International

Report of the Proceedings of the Eighth Assembly of the International Association of Tax Judges Held in Helsinki on 6 and 7 October 2017

Bob Michel[*]

Issue: Bulletin for International Taxation, 2018 (Volume 72), No. 7
Published online: 22 June 2018

This report summarizes the proceedings of the Eighth Assembly of the International Association of Tax Judges, which was held in Helsinki on 6 and 7 October 2017.

1. Introduction

On 6 and 7 October 2017, the Eighth Assembly of the International Association of Tax Judges (IATJ) was held in Helsinki, Finland. The proceedings took place at the premises of the *Korkein Hallinto-Oikeus*, the Supreme Administrative Court of Finland.

The assembly was attended by 68 judges from countries of all continents. The assembly was opened by Chief Justice Eugene P. Rossiter (Canada), President of the IATJ and by Chief Justice Pekka Vihervuori, President of the Supreme Administrative Court of Finland. 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. The following topics were covered:

- issues in commercial and tax accounting (*see* section 2.);
- the use of foreign case law by courts (*see* section 3.);
- tax procedures in Finland (*see* section 4.);
- Recent Case Law Regarding Mutual Agreements (*see* section 5.);
- VAT Case Law on Services Related to Websites and the Internet (*see* section 6.);
- obtaining evidence and information: common law and civil law jurisdictions (*see* section 7.); and
- "exotic" topic: bear-watching in Finland (*see* section 8.).

2. Session 1 – Issues in Commercial and Tax Accounting

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), of France. The panel was composed of Judge Steven D'Arcy (Tax Court of Canada), former Judge Joao Bianco (Brazil), Judge Pramod Kumar (Income Tax Appellate Tribunal, India), Judge Susanne Tiedchen (*Finanzgericht* Berlin-Brandenburg, Germany) and Judge Yoon Junseok (Seoul Administrative Court, South Korea).

In the first part of the session, the relationship between tax and accounting was discussed in the selected jurisdictions. In the second part, the focus was on the choices made by national judges in case of lacunae in the legislation.

2.2. The relationship between tax and accounting in selected jurisdictions

2.2.1. Germany

Susanne Tiedchen gave an introduction to the German system, which is very much based on the old (Prussian) principle of *Maßgeblichkeit*. The principle provides that there is a strict dependency between commercial and tax accounting. A company's annual financial statement is the basis for its tax balance sheet. As such, in Germany the generally accepted accounting standards are also applicable for tax purposes. Tiedchen observed that the aims of commercial accounting (i.e. informing shareholders and other stakeholders) and tax accounting (i.e. complying with tax obligations in order to reveal the taxpayer's ability to pay) are, however, very different and, in recent times, the principle of dependence has been eroded more and more.

* **(Adv.) LL.M., Editor of IBFD's Tax Treaty Case Law Database. The author can be contacted at michel.bob@gmail.com.**

With regard to the German generally accepted accounting principles, it had to be noted that these were developed a long time ago and are currently part of the German Commercial Act. Some principles are merely based on customary law. They are, however, different from the US GAAP and the IAS or IFRS. Some examples of generally accepted accounting principles contained in the Commercial Act were given, such as the principle of completeness (*Vollständigkeitsprinzip*), which requires all profits and losses to be accounted for unless provided otherwise in the law, the principle of prudence (*Vorsichtsprinzip*), according to which profits are shown in the books only when accrued and liabilities are shown even if they have not yet materialized, and the principle of individual valuation (*Einzelbewertungsprinzip*). Tiedchen noted that the principle of a true and fair view was not part of the German principles.

With regard to the *Maßgeblichkeit*, Tiedchen observed that the adherence to the principle also caused certain problems. For instance, changes in the Commercial Act will have an impact on tax accounting. The commercial accounting principle of prudence collides with the purpose of tax accounting to reveal a taxpayer's (real) ability to pay. She also noted that the introduction of the EU's Common Consolidate Corporate Tax Base (CCTB) regime would put an end to Germany's long-standing tradition to adhere to the principle of dependence.

Tiedchen finished by pointing out the relevant provisions of the German Income Tax Act. Section 5(1) of the Income Tax Act provides that traders who are obliged to keep books have to do so pursuant to the generally accepted accounting principles of commercial law, unless the law provides an option to do otherwise or special provisions apply. Such provisions are for instance contained in section 5(6) of the Act with regard to the admissibility of changes to the balance sheet, the valuation and depreciation of wear and tear, or the creation of provisions on withdrawals, etc.

2.2.2. France

Phillipe Martin started with the general observation that, in France, there is a strong connection between tax and accounting. However, unlike in Germany, the legal basis for the connection is rather thin in France. For income tax purposes, article 38 quater of Annex III of the French General Tax Code provides that businesses must abide by the definitions set in the General Accounting Plan (which is contained in an ordinary decree by the executive, and not in an act by the parliament), unless incompatible with the rules determining the taxable base. For local business tax, the value added is used as the taxable base. No explicit reference to accounting rules is made in the relevant legal provisions, but concepts from commercial accounting are often borrowed and used. In French jurisprudence, the rule is that the connection between commercial and tax accounting is upheld, unless tax law differs.

With regard to the nature of the French commercial accounting principles, Martin observed that the French Commercial Code does not contain very detailed rules in this respect; however, close guidance to companies is provided in the General Accounting Plan. Since 2009, the Authority for Accounting Rules (AAR), which is composed of public servants and accounting professionals, prepares the accounting regulations, and these are approved by the Minister. The AAR also issues opinions, but these have a different legal status and are not binding. Opinions are also issued by professional associations representing accounts.

In French courts, judges tend to consider all these elements before forming their decision. Detailed guidance is provided by the General Accounting Plan, but tax judges have a certain margin to interpret accounting rules.

2.2.3. Brazil

João Bianco observed that, in Brazil, the relationship between tax and accounting is explicitly regulated by law. Commercial law determines that financial statements are to be based on the GAAP standards. Specific activities like banking and insurance are obliged to be accounted in separate books.

There have been quite a few policy changes on this matter in the recent past. Bianco noted that, until 2007, GAAP was not completely adopted and a sort of "Brazilian GAAP" was used. Through an invasion of competence, tax law often determined aspects of the accounting procedures. After having received criticism from international investors regarding the lack of adoption of international standards, Brazil changed its system and fully adopted GAAP for commercial accounting purposes. For tax purposes, the Brazilian GAAP practice was maintained, and companies were thus forced to issue financial statements according to both sets of rules. The approach was changed again in 2014 when it was decided that GAAP would be the standard for all purposes except for an exhaustive list of adjustments that had to be made for tax purposes. An example of such adjustment for tax purposes is the depreciation term and value of a company's assets. For commercial accounting purposes, the term and value are determined based on the duration of the usage and the resale price. For tax purposes, 100% of the value of the asset is depreciated according to the number of fixed periods determined by the tax authorities.

2.2.4. Canada

Steven D'Arcy started by noting that Canada is a common law jurisdiction and that, compared to civil law jurisdictions, the issue of tax versus accounting seems to have different dimensions.

For Canadian tax purposes, section 3 of the Canadian Income Tax Act provides that income of a taxpayer for a taxation year is income (or loss) from a source, including the taxpayer's income from an office, employment, a business or property. Section 9 provides that a taxpayer's income from a business or property is the taxpayer's profit for that business or property. Section 9 is subject to various statutory adjustments contained in the Act. D'Arcy observed that the simple structure of the provisions contrasts with the difficulty faced when applying these. For instance, the term "profit" is not defined in the Act and, for this reason, section 9 is one of the most litigated provisions of the Act.

The determination of profit is, however, a question of law and not of fact. The leading case on the matter is the decision of the Supreme Court of Canada (SCC) in *Canderel* (1998),[1] in which the SCC set out six guiding principles for the computation of profit. According to these principles, the profit of a business for a tax year is to be determined by setting the expenses incurred in earning revenues against said revenues from the business of that year. A taxpayer is free to adopt any method that is consistent with: (i) the Act; (ii) legal principles established in case law; and (iii) well-accepted business principles. The method must, in any case, also provide an accurate picture of the taxpayer's income. If the taxpayer has shown that it has provided an accurate picture of its income, consistent with the Act, case law and well-accepted business principles, the onus shifts to the tax authorities to demonstrate either that the figure provided is not accurate or that another method of computation would provide a more accurate picture.

Finally, with regard to the "well-accepted business principles", D'Arcy noted that these are also referred to as the "ordinary commercial principles" or the "well-accepted principles of commercial trading". They are, in fact, non-legal tools, extrinsic to the legal determination of profit. GAAP will generally form the foundation of these principles. D'Arcy observed that Canadian courts must, however, not delegate the criteria for the legal test of profit to the accounting profession and that there are instances where GAAP differs from the well-accepted business principles recognized by law. D'Arcy argued that these principles were merely developed for tax purposes. He quoted the SCC in this regard, which had held that:

> to the extent that they may be applicable to particular circumstances, well-accepted business principles are to be assessed and applied only on a case-by-case basis, and only for the purpose of achieving an accurate picture of profit for the year in question for income tax purposes.[2]

2.2.5. Korea (Rep.)

Junseok Yoon started by establishing that, in Korea (Rep.), the relationship between financial and tax accounting is clarified in the Corporation Tax Act: the tax accounting rules have priority over the financial accounting rules. Two systems exist because the tax laws do not contain all provisions relevant for determining taxable profits and because the two systems generally serve different objectives.

With regard to the financial accounting standards applied in Korea (Rep.), Yoon observed that multiple sets of standards are adhered to, such as Korean versions of IFRS and GAAP and accounting standards for different types of businesses. The Korean Accounting Standards Board (KASB), a private organization composed of accounting professionals, is authorized by the Financial Services Commission (FSC) to determine which standards are applicable. For instance, listed companies have to apply the Korean IFRS. Unlisted companies can elect to apply either Korean IFRS or Korean GAAP.

On some occasions, tax accounting rules differ from financial accounting rules. Yoon referred to the example of bad debts, donations and taxes and fines, which are fully deductible on an accrual basis for accounting purposes but only limited or non-deductible on an accrual or cash basis for tax purposes. Another example is the obligation to take into consideration for tax purposes all income that is not in the financial accounts, whereas deductions are recognized for tax purposes only if they are listed in the tax laws, even if recognized in the financial accounts.

2.2.6. India

Kumar Pramod referred to the changing paradigm in India with regard to the relationship between commercial and tax accounting that was triggered by the introduction of the Income Computation and Disclosure Standards (ICDS) and Indian Accounting Standards (IndAS) in 2015 and 2016. Before these standards were introduced, there was little statutory guidance, including in the Income Tax Act (ITA), regarding accounting methodology, and courts often had to deal with issues regarding the correct approach. The Indian courts did consistently refer to Indian GAAP and guidance notes of the professional accountancy bodies with regard to specific issues, such as the determination of the cost of an asset or the treatment of income from borrowed funds when a business is set up.

With the introduction of the mandatory adoption of the IndAS in 2017 for commercial accounting in large and medium-sized companies – Indian GAAP continues to be applicable for the remaining companies – and the introduction of the new ICDS for tax accounting, much more clarity is provided on both terrains. In the case of a conflict between the ICDS, which are issued by the government through the Central Board of Direct Taxes, and the ITA, the latter prevails. The ICDS prevail over the IndAS and Indian GAAP.

Kumar further noted that there was a clear demarcation of principles between the ICDS and the IndAS; however, the thrust of both systems is different: the IndAS aim to achieve convergence with global reporting standards, whereas the ICDS aim to minimize tax uncertainty in order to reduce litigation.

Kumar wondered, however, how much of the recent ICDS will be approved by the constitutional courts, as the adoption of these standards does require some kind of "wholesale burial" of the well-settled law on correct accounting principles, such as the principle of prudence. The ICDS allow the anticipation of revenues and the booking of income before it actually accrues. Kumar wondered whether the courts were likely to consider such blatant departure from the first principles of accounting. In a subsequent ruling, an Indian High Court struck down several parts of these accounting standards on the ground that they depart from the first principles.[3]

1. CA: Supreme Court of Canada, *Canderel Ltd. v. Canada*, 12 Feb. 1998, [1998] 1 S.C.R. 147.
2. *Canderel Ltd. v. Canada* (1998), *supra* n. 1, at para. 47.
3. IN: High Court of New Delhi, *Chamber of Tax Consultants v. Union of India*, judgement dated 8 Nov. 2017.

2.3. Choices made by tax courts

2.3.1. Question 1: Do courts have to deal with a "grey area" where legislation does not fully define the relationship between commercial and tax accounting?

In Germany, the relationship is clearly set out in section 5(1) of the Income Tax Act. There is some discussion on the terms used in the provision, which state that the assets of an enterprise have to be recorded "pursuant to generally accepted accounting principles of commercial law", because some relevant principles are not in the Commercial Code and some Commercial Code regulations conflict with accounting principles.

In France, the relationship is also clear: under article 38 quater annex III of the General Tax Code, a specific accounting treatment could not be contradicted by tax law. For business tax purposes, the General Tax Code refers to accounting concepts used for the calculation of the value added (i.e. the taxable base), but it does not refer to specific accounting regulations.

With regard to Brazil, grey areas were held unavoidable because tax law cannot list exhaustively all possible adjustments to the accounting rules. In the case of conflicts, however, tax law prevails.

Given the set-up of the system in Korea (Rep.), there should be no grey areas between financial accounting and tax accounting: the tax law holds priority, and items not specified by the tax law may be accounted for according to the financial accounting rules. Any grey areas are limited to matters of interpretation of the tax law itself.

In India, tax accounting is fairly new, so no grey areas have appeared yet, although grey areas exist with regard to the tax accounting rules.

Finally, in the Canadian common law tradition, reliance on an undefined and frequently litigated term of "profits" in tax law causes everything to be a potential grey area.

2.3.2. Is there a court philosophy about connection or disconnection?

Before the panellists addressed the question, Philippe Martin observed that courts could, for instance, select a certain connection system for achieving legal certainty or simplicity for the sake of businesses: if a predetermined set of accountancy rules is followed, the businesses would be deemed compliant for tax purposes. In tax legislation, however, the main criterion is to unveil a taxpayer's real ability to pay tax. Also, tax rules are in principle set by an act of the parliament, whereas accountancy rules flow from more diverse sources of law, including instruments (e.g. professional accountant body opinions) that do not necessarily have full legal standing. This potentially leads to problems with regard to the constitutional principle of legality: taxpayers are held to pay the taxes due as enacted by the parliament, but the determination of the taxable base often flows from accountancy rules which are not law.

In Germany, there is no specific court philosophy about the connection or disconnection between tax and accounting: there is a strict adherence to the principle of dependence (*Maßgeblichkeit*) (*see* section 2.2.1.). With regard to the inherent tension between the principle of ability to pay in tax and the principle of prudence in accountancy, there is a tendency among courts to rule against excessive adherence to the principle of prudence. For instance, in the case of a building acquisition, the costs of the acquisition are accounted for, but what about the expenses for refurbishment of newly acquired buildings? Are these to be deducted at once as a cost, or are these to be activated and amortized as expenditure for modernization and repairs? The tax courts in Germany held that, for tax purposes, these could not be deducted at once, and the acquisition expenses must include the costs for repair and modernization if they constitute more than 15% of the acquisition costs, even though this was contrary to the generally accepted accounting principles. In 2003, however, the *Bundesfinanzhof* (BFH) held against this practice, which was deemed contrary to the principle of *Maßgeblichkeit*. However, in 2004, the legislator stepped in and enacted a specific provision in the tax code which solidified the practice, contrary to the accounting principles.

In France, the approach is clear: accountancy rules prevail over tax rules. There is a thin legal basis supporting this general approach, but the Supreme Administrative Court has almost elevated the tax-and-accounting connection to the rank of a general principle of law for the sake of simplicity and legal certainty for the taxpayer, but not necessarily to serve general principles of taxation. As such, tax courts had to digest a spectacular surrender of discretion. In borderline cases, the accounting treatment prevails if there is no clearly diverging tax rule.[4]

In Korea (Rep.), the rules are clearly set out in tax law and, as a consequence, all issues brought to the courts are issues of interpretation of tax law.

In India, the expression "accounting doctrines" generally refers to the first principles of accounting based on which accounting, as a body of knowledge, has developed. The accounting doctrines, which are the foundation of accounting practices as such, prevail. To the extent that these principles are recognized and implicit in the tax law provisions, there is a clear connection. In many cases, Indian judges have both a tax and an accountancy background, which allows them to apply a holistic approach, although there are personal differences, for instance, in relation to the individual judge's point of view on India's need to attract FDI. For most judges, however, the principle of legal certainty appears sacrosanct.

In Canada, the leading *Canderel* case is a significant example of the relationship between tax and accounting. In that case, the taxpayer was a developer of real estate who had offered "tenant inducement payments" (TIPs) to future tenants. In its financial statements, Canderel

4. *See*, for instance, FR: Supreme Administrative Court, 27 June 1994, No. 121748, *Villeroy et Boch*, in which the Court held that the effects of under-production had to be appreciated according to the accountancy rules and thus by reference to the production at full capacity, and not by the rules derived from tax law.

had capitalized the TIPs, but in computing its income for tax purposes, it deducted them. The SCC held that it was not necessarily GAAP or any other alternative of accounting norms that had to be followed but only those rules that gave the best result, i.e. gave the best picture of the facts. The SCC held that the expenses were not running expenses and were not incurred in earning income solely in the relevant tax year. Since they could be matched, as shown in the financial accounts, they had to be matched also for tax purposes.[5]

2.3.3. Do tax courts distinguish between accounting rules, professional accounting guidelines and accounting doctrine?

In Germany, the tax courts only apply the generally accepted accounting principles, but professional accounting guidelines are a (additional) source of law and are taken into account as part of the discussion in the same way as other decisions, commentaries or academic articles are taken into account. IAS/IFRS or US-GAAP are generally not taken into consideration.

In France, the tax courts apply accounting regulations. There is a strong body of case law in which the opinions given by the AAR are followed, and there is even a certain willingness with the highest court to reconsider a court decision after a contrary accounting opinion is issued.[6] In other cases, the opinions by accountants have been looked at, but there is a margin of appreciation by the courts.

In Canada, the situation is slightly different. A corporate tax return starts with the financial statement of a company, and then it is up to the taxpayer to apply adjustments for income tax purposes which are based on acts of Parliament, case law or whatever the taxpayer feels is relevant. The tax authorities will make an assessment, and any unresolved conflicts will be brought to the courts. Judges are aware of the basic principles of GAAP, but they rely on expert witnesses for specific issues.

In India, courts are not very consistent with regard to their approach to opinions issued by professional bodies, mostly because lobbying has a visible impact on these opinions. So often these are met with a certain degree of scepticism.

2.3.4. Are the tax rules regarding provisions different from accounting rules?

In Germany, the rules regarding provisions are specified in sections 5(3), 5(4), 5(4a), 5(4b) and 6(3a) of the Income Tax Act and deal with, inter alia, provisions for the infringement of third-party intellectual property, provisions for obligations to make grants for employees, provisions for imminent losses and provisions for recovery of radioactive residues, etc. As of 2010, the deductibility of a provision for tax purposes does not require that the provision was deducted in the annual financial statement. Provisions in the annual financial statement are usually deducted in the tax balance sheet as well, unless the relevant Income Tax Act provision provides otherwise.

In France, accounting provisions are tax deductible unless tax law provides otherwise. Under tax law, some provisions are not deductible (such as retirement or termination of employment). Tax law requires that provisions be created in accounting in order to be tax deductible. And case law has added that a taxpayer cannot create an accounting provision and decide not to deduct it fiscally.[7]

In Brazil, the deductible provisions are only those listed by tax law.

Canadian legislation allows the creation of provisions and capital cost allowance for capital assets. The rules are set out in the Tax Act for specific classes of assets or for bad debts. Generally speaking, it does not matter for which purposes a provision is made. It is unlikely for a provision made for accounting purposes not to be claimed for tax purposes, although the amounts accepted may differ. As a general rule, provisions are not very popular in Canada.

In India, there are many artificial disallowances of expenses, which though fully deductible in computation of commercial profits, are not allowed as a deduction on policy consideration or as a disincentive. For example, any payments in respect of which tax withholding obligations are not complied with by a taxpayer, are not allowed as deduction. Similarly, social security contributions, unless actually paid, are not allowed as deduction unless these contributions are actually made. There are disallowances of amounts, which are otherwise deductible in profit computation, based on policy consideration and as a disincentive for undesirable conduct.

3. Session 2 – The Use of Foreign Law by Courts

3.1. Panel composition and agenda

The session was chaired by Justice Jennifer Davies (Federal Court, Australia). The panel was composed of Justice Dennis Davis (Western Cape High Court, South Africa), Justice Ange Beukers-van Dooren (Supreme Court, Netherlands), Judge Anthony Gafoor (Tax Appeal Board, Trinidad and Tobago), Justice Vineet Kothari (Karnataka High Court, India), and Justice Thomas Stadelmann (Supreme Court, Switzerland).

The session consisted of an overview of the judges' experiences with the use of foreign law in their respective jurisdictions. In the subsequent discussion, the emphasis was on the relevance, the usefulness, the issues and the accessibility of foreign case law as a source of law in domestic courts.

---

5. *Canderel Ltd. v. Canada* (1998), *supra* n. 1.
6. *See*, for instance, FR: Supreme Administrative Court, 2 June 2006, No. 269998, *Unilever*. In *Unilever*, the Supreme Administrative Court held that price reduction coupons issued by a food product company had to be deducted at the moment of issuance – as claimed by the accountancy authorities – and not at the moment of the use of the coupon by the consumer, in line with the principle of reality – as argued by the tax authorities.
7. FR: Administrative Supreme Court, 23 Dec. 2013, No. 346018, *Fonciere du Rond-Point*.

3.2. The use of foreign law by courts in selected jurisdictions

3.2.1. Australia

Jennifer Davies started by citing Sujit Choudhry (2006), who stated that "to cite comparative jurisprudence is to demonstrate an educated, cosmopolitan sensibility, as opposed to a narrow, inward-looking, and illiterate parochialism."[8] In Australia, domestic law prevails; however, foreign cases are often referred to and can have persuasive value. However, foreign case law should be consulted and relied on with care and discrimination. Tax systems across the world are diverse and relying on foreign law is thus not always helpful as the differences might be significant and the equivalences might not be exact.

Also, the usefulness may depend on the status of the foreign court and the quality of the reasoning. Domestic courts often have insufficient knowledge of foreign legal systems and case law. Foreign languages spoken in other jurisdictions, lack of good translations of relevant sources and limited access to reliable databases and search tools can form other barriers. Also, the style of writing judgements and processes of reasoning often differ from country to country and across legal traditions (i.e. common law versus civil law).

Davies emphasized that consulting foreign case law has a number of benefits, for example, as an aid to interpretation, a source for helpful analysis on comparative law or as a source of ideas. Reference to foreign case law on a comparative law may also assist with regard to the learning and reasoning of other courts. Foreign law can be relied on or can be rejected according to whether the foreign case supports the view reached by the court.

3.2.2. South Africa

Dennis Davis started by providing the audience with a quote: "Comparative law is written by mediocre lawyers with capacity for languages". He disagreed but conceded that comparative law is useful only if the context and a historical dimension of law is considered. For instance, prior to the establishment of the Union of South Africa in 1910, the Cape Income Tax Act (1904) was modelled after the (Australian) New South Wales Act (1895). A proper income tax act was first introduced in South Africa by means of the Income Tax Act (1914), which was again modelled after the New South Wales Act (1895) together with English legislation. Many terms and phrases in the law were borrowed and, obviously, in those days, no relevant precedents were available. Hence, lawyers would look at foreign precedents.

Early day examples include *CIR v. Stott* (1928),[9] which dealt with the distinction in capital and revenue and in which early English authority is quoted, and *Port Elizabeth Electric Tramway Company Ltd. v. CIR* (1936)[10] on the deduction of business expenses and the interpretation of the concept "in the production of income", in which much emphasis was put on *Usher's Wiltshire Brewery v. Bruce* (1915), a case decided by the House of Lords (UK) in 1914.[11]

Davis noted that the concept of tax avoidance was another topic for which South African courts have long since been drawing heavily on foreign court holdings, mostly UK courts[12] and Australian courts.[13] In South Africa, the concept of beneficial ownership is defined in the South African Income Tax Act in the context of the dividends tax only. To interpret the same concept for tax treaty purposes, the South African Tax Court borrowed extensively from the Canadian *Prevost Car* (2008)[14] case in its decision of *CSARS v. Tradehold* (2012).[15] The Court confirmed that the meaning for treaty purposes had to accord with the meaning of the same term for domestic law purposes.

Value added taxes (VAT) are also often subject to comparative examination. *CSARS v. De Beers Consolidated Mines* (2012) is a prime example. The case dealt with the meaning of "purpose of making taxable supplies" for VAT purposes, and a number of crucial foreign cases such as *FCT v. The Swan Brewery* (1991, Australia)[16] and *BJ Services Company v. The Queen* (2003, Canada)[17] were distinguished.

Finally, Davis observed that foreign law as a source of law is now enshrined in the Constitution of the Republic of South Africa (1996). Section 39(1) of the Constitution provides that, when interpreting the Bill of Rights contained in Chapter 2 of the Constitution, a court, tribunal or forum "[...](b) must consider international law; and (c) may consider foreign law". Davis concluded that, for general domestic tax law purposes, foreign (case) law is relevant, but only to the extent the foreign law relates to the context and history of the domestic legislation at hand.

3.2.3. India

Vineet Kothari observed that Indian courts copiously cite foreign jurisprudence, treating foreign high court and supreme court decisions with great respect. The preparation of legal briefs referring to foreign law is often the work of a court's team of legal research assistants. If lawyers cite foreign decisions, judges give credit and credence to the foreign court if its holdings are relied on.

8. S. Choudhry (ed.), *The Migration of Constitutional Ideas*, Cambridge University Press (2007), p. 4.
9. SA: Tax Court, 17 Mar. 1928, *Commissioner for Inland Revenue v. Stott*, 3 SATC 253.
10. SA: Tax Court, 1936, *Port Elizabeth Electric Tramway Co. Ltd. v. Commissioner for Inland Revenue*, 8 SATC 13.
11. UK: House of Lords, 14 Dec. 1914, *Usher's Wiltshire Brewery Ltd v. Bruce*, [1915] A.C. 433.
12. Fundamental propositions of anti-avoidance jurisprudence in South Africa gleaned from United Kingdom: *IRS v. Duke of Westminster* [1936] AC 1 at 19.
13. A frequently cited case is: AU: *Newton and others v. Commissioner of Taxation of the Common Wealth of Australia* (1958) 2 All ER 759.
14. CA: Tax Court Canada, 2008, *Prevost Car Inc. v. Her Majesty the Queen*, 2008 TCC 231, Tax Treaty Case Law IBFD.
15. SA: Tax Court, 2012, *CSARS v. Tradehold*, 74 SATC 263.
16. AU: Supreme Court of Australia, 1991, *FCT v. The Swan Brewer Co Ltd*, 22 ATR 295 (SCA).
17. CA: Tax Court of Canada, 2003, *BJ Services Company Canada v. The Queen*, 2003 (TCC) 900.

Kothari referred to a number of cases rendered by the Indian Supreme Court that relied on foreign decisions. For instance, in *McDowell and Company Limited* (1985),[18] the Supreme Court applied the UK House of Lords decisions of *Fisher's Executors* (1926) and *Duke of Westminster* (1936),[19] and the US Federal Court decisions of *Perry R. Bas* (1968) and *Barber Greene Americas Inc.* (1960).[20] In *Ishikawajima Harima Heavy Industries* (2007), the Supreme Court explained the difference between the existence of a permanent establishment and a business link, and held that in the absence of a business link, the Indian tax could not be imposed. The Court relied on the English decisions of *Commissioner of Taxation v. Kirk* (1900)[21] and *Love v. Norman Wright (Builders) Limited* (1944)[22] by the House of Lords and the Court of Appeal, respectively.

Kothari concluded that, in order to reduce the divergence and conflicts of opinions in decisions from different jurisdictions with regard to the interpretation of tax treaties and to stimulate uniformity and harmonious construction, international bodies such as the OECD, IBFD and IATJ should undertake constant research and gather and disperse information so that courts deciding on similar controversies have ready-made access to foreign case law. The case law should preferably be compiled and grouped per issue.

3.2.4. The Netherlands

Ange Beukers-van Dooren observed that the use of foreign case law in courts differs depending on whether the court is part of a common law system or a civil law system. Generally speaking, civil law systems are heavily codified, and judicial decisions are rendered within a set of laws. The task of the civil law judge is limited to: (i) establishing the facts of the case; and (ii) applying the relevant provision of the code. Common law systems, on the other hand, are less codified, and judicial decisions are rendered based on precedent. The task of the common law judge is to determine: (i) the relevant precedents; and (ii) the appropriate sentence.

The Netherlands is a civil law country, so does this mean that with regard to the use of foreign law, Dutch courts are essentially inward-looking? Not necessarily, although for the construction of a legal provision, the intention of the parliament is considered primordial. Beukers-van Dooren also noted that, for the interpretation of domestic law, there is little to gain from foreign law because of the lack of common features. For instance, even accounting standards that are presumed to be universal often have a local nature in practice. So, to some extent, a certain "parochialism" is thus not uncommon in the Dutch courts.

Beukers-van Dooren noted that, with regard to tax treaties, the situation is different. Parties or the Advocate General to the Supreme Court often refer to foreign decisions given in similar cases. The courts usually consider these references. In this regard, Beukers-van Dooren referred to two separate decisions of the Dutch Supreme Court with regard to the interpretation of the Germany-Netherlands Tax Treaty in both of which a decision on a similar issue by the German BFH played a significant role.[23]

3.2.5. Trinidad and Tobago

Anthony Gafoor strongly believed that the Caribbean legal experience is essentially based on the reception of law from various sources. The Caribbean has historically been a melting pot of various cultures and traditions, and one of the key drivers of its judges is to look at the experience in comparative jurisdictions. Obviously, these are mostly part of the common law family and, in the 40 years of legal history, lawyers before the Caribbean courts have cited numerous cases coming from Australia, New Zealand, South Africa, the United Kingdom, the United States, and even from some other African countries and India.[24] This tradition has proven to be useful, allowing thorough reflection on all the possible approaches available to a certain matter. Since the aforementioned jurisdictions were often faced with the same issues earlier, and since many of Trinidad and Tobago's laws are modelled after the laws in place in those jurisdictions, Gafoor believes it is only logical for a court to look at the approaches in the relevant foreign courts in order to enrich one's own decision.

3.2.6. Switzerland

Thomas Stadelmann referred to his own past experience, serving in the administrative court of first instance at a time during which international jurisprudence was not a topic of discussion. Currently, while serving in the Supreme Court, that has changed immensely: parties often refer to foreign decisions. For a judge, the question of the relevance of those decisions remains. Stadelmann believes certain criteria could be applied. For instance, for decisions by certain foreign courts, such as decisions of the European Court of Human Rights regarding the *nemo tenetur* principle or decisions by the ECJ pursuant to the Switzerland-EU Association Agreement, consideration is mandatory.

In other domains, the consideration of foreign decisions is optional. If domestic jurisprudence provides sufficient elements to come to a decision, Stadelmann believes there is little motivation to look beyond the borders.

18. IN: Supreme Court, 17 Apr. 1985, *McDowell and Company Limited v. Commercial Tax Officer*, LAWS(SC)-1985-4-20.
19. UK: House of Lords, 1926, *IRC v. Fisher's Executors* [1926 AC 395]; and House of Lords, 1936, *IRC v. Duke of Westminster* [1936 AC 1]. In these decisions, the "right of the taxpayer to arrange his affairs in a manner as not to attract taxes imposed by the Crown" was upheld.
20. US: Federal Court, 1968, *Perry R. Bas v. Commissioner of Internal Revenue* [1968 US 50 TC 595]; and Federal Court, 1960, *Barber Green Americas Inc. v. Commissioner of Internal Revenue*, 1960 35 TC 365. In these decisions, the principle that the motive of tax avoidance was irrelevant was upheld.
21. UK: House of Lords, 1900, *Commissioner of Taxation v. Kirk* [1900] AC 588.
22. UK: Court of Appeal, 1944, *Love v. Norman Wright (Builders) Limited*, [1944] 1 K.B. 484.
23. NL: *Hoge Raad*, 29 Sept. 1999, No. 34482 and Netherlands: *Hoge Raad*, 11 June 2004, No. 37714, Tax Treaty Case Law IBFD.
24. TT: Tax Appeal Court, decisions of I 22 of 2015 (2017), I 97 of 2013 (2015), I 38-39 of 2013 (2016), I 78 of 2012 (2016) and I 65 of 2009 (2017).

Another element to consider is the personal skill set of individual judges: some have few language skills, others do not have the open-mindedness or knowledge and experience to engage in international law and comparative law exercises. In this regard, the availability of the foreign source materials is also an important factor.

3.3. Discussion

3.3.1. To what extent do courts in common law countries look to European or civil law jurisprudence?

In Trinidad and Tobago, it appears that there has not been a single instance of a citation by lawyers of European or civil law jurisprudence, except for cases from the United Kingdom. There is no obvious reason to exclude this from happening, if the code or statute in question is similarly formulated as in a civil law country.

The Supreme Court of India has referred to foreign jurisprudence in multiple cases. Examples include *Vodafone* (2012), regarding the indirect transfer of shares, and *Ishikawajima* (2007), regarding the permanent establishment concept. Generally speaking, if new principles of taxation are at issue, the Supreme Court of India is very open to considering foreign decisions.

South Africa is a hybrid country: private law is still partially based on civil law and Dutch law. As such, in the private law sphere, courts rely on German and Dutch jurisprudence. The situation is different with regard to public law. There is a clear influence of German law because of the similarities between the post-apartheid regime in South Africa and the German post-war regime. However, in tax law, reference to civil law jurisprudence is oddly non-existent. With regard to tax treaties, the situation is different: relevant foreign case law and foreign doctrinal sources are often considered.

3.3.2. Do courts in EU countries look to jurisprudence of other EU countries in relation to application of EU instruments, directives, etc.?

Within the European Union, the ECJ has the highest authority to adjudicate in matters concerning EU law. Supreme courts of other Member States, such as the BFH, are highly regarded; however, even the BFH is sometimes overruled by the ECJ. Furthermore, there is a clear procedure to settle unclarities of EU law by means of the referral of a preliminary question to the ECJ. ECJ decisions are, however, rendered on an individual case basis. Similar cases often require the referral of a new question. In general, national jurisprudence of other EU Member States is taken into account, but this is not essential.

For Switzerland, the case is different. Switzerland is not an EU Member State but is party to association agreements with the European Union. For matters such as VAT, Switzerland unilaterally adopts a system similar to the EU VAT system and tries to follow the rules set by the European Union. In this case, the jurisprudence by the ECJ and the BFH are relevant.

In Switzerland, generally speaking, if clear solutions are found within the domestic realms, looking across the border is perceived as irrelevant, even in the case of tax treaties. Courts applying tax treaties are not obliged to consider foreign jurisprudence, although there is a clear trend developing in the Swiss lower courts to put more emphasis on foreign jurisprudence as a relevant source of law regarding tax treaty interpretation.

3.3.3. Is foreign case law useful as a source for comparative law to identify solutions and approaches which can be adopted in the domestic forum?

A good example in Switzerland is the new development in the field of cum/ex transactions. In countries such as Germany, the problems relating to these transactions were not new; therefore, for the Swiss courts, the relevant German jurisprudence was a great source of inspiration.

Also in South Africa it would make sense to look to other jurisdictions to find a precedent. Often domestic legislations differ, but the underlying issues are similar. The South African transfer pricing (TP) legislation is only slightly different than the Australian regime. There have been no major TP cases in South Africa but, if there were, it would make sense to look at the Australian jurisprudence.

In the Netherlands, this happens frequently, but sometimes without it being very noticeable. For instance, in a very recent case, the Dutch Supreme Court held that emoluments paid to former employees of the European Patent Office (EPO) in the Netherlands could not be characterized as non-pension income by the EPO and were taxable in the Netherlands as pensions.[25] A similar decision had been rendered less than two years before by the BFH in Germany.[26] The Dutch Supreme Court clearly read the German decision but did not expressly mention the decision in its considerations.

With regard to tax treaty cases, it is believed that there will be more pressure in the future to look at foreign law, which necessarily also entails looking at foreign jurisprudence. In Germany, for instance, foreign law is a matter of law and not a matter of fact. This evolution will be further triggered by the application of the Multilateral Instrument (MLI), which, according to its preamble, also aims at preventing double non-taxation. This requires a state also to take into account the tax law of its treaty partner. Furthermore, the MLI is also an agreement on principles which will be interpreted and applied in national courts. Foreign case law (of other MLI states) will therefore gain importance.

25. NL: *Hoge Raad*, 10 Feb. 2017, No. 16/00971, Tax Treaty Case Law IBFD.
26. DE: *Bundesfinanzhof*, 7 July 2015, No. I R 38/14, Tax Treaty Case Law IBFD.

3.3.4. Is the accessibility to foreign case law a problem?

The panellists agreed that, in general, access to the relevant databases, search tools and publications is very expensive and so are adequate translation services. The budgets of the courts for these matters, on the other hand, are often very limited.

It was also noted that there are relevant sources of information that can be retrieved freely on the Internet, but these often come without sufficient context to assess the relevance of the decision (for instance, what is the relevance of a first instance case in a particular jurisdiction? Has the case been appealed and was it declared inadmissible, dismissed or was the first instance case overturned?).

Another problem caused by the lack of access to foreign case law is the fact that it causes a certain imbalance between the parties. Tax advisors are usually well-connected to international networks. They have better access to relevant sources than courts and even the national tax authorities, and they cite selectively. It is, however, impossible for courts to be aware of all relevant cases, especially those that are not cited by taxpayers. It was noted that, at the English and South African Bar, barristers have a duty to also mention relevant unfavourable cases.

3.3.5. Are language differences an insurmountable difficulty?

It was agreed that, besides being very expensive, proper translation of court decisions is often rather difficult because the terminology used cannot be translated without slightly altering the meaning of the terms. For certain topics, such as VAT, translations are more feasible because VAT law is principle based. Within EU context, the ECJ jurisprudence is translated in multiple languages, which makes it easier to look to other jurisdictions. In certain states, it is not uncommon in national courts to refer to legal sources (acts and administrative decisions) in multiple languages in order to distil the one, true meaning of words. In countries with multiple official languages, such as Belgium, courts are on a daily basis confronted with cases that are in foreign languages, i.e. not in the language in which the case will be pronounced. A practical solution to the translation problem in Belgian courts is to request the party submitting a foreign language case to court to also submit an authentic translation.

4. Session 3 – Tax Procedures in Finland

4.1. Panel composition and agenda

The session was chaired by Judge Peter Panuthos (US Tax Court, United States). The panel was composed of Justice Vesa-Pekka Nuotio (Supreme Administrative Court, Finland), Judge Juhana Niemi (Administrative Court of Hämeenlinna, Finland) and Terttu Lepaus (Board of Adjustment, Finland).

The session consisted of an overview of the Finnish tax regime, the Finnish tax authorities and the tax courts.

4.2. The Finnish tax regime

Nuotio started by giving a brief introduction of the Finnish tax system, which is characterized by a tax burden that is one of the highest in the world. For instance, the tax consequences of driving a car in Finland are plentiful: the purchase of a car, the use of a car, the fuel used by the car, the roads used by the car and the gains from selling the car are all taxed.

Nuotio noted that Finnish people, however, are very diligent in paying their taxes. EU studies found, for instance, that Finland is one of the most compliant Member States with regard to the collection of VAT.

Finnish taxes are levied at state level and at municipal level; however, in the future, certain taxing powers with regard to social security contributions might be shifted to the regions.

4.3. The Finnish tax authorities

Terttu Lepaus provided an introduction to the Finnish tax authorities. The 9,000 employees of the Finnish tax authorities collect the taxes due by about 4.9 million individual taxpayers, 640,000 corporate entities and 310,000 VAT subjects. About 95% of all taxes and tax-like charges due are effectively collected.

Individual taxpayers generally receive pre-filled tax returns. Corporate taxpayers apply the traditional assessment through self-declaration. Generally speaking, e-services are gaining in popularity: the number of local visits, letters and telephone calls to the tax authorities is reducing year after year, whereas online services and the 24/7 online chat and question option are becoming increasingly popular.

4.4. The Finnish tax courts

Juhana Niemi gave an introduction to the Finnish court system, which is composed of the Board of Adjustment, the regional Administrative Courts and the Supreme Administrative Court.

The Board of Adjustment has national jurisdiction and is divided into regional and specialized sections. It ensures uniform taxation, legal security and cost-effective processes by hearing appeals raised by taxpayers to assessments issued by the tax authorities. As such, the Board of Adjustment is independent from the tax authorities in its decision-making, which allows it to curb overly aggressive tax audits.

The members of the Board are proposed by the municipalities and by different taxpayer organizations. The Board issues roughly 20,000 decisions per year. Only a small fraction of these is subject to an action for annulment brought to the Administrative Court.

The Administrative Court's jurisdiction is composed of seven courts, one in each judicial district. Most of the cases heard by the courts deal with income tax matters. Thirty per cent of the cases concern immovable property. Corporate tax cases are largely exceptional. Generally speaking, the caseload of the administrative courts has reduced during the last couple of years because of (i) the introduction of the Board of Adjustment procedure in the 1990s, (ii) the simplification of the tax rules in general, (iii) modified thresholds for tax audits by the tax authorities, and (iv) the introduction of a court fee (EUR 250) in 2016.

Appeals against decisions of the Administrative Court are heard by the Supreme Administrative Court, which is the highest judicial instance in administrative cases. The Court is composed of 20 permanent judges and 7 temporary judges. The caseload of the court mostly consists of immigration law cases. Tax cases represent 10% of the cases heard by the court. In 2016, the Supreme Administrative Court heard 641 tax cases, 66% of which concerned income tax.

The Supreme Administrative Court hears cases which concern advance rulings given by the Central Board of Taxation (i.e. the bypass appeal) and cases on appeal against decisions by the Administrative Court. Leave to appeal is granted only if the matter would secure uniformity of taxation practices or case law, in cases of manifest error or in cases of other weighty grounds for appeal. The Court is restricted to decide on the grounds submitted by the parties on appeal.

Administrative appeals can be lodged in English, but the decision by the Board of Adjustment and the courts will be rendered in Finnish or in Swedish, Finland's second official language.

5. Session 4 – Recent Case Law Regarding Mutual Agreements

5.1. Panel composition and agenda

The session was chaired by Judge Malcolm Gammie (Upper Tribunal (Tax & Chancery), United Kingdom). The panel was composed of Justice Ange Beukers-van Dooren (Supreme Court, Netherlands), Judge John Owen (Tax Court of Canada), Judge Massimo Scuffi (Supreme Council for Tax Judiciary, Italy) and Caroline Vanderkerken (Brussels Court of Appeal, Belgium).

Malcolm Gammie introduced the topic by setting the scene for the growth of international tax disputes and some of the measures taken to promote effective dispute resolution. He referred to the mutual agreement procedure (MAP) contained in article 25 of the model conventions and the efforts by the OECD under BEPS Action 14 to make dispute resolution more effective, which has led to the adoption of new minimum standards, best practices and peer-based monitoring. He noted that Part VI of the MLI provides for mandatory binding arbitration and that, so far, this option has been adopted by 26 of the 71 MLI signatory states.

Malcolm Gammie also noted that Part VI envisaged the use of "baseball" arbitration but with the possibility of "reasoned opinion" arbitration. It had sought to provide a procedural framework for the process between any two states which had chosen to adopt Part VI. Nevertheless, many issues related to MAP and arbitration remained, which arose from the fact that tax treaty dispute resolution remains a dual competence. Even though article 19 of the MLI contemplated mandatory binding arbitration, it was still qualified in various ways. Thus, a "binding" arbitral decision is not binding if the affected taxpayer chooses to pursue litigation in the domestic courts or if the courts of one of the states find the decision invalid, perhaps for failure to follow the proper procedure. It is believed, however, that domestic courts have very little competence to oversee and dictate the substantive outcome of MAP arbitration, other than effectively setting aside the decision based on domestic remedies.

The secrecy of the MAP and arbitration process is another issue. Domestic courts may be unaware of ongoing MAP procedures involving a taxpayer who may still want to pursue its domestic remedies through action in the local courts. In most jurisdictions, very little information is released because MAPs remain shrouded in secrecy. Courts can do nothing but deal with the outcome, if and whenever they are confronted with it.

Malcolm Gammie spoke of his experience with the EU Arbitration Convention, which had been in place for more than 20 years but which had generated very few cases over that period. The EU Member States had now agreed to an Arbitration Directive for implementation in 2019. This adopted a more judicial "reasoned opinion" approach in contrast to MLI's default "baseball" arbitration. It is unclear how the Directive will interact with domestic dispute resolution and appeal procedures.

5.2. Canada

John Owen presented the case of *Sifto Canada Corp.*, decided by the Tax Court of Canada on 10 March 2017.[27] The issue was whether the tax authorities were precluded from issuing a reassessment of the taxpayer even though the amounts at issue were agreed to in the context of a MAP between Canada and the United States.

The facts showed that the taxpayer had voluntarily disclosed to the tax authorities that it had understated its income from sales of raw materials to a related US company. The tax authorities reassessed Sifto to reflect the disclosed amounts, and Sifto and the US company applied to the competent authorities to obtain relief from double taxation. Two MAPs were concluded with details of the adjustments to be

27. CA: Tax Court of Canada, 10 Mar. 2017, *Sifto Canada Corp v. Her Majesty the Queen*, 2017 TCC 37, Tax Treaty Case Law IBFD.

made to the income of Sifto and the US company, and Sifto agreed in writing to their outcome. Sifto was reassessed by the tax authorities a later year, but this was not in accordance with the MAPs.

The Tax Court of Canada held that Sifto's agreement to each MAP was a settlement agreement that was binding on the tax authorities. In the alternative, the Court held that the MAPs were binding and that the tax authorities were not permitted to reassess Sifto in a manner inconsistent with the MAPs. The Court held that this was a consequence of the pacta sunt servanda principle, also enshrined in the Vienna Convention on the Law of Treaties, and also of the Act incorporating the Canada-United States Tax Treaty, which affords paramountcy to the treaty provisions.

5.3. The Netherlands

Ange Beukers-van Dooren presented a recent case of the Dutch *Hoge Raad*, decided on 6 January 2017.[28] The case concerned a Dutch resident who had been performing activities for his Dutch employer in Belgium, Germany, the Netherlands and the United Kingdom. His employment contract was terminated in 2007, and he was entitled to a severance payment. In his tax declaration, he had apportioned the income from the severance payment according to the principles laid down in a prior decision (11 June 2004) by the *Hoge Raad* on exactly the same issue, in which the court had held that a severance payment must be allocated to the various countries based on the reference period of the history of employment. The reference period had to be limited to the year in which the employment was terminated and the four preceding years.

The Dutch tax authorities issued a corrective assessment and took the position that, pursuant to a MAP concluded at the end of 2007 between the Netherlands and Germany, different principles of apportionment had been agreed.

The *Hoge Raad* held in favour of the taxpayer: The tax treaty allows competent authorities to conclude a MAP to remove difficulties and doubts which arise in the interpretation and application of the treaty. The MAP of 2007 did not do so, because the court had already addressed any difficulties in its decision of 2004. The MAP of 2007 clearly intended to alter the rules of apportionment in the treaty as interpreted by the Court. The Court held that the MAP provided by the treaty cannot be used to repair distortions between national tax systems *contra legem*.

5.4. Italy

Massimo Scuffi presented a case decided by the Italian *Corte di Cassazione* in 2015, in which an Italian taxpayer requested to enter into a tax settlement procedure following a transfer pricing adjustment and for the tax authorities to initiate a MAP under the EU Arbitration Convention.[29] Access to the MAP was denied in light of the settlement agreement.

The *Corte di Cassazione* held in favour of the taxpayer, and the action against the denial of access to arbitration was upheld. The Court held that the evaluation of the requirements for admitting cases into a MAP was entirely domestic, and any decisions could be challenged in court by the taxpayer.

5.5. Belgium

Carolien Vanderkerken presented three recent cases decided by the Belgian courts. The first case was decided by the Court of First Instance of Namur on 7 January 2016 and concerned the taxation of pensions derived by a former employee of the Flemish public TV company who had moved to France and obtained double nationality.[30] The Court addressed the question of whether the tax treaty allocated the right to tax the income to Belgium. The Court held that the government service article of the Belgium-France Tax Treaty was not applicable, because the provision specified that it did not apply to pensions paid to residents of the other state having nationality of the latter state. The income was thus taxable only in France as "other income", and Belgium had to exempt the income. The interpretative MAP agreed between Belgium and France, that altered the interpretation of the government service article so that income excluded from the article was taxable only in the residence state, unless the taxpayer had double nationality, could not be applied. The Court held that the MAP added de facto a condition of application to the treaty provision, which, according to its wording, required the taxpayer to have nationality of only the state of residency in order to be exempt in the source state. The Court held that the MAP did not have the status of an actual treaty and was not approved by the parliament and could also not be considered as a source of international law.

The second case was decided by the Court of First Instance of Namur and concerned a Belgian taxpayer who was employed in France and who argued to be a French resident, living separately from his Belgian spouse.[31] The tax authorities rejected his claims. The Court dismissed his argument that the tax authorities did not mention the possibility to initiate a MAP to settle the residence dispute and the double taxation (the taxpayer had been taxed in France on his employment income). The Court held that the requirements for the tax authorities to motivate their decisions did not go so far that they had erred by not informing the taxpayer of the existence of dispute settlement through a MAP.

28. NL: *Hoge Raad*, 6 Jan. 2017, No. 15/05836, Tax Treaty Case Law IBFD.
29. IT: *Corte di Cassazione*, 19 June 2015, Tax Treaty Case Law IBFD.
30. BE: Court of First Instance (Namur), 7 Jan. 2016, AR 14/931/A, Tax Treaty Case Law IBFD.
31. BE: Court of First Instance (Namur), 29 June 2016, FJF 2017/09, Tax Treaty Case Law IBFD.

The third case was decided by the Court of Appeal of Brussels and concerned the taxation of public and private pension income derived by a Belgian national who resided in the United States.[32] An appeal was lodged against a decision of the lower court concerning the validity of the tax authorities' reassessment of the taxpayer with regard to his taxes due in Belgium as a non-resident. A MAP had been agreed between the competent authorities with regard to the qualification of the types of pension for the purpose of the Belgium-US Tax Treaty and which was unfavourable for the taxpayer. The Court held that the MAP was non-binding for the taxpayer and remained subject to appreciation by the Court. Yet, the Court adhered to the outcome of the MAP. The assessment was upheld.

6. Session 5 – VAT Case Law on Services Related to Websites and the Internet

6.1. Panel composition and agenda

The session was chaired by Justice Friederike Grube (*Bundesfinanzhof*, Germany). The panel was composed of Judge Dagmara Dominik-Oginska (Voivodship Administrative Court, Poland), Justice Csilla Heinemann (Curia, Hungary) and Justice Mikko Pikkujämsä (Supreme Administrative Court, Finland).

The session consisted of an overview of recent case law in the field of digital services and the supply of digital goods. Csilla Heineman provided an introduction to the recent modifications of the relevant provisions in EU VAT law and at the level of the OECD.

6.2. Case law

6.2.1. Is the supplier a taxable person?

Germany: *Bundesfinanzhof*, 12 August 2015, XI R 43/13

Case

The case concerned a seller who offered 140 fur coats on eBay in 2004 and 2005. She obtained a turnover of EUR 90,000 from the sales. The tax authorities argued that the seller did not act as a private person but as a taxable VAT subject and that the sales consisted of supplies of goods that were taxable in Germany. The seller argued that she was a private person and that she had inherited the fur coats from her mother. The Court held that, considering all the facts, the seller was a VAT subject in the sense of article 9 of the EU VAT Directive because she had acted as a professional trader. Reference was made to a prior decision of the Court of 26 April 2012 (V R 2/11). The seller had sold a large quantity of products and over a longer period of time. The Court did not accept the taxpayer's claim that the coats were inherited.

Discussion

It was noted that, in Germany, the VAT Code provides for a practical solution for the eBay seller issue (in line with article 281 of the EU VAT Directive): a taxable person can opt out of being subject to VAT, but this also means he loses the right to deduct input VAT if the taxable transactions are below a certain threshold.

6.2.2. Place of taxation

Poland: Supreme Administrative Court, 20 March 2017, 1 FSK 1884/14 and ECJ, 16 October 2014, C-605/12, *Welmory*

Case

The case concerned the decision rendered by the Polish Supreme Administrative Court pursuant to the decision of the ECJ in *Welmory* (C-605/12). Welmory was a company established in Cyprus which organized sales by auction on an online sales platform. It concluded an agreement with a Polish company to provide the Polish company with the service of making available an Internet auction site in the Polish language.

Customers first purchased a number of "bids" from Welmory in Cyprus. Those "bids" then gave the customer the right to take part in the sale of the goods on offer for auction by the Polish company. The Polish company received the revenues from the sales of the goods and from part of the revenues received by Welmory for the "bids". The Polish company issued invoices for services supplied to Welmory for advertising, ICT services and data processing. The Polish company took the view that the place of taxation of those services was Cyprus and they should accordingly be subject to Cypriot VAT.

The ECJ held that a first taxable person (i.e. Welmory) who has established his business in one Member State, and receives services supplied by a second taxable person established in another Member State (i.e. the Polish company), must be regarded as having a fixed establishment within the meaning of article 44 of Directive 2006/112 in that other Member State, for the purpose of determining the place of taxation of those services. This applies if that establishment is characterized by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive the services supplied to it and use them for its business, which

32. BE: Court of Appeal (Brussels), 19 Oct. 2016, 2012/AR/1797, Tax Treaty Case Law IBFD.

is for the referring court to ascertain. Subsequently, the Administrative Supreme Court of Poland remanded the case back to the Court of First Instance to re-evaluate it according to the holdings of the ECJ.

Discussion

Article 44 of the EU VAT Directive provides that the place of taxation is the place where the recipient of the supply is established (i.e. the reverse-charge mechanism). Based on this case, it is clear that the establishment of the recipient is determined based on the individual circumstances with regard to whether he has a fixed establishment.

Germany: *Bundesfinanzhof*, 1 June 2016, XI R 29/14

Case

The case concerned the question of whether a US company without having a place of business in the European Union, providing electronically supplied services in Germany in the form of a dating website, was a VAT subject in Germany. The Court held that the US company was obliged to charge VAT on the supplies in Germany because the services were electronically supplied series. The principle supply was the supply of access to the databases (*see* article 58 of the EU VAT Directive Annex II point 3).

Discussion

The outcome of the case did not conflict with the destination principles in section 3.1 of the OECD VAT/GST Guidelines for Business to Consumer (B2C) supplies.

6.2.3. Tax rate on the supply of books published on physical carriers other than paper

Finland: Supreme Administrative Court, 31 December 2014, SAC 2014:119 and ECJ, 11 September 2014, C-219/13, *K Oy*

This case concerned the question of whether Finland could levy a reduced VAT rate on printed books and maintain the standard rate applicable to books (including audiobooks) provided on other physical carriers, such as CD-ROMs or memory sticks. The ECJ held that it was for the referring court to ascertain whether paper form books and books on other carriers were liable to be regarded by the average consumer as similar. If not regarded as similar, a reduced rate for one of the two was justifiable.

Subsequently, the Supreme Administrative Court of Finland decided that the two were not similar and that the principle of neutrality did not require identical tax rates for printed books and books published on electronic carriers.

6.2.4. Tax rate on the supply of e-books

Poland: Constitutional Court, 17 May 2017, K 61/13 and ECJ 7 March 2017, C-390/15, *Rzecznik Praw Obywatelskich (RPO)*

Case

Under the Polish VAT law, supplies of books that are delivered on physical carriers are subject to a reduced VAT rate. The reduced rate is not applicable to electronically transmitted books (i.e. e-books). The difference was considered contrary to the Polish Constitution but was said to be merely transposing article 98(2) of EU Directive 2006/112 and Point 6 of its Annex III. The ECJ held that the provision of the Directive was not invalid due to procedural flaws in its adoption. The Court also held that the supply of digital books on all physical carriers and the supply of digital books electronically amount to comparable situations, and differentiation must be duly justified. The ECJ held that there were no elements submitted affecting the validity of the rule.

Subsequently, before the Polish Constitutional Court, the proceedings were withdrawn by the ombudsman who had brought the action to court.

Discussion

The decision of the ECJ was in line with prior case law (*see* C-479/13 and C-502/13). There have been initiatives by the EU Commission to also apply the reduced rate to e-books. Due to a lack of unanimity, the European Council did not agree to amend the Directive, which is a rather regrettable evolution.

7. Session 6 – Obtaining Evidence and Information in Common Law and in Civil Law Jurisdictions

7.1. Common law jurisdictions

7.1.1. Panel composition and agenda

The session was chaired by Judge John Owen (Tax Court of Canada). The panel was composed of Judge Elaine Y.L. Liu (Board of Review, Hong Kong), Judge Christopher McNall (First-tier Tribunal, United Kingdom) and Chief Justice Paige Marvel (US Tax Court, United States).

The session started with a brief introduction of the tax court systems in the respective jurisdictions, followed by a discussion of a number of practices at the courts with regard to obtaining evidence and information, and more specifically with regard to aspects such as the discovery of documents and disclosure rules, the admission and agreed statements of facts and the use of expert witnesses.

7.1.2. Discovery of documents and disclosure rules

John Owen observed that, at the Tax Court of Canada (TCC), the general procedure rules provide for either partial discovery (i.e. each party discloses the documents on which it intends to rely) or full discovery (i.e. each party discloses all documents in its possession or control and relevant to the matter before the court). The rules provide for either an oral examination for discovery (for issues exceeding CAD 50,000) or examination by written questions. A party may only once examine an opposing party for discovery, although a person being examined may be required to become better informed, and the examination may be adjourned for that purpose. The TCC may grant leave to examine a person that is not a party to the appeal if there is reason to believe that he has relevant information.

In Hong Kong, at the Board of Review (an independent statutory body which hears appeals against tax assessments by the tax authorities), there are no specific rules on the disclosure of information. The President has the power to give directions and to refuse the admission of evidence that does not comply with the directions. In practice, many of the relevant documents will already have been obtained by the tax authorities at the audit state. To this extent, the Hong Kong tax authorities have extensive investigation powers. During the proceedings at the Board, the tax authorities may request consent to issue a notice requesting the taxpayer to furnish a statement of assets and liabilities or issue a search warrant.

In the United Kingdom, the level of document disclosure depends on the track (basic or standard) that is assigned to the appeal heard by the First-Tier Tribunal (FTT). In the basic track, there is a minimal exchange of documents before the hearing and, in practice, the procedure is very informal but effective. In the standard track, the appellant produces a list of documents upon which he intends to rely. There is no obligation to disclose adverse documents, unlike the standard disclosure obligations at the civil courts. There is some flexibility as to introducing evidence at the hearing itself. A taxpayer notice or a third-party notice can be issued if the tax authorities have reason to suspect the correct amount of tax has not been assessed.

In the United States, at the US Tax Court, parties are expected to cooperate with each other and to exchange relevant documents without resorting to formal discovery. In addition, parties have to stipulate all matters that are not disputed yet relevant to the subject matter of the case. Formal discovery techniques exist and include inspection of premises, interrogations, non-consensual discovery depositions and ordinary requests for production of documents.

7.1.3. Admissions and agreed statements of facts

At the Tax Court of Canada, a party to an appeal may serve the other party with a request to admit the truth of a fact or the authenticity of a document. The requested party may admit, deny or refuse to admit the truth of a fact. In some cases, parties will agree in advance to a statement of facts or on the authenticity of certain documents.

In Hong Kong, the Board of Review encourages parties to prepare a statement of agreed facts prior to the hearing, which usually happens, and which binds the parties.

In the United Kingdom, there are no specific rules or powers to require admissions. The tax authorities can use the *Hansard* procedure in cases of suspected fraud, allowing taxpayers to agree to a full confession in return for immunity from criminal prosecution. Parties are allowed and sometimes do agree to a statement of facts, to which they then will be bound.

In the United States, a party in a case before the Tax Court may serve another party with a request of admissions. Pursuant to Tax Court Rule 90(a), parties are required to stipulate all matters relevant to the pending case on which agreement can be reached. This obligation is not affected by the assignment of the burden of proof.

7.1.4. Expert evidence

In Canada at the TCC, reliance on expert evidence is possible. Unless provided otherwise by the TCC, a party wishing an expert to present evidence or rebuttal expert evidence at the hearing must serve the expert report beforehand.

In Hong Kong, there are no specific rules for expert evidence. In the rare case that a party wishes to rely on expert evidence, the President of the Board of Review may give directions.

In the United Kingdom, at the FTT, the parties generally choose what evidence they want to advance, subject to the FTT's general powers of case management. Both parties can instruct experts, and the expert evidence must be served in advance. The FTT can also direct evidence by a Single Joint Expert. The evidence is not confined to facts but extends to opinions.

In the United States, under the Federal Rules of Evidence, which are applicable at the Tax Court, a lay witness may only testify regarding his opinion if it is based on the witness' perception and helpful to determine an issue and is not based on specialized knowledge. However, expert witnesses are permitted if it is established that they qualify as an expert by knowledge, skill or experience. Expert witnesses called by a party must submit a written report to the Court and the opposing party.

7.2. Civil law jurisdictions

7.2.1. Panel composition and agenda

The session was chaired by Justice Michael Beusch (Federal Administrative Court, Switzerland). The panel was composed of Judge Edouard Crepey (*Conseil d'Etat*, France), Justice Clement Endresen (Supreme Court, Norway), Justice Annette Kugelmueller-Pugh (*Bundesfinanzhof*, Germany) and Judge Massimo Scuffi (Supreme Council for the Judiciary, Italy).

The session commenced with a brief introduction of the tax court systems in the respective jurisdictions, followed by a discussion of the general framework of the courts in relation to evidence, and a number of practices with regard to obtaining evidence held by the taxpayer himself and obtaining evidence held by third parties.

7.2.2. General framework

In France, both in first instance and on appeal, the courts are judicial bodies with full jurisdiction, entitled to quash decisions of the tax authorities in all respects, on questions of fact and law. The Supreme Administrative Court rules as a judge of cassation. There is a presumption of regularity attached to the taxpayer's tax declaration. The burden of proof is on the tax authorities if the validity of the declaration is disputed. Many specific provisions in the General Tax Code provide for specific rules of evidence and reversal of the burden of proof, for example in the case of profit shifting to low-tax jurisdictions.

In Norway, appeals to tax assessments are heard by the Tax Appeal Tribunal, which will consider all aspects of the case and will take into consideration any new facts. The courts, including the Supreme Court, are non-specialized tax courts. They evaluate the validity of the assessment without doing a reassessment. As a main rule, taxpayers may not introduce a new factual basis before the court. The facts need to be identified on the occasion of the taxpayer's tax return or later upon an appeal. New legal arguments are not restricted and may be introduced at any state. There are no formal rules on the weight of evidence. The courts remain passive with regard to the finding of evidence. The submission of evidence is up to the parties.

In Germany, the burden of proof of taxable receipts lies with the tax authorities, whereas the burden of proof of deductible expenses lies with the taxpayer. The Court of First Instance deals with questions of fact and law. The Court of Appeal only deals with questions of law.

In Italy, tax cases are heard by specialized tax courts. The Courts (double instance) review questions of fact and/or questions of law. Taxation involves subjective rights and therefore falls within the jurisdiction of the Supreme Court. The latter only decides on questions of law. For disputes below EUR 50,000, there is an alternative administrative recourse that needs to be pursued before the case can be submitted to the courts. Generally speaking, the burden of proof lies with the tax authorities.

7.2.3. Obtaining of evidence/information by the taxpayer

In France, the granting of many tax incentives depends on compliance with certain reporting obligations. Before the courts, assessments are fully reviewed. There has not been any significant jurisprudence with regard to the implications of the *nemo tenetur* principle (*see* article 6 of the ECHR). The core function of the courts is to assess according to the law; hence, taxpayers are allowed to raise new issues at any time, the principle of estoppel is not applied and the courts can order further investigations.

In Norway, the Tax Administration Act contains a duty to inform a taxpayer of his right against self-incrimination and, according to the Supreme Court, this right also pertains to legal entities. There is an obligation of confidentiality of the information obtained during tax audits. However, the tax authorities are allowed to publish lists with information regarding taxpayers' income, and information may also be passed on to other public bodies, such as social security instances, etc.

In Germany, courts provide a full review of a taxpayer's case, but the information submitted to the court must be the same as the information submitted to the tax authorities. There is parity between the rights and obligations of the taxpayer and the tax authorities: both can request for the inspection of files. With regard to the *nemo tenetur* principle, taxpayers are obliged to cooperate with the tax authorities and provide all relevant facts for a correct assessment. However, the German Tax Code does not provide coercive means to obtain information for assessment purposes if the taxpayer is at risk of self-incrimination in a criminal procedure.

7.2.4. Obtaining of evidence/information held by third parties

In France, certain types of third parties, such as employers or banks, have the obligation to provide information spontaneously. The law designates about 20 other types of persons and entities (e.g. telecom operators, public notaries or social security institutions) that can be requested to provide information. The taxpayer must be informed, before the assessment, on the origin and content of the collected evidence. Professional privileges (medical secrecy, business confidentiality, client-attorney privilege) provide certain restrictions to obtaining information from certain third parties.

In Norway, the Tax Administration Act contains an extensive list of third parties that must pass on information to the tax authorities if requested. The taxpayer is generally not involved in the information-gathering process. Evidence concerning something that has been confided to attorneys acting in such capacity cannot be presented to the courts. The impact of attorney-client privilege on tax investigations has been the subject of a number of recent court cases in Norway. In a Supreme Court case of 2010, it was held that lawyers were not to disclose the recipient of a payment made through the law firm's client account, provided that the transfer fell within the scope of the lawyer's ordinary business.

Also, in Germany, the client-attorney privilege grants lawyers the right to refuse to give evidence regarding their clients' affairs. The same is true for accounts to a lesser extent. Any illegally obtained information cannot be used in court. Information is generally first sought from the taxpayer himself. If the information cannot be provided, third parties can be requested to provide the information. Banks automatically provide information. Third parties can join the legal action between the taxpayer and the tax authorities, if relevant, and have the same procedural rights and obligations as the taxpayer.

In Italy, witness evidence is generally not allowed in tax proceedings, although written statements by third parties during the tax assessment can be submitted to court and have value of evidence. Confidential information obtained by the tax authorities, even if indirectly based on theft or other illegal activity, can be used in court as circumstantial evidence. The taxpayer is not involved in the obtaining of information from third parties.

8. Session 7 – "Exotic" Topic: Bear-Watching in Finland

Judge Vesa-Pekka Nuotio of the Supreme Administrative Court advertised one of Finland's finest creatures of nature: brown bears. Fifteen hundred of these formidable animals roam the vast forests of Eastern Finland and make the region an ideal destination for nature lovers. Organized bear-watching trips include transport to the bears' habitat, the services of a nature guide, shelter for the night in a bear-watching cabin, food and drinks to keep warm, and – if you are lucky to survive – transport back to safer ground.

There were two questions on everyone's mind: do these bears really have a taste for humans? And what is the applicable VAT rate on tours to watch these animals in their natural habitat? The answers are, respectively, "no" and "it's complicated". In theory, Finland provides for differentiated rates for the separate services provided on bear-watching tours: Finnish VAT law provides a reduced rate for the supply of food and drinks (14%) and a further reduced rate for transport of individuals, provision of accommodation and admission fees to events and zoos (10%). The standard rate is 24%.

However, in its decision No. 2017:47, the Supreme Administrative Court of Finland decided by a 3-to-2 vote that the services rendered on a bear-watching tour constituted one totality of services and that the VAT rate was to be determined based on the main service, which is the watching of the bears. This activity was held comparable to attending an event or a zoo, even though *in casu* the animals roam free. Hence, the Court held that the applicable VAT rate on the bear-watching package was 10%.

At the risk of poking the bear any further, Vesa-Pekka Nuotio wondered whether the Court was also willing to apply this reasoning to other events encompassing multiple services. For instance, if one buys a beer at an ice hockey game, which is very much part of the experience of attending such an event, will the supply of beer also benefit from the 10% VAT rate on the hockey event admission fee instead of the current rate of 14%?