

Lang et al. (Eds.)

Tax Treaty Case Law around the Globe 2013

This book is a unique publication that gives a global overview of international tax disputes on double tax conventions and thereby fills a gap in the area of tax treaty case law. It covers the thirty-six most important tax treaty cases which were decided in 2012 around the world. The systematic structure of each case allows the easy and efficient study and comparison of the various applications and interpretation of tax treaties in different regimes. Never before have tax treaty court decisions around the world been presented in such a comprehensive and structured way. With the continuously increasing importance of tax treaties, the proposed book is a valuable resource and a must for all practitioners, multinational businesses, policy makers, tax administrators, judges and academics who are active in tax treaty case law.

Michael Lang, professor and head of the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business).

Jeffrey Owens, professor at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business) and Head of the Global tax policy center at the Institute for Austrian and International Tax Law, WU.

Pasquale Pistone, professor at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business), associate professor at the University of Salerno, Italy and Academic Chairman IBFD.

Josef Schuch, professor at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business).

Claus Staringer, professor at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business).

Alfred Storck, professor at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business).

Peter Essers, professor tax law at the University of Leuven (Belgium) and former member of the board of the European Tax College.

Eric C.C.M. Kemmeren, professor of international tax law and international taxation at and chairman of the Tax Economics Department of the Fiscal Institute Tilburg of Tilburg University, the Netherlands and member of the board of the European Tax College.

Daniël S. Smit, Ph.D. in international tax law and European taxation at the Fiscal Institute Tilburg of Tilburg University, The Netherlands.

Linde



ISBN 978-3-7073-2655-0



9 783707 326550

www.lindeverlag.at

Linde



81

Tax Treaty Case Law around the Globe 2013

Lang et al.

Series on International Tax Law
Michael Lang (Ed.)

Tax Treaty Case Law around the Globe 2013

Michael Lang
Jeffrey Owens
Pasquale Pistone
Josef Schuch
Claus Staringer

Alfred Storck
Peter Essers
Eric C.C.M. Kemmeren
Daniël S. Smit
(Eds.)

Linde

Series on International Tax Law
Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor)

Volume 81

Tax Treaty Case Law around the Globe 2013

edited by

Michael Lang
Jeffrey Owens
Pasquale Pistone
Josef Schuch
Claus Staringer
Alfred Storck
Peter Essers
Eric C.C.M. Kemmeren
Daniël S. Smit



Linde

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Das Werk ist urheberrechtlich geschützt. Alle Rechte, insbesondere die Rechte der Verbreitung, der Vervielfältigung, der Übersetzung, des Nachdrucks und der Wiedergabe auf fotomechanischem oder ähnlichem Wege, durch Fotokopie, Mikrofilm oder andere elektronische Verfahren sowie der Speicherung in Datenverarbeitungsanlagen, bleiben, auch bei nur auszugsweiser Verwertung, dem Verlag vorbehalten.

ISBN 978-3-7073-2655-0 (Linde) – www.lindeverlag.at

ISBN 978-90-8722-215-4 (IBFD) – www.ibfd.org

Es wird darauf verwiesen, dass alle Angaben in diesem Fachbuch trotz sorgfältiger Bearbeitung ohne Gewähr erfolgen und eine Haftung der Autoren oder des Verlages ausgeschlossen ist.

© LINDE VERLAG Ges.m.b.H., Wien 2014
1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

Druck: Hans Jentzsch u Co. Ges.m.b.H.
1210 Wien, Scheydgasse 31

Editor's Preface

Both the OECD Model Tax Convention on Income and Capital (OECD MC) and the United Nations Model Double Taxation Convention (UN MC) often serve as a basis for tax treaty negotiations between different jurisdictions worldwide. At the same time, however, interpretation of a particular tax treaty provision may still differ from country to country due to a number of reasons. Therefore, the risk of double/multiple (non-)taxation is not fully removed. In order to promote a uniform interpretation of tax treaties worldwide and, hence, to reduce the risk of double/multiple(non-)taxation, basic knowledge is needed on how various tax treaty issues are solved in different jurisdictions. It is widely known that a unified approach to interpretation and application of international tax treaty rules may benefit not only the countries which are parties to the tax treaty in question but also their taxpayers, as well as international trade and investment in general. Therefore, this topic is of ongoing concern to many tax scholars, practitioners, representatives of international organizations and public officers.

On 23-24 May 2013, the conference „Tax Treaty Case Law around the Globe“ was held at WU (Vienna University of Economics and Business). This international conference took place for the third time (for the second time in Vienna) and was jointly organized by the Institute for Austrian and International Tax Law of WU and the European Tax College of Tilburg University. The conference was dedicated to the analysis of the most important cases on international tax treaty law decided in different tax jurisdictions across the world in 2012. 33 cases were presented by outstanding tax experts from 23 countries. Each presentation was followed by an intensive and fruitful discussion. The participants in the conference compared the interpretation approaches existing in both the OECD and non-OECD member states and came up with comprehensive conclusions and suggestions. The main scientific results of the conference are presented in this book.

Each report in this book is dedicated to a court case or a number of cases from 2012 on a particular article of the tax treaty at issue (often based on the OECD MC or UN MC) in a certain jurisdiction. Every report is structured in a similar way: facts of the case, the decision and reasoning of the court and the author's observations, including the possible impact of the decision on international tax law developments in the respective country and in other jurisdictions. This clear and concise structure enables a solid and accessible overview of the 2012 case law on tax treaty application. The systematic structure of each report, allows for different tax treaty case law to be studied and compared in a simple and efficient way.

The editors believe that the reports presented in this book are of high value and therefore, will be of particular interest for academics, tax consultants, judges, public officers and all those interested in international tax law. The fact that

many domestic decisions are otherwise available only in the respective national languages makes the materials contained in this book even more valuable.

The editors would like to express their sincere gratitude to the Linde Publishing House for the cooperation and swift realization of this publishing project. Ms. Eleanor Campbell contributed greatly to the completion of this book by editing and polishing the texts for authors, for whom English is – to a great extent – a foreign language. Furthermore, we are most grateful to Erich Schaffer, Elena Variyчук and Michael Wenzl who helped with the preparation and realization of the conference and assisted in editing the book. Finally, special thanks go to Renée Pestuka who was responsible for the organization of the conference in Vienna and who also worked on the publication of this book.

Vienna, August 2013

The Editors

Michael Lang
Jeffrey Owens
Pasquale Pistone
Josef Schuch
Claus Staringer
Alfred Storck
Peter Essers
Eric C.C.M. Kemmeren
Daniël S. Smit

Contents

Editor's Preface	5
Personal and Substantive Scope (Art 1, 2 and 4 OECD Model)	
Katerina Perrou Greece: "Taxes Covered" – Is an extraordinary levy on business profits covered?.....	13
Ana Paula Dourado/José Almeida Fernandes Portugal: Tax treaty case law on personal and substantive scope.....	23
David G. Duff Individual Residence Under the Canada – U.S. Tax Treaty: Trieste v. The Queen.....	29
Renata Blahova Slovak Regional Court on a Dutch Holding without sufficient substance	41
Daniël S. Smit Dutch Supreme Court 30 November 2012, BNB 2013/54: Determination of the place of effective management of a non-active company.....	51
Philip Baker UK: Yates v Revenue and Customs Commissioners.....	65
Permanent Establishments (Art 5 OECD Model)	
Pasquale Pistone Italy: Can agent activities of an Italian Subsidiary constitute a Permanent Establishment of Its Foreign Parent?.....	73
María Teresa Soler Roch Spain: Permanent establishment – The concept of "fixed place of business" and the concept of "dependent agent".....	81
Danuše Nerudová Czech Republic: 2 Afs 29/2012-18.....	95
Business Profits and Associated Enterprises (Art 7 and Art 9 OECD Model)	
Luís Eduardo Schoueri/Mateus Calicchio Barbosa Technical services and the application of article 7 under Brazilian treaty practice: a case study	103

D.P. Sengupta	
India: Mediterranean shipping	117
Eric Kemmeren	
Netherlands: Thin capitalization rules are not inconsistent with DTCs and EU Law	129
Royalties (Art 12 OECD Model)	
Ana Paula Dourado/José Almeida Fernandes	
Portugal: Tax treaty case law on the application of Art 12 (royalties)	157
Billur Yalti	
Turkey: The Characterisation of Income as Royalty	163
César Alejandro Ruiz Jiménez	
Mexico: The application of Article 12 to income derived by the lease of Industrial, Commercial and Scientific Equipment	187
Dividends, Interest and Capital Gains (Art 10, 11 and 13 OECD Model)	
Michael Beusch	
Switzerland: Beneficial ownership issues in the light of Art. 10.....	201
Marjaana Helminen	
Finland: Do Investment Fund Distributions Constitute Dividends?.....	211
Tomas Balco	
Kazakhstan: NWKC Case.....	221
Hannah Litwińczuk	
Poland: Judgement of the Supreme Administrative Court of 24 July 2012 (II FSK 2487/11).....	229
David G. Duff	
Canada: Capital Gains Realized by an Austrian Private Foundation: Sommerer v. The Queen	241
Employment Income (Art 15, 18 and 19 OECD Model); Directors' Fees, Artistes and Sportsmen, Students and Other Income (Art 16, 17, 20, 21 OECD Model)	
Philippe Martin	
France: The Paupardin Case	261

Alexander Rust	
Germany: Interpreting the 183-day rule.....	269
Alexander Rust	
Germany: Pensions vs. Business Income.....	277
D.P. Sengupta	
India: Mohan Balakrisnan Pookulanagara	285
Jacques Sasseville	
Spain: Taxation of activities related to U2 concerts	291
Non-discrimination (Art 24 OECD Model)	
Edoardo Traversa/Gaëtan Zeyen	
Belgium: Taking into account foreign income for the calculation of personal tax deduction	305
Marjaana Helminen	
Finland: The Permanent Establishment Non-Discrimination Provision and Transfer of Assets	317
Danil V. Vinnitskiy	
Russia: Thin Capitalization Rules and Non-Discrimination Clause in the light of the „NaryanmarNefteGaz“ Case	325
Yariv Brauner	
USA: The United Airlines Flight Attendants' Saga Continues	339
Methods to Avoid Double Taxation, Mutual Agreement Procedure, Exchange of information and Assistance in the Collection of Taxes (Art 23, 25, 26 and 27 OECD Model)	
Philip Baker	
UK: Weiser v Revenue and Customs Commissioners.....	351
Edoardo Traversa/Gaëtan Zeyen	
Belgium: Territorial allocation of business expenses and exemption with progression.....	357
Malcolm Gammie	
UK: Ben Nevis	367
List of Authors	377

Portugal: Tax treaty case law on personal and substantive scope

Ana Paula Dourado/José Almeida Fernandes

- 1. Case 05071/11, 6 June 2012, Tribunal Central Administrativo Sul**
 - 1.1. Introduction
 - 1.2. Facts of the Case
 - 1.3. The Court's decision
 - 1.4. Comments on the Court's reasoning
 - 1.5. Conclusion
- 2. Case 05568/12 of 7 October 2012, Tribunal Central Administrativo Sul**
 - 2.1. Introduction
 - 2.2. Facts of the Case
 - 2.3. The Court's decision
 - 2.4. Comments on the Court's reasoning
 - 2.5. Conclusion

1. Case 05071/11, 6 June 2012, Tribunal Central Administrativo Sul

1.1. Introduction

In the tax case under analysis, the second instance of the Portuguese tax court – „Administrative Central Court – South“ – had to decide whether reimbursements made by a Portuguese corporation to a related French corporation for the payments made by the French corporation to one of its employees who had been hired to work in Portugal was income covered under Article 7 of the Portugal – France DTC.

1.2. Facts of the Case

The court accepted the following facts as established: Mr. C was the director of a company resident in France – B Corporation – who was seconded to company A to render services to it. A was resident in Portugal and a related company of B. Mr. C rendered the abovementioned services physically in Portugal, and according to the court, it was a matter of fact that company B paid him for those services corresponding to “wages, costs and bonuses”, and invoiced company A for a refund. Company A paid the gross invoiced amount to company B free of any withholding taxes. According to the court, it was also a matter of fact that the invoiced amount corresponded to an advanced payment or payment in substitution of these “wages, costs and bonuses”.

In 2004, A was audited and subsequently submitted to reassessment on the grounds that the services provided by C corresponded to income from services which was obtained in Portugal, according to Article 4(3)(c)(7) of the Portuguese Corporate Income Tax Code and therefore a withholding tax at the rate of 15% should have been applied.

The tax administration deemed the income to be related to services rendered physically in Portugal and as such subject to withholding tax. In contrast, the taxpayer contended that the occasional employment contract/secondment of Mr. C, concluded between B and A, implied reimbursement of the secondment costs, by A to B, in respect of the secondment agreement and the salary costs incurred by B. According to the taxpayer, A was not making a payment representing income earned as a result of the services provided by Mr. C, but income resulting from the secondment of a worker to a resident company. The beneficiary of the income would then be the non-resident company B, and therefore that income could only be taxed by France, under Article 7 of the France-Portugal DTC (point 4 of the decision). Article 7 (1) of the France-Portugal DTC was applicable, due to the fact that B was resident in France and France had the exclusive right to tax the profits derived by its residence in Portugal and as a consequence Portugal was not allowed to impose a withholding tax on the payment.

1.3. The Court's decision

According to the court, payments to Mr. C were advance payments by B and made on behalf of company A. The court did not accept the taxpayer's arguments, and therefore rejected the contention that B had rendered any services to A, but the amounts paid by A were instead a "reimbursement of amounts due for wages and related income that were paid to the manager, but for which A was responsible". Still, according to the court, Article 7 of the France-Portugal DTC, approved by Decree-Law n. 105/71, of 26 of March, is restricted to the profits of entities covered by the convention and is not applicable to payments made on any other basis. The payments as described were, according to the court "outside the scope of the aforementioned convention" and Portugal was not restricted in applying its domestic law and therefore this payment gave rise to a withholding tax obligation in Portugal.

1.4. Comments on the Court's reasoning

The court's reasoning on the application of the DTC seems to imply that its application is autonomous from the characterization of income for domestic tax law. More serious and unacceptable is the fact that the court seems to imply that the income is either characterized as profit – a characterization rejected by it, as explained before – or is outside the scope of the convention, as if there were no other tests in order to see whether the domestic provisions are applicable or whether their application is limited by the DTC; or ultimately, whether there are other types of income covered by the rules of the convention allocating taxing rights.¹

According to the court, because the income described above was outside the scope of the convention, it was taxable under Article 4 of the Corporate Income Tax Code, which extends the objective scope of the corporate income tax obligation to income paid by a debtor, who is a resident or has a permanent establishment in the Portuguese territory, to a non-resident resulting from other services provided or used in the Portuguese territory (Article 4(3)(c)(7) of the Corporate Income Tax Code).

The court seemed to accept that the income should be characterized as services provided directly by Mr. C, the employee of company B, to A. But it did not question if Mr. C was acting on behalf of B or provided the services to A. as an independent worker.

1.5. Conclusion

There are contradictory results from the characterization of this income as services for domestic tax law purposes and not as services for the purpose of determining

¹ See Vogel, K. and Lehner, M., *Doppelbesteuerungsabkommen der BRD auf dem Gebiet der Steuern vom Einkommen und Vermögen, Kommentar auf der Grundlage der Musterabkommen*, 5th edition (München: Beck, 2008), Einleitung, mnos 83-85.

the application of the DTC and its Article 7. There was no analysis of the legal and factual terms under which Mr. C rendered services to A nor any consideration as to whether there was a permanent establishment in Portugal as a result of the arrangement. There was no discussion either on the concept of income or on whether a mere reimbursement should not be considered as income for DTC purposes.

2. Case 05568/12 of 7 October 2012, Tribunal Central Administrativo Sul

2.1. Introduction

Case 05568/12, of 7 October 2012, discussed whether treaty benefits were to be granted to a non-resident who had failed to provide the forms required under Portuguese tax law.

2.2. Facts of the Case

Tejo paid for services rendered by corporations in the UK and Spain. Tejo did not withhold any tax at the time of payment. According to the Portuguese law in force at the time of the facts (Article 90(2) of the Corporate Income Tax Code) there was no obligation to withhold taxes in respect of income paid to a non-resident company (concerning the provision of services), where the taxpayers were partially or totally exempt or where, as a result of a DTC, the tax competence was not allocated to the source country or was only allocated in a limited manner.

Moreover, according to Article 90(3), of the same Corporate Income Tax Code, the beneficiaries of the income shall produce evidence to the withholding entity that the legal conditions for the exemption or for the application of the DTC exist. In the latter case, the beneficiaries have to provide the withholding entity with the official form certified by the competent authorities of the residence state. As a result of the aforementioned condition under Article 90(3), of the Corporate Income Tax Code, a regulation was enacted, approving the required forms.

At the relevant time, Tejo did not have in its possession the necessary forms which was a condition for the application of the DTCs. The tax authorities assessed Tejo for the tax it should have withheld. The taxpayers proved that both corporations were resident for tax purposes in the UK and Spain. They were entitled to the application of Article 7 of the corresponding DTCs (no withholding of taxes) but they had not fulfilled the procedural requirements.

2.3. The Court's decision

The court noted, on the one hand, that Article 8(2) of the Portuguese Constitution grants primacy to tax treaties over domestic law; it added, on the other hand, that the procedural rules necessary to prove that material conditions occur are the responsibility of the contracting states, since it is within the competence of these

states to define the adequate instruments and means of proof of the necessary conditions.

According to the court, Portugal introduced specific rules in the Corporate Income Tax Code as a condition to the entitlement to DTC benefits. Portugal had approved specific forms to which the Corporate Income Tax Code referred and which were a condition for obtaining an exemption, *inter alia*, from withholding tax on payments to non-residents. The introduction of the forms “institutionalized a specific, special, irreplaceable means of proof of fulfilment of the legal requirements, not only of residence, resulting from and required by DTCs” and the fact that those forms were a condition of applying the allocation of taxing rules was not incompatible with the tax treaty.

2.4. Comments on the Court's reasoning

The court held that the aforementioned forms could not be substituted by any other means of proof, even if they were a condition *ad probationem*. This decision contradicts the previous case law which allowed proof of entitlement to treaty benefits by other means. The court has adopted a formalistic approach and did not discuss whether the principle of proportionality was fulfilled.

The competent authorities in the residence states have not always accepted the requirement to submit the abovementioned specific forms and to certify the information required on those forms.

2.5. Conclusion

The court's decision as described above has practical implications because of the difficulties raised by the required use of specific forms and the type of certification required from other competent tax authorities.

Individual Residence Under the Canada – U.S. Tax Treaty: Trieste v. The Queen

David G. Duff

- 1. Introduction**
- 2. Facts of the Case**
- 3. The Court's decision and comments on the Court's reasoning**
 - 3.1. Centre of Vital Interests
 - 3.2. Habitual Abode
- 4. Conclusion**