

Report of the Proceedings of the Fourth Assembly of the International Association of Tax Judges (30-31 August 2013)

The report summarizes the proceedings of the Fourth Assembly of the International Association of Tax Judges, held in Amsterdam on 30-31 August 2013.

1. Introduction

The Fourth Assembly of the International Association of Tax Judges (IATJ) was held in Amsterdam on 30 and 31 August 2013. The proceedings took place partly at the premises of the International Bureau of Fiscal Documentation (IBFD), where the participants were welcomed by Sam van der Feltz (IBFD CEO), and partly at the new building of the Palace of Justice of Amsterdam, where the participants were welcomed by Herman van der Meer (President of the *Gerechtshof Amsterdam* [Court of Appeal], the Netherlands). The Assembly was attended by 60 judges from all over the world. Prof. Stef van Weeghel and Timothy Lyons QC were invited as speakers.

The Assembly was opened by the organizer, Judge Wim Wijnen.

The Assembly was divided into the following seven substantive sessions:

- (1) Tax avoidance/evasion (*see* section 2.1.);
- (2) Excise duties in the European Union (*see* section 2.2.);
- (3) Indirect taxation: subjective elements in VAT (*see* section 2.3.);
- (4) Objective law and subjective judges (*see* section 2.4.);
- (5) Transfer pricing (*see* section 2.5.);
- (6) Recent case law on treaty override (*see* section 2.6.); and
- (7) Conclusive force of declarations of foreign authorities (*see* section 2.7.).

The first four sessions took place on the first day of the Assembly, and the remaining three were held on the second day. The plenary discussions in the various sessions were introduced by a total of 30 speakers.

2. Report on the Substantive Sessions

2.1. Session on tax avoidance/evasion

2.1.1. Opening comments

The Fourth IATJ Assembly opened with a session on tax avoidance/evasion. The session was chaired by Judge Frank Pizzitelli (Tax Court of Canada). Other speakers included: Judge Malcolm Gammie (First-tier Tribunal, the United Kingdom), Judge Pierre Collin (*Conseil d'État* [Supreme Administrative Court], France), Prof. Stef van Weeghel (the Netherlands) and Judge Jürgen Brandt (*Bundesfinanzhof* [Federal Tax Court], Germany).

In this session, the speakers gave insights into different aspects of the concepts of tax avoidance and evasion, as defined and understood in their own countries.

2.1.2. Canada

Judge Pizzitelli stated that tax avoidance (which can be subdivided into acceptable tax avoidance/tax mitigation and abusive tax avoidance) is generally considered legal in Canada, whereas tax evasion, which involves an element of fraud perpetrated upon the treasury by the taxpayer, is regarded as illegal. The Canadian courts employ the "purpose of the statutory provision" test to distinguish acceptable tax avoidance from abusive tax avoidance and frequently apply the General Anti-Avoidance Rules (GAARs) to control and curtail the latter.

According to Pizzitelli, an important feature distinguishing avoidance from evasion is the criminal intent (*mens rea*) accompanying the act of avoiding payment of taxes due (*actus reus*). The offence of evasion requires a clear-cut tax liability, in the absence of which the taxpayer cannot be charged with criminal evasion even though other charges may still be brought against him. In the case of tax evasion (a punishable offence), the standard of proof is higher (beyond reasonable doubt) than that required to establish tax avoidance (balance of probabilities).

2.1.3. The United Kingdom

Judge Gammie pointed out that the UK understanding of the two concepts was no different. He stated that tax evasion is considered to be illegal, whereas tax avoidance is regarded as perfectly legal. Parliament has introduced and implemented the GAAR to deal effectively with cases of tax avoidance, which involve bending the tax rules to gain a tax advantage that Parliament never intended, and to reduce the uncertainty stemming from the use of the

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“purposive construction of the statutory provision” test employed by the UK courts. While speaking of the remedies available, Judge Gammie stated that the trend for Her Majesty’s Revenue and Customs (HMRC) is to resort only rarely to criminal remedies in cases of tax evasion. Criminal investigation and prosecution are reserved for cases where the HMRC needs to send a strong deterrent message or where the conduct involved is so severe that only a criminal sanction is appropriate.

Judge Gammie also mentioned the phenomenon of “avoidance”. He described it as a difficult area falling somewhere between avoidance and evasion, which is especially relevant in the case of “offshore” transactions where the HMRC has difficulty in collecting information and persons outside the UK jurisdiction may have no (enforceable) obligation to deliver information.

2.1.4. France

Judge Collin presented the French perspective. He stated that tax evasion is the act of evading the tax liability by illegal means, whereas tax avoidance involves legal use of the tax regime to reduce the tax liability. He stated that, despite a clear theoretical understanding of the two concepts, in practice, it is often difficult to draw a line between the two. He noted that since the majority of the cases before the French courts do not involve a direct and clear infringement of the law, the courts have to determine whether it is a case of evasion or avoidance, and, for that purpose, they use a two-step approach:

- (1) whether the impugned arrangement is solely designed to obtain a tax advantage (subjective condition); and
- (2) what the underlying purpose of the provision in question is (objective condition).

2.1.5. The Netherlands

Prof. Van Weeghel concurred with Judge Collin. He stated that the distinction between tax evasion and tax avoidance may be visible in some cases but not in others. He explained the Dutch legislation of 1925, which authorized the Dutch courts to ignore a transaction if the predominant purpose of the transaction was to obtain a tax advantage and thereby violate the purpose and spirit of the law.

Prof. Van Weeghel made a brief reference to the judicially developed doctrine of *fraus legis* (abuse of law) and to the fact that this doctrine applied different criteria, depending on whether it was a purely domestic situation or whether a tax treaty was involved.

As a closing remark, Prof. Van Weeghel stated that the distinction between tax evasion and tax avoidance had blurred further, and a major part of the lost tax revenue today was attributable to tax evasion.

2.1.6. Germany

Judge Brandt presented the German view on the concepts of tax avoidance and tax evasion. While expressing concurrence with the view taken by other panellists that tax

avoidance is legal and tax evasion is considered illegal, Judge Brandt stated that Germany distinguishes between typical and non-typical arrangements. He stated that even though the issue of tax evasion could arise both with respect to typical and atypical arrangements, the former did not require an inquiry into the existence of special economic reasons. However, the fact that an arrangement is not a typical arrangement does not necessarily mean that it is bound up with tax evasion. Judge Brandt mentioned that the German courts look at the facts as a whole to ascertain if there is a case of avoidance or evasion.

He stated further that in cases of alleged evasion in typical arrangements, the burden of proof lies with the tax office. In contrast, in cases of non-typical arrangements, the burden of proof lies with the taxpayer. The taxpayer must demonstrate to the court that there are economic reasons for entering into the arrangement. The existence of valid economic reasons can, according to Judge Brandt, absolve the taxpayer of the charge of evasion.

2.2. Session on excise duties in the European Union

Judge Harald Jatzke (Germany) spoke on the broad topic of excise duties in the European Union. The intention was to familiarize the audience with the EU excise regime. After a brief explanation of the salient characteristics of the excise duty (an indirect single-stage tax levied on consumables, collected from retailers, producers or importers and borne by the final consumer), the Judge spoke about the European Commission’s partly successful attempt to harmonize national excise duties (only with respect to some goods), because the Member States have refused full harmonization. Member States are allowed to introduce other indirect taxes on the harmonized excise goods provided that those taxes comply with the EU tax rules applicable to excise duty or VAT.

Lastly, Judge Jatzke spoke about the “duty suspension arrangement” (DSP), a special procedure which is aimed at facilitating trade between Member States by postponing the chargeability of goods to excise duty, thereby allowing economic operators to store and to carry excise goods without paying the tax. The movement of the goods under the DSP is covered by the Electronic Movement and Control System (EMCS). The EMCS is applicable only in the field of excise duties but not VAT.

2.3. Session on subjective elements in VAT

2.3.1. Opening comments

This session was chaired by Judge Friederike Grube (*Bundesfinanzhof*, Germany). Other speakers included: Timothy Lyons (Queen’s Counsel, United Kingdom) and Judge Emmanuelle Cortot-Boucher (*Conseil d’État*, France).

2.3.2. Germany

Judge Grube gave a short overview of the VAT system in general and proceeded to outline the reasons for the introduction of subjective elements in VAT law. According to

Judge Grube, these reasons are: the abusive and improper use of VAT law by some selfish traders causing distortion of competition within the European Union and leading to loss of revenue; and a desire to protect the interests of bona fide taxpayers.

Judge Grube, while pointing to the most important subjective elements in the jurisprudence of the Court of Justice of the European Union (ECJ), suggested the remedies available to the Member States in respect of a taxable person who knew or should have known that he was participating in a transaction connected with fraudulent evasion of VAT. The Judge stated that the Member State concerned may either refuse exemption for the intra-Community supply of goods or refuse the right to deduct input VAT. In cases representing wholly artificial arrangements, the Member State may also disregard the contractual terms.

2.3.3. United Kingdom

Timothy Lyons QC gave a presentation on the concept of intention in the EU VAT law. He stated that even though the concepts of supplies and deduction are objectively determined, evidence relating to intention assumes significance in the area of VAT, particularly in cases dealing with the right of deduction and abuse. As regards “deduction”, he pointed to the ECJ decisions in the cases *Optigen* (Case C-354/03)¹ and *Kittel* (Case C-439/04),² where it was held that an innocent trader who had no knowledge or means of knowledge should not be put at a disadvantage by refusing him the right to deduct input VAT.

With respect to abuse, Lyons stated that even though the essential aim of a transaction was objectively determined, an inquiry as regards the intention of the taxpayer to obtain a tax advantage contrary to the purpose of the tax system should be conducted. If the taxpayer is found to have had such an intention, he should be held to have abused his rights. Referring to the ECJ decision in *Newey* (Case C-653/11),³ Lyons remarked that the ECJ had ruled that in situations of purported abuse, contractual terms are not determinative; they can be disregarded if they do not reflect economic and commercial reality but are wholly artificial and set up with the aim of obtaining a tax advantage.

2.3.4. France

Judge Cortot-Boucher discussed the implications in French law and jurisprudence, of the ECJ judgement in the case of *R* (Case C-285/09).⁴ In the *R* case, a German supplier of luxury cars had carried out a series of accounting manipulations to enable the Portuguese dealers to avoid the payment of VAT. This was considered by the German

tax authorities to be sufficient grounds for refusal of the VAT exemption the German company sought to avail itself of. The ECJ ruled in favour of the German tax authorities despite the fact that all the statutory conditions for entitlement to the exemption had been fulfilled and the refusal of the exemption led Germany to collect VAT to which it was not entitled. Judge Cortot-Boucher remarked that since an intra-Community supply had taken place, it was much more difficult for the ECJ to introduce subjective elements in the application of VAT law.

Turning to the French law and jurisprudence, Judge Cortot-Boucher stated that section 262 of the *Code Général des Impôts* [General Tax Code]⁵ provided the legal basis for refusing exemption to a vendor who voluntarily or intentionally hides the identity of the buyer. A case involving the application of article 262 has not arisen before the French courts so far. As a closing remark, Judge Cortot-Boucher stated that the French courts had had the occasion to resort to the use of the subjective elements while applying the VAT law in cases of fraud where no intra-Community supply had taken place.

2.4. Session on objective law and subjective judges

2.4.1. Opening comments

This session was chaired by Judge Eveline Faase (*Gerechthof Amsterdam* [Amsterdam Court of Appeal], the Netherlands). Speakers included: Judge Geert Corstens (President of the *Hoge Raad* [Supreme Court], the Netherlands) and Judge Klaus-Dieter Drüen (*Finanzgericht* [Tax Court], Germany). Judge Richard Happé (*Gerechthof Amsterdam*, the Netherlands) acted as the moderator.

2.4.2. The Netherlands

Referring to his speech entitled “Objective Law and Subjective Judges” made at the Peace Palace in the Hague on its 100th anniversary, Judge Corstens reiterated his position that a judge, whose duty is to administer justice, should endeavour to be as objective as possible in discharging his duty, since the element of objectivity lends greater legitimacy to his decisions. He stated that a judge should refrain, as far as possible, from subjective insights, convictions and views, though he admitted that it was not possible for a judge to completely dissociate himself from his social background, individual preferences, opinions and outlook. He stated that a particular method for attaining objectivity was for a judge to follow the letter of the law, and, in cases of doubt or ambiguity, to consult the legislative history, which, by offering a certain level of guidance, could considerably lower the chances of a judge deciding the case on the basis of his own personal views and beliefs. Judge Corstens does not favour or encourage the Anglo-Saxon tradition of formulating decisions in the “I” form, only for the reason that it is capable of conveying subjectivity.

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1. UK: ECJ, 12 Jan. 2006, Case C-354/03, *Optigen Ltd and Fulcrum Electronics Ltd (in liquidation) and Bond House Systems Ltd*, ECJ Case Law IBFD.
2. BE: ECJ, 6 July 2006, Case C-439/04, *Axel Kittel v État belge and État belge v Recolta Recycling SPRL*, ECJ Case Law IBFD.
3. UK: ECJ, 20 June 2013, Case C-653/11, *Her Majesty's Commissioners of Revenue and Customs v. Paul Newey t/a Ocean Finance*, ECJ Case Law IBFD.
4. DE: ECJ, 7 Dec. 2010, Case C-285/09, *Criminal proceedings against R*, ECJ Case Law IBFD.

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5. FR: *Code général des impôts* [General Tax Code] (CGI), sec. 262, National Legislation IBFD.

Furthermore, Judge Corstens pointed out that a judge is only required to interpret and apply the law as enacted by the legislature and to not take over the role of the legislature. A judge whose aim must be to render impartial justice must not have a political agenda or political affiliations. His decisions must further the cause of justice and not his own cause. As a closing remark, Judge Corstens mentioned that he does not favour conferring on judges a bigger role to compensate for the reduction in legitimacy of the legislator arising from a decreased participation by citizens in the political process.

2.4.3. Germany

Judge Drüen opened his presentation by putting a question to the audience: is objectivity an aim of the law? Judge Drüen considered the attainment of complete objectivity to be a utopian concept. In view of this impossibility, he supports inter-subjectivity, which is a rational aim, capable of attainment and which may be used as a legitimate starting point for any inquiry. A major focus of his presentation was that subjectivity is not synonymous with arbitrariness, as there are ample safeguards in law against unlimited subjectivity; for example, supervision of the institutions among themselves; the need for giving reasons for judicial decisions which are published and discussed and the review of decisions by higher courts.

Judge Drüen also briefly spoke about the objective and subjective theories of interpretation. The aim of objective interpretation is to find out the real intention of the law, whereas subjective interpretation aims at ascertaining the intention of the legislator. Judge Drüen pointed out that there is considerable debate among scholars as to the real nature of each of the two theories. He remarked that scholars argue that subjective interpretation actually involves an objective standard since the intention of the legislator acts as a threshold for the judge. On the other hand, the objective theory of interpretation is in fact subjective, since the judge is interpreting what he thinks was the intention of the law.

2.5. Session on transfer pricing

2.5.1. Opening comments

This session was chaired by Judge Philippe Martin (*Conseil d'Etat*, France). Other speakers included: Judge Gerald J. Rip (Tax Court of Canada), Judge Vineet Kothari (High Court, India), Judge Stefan Wilk (*Finanzgericht*, Germany) and Judge Nadia Djebali (*Rechtbank Gelderland* [Court of Gelderland], the Netherlands).

2.5.2. France

Judge Martin gave a presentation on the interaction and relationship between article 9 of the OECD Model (2010),⁶ the French transfer pricing provision contained in article 57 of the General Tax Code (which authorizes adjustments on indirect transfers of profits in cross-border situations

6. OECD Model Tax Convention on Income and on Capital (22 July 2010), Models IBFD.

between related enterprises when a situation of dependence or control exists) and the doctrine of abnormal management, which applies also to cases of profit adjustments between unrelated enterprises. Judge Martin discussed the *Sovemarco* decision of the *Conseil d'Etat*,⁷ where it was held that adjustments could be made by the French tax authorities under the doctrine of abnormal management even when it was determined that no such adjustment could be made under article 9 of the OECD Model (2010) or article 57 of the General Tax Code (due to the absence of dependence or control).

Against this background, Judge Martin raised an interesting issue regarding the purpose of article 9 of the OECD Model (2010). The concern was that since adjustment could be made anyway (under the abnormal management doctrine), article 9 of the OECD Model (2010) might not serve any significant purpose. Judge Martin stated that article 9 did serve a significant purpose as the criterion of "participation in the management control or capital" directly influenced the domestic test of "dependence or control" incorporated in article 57. In that sense, article 9 does restrict domestic transfer pricing law. However, article 9 does not, and cannot, restrict domestic law that falls outside its scope, such as the doctrine of abnormal management, which applies not only to associated enterprises but also to unrelated ones.

2.5.3. Canada

Judge Rip gave a presentation on the status of the OECD Transfer Pricing Guidelines⁸ in the judicial determination of transfer prices by Canadian courts. He remarked that despite the long-standing domestic transfer pricing provisions (section 247(2) of the Income Tax Act),⁹ there were very few decisions of the courts dealing with the substantive issues of transfer pricing. Regarding the role and status of the OECD Transfer Pricing Guidelines, Judge Rip referred to, inter alia, the cases of *GlaxoSmithKline* (2010),¹⁰ *General Electric* and *Alberta Printed Circuits* (2010).¹¹

Judge Rip relied on the observations of the Canadian Supreme Court in the *GlaxoSmithKline* case to highlight the most recent trend adopted by the Canadian judiciary towards the OECD Transfer Pricing Guidelines. He stated that the Guidelines can be a useful aid to interpretation only in situations where the statute law is ambiguous or deficient. Where statute law is clear and complete, the Guidelines have no role to play. The OECD Transfer Pricing Guidelines cannot be taken as a substitute for the law.

7. FR: *Conseil d'Etat*, 18 Mar. 1994, *Sovemarco-Europe*.
 8. OECD, *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations* (OECD 2010), International Organizations' Documentation IBFD.
 9. CA: Income Tax Act 1985, National Legislation IBFD.
 10. CA: FCA, 26 July 2010, *GlaxoSmithKline Inc. (Glaxo) v. Her Majesty the Queen*, Tax Treaty Case Law IBFD.
 11. CA: 15 Dec. 2010, *General Electric Capital Canada Inc. v. Her Majesty the Queen*, Tax Treaty Case Law IBFD.

2.5.4. India

Judge Kothari gave a presentation on the legitimacy of the use of secret comparables in the field of transfer pricing. Pointing out jurisdictions which both permit (Mexico, Japan, India) and prohibit (Australia, the Netherlands, the United Kingdom) the use of secret comparables in transfer pricing enquiries, Judge Kothari stated that secret comparables are not a healthy assessment practice. He stated that such an approach is costly, time-consuming, cumbersome, and favours the view of the tax office in most situations.

Judge Kothari elaborated on the position regarding the use of secret comparables in India. He stated that although the collection of secret comparables from other entities is permitted, the taxpayer must be afforded reasonable opportunity to rebut them. Speaking of an ideal situation, Judge Kothari remarked that the use of secret comparables should be banned and only comparables available in the public domain should be used.

2.5.5. Germany

Judge Wilk gave a presentation on a topic similar to that of Judge Martin, i.e. the interaction between article 9 of the OECD Model (2010) and the German domestic transfer pricing provisions. As a general remark, Judge Wilk mentioned that the arm's length principle is recognized as the benchmark in the German transfer pricing law.

With respect to the relationship between article 9 and German domestic law, Judge Wilk referred to the decision of the *Bundesfinanzhof* (BFH) of 11 October 2012,¹² which involved the conflict between section 8(3) of the Corporate Income Tax Law (hidden distribution of profits)¹³ and article 9 of the OECD Model. The BFH ruled that the transfer pricing article in the relevant tax treaty had a limiting effect on the specific conditions (formal requirements) imposed for the controlling shareholder under the principles of a hidden distribution of profits for affiliated companies and established by the BFH in its consistent past decisions. However, according to the German understanding, article 9 is not "self-executing" and requires the existence of domestic law provisions, such as rules on how to establish the appropriate transfer price. Therefore, the regulations concerning the transfer pricing documentation requirements are not contrary to article 9 of the OECD Model. Ultimately, non-compliance with the law on the documentation requirements may result in tax authorities assessing the tax liability, and, thus, in a higher amount of tax payable.

2.5.6. The Netherlands

Judge Djebali focused on the procedural aspects of transfer pricing, in particular the efficacy of the alternative transfer pricing dispute resolution framework, comprising the advance pricing agreements (APAs), mutual agreement procedure (MAP) and the arbitration procedure. After a

brief description of each of the three procedures, Judge Djebali put forth some interesting and challenging questions. One of them related to the role of the national courts in resolving transfer pricing disputes. The use of the traditional legal framework may increase the risk of double taxation since decisions passed by the national courts of one state do not carry any binding value for the courts of the other state. Consequently, a corresponding secondary adjustment may not be ordered to be made, resulting in double taxation of profits, which may encourage taxpayers to use traditional legal methods as remedies of last resort.

In contrast, a taxpayer opting for the alternative framework has more room for negotiation and greater chance of obtaining a more favourable outcome, even though he enjoys less legal protection, since he has, unlike in national judicial procedures, no formal status in the framework procedures. However, the use of the alternative framework gives rise to some concerns, such as the interaction between the national legal remedies and the alternative procedures and the legal protection of the taxpayer.

2.6. Session on recent case law on treaty override

2.6.1. Opening comments

This session was chaired by Councillor Joao Bianco (*Conselho Administrativo de Recursos Fiscais* [Administrative Council of Fiscal Appeals], Brazil) and Judge Manuel Halivis Pelayo (*Tribunal Federal de Justicia Fiscal y Administrativa* [Federal Administrative Tribunal], Mexico). Other speakers included: Judge Pramod Kumar (Income Tax Appellate Tribunal, India), Judge Jennifer Davies (Federal Court, Australia), Judge Ulrich Schallmoser (*Bundesfinanzhof*, Germany), Peter Darak (*Legfelsőbb bíróság* [Curia of Hungary], Hungary), Judge Anthony Gafoor (Tax Appeal Board, Trinidad and Tobago) and Councillor Alexander Alkmim Teixeira (*Conselho Administrativo de Recursos Fiscais*, Brazil).

2.6.2. Mexico

Judge Pelayo presented the Mexican courts' view on the issue of treaty override. He discussed a Mexican case which concerned different obligations regarding withholding tax on dividends arising under the treaty and domestic law. The Mexican company paying dividends to a US resident was obliged, under article 10 of the relevant tax treaty, to withhold tax at the rate of 5% of the gross amount of the dividends. In contrast, under article 152 of the Income Tax Law,¹⁴ the obligation was to withhold tax at the rate of 5%, but after multiplying the gross amount by a factor of 1.5385, which, according to the Mexican tax authorities, was necessary to reconstruct the taxable base. The Mexican company complied with the domestic law obligation, but later filed a request for a refund with the tax authorities. The request was rejected. The issue before the court was whether the Mexican company was obliged to follow the tax treaty or the domestic law. The court held

12. DE: BFH, 11 Oct. 2011, I R 75/11, Tax Treaty Case Law IBFD.

13. DE: Körperschaftsteuergesetz [Corporate Income Tax Law] (KStG), National Legislation IBFD.

14. MX: Ley del Impuesto Sobre la Renta (LISR) [Income Tax Law], 2002, National Legislation IBFD.

that the denial of the refund by the tax authorities was illegal. It took the view that a treaty should always prevail in the case of an attempted treaty override: if both the treaty and domestic tax law define a particular term, the treaty definition must be applied.

2.6.3. India

Judge Kumar dealt with the Indian position on treaty override. At the outset of his presentation, he expanded on the Indian understanding of the concept of treaty override, which is different from the international understanding of the term. He pointed out that in India the expression “treaty override” often refers to a situation where the provisions of a tax treaty prevail over the inconsistent provisions of domestic law. He stated that even though under the present tax law it is not permitted to override tax treaties by enacting inconsistent domestic law, instances of rules constituting direct treaty overrides could be found in the Direct Tax Code Bill 2009.

After discussing the statutory provisions relevant to the issue, Judge Kumar focused on the judicial approach to treaty override in India. Besides the decision of the Indian Supreme Court in *Azadi Bachao Andolan* (2003),¹⁵ Judge Kumar made reference to the *Mashreqbank* (2007) case,¹⁶ which dealt with reverse discrimination. In this case the court, citing the Canadian Federal Court in *Utah Mines v. The Queen* (1991),¹⁷ refused to allow deduction of certain expenses by the taxpayer on the grounds that the deduction would result in reverse discrimination, even though the taxpayer claimed the protection of article 7(3) of the relevant tax treaty.

2.6.4. Australia

Judge Davies gave a short presentation on the Australian courts’ position on the phenomenon of tax treaty override. He stated that Australia is a dualist state and treaties cannot per se take effect in the Australian legal system. Treaties are incorporated into the domestic legal system by an act of parliament which expressly provides that treaties prevail over domestic law, except where the GAAR applies.

Judge Davies stated that as at August 2013, the tax office had not applied the anti-avoidance provision to override the intended effect of a tax treaty, but it might do so in an appropriate case. The other instance of treaty override relates to Australia’s taxing rights under the alienation of real property article in Australia’s pre-1998 tax treaties. That legislation has never been challenged, though at the time of its introduction, the government recognized the potential for challenge.

15. IN: SC, 7 Oct. 2003, *Azadi Bachao Andolan v. Union of India*, Tax Treaty Case Law IBFD.

16. IN: ITAT, 13 Apr. 2007, *Mashreqbank PSC v. Deputy Director of Income Tax*, IT Appeal No. 2153 (MUM.) of 2001, Tax Treaty Case Law IBFD.

17. CA: FC, 28 Mar. 1991, *Utah Mines Ltd v. Her Majesty the Queen*, Tax Treaty Case Law IBFD.

2.6.5. Germany

Judge Schallmoser presented the German view on treaty overrides. He discussed a recent case¹⁸ involving treaty override of the employment income provision by section 50(d)(8) of the Corporate Income Tax Act. Although the BFH is of the view that section 50(d)(8) is unconstitutional, a reference has been made by the BFH to the *Bundesverfassungsgericht* [Constitutional Court] to examine the constitutionality of treaty overrides. Judge Schallmoser pointed out that a shift could be seen in the BFH’s approach to the phenomenon of treaty override. Previously, even though the BFH considered overriding of treaties by domestic law as politically incorrect, it accepted override as lawful in terms of the constitutional law, since the prevailing conception was that tax treaties are not directly enforceable in the German legal system and must be implemented by national legislation in accordance with article 59 (2) of the Constitution. Since the treaty was endowed with the same status as a statute, it was competent for the legislator to override treaty obligations by subsequently enacting an inconsistent domestic law.

However, the recent trend for the BFH is to follow the jurisprudence of the Constitutional Court which has expressed a favourable attitude to international law. At the time of the writing of this article, the decision of the Constitutional Court was still pending, and only after the decision is made, will it be possible to state with certainty what the German approach to treaty override is.

2.6.6. Hungary

Judge Darak discussed three Hungarian cases to explain the position taken by the Hungarian courts on the issue of treaty override. He stated that Hungary is a dualist state and treaties must be incorporated into the domestic law before they can take effect in the legal system. He further stated that even though the Hungarian Constitution requires that the legal system of Hungary accepts the generally recognized principles of international law, the judicial bodies have a large discretion regarding the qualification of international legal rules as generally recognized principles of international law, which can lead to different outcomes in similar situations. Judge Darak expressed his view that not only the legislature but also the courts can cause a treaty provision to be overridden.

2.6.7. Trinidad and Tobago

Judge Gafoor spoke on the issue of treaty override as observed and perceived in the Commonwealth Caribbean. He stated that, as a legacy of British colonization, most Caribbean states except some (such as Haiti and St. Lucia) operate under the dualist theory. Since the treaties are transposed into the domestic legal system by way of legislative instruments, the transposing statutes do not enjoy a special status in relation to other statutes. The theory of parliamentary sovereignty makes it possible for the parliament to enact and override treaty obligations by

18. DE: BFH, 10 Jan. 2012, I R 66/09.

subsequently enacting an inconsistent domestic law. He stated that, unless expressly disallowed, courts would, on the basis of the doctrine of *lex posterior*, give effect to the most recent rule. Judge Gafoor pointed out that, despite the legal framework, the notion of treaty override is rare in the Caribbean states.

After a general overview, Judge Gafoor outlined several reasons for the paucity of case law dealing with instances of treaty override in the Caribbean states. He stated that very few cases involving the issue of override had arisen, firstly, because the Caribbean states are not willing to be so aggressive in their approach to third countries as to commit treaty override, and, secondly, because treaty obligations do not often get transposed into domestic law, reducing the chances of litigation involving such obligations.

2.6.8. Brazil

Councillor Teixeira presented the Brazilian view on the phenomenon of treaty override by discussing two recent cases, known as the CSLL and the CIDE-Royalties cases. In the CSLL case, the issue concerned a contribution payable in terms of legislation brought into force subsequent to the signing of the tax treaties with Austria and Spain. The issue before the court was whether the relevant tax treaties were applicable to the contribution which, according to the tax authorities, did not have the nature of a tax. The *Conselho Administrativo de Recursos Fiscais* (CARF) [Federal Administrative Council of Tax Appeals] concluded that the contribution was a tax and that it was covered by tax treaties which were signed before its introduction (article 2(4) of the OECD Model (2010)).

The CIDE-Royalties case, which still had not been decided at the time of Councillor Teixeira's presentation, involved a bifurcation of the Brazilian withholding tax on royalties of 25% into a withholding tax of 15% and a royalties contribution of 10%. The dispute concerned the second element, namely the royalties contribution. In Councillor Teixeira's view, the contribution was a tax to which tax treaties should apply.

2.7. Session on conclusive force of declarations of foreign authorities

2.7.1. Opening comments

This session was chaired by Judge Robert J. Koopman (*Hoge Raad*, the Netherlands). Speakers included: Judge Emilie Bokdam-Tognetti (*Conseil d'Etat*, France), Judge Petri Saukko (*Hallinto-oikeuden Kuopion* [Administrative Court of Kuopio], Finland) and Clement Endresen (*Høyesterett* [Supreme Court], Norway).

2.7.2. France

Judge Bokdam-Tognetti gave a presentation on the French jurisprudence dealing with the approach taken by the French courts when confronted with the use of secrecy clauses incorporated in the tax treaties by the French tax authorities. Secrecy clauses may either specifically mention

courts as persons to whom the information obtained from foreign authorities may be disclosed or may omit to include courts. According to Judge Bokdam-Tognetti, in all cases where secrecy clauses are invoked, the extent to which the tax judge can access and use that information assumes significance. With regard to a judge's accessibility, it is settled law that even secrecy clauses which fail to specifically include courts do not preclude the communication of the information to the judge.

After discussing the question of accessibility, Judge Bokdam-Tognetti proceeded with another aspect of the use of information by the judge. She noted that it had to be questioned whether the constitutional principle that all proceedings before the French courts must be of an adversarial nature, could be reconciled with the use of the secrecy clause precluding the communication of the information to the taxpayer. Judge Bokdam-Tognetti stated that a French judge was obliged to communicate the information/documents to the taxpayer if he wished to take them into account while arriving at a decision.

2.7.3. Finland

Judge Saukko gave the Finnish perspective on the exchange and use of information by the Finnish tax authorities. He began with a purely domestic scenario. He stated that all natural and legal persons had an obligation to report information to facilitate the tax assessment of another taxpayer, unless there were legal impediments to the reporting of such information. He added that the Finnish tax authorities enjoyed broad powers since they might oblige a taxpayer to supply more information than requested by the foreign authority. On this specific point, he relied on a court case, in which the Finnish tax authorities considerably expanded the scope of the information requested by the Russian authorities.

Judge Saukko stated that in cross-border situations, limitations imposed by the foreign authority on the use of the information supplied may have the effect of narrowing down the use of such information by the Finnish tax authorities. As regards illegally obtained information, Judge Saukko pointed out that currently there is no case law available on whether such information could be effectively used for tax purposes. Finnish tax authorities could be fined for using information against the specific orders of foreign authorities. As a closing remark, Judge Saukko mentioned that the Finnish Court's right to access the information supplied or received has not been subject to any limitations.

2.7.4. Norway

Judge Endresen presented the Norwegian perspective. To better understand it, he outlined the necessary procedural rules which vest the Norwegian courts with wide powers to summon evidence from parties to the proceedings as well as from other persons. Judge Endresen pointed out that there is a specific provision in the law (Dispute Act 2005) empowering the court to disallow improperly obtained evidence in court proceedings. The acquisition

of evidence, he stressed, need not be illegal; it is sufficient if it is improperly obtained. However, the law also requires special circumstances, and evidence of this nature is often allowed. Furthermore, the courts are empowered to disallow presentation of evidence if the court finds it necessary that the evidence ought to have been presented in a different manner. Judge Endresen also spoke of the Norwegian law on legal professional privilege as capable of raising interesting issues vis-à-vis the exchange of information provisions.

Judge Endresen concluded his presentation by discussing the taxpayer's rights against the Norwegian tax authorities' receipt of incorrect information from another state or supply of such information to another state. He noted that in the case of receipt of incorrect information, the tax-

payer could submit relevant documentation to the Norwegian tax authorities to counter the information and the tax authorities may have an obligation under the Disputes Act 2005 to ask for additional information should the taxpayer so request. In the case of supply of information by Norwegian tax authorities to a foreign state, the taxpayer cannot prevent, by means of an injunction, the Norwegian authorities from supplying information to the other state. Should the taxpayer be in a position to substantiate that the information given is incorrect, he could ask the courts to confirm that the tax authorities have an obligation to correct the information provided to the other state, or he could, under certain circumstances, seek damages. Neither option seems to be practical.

BOOK

Effectiveness of the Beneficial Ownership Test in Conduit Company Cases

A critique of the policy behind the beneficial ownership test as a countermeasure against cases of improper use of double tax treaties

Since the introduction of the term "beneficial owner" to the OECD Model Tax Convention in 1977, courts and the OECD have struggled to interpret the term, and to use it as a test for deciding conduit company cases.

If applied in a formal legalistic sense, the beneficial ownership test has no effect on conduit companies because companies are legal persons that, in law, own both their assets and their income beneficially. By contrast, in a substantive sense, a company can never own anything because economically a company is no more than a matrix of arrangements that represents individuals who act through it.

Faced with these opposing considerations, courts and the OECD have adopted surrogate tests for the beneficial ownership test. These tests, however, were originally meant to counter different kinds of tax planning strategies. They did not indicate the

presence of beneficial ownership. Therefore, they are inappropriate for determining the correct tax treatment of passive income derived by conduit companies.

This book examines the conflict between the general policy of double tax treaties embodied in the beneficial ownership requirement and the concept of corporations.

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