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**Recent Judicial Trends in
Tax Treaty Interpretation**

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Trends



- **Recent trends**
- **Judicial trends**
- **Interpretation**
- **Basis: recent court decisions**
- **Weighting to certain countries (judgemental)**
- **Weighting to higher courts**

Trends



- **Statistically suspect!**
- **Some research – but considerable personal observations**
- **This presentation: Good knowledge of treaties and some knowledge of OECD MC Commentary and Vienna Convention assumed**

Subjects examined – is there a trend here?



- **Use of supplementary material generally**
- **Use of other jurisdictions' court decisions**
- **Use of meanings found in other treaties**
- **Obedience to the OECD Model Commentary**
- **Latter commentary preferred?**

Subjects examined – is there a trend here?



- **OECD Model 'supplementary material' – or relevant only to determining the 'context'**
- **Anti-avoidance overriding treaties**
- **Courts upholding domestic treaty override rules?**

Subjects examined – is there a trend here?



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Subject examined – is there a trend here? (continued)



- **EU law influences**
- **Reference to and respect for the Vienna Convention**
- **Treaty override**
- **Respect for tax treaties as treaties (or are they treated as domestic law)**

Use of supplementary material generally - examples



- **India: UAE Exchange Centre Ltd v Union Bank of India on 13 February 2009 (Delhi High Court) – used Blacks Law Dictionary**
- **In determining the meaning of 'auxiliary'.**
- **'The plain meaning of the word "auxiliary" is found in Black's Law Dictionary 7th Edition at page 130 which reads as "aiding or supporting, subsidiary".'**

Use of supplementary material generally - examples



- **South Africa: Volkswagen of South Africa (Pty) Ltd and The Commissioner: South African Revenue Service, 21 April 2008**
- **Issue: was STC limited by dividend article in Germany-South Africa treaty**
- **On what STC is, used 'Olivier, et al. International Tax – A South African Perspective, at p.376)'; 'Ernst & Young. Integritax Newsletter: SAICA, August 1994, at p.1)'**

Use of supplementary material generally - examples



- **Canada: The Queen v. Prevost Car [2009] FCA 57 (FCA). The Federal Court of Appeal**
- **Canada-Netherlands treaty, beneficial ownership**

Use of supplementary material generally - examples



- **Court approved use of ordinary meaning, technical meaning and the meaning it might have in common law, in Québec's civil law, in Netherlands law and in international law; OECD Commentary and the OECD Conduit Companies Report and the amendments made in 2003 by the OECD to its 1977 Commentary.**

Use of supplementary material generally - examples



- **India: Anapharm - Vogel & OECD Commentary**
- **Poland: several cases using MC Commentary, but tend to use to determine 'context'**

Use of supplementary material generally - conclusions



- **Use of OECD Commentary, including Reports, clearly increasing**
- **Sign of maturity: Equally clear trend – more critical approach to using the OECD Commentary – frequent consideration of it but rejection for various reasons**

Use of other jurisdictions' court decisions



- **Conclusions: practically non-existent, thus no trend, but watch this space!**
- **Anticipated trends (next 5-10 years): Selected common law decisions on beneficial ownership and Indian treaty decisions generally – will be considered in other countries**

Use of meanings found in other treaties



- **Only few examples. Only India doing it?**
- **India: Anapharm Inc, ruling of 11 Sep 08 re Indian Authority for Advance Rulings (AAR)**
- **India-Canada treaty**
- **“make available” – no definition in the treaty but used a meaning found in the MOU attached to the Protocol of the India-US treaty**

Use of meanings found in other treaties



- **India: DCIT vs Roxon OY; Finland-India treaty. Used meaning in the Protocols in German, French and Netherlands treaties**
- **Not a trend – or?**

Obedience to the OECD Model Commentary - examples



- **Canada: Prevost**
- **Poland: Ruling of the Supreme Administrative Court of 19 June 2009 (II FSK 276/08)**
- **Poland: Ruling of the Supreme Administrative Court in Łódź of 5 July 2001 (I SA/Łd 758/99)**
- **India: Anapharm**

Obedience to the OECD Model Commentary - examples



- **India: FactSet Research Systems Inc (AAR/787/2008), 3 June 2009, AAR – used OECD Commentary heavily as well as the OECD Commentary on the “Treaty characterization issues arising from e-Commerce”**

Obedience to the OECD Model Commentary - examples



- **(ITAT), Germany-India – OECD commentary considered but not followed. KG resident? Held: KG subject to trade tax and that resident as this was a tax on income. No need to refer to the OECD commentary where the treaty was clear and unambiguous.**
- **India: Automated Securities Clearance Inc v Income Tax Officer on 10 September 2008 (ITAT). Re meaning of 'discrimination'.**

Obedience to the OECD Model Commentary - examples



- **The ITAT referred to the OECD Model Commentary but stated that it would only play a limited role. It would be used as an aid to interpretation only if the relevant terms of the India-US treaty were not explained in the Technical Memorandum to the US Model Convention, only if specific reference is made in the commentary, and the explanation does not conflict with the Technical Memorandum.**

Obedience to the OECD Model Commentary - conclusions



- **Use of OECD Commentary, including Reports, clearly increasing**
- **Sign of maturity: Equally clear trend – more critical approach to using the OECD Commentary – frequent consideration of it but rejection for various reasons**

Latter commentary preferred?



- **Few decisions**
- **Decisions go 'each way'**
- **No trend**

OECD Model is 'supplementary material' – or 'context' only



- **Full title: Is the OECD Model 'supplementary material' – or is it also (or only) relevant in determining the 'context'**
- **Poland cases – some cases clearly consider OECD MC Commentary relevant only in determining the 'context; where context relevant in applying OECD Model art. 3(2) and Vienna Convention art. 32**
- **Other countries/cases?**

Anti-avoidance overriding treaties



- **Spain-NL Case 59/2005 Audiencia Nacional (National Court). Spain owned by NL, in turn owned by US; NL had little role re Spanish sub but NL had substance. Held: EU Parent-Subsidiary Directive did not apply (specific anti-abuse rules applied) but treaty did.**

Anti-avoidance overriding treaties



- **India: Bill on Direct Tax Code Bill 2009, released on 12 August 2009. Effect from 1 April 2011. The Bill introduces a general anti avoidance rule (GAAR), which will allow for treaty override**
- **Germany has had for some years**

Anti-avoidance overriding treaties (continued)



- **Canada: Garrons et al v Her Majesty the Queen, 2006-1405(IT)G Tax Court of Canada**
- **Clear that the GAAR could have overridden the Barbados-Canada treaty**
- **Trend: clear that more countries are overriding treaties based on anti-avoidance rules, anti-abuse doctrine, etc., without regard to the other sovereign state (treaty partner)**

Courts upholding domestic treaty override rules?



- **Conclusion: few cases, but no sign of such rules being declared inoperative or similar**
- **Issue: whilst constitutional, are they in accordance with customary international law? Are they in breach of good faith?**

EU law influences - example



- **France-Netherlands. (No. 298108).
French pension fund**
- **France withheld tax on income derived by tax-exempt Dutch pension funds. Had they been French, no tax would have applied in France**
- **Held: France could not impose withholding tax on dividends paid to the Netherlands pension funds and not on French shareholders (continued next slide ...)**

EU law influences - example



- **Held (... continued): This would be a restriction on the free movement of capital required under Article 56 of the European Community (EC) Treaty, as it would favour French investors over Netherlands investors.**
- **Conclusion: clearly important trend**

Reference to and respect for the Vienna Convention



- **Case 07/12314 on 20 February 2009, Netherlands DTAs with the UK, Belgium and the US, Netherlands Supreme Court**
- **The case concerned the exit charge on individuals who emigrate from the Netherlands.**
- **The court held that the provisions to tax the unrealised gains were not in conflict with the treaties.**

Reference to and respect for the Vienna Convention (continued)



- **The Court also held that: the exit tax was not in conflict with Art. 3(1) of the Vienna Convention requiring good faith to be observed in the interpretation and application of tax treaties.**
- **Court referred to OECD com. on Art. 13 that this Article would not prevent taxation on the gain in value, and therefore held that there was no breach of the good faith principle in the Vienna Convention.**

Reference to and respect for the Vienna Convention (continued)



- **Conclusion: increasing awareness of the existence & importance of the Vienna Convention; but is it understood?**

Treaty override



- **Conclusion: increasing common (rapidly)**
- **Justifications:**
 - **a) anti-avoidance, abuse, 'smell test' – general principles and specific legislation,**
 - **b) not beneficial owner because insufficient economic substance,**
 - **c) specific treaty-override legislation**
 - **d) smell test, and e) smell test**

Respect for tax treaties

Conclusions



- **Full title: Respect for tax treaties as treaties (or treat them as domestic law) –**

Conclusions:

- **Respect for tax treaties (in contrast with other treaties) clearly diminishing (rapidly?)**
- **Courts have difficulty distinguishing between domestic law interpretation and approach and that applicable to treaties with other sovereign states**

Respect for tax treaties

Conclusions



- **Unilateral measures applied to opt out of treaty obligations**
- **Treaties significantly less reliable**
- **Value of tax treaties being quickly reduced**



**A background paper will be put
on the FIT website in due
course**

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