

# Static and/or Ambulatory Interpretation of Tax treaties

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# Tax Treaty Interpretation; specific aspects

- Object can only be achieved by equal interpretation in both States; this makes the text important);
- Two languages; two Courts adjudicating at last instance;
- Mismatches possible: tax planning; abuse;
- *Mutual* (published) intentions;
- Concluded between States, but addressees are taxpayers (rights); good faith between the parties, but also legitimate expectations of third parties (the taxpayers): a huge third-party clause
- Prevalence and direct effect (self-executing);

# Tax Treaty Interpretation; specific aspects

- Reciprocal instead of unilateral: wider use of extrinsic material, unknown in national law interpretation: OECD Model, Commentary, foreign judgments, foreign administrative practice, MAP-awards; Vienna Convention;
- Specific terms unknown in national tax law: ‘enterprise’, ‘beneficial owner’, ‘p.e.’;
- Relieving in character, but imposition is also possible (France; Netherlands);
- Special tax laws, regulating international position of residents of the treaty partners;
- Negotiation process is not public; no public *travaux préparatoires*;
- OECD Model and Commentary instead of parliamentary history;

# Static or ambulatory interpretation?

- Static or ambulatory as to (a) changes in the OECD Model and (b) in the Commentary?
- The OECD Commentary comments on its own dynamics: para's 33-36 of the Introduction;
- Brian Arnold: how should the Commentary be interpreted?
- Frank Engelen: how should Art. 3(2) OECD itself be interpreted, as it is a *lex specialis* in relation to the Vienna Convention?
- 'permanency of commitments;' 'good faith';
- National judiciaries: unclear, ranging from "later versions we only read for fun" to faithful ambulatory application;

# Static or ambulatory interpretation?

## Arguments in favour of static interpretation:

- Pacta sunt servanda
- Legal certainty
- Legitimate expectations
- Democratic legitimization
- Vertical equality (between subsequent but factually identical tax years of the same taxpayer);

## Arguments in favour of ambulatory interpretation:

- present day needs; ruling on the basis of obsolete, outdated, withdrawn or invalid rules is impracticable, and yields unreasonable or absurd results;
- ECHR: 'the treaty is a living instrument'
- Horizontal equality (between taxpayers in the exact same position but for the date of conclusion of the applicable tax treaty)

# Static or ambulatory interpretation?

- Not really an antithesis: ambulatory interpretation limited by context, permanency of commitments and good faith; static interpretation by the fact that the Commentary is authoritative source of interpretation where static interpretation leads to unsatisfactory results;
- Reconciliatory interpretation!
- There is one area where there is no choice but to interpret tax treaties in an ambulatory manner:
- trying to keep up with the direct tax case law of the Court of Justice of the EU;
- From an EU law point of view, bilateral (tax) treaties are just internal law which must conform to EU law;

# Static or ambulatory interpretation?

- (i) national terms: ambulatory interpretation unavoidable, but Treaty obligation circumvention must be curbed;
- (ii) OECD Model: static; legitimate expectations; permanency of commitments;
- (iii) Commentary: Asymmetrical (legitimate expectations) approach? (follow only Commentary changes beneficial to the taxpayer?)

Brian Arnold, 'The Interpretation of Tax Treaties: Myth and Reality', *Bull. for Int. Tax.*, January 2010:

“Interpretation requires judgement; it is inherently subjective. The quest for certainty, for the elimination of subjectivity is misguided or futile. Certainty can be achieved only by arbitrary rules (for example, any uncertainty must be resolved in favour of one side or the other) that involve sacrificing the true goal of all interpretation: to get the right or the most appropriate meaning. Any attempt to control the interpretation of treaties, or statutes, by courts is doomed to failure because the interpretive rules themselves require interpretation and it is the judges who perform that function. Perhaps this explains the misplaced focus of scholars on treaty interpretation: they have little influence on the selection of judges.”

# Brian Arnold, *Bull.*, January 2010 (c'tnd):

- “(...) *any* interpretive approach can be justified under Art. 31.
- “It is unrealistic to think that judges can fundamentally alter their method of interpretation when they deal with words in the context of treaties compared to words in the context of domestic statutes. Judges who prefer the literal or textual approach to the purposive approach will apply literal interpretation to treaties just as they do to domestic tax legislation. Judges who prefer to take a broader approach and give greater weight to context and purpose in the interpretative exercise will do so whether they are dealing with domestic statutes or treaties.”
- (...) the interpretive rules of the Vienna Convention are not particularly useful in interpreting and applying the provisions of tax treaties. Conversely, those rules are not particularly harmful as long as they are not taken too seriously and are not applied narrowly or mechanically.”

# Tax Treaty Interpretation

- Nothing special really; just another text with just another object, purpose and context;
- Rules of interpretation need interpretation;
- Selection and education of judges is much more important than the VC or any rule of interpretation;
- Donot take the Vienna Convention and later Commentaries too seriously ('we only read later versions for fun') and donot apply any rule mechanically;
- Donot take the question static or ambulatory as a dichotomy (Yogi Berra: "If you come to a fork in the road, take it.")

# Yogi Berra:

“I just want to thank everyone who made this day necessary.”