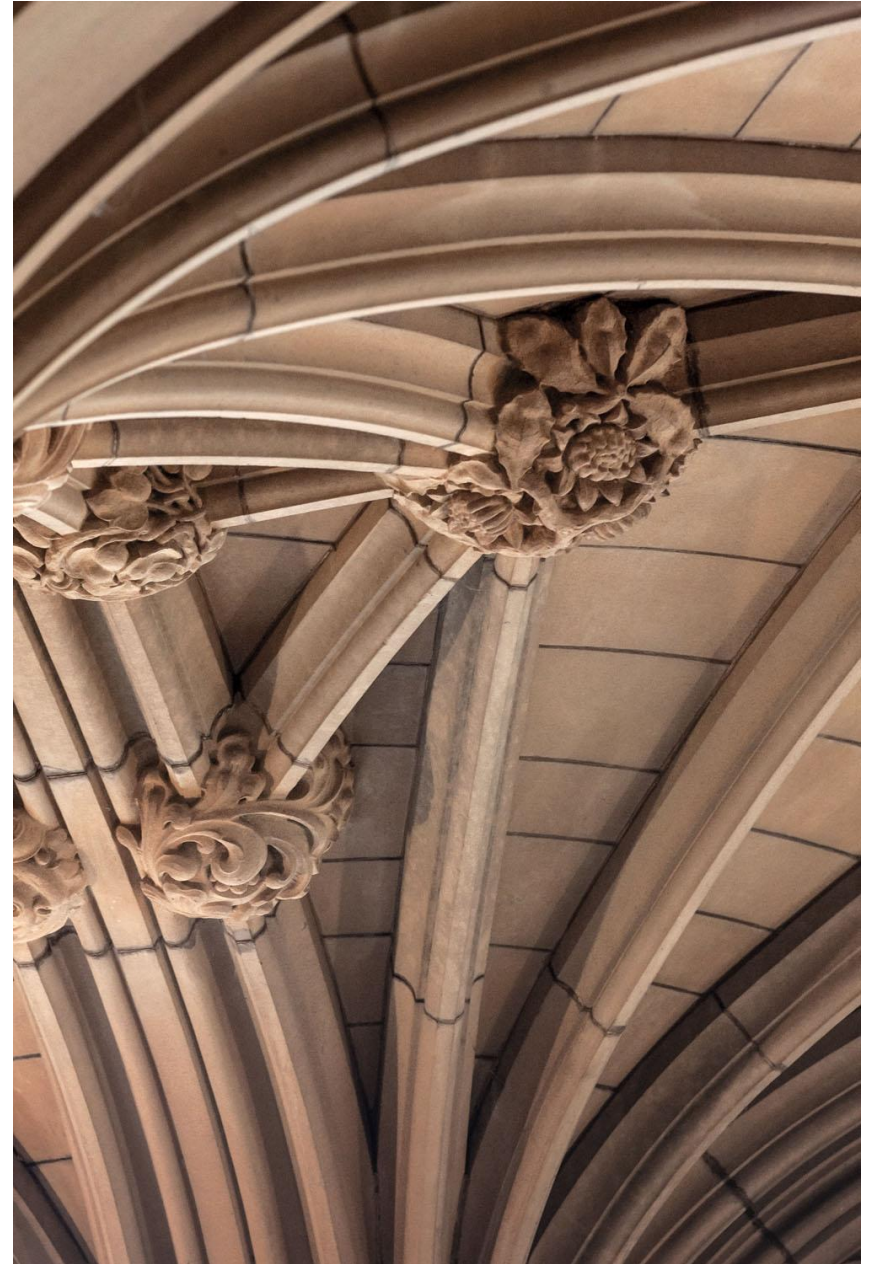


Treaty Abuse and Anti-Avoidance Rules Under BEPS

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Outline of session

- 1. History of BEPS Actions 6 (and 15)**
- 2. The October 2015 recommendations**
- 3. What the future holds**

1. A bit of BEPS Action Item 6 history

Action Plan

- **July 2013: BEPS Action Plan**

Discussion draft

- **March 2014: release of discussion draft**
- **April 2014: release of comments on discussion draft**

Recommendations

- **September 2014: release of report and recommendations on Action 6**

Follow-up work

- **November 2014: release of discussion draft on follow-up work**
- **January 2015: release of comments on discussion draft on follow-up work**
- **January 2015: public consultation from Paris**
- **March 2015: WP1 meetings**

Revised discussion draft

- **May 2015: Release of revised discussion draft**
- **June 2015: Release of public comments on revised discussion draft**

Final Report

- **October 2015: release of final report**
 - **approved by Finance Ministers meeting**
 - **text of some key measures still to be finalised**
 - **still not clear what the recommendation for CIVs will look like**

Four major themes

- 1. Situations where treaty benefits are being accessed inappropriately (ie, treaty shopping)**
- 2. Negating double non-taxation brought about by treaties**
- 3. Situations where treaties are being relied upon by residents to constrain residence country tax rules**
- 4. Situations where pre-conditions / limits inside treaties are being defeated**

And new problem introduced in 2015 (arising from new US Model)

5. How to handle in a treaty ‘special tax regimes’ which are either –

- insufficiently damaging to warrant having a treaty at all, or**
- introduced after the treaty was executed (but don’t justify termination)**

and some BEPS Action Item 15 history

Changes to the Commentary being made unilaterally, but expected that the Multilateral instrument will be the mechanism for amending existing treaties

- September 2014: report**
- February 2015: mandate for project published**
- November 2015: inaugural meeting**
- December 2016: proposed date for completion of drafting**

2. October 2015 recommendations

1. Changes to the Title to treaties

Convention between (State A) and (State B) for the avoidance of double taxation with respect to taxes on income and on capital

– becomes

Convention between (State A) and (State B) for the elimination of double taxation with respect to taxes on income and on capital **and the prevention of tax evasion and avoidance**

2. Explicit Preamble

(State A) and (State B),

Desiring to further develop their economic relationship and to enhance their co-operation in tax matters,

Intending to conclude a Convention for the elimination of double taxation with respect to taxes on income and on capital **without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in this Convention for the indirect benefit of residents of third States)**

Have agreed as follows:

- **Corresponding changes to the Commentary highlighting the intentions behind the changes to the Title and Preamble**

3. A formal Limitation on Benefits clause in the Model

- It is still all in brackets and detailed or less detailed versions offered
 - final text to be settled in 2016
- Basic framework operates around 4 ideas:
 1. No treaty benefits at all unless a qualified person under any one of 3 tests
 - **status** – human / State / State-owned / charity
 - Not-for-profit / pension funds / CIV's / SWF?
 - **ownership structure** – locally publicly listed + traded and their subsidiaries / private entities owned by QPs
 - denial if revenue leakage
 - locally **managed**

2. If not a QP, some items of income can still enjoy benefits

- recipient engaged in substantial, active (non-financial) business and item of income connected to that business

3. equivalent benefits option

- Denial if revenue leakage

4. with residual power in competent authorities to fix anomalies

- **4. Principal purpose test**

Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is **reasonable to conclude**, having regard to all relevant facts and circumstances, that obtaining that benefit was **one of the principal purposes** of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances **would be in accordance with the object and purpose** of the relevant provisions of this Convention.

- **Report recommends countries adopt a ‘minimum standard’ suite of measures:**
 - **changes to Title and Preamble, and**
 - **any one of**
 - **PPT only, or**
 - **PPT + LOB, or**
 - **LOB + domestic anti-conduit financing rule**

5. Dedicated text in the Introduction to the *Commentary* explaining the considerations that should be relevant to deciding whether to have a treaty with a no / low tax jurisdiction

6. Two alternative new proposals from the US released in May 2015 for handling so-called 'special tax regimes' (esp. ones that might be introduced after treaty negotiated)

- marked 'for further consideration'
 - to be finalised in first ½ of 2016
- **Proposal 1: limit on source country tax in articles 11, 12 and 21 removed if income benefits from 'special tax regime'**
- **Proposal 2: either country can terminate application of articles 10, 11, 12 and 21 if either country exempts from tax income dealt with in those articles**

7. Changes to deny residents the ability to use treaty-based arguments to defeat residence country taxes

- sometimes raised against domestic rules such as CFC / fixed ratio thin cap / exit taxes**
- New article (1)(3) (akin to US ‘savings clause’)**

This Convention shall not affect the taxation, by a Contracting State, of its residents except with respect to the benefits granted under paragraph 3 of Article 7, paragraph 2 of Article 9 and Articles 19, 20, 23 A [23 B], 24 and 25 and 28.

8. Changes to the dual residence tie breaker rule for entities other than individuals (art 4(3))

Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.

becomes

Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, the competent authorities of the Contracting States shall endeavour to determine by mutual agreement the Contracting State of which such person shall be deemed to be a resident for the purposes of the Convention, having regard to its place of effective management, the place where it is incorporated or otherwise constituted and any other relevant factors. In the absence of such agreement, such person shall not be entitled to any relief or exemption from tax provided by this Convention except to the extent and in such manner as may be agreed upon by the competent authorities of the Contracting States.

9. Some housekeeping

- OECD took the opportunity of the BEPS project to include minor revisions to the OECD MC to deal with**
 - Splitting construction contracts to get under 12-month minimum [Action 7 Report]**
 - Labour hire arrangements**
 - Transactions intended to avoid dividend characterisation**
 - Dividend transfer transactions**
 - Transactions that circumvent the application of Article 13(4)**
 - Anti-abuse rule for permanent establishments situated in third States**

Some treaty changes happening elsewhere

- **Action Item 2 recommendation for transparent entities. New art 1(2):**

For the purposes of this Convention, income derived by or through an entity or arrangement that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State **shall be considered to be income of a resident** of a Contracting State but **only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.**

- **Action 7 – changes to definition of PE**

3. What the future holds

- **Settling the final texts**
- **National reactions**
 - **Australian Treasurer's Press Release**
- **A solution to termination?**
 - **especially if the US proposals are pursued**
- **What will the UN do?**
- **Waiting for Action item 15?**