

## **International Association of Tax Judges**

Rome, 28 August 2010

### **The Convergence of the Interpretation of Tax Treaties**

1. Interpretation is an important issue in international taxation. Few subjects have been discussed so thoroughly. This is not surprising. Tax treaties, with less than 100 to 120 provisions in some 30 articles, cover the national legislation of two states....legislation that is generally extensive and detailed. Treaties are thus necessarily worded in a general and abstract way and consequently do not always fit seamlessly in the national provisions.

2. There is no international judge to give guidance in the interpretation. The interpretation of tax treaties is left to national courts. And where two courts in two different states have to judge the same case, they can hand down different judgments. And then we are back to square one: the very double taxation that treaties are aimed to avoid.

3. Could arbitration be a solution?

- Since 1995: EU Arbitration Convention: 2 cases
- Since 1990: appr. 150 to 200 tax treaties: not one arbitration case.

Not to be expected that arbitration will become a flourishing business in the near future as long as arbitration is only possible if the two states do not succeed to find a solution in the map within two years. States dislike losing authority.

4. If there is no international court and no arbitration, the question is whether there is something like a common interpretation requirement.

The late Prof. Klaus Vogel answered this question with a clear yes. In his opinion there is something like a "Gebot der Entscheidungsharmonie" which can be translated in English as: common interpretation requirement or principle. In his general report on 'Interpretation of double taxation conventions' for the IFA Congress 1993 in Florence in Italy, he worded this as follows:

"This principle means that courts ... of one Contracting State should look at decisions made by courts ... of the other Contracting State when confronted with problems of interpretation and that they test whether their interpretation can be transferred. If they are plausible and if their application may lead to the avoidance of double taxation, they should at least be considered and any deviation from them should be explained explicitly and convincingly".

I have a deep respect for Klaus Vogel, but I am afraid that it remains wishful thinking. How could you force judges to take foreign decisions into account? How could you force judges to indicate in their decisions why they deviate from a decision of a foreign colleague? Without far-reaching legislative measures this wouldn't work.

5. The first and most obvious problem is the awareness of foreign decisions.

There are two practical obstacles:

- the language; example...the search has labyrinthic proportions;

- decisions are not always published or recorded in one central place: Belgium, Switzerland or Italy. This alone makes it in many cases nearly impossible to start a search.

6. Nevertheless, the current situation is that foreign decisions play a role in court decisions in a number of countries. During IFA 2008 Brussels, a seminar was dedicated to tax treaties and court decisions. One of the subjects was the importance of foreign decisions; representatives of 9 countries:

- CAN/AUST/IND: frequently referred to, especially common law
- UK: sometimes referred to
- GER: sometimes referred to
- AUSTRIA: reference to German case law not uncommon
- NL: frequently referred to: adv. general
- FRA: limited: commissaire de gouvernement
- ITA: none

[not complete picture; only 9 countries; however, gives an idea]

7. The real/fundamental problem is the availability of foreign case law. All these difficulties could be overcome by a database containing all cases dealing with tax treaty interpretation:

- All copies/decisions in one place
- Language problem solved to certain extent if cases would be summarized in English.

Challenge taken up by IBFD, mainly for idealistic reasons, to stimulate the common interpretation of tax treaties. Of course, the IBFD has to earn its own keep and the IBFD wants to get a decent return on its investments. This is to guarantee its independence. , but the database is also an instrument that can contribute in its own way to the harmonization of the interpretation of tax treaties.

In the first years I worked on this Herculean project together with Klaus Vogel. The database was launched in 2005.

8. The database is very ambitious:

- All countries
- All higher and lower court decisions
- All cases, i.e. new and old

9. The beauty is that you can navigate from tax treaty to case law and vv: ex. Art. 5(5) NL/IND:

- All NL cases
- All cases 3<sup>rd</sup> countries

#### 10. About numbers:

- 216 countries...160 with one or more tax treaties
- 30 countries > 3 cases
- 12 countries > 50 cases

#### 11. Countries > 50 cases

- NL 800
- GER 700
- BEL 450
- FRA 250
- US 230
- CAN 200
- ITA 215
- AUT 175
- SPA 155
- SWI 130
- SWE 110
- IND 300 [> 1000?]

#### Content of the database

Altogether in the world appr. 4000 cases

#### Currently in the database

- Identified 3,500
- Summaries 2,000
- Texts 2,500

#### Triptych

- **IATJ**
- **Case Law Database**
- **TT Case Law Journal**