



International Association of Tax Judges

6th Assembly Lucerne - 2015

Application of Foreign Law

Chair: Joao Bianco (Brazil)

Speakers: Emmanuelle Cortot-Boucher (France)

Peter Panuthos (USA)

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1st round

**Legal framework regulating the application
of foreign law in general**

BRAZIL

- foreign civil law may be applied by the judge.
- If the party's reasoning is based on foreign law, the party has to prove the existence and validity of the foreign law.
- If it is impossible to prove the existence and validity of the foreign law, the judge will apply internal law.

Germany

Dr. Stefan Wilk
Richter am Finanzgericht
Bundesministerium der Justiz und für
Verbraucherschutz, Berlin

- Section 293 ZPO in conjunction with Section 155 FGO:

“The laws applicable in another state (...) must be proven only insofar as the court is not aware of them. In making inquiries as regards these rules of law, the court is not restricted to the proof produced by the parties in the form of supporting documents; it has the authority to use other sources of reference as well, and to issue the required orders for such use.”

(cf. www.gesetze-im-internet.de)

USA

- foreign law may be applied by the judge.
- “Comparative constitutional analysis”.

FRANCE

- Foreign private law may be applied by French courts, except if it goes against public order in France.
 - If foreign law is applicable, it is for the judge to determine what its scope is. The burden of proof does not rest on the parties.
 - The judge must quote all the relevant provisions of foreign law in his judgement.
 - If he feels he cannot reach a proper understanding of foreign law, he must apply French law.
- Foreign public law cannot be applied by the judge when there is a risk that it should affect the sovereignty of the State (nationality law, criminal law, tax law)

CANADA

- Foreign law must be specifically pleaded and proved to the satisfaction of the Court.
- Typically, by way of qualified expert.
- In absence of evidence of foreign law—or when foreign law is insufficiently proven—foreign law is presumed to be the same as Canadian law.



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2nd round

**application of foreign law is a matter of fact
or a matter of law?**

Germany

- See round 1; foreign law is handled as a matter of fact
- Section 118 (1), first sentence, FGO:
“An appeal on points of law can be lodged only on the grounds that the judgment against which the appeal is directed was based on a violation of federal law.”
- Very limited examination of first-instance judgments by the Federal Finance Court as regards foreign law

USA

Pursuant to Tax Court Rule 146:

“The Court’s determination
[of foreign law] shall be treated
as a ruling on a question of law.”

FRANCE

- When foreign law is applied by French courts, it is regarded as a rule of law, not as a matter of fact.
- However, it is not controlled by the French Supreme Courts with the same intensity as French rules of law.
 - In case of an appeal on points of law (cassation), the interpretation of foreign law is controlled as lightly as facts are.
 - The judgement will be quashed only if there is a blatant error in the interpretation of foreign law.

CANADA

- Treated as question of fact because must be ascertained according to evidence of witnesses.
- However, it is a question of fact “of a peculiar kind” because what is involved is a question of law.
- Appellate courts do not shy away from intervening to correct a misapplication or misunderstanding of foreign law by trial court because credibility of an expert’s testimony on legal issues can easily be assessed on appeal and appellate courts are well accustomed to evaluating persuasiveness of legal arguments.



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3rd round

is there a legal framework regulating the application of foreign tax law?

GERMANY

- Taxable income is always calculated pursuant to the provisions of German tax law, even if the income was generated abroad.
- OECD-Base Erosion and Profit Shifting Project (BEPS) on the issue of Hybrid Mismatch Arrangements (action 2).

USA

- Taxable income is calculated pursuant to U.S. tax law. The general rule is that taxable income is computed on the same basis as book income.
- The exception that swallows the rule is that the method must clearly reflect income in the opinion of the Commissioner.
- The Commissioner's interpretation of "clearly reflect income" is not interfered with unless clearly unlawful. Thor Power Tool Co. v. Commissioner, 439 U.S. 522, 532 (1979).

- Once an issue of foreign law is raised:
 - Information may be provided by the parties.
 - Information may be provided by experts of the parties and experts of the judge.
 - Information may be collected by the judge.

FRANCE

- Foreign tax law cannot be applied by the judge to solve a tax case.
 - ➔ [Conseil d'Etat, 24 November 2014, Société Artemis, n° 363556](#)
- Other areas of foreign law may be applied by the judge to solve a tax case if they are relevant
 - Examples of admissible areas of law: civil law, corporate law, business law, family law...
 - The provisions of those areas of law may be taken into account to establish legal qualifications according to French tax law.
- ➔ [Conseil d'Etat, 27 May 2002, Société Superseal Corporation, n° 125959](#)

CANADA

- Common law rule is that Canadian courts do not apply foreign tax judgments or enforce claims based on foreign tax law. However, courts may be compelled to enforce foreign tax judgments through Canada's tax conventions (for e.g., Canada's tax treaties with the United States and with Luxembourg).
- With regard to foreign law concerning corporate structure or affecting a transaction, the general rule applies (must be pleaded specifically, otherwise Canadian law applies), but this rule was limited for arrangements like partnerships which must be defined according to Canadian principles guiding partnership law.

BRAZIL

- foreign arrangements are qualified according to Brazilian law.
- Example: partnership, trusts.



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4th round

case law

GERMANY

- BFH-judgment of 20/10/2010 – I R 117/08

The plaintiff taxpayer owned shares in a US company (“F-corporation”). In addition to a cash dividend he received shares in another US company, “A-corporation”, as a spin-off dividend. A-corporation was a subsidiary of F-corporation. The nominal capital of the F-corporation was not diminished as a result. The tax office treated the allocation of shares in A-corporation by F-corporation as a taxable cash dividend.

- BFH-judgment of 20/10/2010 – I R 117/08
The allocation of shares constitutes a taxable dividend only if the allocation is regarded as a distribution of profits and not as a repayment of capital under US commercial and company law.

- Methods of identifying and interpreting foreign law
 1. Court makes its own inquiries
(BFH-judgment of 19.12.2007 – I R 46/06)
 2. Expert opinion
 3. European Convention on Information on Foreign Law of 7.6.1968*
- Discussion of findings with the parties.

*<http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=062&CM=8&DF=05/08/2015&CL=ENG%00>

FRANCE

Conseil d'Etat, 24 novembre 2014, Société Artemis, n°
363556

How to qualify, according to French law, the tax regime of a foreign entity which is not taxable in France ?

- General partnership registered in Delaware (United States)
Owned by a French company submitted to French corporate tax
The tax regime of the amounts distributed by the partnership to the French company depends on the tax regime of the partnership as defined by French law

- Solution of the Conseil d'Etat : assimilation method based on a significant body of evidence.
- Pending issues :
 - What if the social form of the foreign entity has no equivalent in France ?
 - What if there is an option right according to which the companies which are taxable in France may choose, whatever their social form, their tax regime ?

USA

PPL Corp. v. Commissioner, 133 S.Ct. 1897 (2013)

- In 1997, the U.K. imposed a one-time “windfall tax” on 32 U.K. companies. This case determined whether that tax was a creditable foreign tax for U.S. tax purposes.
- A foreign tax is a creditable tax for U.S. tax purposes if its predominant character is that of an income tax in the U.S. sense.
- In concluding that the U.K. “windfall tax” is a creditable tax for U.S. purposes, the U.S. Supreme Court considered the text of the U.K. statute and its legislative history.

CANADA

- Residence of a trust (relationship existing when a trustee manages and controls property for enjoyment of a beneficiary) is not defined under Canada's *Income Tax Act*.
- Canadian courts used to look to residence of trustee to determine residency of trust and apply the law of the trustee's residence. However, in 2009 judgment by Tax Court (upheld by Supreme Court), this approach was not followed. For corporations the rule had been that residency of the corporation was where its central management and control was exercised.

- The Court identified a number of similarities between a trust and a corporation:
 - Both hold assets to be managed;
 - Both acquire and dispose of assets;
 - Both require managing a business;
 - Both require banking and financial arrangements;
 - Both involve hiring lawyers/accountants for advice;
 - Both distribute income.
- Since then, for trusts, courts use the residency standard used for residence of corporations (where central management and control is exercised).

Thank you!