

PRACTICAL APPLICATION OF TAX TREATIES

A joint OECD – IFA research project

This note outlines a joint OECD-IFA research project, agreed at the 2004 IFA Congress in Vienna, to revisit and take forward the reports to the 1998 IFA Congress in London on Practical Issues in the Application of Double Tax Conventions over the next two years. Help is requested from IFA branches with the project.

Objectives of project

The main objectives of the project are the collection and dissemination of current information about the practical application of tax treaties, together with an analysis of the legal principles that operate on issues of application and an identification of the problems of application and available solutions to those problems. The project team intends, by means of the project, to undertake:

- construction for the purposes of the project of a database of national information about the practical application of tax treaties;
- organisation of a comparative analysis of common issues that arise from that information;
- identification of best practices in the application of tax treaties;
- publication of one or more reports analysing the information collected with a view to identifying and clarifying both legal and practical issues to assist in developing the effective, efficient and fair application of tax treaties by and to all parties.

In view of the different target audiences, although sharing information and research, OECD and IFA will wish to publish independently and separately, different analyses, conclusions and recommendations. It will be for IFA and OECD to consider further progress.

How the project will be conducted

The project will be headed by a small team of which Hans Mooij will be rapporteur on behalf of the OECD and on behalf of IFA Professor David Williams, the General Reporter to the 1998 Congress on this topic. Academic advisers will include Professors Philip Baker, Michael Lang, Kees Van Raad, and Richard Vann.

Help requested from IFA branches

With the support of Central IFA, the reporters ask all IFA branches:

- (1) To comment on the scope of the project and help identify relevant issues;
- (2) To nominate individuals to assist the project by revisiting and updating the 1998 branch report (or by producing an IFA branch report where none was submitted in 1998). In addition, a revised questionnaire will be issued after taking into account comments from IFA branches at stage (1);
- (3) To assist with enquiries from the project team about specific issues.

IFA branches are asked to make any initial comments by 31 March 2005. It will greatly assist if at the same time each branch that submitted a report in 1998 could ask the branch reporters or another colleague to comment on any necessary changes to update the 1998 report to that date. (See Annex 2).

The OECD Centre for Tax Policy and Administration will support the project with time of staff members and its information resources. It is also assisting in identifying issues and requesting appropriate individuals in member jurisdictions to assist by providing information and comments. Selected academic institutions specialising in

international tax law are supporting the project both through the advice of leading academic members and also by nominating postgraduate students to conduct collection and analyses of relevant law, information and literature. It is intended that postgraduate students be asked to assist IFA branch reporters where this will help the IFA branches. We also plan to arrange for the project to be supported by, and coordinated through, a web-based information resource available to all those directly involved and, in due course, to IFA branches and members.

Scope of project

The project is targeted at the general application of tax treaties in the common kind of case. It is not designed to deal with application of a treaty to specific issues that justify individual attention of a national tax authority and the taxpayer and advisers, either by way of their complexity and unique nature or by reason of a view that a transaction is or may be abusive. Nor is the project designed to deal with issues of jurisdiction or treaty policy. In other words, its focus is the mainstream application of treaties currently in force. This will include practical issues within regional and other groupings such as the European Union. Our essential concern is with the practical application of specific provisions found in current tax treaties to typical situations, illustrations of which are set out in Annex 1 to this note.

The precise scope of the project will be defined by reference to a questionnaire to all IFA branches and to researchers. This will be drawn up in 2005 in response to comments from IFA branches and the team's advisers on the list of topics set out below. It is necessary to ensure that we tackle an achievable range of topics in this project. Nonetheless, the project team encourages researchers and commentators to look at the way jurisdictions handle international aspects of other taxes when commenting. These include: handling of customs issues in line with the conventions of the World Customs Organisation; handling of international issues arising from the value added tax, goods and services tax or similar general sales taxes; handling of international aspects of the collection of social security contributions.

It is important that reports are based on as wide a survey of jurisdictions as can practically be arranged, taking into account differing stages of economic development and different economic and language backgrounds. The working language will be English, but the project will work in the other official IFA Congress languages, i.e. French, German and Spanish, where necessary.

Timetable

The project starts from the General and 30 IFA branch Reports published on the topic for the IFA Congress in 1998 (Cahier de Droit Fiscal International Vol. 83b), noting relevant issues in the 2004 General and IFA branch Reports on double non-taxation (Cahier de Droit Fiscal International Vol. 89a). It aims to deliver its further reports in time for consideration at the IFA Congress in 2007. It also intends to develop an electronic database of information collected. We will start work in the academic year 2004-5. At the same time, we invite the comments of IFA branches and of interested individuals on the scope of the topic.

A more detailed questionnaire will be prepared and issued in 2005 in the light of responses and comments. This will then be circulated to invite responses from IFA branches. At the same time we will work with the academic institutions to continue the collection and analysis of information. All contributions will be discussed at a specialist and Branch representatives' seminar preceding or following the 2006

Amsterdam Congress, from the outcome of which the reports will be finalised, and the database will also be released.

Specific topics for consideration

The reporters (Mooij and Williams) set out below an analysis of the topics that could be included in this survey. These topics were in part the subject of the survey and reports in 1998. Some topics were also part of the survey and reports on double non-taxation in 2004. The topics selected will be approached in the way we have indicated about the scope of the topic, and with a view to focussing on examples such as those in the attached annex.

But we are concerned both that we concentrate on the problems that currently cause concern and at the same time that we are not too ambitious and do not attempt too much with the project at this stage. We will therefore develop a specific questionnaire for IFA branches and commentators, or perhaps a two-stage approach to information gathering, in the light of comments on this paper and expressions of interest and help.

The reporters ask all IFA branches and interested individuals to comment on this project and specifically on this list, the scope of the project, and the examples in Annex 1.

You are asked to consider which of the following topics are of particular importance to your jurisdiction:

1 Constitutional and legal frameworks of your jurisdiction relevant to tax treaties

- nature of any constitutional provisions relevant to conclusion or application of tax treaties
- whether a tax treaty is automatically part of the law of the jurisdiction on ratification or does it need express incorporation
- how treaties are incorporated into domestic law
- how tax treaties interact with internal tax laws - for example: priority over domestic law; application to non-nationals and non-residents; effect on local taxes

2 Principles and practices by which tax treaties are applied in your jurisdiction

- are there specific international agreements or arrangements or domestic legislation or general regulations dealing with the application of tax treaties, or of treaties of a general kind including tax treaties? Do the laws incorporating tax treaties also deal with application?
- details of administrative codes, circulars or general publications about tax treaty application
- nature of specific rules such as time limits, the need for specific claims, or registration
- whether rules relating to taxpayer privacy or confidentiality
- extent of administrative discretion in providing tax treaty benefits

3 The administrative frameworks for application of tax treaties in your jurisdiction

- which authorities negotiate and apply tax treaties

- how relations with other jurisdictions parties to tax treaties are handled, including exchanges of information and generalised mutual agreements
- what guidance is given to those making claims, and the form that claims are required to take
- how claims from resident/national and non-resident/non-national taxpayers covered by tax treaties are handled, including advice, rulings, assessments and determinations
- how assistance in collecting foreign taxes is handled

4 Deciding on applicable jurisdictions, and identifying relevant taxpayers

- whether taxpayer identification numbers issued
 - how acceptance of characterisation of taxpayer (for example of a partnership or non-profit entity with or without legal status) is confirmed
 - how beneficial ownership of assets such as dividends is confirmed
 - how residence (or non-residence) or other status (such as domicile or nationality) of taxpayer is confirmed
 - whether tax authorities require prior rulings or permissions for taxpayers to receive tax treaty benefits
 - what requirements of tax authorities involve information from foreign tax authorities to support claims for tax treaty benefits
 - whether foreign taxpayers must have local agents or intermediaries
- [Note: this interlinks with 5 and 6 below]

5 Paying tax to and making a treaty claim from your jurisdiction as a source jurisdiction

- how source-jurisdiction taxes on dividends, interest, royalties or other forms of income are imposed, whether by withholding or assessment
- whether duty on payers to collect withholding taxes
- whether duty on intermediaries to remit taxes
- whether treaty relief from withholding taxes is automatic or by refund, and on what conditions
- how claims for treaty relief, if necessary, are handled
- how certification can be obtained of taxes withheld or other information from the source jurisdiction to a taxpayer's jurisdiction of residence
- whether there any presumptive taxes on local source income of foreign based taxpayers and if so how they work
- how disputes are handled, including use of mutual agreement procedures

6 Paying tax to and making a treaty claim from your jurisdiction as a residence jurisdiction

- how the jurisdiction deals with foreign taxes (or exemptions from tax)(either generally or by reference to dividends, interest, royalties, employment earnings, business profits, rents, or other specific forms of income)(including exemption or credit approaches)
- whether exemptions with or without progression
- whether resident taxpayer must declare income exempt under a treaty
- whether entitlement to deduction against income taxable in the jurisdiction of expenses incurred in other jurisdictions in connection with foreign income
- whether assistance in collecting foreign taxes
- how relief from double taxation is given (for example by automatic relief, relief on application, refund on proof of payment of foreign taxation)
- how disputes are handled, including use of mutual agreement procedures

Annex 1: examples of typical taxpayers with treaty issues

1 A medium sized business with some international exposure sees an opportunity to develop business in a new jurisdiction with (or within) which it has previously not done business. It wishes to know at what stage it must or should inform its own and the other national tax authorities, how it should do that, what steps it should take to clarify any jurisdictional issues with the tax authorities (such as residency status), and how it should avoid any double charge to income tax from, and protect any losses on, the project.

2 A wealthy individual has been offered the opportunity to make a portfolio investment in a jurisdiction with which the individual has previously had no commercial connections. The individual has been offered a choice of possible methods for making that investment. The individual is concerned to establish whether there are any withholding or other income taxes operating on the anticipated returns from the investment and how the two national tax authorities will deal with any double taxation that results. The individual does not see this investment as a tax avoidance step but as a straightforward investment in a new but realistic business venture. However the individual will of course seek to reduce tax exposure within the rules of both national tax systems.

3 A company needs to send one of its employees to another jurisdiction for the purpose of performing certain auxiliary business activities. Neither the company nor the employee had or has had any previous commercial or personal connection with that jurisdiction. It is anticipated that the employee will only be in the jurisdiction for a short period, in total not more than 183 days in a year, but that the employees activities in the jurisdiction will carry on for some years. The company and employee are both concerned to find out if they must or should inform their own or the other jurisdiction's tax authorities (and if so, when and how), whether there will be a tax liability in that other jurisdiction, and how they can avoid any double taxation.

Annex 2:

IFA Branch reports published with the general report on Practical issues in the application of double tax conventions In the 1998 Cahiers

Argentina	Dr Antonio Hugo Figueroa
Australia	Roger Hamilton
Austria	Dr Claus Staringer
Belgium	Thierry Denayer
Brazil	Dr José R. Pisani
Canada	Stephen Bowman / Albert Baker
Czech Republic	Ton Kemp / Lucie Vorlickova
Denmark	Esther Schmith / Palle Graff
Finland	Ola Saarinen
France	Yann de Kergos
Germany	Dr jur Matthias Werra
India	Tapas Ram Misra
Indonesia	A Prijohandojo Kristanto / Rahmanto Surahmat
Israel	Dr Avi Alter / Joshua Sherman / Helena Vinter
Italy	Dr Andrea Manganelli
Japan	Isao Watanabe / Yuko Miyazaki
Korea, Republic of	Sung Keun Choi
Mexico	Ramiro González Luna / Eduardo Revilla
Netherlands	JJP de Goede / BJJM Lucas Luijckx
New Zealand	Denham Martin / David Partington / Charles S Wilkie
Norway	Stig Sollund
Portugal	Dr Francisco de Sousa da Câmara
Russia	Serguei Shatalov
South Africa	Ray Eskinazi / Jonathan Barrett
Spain	Stella Raventos Calvo
Sri Lanka	P Karalasingham
Sweden	Inger Paulin
Switzerland	Dr Peter Baumgartner / Andreas Kolb
United Kingdom	Jonathan Schwarz
United States	Mary Bennett / Richard Andersen

[Note: there was no separate report involving the European Union or other regional organisations]

There will also be common ground with the 32 IFA branch reports more recently prepared on the subject of double non-taxation for the 2004 Congress and Cahiers.