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Report of the Proceedings of the Ninth Assembly of the International Association of Tax Judges Held in Ottawa on 28 and 29 September 2018

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This report summarizes the proceedings of the ninth Assembly of the International Association of Tax Judges, which was held in Ottawa on 28 and 29 September 2018.

1. Introduction

On 28 and 29 September 2018, the ninth Assembly of the International Association of Tax Judges (IATJ) was held in Ottawa, Canada. The proceedings took place at the premises of the Lord Elgin Hotel and was organized by the Tax Court of Canada (TCC).

The assembly was attended by 67 judges from countries of all continents. The assembly was opened by Chief Justice Eugene P. Rossiter (Canada), President of the IATJ and Chief Justice of the TCC. IATJ PPC Chairman Wim Wijnen presented the agenda of the assembly.

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

- (1) GAAR under BEPS and MLI (see section 2.);
- (2) Precedent: *stare decisis* versus change of case law (see section 3.);
- (3) Tax procedures in Canada (see section 4.);
- (4) Recent case law on permanent establishments (see section 5.);
- (5) Recent case law on tax fraud in VAT/GST (see section 6.);
- (6) Transparency of court proceedings (see section 7.); and
- (7) “Exotic” topic: “the most important court in Canada” (see section 8.).

2. Session 1 – GAAR under BEPS and MLI

2.1. Panel composition and agenda

The session was chaired by Justice Philippe Martin, President of a section of the *Conseil d'Etat* (Supreme Administrative Court, CE), France. The panel consisted of Justice Peter Cools, *Hoge Raad* (Supreme Court, HR), the Netherlands; Judge Malcolm Gammie, Upper Tribunal (Tax & Chancery), United Kingdom; Judge Pramod Kumar, Vice-President, Income Tax Appellate Tribunal (ITAT), India; Chief Justice Vesa-Pekka Nuotio, *Korkein hallinto-oikeus* (Supreme Administrative Court, KHO), Finland; Justice John Owen, Tax Court of Canada (TCC); and Jacques Sasseville (UN Guest).

The session commenced with an overview of the general anti-avoidance rule (GAAR) practice in the Netherlands, France, Finland and Canada, which have a longstanding tradition in this field. Then, the practice in countries that only recently introduced a statutory GAAR, for example, the United Kingdom, was discussed. (See section 2.2.) In a second part, an analysis was made of the treaty GAAR adopted at the level of the OECD and the United Nations. (See section 2.3.) Finally, certain issues were discussed that are commonly faced by tax courts of all jurisdictions when applying the GAAR. (See section 2.4.)

2.2. Country overview

2.2.1. The Netherlands

Cools gave a brief overview of the use of the GAAR practice in the Netherlands. He noted that there was long-standing tradition of statutory GAAR in the Netherlands in the form of the so-called “*richtige heffing*”. The Dutch courts developed a jurisprudential anti-abuse doctrine under the *fraus legis* principle. The application of both leads to similar results in practice. The differences between *richtige*

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heffing and *fraus legis* is that the latter only applies to direct taxes, merely ignores transactions and requires prior approval by the *Minister van Financiën* (Minister of Finance). Since developments in the case law of the HR, according to which the concept of *fraus legis* also provides for the ignoring of transactions by way of “substitution by elimination”, the Minister no longer formally gives approval for the application of the *richtige heffing*. (Recently, *fraus legis* has also been applied to indirect taxes.)

With regard to the application of the *fraus legis* doctrine – which only applies with regard to tax law – Cools noted that the following three requirements must be fulfilled:

- (1) the objective requirement, namely, the (partial) avoidance of Dutch taxes;
- (2) the subjective requirement, namely, the essential motive, i.e. the only or by far the most important motive, for entering into a legal act of a set of legal acts was to avoid Dutch taxes; and
- (3) the normative requirement, namely, the arrangement is contrary to the object and purpose of Dutch legislation.

The result of the application of the *fraus legis* doctrine is the substitution by elimination of the legal act.

There are a number of limitations to the use of the *fraus legis* doctrine. First, it is a means of last resort that can only be used if there are no other remedies available to combat the tax evasion like the normal means of (teleological) interpretation or requalification of the facts. *Fraus legis* can be used if the existence of the legal act in question is not disputed. Furthermore, the principle of legal certainty is strictly adhered to under Dutch tax law: taxpayers may rely on positive tax law to choose the most profitable way to do business and this might prevent the application of the *fraus legis* doctrine.

It is for the tax authorities to provide evidence of the three requirements. The subjective requirement is understood as requiring evidence that the legal act gives rise to the presumption that the act does not lead to a genuine change and is made without reason, except for the tax benefits. The taxpayer can provide counter-evidence by proving that there were (additional) commercial reasons to undertake the act in question. The normative requirement is not a matter of ethics but merely refers to the intent of the legislator when drafting the tax provision in question. The courts do not take the initiative to apply *fraus legis* and merely assess the application of it by the tax authorities.

Cools observed that the *fraus legis* doctrine is hardly applicable in relation to tax treaties, de facto only when the tax treaty in question expressly provides for its application. Concerning *fraus legis* within the European Union, there are similarities with the doctrine of the Court of Justice of the European Union (ECJ or the “Court”) on abuse developed in *Cadbury Schweppes* (Case C-196/04).^[1]

2.2.2. France

Martin explained that France adopted a statutory GAAR in 1941. The legal tests for its application of this *abus de droit* test have been rewritten through the jurisprudence of the courts. In *Janfin* (2006),^[2] the scope of these tests has been expanded and fine-tuned. In said case, the CE justified the abuse of law doctrine, i.e. *fraude à la loi*, by the general principle of law according to which fraud can have no acceptable consequences of law. The application of the GAAR to tax treaties if no relevant treaty provision deals with abuse has been confirmed by the CE in *Verdannot* (2017).^[3]

With regard to the application requirements of the GAAR, Martin noted that the tax advantage must be real. If the scheme in question does not materialize because of the application of the ordinary tax provisions, the GAAR is not applicable.^[4] The calculation of the exact advantage might require hypothetical assumptions. For instance, when the French tax authorities re-characterized a transaction between a French and a Dutch entity into one between a French and a US entity, the France-United States Income and Capital Tax Treaty (1995)^[5] had to be considered to assess whether the taxpayer had gained an advantage by relying on the France-Netherlands Income and Capital Tax Treaty (1973).^{[6][7]}

Martin observed that the French motive test is a “sole tax purpose” test, with exception in cases regarding negligible financial gains, which contrasts with the decision of the ECJ in *Cussens* (Case C-251/16) in which, for EU law purposes, the motive test was interpreted by the Court as referring to the “essential aim”.^[8]

The purpose of the tax provision in question has to be derived from the *travaux préparatoires* of the domestic act in question. In the *Verdannot* case, the artificial interposition of a Luxembourg company was seen as a violation of the spirit of the France-Luxembourg Income and Capital Tax Treaty (1958)^[9] that was held to allocate to Luxembourg the right to tax transactions only if they were effectively

1. UK: ECJ, 12 Sept. 2006, [Case C-196/04](#), *Cadbury Schweppes plc, Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue*, ECJ Case Law IBFD.

2. FR: CE, 27 Sept. 2006, Case No. 260050 (*Janfin*).

3. FR: CE, 25 Oct. 2017, [Case No. 396954](#) (*Verdannot*), Tax Treaty Case Law IBFD.

4. FR: CE, 5 Mar. 2007, Case No. 284457 (*Pharmacie de Challonges*).

5. [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 2004), Treaties IBFD.

6. [Convention between the Republic of France and the Kingdom of the Netherlands for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital](#) (unofficial translation) (16 Mar. 1973) (as amended through 2004), Treaties IBFD.

7. FR: CE, 21 July 2017, Case No. 392308 (*Thermo Electro Holdings*).

8. IE: ECJ, 22 Nov. 2017, [Case C-251/16](#), *Edward Cussens, John Jennings, Vincent Kingston v. T.G. Brosnan*, ECJ Case Law IBFD.

9. [Convention between France and the Grand Duchy of Luxembourg for the Avoidance of Double Taxation and the Establishment of Rules of Reciprocal Administrative Assistance with Respect to Taxes on Income and Capital](#) (unofficial translation) (1 Apr. 1958) (as amended through 2014), Treaties IBFD.

carried on by a Luxembourg company.^[10] Martin also noted that, under recent case law, it is clear that a transaction resulting in a small financial gain, but with a disproportionately large tax gain does not necessarily exclude that the transaction fails the “sole purpose” test.

The burden of proof for the application of the French GAAR lays with the tax authorities, but may shift to the taxpayer for procedural reasons. The application of the GAAR is generally subject to strong judicial oversight on both the questions of law, i.e. the requirements for application, and on the establishing of the facts.

2.2.3. Finland

Nuotio observed that the Finnish *Laki verotusmenettelystä* (Tax Assessment Law)^[11] contains GAAR, which is applicable to personal and corporate income taxes. The rule can be applied if the taxpayer has used a legal form, which does not correspond to the true nature and purpose of the transaction. The application of the rule has in many cases been based on the overall view of the transaction(s) and the reliance on an unusual legal form and/or the lack of other motives than tax reasons are seen as indications of tax avoidance. The motive test applied is not a clear-cut “sole purpose” test, as in France or the Netherlands. Nuotio observed that the focus lays on the overall view of the transaction and on the “most likely motive” that underlies it, which is not necessarily the “sole motive”.

Application of the GAAR is prevented if there is proof of genuine business reasons for the transaction. There is a substantial body of case law, from which can be derived in which situations the GAAR will be applied successfully.

Nuotio revealed that the Finnish *Laki elinkeinotulon verottamisesta* (Business Income Tax Law)^[12] includes a dedicated anti-avoidance rule based on the Merger Directive (2009/133).^[13] Similarly, a number of specific anti-avoidance rules have been adopted to target, inter alia, hidden profit distributions, non-arm’s length transactions between related entities, excessive deduction of interest paid to related entities and the trading of loss-making companies. Nuotio added that, in certain cases, the tax benefit targeted by the taxpayer via artificial arrangements can also be denied by application of the standard rule on the deductibility of business expenses or other standard provisions.

Over the years, similar anti-avoidance rules have also been adopted in relation to taxes other than income taxes, like property transfer tax, gift and inheritance tax, VAT, insurance tax, social contributions and wage withholding tax. Nuotio observed that these anti-avoidance rules applicable to other taxes have been rarely applied or have not, yet, been applied at all.

2.2.4. Canada

Owen provided an overview of the Canadian GAAR, which was enacted in 1988 and amended in 2004 to (explicitly) make it applicable to tax treaties. Its interpretation is based on three Supreme Court of Canada (SCC) cases: *Canada Trustco* (2005),^[14] *Lipson* (2009)^[15] and *Copthorne* (2011).^[16]

Owen noted that the application of the GAAR is based on a three-pronged test:

- (1) Is there a tax benefit? It is if there is a reduction, avoidance or deferral of tax or an increase of a refund.
- (2) Is there an avoidance transaction? It exists if the transaction(s) results directly or indirectly in a tax benefit and it may reasonably be considered that the transaction was not undertaken or arranged primarily for bona fide purposes other than to obtain the tax benefit.
- (3) Is it reasonable to consider that the avoidance transaction results directly or indirectly in a misuse or an abuse of a provision of the income tax act, income tax regulations, income tax application rules or any other enactment relevant in computing tax or any other amount payable under the income tax act.

Whether a tax benefit or an avoidance transaction exists is a question of fact for the judge to determine. The definition of avoidance transaction requires an objective assessment of the relative importance of the driving forces of the transaction. Consequently, the Canadian motive test is an assessment of the motives which primarily inspired the transaction. The tax authorities may assume facts that establish the existence of a tax benefit and an avoidance transaction. The burden is on the taxpayer to prove facts that support the conclusion of the contrary.

Owen explained that the SCC had condensed the statutory “misuse or abuse” test into a single question: “Is the impugned avoidance transaction abusive?” It is if the transaction in its context frustrates the spirit or purpose of the provision giving rise to the tax benefit. Contrary to the establishment of the fact, the burden for determining the legislative rationale of a provision lays with the tax authorities. The court assesses the position adopted by the tax authorities in this regard by employing a unified textual, contextual and purposive interpretation of statutory provisions and, subsequently, whether the avoidance transaction falls within or frustrates the identified object,

10. Verdannet (2017), *supra* n. 3.

11. FI: *Laki verotusmenettelystä* (Tax Assessment Law).

12. FI: *Laki elinkeinotulon verottamisesta* (Business Income Tax Law).

13. Council Directive 2009/133/EC of 19 October 2009 on the Common System of Taxation Applicable to Mergers, Divisions, Partial Divisions, Transfers of Assets and Exchanges of Shares Concerning Companies of Different Member States and to the Transfer of the Registered Office of an SE or SCE between Member States (Codified Version), OJ, L310 (2009), EU Law IBFD [hereinafter: the “Merger Directive (2009/133)”].

14. CA: SCC, 19 Oct. 2005, Case No. 30290, *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 SCR 601.

15. CA: SCC, 8 Jan. 2009, Case No. 32041, *Lipson*, [2009] 1 SCR 3.

16. CA: SCC, 16 Dec. 2011, Case No. 33283, *Copthorne Holdings Ltd.*, [2011] 3 SCR 721.

spirit or purpose. The court must adopt an objective, thorough and step-by-step analysis of the provision in question and explain the reasons for its conclusion whether an avoidance transaction is abusive. The abusive nature must be clear: *in dubio contra fiscum*.

2.2.5. United Kingdom

Gammie explained that historically, certain UK taxes included a GAAR, like the excess profits tax under the Finance Act (FA) of 1941,^[17] but that otherwise, the country adopted specific anti-abuse rules (SAARs) or attached general anti-avoidance language to specific provisions of an FA. The language used tended to be referring either to “the main benefit to be expected from the transaction being the avoidance or reduction of a liability to tax” or “the main purpose or one of the main purposes of the transaction being the avoidance or reduction of a liability to tax”.

Starting with *Ramsay* (1982),^[18] courts began to take a more proactive approach to combatting tax avoidance arrangements. In the more recent *Barclays* (2004)^[19] case, the *Ramsay* principle was said to involve a general rule of statutory construction and an unblinkered approach to the analysis of the facts: “The ultimate question is whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction, viewed realistically”.

Gammie noted that the adoption of a statutory GAAR had been debated since 1997, but that the tax authorities and the, then, Labour Government were against the introduction of it. Under the 2010 Coalition Government, the GAAR was finally introduced in the FA of 2013.^[20] It applies to all the main direct taxes and targets any arrangement where it is reasonable to conclude that the obtaining of the tax advantage, i.e. any tax saving or benefit, was one of the main benefits of the arrangement. The arrangement must be abusive, i.e. the entering into it cannot reasonably be regarded as reasonable course of action (the “double reasonableness” test) having regard to all circumstances, like the principles and policy objectives of the legislation, any contrived or abnormal steps and the exploitation of legislative shortcomings.

The tax authorities must follow a special procedure to invoke the GAAR, including seeking the opinion of the GAAR Advisory Panel (GAP), which is not a judicial body, but consists of independent individuals appointed by the tax authorities. The GAP also reviews and approves the published guidance of the tax authorities on the GAAR. So far, there have not been any judicial cases dealing with the new GAAR, only GAP opinions. Gammie explained that taxpayers who challenge a GAP opinion in which a transaction is found unreasonable in court, risk suffering a 60% penalty if the opinion is confirmed by the court. As such, also in the future it is highly unlikely to see much GAAR jurisprudence in the United Kingdom.

Gammie noted that the introduction of the statutory GAAR has not led to a reduction in anti-avoidance legislation. In particular, most measures, including measures implementing the proposals of the OECD/G20 Base Erosion and Profit Shifting (BEPS) initiative, are covered by wide-ranging general anti-avoidance provisions known as regime anti-avoidance rules (RAARs) or targeted anti-avoidance rules (TAARs), even though these are formulated in a general way. Examples of this practice are the anti-hybrids legislation and the extension of tax jurisdiction over intellectual property (IP) royalties, both of which are included in the Finance Act of 2016.^[21]

2.3. International organizations: OECD and United Nations

Sasseville discussed the introduction of the GAAR in the updated OECD Model (2017)^[22] and the UN Model (2017),^[23] something which he described as “a not-so-new development”. GAARs have always been part of international law. Article 26 of the Vienna Convention on the Law of Treaties (the “Vienna Convention”) (1969)^[24] provides that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”. The International Law Commission (ILC) commentary on the Vienna Convention (1969) explains that there is much authority in international jurisprudence that the principle of good faith forms an integral part of the *pacta sunt servanda* rule. The commentary also provides that the ILC believed that the obligation on parties to abstain from acts frustrating the object and purpose of a treaty was an implicit part of the obligation to perform a treaty in good faith. Sasseville concluded that preventing abuse was, therefore, clearly inherent to performing in good faith.

Sasseville observed that in international law doctrine, abuse of rights had long since been studied as a principle of international law^[25] and also the application of that principle to tax treaties is far from a new development.^[26] Sasseville also noted that abuse of rights is not a rule of interpretation, though. It restricts the application of clear words in a tax treaty that do not require interpretation. With regard to a remark from the audience that tax treaties are, in a sense, third-party arrangements and that the abusive behaviour not necessarily involves the contracting states, Sasseville observed that especially in countries with a monist tradition, international agreements are incorporated into domestic law and, as such, abuse of a tax treaty is equal to abuse of law. Furthermore, the inclusion of anti-avoidance measures in tax treaties is not so special if compared to other branches of international law. The UN Convention on the Law of the Sea, for example,

17. UK: Finance Act (FA) of 1941.

18. See the decision of the UK House of Lords (HL) in UK: HL, 12 Mar. 1981, *W.T. Ramsay Ltd.; D.M.E. Rawling v. Commissioners of Inland Revenue; Eilbeck (H M Inspector of Taxes)*, [1981] UKHL 1, Tax Treaty Case Law IBFD.

19. UK: HL, 25 Nov. 2004, *Barclays Mercantile Business Finance Ltd v. Mawson (HM Inspector of Taxes)*, [2004] UKHL 51.

20. UK: Finance Act (FA) of 2013.

21. UK: Finance Act (FA) of 2016.

22. *OECD Model Tax Convention on Income and on Capital* (21 Nov. 2017), Models IBFD.

23. *UN Model Double Taxation Convention between Developed and Developing Countries* (1 Jan. 2017), Models IBFD.

24. *UN Vienna Convention on the Law of Treaties* (23 May 1969), Treaties IBFD.

25. See M. Byers, *Abuse of Rights: An Old Principle, A New Age*, 47 McGill L. J., p. 389 (2002).

26. See D. Ward, *Abuse of Tax Treaties*, in *Essays on International Taxation* (H.H. Altpert & K. van Raad eds., Kluwer 1993).

contains a “good faith and abuse of rights clause”.^[27] The recent Trans-Pacific Partnership Agreement (TPPA) contains a “denial of benefits clause” according to which a contracting state may deny benefits of the trade agreement to an investor of another contracting state if the investments have no substantial business activities in the former state.^[28] Sasseville noted that this clause is to some extent similar to a limitation of benefits (LOB) clause in a tax treaty and operates as a primitive principal purpose test (PTT). Just like in tax treaties, the clause is aimed to counter the practice of (trade) agreement shopping.

With regard to the additions to the OECD Model (2017) and the UN Model (2017), Sasseville observed that the newly introduced GAAR in article 29(9) was identical in both Models and resulted from the work on Action 6 of the OECD/G20 BEPS initiative on preventing the granting of treaty benefits in appropriate circumstances. The treaty GAAR is based on a PPT test similar to the French and Dutch general anti-abuse rules and excludes the granting of treaty benefits if obtaining that benefit was one of the principal purposes of the arrangement, unless granting the benefit would be in accordance with the object and purpose of the treaty provision.^[29] Sasseville noted that the new treaty GAAR is merely a codification of a previously recognized principle, enshrined in the Commentary on Article 1 of the OECD Model^[30] and the UN Model.^[31] The “guiding principle” that treaty benefits should not be available where a main purpose for a transaction was to secure a more favourable tax position has been expressly recognized in both the OECD Model and the UN Model for more than 15 years and applies independently from the provisions of article 29(9), which merely confirm it.

Sasseville then observed that article 7(1) of the “Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting” (the MLI)^[32] is identical to article 29(9) of the OECD Model and the UN Model and merely provides for a way to have the article inserted in a treaty network. He noted that it is one of the few MLI provisions that has been accepted by almost all signatory states. He believed that this was the case because article 7(1) of the MLI is the only method provided in the instrument that ensures that a tax treaty meets the new minimum standard on treaty shopping under the Final Report on Action 6.^[33] As requested by the United States, the LOB clause, which figures in the OECD Model and the UN Model, does not appear in the MLI.

Sasseville reminded the audience that the MLI Explanatory Statement indicates that the MLI does not function as an amending protocol which would directly amend the text of the covered tax treaty, but, instead, it has to be applied alongside the existing tax treaties, modifying their application.^[34] In this regard, article 17(17(a)) of the MLI provides that the MLI GAAR of article 17(1) will supersede the provisions of the covered tax treaties only to the extent that those provisions are incompatible with the MLI GAAR of article 17(1). Sasseville observed that, therefore, the two instruments – covered the tax treaty in question and the MLI – need to be taken into consideration to determine which rule is applicable. Switzerland made an exception to this point, as it has amended its tax treaties in line with its adopted MLI policy.

With regard to the interpretation of the treaty GAAR, Sasseville noted that the Commentary on Article 29(9) of the UN Model quotes that on article 29(9) of the OECD Model, with the addition of one example regarding a service permanent establishment (PE). The provisions of the Commentaries on the OECD Model and the UN Model are clearly relevant to the interpretation of article 29(9) of the OECD Model and the UN Model as reproduced in tax treaties. The MLI Explanatory Statement, however, has a higher status than the OECD Commentaries and the UN Commentaries, given the former’s nature as *travaux préparatoires* of the MLI, which is an international agreement and not a non-binding resolution by an international organization, like the OECD Model and the UN Model. Nevertheless, the MLI Explanatory Statement provides regarding the interpretation of, inter alia, article 17 of the MLI that: “the commentary that was developed during the course of the BEPS Project and reflected in the Final BEPS Package has particular relevance in this regard”.^[35]

2.4. Issues faced by tax courts

2.4.1. Application of the domestic GAAR in case of tax treaty abuse

Martin observed that many countries currently seemed to adopt a “toolbox” attitude towards anti-avoidance measures: multiple general and specific measures are adopted on multiple levels – domestic, European and international level. The application often overlaps. Martin wondered whether this means that tax authorities are tempted to choose one or the other. In France, for example, the application of the domestic GAAR requires the tax avoidance to be the sole purpose of the transaction and the penalty imposed is 80%. The application of the treaty GAAR requires the principal purpose to be avoidance and does not come with the application of a penalty. Both measures could be applied to the same set of treaty-related facts.

It was observed that the current GAAR rules are clearly tailored to protect the domestic tax base in case of inbound transactions. Outbound based protection, i.e. transactions in which a resident sets up constructions which affect the tax base of a third country, are generally not targeted. There is a certain hypocrisy in this one-sided approach and tax courts are often faced by dilemmas to strike the right balance. Sasseville observed that many European countries adhere to the exemption system in which outbound base protection, in general, is not

27. *UN Convention on the Law of the Sea*, art. 300, available at www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf (accessed 1 Jan. 2019).

28. *Trans-Pacific Partnership Agreement (TPPA)*, art. 9.15, available at: www.mfat.govt.nz/assets/Trans-Pacific-Partnership/Text/9-Investment-Chapter.pdf (accessed 1 Jan. 2019).

29. See article 29(9) of the *OECD Model (2017)* and article 29(9) of the *UN Model (2017)*.

30. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 1* (21 Nov. 2017), Models IBFD.

31. *UN Model Double Taxation Convention between Developed and Developing Countries: Commentary on Article 1* (1 Jan. 2017), Models IBFD.

32. *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* (7 June 2017), Treaties IBFD [hereinafter: the MLI].

33. See OECD, *Action 6 Final Report 2015 – Preventing the Granting of Treaty Benefits in Inappropriate Circumstances* (OECD 2015), International Organizations’ Documentation IBFD.

34. *Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* para. 13 (7 June 2017), Treaties IBFD [hereinafter: the “MLI Explanatory Statement”].

35. *Id.*, at para. 12.

seen as relevant. Under the exemption system, the residence state exempts the tax base allocated to the source state. Consequently, it is important for the source state to protect that base on the inbound side by application of a GAAR, even if it operates one-sided.

Cools noted that the Dutch *fraus legis* doctrine does not apply in relation to tax treaties, unless a tax treaty expressly provides for it. Martin observed that, in theory, a tax treaty concluded before the era of the OECD/G20 BEPS initiative that is not affected by the MLI, therefore, could continue operating without GAAR. Cools believed this to be correct and noted that even if times have changed, the old jurisprudence of the HR still stands. The HR could very well change its mind in the future, but it clearly has not done so up until now.

2.4.2. Overlap of domestic, tax treaty and EU GAARs

Martin observed that the interpretation of the French domestic GAAR (motive test: sole purpose) might differ from treaty GAAR (motive test: principal purpose) and from the GAAR in the Anti-Tax Avoidance Directive (2016/1164)^[36] (motive test: main purpose). Different wording is used and different sources apply for the interpretation of the three instruments, which makes the task difficult for domestic tax courts. For instance, the GAAR in the Anti-Tax Avoidance Directive (2016/1164) is to some extent similar to the treaty GAAR: will non-EU courts rely on the interpretation of the GAAR in the Anti-Tax Avoidance Directive (2016/1164) by the ECJ for their own interpretation of a treaty GAAR?

Gammie believed besides the interpretation issues, the differing consequences of the different GAARs was also a problem. The GAAR in the Anti-Tax Avoidance Directive (2016/1164) requires the transaction to be ignored, but tax motives are just one of the main purposes of the transaction. How to deal with the transaction's non-tax consequences is an obvious question?

Martin believed the Anti-Tax Avoidance Directive (2016/1164) is harmonized domestic law and, therefore, must be applied as if it is domestic law. On the other hand, a treaty GAAR deals with the question of granting tax treaty benefits or not. As such, in the case of a purely domestic situation, the domestic GAAR should be applied. If the case concerns the granting of a treaty benefit, the treaty GAAR should be applied. Wattel observed that, according to the jurisprudence of the ECJ,^[37] the application of the prohibition of abuse rule requires the courts to redefine the abusive transaction so as to re-establish the situation that would have prevailed without that transaction. Even though this refers to primary EU law, some would say this interpretation should not be different with regard to secondary EU law like the Anti-Tax Avoidance Directive (2016/1164).^[38]

2.4.3. Interpretation of the two-step wording in a treaty GAAR and the Anti-Tax Avoidance Directive (2016/1164)

Martin referred to the Commentary on Article 29(9) of the OECD Model, which seemed to imply that, for the GAAR to apply, the tax motive of the transaction did not need to be the sole or dominant motive.^[39] The GAAR is applicable if one of the principal purposes is to obtain the tax benefit. However, sometimes the transactions of taxpayers have a variety of purposes. Business opportunities are often intertwined with tax motives. Would one bad tax reason affect the entirety of the transaction? Sasseville observed that there were reasons why the treaty GAAR had been drafted like this. In many countries, policymakers wanted to grant tax benefits only if the underlying transaction was genuine, but if a "sole motive" criterion is used, the GAAR will never apply because there are always incidental purposes. In Canada, the burden of proof has been shifted for this reason, as the taxpayer must show that the transaction is not undertaken principally for tax reasons. However, providing proof of the "principal" motive of a transaction is difficult. Consequently, judges ought to be trusted to do the reasonableness test – was it reasonable to do the transaction in such and such way? Wattel wondered why the GAAR was not framed as establishing whether the taxpayer would have undertaken the transaction without the tax benefit. Sasseville believed this led to the same problem as the sole purpose test, as, in case of incidental non-tax benefits, even if very minimal, the application of the GAAR would be prevented.

Martin then observed that the Anti-Tax Avoidance Directive (2016/1164) has a clear two-step approach. In a first step, it has to be established that one of the motives of the transaction is a tax benefit. Then, in a second step, it has to be established whether the arrangement is in place for valid commercial reasons. Martin wondered what the second step in the treaty GAAR entailed. Sasseville responded that the treaty GAAR also has a similar "escape clause". A GAAR without such clause is problematic. For instance, young people contributing to pension schemes for the purpose of the tax benefit might act for the purpose of obtaining the tax benefit, but their actions are in line with the object and purpose of the provision. Similarly, in relation to tax treaties it can be argued that tax-sparing clauses entice companies to invest for the purpose of obtaining a tax benefit. This is clearly in line with the intentions of the drafters of the tax treaty in question. Martin concluded that the GAARs might be drafted for pragmatic purposes, but that their wordings are often not easily applied in practice. He wondered whether within the European Union, ECJ jurisprudence will determine the way forward. Owen noted that, in Canada, the negative evidence test, i.e. no non-tax motives present, had been converted into a positive test in 2009 to relieve the tax authorities. In practice, the tax courts ignored this evolution, which led him to believe that what the words say do not always determine the actual application in practice. Martin concluded that, as always, the last word in this matter lays with the tax court.

36. Council Directive (EU) 2016/1164 of 12 July 2016 Laying Down Rules against Tax Avoidance Practices that Directly Affect the Functioning of the Internal Market, arts. 7 and 8, OJ L 193 (2016), EU Law IBFD, [hereinafter the "Anti-Tax Avoidance Directive (2016/1164)"].

37. E.g. Cases C-255/02, Halifax, and C-103/09, Weald Leasing.

38. As regards application of the general principle of prohibition of abuse to VAT Directive benefits, see Case C-251/16 Edward Cussens a.o.

39. Para. 180 OECD Model: Commentary on Article 29 (2017).

3. Session 2 – Precedent: *Stare Decisis* versus Change of Case Law

3.1. Panel composition and agenda

The session was chaired by Peter Wattel, Advocate-General of the *Hoge Raad* (Supreme Court, HR), the Netherlands. The panel consisted of Judge Emmanuelle Cortot-Boucher, *Conseil d'Etat* (Supreme Administrative Court, CE), France; Chief Justice Paige Marvel, US Tax Court (TC), United States; and Justice Kristina Ståhl, *Högsta Förvaltningsdomstolen* (Supreme Administrative Court, HF), Sweden.

The session consisted of an overview of the perceptions of precedent and the *stare decisis* doctrine in civil law jurisdictions (France and Sweden) (see sections 3.2. and 3.4.) and in common law jurisdictions (United States) (see section 3.3.).

3.2. France

Cortot-Boucher noted that France is a civil law country, in which statutory law is the primary source of law. This outcome is the result of the historic influence of Roman law in France and is also part of the heritage of the French Revolution. Montesquieu, for example, wrote that “judges... are only the mouth that pronounces the words of the law, inanimate beings who can moderate neither its force nor its rigor”. Robespierre believed that “in a state with a constitution and legislation, the jurisprudence of the courts is nothing other than the law”. However, even if only secondary, case law is not denied as a source of law in France. The French *Code Civil des Français* (French Civil Code)^[40] forbids judges pronouncing by means of general disposition on cases submitted to them. On the other hand, courts have the obligation to apply the law even when it is unclear and to solve cases even when there is no applicable law.

Cortot-Boucher observed that case law has gained in importance over time and especially in fields in which there traditionally is not a lot of statutory law, as in the field of administrative law, whole areas of issues are governed by judge-made law. Generally, there is no such thing as binding precedent in the French system, not horizontally, i.e. the CE is not bound by decisions rendered by the *Cour de cassation* (Supreme Civil Court, CC) and vice versa, not vertically, i.e. lower courts do not have the legal obligation to follow the precedents of the two supreme courts. The underlying concept is that individual courts must be able to conduct their own analyses in light of the applicable statutory provisions. On the contrary, French courts are prohibited from following a precedent only because there is a relevant precedent. A decision cannot be rendered merely on the basis of a precedent.

Cortot-Boucher noted that, in practice, even though they are not binding, precedents, as in decisions issued with regard to similar facts and circumstances, play a major role in the making of the decisions of judges. Judges are expected to start their deliberations from scratch in every case, but, in reality, there always is an informal influence of precedents. As such, given the hierarchy of the French judicial system, for lower courts there is a de facto obligation to follow the precedents by the CE and the CC. For these two courts, decisions by the other have only persuasive power and that power is not the same for all precedents. It varies according to the number of precedents on the issue, i.e. a “*jurisprudence constante*” has greater persuasive power than an isolated precedent, the size of the panel of judges, i.e. plenary session decisions have more persuasive power, the level of publication of the precedent in the courts’ official case law digest and the amount of time passed since the precedent was issued, i.e. precedents that are old have special authority, but at the same time a precedent has to be old enough to be overturned – an unwritten rule says that precedents that have been partially or entirely published are left “untouched” for at least ten years. Cortot-Boucher observed that the CE at times “discovers” a new principle of law. If a new principle is presented as such, the CE cannot easily disregard its own precedents on the matter. Examples in the tax field are the principle that tax adjustments have to be contradictory when the tax authorities want to tax on the basis of other elements than those filed by the taxpayer, as in *Ferme de Rumong* (2001),^[41] and the principle that the tax authorities are entitled to issue additional assessments to levy tax avoided by abuse of law, as in *Janfin* (2006).^[42]

Cortot-Boucher believed that the advantages of the French system were the fact that it allowed courts to be flexible and change settled case law in function of changing economic, technological or societal developments. Without the obligations to quote precedents, CE decisions are generally short and easy to read. The lack of precedent value has disadvantages, as it affects predictability of the outcome of CE procedures for the parties. In the redaction of decisions, parts of the reasoning of the judges – namely the part in relation to relevant prior case law – is often omitted which makes that judgements appear less thoroughly reasoned. The opinions of the Advocate General – who can and will quote precedents – only partially remedies this problem because the opinion is not always followed by the CE. In addition, the Advocate General does not have the obligation to make his opinion, which is addressed solely to the CE, publicly available. As for the workload of the judges, the burden of looking for precedents mostly weighs on them. Parties are not invited to provide precedents and they focus on statutory law and on the preparatory works regarding the statutes. Cortot-Boucher observed that, where the parties provide the CE with precedents, it happens often that they selectively cite cases and omit precedents that negatively impact their position.

Cortot-Boucher concluded that the French court decisions could be improved by better highlighting the role that precedents did play in the making of the decisions. If precedents are relied on in any way by the CE and the CC, they should be cited and if relevant cases are left out, reasons should be given why they are left out. She also believed it would not be a bad idea for judges to be allowed to express concurring or dissenting opinions because this would also help assessing the precedent value of the decision in question. However, it would make individual judges more identifiable as decision influencers, something which is contrary to the French contemporary judicial

40. FR: *Code Civil des Français* (French Civil Code).

41. FR: CE, 7 Dec. 2001, Case No. 206145.

42. FR: CE, 27 Sept. 2006, Case No. 260050.

culture according to which judicial decision making takes place in the secrecy of the court's chambers. Cortot-Boucher believed that even if a common law approach of binding precedent value and dissenting opinions would be introduced in France, the eventual outcome in individual cases would probably not be different. The only difference would be the length of the judgements.

3.3. United States

Marvel started by clarifying the vocabulary from the perspective of the US legal system. A "precedent" is an opinion of a court establishing a legal principle or rule that must be followed by the issuing court and/or lower courts when faced with similar legal issues. *Stare decisis* is a bedrock principle of US law because it encourages courts to stand by previously decided matters, unless there is a compelling reason not to do so.

In taxation matters, the federal courts are authorized to hear and decide cases under certain circumstances and only a court can declare a statute or administrative interpretation unconstitutional. Tax cases heard by the federal courts can involve factual issues, legal issues or a mix of both. The federal court system structure is that of a pyramid with the Supreme Court (SC) at the top, the Courts of Appeal (CAs) in the centre and the federal trial courts, for example, the TC, at the base. Each type of federal court applies some concept of precedent but what constitutes precedent differs depending on the court. The US District Courts generally consider the following to be precedential, i.e. SC opinions, opinions of the CAs for their geographical or specialized circuit and, possibly, other opinions issued by the District Court. A "circuit split" occurs if identical issues have been decided differently by the CAs of different circuits. The SC often – but not always – will take cases to resolve circuit splits.

With regard to the TC, Marvel explained that, besides SC opinions and the geographically relevant CA opinions, court-reviewed opinions, i.e. opinions considered by the Court Conference, which are referred by the Chief Judge for consideration by the entire court and which can include majority, concurring, and dissenting views, and non-reviewed opinions that are designated for publication in the official Tax Court reporter (T.C. Opinions) are precedential and normally must be followed by the judges if squarely on point and not distinguishable.

Marvel noted that the federal courts generally adhere to the doctrine of *stare decisis*. SC opinions have confirmed that the doctrine of *stare decisis* is a policy tool that fosters continuity and promotes the even-handed, predictable and consistent development of legal principles. It also contributes to the actual and perceived integrity of the judicial process. As such, the doctrine, which is a guideline and not a command, is important for the day-to-day work of the courts. Under SC case law, when a precedent is challenged and cannot be distinguished, the SC will examine several factors to decide whether *stare decisis* should apply. The most important factors are the quality of the prior decision's reasoning, the workability of the rules it established, its consistency with other related decisions, new developments since the prior decision and reliance interests in the prior decision. As such, *stare decisis* does not prevent the SC from taking a new direction, as became clear in the recent *Wayfair opinion* (2018).^[43] In that opinion, the SC overruled a constitutional dormant commerce clause precedent established in *Bellas Hess* (1967)^[44] and *Quill* (1992)^[45] that states may not compel remote sellers with no physical presence in the state to collect and remit sales tax. Marvel explained that, although the US Congress can change the result of a court decision interpreting a statute it enacted, the SC historically has tended to adhere closely to precedent, especially in certain types of cases. The *stare decisis* doctrine has special force in the area of statutory interpretation. Conversely, in constitutional cases, the SC is less likely to apply *stare decisis* because only the SC may correct error in prior case law. Poor reasoning and unworkability of a prior rule and/or a change in circumstances, for example, the rise of electronic (e)-commerce in *Wayfair*, can influence the analysis.

3.4. Sweden

Ståhl provided an overview of the Swedish system, which she believed shared characteristics with both the French system and the US system. In Sweden, the general courts deal with criminal and private law cases whereas the administrative courts deal with administrative law, including tax law. Both the *Högsta Domstolen* (Supreme Court, HD) and the HF have as their main task to deliver precedents. On a yearly basis, about 8,000 cases, of which a third are tax cases, are appealed to the HF. The latter selects the cases it hears, though leave to appeal is granted in less than 2% of the cases. When delivering a judgement, the HF consists of five judges. Decisions are usually delivered in a joint collective judgement, but it is possible for individual judges to express concurring and dissenting opinions.

Ståhl observed that statutory law is the primary source of law in Sweden and, formally speaking, the jurisprudence of the HF is not binding. However, in practice its opinions – well-reasoned or not – are followed by the lower courts and by the HF itself, as if they were binding precedent. If the HF decides to change direction compared to a prior decision, it will do so in a decision adopted in a plenary session. However, there is a certain reluctance to refer cases for a plenary decision and, in principle, this is only done in cases raising questions of more fundamental importance. Nevertheless, the HF generally sticks to precedent, even if the precedent is badly reasoned. It is believed that it is for Parliament to intervene in such cases, not the judiciary.

In general, judgements tend to be quite long and often consist of a general part where the HF undertakes a broad analysis of the issue at hand and subsequently applies this analysis to the circumstances of the present case. Judgements regularly include references to previous case law.

43. US: SC, 31 June 2018, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

44. US: SC, 8 May 1967, *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967).

45. US: SC, 26 May 1992, *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

Sweden adheres strictly to the legality principle, i.e. the Constitution provides that tax shall follow from statutes enacted by Parliament. In principle, the courts may not overstep the boundaries or written statutory tax law. Ståhl observed that this approach is believed to enhance legitimacy and legal certainty, as does the adherence of the courts to precedents, even if not binding. There are some drawbacks to the system too. One could say that the ambition to draft broad judgements that have precedent value also in cases where the circumstances are different risks turning the HF into a legislator. Similarly, all-encompassing prior case law might prevent the HF from making the best decision in the case before it.

4. Session 3 – Tax Procedures in Canada

4.1. Panel composition and agenda

The session was chaired by Justice Clement Endresen, *Norges Høyesterett* (Supreme Court, NH), Norway. The panel consisted of Justice Wyman Webb, Federal Court of Appeal (FCA), Canada and Justice David Graham, Tax Court of Canada (TCC). The session consisted of the chair interviewing the two Canadian justices (see section 4.2.).

4.2. Tax procedures in Canada

4.2.1. Levels and types of taxes in Canada

Canada levies taxes on three levels. On the federal level, the most important taxes are income tax, sales tax, excise tax, government insurance and pension contribution and industry-specific taxes. The income tax legislation deals with more than just the levying of tax on income and of the collection of a given tax. It also covers the distribution of federal social benefits and the implementation of certain policy objectives like the encouragement of investment in certain sectors of the economy or in certain specific parts of the country. The sales tax is a VAT-type tax, and known as the harmonized sales tax (HST) or the goods and services tax (GST). It is paid by the end consumer and is rebated through the system. It covers goods and services with important exceptions on exports, medical services, etc. Basic groceries are zero rated. Excise tax is levied on “perceived evils”, like tobacco, alcohol, and, very soon, cannabis products.

The Canadian provinces levy taxes on income, sales tax, either HST or a non-VAT sales tax, death taxes and industry-specific taxes, like mining tax or hotel tax. Municipalities levy taxes on property, business licensing, hotel taxes and vacant property taxes.

The TCC has jurisdiction over all taxes imposed by the federal government, regardless of the amount of money involved. It deals with issues regarding the validity or accuracy of a federal tax assessment. Criminal courts deal with tax evasion or fraud. Federal courts are competent to hear cases on issues dealing with all matters relating to federal tax other than the ones within the competence of the tax courts. The provincial superior courts deal with all provincial tax matters.

For the matters that the tax courts have jurisdiction over, the stages in the Canadian tax litigation system are as follows:

- audit by the tax authorities;
- appeal to the tax authorities; and
- appeal to the judiciary, TCC, FCA and the Supreme Court of Canada (SCC).

4.2.2. Stages of the tax procedure

4.2.2.1. Tax audit

Canada employs a self-assessing income tax system. The normal re-assessment period goes back three years for individuals and small companies, four years for everyone else with extensions for carelessness, neglect or wilful default. Uncooperative taxpayers who have not filed a return or have not kept books or records can be assessed based on net worth, deposit analysis or industry specific estimates.

4.2.2.2. Administrative appeal

Taxpayers who have been served a notice of re-assessment have 90 days in which to object to the tax authorities. The administrative objection procedure is the same for all taxpayers. At the administrative appeal level, taxpayers often face lengthy delays while an independent department of the tax authorities reviews their cases. New evidence, explanations or arguments can be considered. After 90 days, for income tax, or 180 days, in respect of GST, the taxpayer has the option to pass over the outcome of the internal review and appeal directly to the TCC. Under the internal review system, the re-assessment will either be confirmed or a reassessment will be undertaken, within the limitation periods.

4.2.2.3. Judicial appeal

Appeal before the TCC

A taxpayer who disagrees with the outcome of the administrative appeal can appeal to the TCC. The appeal must be lodged within 90 days, with the possibility of one additional year on application to the TCC. The TCC consists of the Chief Justice, Associate Chief Justice, 20 full time judges, a number of supernumerary judges and five deputy judges. It employs 12 registries and sits in 59 locations across Canada.

For disputes below CAD 25,000, comprising about 58% of the cases, an informal procedure is followed. The informal procedure entails more relaxed rules of evidence, no discovery procedures and no document exchanges. The objective is to move to trial very quickly. The costs of the informal procedure are very low. For other disputes, approximately 42% of the cases, the general procedure is followed which provides for extensive rules of evidence, full or partial document exchange and discovery procedures. On average, it takes at least a year to get to trial in the general procedure.

Procedural aspects

The burden of proof generally lies with the taxpayer. The tax authorities may make assumptions of fact. In the informal procedure, the tax authorities often know nothing more of the case than what it learned in the audit.

When the hearing commences, the judge will have seen the briefs of the pleading. He will not have seen any documents from the administrative stage or documents exchanged and will not have heard any of the discovery testimony. If there were disputes prior to the trial, those will have been dealt with by a different judge than the trial judge.

Generally, the taxpayer pleads first, unless the government has to prove the entire case. Oral witness testimony can be given and can include expert witnesses. Affidavit evidence can be permitted on specific issues.

Trials are open to the public and only limited personal information is redacted from documents. Financial information is generally not redacted. Taxpayers can apply to the TCC to seal documents or have the proceedings held *in camera* but this is rare.

Settlement

In Canada, it is possible to settle tax disputes at any point during the proceedings. The TCC will run the settlement conference for the parties. A different judge to the trial judge leads the settlement conference. In practice, up to 90% of cases in a settlement conference will be settled. The government is restricted to settling on a "principled basis", i.e. a basis that is consistent with the facts and the law. From a policy perspective, the settlement facility is found to be a very fair and social approach to tax disputed.

Giving the decision and appeal

The TCC is bound by the principle of *stare decisis*. Administrative publications are not binding and are frequently ignored in practice. Legislative explanatory notes are often found helpful. The TCC is bound by federal law, but applies provincial laws where applicable. It is not a court of equity.

The judgement itself must be in writing, whereas the reasons can be given orally. The number of oral decisions varies from judge to judge and is more common in informal procedure cases. Written decisions are published.

The losing party can appeal to the FCA. The parties can both appeal interlocutory or final decisions. The standard of review depends on the issue. With leave, decisions of the FCA can be appealed to the SCC.

4.2.3. Challenges faced by the TCC

Webb and Graham identified a number of challenges faced by the TCC. First, in recent years, around 60% of the taxpayers before the TCC have not been represented by counsel. Many of these represent themselves or are represented by agents with no formal training. When agents are involved, conflicts of interest are not uncommon and it is important to strike a right balance to a fair trial against "buyer-beware".

Another issue is the phenomenon of large group files, which represent an ongoing challenge for the TCC. Often particular tax schemes that have been mass marketed lead to a significant number of identical or very similar tax cases. The techniques used to deal with these cases is for the TCC to hear test cases that are representative of all of the issues and hold all other cases in abeyance. The benefit of this approach is that it is an efficient way to get a decision that covers all issues. The problem is that if the decision goes against taxpayers, many of them will not relinquish their individual claim. One approach to deal with this issue is to set all of the remaining appeals down for trial. Often taxpayers will not actually pursue their cases once they have to come to trial. Another possibility is for the government to ask taxpayers to agree to be bound by the outcome of the test cases.

5. Session 5 – Recent Case Law on Permanent Establishments

5.1. Panel composition and agenda

The session was chaired by Justice Bernard Peeters, *Hof van Beroep* (Court of Appeals, HvB), Antwerp, Belgium. The panel consisted of Pierre Collin, *Conseil d'État*, (Supreme Administrative Court, CE), France and Judge Susanne Tiedchen, *Finanzgericht* (Tax Court, FG), Berlin-Brandenburg, Germany. The session consisted in an analysis of three recent French cases involving the digital economy and the use of PEs (see sections 5.2. to 5.4.), and one German case regarding the residence of an individual (see section 5.5.).

5.2. France: *Tribunal Administratif*, 12 July 2017, Case No. 1505178/1-1 (Google)

5.2.1. Facts of the case

The case concerned a corrective tax assessment issued by the French tax authorities with regard to the taxes due in France by Google Ireland Ltd. in tax years 2005 to 2010. The tax authorities argued that Google Ireland had a PE in France as a result of the activities performed by Google Ireland's French subsidiary, Google France. The net profit for the activities carried out in France by Google France had been subject to French corporate tax. The issue was whether Google Ireland had a dependent agency PE in France within the meaning of article 2(9)(c) of the France-Ireland Income Tax Treaty (1968)^[46] and, as such, would France be entitled to tax more profit derived by Google's operations in France, in addition to the profits assigned to Google France based on the cost-plus transfer pricing arrangement between Google France and Google Ireland.

5.2.2. Decision of the court

The *Tribunal Administratif* (Administrative Tribunal, TA) held that Google Ireland did not have a PE in France. The marketing and service agreement between Google France and Google Ireland provided that the former provided all services of assistance and advice required by the former for the purpose of the marketing and sale of online services provided in France and that the former contributed to market analysis and strategical analysis. The agreement expressly denied Google France the power to bind Google Ireland, to act as its mandatory or authorized representative mandated to acting for the account or in the name of Google Ireland or to sign contracts in the name of the latter. The tax authorities argued that, contrary to the agreement, Google France's employees were de facto given the authority to conclude contracts in the name of Google Ireland. This could be inferred from the documents seized during the tax raid, i.e. the French employees were recruiting new clients and were negotiating contracts.

However, the TA observed that there was no evidence that the French employees effectively had the authority to conclude contracts in the name of Google Ireland or to bind Google Ireland to participate in the business activity in France. The contracts expressly provided that they were signed between the French clients and Google Ireland and even though negotiated in France, they had to be approved by Google Ireland. As such, Google Ireland was held not to have a PE in France.^[47]

5.3. France: *Cour Administrative d'Appel*, 1 March 2018, Case No. 17PA01538 (Valueclick)

5.3.1. Facts of the case

Valueclick was a leading player in the market of the online advertisement industry. The company was incorporated in Ireland (VCI) and had a subsidiary in France (VCF) which provided marketing services to the French clients of VCI on the basis for an inter-company services agreement. The services agreement provided that VCF would prospect potential clients, provide management and back-office services, human resources management, treasury management and management of the information technology (IT). Neither of the parties was authorized to sign contracts in the name of the other or to represent that party for the purpose of binding that party in agreements with clients. VCF was remunerated for the services it provided to VCI at a rate of 8% cost-plus.

The French tax authorities believed VCI's activities in France were restricted to "rubberstamping" contracts sent to it by VCF and sending invoices to the French clients. The tasks performed by VCF were seen as to exceed the scope of the inter-company agreement. As such, VCF was held to have a PE in France and the net profit for the advertisement business in France attributable to said PE was subject to corporate tax in France. VCI objected to the assessments.

5.3.2. Decision of the court

In its decision of 7 March 2017, the TA, Paris held in favour of the tax authorities. Valueclick appealed to the *Cour Administrative d'Appel* (Administrative Court of Appeal, CAA). With regard to whether VCI had a PE in France for the purpose of the France-Ireland Income Tax Treaty (1968), the CAA held that VCF did not perform services beyond the inter-company agreement. As such, VCI did not carry on a business through VCF beyond VCF's own activities and, therefore, did not have a PE in France. The agreement expressly excluded VCF operating as a dependent agent that habitually exercised an authority to conclude contracts in the name of VCI. Despite VCF negotiating the terms of the contracts that VCI merely "rubberstamped" without modification and that VCF's employees presented themselves as employees of VCI, VCF could not be considered as authorized to act for the account and in the name of VCI.

The CAA also held that VCI did not have a fixed base (FB) in France for VAT purposes. Based on the jurisprudence of the ECJ, a FB required a minimum degree of stability derived from permanent presence of both human and technical resources necessary to operate on an independent basis. VCI did not dispose of the necessary means to operate independently in France because the Valueclick employees present in France were VCF employees who did not have the authority to sign contracts. Furthermore, the necessary IT infrastructure to operate the online advertisement business was not located in France.^[48]

46. [Convention between Ireland and France for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income](#) (21 Mar. 1968), Treaties IBFD.

47. For more details on the case and for the original text of the judgement, see FR: TA, 12 July 2017, [Case No. 1505178/1-1 \(Google \)](#), Tax Treaty Case Law IBFD.

48. For more details on the case and for the original text of the judgement, see FR: TA, 1 Mar. 2018, [Case No. 17PA01538 \(Valueclick \)](#), Tax Treaty Case Law IBFD.

5.4. France: *Conseil d'État*, 31 March 2017, Case No. 389577 (*Comala Défense*)

5.4.1. Facts of the case

Comala Défense was a company established in Luxembourg. In 2003, it had acquired a large building complex situated in France with the purpose of demolishing it and building a new hotel on the site. Subsequently, Comala changed its plans and sold the property in 2006, realizing substantial capital gains. Comala had concluded a contract with HRO France, an indirectly related entity, for the latter to provide project management services prior to the sale. Comala did not have employees. It was the directors and employees of HRO who were involved in the negotiations, financial and legal support and project management of the site, which eventually was successfully sold to a third party.

The French tax authorities argued that Comala had a PE in France and that part of the profits realized from the project were attributable to the PE and, therefore, taxable in France.

5.4.2. Decision of the court

In its decision of 19 February 2015, the CAA had held in favour of the tax authorities. Comala was held to have disposed of a PE for the purpose of the France-Luxembourg Income and Capital Tax Treaty (1958) at the premises of HRO in France through which the immovable property project was realized. The profits realized by the PE were held taxable in France.

In its decision of 31 March 2017, the CE confirmed the decision of the lower court. The CE observed that the lower court had held that Comala disposed of a fixed place of business at the premises of HRO France in Paris, based on their sovereign and sufficiently motivated observations that the project was entirely carried on by employees of HRO France, whereas all employees of Comala were situated in Luxembourg, and that the signature power by the director of Comala in Luxembourg was of a merely formal character, as all contracts regarding the project were negotiated and concluded by HRO France. As such that the latter had to be regarded as having the capacity to conclude contracts in the name of Comala.^[49]

5.5. Germany: *Finanzgericht München*, 31 May 2017, Case No. 9 K 3041/15

5.5.1. Facts of the case

The case concerned a taxpayer who was a national of both Germany and Uruguay. He resided in Uruguay with his wife and children. He was active as a computer scientist and in the year of the dispute, 2013, he was hired as an independent IT consultant by a company established in Germany that was itself active as a sub-contractor. The end-client of the services were mostly banks. Since 1995, the taxpayer had been registered with the Uruguayan tax authorities as self-employed acting for his own account and in his own name. The taxpayer also owned an agricultural business in Uruguay which was exploited by the family members of the taxpayer. In 2016, the Uruguayan tax authorities issued a tax residency certificate confirming the taxpayer's capacity as a Uruguayan resident taxpayer.

In March 2013, the taxpayer travelled to Germany to prospect for new consultancy assignments. He initially stayed with his brother in Germany. On 7 May 2013, he signed a new project agreement with a German company. The project would initially run only until the end of September 2013, whereas the project was expected to take two years to be completed. At the beginning of his new contract, the taxpayer stayed with his cousin in Germany. Subsequently, on 7 June 2013, he signed a rental agreement for an apartment in which he would live. The lease was initially set to end on 30 September 2013, the day on which his consultancy contract would expire.

On 28 August 2013, the taxpayer and the German company agreed to extend the former's consultancy contract until 31 December 2013. The taxpayer subsequently extended the lease of his apartment until the same date. On 1 November 2013, the German company unexpectedly terminated the project in which the taxpayer was involved. On 10 November 2013, the taxpayer signed a new agreement with the company for a project that took place in Italy. The taxpayer terminated the lease of his German apartment. From 11 November 2013 to 31 March 2014, the taxpayer was active in Italy on behalf of the German company.

During the time the taxpayer was providing services in Germany, i.e. from May 2013 to November 2013, he performed his activities in the premises of the end-customer, a German bank. The taxpayer had been granted access during the normal business hours to an office in the premises of the bank. The office had not been individually assigned, but was part of a pool of rotating workstations for temporary and project-related use by external service providers. The services agreement with the bank provided that the office was at the taxpayer's disposal solely for the completion of the project and that he was expressly prohibited from using the office space at the bank to provide services to other clients. The German sub-contracting and contracting companies had no independent rights to use the premises of the bank, i.e. the office was put at the disposal of the taxpayer directly by the end-client, the bank.

The taxpayer invoiced the services provided to the German company on a monthly basis. Initially, he used the address of his cousin in the invoices and subsequently the address of his rental apartment.

The German tax authorities requested the taxpayer to file a tax return for 2013 as a resident taxpayer. The taxpayer did not comply and in an ex officio assessment, the tax authorities estimated that his net income from self-employment in Germany in 2013 amounted to EUR 80,000 and that tax was due at a rate of 35.9%, which amounted to outstanding tax of EUR 28,728.

49. For more details on the case and for the original text of the judgement, see FR: CE, 31 Mar. 2017, [Case No. 389577 \(*Comala Défense* \)](#), Tax Treaty Case Law IBFD.

The taxpayer objected to the assessment and brought an action for annulment to the FG Munich. The FG Munich had to decide two legal issues. First, was the taxpayer subject to unlimited income tax liability in Germany? Second, could Germany levy tax on the remuneration paid by the German company to the taxpayer?

5.5.2. Decision of the court

With regard to the first issue, FG Munich observed that the German *Einkommensteuergesetz* (Income Tax Act, EStG)^[50] provides that natural persons who have their place of residence or their usual place of abode in Germany are subject to unlimited tax on their income. The German *Abgabenordnung* (General Tax Code, AO)^[51] provides that persons should be resident at the place at which they maintain a dwelling under circumstances from which it may be inferred that they will maintain and use such dwelling. A habitual abode is a place at which a person is present under circumstances indicating that their stay at that place or in that area is not merely temporary. An unbroken stay of not less than six months duration is invariably regarded as a habitual abode.

The FG Munich held that the taxpayer did have his fiscal residence in Germany, mainly because the rental agreement for the apartment had a term of two years. Before renting the apartment, he was said to have had a habitual abode in Germany, based on his uninterrupted stay at those places.

With regard to the issue of whether Germany could levy income tax in the remuneration, the FG Munich observed that because the taxpayer was deemed to be a resident in both Germany and Uruguay during the relevant time, the tie-breaker rule of article 4(2) of the Germany-Uruguay Income and Capital Tax Treaty (2010)^[52] had to be applied. As the taxpayer had his centre of economic interest in Uruguay, he was a resident of Uruguay for the purpose of the Germany-Uruguay Income and Capital Tax Treaty (2010). Germany could tax the income, only if attributable to a PE of the taxpayer in Germany. The FG Munich observed that the profits realized by the taxpayer from his professional activities could be attributed to a PE of which he disposed in Germany in the form of a “place of management” in the sense of article 5(2)(a) of the Germany-Uruguay Income and Tax Treaty (2010). The taxpayer was physically absent from Uruguay in the period from March 2013 until November 2013 and, therefore, all of the managerial and commercial decisions were taken by him in Germany. The FG Munich observed that it could be left open whether the “place of management” PE was effectively situated at the premises of the bank or in the private homes the taxpayer had stayed in while in Germany. The FG Munich observed that these apartments also met the requirements to be qualified as a place of management because management activities consisted mainly of drafting contractual arrangements and invoices and not specific office or other infrastructure was required to fulfil these activities. The FG Munich observed that, as there could not be any income from self-employed activities without it being attributed to a PE in Germany, the private residence of the taxpayer was a suitable fall-back option if the office at the bank could not be considered a PE.^[53]

6. Session 4 – Recent Case Law on Tax Fraud in VAT/GST

6.1. Panel composition and agenda

The session was chaired by Justice Friederike Grube, *Bundesfinanzhof* (Federal Tax Court, BFH), Germany. The panel consisted of Justice Jennifer Davies, Federal Court (FC), Australia, and Judge Annie Rochat Pauchard, *Bundesverwaltungsgericht/Tribunal administratif fédéral* (Federal Administrative Court, BVerfG/TA), Switzerland.

The main topic of the session was recent cases of “missing trader-fraud” in VAT/GST and the issue of the liability of taxable persons involved in the chain of supplies and services in VAT/GST (see section 6.2.). Other tax avoidance schemes in the field of VAT were also presented (see sections 6.3. to 6.5.).

6.2. “Missing trader-fraud” in the European Union

Grube explained that “missing trader-fraud” occurs in a multi-jurisdictional setting where the movement of goods between jurisdictions is VAT-free when a trader of goods originating from a first country resells the goods in the second country with charging VAT on the resale, but, at the same time, absconds and does not remit the VAT owed on the initial purchase, as the trader in the second country had obtained an intra-community supply of goods. The VAT owed by the trader “goes missing”, therefore “missing trader-fraud”.

Grube noted that it is estimated that in total about EUR 153 billion was lost in 2015 in the European Union due to shortcomings in VAT collection, including fraud, which has serious consequences for state budgets.^[54] The drive against “missing trader-fraud” is also part of the policy of the European Multidisciplinary Platform against Crime Threats (EMPACT) and Europol.

With regard to the European Union, the ECJ has held on various occasions that preventing possible tax evasion, avoidance and abuse is an objective recognized and encouraged by the VAT Directives and that the abuse of rights is prohibited and understood to bar wholly

50. DE: *Einkommensteuergesetz* (Income Tax Act, EStG).

51. DE: *Abgabenordnung* (General Tax Code, AO).

52. *Convention between the Federal Republic of Germany and the Oriental Republic of Uruguay for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital* (unofficial translation) (9 Mar. 2010), Treaties IBFD.

53. For more details on the case and for the original text of the judgement, see DE: FG Munich, 31 May 2017, *Case No. 9 K 3041/15*, Tax Treaty Case Law IBFD.

54. See European Commission, amended proposal for a Council Regulation amending EU Regulation No. 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, 30 November 2017, COM(2017) 706 final, EU Law IBFD.

artificial arrangements which do not reflect economic reality and are set up with the sole aim of obtaining a tax advantage.^[55]As such, transactions may be redefined with the consequence that those transactions, which do not constitute such a practice, may be subject to VAT on the basis of the relevant provisions of national legislation providing for such liability.^[56]

Grube observed that in *Schoenimport Italmoda* (Joined Cases C-131/13 and C-163/13)^[57] and *Astone* (Case C-332/15)^[58] the ECJ had held that it was for the national authorities and courts to refuse a taxable person, in the context of an intra-Community supply, the benefit of the right to deduction of, exemption from or refund of VAT, even in the absence of national provisions providing as such, if it is established that that taxable person should have known that it was participating in evasion of VAT committed in the context of a chain of supplies.

Grube noted that a recent proposal for a Council Directive which has not yet been adopted yet proposes a new concept of intra-community supplies of goods which will address the issue “missing trader-fraud”.^[59] In the proposal, an intra-community supply of goods would consist in a supply carried out by a taxable person for a taxable person or for a non-taxable legal person whereby the goods are dispatched or transported, by or on behalf of the supplier or the person acquiring the goods, from one Member State to another Member State. The supply would be charged with VAT of the Member State of destination and the supplier would be liable for the VAT, but according to a reverse-charge mechanism, the acquirer of the goods should in principle pay the VAT. Grube also observed that this transfer of liability would make it a lot easier to combat “missing trader-fraud”.

6.3. Switzerland: *Bundesverwaltungsgericht/Tribunal administratif fédéral*, 18 November 2016, Case A-3014/2016

6.3.1. Facts of the case

Rochat Pauchard discussed a recent decision by the Swiss BVGer/TA. The case concerned a city. In Switzerland, public entities, like a city, are subject to VAT as long as they carry on a business activity. Public entities carry on business activities by means of various agencies, i.e. police services, sport services, civil engineering, etc., and these agencies are the entities that are subject to VAT. The subdivision of a public entity into agencies is determined in line with the financial and organizational structure of the public entity. As with any other VAT subject, the agencies are permitted to deduct input VAT as long as they are acting in the course of their entrepreneurial activity. No input VAT deduction is granted on supplies which are used to make future supplies of goods that are exempt without credit from the input tax. The sale and rental of buildings and the supplies of goods and services between autonomous agencies of the same public entity is such a supply that is exempt without credit from input tax and, therefore, excludes the right to deduct input VAT on upstream supplies. However, Swiss law does permit taxpayers to opt for voluntary taxation of supplies exempt from the tax without credit. If this option is used, the liability for VAT is reinstated and so is the right to recover input tax.

In the case at hand, the Swiss city decided to create an autonomous service for the buildings managed by its administrative estate and that it planned to rent out. Three buildings previously administered by the city’s financial service, which were not subject to VAT, were to be transferred to this new agency. Major renovation and extension works were planned in these buildings. In November 2013, the city contacted the tax authorities and indicated that it intended to defer the costs of renovation of the buildings to the agency. In the meantime, the buildings were to be leased to another autonomous public agency. The city requested confirmation from the tax authorities that the newly created agency could opt for the voluntary status as a VAT subject with regard to these rentals.

In December 2013, the Swiss tax authorities registered the new autonomous agency as a VAT subject as of 1 January 2013. After reconsideration of the case, the tax authorities decided in 2016 to cancel the VAT registration retroactively and to correct all VAT returns to zero. The tax authorities argued that the construction put in place by the city constituted tax avoidance. The city appealed to the BVGer/TA.

6.3.2. Decision of the court

The BVGer/TA observed that taxpayers are free to organize their economic relations in such a way to bear the lowest possible tax burden. However, there are limits to this freedom. The constitutional prohibition of abuse of rights implies that tax avoidance is prohibited. The BVGer/TA observed that the examination of the three conditions, which serve to determine whether the taxpayer’s actions resorted in tax avoidance also applied in respect of VAT.

With regard to the criterion of the unusual construction, i.e. the objective element, the BVGer/TA observed that the city had the right to set up a new administrative agency and that the creation of it was in itself not abnormal, nor was the fact that buildings were leased between agencies of the same public entity. It was unusual that only buildings in which major investments were planned were transferred to the agency, even though the measure was indicated to improve general transparency of the management of the estate of the city. The BVGer/TA also observed that, if the tax motive were eliminated, the construction made no economic sense.

55. See UK: ECJ, 20 June 2013, Case C-653/11, *Her Majesty’s Commissioners of Revenue and Customs v. Paul Newey t/a Ocean Finance* para. 46, ECJ Case Law IBFD.

56. See IE: ECJ, 22 Nov. 2017, Case C-251/16, *Edward Cussens, John Jennings, Vincent Kingston v. T.G. Brosnan*, ECJ Case Law IBFD, in which this principle was applied to refuse the exemption from VAT certain sales of immovable goods.

57. NL: ECJ, 18 Dec. 2014, Joined Cases C-131/13 and C-163/13, *Staatssecretaris van Financiën v. Schoenimport „Italmoda” Mariano Previti vof and Turbu.com BV, Turbu.com Mobile Phone’s BV v. Staatssecretaris van Financiën*, ECJ Case Law IBFD.

58. IT: ECJ, 28 July 2016, Case C-332/15, *Criminal proceedings against Giuseppe Astone*, ECJ Case Law IBFD.

59. European Commission, Proposal for a Council Directive amending Directive 2006/112/EC, 25 May 2018, COM(2018) 329 final, EU Law IBFD.

With regard to the criterion of the aim to save taxes, i.e. the subjective element, the BVGer/TA noted that, if the arrangement were to stand, the city would benefit from the input VAT deduction. Without the creation of the autonomous agency, there would not be such input tax deduction. The BVGer/TA also observed that it had to be presumed that there was an intention of tax avoidance, given the unusual structure and the fact that only a few buildings were covered by it. If all buildings had been transferred, the tax benefit would have been greatly reduced because, if rented to other agencies, which generally did not exercise business activities, no deduction of input VAT would have been granted.

With regard to the criterion of significant tax savings, i.e. the effective element, the BVGer/TA observed that the amount of VAT recovered was close to USD 700,000 while the VAT due on the rent received in the same period was about USD 12,000. The tax credit was, therefore, USD 688,000.

The BVGer/TA held that the arrangement qualified as tax avoidance and that the tax authorities had rightly rejected it and had rightly treated the city as if the autonomous agency had never been set up. The city did not appeal to the Swiss *Bundesgericht/Tribunal fédéral* (Federal Supreme Court, Bger/TF).^[60]

6.4. Australia

Davies discussed a GST abuse scheme involving gold transactions. The scheme was based on the fact that GST does not apply when a trader buys gold bullion, the high-grade tradable form of the metal. However, GST is due when gold scrap is sold. The scheme operates as follows. An intermediary sells gold scrap to a refiner and charges GST (transaction A). The refiner claims a GST credit for the amount paid, but the intermediary does not remit the GST to the tax authorities, i.e. the GST goes 'missing'. The refiner turns the gold into bullion and sells it to the dealer at a profit margin. No GST is applicable (transaction B). The dealer sells the precious metal to a third party, including intermediaries, at a profit margin and claims input tax. The intermediaries melt the bullion into scrap and sell the same gold once again to the refiner, although often the arrangement is a one-off transaction. The tax authorities pay GST credits to the refiners, but do not receive the remitted GST from the intermediaries, who often send the GST amounts to third parties and then go into liquidation to avoid paying GST.

Davies noted that the scheme is subject of a pending case where the tax authorities have applied the Division 165 anti-avoidance provisions to negate the GST benefit. These dedicated GST anti-avoidance rules have only been applied in a few cases to date. The principle legal issue in the case at hand is the question whether the gold is being "refined" within the meaning of the Goods and Service Tax (GST) Act^[61] because, in reality, the intermediary takes investment grade bullion and "scratches" it to reduce it to scrap, i.e. non-investment grade gold, and sends it back to the refiner to be turned into bullion once again. A second question concerns the nature of the "dominant purpose" of the refining activities. The refiner could claim that the purpose of the refining is of a commercial nature, namely to increase his refining volumes to obtain accreditation in foreign gold markets. Davies noted that the purpose test applied is an objective test, not a subjective test.

Owen interjected and said that there were similar cases in Canada and he wondered whether the sham doctrine could not be applied in the Australian case. Davies noted that the sham doctrine traditionally has a high application threshold in Australia and it was harder for the tax authorities to apply than the anti-avoidance rules.

Davies then observed that the Australian legislator had responded to the gold industry GST fraud by introducing the Treasury Laws (GST Integrity) Bill 2017,^[62] which, in the meantime, has passed both houses of the Parliament. The main change introduced in the bill is the rule that the refiner has to remit GST himself directly to the tax authorities, rather than relying on the intermediary to remit.

With regard to the question of who has the burden of proof as to whether there was no fraud or evasion, Davies noted that, in Australia, the burden lies with the taxpayer. According to the other panellists, in Germany and Switzerland, and, in the jurisprudence of the ECJ, the burden of proof to the effect that there is evasion lies with the tax authorities. Davies observed that Australia might benefit from amending its GST rules so as to fall into line with the developments regarding "missing trader-fraud" in EU VAT.

6.5. Germany: *Bundesfinanzhof*, 10 August 2017, Case No. V R 2/17

6.5.1. Facts of the case

Grube discussed a recent VAT case from Germany. The facts of the case were as follows. A car trader bought several cars from Company B. The trader received invoices related to these purchases in January 2012 and paid the VAT due to Company B. The latter did not remit any of the paid VAT to the German tax authorities. The managing director of Company B had also worked for other firms to whom the car trader had business connections. Several cases of VAT fraud involving that director were being investigated by the tax authorities and ultimately, the *Finanzgericht* (Tax Court of First Instance, FG) had held that the director had been guilty of VAT evasion on the supplies of cars undertaken in January 2012.

The tax authorities informed the car trader of the investigations into the director and a dispute arose as to whether the car trader was aware of the VAT fraud to be undertaken in relation to the purchases of the cars. The tax authorities concluded that the car trader should

60. For more details on the case and for the original text of the judgement, see CH: BVGer/TA, 18 Nov. 2016, Case A-3014/2016.

61. AU: Goods and Service Tax (GST) Act.

62. AU: Treasury Laws (GST Integrity) Bill 2017.

be liable for the evasion of VAT committed by the company and/or the director by way of the application of section 25(d), paragraph 1 of the German *Umsatzsteuergesetz* (VAT Act, UStG) 2005,^[63] which provides that such a liability arises if the taxable person knew or should have known of the VAT fraud committed with regard to the foregoing supply.

6.5.2. Decision by the courts

The *Finanzgericht* (Tax Court of First Instance, FG) held in favour of the taxpayer and decided that the tax authorities had erred by declaring the car trader liable for the VAT due by the fraudulent supplier. The tax authorities appealed to the BFH, arguing that the car trader knew or had reasonable ground to suspect the (bad) intentions of the company and/or the director to evade VAT. The BFH dismissed the appeal, holding that the requirements for the application of section 25(d), paragraph 1 of the UStG 2005 had not been fulfilled, as the tax authorities were not in a position to be able to prove that the car trader knew or should have known anything about the tax fraud. The BFH also observed that the application of the rule must be in line with the principle of certainty and proportionality and referred to prior case law of the ECJ in *Red. Of Technological Industries* (Case C-384/04)^[64] regarding this matter. Such a situation would constitute a violation of the principle of proportionality if the mere fact that the car trader was aware of the investigations concerning the managing director would lead to the former being liable to pay the evaded VAT. Finally, the BFH observed that there was no further proof to be found to the effect that the car trader should have known anything about the director's intentions beforehand.

Grube concluded that for the application of section 25(d), paragraph 1 of the UStG 2005, the burden of proof is clearly with the tax authorities and that, as such, the rule is rarely applied in practice because it is too difficult for the tax authorities to fulfil the conditions of this provision – with the exception of the special cases named in section 25(d), paragraph 2 of the UStG 2005. Grube wondered whether, in principle, it was reconcilable with the proportionality principle to deny the deduction of input VAT, on the one hand, and to assert as well liability for the VAT evaded by another taxable person in the chain of supplies, on the other. Justice Caroline Vanderkerken (Court of Appeal Brussels, Belgium) observed that, at least in Belgium, it appears to be not impossible for the tax authorities to present evidence of fraud. She believed that a certain leniency by the courts was required in these matters because otherwise VAT fraud is simply uncontrollable. Owen observed that, in common law jurisdictions, there is a marked difference between the burden of proof in civil cases, which requires proof of possibilities and, in criminal (fraud) cases, in which facts must be established with undoubted certainty. Martin noted that, in France, criminal cases require the facts to be established beyond reasonable doubt, whereas, in civil cases, the burden of proof is linked attributed to the party that seeks to obtain a benefit. In tax matters the burden lays with the tax authorities, but the standard is not as high as the one maintained in criminal cases.^[65]

7. Session 6 – Transparency of Court Proceedings

7.1. Panel composition and agenda

The session was chaired by Justice Manuel Hallivis Pelayo (Former President of the Federal Tax and Administrative Law Court (*Tribunal Federal de Justicia Fiscal y Administrativa*)). The panel was composed of Justice Michael Beusch (Federal Administrative Court, Switzerland), Judge Eui Young Lee (Supreme Court, Korea Rep.), Justice Tony Pagone (Federal Court, Australia), Judge Peter Panuthos (US Tax Court, United States) and Justice Caroline Vanderkerken (Court of Appeal Brussels, Belgium).

Manuel Hallivis presented opening remarks explaining how the panel would be presented, and encouraged questions and comments from those in attendance.

Peter Panuthos then presented a paper which posited a number of questions regarding transparency of court proceedings based on his experience in the United States. The other panellists compared the outcomes with their findings in relation to their own jurisdiction and presented discussion as to reasoning for the respective positions on issues of transparency.

7.2. How are court cases assigned and to what extent is this process available to the public?

7.2.1. United States

The TC is a traveling court. It sits in 74 cities throughout the United States. All petitions are filed with the TC in Washington D.C. where the judges are located. The Chief Judge has the responsibility to assign cases and sessions to judges. The Clerk drafts a list of cases for various cities and sessions in cities are assigned to individual judges. For instance, Judge A might be assigned a one-week session in each New York City, Chicago and Los Angeles for the winter 2019 term. Specific cases that need special treatment can be assigned individually, for example, because a lengthy trial is required that will not fit within the normal trial week. The TC does not assign particular kinds of cases to specific judges and the judges do not specialize in subject matter issues. The opinions of the TC undergo a review process by the Chief Judge and staff. The assignment of cases is effected as impartially and neutrally as possible, and are assigned in the way most expedient to the TC, not to the individual judge. A listing of TC sittings at predetermined locations is published, but not

63. DE: *Umsatzsteuergesetz* (VAT Act, UStG).

64. UK: ECJ, 11 May 2006, *Case C-384/04*, *Commissioners of Customs and Excise H.M. Attorney-General v. Federation of Technological Industries and 53 others*, ECJ Case Law IBFD.

65. For more details on the case and for the original text of the judgement, see DE: BFH, 10 Aug. 2017, *Case No. V R 2/17*, Other Case Law IBFD.

the identity of the judges, which is only revealed in pre-trial notices. For security reasons, the general public usually does not know in advance the identity of the sitting judges.

7.2.2. Belgium

Belgium is a small civil law country. Tax judges relate to the general civil court system and cases are assigned based on the principles contained in the Belgian *Gerechtelijk Wetboek/Code Judiciaire* (Civil Procedure Code, Ger.W.).^[66] The courts sit in cities and operate along territorial conscriptions. The competence of a specific court depends on the location of the competent division of the tax authorities in a particular case. With regard to the specific case of the HvB/CdA, Brussels, the President of the HvB/CdA, Brussels issues a yearly decision on the organization of his court in which the number of chambers is determined and the matters for which the chambers are competent and the times of the sessions. Once a case is accepted in a chamber, this cannot be changed. However, debate before the President of the HvB/CdA, Brussels is possible to determine which chamber will take a case. The President's decision cannot be appealed by the parties and is also binding for the judges. Specific chambers can be set up for exceptional and large-scale cases. The complexity of the cases is assessed by the courts at first sight and estimated pleading time is allocated. In practice, it is the length of the written observations which determines the amount of pleading time. With regard to transparency, dates and session times of the individual chambers are published online. Cases currently face enormous delays. In principle, there is no choice for parties which judge will hear their case. In practice, parties sometimes are eager to submit their case to a particular chamber. If both parties agree, this can be accommodated. There is no specialization amongst Belgian tax judges who hear all types of cases, for example, VAT, corporate tax, international tax, etc. In criminal chambers, money laundering and tax fraud cases are assigned by specialization of the judges but this does not occur in the ordinary tax chambers.

7.3. How are deliberations by judges handled and to what extent does the public have access to the deliberative process?

7.3.1. United States

In the United States, the deliberative process differs from the trial and the filings in the case which are all part of a public record. After hearing the arguments and the evidence, the judge takes transcripts back to Washington DC, goes through the records and all the exhibits. The deliberative process, i.e. the process during which the judge decides the case, is not quite as transparent and is kept within the judge's chamber. Within the court and the chambers, judges share opinions and rely on the assistance of legal staff but only within the courthouse building. The deliberative process is not transparent to the general public or the parties, which is a prerequisite to have meaningful deliberations, and to be able to consider alternative views. Unlike in certain other courts, the TC likes to speak with one voice which represents the majority or the unanimous conclusion of the court. This is of importance with regard to the TC's status as a national court, responsible for the uniform enforcement of tax laws in the country. Different outcome of cases depending on the individual judges is not perceived as optimal.

7.3.2. Korea (Rep.)

In Korea (Rep.), the state of affairs is similar to the United States (see section 7.3.1.). The announcement of judicial decisions is always public, whereas deliberations are private in order to protect the independence of the judges. Changes and alterations to court opinions in the deliberation process are kept strictly confidential. Press releases are issued in relation to decisions with high public visibility. A court's library contains detailed reports on case deliberations, access to which is restricted. They contain notes on exchange of views among judges, first drafts and persuasions. Confidentiality of these documents is seen as crucial to protect the court from external pressure for the parties and from the legislative bodies. The official wording of the final opinions of courts is deemed sufficient to explain their decisions. Modern democratic society requests more transparency, though, even if this might cause the executive power to influence the judiciary. From this perspective, more detailed explanation of judgements and more details on court deliberations could be useful in the future.

7.3.3. Switzerland

In Switzerland, there is a general belief that court deliberations should not be public. Judges are selected by Parliament and serve terms of six years. All judges belong to a political party that is represented in Parliament. As such, the composition of the courts is a reflection of the composition of Parliament. Sometimes, persons are appointed judge in a fairly accidental way because candidates have to have a certain linguistic and political background, which makes the pool of candidates not that large. This aspect of the Swiss judiciary that has a long-standing tradition and usually does not give reason to complaint is unique, compared to most other countries. Swiss tax courts almost always operate in panels of three or five judges. At the BVGer/TA, a computer program randomly assigns cases, taking into account the workload and linguistic background of individual judges. Only in exceptional cases, there are oral deliberations before the courts. The Swiss *Bundesgericht/Tribunal fédéral* (Federal Supreme Court, Bger/TF) holds public debates and public deliberation processes. In practice, the rapporteur reads his opinion, another judge serves as the contra-rapporteur and reads his opinion as to why he disagrees. In a second round, the same unanimous opinion is repeated, which sometimes strikes as odd and which leads some to the conclusion that public deliberation is not a good idea.

66. BE: Gerechtelijk Wetboek/Code Judiciaire (Civil Procedure Code, Ger. W.).

7.4. Are all proceedings made available to the public or are there some circumstances in which proceedings are not made available?

7.4.1. United States

TC proceedings are open to the general public and for interested parties, attendance is an interesting learning opportunity. There are exceptions. Sometimes, a protective order is issued, under which certain documents cannot be used outside the TC, are kept under seal and prevented from appearing in the electronic record, or parties are instructed not to pass them on to third parties. The website of the TC lists all house rules of the Court. In whistle blower cases, third parties often seek anonymity, which forces the TC to make a difficult decision, i.e. secrecy is important in certain circumstances, but it diminishes the level of confidence by the litigants and the public in the court system.

7.4.2. Australia

In Australia, proceedings of the courts are also always public and equal exceptions apply as in the United States (see section 7.4.1.). Taxpayers have the right to choose between a judicial appeal to the Federal Court of Appeals (FCAs) or an administrative appeal to the Appeals Tribunal (AT). The choice is significant because of the difference in public exposure: AT decisions are kept private and confidential and anonymous, if needed, whereas FCAs decisions are necessarily public, as are all court proceedings in Australia. In line with the tradition of English law, exceptions to this rule exist in the interest of justice and in line with the adagio “not only must Justice be done; it must also be seen to be done”. Consequently, exceptions are granted only in rare cases when the visibility of the proceedings hampers administering justice itself, like in case of safety concerns for the parties, protection of trade secrets, or in case there is evidence that publicity might undermine commercial interest. The assignment of cases to judges occurs randomly.

7.5. What personal information are judges required to provide which may be made available to the public?

7.5.1. United States

In the United States, judges must submit an annual update of their financial disclosure statement, which contains information on assets held, liabilities incurred and reimbursement information regarding other activities. This information is public and available on the federal judiciary website. The net-worth of individual judges is always communicated within certain ranges and is made available to the public on request. There are bills pending at the time of holding this conference to make the disclosure obligations for the judiciary also applicable to the President of the United States, who, again at the time of holding this conference, does not have such disclosure obligations.

7.5.2. Belgium

Compared to the advanced system of the disclosure employed in the United States, the status in Belgium appears prehistoric. Under current anti-money laundering legislation, individuals who are deemed politically exposed, such as members of the highest courts and constitutional court, have to abide to financial disclosure obligation. HvB/CdA judges and judges of the *Rechtbank van Eerste Aanleg/Tribunal de Première Instance* (Court of First Instance, RvEA/TdPI) are deemed not exposed and, as such, there are no financial disclosure obligations before or after the nomination of such judges. The system employed is one of self-assessment. Judges are expected to be impartial and have to recuse themselves in case of a conflict of interest. Bribery or fraud on the part of a judge obviously results in criminal investigation. Politicians have to file lists of assets maintained, which are sealed and only opened in case of a criminal investigation. An extension of the system applicable to politicians in line with the US disclosure rules for judges would be a good thing but for ordinary judges some would argue it is too far-fetched. Many of the issues targeted by those rules can also be covered by the deontological rules and duties to which judges have to adhere in Belgium.

7.5.3. Switzerland

Switzerland applies similar rules as Belgium (see section 7.5.2.). The right to privacy which is enshrined in the Swiss Constitution also applies to civil servants and judges.

7.5.4. Mexico

In Mexico, strict disclosure obligations are in place and, as of 2019, all information will be publicly accessible online.

7.6. What outside activities may judges participate in?

7.6.1. United States

In the United States, judges are allowed to perform teaching activities, subject to approval by the Chief Judge and with the remuneration being within certain limitations. A token remuneration for the delivery of speeches is acceptable. Every instance of remuneration received from these extra activities must be included in the financial disclosure report.

7.6.2. Korea (Rep.)

In Korea (Rep.), similar rules apply. Public speaking, lecturing or publication of articles is allowed, subject to approval. In academic activities, judges should be careful not to disclose details on pending cases. However, judges are encouraged to focus their efforts on the main task of serving as a judge as public impartiality and independence are seen as very important. The judicial profession cannot be used to derive private economic benefit. This rule is applied through the reliance on common sense, ethics guidelines and the general code of judicial ethics, published by a dedicated committee. Remuneration received from lectures must be reported in advance and after the facts. In practice, most judges dread the disclosure obligations and give their lectures pro bono.

7.6.3. Australia

In Australia, very little is formally established regarding these matters. The Australian Constitution provides that judges are not allowed to have another office of profits. Judges can have other activities, like exploiting a farm, but they cannot teach law subjects and be remunerated for it. This is a very broad principle and there is formal code as in the United States. The Chief Justice publishes guideline booklets that require judges not to participate in politics or activities that risk undermining the office. These are conventions rather than strict rules. A judge responding on Twitter to remarks made by a member of government regarding (the lack of) night time public safety in an Australian city could be seen as participating in politics. However, the judge was not reprimanded. Australian judges can conduct teaching activities and can participate in not-for-profit management boards. He or she cannot be remunerated for these activities. The giving of speeches is accepted, but judges should treat carefully and avoid controversial positions regarding issues they might have to decide in the future. Australia has a tradition of tax discussion groups in which tax professionals discuss pending tax issues. Judges were asked to remove their membership of such groups to avoid court proceedings in which advocates and judges had prior interactions on the issues to be decided. Nevertheless, many judges are member of private clubs and maintain friendships from the past, unavoidably sometimes also with litigants or advocates that appear before them.

7.6.4. France

In France, there has been a significant evolution regarding this matter over the last three decades. In the past, judges could not appear in conferences and could not interact with other professionals. In the last decade, there has been a strong movement to participate more and more and to interact with other stakeholders. The question is whether there is a limit to the contribution of judges in these interactions. Judges should accept comments on court decisions and be allowed to explain the rationale. Adopting a typical civil law mindset, there is a difference between the principles that guide case law and the consequences that rise from these principles. Judges should not elaborate on what the application of the principles would be in a hypothetical situation, but they can discuss the consequences of a case established in precedent.

7.6.5. Netherlands

In the Netherlands, in principle, judges should conform to the general ethical rules applicable to civil servants. In addition, there is a plethora of rules addressing the ethical position of judges consisting of laws, guidelines and codes of conduct. All of these instruments also apply to substitute judges. Among other things, they describe which secondary activities are allowed, and those which are not, and for each activity a level of vulnerability is assigned. For example, judges cannot serve in the local parliament, the professional activities of wife and children could be a prohibitive factor and so much more. Substitute judges are subject to a number of additional rules. For example, they have to report all professional activities carried out in a public register. The integrity codes do not allow them to be involved in cases in which they were also involved in another capacity. They are not permitted to serve as a sole judge on the bench, nor as the president of a panel. Substitute judges cannot be involved in cases in which a (former) colleague of his firm participates, or in cases in relation to which he had published an official opinion.

8. Exotic Topic: “The Most Important Court in Canada”

Eugene Rossiter, President of the IATJ and Chief Justice of the Tax Court of Canada (TCC) closed the ninth IATJ Assembly by trying to answer one of mankind’s eternal questions: which is the most important court in Canada? By applying a simple “1 and 1 equals 2” thought process, Rossiter believed that no Canadian court qualified for this title, but the TCC.

With Canada having an estimated population of 37 million, the TCC has at least an equal number of potential clients, and arguably many more, if corporate entities are counted. Criminal courts are very relevant in society, but only 1% of the population is or will be a criminal. Similarly, other courts have important functions, but none of these are as relevant to as large a number of Canadians as the TCC. The Supreme Court of Canada (SCC), for example, consists of nine judges and deals with important issues related to the constitution or the Charter of Rights and Freedoms, but its caseload is limited to 70 cases a year. And more importantly, for most Canadians, the issues dealt with are not important in their list of daily worries, such as having to pay off the mortgage on the house, being able to educate the children or having some spare cash at the end of the month to buy beer. All of these important issues are affected by the tax bill received by individuals and, therefore, by the TCC. None of the other courts can compete with the TCC in this regard. Thirty per cent of the cases dealt with by the Federal Court of Appeal (FCA) are on appeal to a TCC decision, which makes the FCA only the most important for 30% of cases. The Federal Court of Canada (FCC), the sister court of the TCC, deals mostly with immigration cases, which are cases not

involving Canadians, even if being in the process of becoming Canadian, so they are out for the purpose of this exercise. The provincial courts deal with tax matters, but their jurisdiction is restricted to a province, unlike the TCC. And so on and so on.

Health, family and money are what make Canadians go around, public polling shows. Canadians' money is also what the TCC deals with. The TCC is the most important court. Case closed.