter Wattel, Advocate-General to the HR, the Netherlands. The panel consisted of Judge Greg Sinfield, UKUT and President of the Tax chamber of the UKFTT, United Kingdom and Judge Christopher McNall, UKFTT, United Kingdom. The session took the form of an interview of the two UK justices, conducted by the chairman, and focused on the work of the UKFTT Tax Chamber and the UKUT Tax and Chancery Chamber.

4.2. UKFTT

McNall explained that the UKFTT's Tax Chamber is one of six chambers dealing with different public and administrative law matters. It does not operate as a superior court of record – the UKFTT does not create precedent – nor does it have any inherent jurisdiction: its jurisdiction is entirely statutory.

The UKFTT hears cases regarding direct and indirect UK-wide taxes, except council tax, and cases regarding UK-wide duties, except vehicle excise duties. Actions regarding penalties relating to taxes and duties are also heard, but the UKFTT has no jurisdiction over cases regarding interest, the "care and management powers" and "litigation and settlement strategy" of the tax authorities or judicial review of the behaviour of the tax authorities if claimed to be irrational or contrary to legitimate expectations. Claims of that kind lie to the high courts, like the High Court of Justice of England and Wales (EWHC).

The UKFTT is led by a full-time president and includes eight full-time, salaried judges, 52 part-time, fee-paid judges and 60 lay members. Lay members are not judges. They are recruited through open competitions and are often accountants and business people. McNall noted that lay members often operate as a second pair of eyes and ears for the judge. The procedures before the UKFTT are not recorded and deliberation depends on the judge's notes. Lay members often assess the credibility of witnesses in court. The full-time judges are stationed in London (four), Manchester (two) and Birmingham (two). The UKFTT sits in about 40 other towns and cities across the United Kingdom.

The UKFTT operates as a civil jurisdiction. As such, the tax assessment by the authorities is deemed to "stand good" and it is for the taxpayer to show that it is wrong or not in accordance with "best judgement". With regard to penalties and allegations connected to fraud, the burden of proof lies with the tax authorities. The standard of proof is the "civil" balance of probabilities in all cases, including fraud allegations. Evidence also follows the civil rules.

UKFTT judges usually sit in public; the procedural rules are highly flexible and do not involve wigs, gowns, gavels or Latin. The proceedings are adversarial, and the court can hear evidence on oath. The UKFTT's decision powers are not "free-range". Depending on the governing statute, it can quash, vary or uphold assessments and dismiss, uphold or substitute penalty decisions. The UKFTT cannot remake decisions by the tax authorities or the Border Force to seize goods, but can only remit them for reconsideration.

Decisions are always in writing, usually with reasons. There is no automatic right of appeal. The parties must ask the UKFTT for permission to appeal, within 56 days of the decision. In order to be granted leave for appeal, applicants must show an arguable "error of law" in the decision. If refused, the applicant can renew the application for permission to appeal to the UT.

4.3. UKUT

Sinfield informed the audience that the Tax and Chancery Chamber of the UKUT – the chamber that hears appeals against tax decisions of the UKFTT – was established in 2009 under the Tribunals, Courts and Enforcement Act 2007.[16] It is one of four chambers of the UKUT and it does operate as a superior court of record. Decisions of the UKUT bind the UKFTT Tax Chamber.

The UKUT Tax and Chancery Chamber's main business is hearing appeals from the UKFTT Tax Chamber, but it also has (first instance) jurisdictions over financial services cases and decisions of the financial conduct authorities, as well as decisions of the pensions regulator, the Bank of England and the treasury services.

16. UK: the Tribunals, Courts and Enforcement Act 2007.

The UKUT is headed by a president who is a High Court judge and consists of four full-time salaried judges and eleven fee-paid judges. The UKUT generally sits at the Royal Courts of Justice, but can sit elsewhere in the United Kingdom if the case so requires. In tax cases, decisions are usually given by a two-person panel. There is no financial threshold. Cases range from very low to very high value. Since, before the UKUT, there is a strong focus on whether the UKFTT decision was affected by an "error of law", the UKUT will not generally hear evidence, and, if it does, it considers documentary evidence only. "Error of law" is not defined in statute, but is deemed to include fundamental errors of fact, issues of general principle and inconsistency of approach between UKFTT panels.

Decisions of the UKUT can be appealed to the courts of appeal like the Court of Appeal of England and Wales (EWCA), but there is no appeal as of right. Permission for onward appeal can be granted by the UKUT. Appeal to the EWCA is rarely granted, though, and only in cases which have "a real prospect of success" and "raise an important point of principle or practice", or where there is another compelling reason for the EWCA to hear the case.

4.4. Discussion

Wattel observed that the number of appeals received by the UK tax courts seemed to be much lower than in the Netherlands. He wondered whether this was explained by the fact that the UK tax authorities were quite proficient in handling taxpayer objections, perhaps through an extra-judiciary mediation system. McNall believed that UK taxpayers might be apprehensive of pushing back against the state, perhaps out of fear of future trouble with the tax authorities. Wattel asked whether the courts could increase the taxpayer's tax liability in excess of the assessment presented by the tax authorities. The answer was that they can, but only when the tax authorities request so. Taxpayers might then want to withdraw their appeal, but they are stuck. Once they have made their appeal, they cannot withdraw the case. This may also explain why relatively few cases reach the UKFTT. However, Sinfield believed that the low appeal numbers were explained by the fact that UK taxpayers generally believe that the tax system is fair, broadly speaking. Nevertheless, when they find something unfair, they will spend enormous amounts of time and money to resolve the injustice.

From the audience, questions were raised regarding possible conflicts of interests between fee-paid judges who also serve as barristers. Sinfield believed that this had been an issue at times, although it has not often been raised. The official line is that, as a judge, one takes the judicial oath, which comes with the duty to act independently and impartially. In rare cases, taxpayers have objected to certain lay judges hearing their cases and, in certain of these cases, these objections have been upheld and the judge recused himself.

5. Session 4 – Recent Case Law on Partnerships and Beneficial Ownership

5.1. Panel composition and agenda

The session was chaired by Chief Justice Eugene P. Rossiter, TCC. The panel consisted of Justice Jennifer Davies, Federal Court of Australia (FCA), Australia; Justice Csilla Heinemann, Kuria, Hungary; Judge Jong-Min Kim, KDC, Korea (Rep.); and Judge Swami Raghavan, UKUT, United Kingdom.

The session consisted in an analysis of three recent cases involving beneficial ownership issues and two cases regarding partnership issues. *See* sections 5.2. to 5.6.

5.2. Divergent views on the concept of beneficial ownership

Rossiter explained that the concept of beneficial ownership was first introduced into the OECD Model (1977)[17] and should not be confused with the domestic law concept in anti-money laundering legislation. As a treaty rule, it operates to restrict access to treaty benefits in certain cases. As such, the concept can be characterized as an anti-abuse rule.

The beneficial ownership concept has been adopted worldwide, but not without global controversy regarding its meaning. As it is an undefined treaty term, article 3(2) of the OECD Model[18] reverts to its meaning under domestic law. Consequently, a multitude of jurisprudential interpretations of the concept exists, often with conflicting outcomes in common law and in civil law jurisdictions. The Commentaries on the OECD Model view the concept as a specific anti-abuse rule with limited application and generally reject technical interpretations under domestic law.

Two approaches have been identified. On the one hand, there is the ECJ view on beneficial ownership, which focuses on substance and economic reality, and which is adhered to in cases such as *Indofood* (2006)[19] and *Bank*

17. *OECD Model Tax Convention on Income and on Capital* (11 Apr. 1977), Treaties & Models IBFD.
18. Most recently, *OECD Model Tax Convention on Income and on Capital* art. 3(2) (21 Nov. 2017), Treaties & Models IBFD.
19. UK: EWCA, 2 Mar. 2006, *Indofood International Finance Limited v. JPMorgan Chase Bank NA, London Branch*, A3/2005/2497, Case Law IBFD.

of Scotland (2006).[20] On the other hand, there is the approach of the Canadian courts in cases, such as *Prévost Car* (2008)[21] and (2009)[22] and *Velcro* (2012),[23] according to which the international meaning of the concept is to be rejected and the focus lies on the legal ownership attributes such as usage, possession, risk and control.

5.3. European Union: ECJ – Joined Cases C-115/16, C-118/16, C-119/16 and C-299/16

5.3.1. Opening comments

Heinemann presented four beneficial ownership cases recently decided by the ECJ.

5.3.2. Facts of the cases

N Luxembourg 1 (Case C-115/16)[24] concerned a private equity fund resident outside the European Union that established a group of companies in, inter alia, Luxembourg and Denmark, for the purpose of purchasing a large Danish services company. The purchase was financed by loans granted by the private equity fund to the Luxembourg group company. The Luxembourg company granted loans to a Danish group company which acquired the Danish target company. The Danish tax authorities took the view that the Luxembourg company was not the beneficial owner of the interest received on the loans granted to the Danish group company, but operated as a mere conduit, and that the interest was actually transferred from the Danish part of the group to the private equity fund through the Luxembourg company. The tax authorities denied an exemption of withholding tax due to the fact that the interest was not paid to a beneficial owner of the interest.

X Denmark (Case C-118/16)[25] concerned a multinational group of companies that was purchased by a private equity fund. The fund was a direct shareholder of the group's ultimate parent, a company established in Luxembourg and organized in the form of a limited partnership (LP) with share capital with the status of a *société d'investissement en capital à risque* (venture capital company, SICAR). The Luxembourg company had a fully-owned holding company in Sweden that held the shares in another company set up in Sweden. This second Swedish company owned the shares of a company in Denmark, the target company. At the end of 2006, the first Swedish company took a loan from the company in Luxembourg. On the same day, the Danish company took a loan from the second Swedish company for an almost corresponding amount. The Danish company paid interest on the loan to the second Swedish company. The Danish tax authorities took the view that the Swedish companies and the company in Luxembourg did not have the status of beneficial owners of the interest, within the meaning of the Interest and Royalties Directive (2003/49)[26] and of the Denmark-Luxembourg Income and Capital Tax Treaty (1980)[27] and the Nordic Tax Convention (1996).[28] As such, the beneficial owners of the interest were the owners of the company in Luxembourg, as, under Danish law, the entity was regarded as transparent and could not be the beneficial owner of the interest.

C Danmark I (Case C-119/16)[29] concerned a company established in the United States and owned by a Cayman Islands company. Until the end of 2004, the Cayman Islands company was the owner of a Danish holding company that held the shares in an international group of companies. A restructuring of the group was carried out at the end of 2004, pursuant to which two Swedish companies and a Danish company were interposed between the Cayman Islands company and the Danish holding company. The Danish tax authorities took the view that the interposing of two Swedish companies above the Danish part of the group had been driven by tax considerations. Accordingly, the Swedish companies could not be regarded as the beneficial owners of the interest paid by the Danish holding company, within the meaning of the concept in the Interest and Royalties Directive (2003/49) and the Nordic Tax Convention (1996). In 2011, a local court confirmed the decision of the tax authorities in holding that the Swedish companies were mere conduits.

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20. FR: CE, 29 Dec. 2006, Case 283314 , *Bank of Scotland v. Ministre de l'Economie, des Finances et de l'Industrie* , Case Law IBFD.
21. CA: TCC, 22 Apr 2008, *Prévost Car Inc. v. Her Majesty the Queen* , 2004-2006(IT)G and 2004-4226(IT)G, Case Law IBFD.
22. *See* the decision of the Canadian Federal Court of Appeal (CFCA) in CA: CFCA, 26 Feb. 2009, *Prévost Car Inc. v. Her Majesty the Queen* , A-252-08 , Case Law IBFD.
23. CA: TCC, 24 Feb. 2012, *Velcro Canada v. The Queen* , 2012 TCC 57 , Case Law IBFD.
24. DK: ECJ, 26 Feb. 2019, Joined Cases C-115/16 (*N Luxembourg 1 v. Skatteministeriet*), C-118/16 (*X Denmark A/S v. Skatteministeriet*), C-119/16 (*C Danmark I v. Skatteministeriet*) and C-299/16 (*Z Denmark ApS v. Skatteministeriet*), Case Law IBFD.
25. Id.
26. 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 (as amended through 2013), OJ L49 (2007), Primary Sources IBFD [hereinafter Interest and Royalties Directive (2003/49)].
27. *Convention between the Government of the Grand Duchy of Luxembourg and the Government of the Kingdom of Denmark for the Avoidance of Double Taxation and the Establishment of Rules for Reciprocal Administrative Assistance with Respect to Taxes on Income and Capital* [unofficial translation] (22 Mar. 1982) (as amended through 2013), Treaties & Models IBFD.
28. *Convention between the Nordic Countries for the Avoidance of Double Taxation with Respect to Taxes on Income and on Capital* [unofficial translation] (23 Sept. 1996) (as amended through 2018), Treaties & Models IBFD.
29. *See N Luxembourg 1* , *supra* , n. 24 .

Z Denmark (Case C-299/16)[30] concerned a private equity fund that had been acquired by a Danish company. The fund consisted of five funds, four of which were set up in the form of LPs in Jersey, which under Danish law are tax transparent. The final fund had the form of a non-tax-transparent company. The investors in the first four funds were resident for tax purposes in a large number of countries, inside and outside the European Union. The opaque fund granted the Danish company a loan. The debt was subsequently transferred to a Luxembourg company, established on the day of the transfer, and within less than two months the fund had transferred its shares held in the Danish company to the company in Luxembourg. The Danish tax authorities took the view that Luxembourg company was not the beneficial owner of the interest paid by the Danish company within the meaning of the concept in the Interest and Royalties Directive (2003/49) and the Denmark-Luxembourg Income and Capital Tax Treaty (1980).

5.3.3. Decisions of the ECJ

The first question to be addressed by the ECJ was whether the recipient of the interest in the three cases was the beneficial owner, and could therefore enjoy the withholding tax exemption following from the Interest and Royalties Directive (2003/49). The ECJ first observed that the term "beneficial owner" concerned not a formally identified recipient but, rather, the entity that benefits economically from the interest. The ECJ considered the Commentaries on the OECD Model to be relevant for interpreting the term "beneficial owner" also in the Interest and Royalties Directive (2003/49).

Where the conditions for obtaining the withholding tax exemption in the Interest and Royalties Directive (2003/49) or the Parent-Subsidiary Directive (2011/96)[31] were formally met, the Danish *Landsretten* (High Court, LRN) had asked the ECJ if it was necessary for a Member State to implement an anti-abuse provision in its domestic law to deny any benefit following from the Interest and Royalties Directive (2003/49) or the Parent-Subsidiary Directive (2011/96). The ECJ observed that the general EU law principle of abuse of law implied that a Member State had to deny such benefit if an arrangement constituted abuse of rights, irrespective of whether any specific anti-avoidance legislation has been implemented in domestic law.

The ECJ provided some guidance on when an arrangement constitutes abuse of rights. If the funds are passed on – in full or in part – shortly after they have been received, this might indicate that the entity is a flow-through or conduit and this could be an indicator of abuse. It was not a requirement that there should have been a pre-agreed contractual obligation to pass on the funds. Another indication for abuse would be a lack of substance on the part of the recipient or its interposition in a structure that otherwise would not be covered by the Interest and Royalties Directive (2003/49) or the Parent-Subsidiary Directive (2011/96). The fact that the ultimate parent is resident in a third country with which a tax treaty has been concluded can neither prove nor disprove an abuse of rights. Heinemann concluded that it is now up to the LRN to decide the final outcome of each case based on the guidance they received from the ECJ and to conclude whether the recipients are the beneficial owners and/or whether there was an abuse of rights.

The ECJ did not refer to possible references to domestic law in interpreting the beneficial owner concept. Denmark does not have anti-abuse legislation in force, so the question can be raised whether it could deny the benefits. Wattel observed that the ECJ applies a general concept of abuse which has been modelled on the concept of beneficial ownership in the OECD Model, but which essentially remains a very broad approach to anti-abuse based on judge-made law.

5.4. Korea: KSC – *Samsung* (2018) and *CJ E&M* (2018)

5.4.1. Opening comments

Jong-Min Kim presented two recent beneficial ownership cases decided by the KSC.

5.4.2. *Samsung* (2018)[32]

5.4.2.1. Facts of the case

A US patent management company had been providing intellectual property management services for various patents owned by US parent companies (US Parent Cos). The US patent management company had been in negotiations since 2004 with Samsung, a Korean company, regarding the patent licence and settlement over patent infringement claims. In May 2010, US Parent Cos established a US company (US Co) for patent management. After US Co was established, it was in charge of negotiating with Samsung regarding the patent licence and the settlement with Samsung over alleged patent infringement.

In June 2010, US Co established an Irish company (Irish Co). Subsequently, Irish Co continued the negotiations with Samsung in place of US Co. In November 2010, US Parent Cos granted certain licensing rights to US Co. US Co, in turn, granted sub-licensing rights to Irish Co on the same day.

30. *See N Luxembourg 1*, *supra* n. 24.
31. 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 (recast), OJ L345 (2011), Primary Sources IBFD [hereinafter the Parent-Subsidiary Directive (2011/96)].
32. KR: KSC, 27 Dec. 2018, 2016du42883, *Samsung Electronics Ltd v. National Tax Service of Korea*, Case Law IBFD.

A few days later, Irish Co entered into a patent licence agreement with Samsung and received USD 370 million from Samsung in royalties. Within a month, approximately USD 340 million was passed to US Co.

Samsung did not withhold any tax under the Ireland-Korea (Rep.) Income Tax Treaty (1990) ,[33]as that tax treaty provides for a 0% withholding tax rate on royalties paid to an Irish beneficial owner. When the patent licence and settlement agreement was made, Irish Co's initial capital was EUR 20, and it had only three employees and a rented office space in Ireland. It had also entered into licensing agreements with various licensees in four other countries.

The Korean tax authorities argued that Irish Co was established solely to take advantage of the 0% withholding tax rate and assessed additional taxes on the income at issue, thereby alleging that US Co was the beneficial owner of the income and applying the reduced withholding tax rate available under the Korea (Rep.)-United States Income Tax Treaty (1976) ,[34]i.e. 15% excluding the local income tax.

The taxpayer argued that Irish Co was the beneficial owner, and added that, even if it were disregarded and US Co were to be considered the beneficial owner, the Korean tax authorities should not impose taxes on the portion of US Co's income derived from the use of the patents that were not registered in Korea under the Korea (Rep.)-United States Income Tax Treaty (1976). In the case in question, only approximately 5.7% of the patents were registered in Korea. The taxpayer argued that, as such, the tax assessed in proportion to 94.3% of the patents needed to be cancelled.

5.4.2.2. Decision of the KSC

With regard to the issue of the beneficial ownership, the KSC decided that, upon reviewing the evidence submitted, the holdings by the lower court according to which Irish Co was merely a conduit and that US Co was the effective beneficial owner of the royalties derived from that agreement were to be upheld. The KSC observed that multiple factors were in support of this conclusion, including the following:

(i) the purpose of establishment of Irish Co and operation status: Irish Co was established only four months before the patent licence agreement was made. It did not have sufficient commercial reasons justifying its existence in Ireland aside from avoiding tax;

(ii) human and physical resources: Irish Co had capital of approximately EUR 20 and three employees when the agreement was made;

(iii) the decision-making process in respect of the transaction: another patent management company established by US Parent Cos was involved with the board of directors of Irish Co during the process of preparing a memorandum of understanding and signing the agreement with Samsung;

(iv) control and management of royalty income: more than 90% of the royalties flowed to US Co from Irish Co within a month.

With regard to the issue of whether the full amount of the royalties paid was taxable in Korea, to the extent that only 5.7% of the patents were registered for domestic use, the KSC held that, pursuant to article 28 of the Korean Adjustment of International Taxes Act 1995 (amended 2017),[35]the Korea (Rep.)-United States Income Tax Treaty (1976) should apply in determining the source of a payment that had been made to a US corporation for the use of the US corporation's patent when the patent is registered in a country other than Korea, but is used for manufacture or sale in Korea. The KSC stated that that should be the case even though article 93(9) of the former Korean Corporation Tax Law provided that a payment made to a foreign corporation for the use of its patent was to be deemed as sourced in Korea, even if the patent was registered outside Korea, as long as the patent was used for manufacture or sale in Korea.

In addressing the context and text of the Korea (Rep.)-United States Income Tax Treaty (1976), the KSC held that articles 6(3) and 14(4) of that treaty merely determine that a payment made to a US corporation for the use of its patent is sourced in Korea only if the US corporation has registered the patent in Korea, and, therefore, has the right to use the patent in Korea. The KSC stated that such determination of the Korea (Rep.)-United States Income Tax Treaty (1976) is based on the understanding that, under the territoriality principle applicable to patent protection, a patent holder's right to exclusively produce, use, transfer, rent, import or display patented items has effect only within the country in which the patent is registered. The KSC further stated that, under this interpretation of the Korea (Rep.)-United States Income Tax Treaty (1976), a patent cannot be infringed outside the country of registration, and, therefore, the use of a patent outside of the country of registration, and a payment for such use, are not even conceivable. Accordingly, the KSC concluded that, when a US corporation has received income in connection with a patent that

33. *Convention between Ireland and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* (18 July 1990) , Treaties & Models IBFD.
34. *Convention between the United States of America and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and the Encouragement of International Trade and Investment* (4 June 1976) , Treaties & Models IBFD.
35. KR: Adjustment of International Taxes Act, Act 4,981 of 6 Dec. 1995, art. 28 (amended 2010), Primary Sources IBFD.

the US corporation has registered only outside of Korea, the income cannot constitute a payment made as consideration for the use of the patent, and, therefore, it cannot be Korean-source income.

The KSC agreed with the lower court that, in respect of the royalties paid to the US corporation, only the portion of the royalties paid for the patent registered in Korea is Korean-source income. The remaining portion of the royalties is not Korean-source income.

5.4.3. *CJ E&M* (2018)[36]

5.4.3.1. Facts of the case

A global entertainment content group (Viacom Group) owned a film producing company, Paramount, and a music channel, MTV. In 2010, Viacom Group established a Hungary-based company (VIH) as an affiliated company. In May 2011, CJ E&M, a Korean company, concluded a licence agreement relating to the domestic distribution of Paramount films and other entertainment content with VIH. From the time of the agreement until December 2013, CJ E&M paid royalties to VIH amounting to roughly EUR 10.5 million.

The taxpayer had not withheld any tax on the royalties paid to VIH, in line with article 12(1) of the Hungary-Korea (Rep.) Income Tax Treaty (1989) .[37]The Korean tax authorities issued a corrective assessment in which a withholding tax was held due, based on their conclusion that VIH was merely a conduit company established for the purpose of tax avoidance and that the de facto beneficial owner of the royalty income was Viacom Global Netherlands (VGN), the parent company of VIH based in the Netherlands. As such, by application of article 12(2) of the Korea (Rep.)-Netherlands Income Tax Treaty (1978) ,[38]a withholding tax of 15%, plus penalties, was held due, amounting to about EUR 1.9 million.

The taxpayer objected to the assessment and filed a suit with the Seoul Administrative Court, but was rejected. The taxpayer then appealed against the decision to the Seoul High Court (SHC), but was dismissed. Subsequently, the taxpayer appealed to the KSC.

5.4.3.2. Decision of the KSC

The KSC observed that article 12 of the Hungary-Korea (Rep.) Income Tax Treaty (1989) prevented Korea from taxing the royalty income if it was paid to a resident of Hungary who was the beneficial owner of the income. In full view of the legislative history and context of article 12(1) of the Hungary-Korea (Rep.) Income Tax Treaty (1989), a beneficial owner is a person who is entitled to enjoy benefits of the royalty income received and who is neither bound by law nor by contract to retransfer the relevant royalty income to another person. The determination of whether a person constituted a beneficial owner had to comprehensively factor in the content and status of the business activities related to the income at issue, together with the details of usage and operation of the income.

The KSC then observed, however, that the principle of substantial taxation, as prescribed in article 14(1) of the Korean Framework Act on National Taxes 2016 (FANT),[39]applies similarly to the interpretation and application of a domestic statute and of a tax treaty, which has the same effect as a statute. Article 14(1) of the FANT 2016, which enshrines the principle of substantial taxation, provides that if any ownership of an income, profit, property, act or transaction that is subject to taxation is nominal only, and there is another person to whom such income belongs, the other person is liable to pay taxes and the relevant tax provisions apply accordingly. If the application of the principle of substantial taxation relates to a matter of tax treaty abuse, the relevant tax treaty may be deemed inapplicable even though it involves a beneficial owner of royalty income. That is, in a case in which (i) the person to whom a property nominally accrued lacked the capacity to control or manage the property; (ii) there was another person who substantially controlled or managed the property by means of governance, etc. over the nominal owner; and (iii) the disparity between name and substance arose out of the intent to avoid tax, the relevant tax treaty should not apply to nominal ownership and the income pertaining to the property should be deemed to accrue to the person who substantially controls or manages the property; this person, therefore, should be deemed liable for tax. The KSC referred on this point to a prior decision of the KSC.[40]

With regard to the case in question, the KSC observed that, from the facts as established by the lower court, it appeared that for over ten years before starting VIH in Hungary, the Viacom Group had been active in the broadcasting business in Hungary. VIH had been set up in 2010, thereby benefiting from Hungary's skilled labour force and the government investment incentives. Thereafter, VIH actively carried out a number of business activities, including activities relating to the distribution of Paramount films to Hungary and to a number of third countries, including Korea. Furthermore, VIH employed 19 people for its film distribution

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36. KR: KSC, 15 Nov. 2018, 2017du33008 (*CJ E&M Co. Ltd v. National Tax Service of Korea*), Case Law IBFD.
37. *Convention between the Government of the Republic of Korea and the Government of the Hungarian People's Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* art. 12(1) (29 Mar. 1989), Treaties & Models IBFD.
38. *Convention Between the Kingdom of the Netherlands and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* art. 12(2) (25 Oct. 1978) (as amended through 1998), Treaties & Models IBFD.
39. KR: Framework Act on National Taxes, Act 14,382 of 20 Dec. 2016, art. 14(1), Primary Sources IBFD.
40. KR: KSC, 14 July 2016, Case 2015du2451 , *Hanhwa Total Co. Ltd v. Head of Seosan District Office of National Tax Service and another* , Case Law IBFD.

business and realized a significant amount of profit on which it had paid corporate tax in Hungary. The Viacom Group had a global effective tax rate between 30% and 32% in the relevant tax years. Matters related to the licence agreement between VIH and its parent company in the Netherlands were discussed in detail at VIH's board of directors meeting. VIH's legal team handled contract matters, including the review of the contracts with the taxpayer. The KSC observed that, in the relevant period, VIH had used about a fourth of its turnover to pay activity-related expenses. About 42% of the profits had been paid to its shareholders. The remaining funds were extended as intra-group loans to other group companies. The KSC observed that VIH had continued to expand its business by proactively investing in broadcasting and film-related business in Romania and Israel.

The KSC then observed, firstly, that these additional facts had to be taken into account when examining whether VIH constituted the beneficial owner of the royalties for the purpose of the Hungary-Korea (Rep.) Income Tax Treaty (1989). Given VIH's history and business activities, the details of its activities performed under the agreement with the taxpayer and the details of its expenses and use of funds, VIH was deemed to have enjoyed the benefits of the royalty income without any legal or contractual obligation to transfer said income to VGN, its parent company in the Netherlands. On these grounds, the KSC held that VIH was the beneficial owner of the royalty income for the purposes of the Hungary-Korea (Rep.) Income Tax Treaty (1989).

The KSC next observed that it had to examine whether the Hungary-Korea (Rep.) Income Tax Treaty (1989) applied to the royalty income in question under the principle of substantial taxation in article 14(1) of the FANT 2016. Based on the facts as set out in section 5.4.3.1., it was reasonable to deem that VIH in Hungary, as an ordinary media business entity, de facto controlled and managed the distribution rights and the royalty income derived from it, as with any other asset it owned. From the sole fact that VIH paid a considerable portion of its profits as a dividend to VGN, its parent company in the Netherlands, it was difficult to conclude that VIH was incapable of controlling and managing the distribution right or that a disparity existed between the form and the substance of the royalty payment. On these grounds, the KSC decided that article 14(1) of the FANT 2016 could not deny the application of the Hungary-Korea (Rep.) Income Tax Treaty (1989).

In conclusion, the KSC held that the lower court had erred by holding that VGN was the beneficial owner of the royalty income and that VIH in Hungary was merely a conduit set up solely with the aim to save taxes. In doing so, the lower court had erred and wrongly applied the concept of beneficial owner in article 12(1) of the Hungary-Korea (Rep.) Income Tax Treaty (1989). The KSC remanded the case to the SHC.

5.4.4. Discussion

Michael Beusch of the Swiss Federal Administrative Court raised the point that the KSC had to consider very similar fact patterns in both cases, but, in the first case, the case was framed as a beneficial ownership case, whereas, in the second case, the KSC applied the general anti-abuse doctrine. The case law seems to lack coherence and consistency in this regard. Martin noted that the blending with the beneficial ownership concept and the general anti-abuse doctrine is interesting and also reflected in the Danish ECJ decisions. Perhaps, he suggested, this approach is inspired by the prospect that beneficial ownership might quickly become an outdated concept. It is included in only a limited number of treaty provisions and many countries struggle with its meaning and application. This situation might indicate a general shift towards the general abuse doctrine, understood as absorbing the beneficial ownership concept. For instance, previously the application of the beneficial ownership concept was characterized by an emphasis on objective parameters such as the days between pass-through payments; currently, however, there is also a focus on the taxpayer's motives for passing on payments. Martin noted that this contemporary interpretation of the beneficial ownership concept comes very close to the abuse concept. On the other hand, there is also a general trend to apply domestic general anti-abuse rules (GAARs) extensively, including in relation to treaty benefits and regardless of dedicated anti-abuse rules in the treaty. The *Verdannet* (2017)[41] decision of the French CE is a case in point. Rossiter wondered whether this made any panel discussion about the beneficial ownership fundamentally outdated. Owen did not think so. Canada and other non-EU countries seem not to depart from the traditional beneficial ownership concept.

Maria Bocachica raised the question, with regard to *Samsung* (*see* section 5.4.2.), as to why the KSC seemed to assume that, if the Ireland-Korea (Rep.) Income Tax Treaty (1990) did not apply because of the Irish recipient's lack of beneficial owner status, the Korea (Rep.)-United States Income Tax Treaty (1976) automatically applied. Formally speaking, the royalties were paid to a US resident, so it could be said that that the tax treaty does not apply and that the domestic withholding tax rates should have been applied. EuiYoung Lee explained that this was a Korean procedural matter. In Korea, generally both taxpayers and the tax authorities can make a secondary argument prior to the closure of KHC proceedings if their first argument fails. Both the taxpayer and the tax authorities in this particular case agreed that the application of the Korea (Rep.)-United States Income Tax Treaty (1976) would be determined in the event the Ireland-Korea (Rep.) Income Tax Treaty (1990) did not apply. Consequently, the courts in question did not have any problem in this respect.

41. FR: CE, 25 Oct. 2017, Case 396954 , *Verdannet* , Case Law IBFD.

5.5. Australia: FCA (Full Court) – *Resources Capital Fund IV LP* (2019)

5.5.1. Opening comments

Davies presented the case of *Resource Capital Finance* (2019), which was decided by the Full Court of the FCA (FCAFC).[42]

5.5.2. Facts of the case

Resource Capital Fund IV LP (RCF IV) and Resource Capital Fund V LP (RCF V) were two LPs set up in the Cayman Islands. Both partnerships owned shares in a company incorporated in Australia and both were transparent for US income tax purposes. As such, neither was liable to pay income tax in the United States. Under an approved scheme of arrangement, RCF IV and RCF V disposed of their shares and interest in the Australian company and were assessed by the Australian tax authorities in 2013 on the gains from the sale of the shares, as, under Australian tax law, corporate limited partnerships (CLPs) are taxed as companies. As such, the partnerships were taxed in Australia as non-resident corporate entities on their Australian source income.

5.5.3. Decision of the FCAFC

The issue involved the interpretation of a provision in the Australian Income Tax Assessment Act 1936 (ITAA 1936)[43]that treats CLPs as companies. At first instance, the primary judge had considered that the legislative effect of this provision fell short of creating a new taxable entity.[44]Accordingly, a CLP could not be liable to tax. The FCAFC disagreed and held that CLPs were liable to tax, and that the tax, as a matter of administration, may be collected from its partners.

The assessments were issued to the LPs in question, and not to the individual partners. The primary judge had ruled that the assessments were issued to the partners in the name of the partnership.[45]The FCA (Full Court) disagreed, on the basis that each LP is to be treated as a company for tax purposes, including for the purpose of assessment.

With regard to the issue of whether the LPs could rely on the treaty, the primary judge had answered this question in the negative, i.e. neither LP could be a resident of the United States, as, under US tax law, neither LP was a separate legal person or entity. The correct taxpayers were the US partners of the entities, who would be entitled to relief from liability by reason of article 7(1) of the Australia-United States Income Tax Treaty (1982) .[46]The FCAFC upheld this consideration. In a majority decision, the FCAFC observed that the term "person" in articles 3(1) and 4(1) of the Australia-United States Income Tax Treaty (1982) did not provide and did not warrant a construction that the partnership should be treated as a separate "person" with a separate residence. The FCAFC noted that the LPs were organized under the laws of the Cayman Islands, were not liable to pay tax in the United States and, therefore, could not be residents of the United States; hence, they could not rely on the treaty.

Davies referred to her dissenting (minority) opinion in the case, which was based on the assumption that the words "provided that" used in article 4(1)(b)(iii) of the Australia-United States Income Tax Treaty (1982) only made sense if directed at identifying when a partnership is "treated as" having residency for the purpose of that tax treaty. As such, although the partnerships in question under US law did not have residency, the proviso would attribute a residency status to them separate from their partners for the purpose of the Australia-United States Income Tax Treaty (1982) where income of the partnerships was taxable in the hands of the US resident partners. In conclusion, Davies noted that no leave to appeal to the High Court of Australia had been granted.

5.5.4. Discussion

Davies explained that the case was illustrative of the Australian mining boom during the 1990s: foreign investments in the sector often occurred via CLPs and, at that time, these entities were selling shares in the mining companies. The participants speculated why there was little emphasis on treaty interpretation in this case and why the FCAFC did not look to similar provisions in other Australian tax treaties or to the relevant *travaux préparatoires* . Davies noted that, from the outset, the case been treated as an Australian domestic law issues case, and had not been argued by the parties with a focus on treaty construction. Once it had been established that the entity was a company under domestic tax law (under specific provisions), that was the end of the matter and no consideration was given to general law. Bernard Peeters of the Belgian Court of Appeals observed that similar problems existed in Belgium with regard to US limited liability companies (LLCs), which are treated as transparent for US tax purposes, but as opaque for Belgian tax purposes. The problems have been resolved by the introduction of dedicated provisions in the relevant tax treaty. Gammie noted that similar issues have been dealt with by the UK courts in *Anson* (2015).[47]Based on considerations of general law, the UK Supreme Court (UKSC) decided that the LLC in question was not a taxable entity for UK tax purposes.

42. AU: FCAFC, 2 Apr. 2019, *Commissioner of Taxation v. Resource Capital Fund IV LP* .
43. AU: Income Tax Assessment Act, 1936, sec 3A(2), Primary Sources IBFD.
44. AU: FCA, 5 Feb. 2018, *Resource Capital IV LP and Resources Capital V LP v. Commissioner of Taxation* , [2018] FCA 41 , Case Law IBFD.
45. Id.
46. *Convention between the Government of the United States of America and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* art. 7(1) (6 Aug. 1982) (as amended through 2001), Treaties & Models IBFD.
47. UK: UKSC, 1 July 2015, *Anson v. Her Majesty's Revenue & Customs (HMRC)* , [2013] EWCA Civ 63 , Case Law IBFD.

5.6. United Kingdom: UKFTT (Tax Chamber) – *Bloomberg* (2018)

5.6.1. Opening comments

Raghavan presented *Bloomberg* (2018),[48] decided by the UKFTT (Tax Chamber).

5.6.2. Facts of the case

The taxpayers were US resident companies, each of which carried on business through a separate Delaware registered LP. It was common ground that the activities and profits of each partnership were taxable in hands of the respective taxpayer, because each taxpayer had a UK permanent establishment (PE) and the profits of the partnerships were attributable to each taxpayer's respective PE. The taxpayers entered into transactions through which they increased their holdings in the respective partnerships. The taxpayers claimed that, as a result of these transactions, their PEs had acquired certain intangible fixed assets (IFAs), such as customer contracts, trademarks, software and certain other licences, in respect of which the PEs were entitled to deduct the capitalized cost on a fixed-rate basis. Their claim that the PEs should be treated as having acquired the IFAs was based in particular on article 7 of the United Kingdom-United States Income Tax Treaty (2001)[49] and the fiction that a PE is to be treated as a separate and distinct enterprise, so that the transactions must be viewed from the perspective of the PE and the notional accounts that are constructed for that PE.

The UK tax authorities rejected their claim, arguing that it was relevant to take account of the fact that the trade carried on in the United Kingdom was carried out in partnership and that, when the relevant UK provisions relating to taxation of corporate partners are applied, the relevant accounts perspective is that of the partnership. At that level there was no change in IFAs. Rather, there was a change in ownership of the partnership. No IFAs were acquired at that level, and the taxpayers' claims were therefore not valid. The taxpayers appealed to the UKFTT.

5.6.3. Decision of the UKFTT

The issue before the UKFTT was whether the fact that the United Kingdom-United States Income Tax Treaty (2001) regarded the PEs as separate and distinct entities under article 7 meant that the increase in partnership interests should be construed as a transfer of the IFAs to them. The UKFTT held that the separate entity approach for attributing profit to a PE did not mean that a partnership interest had to be treated as partial ownership of the partnership's underlying assets. The UKFTT noted that, under UK domestic law, the taxpayers should be treated as carrying on a trade in the United Kingdom through the PEs through which the partnership business was carried on, and that the trading profit of the partnership should be calculated without regard to any changes in the partners. Accordingly, as there was only a change in ownership of the partnership and not of the IFAs, no amortization deduction should be allowed. The UKFTT held that the United Kingdom-United States Income Tax Treaty (2001), and, in particular, the principle that a PE should be treated as a separate and distinct enterprise, did not change this conclusion.

Referring to the Commentaries on Article 7 of the OECD Models (2000)[50] and (2010),[51] the UKFTT agreed with the submission of the tax authorities that the function of the United Kingdom-United States Income Tax Treaty (2001) is the allocation of taxing rights. However, the UKFTT noted that the explanatory material in the OECD Commentaries on Article 7 (2000) and (2010) "positively discourages an approach whereby global profits are first ascertained and then apportioned to the PE".[52] Accordingly, the UKFTT concluded that:

the mere fact that the transaction was treated at the level of the corporate entities... as an acquisition of partnership units would not necessarily mean the PE was similarly to be regarded as acquiring partnership units.[53]

While the UKFTT accepted that both the United Kingdom-United States Income Tax Treaty (2001) and the OECD Commentaries on Article 7 (2000) and (2010) supported a factual or functional analysis, this did not mean that the transaction was "inevitably" a transfer of assets. The UKFTT also rejected the suggestion that example 14 in the OECD Partnership Report of 1999[54] meant that, where an entity was fiscally transparent, the PE was to be regarded as the economic owner of the underlying partnership property. The UKFTT explained that the point of the example was not to endorse a "look-through" to the assets but rather served as an example of a different view of the law being taken by the state of source. Noting that the Commentary on Article 7 of the

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48. UK: UKFTT, 16 Apr. 2018, *Bloomberg Inc and another v. Commissioners for Her Majesty's Revenue and Customs*, TC06449, [2018] UKFTT 2015 (TC), Case Law IBFD.
49. *Convention between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* art. 7 (24 July 2001), Treaties & Models IBFD.
50. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 7* (29 Apr. 2000), Treaties & Models IBFD.
51. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 7* (22 July 2010), Treaties & Models IBFD.
52. Para. 128 *Bloomberg* (2018).
53. Id., at para. 128.
54. OECD Committee on Fiscal Affairs, *The Application of the OECD Model Tax Convention to Partnerships* para. 106 (OECD 1999), Primary Sources IBFD.

OECD Model (2014) [55] provided that an enterprise of a contracting state included a partnership, the UKFTT observed that, rather than offending against the separate and distinct principle, taking account of the partnership was consistent with it. Furthermore, although the UKFTT rejected the idea that the separate enterprise fiction could be regarded as either "strong" or "weak", as well as the idea that, if it was assumed to be strong, there was no difficulty in imagining that a PE holds capital rather than trade assets. In conclusion, the UKFTT stated that the perspective from which to construct the accounts is the partnership level, and that the accounts generated in this way show no acquisition of IFAs. As a result, the taxpayers' claim for amortization deductions in respect of the IFAs was rejected. Raghavan concluded that, in this case, the truth proved to be stronger than the fiction.

6. Session 5 – Recent Case Law on Banking and Financial Services in VAT/ GST

6.1. Panel composition and agenda

The session was chaired by Justice Friederike Grube, BFH, Germany. The panel consisted of Steven d'Arcy, TCC, Canada, and Justice Caroline Vanderkerken, *Hof van Beroep/Cour d'Appel* (Court of Appeals, HvB/C.A.) Brussels, Belgium.

6.2. Financial Services and EU VAT

6.2.1. Legal background and relevant ECJ jurisprudence

Vanderkerken started by providing an overview of the most relevant provisions of the VAT Directive (2006/112)[56] dealing with financial services. Historically, financial services have been exempt from VAT.[57] Instead, such services are covered by an exemption relating to deposit and current account services, payment and transfer services, currency transactions, bank notes and coins used as legal tender, transactions in shares and the management of special investment funds. However, Member States may tax these services.[58] The exemption from VAT on financial services is granted without the right to deduct the associated input VAT.[59] As such, no recovery is available on VAT incurred on the purchases of associated goods or services relating to the financial transaction service. This could result in distortions in respect of the neutrality of the VAT system. In other words, financial institutions incur extra costs that are passed on to the customer and that increase the cost of doing business in the European Union. Member States also have been inconsistent in applying the input VAT deduction prohibition. A European Commission proposal to address these two issues was withdrawn in 2016.[60]

Vanderkerken referred to jurisprudence of the ECJ with regard to the financial transaction VAT exemption. In *Muys & De Winter* (Case C-281/91),[61] the ECJ held that the granting of loans and credit was exempt irrespective of whether the granter of credit was a financial institution. *In casu* , the granter was a building contractor. In *SDC* (Case C-2/95),[62] the ECJ confirmed that the scope of the exemption provision was in no way limited to loans and credits granted by financial institutions. In *CSC* (Case C-235/00),[63] the ECJ held that a call centre that provided services with regard to transactions in securities was not entitled to the VAT exemption. Similarly, in *Abbey* (Case C-169/04),[64] services rendered with regard to management and bookkeeping of investments and investment funds were not exempt from VAT.

6.2.2. ECJ: *Bookit* (C-607/14)

Next, Vanderkerken discussed *Bookit* (Case C-607/14),[65] which was decided by the ECJ on 26 May 2016. Bookit was a company that was wholly owned by Odeon Cinemas, a company that operated a chain of cinemas in the UK. Bookit's activities consisted in providing card handling services, i.e. the processing of debit and credit card payments for customers of Odeon.

The payment handling occurred as follows. Customers provided Bookit with card data. Bookit transferred the data to a company named DataCash. DataCash transmitted the data to a merchant acquirer who contacted the payment card issuer. The latter

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55. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 7* (26 July 2014) , Treaties & Models IBFD.
56. EU Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax, OJ L347 (2006) [hereinafter VAT Directive (2006/112).
57. Id., at art. 135(1)(d) and (e).
58. Id., at art. 137.
59. Id., at art. 168.
60. *See* European Commission, Proposal for a Council Directive Amending Directive 2006/112/EC on the Common System of Value Added Tax, as Regards the Treatment of Insurance and Financial Services, 2007/BBB (CNS), Primary Sources IBFD.
61. NL: ECJ, 27 Oct. 1993, Case C-281/91 , *Muys' en De Winter's Bouw- en Aannemingsbedrijf BV v. Staatssecretaris van Financiën* , Case Law IBFD.
62. DK: ECJ, 5 June 1997, Case C-2/95 , *Sparekassernes Datacenter (SDC) v. Skatteministeriet* , Case Law IBFD.
63. UK: ECJ, 13 Dec. 2001, Case C-235/00 , *Commissioners of Customs and Excise v. CSC Financial Services Ltd (formerly Continuum (Europe Ltd) Ltd)* , Case Law IBFD.
64. UK: ECJ, 4 May 2006, Case C-169/04 , *Abbey National plc (with Inscape Investments Ltd as Joined Party) v. Commissioners of Customs and Excise* , Case Law IBFD.
65. UK: ECJ, 26 May 2016, Case C-607/14 , *Bookit, Ltd v. Commissioners for Her Majesty's Revenue and Customs* , Case Law IBFD.

provided, via DataCash, an authorization code to Bookit. Odeon confirmed the reservation; Bookit received the payment and subsequently transferred the ticket sale revenue to Odeon, minus a card handling fee.

According to the UK tax authorities, the supplies made by Bookit to the customers of Odeon, i.e. the customers buying Odeon tickets, did not consist of a VAT-exempt "transfer of money" under article 135(1)(b) of the VAT Directive (2006/112). According to Bookit, the entire transaction was exempt under article 135 of the VAT Directive (2006/112).

The following two questions were submitted by the UK Court to the ECJ. Does the exemption of article 135 of the VAT Directive (2006/112) apply to such services, which result in a transfer of funds, but which do not include the task of making a debit to one account and a corresponding credit to another account? And does entitlement to the exemption depend on whether the service provider itself obtains authorization codes directly from the cardholder's bank?

The ECJ held that the exemption in article 135(1) of the VAT Directive (2006/112) did not apply to card handling fees. It observed that the provider of the card handling services, i.e. Bookit, did not play a significant role in the changes of financial situation that resulted in the transfer of ownership of the funds. It provided nothing more than technical and administrative assistance in the obtaining of information and communication to carry out the transaction. The card handling services in question consisted of nothing more than an exchange of information between a trader and its merchant acquirer with a view to receiving payment for a product. As such, the service did not fall within the scope of the article 135(1)(d) of the VAT Directive (2006/112).

6.2.3. Addendum: the situation in Belgium

Vanderkerken briefly summarized the implementation of the financial services exemption in Belgium. The guidelines used by the Belgian tax authorities reflect to a large extent the same notions of "financial transactions" as in article 135 of the VAT Directive (2006/112). In order to mitigate the hidden VAT problem and absence of input VAT recovery, Belgian banks have very substantially opted for taxation and (proportional) deduction of input VAT with regard to "payment transactions". There is rule for the characterization of complex transactions consisting of exempt services and non-exempt services. In theory, the principles set out by the ECJ in *SDC* and *CSC* are followed, but, in practice, the position of the tax authorities is often unclear.

There is little jurisprudence on the matter. Two recent cases, both decided in 2017, decided by the *Rechtbank van Eerste Aanleg* (Court of First Instance, Rb) Antwerp[66] and the HvB/CdA Brussels,[67] concerned the VAT exemption on share transactions in an immovable property project and ICT company, respectively. However, the focus in these cases was on the genuine or sham nature of the transaction itself and not on the qualification for the VAT exemption.

6.3. Recent case: Canada – TCC: Canadian Imperial Bank of Commerce (CIBC) (2018)

6.3.1. Introductory remarks on Canadian VAT (GST)

D'Arcy noted that no government has devised a system that permits it to tax financial transactions in a suitable manner. VAT seems to be the only option, even if the approach is less than optimal. Canada has a disproportionate number of appeals regarding the recovery of input VAT in relation to financial services. There is also a strong emphasis on controversies involving products and services coming in from the United States, which does not have VAT.

As in Australia and New Zealand, Canadian VAT is formally known as the goods and services tax (GST) and is levied at multiple rates, not based on the nature of the goods but on the place of the supply. Certain Canadian provinces do not participate in the federal GST and only levy the provincial sales tax (PST). Other provinces combine GST and PST and apply a system of a harmonized sales tax (HST). Still others, such as oil and gas-rich Alberta, effectively do not levy a sales tax at all: Alberta does not levy a PST and levies a GST at a rate of 0%.

The standard GST rates in Canada put the country at a competitive disadvantage with its largest trading partner, the United States. Canadian banks cannot recover the GST on services and, as such, they will look at services provided where no VAT is due, as these are inherently cheaper.

A notable aspect of Canadian GST is that the tax is not included in the advertised prices of goods. In line with the Canadian constitution and the opinion of the Supreme Court of Canada, only the provinces have the competence to deal with this commercial issue and a change is not expected.

The financial services industry has lobbied for inclusion under the so-called "arranging for" provision, so that banks can choose to be exempt from GST on capital transactions. However, the government needs revenue and frequently challenges the banks and even retroactively amends the law in the event that the courts hold in favour of the banks.

66. BE: Rb Antwerp, 9 June 2017, Case 16/1322/A.
67. BE: HvB/CdA Brussels, 18 Jan. 2017, 2013/AR/1990.

6.3.2. Legal background: exempt financial services and Canadian GST

"Financial services" are defined in section 123(1) of part IX ("Goods and Services Tax") of the Excise Tax Act (ETA) 1985[68]and include, inter alia, the exchange, payment, receipt or transfer of money; the operation of bank accounts and the lending of money; various supplies relating to financial instruments; various supplies relating to insurance policies; any service provided under an agreement related to payments of amounts in respect of which a credit card voucher of charge card voucher has been issued; and agreeing to provide or arrange for any of the services previously noted. Not included are the payment or receipt of money as consideration, the provision of advice, debt collection services and numerous management or administrative services relating to investment plans and in respect of managing credit.

6.3.3. Canada: TCC – *CIBC* (2018)

D'Arcy provided a summary of the recent case of *CIBC* (2018),[69]decided by the TCC. The case concerned a Canadian bank that issued Visa credit cards and utilized a credit card payment system that was operated and managed by Visa Canada. Visa Canada was the intermediary between the card issuer, Canadian Imperial Bank of Commerce (CIBC), which provided the funds for the purchases, and the credit card holder, who used the funds to make purchases. Visa Canada, in billing CIBC for its services, added CAD 18 million in GST or harmonized sales tax (HST) to its charges. As a result, CIBC made a rebate claim for the GST/HST, thereby arguing that the services were exempt financial services.

The Canadian tax authorities did not agree with this view and denied the rebate claim made by CIBC. CIBC disputed this rejection and brought the case before the TCC, where the issue was whether these services constituted a taxable or exempt supply for the purposes of the ETA 1985.

The TCC held the view that the supply of services made by Visa Canada to CIBC fell outside the definition of a "financial service" within the meaning of the ETA 1985 and, therefore, did not qualify as an exempt supply. Visa Canada had correctly charged GST/HST its service fees.

In essence, as emphasized by the TCC, Visa Canada was not providing financial services. Instead, the services were deemed administrative in nature. The first issue to be addressed by the TCC was to characterize the predominant element of the single compound supply made by Visa Canada. The single supply consisted of several distinct but indivisible components that were intertwined. The TCC concluded that the supply of a payment platform which allowed Visa to facilitate transactions between CIBC, card holders, acquirers and merchants was the predominant element of the compound supply.

Next, the TCC addressed whether this supply was within the "inclusion paragraphs", i.e. included in the definition of (exempt) financial services in the ETA 1985. The TCC believed it was, as it constituted arranging for the credit services offered by CIBC, through acting as an intermediary in the transfer of money, and also a service provided under an agreement relating to payments for which a credit card voucher has been issued (compare again under (i) of the definition of "financial services" in section 123(1) of the ETA).

The final issue was for the TCC to address was whether the provided services fell under one of the express exclusions in section 123 of the ETA in respect of services that were not financial services. They did not, but they were caught by section 4(2)(b) of the Financial Services and Financial Institutions (GST/HST) Regulations 1990,[70]which provides that an administrative service is excluded from the exemption for financial services. According to the TCC, the services provided by Visa were "quintessentially administrative in nature".[71]

D'Arcy noted that, in the case at hand, Visa sided with the tax authorities, arguing that its services were subject to GST. If the opposite were held to be the case, Visa would lose its right to deduct input GST. The case has been appealed.

6.4. Recent case – ECJ: *Cardpoint* (Case C-42/18)

6.4.1. Legal background: exempt financial services in German VAT law

Grube emphasized that EU law, including the general principles established by the ECJ, constitutes the basis of German VAT law. With regard to existing EU law, she referred to Vanderkerken's presentation (*see* sections 6.2.1. to 6.2.3.). Then, she provided an overview of the relevant provisions of the German *Umsatzsteuergesetz* (VAT Act, UStG).[72]The UStG provides that transactions, including negotiations, concerning deposit and current accounts, payments, transfers and the encashment of

68. CA: Excise Tax Act, 1985, sec. 123(1), Primary Sources IBFD.
69. CA: TCC, 12 July 2018, *Canadian Imperial Bank of Commerce (CIBC)* , 2018 TCC 109.
70. CA: Financial Services and Financial Institutions (GST/HST) Regulations, 1990, SOR/91-26, sec. 4(2)(b).
71. Para. 116 *CIBC* (2018).
72. DE: Umsatzsteuergesetz [VAT Act], 2005 (amended 2019), BGBl. I, 386, Primary Sources IBFD.

commercial documents are exempt from VAT. In principle, there is no right to deduct the related input VAT. By way of an exception, taxpayers are granted the option to levy VAT and to recover input VAT.

Next, Grube presented *Cardpoint* .[73] At the time that the conference was held, *Cardpoint* was pending, but was decided by the ECJ on 3 October 2019.

6.4.2. ECJ: *Cardpoint*

6.4.2.1. Facts of the case

Cardpoint, a company established in Germany for VAT purposes, supplied technical and administrative services for operating automated teller machines (ATMs) under its contractual obligation to a German bank. The services consisted of: (i) the collection and transfer of data that allowed the bank to authorize money withdrawals and payments; (ii) dispensing of money and registering withdrawal transactions; (iii) the replenishment of the ATMs with bank notes; and (iv) the maintenance of the software and hardware of the ATMs. With regard to the transmission of data by Cardpoint, it was necessary for the bank's informational system to provide authorization for the dispensing of the bank notes by the ATMs and, consequently, to record the change in the bank account of the user of the ATM. In addition, Cardpoint provided advisory services for the everyday operation of the ATMs and supplied the bank with a list of daily transactions, which the bank then transmitted to the German Federal Bank.

On 7 February 2007, Cardpoint submitted an amending VAT declaration for the period of 2005, holding that the services that had been provided to banks should have been exempt from VAT. The German tax authorities concluded that Cardpoint did not supply any financial services exempt of VAT for the purpose of the German UStG.

Cardpoint brought an action before the German *Finanzgericht* (Tax Court, FG). The FG held in favour of the taxpayer. It decided that the supplies carried out by Cardpoint played a specific and essential part in achieving the changes in the legal and financial situation that were the result of the transfer of ownership of money, and, therefore, were exempt from VAT. The tax authorities appealed to the BFH.

6.4.2.2. BFH: Case V R 6/15 (28 September 2017)

The BFH decided to stay the proceedings and refer the following question to the ECJ:

Is technical and administrative assistance provided by a supplier of services to a bank operating a cash point (ATM) for cash withdrawals from the bank exempt from tax under Article 13.B(d)(3) of Directive 77/388/EEC in the case where technical and administrative assistance of the same nature provided by a supplier of services for payments by card in connection with the sale of cinema tickets is, in accordance with the judgment of the Court of Justice of the European Union of 26 May 2016, *Bookit* , C-607/14 , not exempt from tax under that provision?[74]

Grube pointed out that, in this case, the whole of the classical function concerning the physical withdrawal of money by a customer from a bank had been outsourced to the ATMs. Accordingly, the facts of *Cardpoint* were not identical to those in *Bookit* .

6.4.2.3. ECJ: *Cardpoint*

6.4.2.3.1. Opinion of the Advocate General

Advocate General (AG) Bot[75] opined that the services in question did not entail the act of debiting or crediting an account itself and only the bank itself sent the data it received from Cardpoint to the bank system. The services in question did not entail a transaction that had the effect of entailing legal or financial changes. They were physical, technical or administrative services that did not have the effect of transferring funds ownership.

The AG, therefore, concluded that:

> ... the exemption from value added tax which is laid down in that provision for transactions concerning payments and transfers does not apply to supplies of services, such as those at issue in the main proceedings, consisting in operating and maintaining ATMs, replenishing them, installing computer hardware and software in them, sending a withdrawal authorisation request to the bank that issued the bank card used, dispensing money and registering withdrawal transactions, by a service provider to a bank operating an automated teller machine.[76]

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73. DE: ECJ, 3 Oct. 2019, Case C-42/18 , *Finanzamt Trier v. Cardpoint GmbH, as successor in law of Moneybox Deutschland GmbH* , Case Law IBFD.
74. DE: BFH, 28 Sept. 2017, Case V R 6/15.
75. DE: Opinion of Advocate General Bot, 2 May 2019, Case C-42/18 , *Finanzamt Trier v. Cardpoint GmbH, as successor in law of Moneybox Deutschland GmbH* , Case Law IBFD.
76. Id., at para. 62.

6.4.2.3.2. Decision of the ECJ

When the conference was held, *Cardpoint* was pending before the ECJ. In its decision of 3 October 2019, it became clear that the ECJ had followed the opinion of the AG. In Germany, this judgment was also commented on in a critical manner with regard to the recent increasing "outsourcing" of classical banking services. On 13 November 2019, the FG decided Case V R 6/15 (V R 30/19)[77]according to the judgment of the ECJ.

6.5. Observations

Grube concluded that a comparative analysis reveals that the Canadian and EU approaches are rather similar. As in the European Union, the TCC faced the same issue of compound supplies that have to be broken down into ancillary and main services. The legislative approaches are different, however. In the European Union, the definition of the VAT Directive (2006/112) applies, which is rather narrow. In Canada, the ETA contains a broad exemption, but this is narrowed by a list of exceptions to the exemption. The scope is determined by the national Parliament, unlike in the case of the Member States.

D'Arcy observed that the scope of the Canadian exemption rules is wide because of the competition concerns. In other words, there is a risk that economic actors will move those parts of their business that generate unrecoverable GST charges.

Vanderkerken observed that the AG's analysis regarding ancillary (and, therefore, not exempt) and non-ancillary (and, therefore, exempt) services appeared odd. Banks are seen to rely more and more and outsourcing and, therefore, on paying fees for services. If these are not exempt, the burden on the end customer might increase in the whole of the European Union. She wondered whether technical evolution in the financial business might require a review of the exemption rules, which were designed with a different reality in mind.

7. Session 6 – The Increasing Impact of Soft Law on (International) Tax Law

7.1. Panel composition and agenda

The session was chaired by Justice Bernard Peeters, *Hof van Beroep* (Court of Appeals, HvB) Antwerp. The panel was composed of Justice Pierre Collin, CE, France; Justice Eveline Faase, HR, the Netherlands; Justice Robert Hogan, TCC, Canada; Chief Justice Paige Marvel, USTC, United States; and Judge Stefan Wilk, FG Köln, Germany.

7.2. Introductory remarks on the effect of soft law

Peeters referred to the continuous updating by the OECD of its Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations (OECD Guidelines)[78]as a blatant example of the increasing effect of soft law on national tax law. The OECD Guidelines were updated in 2017 pursuant to the outcomes under Actions 8-10 of the OECD/G20 Base Erosion and Profit Shifting (BEPS)[79]project. The amendments were intended to provide clarity and legal certainty regarding the status of the BEPS changes to the OECD Guidelines, and some of the new rules contain drastic alterations of previous rules.[80]Peeters noted that the Belgian tax authorities intend to retroactively apply the amended OECD Guidelines (2017), which clearly illustrates the far-reaching effect of soft law and its potential to alter the tax base without parliamentary intervention.

Soft law is often defined as:

> Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain – indirect – legal effects, and that are aimed at and may produce practical effects.[81]

Critics of soft law often refer to its lack of transparency and democratic legitimacy and its absence from public debate. As far as soft law in international tax law is concerned, the most relevant instruments are the OECD Model and the UN Model ,[82]the OECD TP Guidelines, the standards set by the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes and, possibly, the various Reports under the OECD/G20 BEPS project. Peeters noted that, within the framework of the Convention on the Organisation of the OECD of 14 December 1990, these instruments are to be characterized as "recommendations to Members"[83]and not as binding decisions. Article 18b of the Rules of Procedure of the OECD provides that recommendations

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77. DE: BFH, 13 Nov. 2019, Case V R 6/15 (V R 30/19).
78. Most recently, *OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2017) , Primary Sources IBFD [hereinafter *OECD Guidelines* (2017)].
79. *See* OECD/G20, *Aligning Transfer Pricing Outcomes with Value Creation – Actions 8-10: 2015 Final Report* (OECD 2015), Primary Sources IBFD.
80. *See* , for example, new paragraph 6.42 of the *OECD Guidelines* (2017), *supra* n. 78 , regarding the allocation of returns on intangibles.
81. L.A.J. Senden, *Soft Law, Self-Regulation and Co-Regulation in European Law: Where Do They Meet?* , 9 Elec. J. Comp. L. 1, 23 (2005).
82. *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2017) , Treaties & Models IBFD.
83. OECD, *Convention on the Organisation of the OECD* , articles 5 and 6. (OECD 1999).

"shall be submitted to the Members for consideration in order that they may, if they consider it opportune, provide for their implementation".[84]

Peeters observed that all of this did not imply that soft law instruments such as the OECD Guidelines have no legal value. Some states explicitly refer to the OECD Guidelines in their tax treaties or agree that a treaty's provisions are to be interpreted in line with the Guidelines.[85]An additional issue is whether such reference has a static or an ambulatory effect.[86]

A step further is the inclusion of express references to the OECD Guidelines in domestic tax law. In such a case, it can be assumed that the OECD Guidelines are legally binding, at least for the purpose of the application of domestic law. Examples of this practice can be found in Ireland, Mexico, the Netherlands, Spain and the United Kingdom. The effect of future changes to the OECD Guidelines is not always clear in case of these statutory references.

Finally, Peeters noted that references to soft law and the OECD Guidelines are most often found in the administrative guidelines of national tax authorities, which are often binding only on the latter but not on the taxpayer or the judiciary. However, with regard to national jurisprudence, the effect of the OECD Guidelines in specific cases seems to be increasing as well. Peeters referred to examples of cases decided in Austria,[87]Canada,[88]Germany,[89]Italy[90]and Switzerland.[91]On the other hand, in countries such as France and the United States, references to the OECD Guidelines are almost non-existent in case law. In Australia[92]and Malawi,[93]courts have been witnessed expressly rejecting the OECD Guidelines as a source of law.

7.3. The effect of soft law on French tax law

Collin talked about the effect of soft law on French tax law. He noted that, if the soft law provisions are in line with the law, there is no specific effect. Only in the case that the soft law instrument adds to the law is there an effect, but this effect is asymmetrical. The instrument cannot have a binding effect on the taxpayer because of the principle of tax legality which has historically been enshrined in article 14 of the French *Declaration des droits de l'homme et du citoyen* [Declaration of the Rights of Man and of the Citizen] of 1789.[94]Soft law instruments have a binding effect on the tax authorities, but they cannot apply with ambulatory effect or with regard to the interpretation of procedural rules. (Domestic) soft law instruments can be challenged before the French courts if their application would result in less favourable treatment than the law.

Collin observed that for the purpose of interpreting French tax treaties, the Commentaries on the OECD Model as they existed before a particular tax treaty was signed and to the extent that the tax treaty contains provisions modelled on the OECD Model are considered to be a form of preparatory document and useful for shedding light on the intentions of the signatory states. Tax judges, therefore, refer to the OECD Commentaries when interpreting undefined tax treaty terms. Nevertheless, the OECD Commentaries do not have real legal binding effect, as they are not part of the tax treaty in question. Collin referred to the case of *Thermo Electron* (2017),[95]in which the CE expressly referred to the OECD Commentaries in force when the tax treaty was signed for the purpose of interpreting the France-United States Income Tax Treaty (1994) .[96]In other cases, the CE has expressly steered clear of any ambulatory effect of later-in-time versions of the OECD Commentaries.[97]

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84. OECD, *Rules of Procedure of the OECD* , rule 18 (OECD 2013).
85. *See* , for example, *Convention between the Government of the United States of America and the Government of the Kingdom of Belgium for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* Protocol, para. 1 (27 Nov. 2006), Treaties & Models IBFD.
86. It could be argued that ambulatory references to soft law instruments pave the way to informal modifications of the original meaning of the treaty in question. For an example of a reference with ambulatory effect, *see* : *Exchange of Notes* relating to the *Convention between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income* (6 Nov. 2003) , Treaties & Models IBFD [hereinafter the *Japan-US Income Tax Treaty* (2006)], according to which the *Japan-US Income Tax Treaty* (2006) must be interpreted according to the latest available version of the *OECD Guidelines* .
87. *See* the decision of the *Verwaltungsgerichtshof* (Supreme Administrative Court, VwGH) in AT: VwGH, 13 Sept. 2006, Case 2002/13/0190 , Case Law IBFD.
88. CA: FCA, 31 May 2002, [2002] FCA 229, *SmithKline Beecham Animal Health Inc v. Her Majesty the Queen.*
89. DE: BHF, 17 Oct. 2001, Case I R 103/00 , Case Law IBFD.
90. *See* the decision of the Italian *Corte Suprema di Cassazione* (Supreme Court, CSC) in IT: CSC, 13 Oct. 2006, Case 22023 , Case Law IBFD.
91. CH: BVGer/TAF, 24 Sept. 2009, Case A-710/2009.
92. AU: FCA, 25 June 2010, *SNF (Australia) Pty Ltd. v. Australian Tax Office* , Case Law IBFD.
93. *See* the decision of the Malawi High Court (MHC) in MW: MHC, 27 July 2018, Case 43 of 2016 , Case Law IBFD.
94. FR: Declaration des droits de l'homme et du citoyen [Declaration of the Rights of Man and of the Citizen], 1789.
95. FR: CE, 21 July 2017, Case 392908, *Thermo Electron* .
96. *Convention between the Government of the United States of America 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 Capital* (31 Aug. 1994) (as amended through 2009), Treaties & Models IBFD.
97. *See* , for example, FR: CE, 12 Mar. 2014, Case 352212 , *DGFP Zeta* , Case Law IBFD; and FR: CE, 30 Dec. 2003, Case 233894 , *SA Andritz* , Case Law IBFD.

With regard to the OECD Guidelines, Collin noted that the tax authorities have issued administrative guidelines confirming that they follow the guidelines.[98]However, the CE never directly refers to the OECD Guidelines and they merely serve as a source of inspiration. They are often quoted in opinions of the AG to the CE.[99]

7.4. The effect of soft law on Dutch tax law

Faase provided an overview of the evolution and use of (domestic) soft law instruments in Dutch tax law. These instruments are typically not based on delegated legislative powers and concern the interpretation and enforcement of statutory provisions. They usually solidify the consent of the tax authorities to positions favourable for the taxpayer. In a number of “breakthrough” decisions, the HR has clarified the binding effect of these instruments on the tax authorities – potentially even if *contra legem* – and their generation of legitimate expectations on the part of the taxpayer.[100]

With regard to the effect of the Commentaries on the OECD Model, Faase noted that these were referred to for the purpose of interpreting treaty terms. In its settled case law, the HR has held that the Commentaries on the OECD Model do not merely provide guidance, but are deemed to be “of great significance”.[101]In recent decisions, the HR’s view on this matter has remained unchanged.[102]Based on the HR’s unwillingness to refer to the most recent versions of the OECD Commentaries, it is presumed that it disapproves of giving the OECD Commentaries ambulatory effect.[103]

7.5. The effect of soft law on German tax law

Wilk gave an overview of the situation in Germany. As in France, there is a strong adherence to the principle of legality in tax, which is derived from the provisions of the German *Grundgesetz* (Basic Law, GG).[104]The *Abgabenordnung* (General Tax Code, AO) provides that taxes are determined by the law and that the law includes formal statutes, ordinances based on statutory delegation and instruments of public international law.[105]Exceptions exist in situations in which the law entitles the tax authorities to act at their own discretion, while respecting the principle of equality. Another exception can be found in section 176(2) of the AO. Under this section, an administrative provision may protect legitimate expectations in an individual case.

Wilk referred to a recent decision of the BFH,[106]in which it observed that the importance of the Commentaries on the OECD Model was comparable to that of the explanatory memoranda in the interpretation of national laws. It may be relevant for the interpretation of tax treaties concluded after the relevant OECD Commentaries were drafted, but under no circumstances has it the same rank as the treaty provisions themselves. As such, the intentions of the drafters of the OECD Commentaries might not necessarily be reflected in the treaty provision in question. It is possible that the intentions of the drafters of the OECD Commentaries are superseded by overriding systematic or teleological considerations regarding the tax treaty in question.

Wilk observed that the Germany-Hungary Income and Capital Tax Treaty (2011) provides that:

> The application and interpretation of Articles 5 and 7 of this Agreement and, in particular, the settlement of any disputes, should be done by using the Commentary on Articles 5 and 7 of the current Model Convention of the OECD. If the Commentary is revised in the future by the OECD, Articles 5 and 7 of this Agreement should be interpreted in the spirit of the revised Commentary, provided this is in accordance with the text of the Agreement.[107]

In Germany, the OECD Guidelines are regarded as reflecting the views of the participating tax authorities, but they have no binding effects comparable to statutory law. However, the OECD Guidelines may produce factual effects in the context of mutual agreement procedures (MAPs) to reach a mutually agreed solution.

Wilk believed that, from the perspective of the rule of law and the separation of powers, it was rather disconcerting to witness the OECD soft law instruments being given too much value. The rules contained there have been defined solely by an executive body and without parliamentary input. As such, they cannot bind the judiciary. In court, they can serve as an aid to interpretation. In Wilk’s opinion, OECD soft law should not dictate interpretation unless the interpretation method itself is given by law.

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98. FR: Direction générale des Finances publiques, *INT – Dispositions communes – Droit Conventionnel – Les prix de transfert* , Administrative Guideline BOI-INT-DG-20-40-20120912 (12 Sept. 2012), available at: http://bofip.impots.gouv.fr/bofip/5341-PGP.html?identifiant=BOI-INT-DG-20-40-20120912 (accessed 1 Feb. 2020.).
99. *See* , for example, FR: CE, 9 Nov. 2015, Case 370974 , *Sodirep Textiles S.A.* , Case Law IBFD; and FR: CE, 18 Sept. 2018, Case 405779 , *Philips France SAS* , Case Law IBFD.
100. NL: HR, 12 Apr. 1978, BNB 1978/135-137; NL: HR, 28 Mar.1990, BNB 1990/194; NL: HR, 27 Apr. 2012, BNB 2012/217; NL: HR, 26 Sept. 1979, BNB 1979/311; and NL: HR, 13 Dec. 1989, BNB 1990.119.
101. NL: HR, 2 Sept. 1992, Case 27.252 , BNB 1992/379, Case Law IBFD.
102. *See* , for example, NL: HR, 14 July 2017, Case 16/03578 , Case Law IBFD.
103. *See* , for example, NL: HR, 9 Feb. 2007, Case 40.465 , BNB 2007/142-144, Case Law IBFD and NL: HR, 29 Nov. 2013, Case 12/05498.
104. DE: Grundgesetz [Basic Law], [1949], secs. 2(1) and 20(3).
105. DE: Abgabenordnung [General Tax Code], [1976], secs. 3(1) and 4.
106. DE: BFH, 11 July 2018, Case I R 44/16.
107. *Agreement between the Federal Republic of Germany and the Republic of Hungary for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* , Protocol, para. 3 (28 Feb. 2011), Treaties & Models IBFD.

7.6. The effect of soft law on Canadian tax law

Hogan explained that there were two types of soft law in Canadian tax law. Soft law instruments that are close to the domestic legislative process, such as technical notes issued by the tax authorities, have a high persuasive value. Technical notes include interpretation bulletins and technical views and interpretations. Taxpayers routinely use these when they are to their advantage. Technical notes are not part of the final tax legislation adopted by Parliament, but the courts consider these to be a useful extrinsic aid, as they are closely connected to the legislative process and they illuminate the legislative context, purpose and rationale.[108]The persuasive value of technical notes also clearly manifested itself in litigation involving the Canadian GAARs.[109]Other publications of the tax authorities, such as tax guides, information circulars and bulletins are not connected with the legislative process, and, therefore, are less persuasive.

Hogan warned that there are some dangers in giving too much effect to soft law of which the application sometimes results in arbitrariness. He referred to the example of the frequent abuse on the partial exemption on the sale of enterprises, which has often been used to strip earnings out of corporations. As such, a specific anti-avoidance rule was devised. The tax authorities came up with a soft law policy to allow circumventing the anti-abuse rule if it concerned bona fide sales for family estate planning.

Hogan also noted that, generally, Canada models its tax treaties on the OECD Model. However, significant divergences can be found between Canada's tax treaties and the OECD Model. The Canadian tax authorities often deal with questions of treaty interpretation and their views are deemed highly persuasive. They often refer to the OECD Model and the Commentaries on the OECD Model. For specific tax treaties, dedicated technical explanations are issued. The positions adopted in these publications are strictly followed during the audit process, assessment state and MAP process.

The Canadian courts have confirmed the high persuasive value of the Commentaries on the OECD Model when interpreting tax treaties modelled to the OECD Model.[110]Hogan referred to the recent case of *Alta Energy* (2018)[111]as an instance in which the TCC had to consider the value of the OECD Commentaries in the interpretation of a treaty provision that expressly deviated from the OECD Model. The TCC concluded that the deviation signalled the negotiators' intent to create an exception from the generally accepted rule under the OECD Commentaries.

The views of the Canadian tax authorities on the OECD Guidelines are set out in Information Circular 87-2R (the Circular),[112]which was last updated to reflect the OECD Guidelines (1995) .[113]The Circular has not been updated to include later revisions of the OECD Guidelines. There is no legislative foundation for the tax authorities to publish its own transfer pricing guidelines or to adhere to the OECD Guidelines. This view is also reflected in the courts' decisions. Accordingly, the OECD Guidelines are useful, but are not controlling in the same way as a Canadian statute.[114]

7.7. The effect of soft law on US tax law

Marvel explained that the term "soft law" is not one that is generally found in US tax jurisdiction. Instruments considered to be soft law are not binding precedent in the US courts deciding tax matters. Researching a tax issue in the US involves the examination of various "primary authorities", i.e. statutory law and related legislative history, final regulations issued by the government and temporary regulations issued by the tax authorities, and sometimes "secondary authorities", i.e. sources explaining but not establishing the law, such as doctrine and other non-governmental sources. Not all primary authority is binding, although the tax authorities are expected to follow their own published guidance.

Officially published guidance of the tax authorities includes revenue rulings, notices, announcements, notices of acquiescence and non-acquiescence and delegation orders. Other documents of the tax authorities, such as actions on decision, appeals settlement guidelines, chief counsel bulletins, general counsel memoranda and administrative manuals and instructions, are not published in the official Internal Revenue Bulletins and are not given much credence in the courts. In *Chevron* (1984),[115]the US Supreme Court (USSC) held that the courts must defer to an agency's reasonable interpretation of an ambiguous statute if issued by duly

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108. *See* , for example, CA: CFCA, *Owen Holdings Ltd. v. Canada* , [1997] CanLII 16702 (FCA).
109. *See* , for example, CA: CFCA, (Appeal Division), *OSFC Holdings Ltd. v. Canada* , [2002] 2 F.C. 288.
110. *See* CA: SCC, 22 June 1995, *Crown Forest Industries Ltd. v. Her Majesty the Queen* , Case 23940 , [1995] 2 S.C.R. 802, Case Law IBFD.
111. CA: TCC, 22 Aug. 2018, *Alta Energy Luxembourg S.A.R.L. v. the Queen* , 2018 TCC 152 , Case Law IBFD. The case concerned the interpretation of an exception to the rule of source taxation on capital gains realized on the alienation of shares in immobile property rich companies, contained in *Convention between the Government of Canada and the Government of the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* art. 13(4) (10 Sept. 1999) (as amended through 2012), Treaties & Models IBFD. Under the exception, immovable property used to carry the business of a taxpayer is not covered by the source taxation rule. The TCC observed that the purpose of the carve-out is to attract foreign direct investment, and that, therefore, it was reasonable to assume that the treaty negotiators wanted the exception to be granted in accordance with industry practices and cover entire shale oil fields, even if the actual oil extraction took place in a small area of the land.
112. Canada Revenue Agency, Information Circular 87-2R (27 Sept. 1999).
113. OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 1995), Primary Sources IBFD
114. *See* CA: TCC, 10 June 2014, *Marzen Artistic Aluminum v. Her Majesty the Queen* , 2010-860(IT)G, Case Law IBFD and CA: SCC, 18 Oct. 2012, *GlaxoSmithKline* , 33874.
115. US: USSC, 25 June 1984, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc* , Case 82-1005.

promulgated regulations. Other federal courts have applied this and other USSC case law to reach conclusions on the level of deference, if any, to be given to administrative guidance.

When considering the meaning of a tax treaty – whether bilateral or multilateral – the USTC construes the tax treaty to be a contract between sovereigns.[116] The USTC begins with the text of the tax treaty and the context within which the words are used. The plain meaning of the terms controls unless that meaning is contrary to the intent or expectations of the signatories. A tax treaty's legislative history, including the negotiations and diplomatic correspondence of the parties, may be considered to determine the intent of the signatory states. The courts also give weight to how the departments of the governments charged with negotiating and enforcing a tax treaty interpret that tax treaty, including the courts of a signatory state.[117] In deciding tax treaty cases, the USTC and other federal courts have used the Commentaries on the OECD Model to buttress their analysis of bilateral tax treaties containing substantially similar language to that of the OECD Model.[118]

Marvel noted that the OECD Guidelines are a different story. The USTC has not cited or relied upon the OECD Guidelines to decide its transfer pricing cases. She believed that this might be explained by the fact that the OECD Guidelines are an evolving set of standards that function more like a treatise or practical guide and do not necessarily reflect consensus within the international community. The reference to the OECD Guidelines in the Belgium-United States Income Tax Treaty (2006) is a rare exception in this regard (*see* section 7.2.). This does not detract from the fact that the OECD Guidelines are very effective at the administrative dispute level where taxpayers deal directly with the tax authorities.

8. Exotic Topic: The Tax Judge and the Saucy Stage Gear

Justice Guy Brannan of the UKUT shared with the audience his tragic fate as a tax judge trying to explain his profession to his children. After successfully explaining the concepts of "evidence", "facts" and "cross-examination" at the Christmas dinner table, the children did what children do nowadays – they rushed from the table and looked up their father's name on Google.

Under the first search result an article popped up published in tabloid newspaper The Sun under the title: "Judge Guy Brannan tells pole dancer stripper that she can deduct expenses for her saucy stage gear including naughty nurse and schoolgirl outfits".[119] Yes, children, all part of a tax judge's day job.

Brannan explained that the case was rather revealing – from a tax technical point of view, that is. In a similar case dating from the 1980s, a barrister had tried to claim a tax deduction for wardrobe expenses, arguing that she would never wear the professional attires in question outside the courtroom and that she had only purchased these to comply with professional requirements. The legal test applied at the time was that of the general test of the expenses being made "wholly and exclusively" for business purposes. The UK House of Lords (UKHL) subsequently modified the test for business clothing. The Lords concluded that, even if the outfits were purchased wholly for business purposes, the clothes could still be worn outside work. Hence, under their new legal test, items of clothing that provided "warmth and decency" – essential characteristics of most items of clothing – were not tax deductible, regardless of their professional purpose.

In the case at hand, Justice Brannan did what is required of a tax judge. He kept a straight face and assimilated the information put in front of him. He carefully took notice of the evidence – black corsets, knickers, stockings, bras and six to ten-inch stiletto heels – and of the taxpayer's personal appearance in court. He came to the conclusion that the items worn by the taxpayer could not be described as providing "warmth and decency". On the contrary, the objective of the taxpayer in acquiring the items was believed to be the reverse of the objective of provision of warmth and decency. The expenditures were furthermore held akin to the acquisition of a costume by a self-employed actor for use in a performance. The taxpayer was entitled to the tax relief.

Looking back at the case, Justice Brannan could only think of two things. First of all, would this be his most momentous contribution to UK tax law? Secondly, with Brexit looming, was it too late to exercise his EU General Data Protection Regulation "right to be forgotten"?

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116. *See* US: USTC, 22 Dec. 2015, *Usman Bhutta v. Commissioner of Internal Revenue* , Case 26940-13 , Case Law IBFD.
117. *See* , for example, the non-tax case of *Abbott v. Abbott* , in which the USSC observed that "in interpreting any treaty, the opinions of our sister signatories are entitled to considerable weight" (*see* US: USSC, 17 May 2010, Case 08-645, 560 US 1 (2010)).
118. *See* , for examples, the decision of the US Court of Appeals (CAFC) for the Ninth Circuit, in US: CAFC, 29 Aug. 2002, *American Air Liquide Inc. and Subsidiaries v. Commissioner of Internal Revenue* , Case 1-70627 , Case Law IBFD; US: USTC, 20 Jan. 2016, *Gerd Topsnik v. Commissioner of Internal Revenue* , Case 2482-14 , Case Law IBFD; US: USTC, 12 Dec. 1996, *The North West Life Assurance Company of Canada v. Commissioner of Internal Revenue* , Case 4694-94 , Case Law IBFD; and US: USTC, 2 May 1995, *Taisei Fire and Marine Insurance Co., Ltd., et al v. Commissioner of Internal Revenue* , Case 14296-92 , Case Law IBFD.
119. E. James, *Pole Tax: Stringfellows Stripper Wins Battle over £10,000 Tax Relief on her Saucy Stage Gear Including Naughty Nurse and Schoolgirl Outfits* , The Sun (9 Sept. 2018).