行政院及所屬各機關出國報告

出國類別：國際會議

參加第五十七屆國際財政協會雪梨年會會議報告

服務機關：財政部臺北市國稅局

出國人　職　　稱：局　長

姓　　名：張盛和

出國地區：澳大利亞雪梨

出國期間：92 年 8 月 31 日至 9 月 7 日

報告日期：92 年 12 月 5 日

系統識別號:C09204910

公 務 出 國 報 告 提 要

頁數: 40　含附件: 是

報告名稱:

參加第五十七屆國際財政協會雪梨年會會議報告

主辦機關:

財政部

聯絡人／電話:

張雅惠／2322-8299

出國人員:

張勝和　財政部臺北市國稅局　　局長

出國類別: 其他

出國地區: 澳大利亞

出國期間: 民國 92 年 08 月 31 日 -民國 92 年 09 月 07 日

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分類號/目: D6／賦稅　D6／賦稅

關鍵詞:　財政協會

內容摘要: 國際財政協會年會係於八月三十一日至九月五日在澳大利亞雪梨舉行，我國由臺北市國稅局張局長盛和、勤業眾業會計師事務所董會計師麗貞、安侯建業會計師事務所許會計師志文，以及賦稅署李科員明機等四人代表出席，本次年會之大會議題有二項分別爲：（一）對公司（股東）課稅之趨勢：課一次稅或兩次稅（Trends in company/shareholder taxation: single or double taxation?），（二）消費課稅與金融服務（Comsumption taxation and financial services）。另會方並安排六場研討會，就國際財政協會與經濟合作發展組織（IFA-OECD）之關係、租稅協定有關股票增益之處理、國際租稅中之反避稅規定、國際租稅近期之發展、OECD Model第九條所定義之「關係企業」爲何、境外投資基金制度等議題進行討論，故參加本次會議無論在促進友好國家實質關係，或吸取國際經驗方面，均獲益匪淺。

目　　　　錄

參加第五十七屆國際財政協會雪梨年會會議報告

第一章　前言

國際財政協會（International Fiscal Association，簡稱 IFA）係一國際性財稅組織，每年於會員國輪流舉行年會，探討國際租稅問題，在國際間著有聲譽。本屆年會係於 8 月 31 日至 9 月 5 日在澳大利亞雪梨舉行，我國由臺北市國稅局張局長盛和、勤業眾業會計師事務所董會計師麗貞、安侯建業會計師事務所許會計師志文，以及賦稅署李科員明機等四人代表出席，本次年會之大會議題有二項分別為：（一）對公司（股東）課稅之趨勢：課一次稅或兩次稅（Trends in company/shareholder taxation: single or double taxation?），（二）消費課稅與金融服務（Comsumption taxation and financial services）。另會方並安排六場研討會，就國際財政協會與經濟合作發展組織（IFA-OECD）之關係、租稅協定有關股票增益之處理、國際租稅中之反避稅規定、國際租稅近期之發展、OECD Model 第九條所定義之「關係企業」為何、境外投資基金制度等議題進行討論，以下茲在第二章及第三章分別就大會議題，以及專題研討會之研討內容，作簡厄介紹臚陳於后。

第二章　主題議題之討論內容

壹、Subject I：對公司（股東）課稅之趨勢：課一次稅或兩次稅（Trends in company/shareholder taxation: single or double taxation?）

主　席：Malcolm J. Gammie (United Kingdom)

討論者：Prof. Richard. Vann（Australia）

Krister Andersson (Sweden)

Barbara Angus (USA)

Prof. Adolfo J. Martin Jimé nez(Spain)

Prof. Wolfgang Schoen (Germany).

本主題將討論並檢視各國政府持續用以確保該國公司股東利益之課稅制度，希望各國能夠遵循國際法則。尤其是討論許多國家取消設算制度（imputation system）後之各種減少股東負擔（shareholder relief systems）之規定，諸如最近美國已廢除長期標準課稅制度。除股利之問題探討外，鑒於股票資本利得現已被視為公司股東課稅基礎之一部分，故本研討會亦討論現今國際上對股票資本利得之處理。其內容介紹如下：

一、當跨國投資組合或是直接投資時，公司或股東課稅之趨勢是否有任何之新國際標準，以及該標準係如何影響來源國和居住地國家對於跨國資產投資分配稅收。玆先分別就公司利潤、股利及股票資本利得等租稅待遇作一比較：

首先預設下列情況：

１、資產組合投資者甲，投資在Ａ國當地之公司Ａ，僅在Ａ國賺取利潤（稱為國內資產組合投資）。

２、資產組合投資者甲，投資於在Ｂ國之公司Ｂ，僅在Ｂ國賺取利潤（稱為國外資產組合投資）。

３、資產組合投資者甲，投資於當地之公司Ａ，而Ａ公司在Ｂ國有子公司Ｂ，Ｂ公司僅在Ｂ國賺取利潤並支付股利予其母公司Ａ（稱為國外直接投資）。

假設視Ａ國為居住者國家，視Ｂ國為來源者國家。當考慮Ｂ國對股利支付給資產組合投資者甲及母公司Ａ之處理，就有必要比較股利支付給居住在Ｂ國之資產組合投資者或者給付給Ｂ國當地母公司之情況。

但是在目前國際環境中，僅比較二個國家之情況是不切現實，實際之情形尚包括在Ｘ國家的資產組合投資者投資到某些存款機構（包括保險公司、共同基金，養老金免稅之計劃），再由這些機構投資母公司Ａ，母公司Ａ擁有在Ｂ國家之分支機構Ｂ公司，但是Ｂ公司可能在Ｙ國家賺得其利潤。因此，最後資產組合投資者Ｘ之存款，將反應

X 、A、B 和 Y等國家之課稅制度。

然而在僅二個國家之情況下，仍可拋出上述問題的癥結點，例如來源國對於國內投資者與對國外直接或組合投資者有關公司稅或股利課稅係如何處理。而來源國可能同意透過雙邊租稅條約之方式，約定境內公司或股利課稅制度對於適用在國外投資者之規定，在此情形下，B國亦將考量A國對於居住者之公司或股利課稅情況。除此之外，本主題之最後部分將討論從簡單的兩個國家，轉變為更複雜的多邊國際投資，另亦特別集中在公司股東課稅趨勢之研討上。

二、Segment 1：目前國際環境之正確股利課稅制度

（一）來源國之觀點：

國際上對於股利課稅基本採用"傳統"之觀點，亦即所得來源國B通常對歸屬在B境內之資產投資產生之利潤課稅，而忽略居住者國家A對於B國境內公司分配予A國股東課稅之任何規定。也因此A國必須視B國擁有優先課稅權之課稅程度再對其股東課稅，以減緩國外股利之雙重課稅情形。

目前國際規定僅在B國視債務為準資產（quasi-equity）之前提下，否則B國並不對債務的返還課稅，會如此規定，是因債務具有資產之特性，或者是因B公司之資本將因而減少，除了上述情況外，B公司必須將收入減除債務融資成本，因此其課稅所得勢必減少。B國為求徵稅，可能對利息支付採取扣繳手段，但在許多案例中，最後之扣繳稅收可能微乎其微。

債務或資產的選擇將影響兩國間對於從跨國公司活動徵稅多寡之程度。而整合公司及股利課稅制度的一個主要原因即在於要減少資產投資與債務融資之差異性。為避免法人組織相對於其他營利型態需採單一課稅所造成之扭曲，合併公司及股利課稅制度因此十分重要。當然，政府也能選擇股利課稅之制度，藉以影響公司發放股利或保留盈餘之策略。此外，大多數國家均體認到對公司盈餘課稅即表示股東投資行為之預付稅款。

惟所得來源國通常不認為上述措施恰當，但因體認從來源國盈餘

分配之股利，居住者國家將對該股利課稅，為減少對資產投資課稅之程度，因此國際發展之趨勢遂採取了下列措施：

1. 所得來源國已傾向放棄減除股利採差別稅率之制度，因為最後之結果沒有任何益處，並且使得公司稅之實質稅率降至零。
2. 所得來源國之設算制度將不考慮境內任何投資者享有稅額抵減之待遇。

事實上所得來源國可能經由對投資者採股利扣繳之方式來增加稅收，也因此反應了來源國對居住地國股東課稅之直接要求。

（二）居住地國之觀點：

居住地國A必須解決盈餘業被B國課稅，其隱涵在盈餘中併同課稅之股利遭重覆課稅之情況，足見公司盈餘遭重複課稅之情形在居住地國與來源國是沒有區別的，故A國之措施將致力於減少債務融資與非營利組織選擇之偏差。

A國必須承認股利已在B國課稅之情況，但對於B國扣繳股利之措施，可以透過雙邊協定來消除或降低，如果B國在其境內實行設算制度（即允許境內股東抵減已繳納之公司稅），則A國亦可與B國協商，以求A國之股東投資B國有相同之稅額抵減待遇。理論上，A國若實施設算制度，則將較有利協商，但實際上來源國B通常不願意透過跨國股利稅額扣抵來抵減已課徵之公司稅。

倘A國實行之設算制度允許已納之公司稅返還予國外股東，則A國居住者對於國外投資之行為勢必產生偏差。不管直接對資產組合投資或是間接透過從B國取得利潤之母公司A支付股利，A國並不會對B國返還已課徵稅款；惟在一般情形下，A國通常對在B國利潤課稅後所獲得之股利，採取與在A國對利潤課稅後所獲取之股利，有一致性之課稅基礎。

在傳統制度下，股利是以投資者個人邊際稅率來課稅，而不論是否由公司來支付該筆稅款。然而當A國視股利從B國分配並課稅下，所採行之措施將包括採單一稅率、差別稅率、稅額扣抵和股利減免。在上述情況下，境內和境外資產投資之差異點，存在於A國政府和B

國政府對股利所採取之稅率。

不同國家實行不同之公司股利課稅制度產生許多問題，國際間之設算制度運作不良主要是因其隱含偏好國內投資，此一問題B國較A國嚴重。B國政府不配合A國政府實行抵減公司稅之做法，可能阻礙B國居住者對於A國之投資。

B國制度阻礙了對外投資，但上述情況亦須視A國之股利課稅制度而定。原因在於當A國實行較為單純之標準制度，則B國對於抵減公司稅之實施較無壓力，並且當A國在要求國內公司分配股利扣繳下，B國更能維持對內投資之扣繳制度。同時，B國對境內投資者支付境外股利所採行課稅之方法，與其對國內股利課稅之情形一致。相較之下，A國除非受制其他之約束（如租稅協定），否則對國外股利課稅將不同於國內股利。

實際上，多數已發展國家必須解決A國和B國不同觀點所產生之問題。因此國際發展之趨勢，已朝向對跨國投資者採取更為中立之態度，並且體認避免公司利潤被雙重課稅之重要性，亦即必須匯聚非僅限於朝向股利單一課稅之不同方法來達成上述目標。

針對本節討論之內容，獲致下列結論：

1. 股利課稅必須考量公司利潤是由誰支付之觀點重要嗎?
2. 如果是的話，是否有一種股利課稅的模型可以達成單一課稅的目標，以減少跨國資產投資之扭曲?

三、Segment 2：區分跨國投資者之稅收歸屬於所得來源國及居住地國

國際間企圖透過三種方法對資產投資之匯回課稅：即分別透過公司利潤、股利及股票資本利得課稅。在探討這些不同課稅方法間之關係時，政府通常必須作某些調整以避免在公司階段對於資產投資之盈餘匯回被課了好幾次稅，因此，相較於個人股東之股利或個人之資本利得，公司型態股東之股利和資本利得必須受限於較複雜之課稅方式。

整合跨國資產投資所需面對之不同課稅方式，以防止對投資匯回

課徵更高之實質稅率，將十分困難。目前國際會議討論均認為所得來源國有對歸屬於境內投資之利潤課稅之權利，但如同 Segment 1 討論所述，雖然居住地國實施公司及股利課稅合一之制度，所得來源國是不願意對居住地國放棄他們課徵公司稅之權利；同時所得來源國亦不企圖對由居住地國股東賣出股票時所獲取之資本利得課稅；同樣地，居住地國也不企圖藉由課稅方式來干預股東實現資本利得。

所得來源國及居住地國區分稅收最自然之方式，即所得來源國對利潤課稅，而居住地國對股利及資本利得課稅。有關 OECD 租稅協定範本第十條第一項規定，提供了居住地國對所得來源國支付股利課稅之權利，但第十條第二項亦規範了所得來源國亦可對股利所得扣繳。

對於股利扣繳稅款之情形在跨國直接投資之論證上仍顯薄弱，而前述之直接投資可透過Ａ國之分公司或Ｂ國之分支機構來進行。除非Ｂ公司有被課徵分公司利潤稅(代表對股利課稅)，否則Ａ國通常對於Ｂ國境內分公司匯回之利潤不採取任何措施。因此，透過子公司直接投資所產生之股利支付，尚須扣繳稅款，相較於分公司利潤匯回不須課稅之情形，子公司型態必須負擔額外之稅負。

另一方面，鑑於國內母公司和子公司間的股利流通並不會課稅，因此，即使Ａ國對國內投資產生之股利扣繳稅款，仍然允許境內母公司和子公司之股利流通不課稅，或是允許已課徵之扣繳稅款給予抵減，除非Ａ國同意用相同之方式抵減已在Ｂ國之扣繳稅款，否則對於分配股利予國外母公司扣繳稅款之現象，將形成另一階段之重複課稅。為避免上述情形發生，歐盟國家針對母子公司股利流通，已原則同意消除扣繳之規定。

Ｂ國政府可以參採境內股利課稅制度以證明扣繳稅款之正當性，並且在Ａ國政府對資產股利附加額外之個人稅負時，更能支持其立論；儘管如此，對所得來源國之股利扣繳，其理論基礎仍顯顯薄。

股利扣繳制度之存在將會阻礙跨國直接和資產組合投資，特別是經由仲介機構從事資產組合投資之情況，例如經由共同基金、保險公司和非儲蓄機構等。所以就股東之立場而言，扣繳稅負將是額外之成本。

針對本節討論之內容，獲致下列結論：

1. 消除經由公司組織不同階段之資產投資產生重複課稅之程度。
2. 尋求整合股利課稅、股票增益課稅及公司盈餘課稅之程度。
3. 如何將區別所得來源國及居住地國稅收型態之觀念，由境內轉換為國際問題。

四、Segment 3 :如何採取公司或股利課稅制度以處理跨國資產投資問題，或是另有其他可供選擇之制度

大多數個人資產組合投資在境內發生，但多數跨國資產組合投資是以透過多國籍企業或藉由共同基金、保險公司等儲蓄型公司之組合投資型態來作投資。而此儲蓄機構可能因A國之特別課稅制度（可能透過經由減免該機構之稅負，亦或使其朝向個人階段課稅而非公司階段）而有某種程度之優惠。上述朝向個人階段課稅之措施並不會對源於A國境外而在境內募集之投資基金課稅，而一旦個人存款已成為中間（媒介）機構之資金，B國將不再視源於A國之資產投資與A國有任何實質關係。

若B國政府僅對在其境內投資產生之公司盈餘課稅，是不具任何實質意義的，問題在於跨國資產投資之行為，所得來源國對其匯回扣繳稅款，並不會阻礙B國相對於其他國家之投資。較複雜之處理型態發生在當尋求對源於X國之儲蓄課稅，但是中間機構在A國，而投資在B國時，其A國之作法為何？

近年來公司稅在國際間之平均稅率已從平均48%，降到1980年之35%，以致於1990年代末期之25%。由於公司稅基礎之加寬在某種程度上已經補償了公司稅率的減少，並且對公司利潤之維持做重要程度之支撐。然而，公司稅率之降低反映了對所得來源國家吸引公司投資之活動將更具競爭優勢，特別是在某些特定項目具機動性，但成本高於競租之投資上。

另一方面就居住地國之觀點言，亦需維持對該國居住者在個人儲蓄投資所賺取之利潤返回課稅之權利。

針對本節討論之內容，獲致下列結論：

1.所得來源國及居住地國家尚須考量在允許投資機構存在下，採取公司課稅和股利課稅之情形。

2.是否有其他方式可以解決當前國際間對於資產投資課稅所發生之問題。

Vann 教授對本研討會概述其結論如次：

公司稅對於商業流通十分重要；但股利課稅制度已有轉變，即

- 從設算制度到更簡單之系統；
- 從古典雙重課稅制度到單一課稅之規定；
- 以最大個人稅率對股利全面課稅。

另外針對股利重複課稅產生扭曲之現象，Mrs. Angus 做成如下結論：

- 在公司型態下對於投資的偏差；
- 偏好負債而非資產之偏差；
- 保留盈餘而不分配之趨勢。

Prof. Martin Jimé nez 更質疑設算制度是否是最適之制度，亦或會造成更多問題，因為設算制度將產生如下問題：

-時間成本；

-租稅優先選擇之調整；

-退稅問題；

-股利和資本利得之處理差異。

貳、Subject II：消費課稅與金融服務(Comsumption taxation and financial services)

主　席：Satya Poddar (Canada)

討論者：Han Kogels (Netherlands)
Vieri Ceriani (Italy)
Peter Jenkins (United Kingdom)
Tony Long (Australia)
Alan Schenk (United States)

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金融服務通常從加值稅或者其他的一般消費稅中免除。本議題將檢視對金融服務減免制度之操作和它對經濟之衝擊，尤其是在處於競爭市場方面。討論係分成三個主要部分，第一部分將著重在世界上對於金融服務課稅之一般方法介紹；第二部分係探討目前免稅制度所遇到之問題，這個部分亦討論部分進項稅額扣抵制度、外包金融交易過程中課稅之運用，以及歐洲最近法庭判決所提供的原則；第三部分針對特殊問題討論，或者簡化部分進項稅額扣抵制度之分析。

一、現今金融服務課稅之一般方法介紹

本討論將對以下現今減免制度之特色作一介紹，專題討論小組每位成員將對免稅系統內下述五項主要設計功能提出評論，他們著重在其最熟悉管轄權領域之 VAT（加值稅）制度。五項主要設計功能為：

1. 免稅金融服務之定義
2. 部分扣抵方法
3. 進口服務反向收費機制
4. 集團法則
5. 外包之待遇

此免稅制度引起四項主要考量，分別是(1)競爭之扭曲；(2)稅制重複；(3)替代產品與服務課稅之非中立性，以及 (4)稅制依循與基徵管理之複雜性。專題討論小組將就免稅系統的特定設計功能組成做出評論，或就上述考量提出改善，並闡述政府嘗試提出的作法。

• 免稅金融服務之定義：

當存款與放款及發行金融證券等核心金融服務在法律管轄區均免稅時，其他之金融服務（係指隨金融市場創新而有顯著增加之商品）的稅負處理勢必有重大改變。例如：

1. 第三人服務，包括代理機構與「代辦（arranging for）」服務

這些服務排除在新加坡金融服務定義之外，紐西蘭亦提議將其涵

蓋在納稅體系內，澳洲對於這些服務有特殊的規定，而「代辦（arranging for）」金融服務的成立，經常引起納稅義務人與稅捐稽徵機關之間的爭議。

2. 資產與基金管理服務

在加拿大全部屬於應稅範圍，但在歐洲及許多其他法律管轄區係屬於免稅。資產管理是金融市場逐漸成長的部門之一，而資產管理服務課稅對於政府稅收將具有顯著影響。

3. 國外來源金融服務

國外來源之金融服務是否屬於金融服務範圍呢？歐洲法庭對於此問題有相當多的闡述【例如：Sparekassernes Datacenter(SDC) 與 First Data Resources (FDR)案例】。奧地利對於國外來源之金融服務課稅，但屬於低稅率；加拿大制訂非常嚴厲的規定，旨在對該國外來源服務課稅，但當提供服務者需以類似金融機構之方式承擔財務風險時則排除在外。

4. 保險與擔保

紐西蘭與澳洲將一般保險（產物與意外保險）排除在金融服務定義之外；加拿大將擔保（其結構可能為保險方式）排除在免稅服務之外。許多國家免除保險之加稅，但課徵特殊賠償稅，例如：德國對一般保險費採15%特殊稅（與標準加值稅相同）。

5. 徵收金融服務稅之選擇權

歐盟成員國可授予金融機構選擇權，選擇將免稅金融服務改為應稅，此選擇權受惠於當金融機構客戶為加值稅之登記人，該客戶可就金融機構收取之稅額進行進項稅額抵減，惟歐洲的選擇權制度經驗並不一致，不是成員國不願意允許此選擇權，就是即使成員國允許，但金融機構亦不願使用。

二、部分進項稅額扣抵制度、外包金融交易過程中課稅之運用，以及歐洲最近法庭判決所提供的原則

（一）部分扣抵方法

1. 公式基礎或要求以公平與合理方式直接歸屬

多數 VAT 轄區的立法對於進項稅額的部分抵減方式保持沈默。新加坡允許固定百分比率的抵減，而前述抵減比率隨金融部門之類別不同而有所差異，並且對於企業與非企業客戶的組合亦納入考量。設定此百分比率以允許企業客戶用作進項稅額抵減，乃是減少企業交易稅負重複課徵之間接方式；另外，前述抵減百分比亦簡化了遵行程序。其他 VAT 轄區仍堅持直接歸屬，但對於合併企業並不實際。

2. 抵減公式之組成

當允許公式分配時，通常是以應稅與免稅活動收入為基礎。然而，收入公式之組成各異，在某些情況下，收入之定義包括利息總額，而其他情況下則是利息淨額，有些轄區對於利息支出與收入採總額課稅。另對於保險則無標準公式，而不確定的領域為租賃收入、來自於衍生性金融商品之現金流入或流出、壞帳提出與損失，以及與資本交易有關的現金流量處置部分。

3. 禁止抵減之特殊情形

例如義大利就金融機構之金融交易稅負抵減執行特殊限制。

4. 允許企業客戶就金融交易抵減之特殊情形

新加坡允許金融機構對使用金融服務之企業客戶申請進項稅額抵減，此抵減納入前述金融機構之抵減百分比率。紐西蘭提議對企業客戶之金融服務採零稅率，惟此將對允許企業客戶全數進項稅額抵減造成影響。

5. 整體制度之複雜程度與稅捐稽徵機關之態度

英國的分配公式似乎最為精密，同時也是最複雜制度之一，使得

納稅人與稽徵機關之間始終維持緊張關係。其他多數轄區既不允許簡單收入基礎公式，亦未採行非常嚴格之政策。

（二）進口服務之反向收費機制

1.反向收費之需要與範圍

反向收費機制是為了確定金融機構並未從其他轄區進口非金融商品與服務，而無須負擔居住地之VAT成本。多數轄區具有某些形式的反向收費。然而，其範圍隨強制執行之有效性而有所差異。

加拿大以精確的方法，對任何用來提供免稅金融服務之非金融服務進口課稅（於海關進口時對商品課稅）。在歐洲則採用選擇性收費方式，但此機制在總公司費用分配至海外分支與分公司時之處理方式，產生很大的不確定因素，在加拿大之情況為從非本地母公司分配至本地分支或子公司的服務，視為管理服務進口（除非出示免稅金融服務證明），以作為反向收費之依據。但在歐洲及其他轄區，對於該收費之處理卻有極大不同。

2.適用反向收費之有利條件

反向收費機制之需要，通常被認為是為了確定國內與進口供給之一致性待遇，使金融服務的進項稅額免稅。然而，此舉可能阻礙一般市場的發展，因為必須在海關確定金融服務之有效金額。此外，亦可能導致競爭性扭曲，且如果無法系統性地強制執行，可能變成不公平的措施。

反向收費機制可能涉及有關消費地點或供給用途之複雜議題。例如：如果金融機構要求當地運輸服務或在海外訂旅館，則他們是否應為反向收費的對象呢？這些服務需要在特定地點提供，而且可由供應商在該地點提供，但它們並非與金融機構所在地之在供應商競爭下所提供之服務。不僅如此，它們通常可能是外國轄區地方稅的課徵對象，故在註冊地收取反向費用可能導致雙重課稅。

在國內擁有分支網路之本國銀行，可能會在分支的管理與營運上產生任何勞工成本的VAT。然而，如果反向費用適用在所有分支機構

與母公司之間的跨越國界費用時，則在VAT轄區設有分行之外國銀行，相對於本國銀行將有競爭上之劣勢。換句話說，一家在國內有分行之本國銀行，另一家為擁有國內分行的外國銀行，則兩家銀行將因為國際銀行非居住地員工之服務，適用於反向費用規定，而須支付不同之進項稅額。

（三）集團法則

多數VAT轄區允許企業集團內採部分合併申報形式，此規定造成的影響為集團內任何公司間之交換均不適用VAT。此項規定對於金融部門非常重要，因為對於公司間之收費課稅時，可能導致重複課稅嚴重增加。例如：在歐洲與澳洲的企業合併系統下，是將企業集團視為單一法律個體計算VAT。在允許合併計算的地區，對於位在其他轄區的關係企業與分支機構的處理方法各異，在某些情況下，合併是全球性的，而在其他情況下，則限制在特定VAT轄區內。

從另一角度來看，加拿大並不允許合併申報，但允許集團內選取兩家「關係密切」的公司，對任何服務之提供（以及特定財產供給）均以免稅處置，但不具進項稅額抵減權利。此系統不似合併系統有效，而且在特定情況下可能導致更多重複課稅問題。

各國對於集團減稅的門檻測試亦有所不同。在加拿大，集團減稅限制在至少90%為一般股東的企業。在歐洲，此門檻為主要股權控制。

（四）外包之待遇

金融機構外包許多交易處理功能以實現規模經濟，但產生下列問題：當這些服務外包予第三人時，是否仍維持先前之金融服務特徵，如果不是，則對外包服務採行不可扣抵之VAT規定時，將阻礙金融事業成為高效率之組織。

歐洲法院所持之觀點為：如果金融服務之執行是由金融機構擔任委託人角色而由第三人執行時，該服務功能仍屬於金融服務（如SDC案例歐洲法庭之判決）。此結果的關鍵要求之一為該外包功能必須為完整功能，不能僅只是部分要件。

澳洲允許特殊稅負減輕，以減少外包可能引起之稅負重複問題；然而，此簡單規定看起來似乎相當複雜。

（五）重要法庭案例

專案討論小組檢視了幾件重要的法庭案例以描述此議題的複雜性，同時也告知與會者他們在不同VAT轄區內處理的方法。專題討論小組討論之歐洲法庭關鍵案例包括：Card Protection Plan（有關單一或多供給議題）、SDC（有關外包議題）、First National Bank of Chicag（有關部分扣抵法與金融服務定義之考量）以及FDR（有關信用卡處理服務外包）等。

三、特殊問題討論

（一） 變更之選擇

目前的免稅制度已經過時，而且無法有效適用於金融市場，而加諸於此制度之稅負是否具有效率，端視稅捐稽徵機關態度而定。有些轄區證實免稅制度之實施，已簡化遵循之方式（例如新加坡），而其他轄區對於免稅制度實施之經驗卻不樂觀。對於現有制度之改善工程相當龐大。在此部分，專題討論小組討論了各種改進制度的方法。

（二）全部或選擇性金融服務零稅率

經過廣泛評估各項選擇後，紐西蘭已經提出討論報告，歸納出一組簡化與合理化金融服務課稅之提案。這些提案之重點為延伸稅負至第三人金融仲介者所提供之金融服務（即除了委託人以外之身份），以及對企業客戶之金融服務採零稅率。如果提案獲得通過，則上述改變將使紐西蘭系統與新加坡相似。

（三）部分或全部課稅

如主席Poddar與英方之討論，可透過現金流量租稅機制，將金融服務納入VAT範圍內，在該機制下，金融機構之現金收入納入課稅，而所有現金流出則給予稅額扣抵或減免。此稅額計算帳戶（TCA）系

統為 Poddar 開發系統之修正版，藉以克服有關完全現金流量系統之特定交易問題。此系統目前在歐盟六個成員國內十家大型金融機構進行測試。

然而，有些試驗機構發現，不管其概念健全與否，金融機構及其客戶必須花時間全盤瞭解其影響，並修正產品與價格。為了簡化交易時的租稅處理程序，對於企業客戶的金融服務採零稅率可能有所助益。

尚有其他選擇可考慮作為完全課稅的中間步驟。例如：如紐西蘭的提案，課稅可延伸至付費服務，而所有保證金服務仍維持免稅。另根據 TCA 概念，由金融機構選擇對保證金服務採行課稅，當它們傾向於向消費者服務課稅時，則企業客戶的保證金服務可為零稅率，然後它們即可就進項稅額申請全額扣抵。消費者之保證金服務可以總合基礎課稅，無須就個別交易計算稅額，因為消費者無須擁有進項稅額抵減之納稅資訊。

（四）IRAP

1998 年，義大利就加值稅部分引進新稅制（稱為 IRAP：imposta regionale sulle attività produttive)，作為社會保險與財富稅改革的一部份。這是 VAT 制度之縮減，以適用在商品與服務，亦包括金融服務在內。專題討論小組並討論透過 IRAP 機制執行金融服務 VAT 之優點與可行性。

（五）促進方法

即使當金融機構維持或持續免稅時，稽徵程序或特定設計功能必須更嚴謹考量其操作與影響。例如：藉由事先敘述的計算進項稅額抵減公式以簡化遵循程序，遠勝過於稽徵機關對於進項稅額直接歸屬之堅持。同樣地，有關重複課稅或外包的考量亦可透過特定服務採零稅率，或給予金融機構對特定金融服務採應稅的選擇權，藉以簡化操作，此均為促進效率之方法。

第三章　專題研討會之討論內容

壹、專題研討會C：國際財政協會與經濟合作發展組織（IFA-OECD）

主　席：特別委員 John F. Avery Jones（United Kingdom）

討論者：Ariane Pickering（Australia）
Mike Waters（United Kingdom）
William R. Holmes（Canada）
Jan-Mikael Bexhed（Sweden）
Jeffrey Owens（OECD）
Jacques Sasseville（OECD）

IFA-OECD 專題討論與前幾年一樣，將區分為兩部分。OECD 代表在第一部份討論 OECD 目前所涉及的租稅議題；第二部分，專題討論小組係討論有關跨國界退休金提撥與利益協定議題之案例研析。

一、Part 1- OECD 目前著手之租稅規劃

Jeffrey Owens 是 OECD 組織負責租稅政策與管理中心之領導人，首先就 OECD 目前所著手之租稅規劃提出概述，接著並由 OECD 第一工作小組主席 Mike Water 針對相關問題提出簡報，另有關租稅協定部分，亦由小組領導人將目前 OECD 著手之特定租稅協定議題提出報告，其主要著重在有關員工股票選擇權之違反規定，以及租稅協定議題之近期有效管理執行概念的草案討論。

二、Part 2- 有關跨國界退休金提撥與收益之協定議題

世界各地存在各式各樣的退休基金計算制度，提撥至退休基金或從基金而來的利益，而這些計算制度之支付通常跨越國界。跨國界提撥與收益之租稅協定因國家至國家、同一國家內，以及從一種計算制度至另一制度而異。

勞動市場的開放或經濟全球化，已經誘發出因這些差異而來的租稅問題。歐盟因為歐洲法庭的決議，以及委員會近期的溝通，而使得這些議題受到重視。預期隨著會員國人口老化，以及勞動人口具有更大之行動性，勢必增加該問題的重要性。

租稅協定在解決有關跨國界退休基金提撥與收取利益之相關租稅問題方面扮演重要角色。根據某些國家而言，OECD 租稅協定範本(Model Tax Convention)第十八條之規定，對於這些問題有時並不能提供適當之解決方案；但無須驚訝，雙邊租稅協定之條款係來自於雙方提案條款協商。基此，第一工作小組遂就有關跨國界退休基金提撥與利益相關議題之租稅問題，提供更具指導性的意見。

與 IFA-OECD 專題討論慣例相同，專題討論小組採用案例研究來討論跨國界退休金提撥與利益領域之特定租稅協定問題，所舉案例如下所述。

案例 1—移居國外者之提撥

A 國居民瑪麗亞於 1999 年初受雇於 WHYCO，同意在 WHYCO 的 B 國分支機構工作 4 年期間。

1999 年 6 月 1 日，瑪麗亞搬至 B 國以租賃方式取得的房屋。她的家人只有在 2000 年初時共同居住，瑪麗亞在 B 國工作與居住直到 2004 年 1 月。

這段期間內，瑪麗亞參與成立於 A 國的員工負擔部分之確定提撥退休金計畫，並每年提撥薪水的 8%到退休基金，而她的雇主則提撥相等於瑪麗亞薪資的 14%金額。在 A 國，如果該筆退休基金因租稅目的而申請時，則該筆提撥金額可完全減免。瑪麗亞同時也提撥最高額度的 A 國基本公共社會保險退休金計畫，此最高提撥額度為瑪麗亞薪資的 1.5%。

在 B 國之稅法規定提撥金減免應根據國家制訂的基本公共計畫（最高退休金計畫係規定服務年資 35 年後，並受限在相當於雇佣最後十年平均薪資的 50%）以及貿易工會與員工組織共同制訂的各種勞工命令補充計畫而定。基本計畫與補充計畫均為確定利益之計畫模

式。提撥至該計畫的總金額之10%為員工負擔，15%為雇主負擔。

身為管理階層，瑪麗亞同時獲准參與WHYCO的管理階層退休計畫。在該非基金基礎的計畫下，WHYCO每年匯入瑪麗亞帳戶大筆金額。此筆匯入帳戶的金額，加上每年3%之名目利率，將在她年滿65歲時以每月分期方式支付。根據A國稅法規定，此金額在交付瑪麗亞手上之前無須課稅，而WHYCO在確實支付金額之前無法取得租稅減免，B國對於該計畫並無特定之法規因應。

瑪麗亞最後支付在A國投保的人壽保險保費。在A國法律下，這些保險費可抵減至最高金額限制。惟B國並不允許該項減免，但允許特定在該國成立的個人退休計畫提撥金額之免稅，最大減免金額根據基本計畫與補充計畫的提撥金額而定。

A國與B國的租稅協定遵循OECD Model，即A國與B國遵循抵減方法以排除重複課稅問題。

案例 2—來源國與居住地

喬治為EXCO工作達40年之久，是A國居住者。喬治在A國定居、工作20年；在B國工作、定居5年；在C國工作、定居15年。在這些年間，喬治參與成立於A國的EXCO確定提撥退休金計畫。喬治退休後不久，搬到B國享受溫暖氣候。

在A國，員工部分提撥的退休金計畫可完全減免。退休基金投資提撥金額所賺得的收入排除在納稅所得內。然而，退休計畫所支付的退休金，對於收受人而言必須全數納入所得課稅。如果退休金支付予非A國居住者，則A國稅法規定必須扣繳30%所得稅。

B國的退休金提撥與收取利益之租稅規定與A國相似，另A國與B國目前無強制性的租稅協定，但正在協商當中。

案例 3—退休基金收益租稅待遇之不協調

維多利亞在A國工作40年，而且是該國居民。在所有工作年間，維多利亞及其雇主參加國家基本公共退休金計畫，以及員工支付確定提撥之退休金計畫。維多利亞退休後不久，即搬到B國享受溫暖氣候。

在A國，員工提撥予基本退休金計畫的退休金提撥金額均可在40年間完全免稅，退休基金投資賺得的收入免稅。然而，退休計畫所支付的退休金，對於收益人而言，必須全數納入所得，如果退休金支付予非A國居住者，則A國稅法規定必須扣繳30%所得稅。從海外支付予A國居住者之退休金在交付時全額應稅。提撥至基本退休金計畫的金額可完全減免，但交付退休金至居住者手中時有50%為應稅；如果退休金支付予非居住者時，則必須預扣30%所得稅。

奧爾加在B國工作35年，是B國居住者。在這些年間，奧爾加及其雇主參與員工確定提撥退休金計畫，以及國家基本公共計畫。她退休後不久，立即搬到A國追求她的嗜好，從事極地探險的歷史工作。

在B國，員工部分提撥的退休金計畫並未被包含在奧爾加工作年間的所得內，但適用於15%的提撥稅率。同樣地，退休金計畫投資賺得的所得，需支付15%稅率。基金所支付的退休金為應稅，但先前已繳交的稅款可獲得15%退稅。支付予非居住者之私人退休金在B國無須付稅。從海外支付予B國居住者的退休金為完全應稅。提撥至基本退休金計畫的金額可全數減免；如果領受退休金者為低收入戶，則支付之基本退休金免稅；但如果領受人之收入超過特定門檻（領受人為非居住者時適用於預扣30%所得稅）時，需透過100%之課稅，以歸還給政府。另A國與B國之間無強制之租稅協定，但正在協商中。

案例 4—何謂退休金計畫？

卡爾是33歲橄欖球選手，為A國居住者，受傷後結束職業運動員生涯，然後搬回出生地B國。卡爾並從A國收到下列款項：

- 2004年與2005年，每月從他最後加入的球隊中獲得相當於（以年為基礎）2003年薪資50%的款項。這些付款是根據他在31歲時所簽訂合約，條件為卡爾因為受傷退休，且不在以後年度為其他任何職業橄欖球隊效力。
- 從2012年至2032年，每年從該球隊領到相當於2003年薪資10%的款項。此付款亦是根據他最後合約所規定，無任何附帶條件。
- 2004、2005與2006年，三筆相同款項，代表由橄欖球員工會為A

國球員成立之退休基金的退休金權利。球員對於該退休金計畫的提撥屬於自願性質，但不得超過球員年薪的18%（卡爾在他為A國兩支球隊效力的5年間提撥最高金額）；雇主無提撥任何金額。此退休金計畫允許球員以不同方式領取基金。A國與B國的稅負協定遵循OECD模式，A國與B國遵守該免稅方法以避免重複課稅。

貳、專題研討會D：租稅協定有關股票增益之處理（TREATY TREATMENT OF GAINS ON SHARES）

主　席：Guglielmo Maisto (Italy)

討論者：Rick Krever (Australia)
John Ulmer (Canada)
Claus Staringer (Austria)
Dennis Weber (The Netherlands)
Gauthier Blanluet (France)

本專題討論在租稅協定下，適用於個人或公司實現股票利得之所得稅制度，討論範圍亦包含其他影響協定執行之稅制參考（這些情況主要限制在非歧視條款），但本專題討論尚未涵蓋下列議題：

（1）來自於個人移民產生的利得（業在2002年IFA奧斯陸大會主題II中討論過）；

（2）因企業重整而取得之股票利得（擬在2005年IFA維也納大會，或是2006年IFA布宜諾斯艾利斯大會中討論）；

（3）不動產公司之股票利得（獨立在未來IFA大會中以特定專題討論方式進行討論）。

排除上述（1）、（2）與（3）所列主題，應可避免IFA會議之間討論重疊之情形。

本專題討論區分為五個部分：

Segment I：股票利得之認定

Segment II：股票利得之確定，時間及其他計算議題

Segment III： 除公司重整外，因企業交易而產生之股票利得

Segment IV： 歐盟觀點

Segment V： 可行由協定之解決方案

本專題討論之目的：

1.「股票」一詞是指在合股（joint stock）公司的持股，該公司是其成立所在國之應稅人。

2.來源國是指出售股票的合股公司成立之所在國。

3.居住地國是指實現利得之納稅義務人居住的國家。

4.「公司交易」一詞涵蓋影響公司組織結構之交易（清算、股票買回、股票交換、席位移交），但不包括併購、分割，以及其他企業重整。

一、Segment I： 股票利得之認定

此部分涵蓋 OECD 租稅協定範本第十三條之一般結構，並特別參考有關「認定」之定義。本部分特別強調：1、 OECD 租稅協定範本第十三條有關「轉讓（alienation)」一詞之意義 ；2、股票利得認定之特殊議題；3、認定衝突（如果結論涉及 OECD Model 第二十三條之評論項目 32.1 至 32.7，則適用於股票利得之討論，而且亦適用於第十三條規定）；4、政策觀點。

1.OECD 租稅協定範本第十三條有關「轉讓（alienation)」一詞之意義

在 OECD Model 第十三條之規定下，「轉讓」一詞並非定義名詞，而且在該條款之評論（Commentary）下，亦未對其意義提供清楚之定義，然而，第十三條之評論第五項則清楚指出允許締約國廣泛解釋該名詞。事實上，該評論指出「財產轉讓」包括財產交換、部分轉讓、徵收、移轉至公司以交換股票、出售權利、贈與，以及因死亡移轉財產等。

2.股票利得認定之特殊議題

來源國與居住地國可能在協定下對利得之認定有不同規定，此種

情況可能係因不同環境所造成，像是銷售協議條款等。例如：賣方與買方相互交換賣權與買權即是導致認定不同之原因。特殊議題亦可能因為銷售限制與股票權利限制（例如選擇權）等事件，或是股票的終身股息（或於國內法定義為「使用權」）而引起，其他例子亦包括了：

（1）證券借款與股票租賃；

（2）股票贈與；

（3）可轉換債券之銷售；

（4）非直接處置；

（5）在終身使用權期間買方所支付的年費（OECD 第十三條之評論第十八項指出「…難以針對此事項訂定一條規定」）。

3.認定之衝突

認定衝突議題是由 OECD Model 第二十三條之評論第 32.1 項至第 32.7 項所規範，係就特定之事件予以討論（股票利得），尚不限於一般問題。租稅協定中有關特別國家之經驗（例如：澳洲）應屬於此節之重要議題，另外受國內（稅）法結構之影響，可能必須在協定認定與相關衝突中予以釐清。這也是測試 OECD 評論（2000 年）之機會，並確定因國內法律（第 32.3 項）與不同事實之解釋，或協定條款（第 32.5 項）引起衝突之區隔。在此範圍內，可參考來源國對於國內法律反濫用規定之適用認定（例如：股票利得係認定為出售之企業而來）。

4.政策觀點

政策觀點非常有限，可能是為了使專題討論與大會主題有所關連（公司/股東課稅之趨勢：單一或雙重課稅）。專題討論小組指出須課稅之利得，在經濟上代表銷售公司之保留盈餘，且將該利得視為股利課稅，且將對協定造成影響。例如在西班牙立法中可發現准許實現股票利得的納稅人在反映保留盈餘之利得部分予以稅額抵減。

二、Segment II： 股票利得之確定，時間及其他計算議題

此節涵蓋之議題可能發生在一締約國（居住地國）之居住者（R）

（不論是個人或公司）持有其他締約國（來源國）公司（T）之股票，透過實際銷售（根據雙方國家之商法認定）而實現的利得。

首先，係討論R出售給其他締約國之居住者S。

儘管此交易十分清楚與簡單，但居住地國與來源國間可能產生因適用稅法規定不同之議題，包括：

1.利得之確定

居住地國與來源國對於利得之認定十分分歧。儘管OECD租稅協定範本並未在第十三條提及此議題，但有關此事件之規定有其必要，以避免雙重課稅（OECD第十三條之評論第十二項規定，係將利得之認定交予締約國之國內法律決定）。

有關銷售之來源與成本之減除，亦可能引起兩國間之不同觀點。此種情況發生在避險成本或股票銷售有關之匯率交換合約費用上，另購買股票所發生的利息費用可供扣除亦是其中一例。其他例子可能關於部分轉讓時，股票處理價值計算方法不同而引起（例如：來源國採用FIFO先進先出法，而居住地國採LIFO後進先出法）。

最後，當某個國家將利息從納稅人之實際利得中分離時，銷售價格之遞延給付亦可能產生利得認定的分歧。如前所述，此議題業由OECD範本第十三條之評論第十八項有關資格限制之認定所提及，此外，若來源國之稅法規定採用銷售價格而非利得來認定，則居住地國的確會產生利得認定之問題。

所有問題可藉由居住地國之國外稅額抵減條款以及協定條款中獲得解決，以避免雙重課稅。除了Segment I所敘述的所得認定議題之外（例如：部分價格認定為股利的情況），銷售價格之價格調整亦為國外稅額抵減之議題。與計算議題有關的相關主題亦在OECD評論中有所著墨，如OECD範本第二十三條評論之第六十一項所述。

2.實現時間

國外稅額抵減問題亦在來源國與居住地國對利得認定之時間不同而產生，例如，兩國對股票所有權之移轉時間可能不同。此在OECD稅約範本之第二十三條有所討論。

另外賣方與買方間之股票交換亦可能產生稅額抵減之時間問題。

3.其他議題

其他涵蓋在此節之議題包括資本損失與利得在租稅上之適用（例如：適用於預付款之扣繳所得稅）。在資本損失方面，可能產生其損失可被遞延，並用以抵銷來源國家內同一公司或其他公司持股之利得。最後，某些證據已顯示非歧視條款的重要。

三、Segment III： 除公司重整外，因企業交易而產生之股票利得

此節包括透過公司交易（不包括重整）產生之利得，以及涉及可能因確定利得之時間，或因所得認定而引起之協定問題。此部分不應與 Segment I 之認定處理議題重疊，事實上， Segment I 涵蓋的為一般認定，以及以舉例方式考量特定交易；此節係討論特定交易與認定，應有別於一般情況，其交易特徵係呈現獨特議題。

此交易方法亦應允許確認國內或協定反濫用之條款，或在各國實施經驗之有效性，應特別注意對於此主題有所說明之判例(例如：2002 年 12 月 6 日荷蘭最高法院，適用荷蘭 fraus legis 法律的 36.773 號判決)。

1.公司清算之股票利得

該主題已經在 1987 年 IFA 布魯塞爾大會上討論。此領域之主要問題與兩締約國之所得認定有關（例如：股利 vs. 資本利得）。OECD 稅約範本第十三條評論之第三十一項承認，資格認定之衝突或係由清算分配而引起，亦即來源國可能將所有或部分分配資產視為股利，而居住地國可能認定是資本利得。此問題之解決方案為發布因清算引起所得認定之命令（比利時-法國協定第十五條第八項，對於因公司合併引起股票分配亦提出類似解決方式）。此節之判例應特別注意（例如：1991 年 7 月 3 日荷蘭最高法院對於清算所得認定的第 25.308 號判決）。

2. 買回自家股票（「股票買回」）

多數國家的商業法將買回自家股票視為銷售。然而，此交易實際情況是由國內公司法條款所規範，亦即公司法係整合並補充商業法對於銷售之規定。買回自家股票可被居住地國與來源國之國內法律認定為利得或股利，進而引起協定認定之議題。而該此主題討論事項已予限制，用以避免與 2002 年 IFA 奧斯陸大會的專題討論 E：「公司取得自家股票」之議題重覆。

3. 視為銷售

營利事業之納稅義務人稅負情況改變，可能產生等同於股票銷售情況之事件。例如：在加拿大與義大利政府規定，公司之法定席次轉移至外國，則公司之資產被認定為視為銷售。另外，於資產實際出售前課稅，可能導致資產真正出售時之雙重課稅，因此，持有轉換法定席位公司股票的股東，可能在實際銷售時產生雙重課稅。此問題可透過雙邊協定解決（例如，德國與義大利之間協定第十二條規定）。另一解決方案為允許納稅人選擇於其他國家視為該股票轉讓已經實現的時點課稅（假設股票已經以其公平市價出售或買進，例如加拿大-美國之租稅協定第十三條第七項規定，但只有個人才可適用）。

4. 股票分配視為利得

相同議題亦可能因為股票分配視為利得而引起。

四、Segment IV： 歐盟觀點

歐盟成員國之國內法律所包含之條款（亦即區分居住者與非居住者實現之股票利得適用不同規定之條款），其差異性係與應稅項目，或更繁瑣之承諾要求有關。有關歐盟法律與租稅協定間互動之觀點，存在各種情況。

1. 與歐盟協定相衝突

適用租稅協定之模式可能與歐洲法庭所提出之歐盟協定原則相

互衝突。例如：非居住者所實現之資本利得範圍，可能比居住者實現之利得課徵更重之稅負。同樣地，亦須重新檢視遵循協定之義務，是否與歐盟的非歧視原則，或與歐盟的自由原則相衝突。

2. 次要歐盟立法

不僅如此，次要歐盟立法亦包含適用在個人或公司處置跨國股票，以及其他成員國股票之利得之規定條款。這些規定係於 1990 年 7 月 23 日之 Directive 90/434/EEC 所規定 ，有關不同成員國內公司之合併、分割、股票交換適用之一般課稅制度（即所謂的 Merger Directive），以及 1990 年 7 月 23 日的 Directive 90/435/EEC，有關不同成員國家內母公司與子公司所適用的一般課稅制度（即所謂之 Parent-Subsidiary Directive）。但這些指導條款亦被限制在股票交換減稅的討論範圍內，而不討論合併或分割，以避免與未來 IFA 大會之議題重疊。

3. 歐盟之協調

股票利得之課稅處理最後將落入可行的歐盟協調範圍內。相關之案例為位在某成員國之母公司，持有另一成員國子公司股票，而由母公司實現股票利得的情形。（見 G. MAISTO「歐盟成員國母公司實現資本利得之免稅提案」，European Taxation，Vol. 42, n. 1, 2002, 28）。

五、Segment V： 可行由協定之解決方案

此節係評估於前述指出之議題，並提出可行的協定解決方案，包括：（1）在租稅協定之架構下，全球重新評估資本利得課稅，例如刪除 OECD Model 第十三條等；（2）OECD Model 之評論小幅變動新增規定；（3）適應目前歐盟稅法指導原則；（4）運用國內稅法以規避適用租稅協定之規定；（5）租稅協定反濫用條款之提案。

註：有關 OECD 租稅協定範本新增條款之討論可能包括：（1）從事國際船運或航空活動公司股票利得之免稅；（2）從公司保留盈餘分離資

本利得，以及後續 OECD 租稅協定範本第十條之應用。

參、專題研討會 E：國際租稅中之反避稅規定（General anti-avoidance rules in international taxation）

主　席：Graeme Cooper (Australia)

討論者：Brian J. Arnold (Canada)
Graeme S. Cooper (Australia)
Anders Hultqvist (Sweden)
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此研討會將討論一般反避稅規定之操作對國際交易課稅之影響。其焦點在於境內反濫用原則對國際交易課稅之衝擊，研討會議內容係在討論GAAR之主要因素、GAAR對國際一般交易之運用、GAAP與一般國際原則之比較，以及GAARs和DTAs 之間的相互作用等方面。並以案例說明之方式進行討論。

案例研究 I　跨國企業之盈餘分配（加拿大）

假設相關交易涉及跨國公司（含大量現金資產與保留盈餘）股票之出售，例如：屬加拿大公司之股票，被美國股東出售給另一家加拿大公司。加拿大公司若以支付給美國股東股利之方式，則須扣繳所得稅款。此外，由美國股東收訖之股利亦真實反映在股票銷售價格內。

此案例討論包括：(a) 加拿大之一般反避稅規定是否適用於此交易，另又如何適用，以及 (b) 加拿大-美國之雙邊租稅協定對於此交易適用國內反避稅規定之影響。

加拿大對 GAAR 之分析主要涉及下列三項要素：

1、租稅利益

2、避稅交易

3、 誤用或濫用

這些要素已經加以檢視，且對於跨國出售股票之應用亦已加以解釋。加拿大法院之案例指出，此銷售價格之支付涉及透過交易，以逃避加拿大扣繳稅款之規定，是為了達到租稅利益而設計。此交易被認為濫用或誤用加拿大之扣繳所得稅之規定。

其次，加拿大-美國之租稅協定是否避免了國內一般反避稅條款之適用。納稅人爭辯協定條款第十三條（4）規定，係避免加拿大向美居住者課徵股票出售之資本利得。政府主張股票交易涉及股利，而第十條允許加拿大課徵股利所得，但稅率不超過15%。最後法庭結論認為應適用第十條而非第十三條，因為此交易並非股票的「真實轉讓」。

其他議題討論之結果，包括了根據S245(5)將利得重新定義為股利，其是否可解釋為視為條款，若視為股利，是否暗示協定規定之推翻。

案例研究 II 境內與境外利息分配之策略（澳洲）

第二個案例研究係有關澳洲GAAR對於債務融資境外承接之適用。取得非居住地公司的股票資金，是為了要在境內籌措資金，因為境內借款之資金成本可能較低，而借入資金係用來購買另一家境內公司之股權，此境內公司隨後認購境外從事併購之公司股權。

當交易涉及境內融資（最終）以賺取境外收入時，可能對於國內利息分配規定產生負面影響，且引發其他對於境外收入可能不足以涵蓋境外損失之國內保證規定。政府主張境內股權買進是為了避免對借款人採行相關規定。

適用GAAR之要求為：

1、 計畫之存在；

2、 發現有些納稅人可能取得與該計畫有關的租稅利益；

3、 該計畫參與者是為了取得租稅利益之目的。

這些要素已加以檢視，並解釋該結構之適用。最後說明法庭之案例，指出境內股票買進之處置是為達到租稅利益，而且該租稅利益來

自於逃避保證規定。

案例研究 III　back-to-back 放款結構與協定之選擇（阿根廷）

第三個案例研究係評估阿根廷 GAAR 對於國外母公司之本地子公司跨國放款適用之規定。此放款透過一系列中間交易達成，並涉及同一多國籍銀行集團之不同子公司。

假設案例涉及四個納稅人，並分成兩組關係人。某德國公司申購一家銀行所發行的債券。之後沒多久，德國公司之阿根廷子公司向第二家銀行（與第一家銀行有關）借入相同金額貸款。除了金額之外，此兩筆貸款之安排有極大不同，但處理時間相似。第一家銀行隨後對子公司向第二家銀行之借款做出償還保證，保證成本隱含在支付給德國母公司之債券利息中。在此同時，德國公司將債券抵押給銀行作為保證的擔保品。沒多久，借款人給予德國母公司取得貸款利息之選擇權。

如果德國母公司直接向阿根廷子公司借款，則利息支付將根據阿根廷-德國協定條款第十一條(2)(b)產生 15%之扣繳利息所得稅款。但另一方面，租稅協定可能免除支付阿根廷的利息預扣所得稅款，因為阿根廷-丹麥協定條款第十一條（3）(c）規定，特定金融安排之利息所得免稅。

阿根廷 GAAR 兩項規定均已在討論會中檢視。如租稅程序法第 1 節要求租稅條款依據其目的與經濟意義建立，租稅程序法第 2 節指出，當納稅人所選取的法律形式，在真實經濟目的之法律未同時發生時，則該選取的法律形式應予以摒棄。反之，法律要求在私法提供之架構內，考慮真正的經濟情況，以及與納稅人真正意圖一致之最自然形式。

案例研究 IV　跨國界附息票券之分配（西班牙）

第四個案例研究西班牙 GAAR 對於跨國界付息票券分配之應用。

此交易假設買進澳洲政府公債（附息票），收取利息，之後以賠本售出。在西班牙-澳洲協定下，由一締約國發行之債務工具利息可

以只由該國家課稅。因此，澳洲對於公債之利息課稅具獨佔性。另根據澳洲國內法律，該利息確實免稅。不僅如此，因出售而產生的資本損失可適用於西班牙稅制以抵銷西班牙境內的資本利得。

西班牙 GAAR 規定之關鍵要素涉及稅法之濫用。另外西班牙 GAAR 亦規範非真實交易。

中央經濟管理法院(Central Economic-Administrative Court)判決指出買進澳洲公債涉及免稅目的之再出售協議，故相關利息支付為稅法之濫用。其主要原因為該交易僅用於取得租稅利益，並無任何其他有效之經濟理由來證明該交易。

案例研究 V　跨國界結構融資（瑞典）

最後一個案例研究檢視的是，瑞典 GAAR 在跨國融資獲得利息用來抵減國內損失之應用。

某瑞典公司成立愛爾蘭子公司。母公司向愛爾蘭銀行借錢，然後買進子公司之額外股票。子公司隨後借款給其中銀行之子公司（利率與原借款利息相同)。當該銀行之子公司償還貸款時，其本金隨之減少，而向愛爾蘭銀行借入之貸款，則由瑞典公司償還。此交易之租稅優勢在於母公司支付之利息，從子公司處收回。

稅捐機關主張此交易之設計與買賣是為避稅機制，已抵觸 GAAR 之規定，且亦違反租稅協定。納稅人則反駁指出此結構具有其商業目的，因為瑞典公司計畫在愛爾蘭建立金融中心，但該計畫隨後被取消。瑞典適用 GAAR 之要求為：

1、 交易造成租稅利益；

2、 租稅利益為交易之主要原因；

3、 交易基礎之評估可能違反立法目的。

地方法院判斷此交易為人為基礎，所以無須考慮 GAAR 之規定。上訴法院考慮應可適用 GAAR，但根據相關證據，無法做出此交易之主要目的係為租稅利益。

另外，租稅協定之爭議亦獲得勝訴。法院認為此股利應視為股利，而根據協定，股利在瑞典無須課稅。

肆、專題研討會 F: 國際租稅近期之發展(Recent developments in international tax)

主　席：Professor Maarten J. Ellis (Netherlands)

討論者：Judith Blissard (USA)

　　　　Willard B. Taylor (USA)

自2002奧斯陸會議圓滿舉行後，國際租稅最近發展之討論已成為IFA大會的一個固定議題，而本次討論會之重點在於國際租稅法律近期之發展，包括法院之判決、立法意旨、條約的發展，以及國際交易之型態。而討論內容之特色為具有即時、具一般利益及引起國際租稅參與者和專家濃厚興趣之主題。玆舉目前國際近期發展之案例如次：

一、盈餘剝削法則(Earning Stripping Rules)

(一)現時一般之規定

1. 公司在一課稅年度支付之利息費用不符規定者，不得自收入中扣除。
2. 不符規定之利息費用若佔符合規定之利息費用達已調整所得（adjusted taxable income）之百分之五十者，該費用及超額限制之金額不得前抵三年。
3. 超額限制（excess limitation）係指超過公司可調整所得之百分之五十，或者是超過公司之淨利息費用。
4. 不符規定之利息費用係指：利息支付給

   －關係人；

   －由關係人或免稅單位擔保之非關係人；

   －或美國政府不對該利息費用課稅之利息。
5. 負債與資產比不得超過1.5:1

(二)Thomas法案I(2002)

1. 跨國集團之公司利息費用若大於下列情形，則不被允許認列。

—已調整課稅所得之百分之三十五。

—超額境內未符合規定之利息（excess domestic disqualified interest）

2.超額境內未符合規定之利息係指：

公司一課稅年度所支付不符規定之利息，乘以該公司負債資產比佔全球集團負債資產比之比率。

3.本法案之影響為當公司之負債資產比超過某均衡比例時，則該公司之利息費用不被允許認列。

(三)Thomas法案II(2003)

1. 取消負債與資產比1.5:1之規定。

2. 取消超額限制延後抵減（carryover）之規定。

3. 不符規定之利息費用延後抵減限制至10年。

4. 允許不符規定之利息費用佔已調整所得有不同比率之門檻。

—支付利息予關係人調整為百分之二十五。

—因關係人之擔保所支付之利息仍維持在百分之五十。

舉例說明：

在美國境內之子公司持有

-ATI$100

-對國外母公司負債產生之利息費用$30

-由國外母公司擔保之不具任何關係之負債產生之利息費用$20

-非擔保及非具任何關係負債所產生之利息費用$25

因此美國子公司擁有全部利息費用$75，其中包括不符規定之利息費用$50。惟在本法案下不符規定之額度將為：

超額利息費用（$75-$50=$25）+ 超額關係人利息費用（$30-$25=$5）= $30

(四)Hatch法案（2003）

非符合規定擔保情形之除外：

外國人擔保若納稅義務人已借之本金實質上等於在未擔保之情形下，向非關係人借貸一樣。

二、盈餘之匯回

（一）Thomas法案II(2003)

1. 扣除之限制：

(1)當匯回額度超過基礎年度之平均數時(基礎年度平均數係指最近五年扣除最高和最低年度後，三年之平均數)。

(2)永久轉投資於美國境外，在財務報表表現盈餘時之限制。

2. 美國境內公司之投資，必須經由公司資深經理或董事會核准通過，其所獲得之股利才符合規定。

（二）Hatch法案（2003）

1. 美國境內之公司可選擇符合規定之國外分配股利，以5.25%稅率課稅。

2. 上述符合規定之國外分配股利不得超過「當年度創新研發費用大於基本創新研發費用之差額」。(基本創新研發費用係指前三年創新研發費用平均數之85%)

伍、專題研討會G：OECD Model 第九條所定義之「關係企業」為何？（Article 9 OECD Model Convention “What is an associated enterprise?” ）

主　席：Prof. Hubert Hamaekers (Netherlands)

討論者：Helmut Becker

Luis Schoueri

Carmine Rotondaro

David Grecian

關係企業之意義，在 OECD 及 UN Model 租稅協定範本之第九條已有所規定，此外，並且在許多國家最近對移轉訂價之立法上，亦有定義。

上述 OECD 稅約範本對關係企業之定義為：

（一）一方領域之企業直接或間接參與他方領域企業之管理、控制或資本。

（二）相同之人直接或間接參與一方領域之企業及他方領域企業之管理、控制或資本。

雖然如此，關係企業之定義至今仍有模糊之空間，特別是有關「控制」（control）之定義，仍存在疑義。因此本研討會之目的在於更深入分析並釐清 OECD 稅約範本對關係企業之定義。

有關「控制」之定義，在本次研討會分別由兩不同層面來探討，第一是從股權及投票權多寡之角度；第二從是否有權利干涉公司之財務與管理政策來分析，此外，更將重點放在國際上對關係企業規定之比較，例如：

1. 澳大利亞

移轉計價所規範之事項（非常規交易）亦可在國際避免雙重課稅上運用，因此有關關係企業須具「控制」之關係，並非必要。

2. 巴西

將關係企業排除代理商，以及僅為該公司處理購買或銷售貨物、勞務之相關業者。

3. 德國

需具有實質參與與控制效力，以及至少須持有股份達 25%。

4. 印度

某公司之產品製造必須依賴它公司之無形資產，或者是生產原物料之 90%以上由它公司供應，則認定雙方為關係企業。

5. 日本

直接或間接擁有其股權至少 50%以上。

6. 荷蘭及英國

依 OECD 稅約範本第九條所規定之定義。

7. 美國

雙方因相同利益直接或間接互相控制或受控。

有關本次研討會討論關係企業之定義，尤其以各國之相關規定，相信可作為我國在擬訂移轉計價規定之參考。

陸、專題研討會 H：境外投資基金制度（Offshore Investment Fund Regimes）

主　席：John Prebble（New Zealand）

討論者：Wolfgang Oho（Germany）
Ronald Durand（Canada）
Lee Burns（Sydney）
Jean-Blaise Eckert（Switzerland）
David White（New Zealand）

在本研討會討論之「外國投資基金」有其特殊意涵。從租稅管轄權觀點來看外國投資基金制度之執行，該名詞係指除了租稅管轄權範圍外存在於國家之實體，並且管轄權內之居住者，可能投資但投資金額較小或較分散，而不至使該投資個體納入受控外國公司之立法範圍內。

外國投資基金為典型之共同基金，但可能是由公司握有龐大持股或信託單位、退休基金或其他持有龐大利息之基金工具組合而成。重點並非投資個體之形式，而是藉由投資國外個體不須年年分配所得之事實，而使納稅義務人能夠遞延或避開國外來源的所得。

一、政策

大多數課徵居住者之所得稅，單純以其定居之住所為基準。有些管轄權另外採用其他因素，像是收入來源或納稅義務人的公民權。外國投資基金制度之計算方式是為了阻撓在定居基礎下而採行的避稅方法，在缺乏特定規則下，居住者有時能技巧性地規劃將所得來源以

國外個體取代。例如，某高稅率國家之納稅義務人擁有投資之儲蓄，他決定投資某種類型之共同基金，最終在未來的某個時間贖回。此納稅義務人可根據相同特色投資在當地之基金，但一般而言，當基金獲利時，獲取之所得必須承擔稅負，使得納稅義務人因而投資低稅率國家之基金。當此基金最終解散並分配收益予其成員才須課稅，該成員在基金存續期間享有遞延稅負，且居住在無資本利得稅負國家的成員甚至可以避開所有稅負。故允許其居住者以此方法投資海外的高稅率管轄權國家，事實上是提供國外投資組合之租稅抵減。

當人們投資海外，並非為共同基金或其他各種投資組合，而是在低稅率國家成立自己的公司，然後利用該公司作為國外貿易或投資基礎，並以該公司逃避居住地國家之納稅義務時，則上述問題即須以不同觀點看待。故一般而言，高稅率國家就當地所有人分配至受控國外公司之所得計算制度，須以立法控制。

授控國外公司之所得計算制度並不能解決投資組合之稅負遞延問題，例如假設身為查帳員，當地所有人能夠取得有關受控國外公司相關之資訊，使他們可以申報推定之納稅所得比例。因此，如果管轄權國家希望解決有關國外投資組合之稅負遞延問題，則需要有不同種類的所得計算制度。

該境外投資基金計算制度，其作用像是受控外國公司所得計算制度之支架。如果人們規劃投資，以逃避受控外國公司所得計算制度(例如，投資人在國外公司持有之利息，低於受控國外公司利息之門檻)，則根據此管轄權國家之政策，國外投資基金計算制度可能不利。

本研討會廣泛討論多數國外投資基金計算制度的主要政策要素包括下列一項或以上：反避稅與反遞延；資本輸出中立；受控外國公司所得計算制度之架構；不論投資機構為國外或國內均視為整體應納稅之投資；其他直接投資的稅負不計入受控外國公司利息內；國外投資基金計算制度之主要目標，將考慮類似退休基金與人壽保險結構之所得稅負。最後，有些法律管轄範圍對於外國投資基金所得施行懲罰性稅負，顯然不鼓勵投資於所有外國投資基金。

二、結構

「境外投資基金計算制度」一詞，存在某些誤導，嚴格說來，該計算制度應納稅之對象既非外國人也不是投資基金，反而是投資在境外投資基金之本國居民。境外投資基金計算制度係對本國居民就其投資在國外個體之所得比例（或預估所得）課徵稅負。一般而言，境外基金計算制度涵蓋某些要素。

第一件要素是一連串適用該計算制度之國外實體的定義。此政策是向本國居住者而非外國基金課稅，而推論結果是，制訂境外投資基金計算制度的法律管轄權可能未考量目標投資工具之特定結構。因此，有些境外投資基金計算制度可能採用通稱為「雜湊（omnium gatherum)」的名詞涵蓋所有國外實體。

其次，是規範本地納稅義務人就境外投資基金獲取利息之規定。這些因素包括具投票權利息、股東利息收入以及其他可能攸關的利息所得。利息定義之規定需要相關之細則配合，以詳述計算執行的時間，例如：所得年度結束時間？包括在年度內成為納稅管轄權範圍之居住者亦需要納入規定。

第三，有關個體與利息之規定通常涵蓋在管轄區內境外投資基金計算制度內，另外，亦包括受控外國公司所得計算制度、讓與人信託，以及其他本國居住者持有利益等與其他國外個體之間重疊範圍所引起相關議題之規定。例如，同一外國個體在另一管轄權範圍內可能為某一本國納稅義務人之境外投資基金，但卻是另一納稅義務人之受控外國公司。

第四，係有關境外投資基金損失之問題。本地納稅義務人是否可納入這些外國損失，然後抵銷本地所得呢？或這些損失只能抵銷外國所得，或只能抵銷基金所得呢？

第五，制訂境外投資基金計算制度之管轄權面臨幾項範圍問題。此制度是否適用於所有國家基金，或排除包含健全國際反避稅模式之高稅率國家呢？該排除國家是否有合理基礎，以作為居住者在某特定管轄權內並未享有特定避稅或遞延稅負之抵減，或者司法管轄權主要考量之反避稅方法，可能僅適用在租稅天堂國家之個體。這些是主要

的範圍問題，但仍有其他存在。例如：是否應對小額投資有最小金額的排除呢？

三、所得計算

在受控國外公司所得計算制度的情況下，必須考量境外基金計算制度可能包括國內納稅義務人須設定其投資基金所得之計算方式。然而，此計算方式與受控外國公司之計算方法有所差異。受控外國公司計算規定係假設受此制度規範之人，能夠發現足夠資訊以計算公司所得，然後再計算自身比例。此計算有時稱為「約當分支（branch equivalent)」，因為國內納稅義務人將外國公司當作分支機構而非獨立公司計算所得。從另一角度來看，境外投資基金規定，亦假設納稅義務人並非必然能夠取得約當分支計算的必要資訊，因此提供替代的所得計算方式，通常提供幾種選擇。

考慮投資人可能從基金機構取得詳細完整所得之可能性，境外投資基金規定可能選擇性要求納稅義務人可使用約當分支計算方式。如果此選項可行時，則通常會有解釋國內稅法內容適用於約當分支計算的規定。

外國投資基金計算制度可能提供其他代替約當分支之計算方式，包括：(a)「會計利潤」亦即根據可接受的會計方法計算之利潤，通常比適用於完全約當分支計算容易；(b)「約定報酬率」亦即納稅義務人持有之外國投資價值，以及以法律規定之約定報酬率計算；或（c）在基金利息可交易的情況下，市值增加（亦即在納稅年度內增加價值)。這些替代方式可能具選擇性，或納稅義務人可能被規定應優先使用的方法，端視各方法在各條件下之可行性而定。

上述規定通常形成境外投資基金計算制度之所得計算要素核心，此外，吾人可以預期這些規定尚包括：(a）納稅人處置或取得境外投資基金之利息；(b）從一種計算方式變更至另一計算方式；(c）當某筆來自於境外投資基金的所得，已經在之前年度以所得計算方法分配至納稅人所得時，屬於所得分配之租稅抵減；(d）外國稅負之減免；以及（f）基金從一管轄主權遷移至另一管轄主權範圍。

四、專題討論與報告

專題討論小組概述境外投資基金計算制度的基礎，但選取較複雜之議題。此外，Oho 博士與 Eckert 博士將分別討論德國與瑞士的相關制度。英國國內稅收討論文件近期將提出合格之基金系統，以及特定境外投資基金計算制度之法律架構也在討論範圍內。

第四章　結論與建議

國際財政之思潮，不斷推陳出新，各國在實務運作上，亦因社會、經濟、文化、政治環境不同，而多所差異，此次有機會與其他各國出席代表齊聚一堂，就各國關心之議題，交換心得意見，實屬難得，而為拓展我國國際租稅之領域，本部自八十年起已陸續派員參加國際財政協會舉辦之年會或地區性研討會，故無論在促進友好國家實質關係，或吸取國際經驗方面，均獲益匪淺。

為因應全球化趨勢，以及促進我國經貿活動，租稅國際化向為我國努力之目標，而在此方面，我國努力方向主要有二，一為稅制稅政國際化，另一為加速雙邊租稅協定之洽簽，目的在與國際接軌，消除國際間重複課稅，同時促進我國與他國間經貿、文化與科技交流。

在稅制與稅政國際化方面，我國在 1986 年實施之加值型營業稅（Value Added Tax）及 1998 年實施之兩稅合一所得稅制（Income Tax Integration System），為我國稅制國際化之歷史見證，而目前仍在建構中之稅政電子化及預先核示機制，則為我國稅政國際化之最佳範例。

另外租稅協定之簽署，近年來由於我經濟部、外交部及駐外單位等協助推動，經過多年之努力，我國已與 17 國簽有避免所得稅雙重課稅及防杜逃稅協定，因此租稅協定之運用，隨著協定之簽署國日益

增加而日趨複雜，國與國間之間課稅權之分配在實務上之運用更易產生爭議。

本次年會所討論之議題亦多與租稅協定之運用有關，諸如針對租稅協定有關股票增益之處理、國際租稅中之反避稅規定、國際租稅近期之發展，以及 OECD Model 第九條所定義之「關係企業」為何等等，均可作我國面對適用租稅協定時相關問題之參考。

有關對公司（股東）之課稅趨勢問題，我國自 1998 年起實施兩稅合一設算扣抵制，已消除營利事業舉債與募股間之租稅扭曲，國內營利事業界舉債之利息支出沖銷被投資公司原應分配之盈餘，以規避稅負之情形已大幅消失。惟因兩稅合一制原則上僅適用於居住者個人及在我國境內有固定營業廠所之營利事業，故非居住者個人及外國營利事業取得我國股利，仍存在經濟重複課稅問題，以致跨國企業仍偏好以貸款方式投資子公司，藉利息支出沖銷子公司原應分配之盈餘，以降低稅負。故就保障我國稅收觀點，我國確有建立稀釋自有資本法則之必要性。

其次，外國分公司匯回之營業利潤，其性質與子公司分配股利相近，同一性質之所得應負擔相同的稅負。就世界各國比較，目前以立法規定消除對分公司與子公司間盈餘總稅負差異之國家居多，主要方式為分公司匯回盈餘時課分公司利潤稅。故目前分公司匯回盈餘不必課稅，而子公司分配股利需要扣繳的租稅差異，對外商公司決策之扭曲效果將日益加深，且間接鼓勵外商在我國設立分公司而非子公司，與我國亟欲建立亞太營運總部之政策有違，實有檢討改進之必要。

本屆年會雖無正式討論有關移轉訂價制度之問題，但自 1998 年倫敦年會提出有關 OECD 移轉訂價制度之綱領後，已成為國際間熱門之租稅議題，如專題研討會討論有關 OECD Model 第九條所定義之「關係企業」為何之議題，即涉及日後擬訂移轉訂價制度之規定，我國已深切體認參考國際經驗與潮流趨勢，作為移轉訂價法規與查核制度之參考，冀以保障我國在國際間合理之稅收配額及維持我國稅制公平之重要性。

附件

會議資料

57th IFA Congress, Sydney 2003

Subject 1: Trends in company/shareholder taxation: single or double taxation?

Summary of Discussion:
Drafted by a Committee comprising Jacques Malherbe (Belgium) and Qinghua Xu-Pionchon (France)

"Trends in company/shareholder taxation" was discussed as one of the main Congress Subjects of the 57th Congress of International Fiscal Association held in Sydney, Australia, in 2003. A "Cahier" with the General Report prepared by Professor Richard J. Vann (Australia) and 36 IFA Branch Reports had previously been made available to the participants. A Panel dealt with the presentation. Members of the Panel were: Chairman Malcolm J. Gammie (United Kingdom), General Reporter Prof. Richard J. Vann (Australia), Secretary Justin Dabner (Australia), and Panelists Krister Andersson (Sweden), Barbara Angus (USA), Prof. Adolfo J. Martin Jiménez (Spain) and Prof.. Wolfganf Schoen (Germany).

Tax planning to avoid international double taxation of dividends was discussed in Break-Out Session A.

Members of the Panel were: Chairman: Philippe Derouin (France); Secretary: Jason Chang (Australia) and Panelists: Peter C. Canellos (USA), Prof. Peter A. Harris (Australia), Patrick M. Mears (United Kingdom), Norbert Meister (Germany).

Holding and Conduit Companies was discussed in Break-Out Session B.
Members of the Panel were: Chairman Robert Couzin (Canada); Secretary Erki Ustaluu (Estonia), and Panelists: Michel Aujean (EU Commission), Theo Keijzer (The Netherlands), Gregory May (USA), Robin Oliver (New Zealand).

The Chairman scheduled the following subjects for general discussion.
A. System of dividend taxation in the current international environment.
B. Division of tax revenues from cross-border equity investments between source and residence countries.
C. Alternative systems of taxation

Professor Vann summarized the main findings of his general report.

Corporate taxes are important to the business community.

There has been a shift in dividend taxation:
- from imputation system to simpler relief system;
- from classical double taxation systems to relief system
- towards an overall taxation of dividends at maximum individual tax rates.

These moves were prompted by international forces.

On the contrary, no coordination is observed in the field of capital gains, where special capital gains regimes are not targeted to stock.

Some alignment is observed in the treatment of capital gains in direct investment.

A. System of dividend taxation

Double taxation of dividends causes distortions, which Mrs. Angus summarized as the follows:

- a bias against investment under corporate form;
- a bias in favor of debt against equity;
- a tendency to retain earnings instead of distributing them, although corporations have continued to pay dividends, as a signal of financial health.
- the setting up of costly restructuring techniques, which have corporate governance implications (hybrids, share repurchases...)

Prof. Martin Jiménez questioned whether imputation was the adequate system to more problems.

Domestically, imputation of the corporation tax on the shareholders meets with difficulties:

- timing;
- washing out of tax preferences;
- refunds;
- difference in treatment of dividends and capital gains.

Internationally, the issue is magnified by the discrimination between domestic and foreign shareholders, to whom the benefits of imputation are not extended and who may suffer three layers of tax (corporate- withholding- dividend)

This creates:

- a bias in favor of capital gains;
- a bias towards domestic investment.

Model treaties are unhelpful, as they acknowledge withholding at source.

The lack of neutrality in international situations is the main cause of the demise of imputation, together with administrative complexity.

Mr. Andersson noticed that double taxation increases the cost of capital and therefore:

- it reduces domestic holdings of stocks;
- it increases foreign ownership of stocks if the residence country of the investor implements capital export neutrality: productivity gains are picked up by foreign investors.

Prof. Schoen sees also in the European Union a move from classical (1963) to imputation (1983) system, and the abandonment of imputation in 2003 in the UK, Germany, and even France to a certain extent.

Withholding taxes were abolished on direct investment, but nothing was done for portfolio investment.

The case law of the European Court of Justice prohibited discrimination by the State of source as to credits or thin capitalization, by the state of residence as to exclusion of dividends from taxation and generally as to equal treatment in branch and subsidiary form which may make withholding taxes on dividends generally questionable.

The court acknowledges, however, the legal difference between the corporation and its shareholders.

A participant questioned the relationship of dividend relief with the progressive nature of the income tax.

B. Division of Tax Revenues

Mrs. Angus recalled that, if the residence country taxes dividends, customs and model treaties allow the source country to levy a withholding tax.

The elimination of withholding tax, if implemented worldwide, would improve capital allocation and eliminate barriers to international capital flows.

It should raise no revenue concerns for a country that grants a foreign tax credit: the waver of the withholding would be offset by the revenue gain on credits that would no longer be granted.

Withholding taxes have often been reduced or waved on direct inv., but not on portfolio investment, although the 1928 League of Nations draft recommended that the latter be taxed only in the country of residence of the investor.

Turning to capital gains, Prof. Martin Jimenez noticed that source countries exempt capital gains either because they are generally exempt or because they benefit non-residents.

According to the UN model and in some countries, capital gains on substantial participations are taxed at source.

An inconsistency is thereby created between the treatment of dividends and the treatment of gains, resulting in:

- a bias towards (exempt) capital gains, rather than dividends, taxed at source;
- a bias towards dividends if capital gains on substantial participations are taxed at source.

A further inconstancy exists between the treatment of a (taxable) gain on disposal of a permanent establishment and of an (exempt) gain on the disposal of a substantial participation.

In the residence country, mitigation of tax or (participation) exemption of capital gains will alleviate double taxation and create a further bias in favor of capital gains against dividends.

Prof. Schoen dealt with the intermediation of investment funds. Ideally, the investor's tax position should not be altered vis-à-vis direct investment.

This is not always the case, although it is often achieved by transparency or tax-free status of the fund. Investment funds also do not always have access to treaties.

The abolition of imputation simplifies the tax treatment of investment funds.

C Alternative systems

Mr. Andersson put forward as alternatives the following:

- the comprehensive business income tax (CBIT) where interests are disallowed as a deduction and the tax rate is lowered, which might have an impact on the market valuation of stocks of companies financed by debt;

- the allowance for corporate equity (ACE) under which dividends are deductible, which lowers the cost of capital;

- the cash flow corporate tax.

The Swedish national reporter pleaded for the abolition of corporate taxation, which he sees as distorting savings decision and impairing capital formation.

Prof. Vann replied that this was arguable only if a consummation tax base was adopted.

D Conclusion

The panel concluded that the trend in dividend taxation is towards abolition of imputation, partial inclusion of dividends in income and reduction in corporate tax rates.

An alignment would be needed between dividends and capital gains.

Withholding taxes should be abandoned, leaving the corporation tax as taxation at source, and taxing dividends and interests in the resident country, thereby aligning the treatment of equity and debt financing.

Break-Out Session A: Tax Planning to Avoid International Double Taxation of Dividends

The discussion dealt with "straight" dividends planning, not restructuring or share buy-backs. The goal is to avoid double taxation, sometimes achieving non-taxation.

1. Repo. (Mr. Mears)

If an investor in B subscribes stock in a subsidiary in A but enters in to a repurchase agreement with the parent A, cashes in the dividend and sells, what is the tax position?

Ideally, in country B, the investor obtains a tax free dividend or a tax credit, whereas in country A (United States for example), the issuer subsidiary is considered as having paid (deductible) interest under a secured loan to the investor in the amount of the dividend but the dividend is considered as effectively paid (tax free) to the parent.
No withholding should be levied on the dividend or on the deemed interest.

An abuse of tax legislations may occur, especially if there is no pre-tax positive return. The credit risk should be covered.

The investor may have to be vested with voting power to be treated as a shareholder. Tax consolidation to the parent may be broken.

2. Dual holding companies (Mr. Canellos)

Tax companies enter into an equalization agreement to fund dividends to A and B shares. A voting (trust) arrangement grant A and B shareholders the same voting right. Assets may be pooled in sub-holdings.

A stock may be stapled to B stock.

Alternatively, access shares may be created, as preferred shares of B stapled to special A common stock, assuring B shareholders equal voting rights in A.

Whereas the UK or Australia wound not question the dividend treatment, the United States may see the venture as a partnership. They will also treat any company stapling more than 505 of its stock as a United States taxpayer.

A side benefit of the scheme in Canada, for example, is that capital gains taxation is avoided because the exchange is against Canadian, not foreign shares.

Nevertheless, those techniques have mostly been used in the United States by companies paying little or no dividends. No rulings may be obtained.

In the same situation, German companies have received the old technique of the Gewinngemeinschaft.

3. Dividend stripping (Mr. Meister)

A shareholder sells his shares for a short time to a third party who receives the dividends and then returns the shares to the seller paying him a compensation commensurate with the dividend.

The purchase is to avoid a forfeiture of tax benefits, e.g. to secure an imputation available to the purchaser or to avoid a withholding tax.

Generally, a sale of the coupons will not achieve the goal and a sale of the shares will be required.

The long term investment must remain with the seller: if a long holding period is required in the buyer's country, it will be an obstacle.

The tax benefit must be secured in cash by the buyer: a tax credit to a non-taxable entity for instance would be of no use. If the buyer is taxable, his tax should not be increased because of the dividend income, requiring either the availability of a credit or exemption or the deductibility of a loss on the resale of the ex-coupon stock.

As the technique challenges, for instance, the denial of imputation credits to non-residents, anti-abuse legislation may come into play. The German Supreme Tax Court held that if a buyer can dispose of the shares, he(she) is to be considered as a shareholder.

In the United States, the buyer should be at risk, which may require hedging.

The UK has legislated against the above technique, but avoidance of withholding remains open.

4. Equity swaps (Mr. Derouin)

Shareholder A will, without actually transferring stock, pass on the economic attributes of stock (dividend equivalent and value appreciation) to B, who will pay A interest and cover him against value depreciation.

The swap will be tax efficient if:

- A retains the tax position of a shareholder;
- A may deduct his payment to B;
- B may deduct his payment to A;
- There is no withholding on either payment.

A double tax benefit will ensure if A is treated as a shareholder in his jurisdiction and B is also considered as such in his country, because he received a deemed dividend.

Single equity swap will be more sensitive to anti-avoidance rules than multiple equity swaps.

Such rules may be general ones on special legislation. The UK will deny taper relief for capital gains during the period in which the shares are economically transferred; the United States would also suspend the holding period for long term capital gains treatment.

5. Conclusion

Tax planning may avoid or mitigate double taxation of dividends and even duplicate the benefits available to dividends in the event of a mismatch between legislations.

Break-Out Session B:
Holding and Conduit Companies

This session examined the various implications that interposition of holding companies have on tax in State A (parent –residence country), State B (Holding – Intermediary country) and State C (Subsidiary – source country).

Country A – Parent Company

In this part, the Panel dealt with the following two major issues:

1. When holding is recognized as transparent under the tax law of A, how should the holding be disregarded and what are the effects of disregarding it.

There are at least three ways of disregarding Holding:

- purely elective and mandatory regime (e.g. US "check the box");
- application of the resemblance test by comparing Holding to the entities in A. However, the holding characteristics may be "manipulated" at times;
- consolidation.

In general, the effect of disregarding Holding is the direct taxation by A as if Holding did not exist. In this case, the parent reverts to the normative position where there is no holding. Thus, the parent can benefit from certain advantages that it normally does not have.

2. When State A recognizes Holding as a foreign corporation, provisions in the tax law country may seek to prevent the resulting deferral of income or gains realized by Holding.

Two types of rules were considered: the CFC rules and the Anti-avoidance rules. CFC rules generally cover Anti-avoidance (e.g. the Netherlands). However, the former are much broader. The aim of the CFC rules is to prevent deferral of passive income. Along with the CFC and the Anti-avoidance rules, country A can also employ conduit and similar rules.

Country B – Holding

The Panel dealt with three issues here: the possible adverse effects and advantages of Holding, the different regimes of Holdings in State B and harmful practices according to the EU code of conduct and the OECD model reports.

1. Possible adverse effects and advantages of Holding:

Possible adverse effects:

- double (or higher) taxation of distribution and gains;
- loss of treaty benefits.

Possible advantages:

- deferral of income in State A;
- access to different tax conventions.

2. Different regimes of Holding

   i. State B has no special rules for Holding

Regarding the mainstream dividends tax, B treats Holding as a local company and levies withholding tax in B on distributions of dividends.

ii. State B has special rules for Holding

In this case, B takes income out of the Holding's tax base.

Often, different problems, such as the strains from source, residence and intermediate countries' taxation, lead State B to adopt a special holding company regime. There are three major approaches to this regime: selective relief from withholding tax, the combination of State B tax rules of mainstream tax plus the withholding tax and legislations on specific Holding companies (e.g. New Zealand).

3. Harmful practices

i. OECD harmful preferential regimes: accepted principles:

- Exemption system is a part of holding regime
- No preferential treatment between residents and non-residents, etc.

ii. EU Code of conduct: different situation from OECD reports and therefore, a different solution.

First of all, the EU is determined to fight against harmful tax competition. Secondly, the EU is committed to eliminating double taxation.

Country C: Taxation of Subsidiaries

Here the central issue is: does the interposition of holding companies affect the taxation of the business income of Subsidiary?

The mainstream taxation of Subsidiaries should be unaffected. However, the withholding tax on dividends to Holding in bilateral situations may pose issues such as treaty shopping.
The solution to it may be individual stipulations in treaties.

57th Congress of the
International Fiscal Association
Sydney, Australia
August 31 – September 5, 2003

Consumption Taxation and Financial Services

Speakers

- Han Kogels, General Reporter
- Peter Jenkins, Ernst & Young
- Tony Long, Australian Taxation Office
- Professor Alan Schenk, Wayne State University
- Vieri Ceriani, Banca d'Italia
- Rebecca Millar, University of Sydney
- Satya Poddar, Ernst & Young LLP

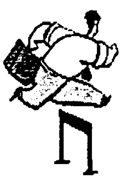
Universe of Financial Services

• Intermediaries acting as Principals – Margin Services • CORE financial service, exempt in most VAT jurisdictions	• Services of Agents, Advisors and Others – Margin Services • Agents acting as Principals
– Fee Services • Fees related to principal transactions • Other	– Fee Services • Complex mix of taxable and exempt services

Exemption under VAT

THE MORE YOU ARE EXEMPTED, THE MORE YOU PAY IN TAX

Challenges for Financial Institutions



- Definition of Financial Services
  - Single or Multiple Supplies
  - Outsourcing
  - "Arranging for" financial services
- Input Tax Credit Allocations
  - What is "reasonable"
- Special application rules
  - Supplies between related entities
  - Imported services

Taxation Issues

- What are exempt services
  - Status of CORE and Non-CORE Services
  - Composite or Multiple Supplies
  - Outsourced Financial Services
- How is the tax applied
  - Grouping Rules
  - Input Tax Deduction Method
  - Reverse Charge for Imports
- Economic Distortions
- Options for Reform

Consumption Taxation and Financial Services

Han Kogels
General Reporter Subject II
Findings of the General Report

Coverage

- 31 countries with VAT system
- 3 countries other system
  India – Japan – USA

Outcome

- Most financial services exempt from VAT
- VAT exempt supply in chain leads to:
  - cascading ("hidden") VAT
  - excess VAT burden on final consumption
  - distortion of the principle of neutrality

Principles Consumption VAT

- Scope:
  - CT apply to consumption only (including financial services)
  - if no consumption then out of scope for CT
- Neutrality Principle:
  - deduction or refund of input CT in business chain
  - no cascading (hidden) tax on final consumption
- Destination Principle:
  - taxable in country of consumption

Financial Services

- Specific problems:
  - which financial activities can be identified as consumption?
  - how can value of consumption be measured?

Summary findings

- In general: core financial services exempt or outside scope
- However, there is a great variety as to
  - application of exemption and outside scope
  - input tax deduction and refund
  - application of reverse charge
  - application of VAT grouping
  - VAT effects of outsourcing

Panel Format: Part A

- Europe
- Australia, New Zealand, Japan, Singapore
- Argentina, Brazil, Israel, South Africa
- Canada

Speaker

Peter Jenkins,
Global Head of Indirect Tax,
Ernst & Young

AGENDA

- Scope of the financial services exemption – EU law
- Single v Multiple supplies
- Outsourcing
- Special investment funds
- Input tax deduction
- Grouping relief
- Cross border transactions

EC 6th VAT Directive – Art. 13B(d)

VAT exempt financial services

- The granting and the negotiation of credit and the management of credit by the person granting it;
- The negotiation of or any dealings in credit guarantees or any other security for money and the management of credit guarantees by the person who is granting the credit;

  (Comment – these are worded with the intention of limiting the exemption when the credit or credit guarantee is managed by a person other than the grantor/guarantor)

EC 6th VAT Directive - Article 13B(d)

- Transactions, including negotiation, concerning deposit and current accounts, payments, transfers, debts, ~~cheques~~ and other negotiable instruments, but excluding debt collection and factoring;
- Transactions, including negotiation, concerning currency, bank notes and coins used as legal tender, with the exception of collectors' items; "collectors' items" shall be taken to mean gold, silver or other metal coins or bank notes which are not normally used as legal tender or coins of numismatic interest;

  (Comment – the exclusion for debt factoring has recently been confirmed by the ECJ)

EC 6th VAT Directive - Article 13B(d)

- Transactions, including negotiation, excluding management and safe-keeping, in shares, interests in companies or associations, debentures and other securities, excluding:

  documents establishing title to goods, —the rights or securities referred to in Article 5(3);

- Management of special investment funds as defined by Member States;

  (Comment – the range of funds to which this exemption is applied varies widely from member state to member state – this is dealt with in greater detail later on)

Single v. Multiple Supplies

Card Protection Plan Ltd ('CPP') – European Court of Justice

- CPP indemnified cardholders against fraudulent use of lost or stolen credit cards and engaged an insurance broker to arrange for insurance cover
- CPP offered 17 different elements in its ~~supply to~~ cardholders, some of which were clearly taxable
- Single taxable supply of card registration services v. multiple supplies, some or all of which were exempt as insurance related services
- ECJ did not provide the answer to single/multiple, but set out the facts which National Courts were to apply
- ECJ ruled that companies who procure insurance cover for their customers from an insurer under a block policy are effecting an exempt insurance transaction, whether or not they are insurers

Single v. Multiple Supplies

The ECJ ruling on the question of single v. multiple supplies can be summarised as a four part test:

- Every supply of services must normally be regarded as distinct and independent and.... a supply which comprises a single service from an economic point of view should not be artificially split"
- A single supply is one where one or more elements are to be regarded as constituting the principal service whilst other elements are no more than ancillary services. (NB: An ancillary service is one which does not constitute for customers an aim in itself, but merely a means of better enjoying the principal service (Madgett v. Baldwin))
- In order to determine the nature of the supplies it is necessary to look at the essential features of the transaction – what is the commercial reality?
- The essential feature of the scheme is to be determined by asking why, objectively, people are likely to join it – What is in the mind of the customer?

Outsourcing

- Critical case law:-
  - Sparekassernes Datacenter (C-2/95) 1997
  - FDR Ltd UK Court of Appeal 2000
  - Continuum (Europe) Ltd (C-235/00)]
  - EDS UK Court of Appeal 2003

Outsourcing

Case law around the financial services exemption for outsourced service providers (OSPs) has focused on:

- Does the OSP's service form a distinct whole and have the essential specific elements of an exempt financial service **not** whether the supplier facilitates a financial service?
- Does the OSP entail changes in the legal and financial situation between the supplier and recipient of the underlying financial service (i.e., OSPs effecting payment transfers must cause settlement to take place)?
- What matters is the quality and nature of the actual service provided by the OSP, not the nature of the service which it supports or facilitates – an outsourced service must be exempt in its own right ?

Outsourcing

- Disparities between Member States
- SDC and FDR (regarding payment transfers) have been accepted by the taxation authorities in the UK, the Netherlands, Ireland, Denmark, Sweden and France, but
- Have not been accepted by Germany, Greece and Portugal who continue to apply VAT (or reverse charge VAT) to such services.
- There is doubt in other countries such as Spain and Italy, and generally a lack of clear rulings/precedents.
- Lack of clear guidance on the issue at a European level – no willingness on the part of the Commission to refer the issue to the VAT Committee

Article 13B(d)6

- Exemption for 'management of special investment funds' as defined by Member States
- Definition of funds
  - Member States have discretion to define 'special investment funds' but no discretion to define the body undertaking the activity
  - In the UK VAT exemption applies to the services of third party managers who manage the investments of AUTs/ OEICs on a subcontract basis (Prudential Assurance Co Ltd, Abbey National plc)
  - Many Member States have a wider definition of qualifying funds than the UK

Article 13B(d)6

- Definition of management
  - In Sogefonds case the French Court of Appeal ruled that fund administration activities are indissociable from the exempt activities and, therefore, should also be treated as VAT exempt
  - UK authorities take the view that discretionary investment management must be supplied to qualify as 'management'

Input tax deduction: problem areas

- Input tax incurred after the time of supply – the extent to which inputs can form a cost component of a supply that has already been made (see Deutsche Ruck and Midland Bank)
- Input tax incurred in connection with:
  - Share disposals – certain member states see disposals of shares by a holding company as no supply, others treat this as a VAT exempt supply (see BLP case)
  - Share Issues – certain member states view these as no supply, others take the view that there is a VAT exempt supply
  - Company acquisitions – accepted as supply to the acquirer not by the acquirer so input tax in principle residual (see UBAF case)

Grouping reliefs

- Article 4(4) EC 6th VAT Directive

  '...each Member State may treat as a single taxable person persons established in the territory who, while legally independent, are closely bound to one another by financial, economic and organisational links'
- Generally no VAT on supplies between members of a VAT group
- Administrative benefit for taxpayers
- Cost benefit for partly exempt VAT group members

Grouping reliefs

Difficulties:

- Only five Member States allow VAT grouping – majority will not accept it.
- There are no cross border VAT grouping provisions
  - This gives rise to problems with multi-jurisdictional Shared Service Centres
  - EIGs used in Portugal and Spain
  - This distorts competition in favour of multinationals with branch structures and against those which operate through local subsidiaries

Cross frontier transactions

- Majority of Member States do not apply reverse charge to branch to branch transactions – exceptions are Spain and Portugal (formerly Italy)
- Parent to subsidiary management changes generally trigger a reverse charge
- Not all services are correctly classified under Article 9(23)(e) – management services may include consultancy, administration, treasury, bookkeeping, etc.
- Bundling/unbundling of supplies presents planning opportunities.

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VAT in Australia, NZ, Singapore & Japan

Deviations from the 6th Directive

Speaker

Presenter: Tony Long

Assistant Deputy Commissioner
Australian Taxation office
GST
Financial Supplies & Insurance

Australian treatment (1)

Compared to typical EU classification, Aust:

- "Arrangement" (eg by commission-based agents) of financial supplies taxable
- Non-life insurance and reinsurance taxable (except medical insurance which is O/S)
- Funds management charges taxable
- Interchange and payment system access taxable

Australian treatment (2)

Compared to typical EU VAT recovery, Aust:

- Credits available for input tax not in relation to exempt supplies (ie negative test)
- No statutory treatment of input tax partly attributable to taxable and exempt supplies
- Additional "reduced input tax credit" (RITC) of 75% of input tax for expenditure
- Bizarre "acquisition supply" concept

Australian – Consequences (3)

In relation to non-typical classifications:

- The expanded treatment of taxable "arrangement" supplies reduces the number of exempt supplies made
- Taxation of non-life insurance as taxable complex, notwithstanding that similar provisions in NZ appear to operate satisfactorily

Australian – Consequences (4)

In relation to "reduced input tax credit" (RITC) :

- Originally intended for small institutions
- Partly compensation for additional taxable supplies such as "arranging"
- Partly to combat insourcing bias
- Single rate of 75% represents an overall estimate, overcompensates some
- Is not an solution to inherent inefficiencies in "exemption"
- Classification issues (eg "processing")

Australian – Consequences (5)

In relation to statutory recoveries:

- No statutory "fair and reasonable" test
- No order of attribution (eg direct attribution first)
- Negative test potentially brings in "outside scope" supplies
- No "fallback" statutory attribution of the "pot". No guidance on methods.
- Little guidance on prospective nature of creditability test for acquisitions
- No annual recalculation of credits, only selective adjustments under Division 129

Comparisons - Features

	European Union	Australia	New Zealand	Singapore	Japan
Start Year	1977	2000	1986	1994	1989
Rate – 2003	17.5%	10%	12.5%	4%	5%
Turnover Threshold ($AUS approx)	$17,000	$50,000	$35,000	$850,000	$400,000
Invoicing ?	Yes	Yes	Yes	Yes	No

Comparisons – Financial Services

Type of Supply	European Union	Australia	New Zealand	Singapore	Japan
Bank accounts / loans	Exempt	Exempt	Exempt	Exempt	Transfers / bank accts taxable
Credit card services	Exempt	Interchange taxable	Exempt	Annual fee taxable	Annual fee taxable
Financial instruments / shares	Exempt	Exempt	Exempt	Issue exempt with credit	Issue O/S with credit
Life insurance	Exempt	Exempt	Exempt	Exempt	Exempt
Non-life insurance	Exempt	Taxable	Taxable	Exempt	Exempt
Underwriting	Exempt	Taxable	Exempt	Taxable	Taxable
Options & swaps	Exempt	Exempt	Exempt	Exempt	Sale O/S
Financial leases	Taxable	Disclosed HP credit exempt	Disclosed credit exempt	Taxable	Disclosed credit exempt
"Arranging" financial services	Exempt	Taxable	Exempt	Taxable	Mostly Exempt

Comparisons – Partial Deductions

Features	European Union	Australia	New Zealand	Singapore	Japan
Must be "used" for taxable purposes?	Yes	No, negative exempt test	Yes	Yes	Yes
Determine "exclusive" use first?	Yes	No, but used in practice	Yes	Yes	Yes
If "exclusively" used for outside scope	No credit	If "supply" credit available	No credit	No credit	No credit
Standard revenue apportionment of "pot"	Yes	No, but limited availability under GSTR 2000/22	Yes	Yes	Yes
"Special method" option for pot?	Yes	Not provided for	Yes	Yes	Alternative revenue method
Additional credits available?	No	Yes – 75% "reduced credit acquisitions"	No	No	No
Industry-based methods available?	No	No	Yes "single pot"	Yes, prescribed formula	No

Reverse Charge

- A notion designed to protect local (GST- charging) suppliers.
- Applies GST to the recipient where the recipient's activity is partially or fully exempt.
- In Australia and (going forward) New Zealand the concept applies to registered entities.
- NZ will apply the reverse charge to supplies from both subsidiaries and branches to NZ entities
- Does not apply in Japan
- Singapore allows for reverse charge, however a recent history of 'suspending' the operation of the provision.

Grouping

Australia	GST grouping provisions. Transactions between group members ignored. Act looks to the final supply made to a non group member and allows/disallows a credit accordingly. Equivalent income tax consolidations legislation has different test.
New Zealand	Draws on Income Tax concepts. Common holding at 66% otherwise similar to Australia.
Japan	No grouping provisions.
Singapore	Financiers which exceed the de minimis rule are not entitled to be part of a Group. Also subject to Comptrollers veto (on revenue protection ground)
European Union	Variation between member states in relation to the percentage (if any) of ownership or common ownership required for grouping

Outsourcing

- In Australia functions commonly outsourced by financiers are treated as taxable supplies made by the supplier to the financier, yet eligible for 75% credit (Credit designed to deal with insourcing bias).
- In New Zealand 'arranging' has been exempt (as is commonly the case). New proposals attempted to make them taxable.
- In European Union such exempt services include 'negotiation', therefore many outsourced services provided to financiers do not bear GST.

Conclusions on Australian GST

- Content with narrow definition of FS
- RITC provision deals with outsourcing
- General insurance
- "Acquisition supply"
- ATO administrative rulings
- Stability of legislation

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Alan Schenk
Professor of Law
Wayne State University Law School
Detroit, Michigan, USA

Topics Covered

- Taxation of More than Margin on Financial Services
  - Argentina, Brazil & Israel
  - U.S.Competitive Position
  - South African Public-Private Agreements

Argentina

- Consumption inhibited by taxing gross interest on consumer loans
- Consumers also highly taxed on checking account fees, and credit card late fees
- Consumers interest on home loans and interest on savings accounts exempt
- Ad hoc decisions on tax base – no clear definition of financial services

Argentina

- Businesses taxed at lower rate on interest charges, and are eligible for input credit
- Outsourcing of "financial services" to foreign suppliers encouraged
- Allocation of inputs to exempt supplies based on gross income, so banks use Costs-Based System using factors such as time spent on taxable and exempt functions

Brazil

- 28 different state and federal VATs – no VAT on intermediation and most other bank services.
- Financial services are subject to other federal taxes.
- Incentive to outsource financial services to foreign suppliers.

Israel

- Taxation of financial services is split between financial institutions and dealers
- Financial institutions taxed on financial services and other activities in Israel under tax measured by Wages and Profits (WPT)
- Director can register financial institution as dealer or visa versa

Israel

- Economic distortion – no input credits for WPT to financial institutions and business users
- Dealers subject to VAT can claim input credits for VAT.
- Business users claim credits for VAT on purchases from Dealer
- No incentive for domestic outsourcing by financial institutions

United States Competitive Position

- No national VAT or national Sales Tax
- European cases give EU firms incentive to outsource elements of exempt financial services

United States Competitive Position (cont)

- Tax arbitrage -- U.S. business rendering support services classified as exempt financial services in EU
  - EU suppliers price services with embedded VAT, and
  - EU users not subject to VAT on import
- No competitive advantage to U.S. suppliers rendering those exempt services to EU importers over foreign suppliers in VAT countries that zero rate exports of same services
- No VAT advantage for U.S. firm to **import** elements of financial services rather than purchase from U.S. suppliers

Movement Closer to Normative Base – South African Public-Private Sector Agreement

Classification of Bank Services for VAT: of Bank Services for VAT

- South Africa closer to normative VAT base for financial services
- Fee-based financial services for consumers taxed
- Business users claim input credits on taxable services
- Banks claim input credits on inputs related to taxable services

South African Public-Private Sector Agreement

Classification of Bank Services for VAT:

- Limited exemptions – intermediation, security transactions, and services with value buried in margins
- Government-banking sector agreement defines banks' taxable, exempt, and zero-rated services
- No incentive to outsource services used in rendering taxable financial services
- Tensions between taxable fee-based services and exempt intermediation services, but no abuses

South African Public-Private Sector Agreement (cont'd)

- Banking Council and Revenue Service agreed on VAT input tax Apportionment Method for Financial Services industry
- Apportionment formula
  $A/B \times 100/1$ = % input tax recovery rate
  - A = value of taxable supplies
  - B = value of all supplies
  - Supplies = all supplies defined in VAT Act, other than those specially treated in the Agreement

South African Public-Private Sector Agreement (cont'd)

Credit Allocation Formula

- Agreement provides for potential disputed items in formula. For example:
  - Net interest is excluded from *A* and included in *B*.
  - Gross rent, less interest or cost of funds, is included in *A* and *B*.
  - Deemed supplies (imported services subject to reverse charge) and receipts beyond scope of the tax (dividends) are excluded from *A* and *B*

Canadian System

Satya Poddar
Ernst & Young LLP

Europe vs. Canada

- Unique Canadian Rules
  - Management and Administration of Investment Funds Taxable
  - Administrative/processing services taxable, except when provided by:
    - a person at risk, or
    - agents/sales persons for financial instruments
  - No consolidation, but Sec.150 election
  - Reverse charge for all imported services

Fund Management

- Explicit rule to make fund management and administration taxable
- A significant component of management fee relate to financial services provided by the manager
  - Specific rule to make the whole amount taxable
  - New Zealand applies the tax only the non-financial portion
- Area of significant planning and disputes

Reverse Charge:STATE FARM CASE

- **Head Office Cost Allocations to the Canadian Branch**
- **ISSUES**
  - Is there a Supply?
  - If a Supply, a single supply, or multiple supplies?
  - If a single or multiple supply, exempt or taxable?

Reverse Charge:STATE FARM CASE

Court Decision

- There is no supply factually and the deeming rule is deficient.
- If a supply, a single supply of exempt underwriting services

ITC: B J SERVICES CASE

- Target company:
  - involved in taxable activities
  - incurs expenses to fight-off a hostile takeover by BJ Services
  - claimed full ITCs for takeover costs
- CCRA denied ITCs because:
  - "maximizing shareholder value" is not a commercial activity of the company
  - Costs related to supply of shares by the shareholders and not by the company

B J SERVICES CASE

Court allowed the ITCs

- shareholders' collective benefits tied to overall operation, and the essence of the business
- without efforts to defend shareholder value, day-to-day (commercial) operation would be limited
- the corporation doesn't make the exempt supply of shares, shareholders do
- costs to defend takeover bid are a necessary cost of doing business as a large public company

Lessons from Canada

- Distortions as serious as in other VAT jurisdictions
- Ad hoc solutions limited in effect, and often perverse

Panel Format: Part B

- Full Taxation
  - Tax Calculation Account (TCA)
  - Intermediate Options
- IRAP
- New Zealand and Singapore Systems
- Facilitation Measures

Full Taxation of Financial Services

Satya Poddar
Ernst & Young LLP

Elements of financial flows

- Capital transfers
- Pure interest
- Risk Premium
- Compensation for intermediation services
  - Explicit Fees and Commissions
  - Margin

Taxation of Margin

- Margin is a measure of services to both borrowers and depositors
- Margin ~~calculated globally, not for each~~ individual transaction
- TCA method designed to allocate the margin to individual transactions

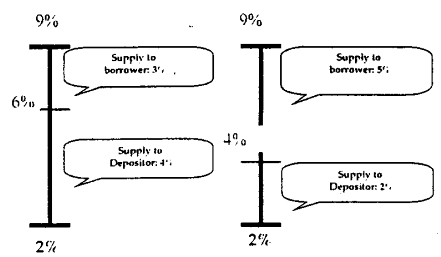
TCA Method

- Explicit fees and commission taxable under the traditional system
- TCA Method for Margin taxation
  - Tax base for Loans: Interest Charged on Loan – Cost of Funds
  - Tax base for deposits: Cost of Funds – Interest Paid on Deposit

Cost of Funds

- Crucial variable
  - Allocates the margin between the borrower and the depositor
- Should reflect pure rate of interest
- Should not include:
  - Premium for risks
    - Bad debt risks
    - Market risks
  - Compensation for intermediation services
- Could be approximated by short-term inter-bank rate
- Not fixed, but variable over time

Changes in Cost of Funds



Impact of the system

- Removal of competitive distortions
- Removal of tax cascading in respect of supplies to business customers
- Reduced political pressures for ad hoc compensatory taxes
- Removal of self-supply bias for financial institutions
- Additional tax on financial services to consumers
- Impact on government revenues

Transitional Measure

- Tax applied to all explicit fees
  - For both principal and agency transactions
  - For agency transactions only
- Optional Taxation of Margin
  - A: All margin revenues exempted, with no right of input tax deduction
  - B: Consumer margin taxable in aggregate, Business margin zero-rated, Full input tax deduction
    - Consumer Margin: (Interest Received from Consumer Loans less Cost of Funds) +(Cost of Funds - Interest Paid on Consumer Deposits)

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Value-Added Taxation of Financial Services: The Italian case

By Vieri Ceriani

Banca d'Italia, Research Department

IRAP *(Imposta Regionale sulle Attività Produttive)*

- A new tax on value added
- Introduced in 1998
- A substitute for some local business taxes and social security contributions, which were abolished
- Coexists with the national corporation tax and the standard (European type) VAT

Basic Features of IRAP

- Income Type VAT (ITVAT)
  - Fixed assets amortized, not expensed
- The tax base (value added) calculated by the subtraction method, based on annual P&L account used for income tax purposes
- Value added base is defined as profit with no deduction for labour costs and interest payments

IRAP vs. Consumption VAT

- IRAP includes accrual valuations
- IRAP does not permit the immediate deduction of investment expenditures, but allows depreciation allowances
- IRAP is based on the origin principle, while consumption VAT on destination principle
- IRAP is levied on the annual aggregate value-added, not on individual transactions

IRAP on Financial Services

- No exemption for financial institutions
- Tax base for financial institutions is "gross margin":
  - + fees and commissions
  - + interests charged
  - - interests paid
  - - intermediate goods and services
  - - depreciation allowances

IRAP vs. TCA System

- Similarities:
  - Both tax the full value added of financial services, i.e. intermediation margin and fees and commissions
- Differences:
  - Fixed investments amortized under IRAP
  - No border adjustment under IRAP
  - TCA allocates the interest margin between borrowers and depositors by reference to "pure interest"
    - defines the base for each depositor and borrower by taking the difference between the "pure interest" and the interest actually paid or received
  - "cascading" effect under IRAP as the business sector does not deduct interest payments, which include a service charge by financial intermediary which is subject to IRAP

From IRAP to TCA: some suggestions

IRAP model could be modified to approximate the TCA system:
- Allow full and immediate deduction of investment costs
- Implement border adjustment: exclude from the base interests, fees and commissions from "foreign" counterparts
- Eliminate cascading

Ways to Eliminate Cascading

- Zero-rate interest margin for business customers
  - Intermediaries have to distinguish *households* and *business* customers
  - The base of the *household* sector could be taxed every year on aggregate basis. Since households are final consumers, no invoicing is needed. A "pure" interest (cost-of-funds) adjustment is to be allowed in calculating the base
  - Tax on fees and commissions made deductible by business customers under normal VAT system
- Alternatively, the tax on the *business* sector could be calculated once a year on the total amount of transactions related to every single customer. Input tax deduction to business customer based on the single annual invoice

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GST Proposals

Zero rating financial supplies to business

Agenda

New Zealand Proposals

- Background to the provisions
- Overview
  - ➢ Supplies to non-financial supply providers
  - ➢ Supplies to financial supply providers
- Practical issues
- Tax Cascades

Background to the Proposals

Gov't discussion paper (October 2002)
- ➢ Policy on taxing supplies of financial services
- ➢ Zero-rate B2B transactions
- ➢ Definition of "financial services" (exclusion of "third party services")
- ➢ Grouping rules
- ➢ Reverse charge introduction

B2B and Reverse Charge changes made

Non-financial supply providers

- Recipient must be registered and make = 75% taxable supplies (including zero-rated, but not the new zero-rated financial supplies) in a 12 month period (or a period acceptable to the Commissioner)
- 75% determination can be based either:
  - Actual figures for customers' taxable & total supplies; or
  - An estimation of the level of supplies approved by the Commissioner

Financial supply providers

- Supplies remain exempt supplies of financial services to another financial supply provider (FSP2)
- The deduction represents an estimate of the flow-through effect of eventual zero-rated supplies made by the recipient (FSP2) and allows FSP1 a credit to compensate for this.
- The additional financial supply recipient deduction assumes an exchange of information about level of supplies that seems unlikely to occur in practice

Tax Cascades Etc

- Provisions are designed to overcome the problem of tax cascades, however there is the potential of heavy compliance costs.
- Decision to retain exempt status for brokerage services after industry lobbying.

Singapore

- "Zero-rating" of services to businesses
- Recovery rates:

Merchant Banks	96%
Finance Company	44%
Life Insurer	40%
General Insurer	75%

Australia's response

- Reduced Input Tax Credits at a rate of 75%
- Practical problems
  - Difficult to describe service accurately
  - Breadth of defined services
- Selection of the rate of 75%
- Is the RITC regime a successful precedent capable of application in other jurisdictions?

Many thanks to Jeff Barcham of ATO (Sydney) for assistance with my presentations

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Financial Services

Facilitation Measures –
Improving the Present System

Speaker

Peter Jenkins
Global Head of Indirect Tax
Ernst & Young

Agenda

- Exclusions from exemption – problems and conceptual issues
- Possible improvements
  - outsourcing
  - Credit management
  - Management of funds
  - 'hybrid' finance leases
- Partial exemption
  - Definition of pro rata
  - Definition of incidental
  - Special methods

Improving the definition of financial services

- Exemptions are an exception from the norm, and must be interpreted narrowly/strictly.
- In EU model exemption for financial services covers broadly:-
  - Credit (granting and negotiation but not third-party management)
  - Dealings (issue, transfer, receipt) in money and things standing for money.
  - Operation of any current deposit or savings account
  - Trading/dealing in securities
  - Intermediary services ("negotiating" – bringing together a willing buyer and seller of financial services without being a party to the main contract)

Main Exclusions:-

- Mere introductory services (preparatory/administrative work)
- Debt collection and factoring
- Bookkeeping services
- Investment, finance and taxation advice, M&A advice
- Management of "non-special" investment funds and portfolio management
- Safe custody, safe transport and registrar services

Borderline and Conceptual Issues

- Composite supplies involving included and excluded elements (e.g. credit where granting negotiation and management are all performed by a third party, 'global' safe custody services, outsourcing of financial transaction processing services, e.g. total payment card management, including administrative and data processing services but where money rolls across the table).
- Financial leasing – when does it become an up-front supply of goods (with VAT on full sale price but with exempt credit element if separately identified)?
- Product warranties – when are these exempt insurance?
- Management of "special investment funds" – in UK Authorised Unit Trusts and OIECs but not Investment Trusts or privately managed portfolios (plus what is management?)

Present Rationale for Borderlines Present

- EU looks at <u>quality</u> of functions performed, and not:-
  - Whether risk is taken in the underlying transaction
  - Whether there is a direct relationship with final customer ('principal party' to transaction)
  - Whether it is described as a financial institution or bank
  - In general, to be exempt the party must speak to the outside world and the effect must be to change the legal and financial position of the other parties to the transaction.

Suggested Improvements

- Outsourcing – a 'liberal' interpretation is desirable and justified on economic grounds (c.f. Australian RTC): the main test should be whether settlement (payment transfers) is included, not whether risk is taken.
- Third party credit management should not 'taint' a composite exempt supply (involving granting and/or negotiation and/or dealing with money, accounts, debts etc)
- Widening exemption for investment funds difficult – there would be losers and where do you stop?
- "Hybrid" financial leases – there should be exemption for the element of financing.

Partial Exemption

- Direct allocation should be taken as far as possible/practicable to taxable (fully recovery) and exempt (no recovery) supplies/activities.
- The difficulty is with the "residual pot" – e.g. telecommunications, cleaning, electricity and power, dual use equipment.
- Some countries allow only use of outputs based pro rata (value taxable over total supplies made) (e.g. Spain, France)
- Others also allow 'special methods' – imposed or negotiated to produce a "fair and reasonable" result, e.g. transaction count, floor space, staff numbers (e.g. UK, Ireland, Netherlands)

Problems and Solutions

- No common definition of excluded "incidental" transactions – e.g. one-off transactions which would be distortive or which consume little input tax (e.g. receipt of interest)
- Should pro rata be based on gross or net revenues – relevance of FNBC case on FOREX transactions
- Would a net approach to the pro rata (overt fees plus margin) plus a uniform (and liberal) approach to exclusion of incidental transactions obviate the need/justification for special methods?
- New Zealand solution conceptually better – zero rating all business to business suppliers (and supplies to all non-residents) except between financial institutions, exempt supplies to final consumers, with a narrower exemption excluding all brokerage and intermediary services.

S L I D E S

on

Seminar C

of the

2003 Sydney Congress

IFA/OECD

Wednesday 3 September 2003
from
08.45-11.15

Room : Auditorium 2
Sydney Convention and Exhibition Centre

Promoting a Global Tax Environment for Government and Business

Jeffrey Owens
Head
OECD's Center for Tax Policy and Administration
Presentation to
International Fiscal Association
Sydney, September 2003

Outline of Presentation

- What is the O.E.C.D?
- International taxation : some pressure points
- Promoting fair tax competition
- Emerging issues.

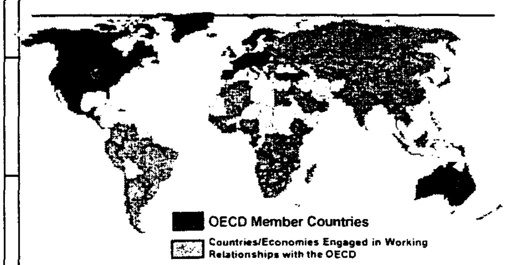
Part I

What is the OECD?

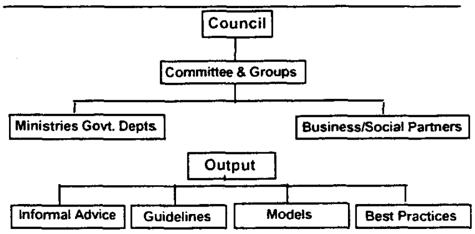
Why have an OECD?

- A forum in which governments work together to address the economic and social challenges of interdependence and globalisation
- A provider of comparative data, analysis and forecasts to underpin multilateral co-operation
- Setter of "soft" and occasionally "hard" rules

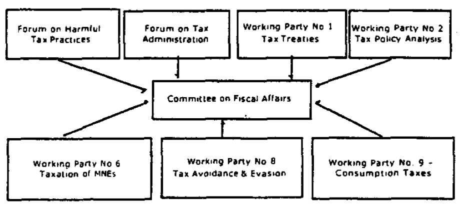
Limited membership but global reach



Structure of the OECD



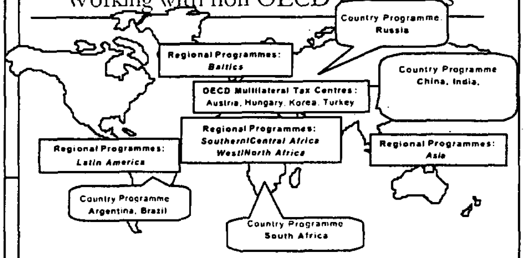
Committee on Fiscal Affairs



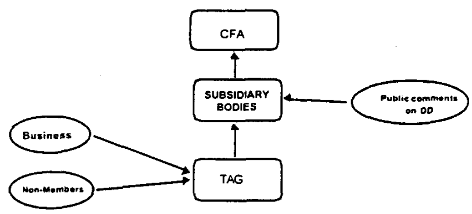
Working with Business

- Business and Industry Advisory Committee to the OECD (BIAC)
- Technical working groups (e.g. E-com TAG's)
- Approaches on specific problems (e.g. International Transportation, Insurance)
- Consultation on discussion drafts (http://www.oecd:taxation.org)
- Open fora and Roundtable

Working with non OECD Economies



E-Commerce Model



Part II
International taxation: some pressure points

Can the arm's length principle as set out in the 1995 Transfer Pricing Guidelines remain the basis for taxing MNEs?

Requires consistency in application and responsiveness to emerging issues:

- **Monitoring**:
  - Practical examples
  - Peer reviews
  - Review of comparability issues
  - Review of profit methods
- **Extending the Guidelines :**
  - Attribution of profits to PEs
  - Thin capitalisation and other financial transactions
  - Stock options
  - E-commerce

From an E-Commerce to a Cross Border Service Agenda

- 1998 Ministerial established Ottawa Taxation Framework Conditions
- 1998-2003 CFA worked on implementation:
  - International aspects
  - Consumption Tax Aspects
  - Tax Administration
  - Taxpayer Service
- Major Report by autumn 2003
- Next Step: Extending discussion to cover all cross border service activities.

Improving Dispute Resolution Mechanisms

- Major priority over next 2 years
  - Transfer pricing and treaty issues
- Questionaire to OECD, non-OECD and business
  - Identify best (and worst) practices
- Examine why Mutual Agreement Procedures (MAPs) is not used more by business
- Why doesn't Mutual Agreement Procedures (MAPs) work better?
  - Operational issue
  - Substantive issues
- Supplementary dispute resolution
  - Arbitration and mediation

Standardised Tax Reporting Requirements

- Globalisation for business means dealing with many tax administrations
- More consistency of information reporting requirements = reduced costs
- Building on efforts by PATA and EU.

Part III

Promoting Fair Tax Competition

Impact of globalisation

- Today's more open envirnoment has increased living standards globally.
- But also raised challenges for governments to ensure that:
  - Tax competition is « fair »
  - Tax rules are fairly enforced.
- OECD is assisting governments in meeting these challenges.

The Response of OECD Governments

- 1998: Launch of project to eliminate harmful tax practices
- 2000: Issuing of a report on improving access to bank information
- 2002: Initiate a Review of Article 26
- All aimed at promoting fair tax competition and helping governments to enforce their tax legislation.

The 1998 Harmful Tax Practices Initiative – Current Status

<u>Harmful Preferential Tax Regimes in OECD countries</u>

47 identified as potentially harmful in 2000;
Almost all now redesigned/eliminated

<u>Tax Havens</u>

32 Offshore Financial Centers (OFC's) become OECD's participating partners;

Six OFC's remain unco-operative tax havens.

Dialogue on implementation of commitments continues.

2000 Report on Improving Access to Bank Information - Current Status

- Established a standard on access to bank information
- Identified 5 measures to help achieve standard:
  - Removal of anonymous accounts
  - Know your customer rules
  - Removal of domestic tax interest requirements
  - Establish a common understanding of tax fraud
  - Improving access to information on civil tax matters
- Article 26 will be updated to reflect these and other developments

The end game

- Increased international tax cooperation
- Tax authorities have better access to the information needed to apply the tax laws.
- Countries compete on basis of service not secrecy.
- Reduced incidence of non-compliance with the tax laws.
- Fairness in taxation becomes the norm.
- Tax rates can be lowered.
- Integrity of international financial systems enhanced.
- Business gets level playing field

Part IV

Emerging Issues and some Recent Developments

Managing Tax Administration in a Global Environment

- New emphasis on promoting good practices in tax administration.
- New Tax Administration Guidance Series launched
  - Principles of Good Tax Administration.
  - Risk Management.
  - Compliance Management.
  - Taxpayers Rights and Obligations
  - Business Identification.
  - Transaction Information.
  - Record-keeping.
  - Electronic Payment System Accountability
- Aim to help Tax Administrations do more with less.

Promoting International Tax Cooperation: The International Tax Dialogue

- The International Tax Dialogue: An initiative of the IMF, OECD and World Bank.
- Aims: Promote sharing of experiences; share good practices; coordinate programmes.
- Tax Administration and policy information. A broad range of administrative and policy topics.
- Over 1400 documents are already available. Updated daily.
- Free online resource of tax knowledge and experience www.ITDweb.org .

Institutional Issues

- Pressure for a world tax organisation
- Will tax policy makers be able to resist the pull of the WTO?
- Linkage between regional groupings and OECD
- Inclusiveness versus Effectiveness

Substantive Issues

- **The balance between source and residence taxation**
- **Pressure from financial markets and new financial instruments.**
- **Greater reliance on environmental taxes without impeding business competitiveness**
- **Reconciling privacy/ confidentiality issues with the need for access to information.**
- **Clarifying the role of tax administrations.**
- **Financing the demands of an ageing population.**
- **Minimising the adverse impact of labour taxation on labour market performance**
- **Taxation of highly mobile high income individuals**
- **Counteracts systematic attacks on VAT.**

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57^TH IFA CONGRESS

SYDNEY, AUSTRALIA

August 31 - September 4, 2003

OUTLINE OF SEMINAR D
TREATY TREATMENT OF GAINS ON SHARES

The Seminar covers the income tax regime applicable to gains on shares realised by individuals or companies under treaties. References to other taxes may also be made insofar as they impact on the application of a treaty (these situations are confined primarily to the non-discrimination Article).
The Seminar does not cover the following topics:

(i) gains arising from the emigration of individuals since they had been examined by Subject II at the 2002 IFA Congress in Oslo;
(ii) gains on shares arising under corporate reorganisations which might be covered by either the 2005 IFA Congress in Vienna or the 2006 IFA Congress in Buenos Aires;
(iii) gains on shares of real estate companies which might be separately dealt with by a specific seminar at future IFA congresses.

The exclusion of the topics listed under (i), (ii) and (iii) above shall avoid the risk of overlapping between the several IFA events.

The Seminar is divided into five segments:

<u>Segment I</u> Qualification of the Gains on Shares

<u>Segment II</u> Determination of the Gains on Shares, Timing and Other Computational Issues

<u>Segment III</u> Gains on Shares Arising from Corporate Transactions other than Reorganisations

<u>Segment IV</u> EU Aspects

<u>Segment V</u> Possible Treaty Solutions

For the purposes of the Seminar:

- the term "shares" means an holding in a joint stock company which is a taxable person in the State of its incorporation;
- the Source State is the State of incorporation of the joint-stock company whose shares are disposed of;
- the Residence State is the State of residence of the taxpayer realising the gain;
- the term "corporate transactions" covers transactions which affect the corporate structure of the corporation (liquidation, buy back of shares, exchange of shares, transfer of seat) with the exception of mergers, splits, divisions and other corporate reorganisations.

SEGMENT I
Qualification of the Gains on Shares

This Segment I covers the general structure of Article 13 of the OECD Model Convention with particular reference to issues of qualification. Particularly, the Segment shall focus on: (i) the general issue of qualification under Article 13 of the OECD Model Convention with particular reference to the meaning of the term "alienation"; (ii) specific issues of qualification of gains on shares; (iii) conflicts of qualification (it may also be discussed if the conclusion contained in paragraphs 32.1 through 32.7 of the Commentary on Article 23 of the OECD Model Convention can be satisfactorily applied also to gains on shares and to Article 13); (iv) policy aspects.

A. The issue of qualification under Article 13 of the OECD Model Convention with particular reference to the meaning of the term "alienation". The term "alienation" under Article 13 of the OECD Model is not a defined term and the Commentary on Article 13 provides (perhaps deliberately) no clear guidance on its meaning. However, paragraph 5 of the OECD Model Commentary on Article 13 makes clear that Contracting States are allowed to interpret such term broadly. Indeed, the Commentary clarifies that the words "alienation of property" includes exchange of property, partial alienation, expropriation, transfer to a company in exchange for stock, sale of a right, gifts and passing of property on death.

B. Specific issues of qualification of gains on shares. The Source State and the Residence State may qualify the gain differently under the treaty and this may be caused by various circumstances such as the terms of the sale agreement. Put and call options exchanged reciprocally by seller and buyer, for instance, are good examples of a situation which may lead to diversity of qualification. Special issues may also arise in the event the sale is limited and confined to rights attached to the shares (*e.g.* option) or to the life interest of the shares (otherwise defined "usufruct" in civil-law countries). Other examples include:
   - (i) securities lending and leasing of shares;
   - (ii) gift of shares;
   - (iii) sale of convertible bonds;
   - (iv) indirect disposals;
   - (v) annuity payments made by the purchaser during the life time of the alienator (paragraph 18 of the OECD Commentary on Article 13 states that "... *it is difficult to give one rule on the matter*").

C. Conflicts of qualification. The issue of conflicts of qualification dealt with by paragraphs 32.1 through 32.7 of the Commentary on Article 23 of the OECD Model Convention shall be discussed focusing on the subject matter (gains on shares) so that in no event shall the discussion turn into a general overview of conflicts of qualification. Experience of certain States (*e.g.* Australia) under treaties shall contribute to highlight the issues of treaty qualification and the influence that the structure of internal (tax) law provisions may exercise on treaty qualification and related conflicts. This is also the opportunity to test the relatively new wording of the OECD Commentary (2000 update) and ascertain the extent to which the distinction between conflicts arising from internal law (paragraph 32.3) and conflicts arising from different interpretation of facts or treaty provisions (paragraph 32.5) can be easily drawn or becomes ephemeral. In this context, reference might be made also to Source State qualification arising from the application of internal law anti-abuse rules (*e.g.* gains on shares qualified as sale of a business).

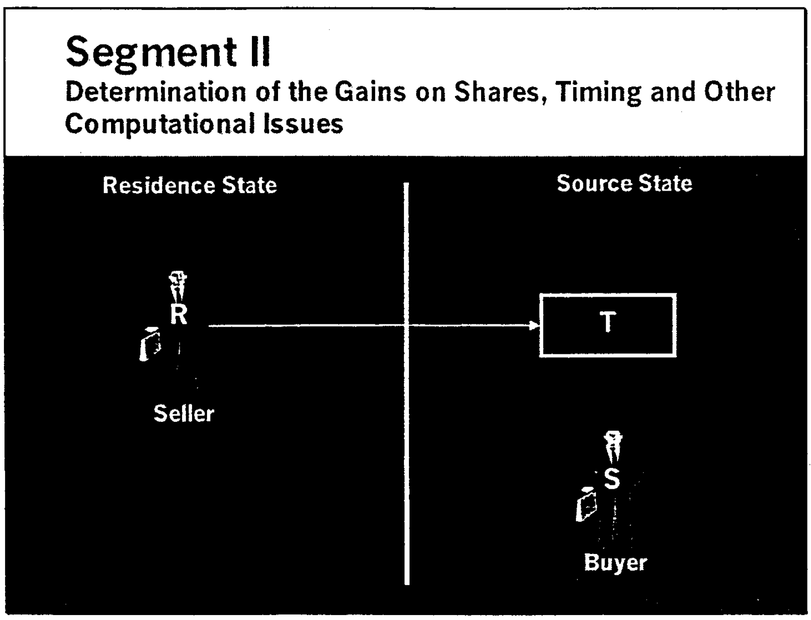
D. Policy aspects. Very marginally, policy issues could be addressed in order to create a connection between the Seminar and Subject I of the Congress (Trends in Corporation/Shareholder Taxation: Single or Double Taxation?). Particularly, the panelists(s) could refer to taxation of gains which economically represent the retained earnings of the company under sale. The desirability to tax such gains as dividends under internal law might have consequences also under treaties. An example may be found in Spanish legislation which grants to taxable persons realising gains on shares a tax credit on the portion of the gain reflecting retained earnings which would have otherwise being exempted from tax.

SEGMENT II
Determination of the Gains on Shares, Timing and Other Computational Issues

This Segment II covers the treaty issues which may arise in the event that a resident (R) – either an individual or a company – of one Contracting State (the Residence State) realises a gain on shares held in a company (T) of the other Contracting State (the Source State) through a true and genuine sale (qualified as such under the commercial laws of both States).

Firstly, the discussion is focussed on a sale by a resident (R) of the Residence State to a resident (S) of the other Contracting State (the Source State). This transaction and taxable event is described by Table A below.

Table A



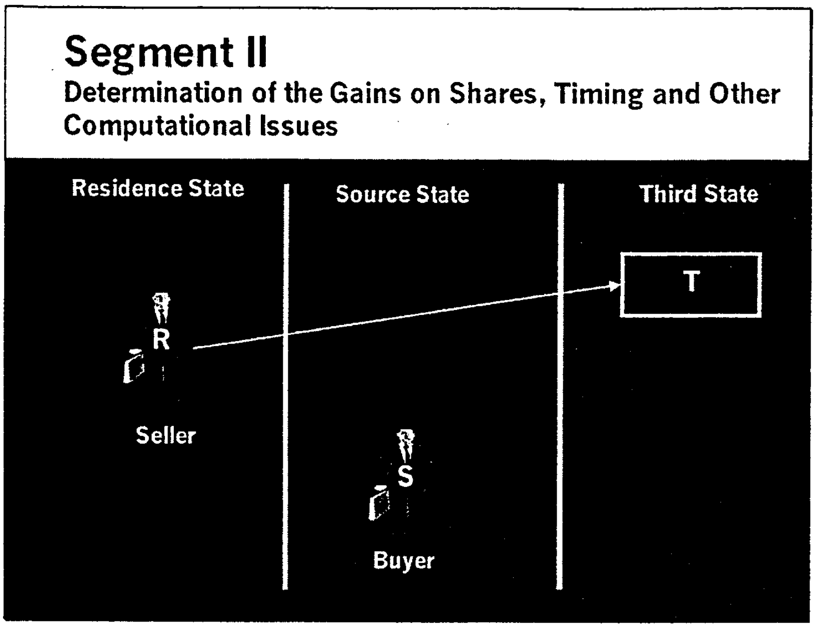
Notwithstanding the clarity and simplicity of the transaction, issues on the applicable tax regime under the treaty between the Residence State and the Source State may arise. They include:

A. Determination of the gain. Divergence between the Residence State and the Source State on the determination of the gain deserves special attention. While the OECD Model Convention does not address this issue in Article 13, treaty rules on the subject-matter might be desirable to avoid double taxation (paragraph 12 of the OECD Commentary on Article 13 leaves the determination of the gain to domestic laws of the Contracting States).
Sourcing and deduction of costs associated with the sale may also be viewed differently in the two States. This is the case of hedging costs or expenses derived by currency swaps agreements associated with the sale of the shares. Deduction of interest expenses incurred to purchase the shares may also be an example. Another example might relate to the application of different methods of computation of the value of the shares disposed of in case of partial alienation of a participation which has been acquired in the execution of several purchases (*e.g.* the Source State applies the FIFO method whilst the Residence State applies the LIFO method).
Finally, deferred payment of the sale price may create a divergence on the gain determination insofar as one State only segregates the interest component from the gross gain actually derived by the taxpayer. As mentioned earlier, this issues is dealt with by paragraph 18 of the OECD Commentary on Article 13 limitedly to qualification. Furthermore, the determination of the gain is certainly an issue in the Residence State if the tax in the Source State is applied on the sale price and not on the gain.
All these issues may find resistance in foreign tax credit provisions in the Residence State and treaty provisions on the avoidance of double taxation may provide a solution. Pricing adjustments to the sale price may also turn into foreign tax credit issues in addition to issues of qualification of income mentioned in Segment I (*e.g.* situations in which a portion of the price is qualified as a dividend). The topical relevance of computational issues is echoed by the fact that the OECD Commentary takes the view that "... *such problems could hardly be solved by an express provision in the Convention*" (paragraph 61 of the OECD Commentary on Article 23).

B. Time of realisation. Foreign tax credit issues may also arise in the event that the income (gain) recognition differs in the Source State and in the Residence State. In some States, actual passage of title on the shares may be the triggering event compared to States in which the binding obligation to sell governs regardless of later delivery of the shares. Price adjustments made after the delivery of the shares pursuant to the warranties contained in the sale agreement may also present issues to be dealt with under Article 23 of the OECD Model Convention.
Exchanges of shares between seller and buyer may create timing issues in the presence of roll-over reliefs in one State.

In the second place, this Segment II includes the review of transactions in which the gain accrues on shares in a company which is a resident of neither the Source State or the Residence State. The transaction and taxable event are described by Table B below.

Table B



C. Other issues. Other issues which may be included in Segment II include capital losses and modalities of application of the tax on the gain (*e.g.* application of withholding taxes as prepayments). On capital losses, the issue may arise to the extent such losses may be carried forward and used to offset gain on shares own in the same or other companies of the Source State. Finally, evidentiary requirements and compliance aspects might also be considered in the light of non-discrimination provisions under treaties.

SEGMENT III
Gains on Shares arising from Corporate Transactions Other than Reorganisation

This Segment III covers gains realised through corporate transactions other than reorganisations and addresses treaty issues which may arise ranging from qualification of income to timing or determination of the gain. This Segment shall not overlap with Segment I dealing with qualification. Indeed, Segment I covers qualification in general and considers certain transactions on an illustrative way; by contrast, this Segment III covers specific transactions and qualification shall come into play as one of the features of the commented transaction to the extent that qualification shall present unique issues compared to standard situations.
The transactional approach shall also permit to identify the effectiveness of domestic or treaty anti-abuse provisions or doctrines in the experience of various countries [this part of the discussion would be the basis for addressing in Segment V (Proposed Solutions) the issue of possible treaty anti-abuse provisions]. Special attention shall be paid to the case law which expressed views on the subject matter (*e.g.* the decision of December 6, 2002 n. 36.773 of the Netherlands Supreme Court on the application of the Dutch *fraus legis* doctrine).

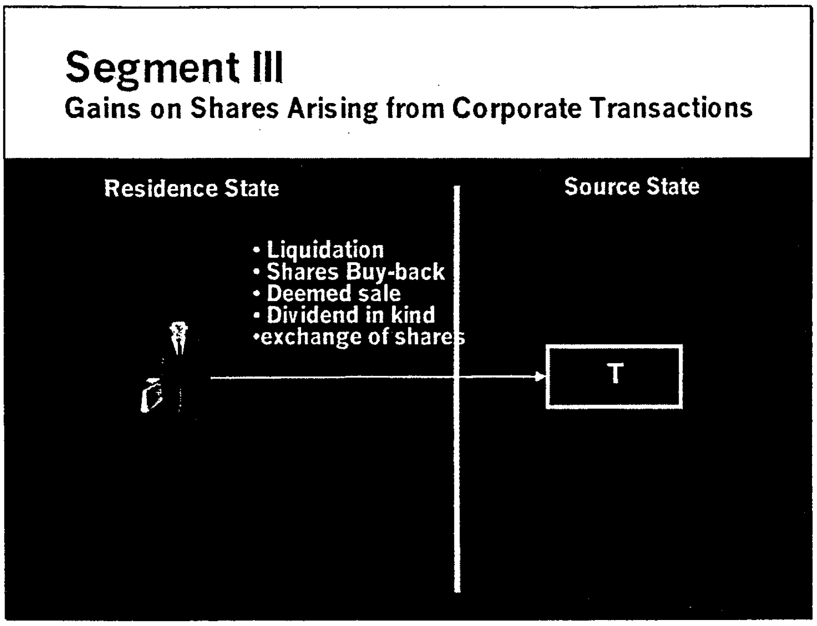
A. Gains arising under liquidation of companies. The subject has been dealt with by Subject II at the 1987 IFA Congress in Brussels. The main problems arising in this area relate to the qualification of the income (*e.g.* dividend *vs.* capital gains) given by the two Contracting States. Paragraph 31 of the OECD Commentary on Article 13 acknowledges that qualification conflicts may arise from a liquidating distribution and takes the view that the Source State may treat all or a portion of the distributed assets as a dividend even if the Residence State would consider the same as a capital gain. A solution to this matter might be to provide a mandatory qualification of income arising from the liquidation (Article 15, paragraph 8 of the Belgium-France treaty provides a similar solution for distributions of shares caused by a merger of companies). Case law on the subject shall also be given special attention (*e.g.* the decision of July 3, 1991 n. 25.308 of the Netherlands Supreme Court on the qualification of liquidation proceeds).

B. Purchase of own shares ("shares buy-back"). Purchase of own shares is regarded as a sale under commercial laws of most States. However, the transaction is governed in most instances by domestic company-law provisions which integrate and supplement the commercial law rules on sales. Purchase of own shares may be qualified either as gain or as dividend under internal laws of the Residence and the Source States and treaty qualification issues may arise. The subject matter shall be restricted in order to avoid an overlapping with the scope of Seminar E which was held at the 2002 IFA Congress in Oslo which was titled "Acquisition by companies of their own shares".

C. Deemed sales. Change in the tax status of the corporate taxpayer and/or loss of the tax claim by either the Residence State or Source State may trigger a taxable event under provisions which equate such situations to a sale of shares. For instance, in Canada and in Italy the transfer of the legal seat of a company to a foreign State is considered to be a deemed sale of all of the assets of the company. Taxation at a stage prior than the actual sale of an asset might cause double taxation in the event the capital gain realised at the moment of actual sale is not computed by taking into consideration the stepped-up value. As a consequence, a corporate shareholder owning shares in a company transferring its legal seat may suffer double taxation at the moment of the actual sale. Treaty solutions to this problem exist and shall be dealt with in this Segment III and subsequently mentioned in Segment V (for instance, reference shall be made to Article 12 of the Protocol of the treaty between Germany and Italy which however applies to individuals). Another solution might be to permit the taxpayer to opt for taxation at the moment in which the other State deems that the shares have been alienated (as if the shares had been sold and repurchased for their fair market value. Such solution is found in Article XIII, paragraph 7 of the Canada-US tax treaty, but it can be again invoked only by individuals).

D. Shares distributed as dividends. Similar issues may arise in the event the shares are distributed as a dividend.

Table C



Segment IV

EU Aspects

Domestic laws of the Member States contain provisions which differentiate the regime applicable to gains on shares realised by resident and non-resident and this discrepancies may regard the taxable events or more burdensome compliance requirements. Various reasons suggest a special focus on the EU aspects of the subject matter taking into account the interaction between EU law and tax treaties.

A. Conflicts with the EU treaty. In the first place, the applicable tax (treaty) regime may thus conflict with the principle and provisions laid down by the EU treaty as developed by the jurisprudence of the European Court of Justice. It may be investigated, for instance, the extent to which capital gains on shares realised by non residents may be subjected to a more burdensome treatment compared to gains realised by resident taxpayers. Similarly, evidentiary requirements and compliance obligations might be examined to the extent that they conflict with the EC non discrimination principle or with the EC freedoms [insofar as such issues are not covered by treaties. Cfr. Paragraph C (other issues) under Segment II above (Determination of the Gains on Shares, Timing and Other Computational Issues)].

B. Secondary EU legislation. Furthermore, secondary EU legislation contains provisions which apply to gains on shares realised by either and individual or a company in a cross-border disposal of shares and in a company of another Member State. These are the rules contained in the Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchange of shares concerning companies of different Member States (the so-called Merger Directive) and Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the so-called Parent-Subsidiary Directive). The Merger Directive shall be examined limitedly to the exchange of shares relief and neither mergers nor divisions shall be discussed in order to avoid overlapping with future IFA Congresses.

C. EU harmonisation. Finally, taxation on gains on shares may fall within the scope of possible EU harmonisation. This is the case of gains realised by a parent company of a Member State on shares held in a subsidiary company of another Member State (see G. MAISTO, *Proposal for an EC Exemption of Capital Gains Realised by Parent Companies of Member States*, in European Taxation, Vol. 42, n. 1, 2002, 28).

SEGMENT V
Possible Treaty Solutions

This Segment V shall assess the issues pointed out during the previous Segments and submit proposed treaty solutions to include (i) global revisiting of capital gains taxation under treaties to include drastic domestic changes such as the deletion of Article 13 of the OECD Model; (ii) less drastic changes to the OECD Model Convention or additions to the Commentary[1]; (iii) changes to the current EU tax Directives; (iv) changes to internal law to the effect that such changes may permit avoidance of treaty issues; (v) proposal of treaty anti-abuse provisions (*e.g.* whether it might be appropriate to include in treaties anti-abuse clauses addressing particularly capital gains. In the framework of this discussion, it might be interesting to consider the "main purpose test" clause laid down by the Italy-US treaty signed on 25 August, 1999, with regard to dividend, interest, royalties and other income).
Such possible treaty solutions shall be the result of the panellists' joint effort coordinated by one panel member and shall be discussed by the entire panel who shall also provide language to reflect such proposed changes.

11 July 2003

(Guglielmo Maisto)

[1] Discussion regarding new provisions to the OECD Model Convention could include: (i) exemption of gains on shares of companies engaged in international shipping or aircraft activities (in the event the source State is departing from the standard OECD source State exemption laid down by Article 13 of the Model Convention); (ii) segregation of gain attributable to retained earnings of the target company and subsequent application of Article 10 of the OECD Model Convention.

57th Congress of the
International Fiscal Association
Sydney, Australia
August 31 – September 5, 2003

SEMINAR E

General Anti-Avoidance Rules in International Taxation

OUTLINE

Professor Brian J. Arnold (Canada)
Barbara Angus (USA)
Professor Graeme S. Cooper (Australia, Chair)
Professor Anders Hultqvist (Sweden)
Professor Cameron Rider (Australia, Secretary)
Professor Fernando Serrano (Spain)
Mr. Guillermo O. Teijeiro (Argentina)

Seminar E – *General Anti-Avoidance Rules in International Taxation* – is designed as a successor to the examination of Subject 1 at the Oslo Congress in 1992 – *Form and Substance in Tax Law*. This seminar elaborates the discussion in Oslo by focussing on statutory GAARs and how they operate when applied to international transactions. This seminar will examine the topic by the discussion of 5 case studies demonstrating the potential application of domestic GAARs to a selection of international transactions.

Case Study I. Cross-border corporate surplus stripping (Canada)

The first transaction examined involves the cross-border sale of shares in a company with substantial cash assets and retained profits: the shares in a Canadian company are sold by its US shareholder to another Canadian company. The profits of the Canadian operating company would have been subject to withholding tax if paid to the US shareholder as a dividend prior to the sale. Instead, the value of the cash and profits is reflected in the sale price received by the US seller. Other collateral arrangements involve payments under a guarantee.

The issues examined are (a) whether and how Canada's general anti-avoidance rule applies to the transaction and (b) the impact of the Canada-US treaty on the application of the domestic anti-avoidance rule to the transaction.

The principal elements of GAAR analysis in Canada involve three requirements

1. a tax benefit,
2. an avoidance transaction and
3. a misuse or abuse.

These elements are examined and their application to the cross-border sale explained. The Canadian Court concludes that the payment of the sale price involves the avoidance of Canadian withholding tax through a transaction that was designed to achieve that tax benefit. This is viewed as an abuse of the Canadian withholding tax rules.

The second issue is whether the Canada-US tax convention prevents the application of the domestic general anti-avoidance rule. The taxpayer contends that Article XIII(4) of the treaty prevents Canada from taxing a US resident on the capital gain made from the sale of shares. The Government argues that the transaction involves a dividend and Article X allows Canada to tax dividends at rate not exceeding 15%. The Court concludes that Article X applies and not Article XIII because the transaction was not a "genuine alienation" of shares.

Some of the other issues which the outcome raises include whether the re-characterization of the gain as a dividend under s. 245(5) should be understood as amounting to a deeming provision which assimilates the payment for the shares to a dividend; and whether there is an implicit override of the treaty occurring in this outcome.

Case Study II. On-shore and offshore interest allocation strategies (Australia)

The second case study involves the application of Australia's GAAR to a debt-financed offshore takeover. The acquisition of the shares in the non-resident company was to be funded by debt borrowed onshore where the cost of funds was likely to be lowest. The borrowed funds were used to purchase equity in another onshore company. The onshore company then subscribes for equity in an offshore takeover vehicle. The offshore takeover vehicle then starts buying the shares of the takeover target.

As the transaction involved onshore borrowing (ultimately) to earn foreign income, it could have been adversely affected by domestic interest allocation rules triggering other domestic rules which quarantine foreign losses where there is insufficient foreign income. The transaction was structured in such a way – the onshore borrowing could be traced directly to the purchase of onshore equity – that the effects of these rules were negated. The Government argued that the onshore equity purchase was done to avoid the application of these rules to the borrower. The issue is whether the use of the structure would trigger the application of Australia's GAAR, re-instating the outcome that would have been produced had the funds simply been borrowed and employed without the intermediate onshore equity purchase.

The application of the GAAR requires,

1. the existence of a scheme
2. a finding that some taxpayer would obtain a tax benefit in connection with the scheme, and
3. the person who entered the scheme did so for the purpose of securing the tax benefit

These elements are examined and their application to the structure explained. The Court concludes that the interposition of the onshore equity purchase was designed to achieve a tax benefit and that a tax benefit arose from the avoidance of the quarantining rules.

Case Study III. Back-to-back loan structures and treaty shopping (Argentina)

The third case study evaluates the application of Argentina's GAAR to a cross-border loan made to a local subsidiary and backed by the foreign parent company. The loan is mediated through a series of transactions involving different subsidiaries of the same multinational banking group.

The terms of the arrangement involve four taxpayers – two sets of related parties. A German company subscribes for bonds issued by a bank. Shortly thereafter German company's Argentine subsidiary borrows an equivalent sum from a second bank which is related to the first bank. Apart from the sum, the terms of the two loan arrangements differ substantially, but are proximate in time. The first bank then guarantees the repayment of the subsidiary's loan to the second bank. The cost of the guarantee is implicit in the (lower) interest rate being paid to the German parent on the bonds. At the same time, the German company pledges the bonds to the Bank as security for the guarantee. Shortly thereafter the lender grants an option to the German parent to acquire an interest in the loan.

If the German parent had lent the sum directly to the Argentine subsidiary, the payments of interest would have subject to Argentine withholding tax at the 15% rate prescribed in Article XI(2)(b) of the Argentina-Germany treaty. Instead, this structure would have the effect of eliminating Argentine interest withholding tax on the interest paid because, under Article XI(3)(c) of the Argentina-Denmark treaty, interest on certain financial arrangements is free from withholding at source.

The application to this structure of the two Argentine GAARs is examined. Section 1 of the Tax Procedure Law requires that tax provisions be construed in accordance with their purpose and economic meaning. Section 2 of the Tax Procedure Law provides that when a taxpayer's chosen legal form does not coincide with a structure offered or authorized by law to properly shape actual economic objectives the chosen form may be discarded. In its stead, the law requires that the real economic situation be considered within the structures provided by private law and the most natural form applied consistent with the taxpayer's real intention.

Case Study IV. Cross-border coupon stripping (Spain)

The fourth case study concerns the application of Spain's GAAR to cross-border coupon stripping.

The transaction involves the purchase of Austrian Government bonds *cum interest*, collection of the interest, and subsequent sale at a loss. Under Article XI(3) of the Spain-Austria treaty, interest on debt instruments issued by one Contracting State can only be taxed by that State. Accordingly, Austria has the exclusive right to tax interest from public debt. The interest is actually exempt from tax under Austria's domestic laws. Furthermore, the capital loss arising on the sale can be used in Spain to offset capital gains made in Spain.

The application of Spain's GAARs to this transaction is examined. The key elements of one Spanish rule revolve around the abuse of the tax law. A second GAAR regulates sham transactions.

A decision of the Central Economic-Administrative Court concluded that the purchase of Austrian bonds subject to a resale agreement for the purpose of taking advantage of the tax exempt status accorded to interest paid under such bonds is an abuse of tax law. The principal reason given was that the transaction was used solely to obtain a tax benefit without any valid economic grounds to justify the transaction.

Case Study V. Cross-border structured finance (Sweden)

The last case study examines the application of Sweden's GAAR to a cross-border funding arrangement designed to generate a domestic loss from interest deductions.

A Swedish company establishes an Irish subsidiary. The parent company borrows money from an Irish bank which is then subscribed for additional stock in the subsidiary. The subsidiary then lend that money to one of the lender's subsidiaries (at the same interest rate as it pays). After the bank's subsidiary repays the loan, the capital of the subsidiary is reduced accordingly and the loan to the Irish bank is repaid by the Swedish company. The tax advantage to the transaction turns on the deductibility of the interest paid by the parent being funded out of tax-free dividends repatriated from the subsidiary.

The tax authorities argue that the transactions, which are designed and marketed as a tax avoidance scheme, offend the GAAR. The tax administration also argued for a violation of the DTA. The taxpayer argues that there is a commercial purpose to the structure since the Swedish company planned to establish a financial center in Ireland, a plan which it later abandoned.

The application of the Swedish GAAR at the time requires,

1. The transaction results in a tax benefit

2. The tax benefit can be assumed to be the main reason for the transaction

3. An assessment on the basis of the transactions would be in violation of the purpose of the legislation.

These elements are examined and their application to the structure explained. The judgement of the lower court impugned the transaction on the basis of its artificiality and so the GAAR did not have to be considered. The judgement of the Court of Appeal considered the application of the GAAR but could not conclude, on the evidence, that the tax benefit was the main reason for the transaction.

The treaty argument was also defeated. The Court concluded that a dividend was to be regarded as dividend and under the treaty was not taxable in Sweden.

Seminar F : Recent developments in international tax

Chair *Prof. Maarten J. Ellis (Netherlands)*
Secretary *Vincenzo Cocco (Australia)*

EC Jurisprudence: The Gerritse, Lankhorst and Open Skies Cases

Chair *Prof. Peter A. Harris (UK/Australia)*
Panelists *Dick Molenaar (Netherlands)*
Dr. Klaus Sieker (Germany)

- The Arnoud Gerritse Decision of the ECJ (in English)
- Decision on the Lankhorst-Hohorst Case (in English)
- Decision on the Lankhorst-Hohorst Case (slides)

New U.S. legislative proposals regarding earnings stripping legislation (Contents of the Bill, status, expectations and impact)

Panelists *Judith Blissard (USA)*
Willard B. Taylor (USA)

Recent major CFC-legislative developments New rules in Australia, Canada and Germany

Panelists *Richard Dukes (Australia)*
J. Scott Wilkie (Canada)
Dr. Klaus Sieker (Germany)

- Major CFC Legislative developments in Germany (slides)

Recent court decisions on permanent establishment issues The Interhome and Unisys cases

Chair *Mr. Nishith Desai (India)*
Panelists *Mr. Philippe Thiria (France)*
Mr. Tony H. Slater (Australia)

- Decision on the Interhome Case (in English)
- Decision on the Unisys Case

EC Jurisprudence: The Gerritse, Lankhorst and Open Skies Cases

Chair	*Prof. Peter A. Harris (UK/Australia)*
Panelists	*Dick Molenaar (Netherlands)*
	Dr. Klaus Sieker (Germany)

- The Arnoud Gerritse Decision of the ECJ (in English)
- Decision on the Lankhorst-Hohorst Case (in English)
- Decision on the Lankhorst-Hohorst Case (slides)

International Artist and Sportsman Taxation

THE *ARNOUD GERRITSE* DECISION OF THE ECJ

On 12 June 2003 the European Court of Justice (ECJ) has issued its decision in the *Arnoud Gerritse* Case (C-234/01), regarding the taxation of international artists (and sportsmen).

Production expenses need to be deductible
The ECJ decided that the non-deductibility of (production) expenses prior to the performances of foreign artists in Germany is in breach with the freedom principles of the European Treaty. Foreign artists are worse off than domestic German artists, the non-deductibility of (production) expenses is an obstacle to enter the German market and cannot be acceptable within the EU. Also other EU-countries do not allow the deduction of expenses and are now in conflict with the European rules.
The ECJ (and earlier the A-G) acknowledged that expenses for performing artists can be quite high.

Normal income tax return
Taxing foreign artists at a fixed tax rate of 25% is allowed under the European Treaty, as long as this taxation is not higher than the normal income tax rates. This opens the door to normal income tax returns for foreign artists, who have paid too much tax in the past in Germany (and other countries).
In this normal income tax return the general free taxable amount will not be applicable.

Implications for the artist tax practice in Germany (and other EU-countries)
After the *Arnoud Gerritse* decision it is inevitable that Germany and other European countries need to change their tax legislation for foreign artists (and sportsmen). The international circulation of performing artists can profit very much from the lower taxation. In some cases no withholding tax will be due anymore, because the expenses are higher than the earnings.

Consequences for Article 17 OECD Model Treaty
The *Arnoud Gerritse* decision of the ECJ will also start a discussion about paragraph 10 of the Commentary on Article 17 OECD Model Treaty. It is now – at least within Europe – questionable whether the OECD still can allow countries to tax the gross artist performance fees without deductions for expenses. These expenses are an important factor and can vary considerably for the various artists (from 15% to more than 100% of the earnings).

The UK and the Netherlands as best practice examples
Both the UK and the Netherlands have implemented a fair tax system for artists (and sportsmen). During the year, special tax departments deal with applications for the deductions for expenses and after the year artists (and sportsmen) can opt in the normal income tax system.
The British and Dutch artist (and sportsman) tax systems can be used as best practice examples by the EU-countries Belgium, Luxembourg, Germany, France, Spain, Portugal, Italy, Greece, Austria, Sweden and Finland, but also by the new member countries Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Malta and Cyprus to adjust their legislation.

IFA - August 2003

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All Arts Belastingadviseurs
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Harald Grams
Grams und Partner Rechtsanwälte und Steuerberater
Bielefeld, Germany

JUDGMENT OF THE COURT (Fifth Chamber)

12 June 2003(1)

(Income tax - Non-residents - Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) - Non-taxable threshold amount - Deduction of business expenses

In Case C-234/01,

REFERENCE to the Court under Article 234 EC by the Finanzgericht Berlin (Germany) for a preliminary ruling in the proceedings pending before that court between

Arnoud Gerritse

and

Finanzamt Neukölln-Nord,

on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC),

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, P. Jann and A. Rosas, Judges,

Advocate General: P. Léger,

Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Gerritse, by H. Grams, Rechtsanwalt, and D. Molenaar, belastingadviseur,

- the Finanzamt Neukölln-Nord, by W. Czarnetzki and S. Wolff, acting as Agents,

- the Finnish Government, by T. Pynnä, acting as Agent,

- the Commission of the European Communities, by R. Lyal and W. Mölls, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Gerritse and the Commission at the hearing on 9 January 2003, after hearing the Opinion of the Advocate General at the sitting on 13 March 2003,

gives the following

Judgment

1. By order of 28 May 2001, received at the Court on 19 June 2001, the Finanzgericht Berlin (District Tax Court, Berlin) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 52 of the EC Treaty (now, after amendment, Article 43 EC).

2. That question was raised in proceedings between Mr Gerritse and the Finanzamt Neukölln-Nord (the Finanzamt) concerning the taxation of income received in Germany as a non-resident.

National legal background

3. Paragraph 50a of the Einkommensteuergesetz (Law on Income Tax) in its 1996 version (the EStG 1996) concerns the taxation of partially taxable persons; that is to say those having neither their permanent residence nor ordinary abode in Germany, and who are taxed there only on the income received in that State. Under Paragraph 50a(4) of that Law:

In the case of partially taxable persons, income tax shall be deducted at source:

1. In respect of income from artistic, sporting or similar performances in national territory or from the exploitation of such performances in national territory, including income derived from other acts of performance connected with the above, irrespective of the person who receives the income ...

...

The deduction at source shall be 25% of the income received ...

4. In accordance with Paragraph 50(5), fourth sentence, of the EStG in its 1997 version, applicable with retrospective effect to remuneration received in 1996, no deduction for business expenses is in principle authorised, unless those costs represent more than half of the income received.

5. In principle, retention at source constitutes a definitive charge, as is shown by Paragraph 50(5) of the EStG 1996:

In the case of partially taxable persons, income tax on income which ... is subject to deduction at source under Paragraph 50a is to be regarded as finally paid by that deduction.

6. Under Paragraph 1(3) of the EStG 1996, certain persons falling within the scope of Paragraph 50a of that law may nevertheless ask to be treated like persons wholly subject to income tax, their tax treatment being thereafter on the same basis as that of a wholly taxable person for the purposes of assessing the tax due in the light of

the tax return.

7. However, partially taxable persons may use that option only if one of the following conditions is fulfilled: either at least 90% of the income must have been subject to German income tax during the calendar year, or the income not subject to German income tax during the calendar year must be equal to or less than DEM 12 000.

8. In the clearance procedure for income tax, generally applicable to wholly taxable persons, the basis of assessment, as regards income from a self-employed activity, is the net profit after deducting business expenses (see Paragraph 50(1) and (2) of the EStG). In addition, the progressive table laid down by Paragraph 32a of the EStG 1996, which includes a non-taxable threshold amount limited for 1996 to DEM 12 095, must be applied.

The dispute in the main proceedings and the question referred

9. Mr Gerritse, a Netherlands national resident in the Netherlands, received the sum of DEM 6 007.55 in 1996 for performing as a drummer at a radio station in Berlin. The documents before the Court show that the business expenses occasioned by that performance amounted to DEM 968.

10. In the same year, Mr Gerritse also received gross income totalling around DEM 55 000 in his State of residence and in Belgium.

11. In accordance with the Convention concluded on 16 June 1959 between the Kingdom of the Netherlands and the Federal Republic of Germany for the avoidance of double taxation in the area of income, capital and various other taxes, and for regulating other tax matters (BGBl. 1960 II, p. 1782; the bilateral convention) and with Article 50a(4) of the EStG 1996, the fee of DEM 6 007.55 was subjected to tax on a notional assessment of income, at the rate of 25% (namely DEM 1 501.89), which was deducted at source.

12. In September 1998, Mr Gerritse lodged with the German tax authorities, under Paragraph 1(3) of the EStG 1996, a declaration of income with a view to be being treated as a wholly taxable person. The Finanzamt refused to carry out income tax clearance, however, on the ground that the other income declared exceeded the ceiling of DEM 12 000. Mr Gerritse's administrative complaint was likewise rejected.

13. Mr Gerritse brought an action against that rejection before the Finanzgericht Berlin, relying on the principle of non-discrimination guaranteed by Community law. He argued that a wholly taxable resident in a situation comparable to his own would not be required to pay tax by reason of the non-taxable threshold amount limited to DEM 12 095.

14. The Finanzamt argued that, by applying the basic table, the applicant would escape the progressivity of German income tax, even though the level of his income, having regard to his worldwide income, required the application of a higher rate. In that way, he would be favoured in comparison with wholly taxable residents, in respect of whom, in accordance with Paragraph 32b(1), point 3, of the EStG 1996,

worldwide income is taken into account when determining the rate of taxation.

15. The referring court inquires as to the compatibility with Community law of the definitive taxation at the rate of 25% laid down by Paragraph 50a(4), first sentence, point 1, and second sentence, of the EStG 1996.

16. It notes that the possibility, by virtue of the bilateral convention, of the State of residence taking the income received in the State of activity into account for the purposes of taxing the balance of worldwide income might lead to an extra charge for the taxpayer in that a possible leap in the rate of income tax would not be entirely compensated for by deduction of the tax in the State of residence, such deduction being calculated in a purely abstract way by reference to the relation between the income received in Germany and the taxpayer's worldwide income.

17. According to the referring court, the definitive taxation of Mr Gerritse's income at a rate of 25% cannot be justified by the principle of tax consistency, since there was not, as the case-law of the Court of Justice on the matter requires, a direct link between the tax advantage - in this case the tax-free allowance - and the definitive taxation.

18. The referring court also finds that, in certain cases, application of a uniform rate of 25% risks leading to blatant discrimination against a partially taxable person by comparison with a tax resident. For example, in 1996, a single taxpayer with his permanent residence in the Netherlands and receiving there the equivalent of DEM 12 001 by way of net income, as well as gross income in Germany derived from a self-employed artistic activity amounting to DEM 100 000 gross and DEM 50 001 net, was subject to a definitive charge of DEM 25 000 by way of income tax, in addition to the proportionate solidarity surcharge. According to the referring court, that corresponds - when applied to the net income received in Germany - to an average rate of tax of 49.99%, which is generally applicable only to persons with very high incomes (the maximum tax rate in 1996 amounted to 53% for single taxpayers with taxable income over DEM 120 042).

19. If the taxpayer's permanent residence had been in Germany, and he had obtained a net worldwide income there of DEM 62 002, he would have had to pay, according to the basic table, a tax on income of only DEM 15 123. In that case, the average rate of taxation would have corresponded to only 24.4%, half the rate mentioned in the previous paragraph.

20. The referring court recognises, however, that, in a large number of cases, particularly where national income is very high and business expenses negligible, the provisions at issue in the main proceedings lead, in relation to the rate of tax to be applied, to more favourable treatment of a partially taxable person subject to the deduction of tax, compared with a taxpayer established in Germany or with a partially taxable person assessed to tax in accordance with Article 50 of the EStG 1996. Mr Gerritse, however, was not one of those favoured persons, given that the tax assessment in respect of income received in German territory would have been nil in the event of full liability to tax.

21. The referring court adds that the dispute in the main proceedings might be resolved by allowing Mr Gerritse the possibility of being assessed to tax on the basis of the

basic income tax table, but without taking account of the tax-free allowance, which would lead to income tax slightly lower than has been demanded. The question would then arise whether negligible differences in the matter of taxation constitute an effective obstacle to the exercise of an economic activity in another Member State.

22. In those circumstances, the Finanzgericht Berlin decided to suspend the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Is there an infringement of Article 52 of the EC Treaty ... where, under Paragraph 50a(4), first sentence, point 1 and second sentence, of [the EStG 1996], a Netherlands national who earns in Germany taxable net income of approximately DEM 5 000 from self-employed activity in the calendar year is subject to deduction of tax at source by the person liable to pay his fees at the rate of 25% of his (gross) revenue of approximately DEM 6 000 plus solidarity surcharge, where it is not possible, by means of an application for a refund or an application for a tax assessment, for him to recover, in whole or in part, the taxes paid?

The question referred

23. It should be noted at the outset that Mr Gerritse, who lives in the Netherlands, performed temporary services in Germany, for which he received income the taxation of which is disputed before the referring court. In those circumstances, as Mr Gerritse and the Commission have observed, the question referred should be understood as concerning the freedom to provide services rather than the freedom of establishment.

24. The Court considers, therefore, that the referring court is essentially enquiring whether Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) preclude a national provision such as that at issue in the main proceedings which, as a general rule, on the one hand, takes gross income into account when taxing non-residents, without deduction of business expenses, whereas residents are taxed on their net income after deduction of their business expenses, and, on the other, makes the income of non-residents liable to a definitive tax at the uniform rate of 25%, deducted at source, whereas the income of residents is taxed in accordance with a progressive table which includes a tax-free allowance.

The deductibility of business expenses

25. Mr Gerritse and the Commission argue that, in the case of self-employed persons who are wholly taxable, only the profit is subject to income tax, business expenses being generally excluded from the basis of assessment, whereas, in the case of partially taxable persons, the tax of 25% is levied on receipts, business expenses being non-deductible (save where they are higher than half of the receipts, in which case tax is repaid in so far as it exceeds 50% of the difference between the receipts and the business expenses).

26. Mr Gerritse argues, in particular, that there are serious consequences for non-resident artists on tour in Germany, whose business expenses are generally very

high.

27. It is to be noted at this stage that the business expenses in question are directly linked to the activity that generated the taxable income in Germany, so that residents and non-residents are placed in a comparable situation in that respect.

28. In those circumstances, a national provision which, in matters of taxation, refuses to allow non-residents to deduct business expenses, whereas residents are allowed to do so, risks operating mainly to the detriment of nationals of other Member States and therefore constitutes indirect discrimination on grounds of nationality, contrary in principle to Articles 59 and 60 of the Treaty.

29. Since no precise argument has been put before the Court to justify such a difference in treatment, Articles 59 and 60 must be held to preclude a national provision such as that at issue in the main proceedings in so far as it excludes the possibility for partially taxable persons to deduct business expenses from their taxable income, whereas such a possibility is granted to wholly taxable persons.

The deduction at source of 25%

Observations submitted to the Court

30. Mr Gerritse argues that the effect of exacting income tax by way of deduction at source and the fact that non-residents are thereby excluded from any form of repayment of overpaid amounts are incompatible with the third paragraph of Article 60 of the Treaty. In particular, he maintains that the failure to take account of the tax-free allowance leads to discrimination contrary to Community law, since its effect is to impose a minimum rate of tax, ruled unlawful by the Court in its judgment in Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 49.

31. There is, he submits, no objective reason capable of justifying that difference in treatment by comparison with residents. In particular, the argument of tax consistency cannot be validly relied on, since there is here no advantage to compensate for the tax disadvantage, as required by the Court's case-law on the subject.

32. The Finanzamt and the Finnish Government argue, by contrast, that the tax regime at issue in the main proceedings complies with Community law.

33. First, according to the Finanzamt, deduction at source constitutes a legitimate and appropriate method for the tax treatment of a partially taxable person, established abroad.

34. In addition, if the basic tax table were to be applied without restriction, which in this case would result in no German income tax being levied, Mr Gerritse would escape the progressive element of that tax, even though his worldwide income required the application of a higher rate. In that way, a partially taxable taxpayer would be favoured in comparison with wholly taxable persons, for whom worldwide income is taken into account when determining the tax rate.

35. The Finanzamt and the Finnish Government add that, according to the case-law of the Court (judgments in Case C-279/93 *Schumacker* [1995] ECR I-225, paragraphs 31 to 33; Case C-391/97 *Gschwind* [1999] ECR I-5451, paragraph 22; and *Asscher*, paragraph 44), the obligation to take account of a taxpayer's personal situation is, in principle, a matter for the competence of the State of residence, and not that of the State where the income originates, unless, on account of the lack of sufficient income for taxation in the first State, the latter were unable to fulfil that obligation, so that, from the economic point of view, neither of the two States under consideration would in the end take account of the personal situation of the taxpayer for the purposes of tax assessment.

36. However, a tax-free allowance is designed to protect the essential minimum income of taxpayers with low incomes, which is in principle a matter falling within the responsibility of the State of residence, where, as a general rule, the taxpayer receives the greater part of his income. The German tax authorities take account of the essential minimum in the case of a partially taxable person, in so far as that person is subject to assessment in the ordinary way, where the income received abroad is less than DEM 12 000.

37. Finally, according to the Finnish Government, the rate of 25% often corresponds to the actual rate of tax to which the person is subject in his State of residence, so that the deduction at source at issue does not constitute an unforeseeable obstacle to the free movement of persons.

38. The Commission makes a similar argument. It considers that, bearing in mind the circumstances of the case at issue in the main proceedings, account should not be taken of the tax-free allowance, so that the rate corresponding to taxation above that amount should be applied.

39. It thus proposes that the net income (A) be added to the tax-free allowance (B) to obtain a total (C). The amount of tax (D) laid down by the relevant table for that total (C) could be regarded as a fair tax on the net income. The average rate of taxation, which could serve as a reference for non-discriminatory treatment, would then arise from the relationship between the amount of the tax (D) in accordance with the table and net income (A).

40. According to the Commission, the calculation in Mr Gerritse's case would be as follows: the total (C) would be composed of net income (A) amounting to DEM 5 039.55 plus the tax-free allowance (B) of DEM 12 095, and would thus amount to DEM 17 134.55. For that income, the relevant tax table gives a tax (D) of DEM 1 337. Having regard to net income (A), that sum would correspond to an average rate of taxation of 26.5%, close to the rate of 25% actually applied to Mr Gerritse.

41. The Commission argues that, at that rate, there is no discrimination. There is therefore no cause in this case to challenge the German authorities' application of the uniform rate of 25% to partially taxable persons.

42. It also shares the views of the Finanzamt and the Finnish Government as to the benefit of the tax-free allowance. It is in principle for the State of residence, which carries out the global taxation of the person concerned taking his worldwide net income into account, to integrate into its system of progressive taxation the

considerations of a social nature that justify the existence of such an allowance.

The answer of the Court

43. As the Court has already held, in relation to direct taxes, the situations of residents and of non-residents are generally not comparable, because the income received in the territory of a Member State by a non-resident is in most cases only a part of his total income, which is concentrated at his place of residence, and because a non-resident's personal ability to pay tax, determined by reference to his aggregate income and his personal and family circumstances, is easier to assess at the place where his personal and financial interests are centred, which in general is the place where he has his usual abode (*Schumacker*, paragraphs 31 and 32; *Gschwind*, paragraph 22; Case C-87/99 *Zurstrassen* [2000] ECR I-3337, paragraph 21).

44. Also, the fact that a Member State does not grant to a non-resident certain tax benefits which it grants to a resident is not, as a rule, discriminatory having regard to the objective differences between the situations of residents and of non-residents, from the point of view both of the source of their income and of their personal ability to pay tax or their personal and family circumstances (*Schumacker*, paragraph 34; *Gschwind*, paragraph 23).

45. Moreover, for tax purposes, residence is the connecting factor on which international tax law, in particular the Model Convention of the Organisation for Economic Cooperation and Development (OECD) (Model Convention on Double Taxation concerning Income and Capital, Report of the Tax Affairs Committee of the OECD, 1977, version of 29 April 2000) is as a rule founded for the purpose of allocating powers of taxation between States in situations involving extraneous elements.

46. In this case, the documents before the Court show that Mr Gerritse, who lives in the Netherlands, received only a minimal part of his overall income in German territory.

47. The question therefore arises whether the objective difference in situation between such a non-resident and a resident allows one to disregard the discriminatory character of a national provision such as that at issue in the main proceedings which makes the income of non-residents subject to a definitive tax at the uniform rate of 25% deducted at source, whereas the income of residents is taxed according to a progressive table including a tax-free allowance.

48. Concerning, first, the tax-free allowance, since, as the Finanzgericht Berlin, the Finnish Government and the Commission have argued, it has a social purpose, allowing the taxpayer to be granted an essential minimum exempt from all income tax, it is legitimate to reserve the grant of that advantage to persons who have received the greater part of their taxable income in the State of taxation, that is to say, as a general rule, residents.

49. It should be noted that, where it is nevertheless established that a partially taxable person has received the greater part of his income in Germany, by fulfilling one of the two conditions mentioned in paragraph 7 of this judgment, the national provision at issue in the main proceedings assesses him to tax in precisely the same

way as a wholly taxable person, by applying to the income of the taxpayer concerned a progressive table including a tax-free allowance.

50. That is not, however, the case with Mr Gerritse.

51. In that regard, the Netherlands Government has stated, in reply to a question by the Court, that, in a case such as that at issue in the main proceedings, the taxpayer may benefit in the Netherlands, the State of residence, from the tax-free allowance which is deducted from overall income. In other words, an advantage comparable to that claimed by Mr Gerritse in Germany is granted in the State of his residence, which must, in principle, take into account the personal and family situation of the person concerned.

52. Moreover, as regards the application to non-residents of a flat rate of tax of 25% while residents are subject to a progressive table, as the Commission has pointed out, the Netherlands as State of residence, pursuant to the bilateral convention, integrates the income in respect of which the right to tax belongs to Germany into the basis of assessment, in accordance with the progressivity rule. It does, however, take account of the tax levied in Germany, by deducting from the Netherlands tax a fraction which corresponds to the relation between the income taxed in Germany and worldwide income.

53. That means that, with regard to the progressivity rule, non-residents and residents are in a comparable situation, so that application to the former of a higher rate of income tax than that applicable to the latter and to taxpayers who are assimilated to them would constitute indirect discrimination prohibited by Community law, in particular by Article 60 of the Treaty (see, by analogy, *Asscher*, paragraph 49).

54. It is for the referring court to verify, in this case, whether the 25% tax rate applied to Mr Gerritse's income is higher than that which would follow from application of the progressive table. In order to compare comparable situations, it is necessary in that respect, as the Commission has rightly pointed out, to add to the net income received by the person concerned in Germany an amount corresponding to the tax-free allowance. According to the Commission, which carried out that calculation, application of the progressive table, in a case such as that at issue in the main proceedings, would lead to a rate of tax of 26.5%, which is higher than that actually applied.

55. In view of the whole of the above considerations, the answer to the Finanzgericht Berlin must be:

- Articles 59 and 60 of the Treaty preclude a national provision such as that at issue in the main proceedings which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses;

- However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance.

Costs

56. The costs incurred by the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Finanzgericht Berlin by order of 28 May 2001, hereby rules:

1. Article 59 of the EC Treaty (now, after amendment, Article 49 EC) and Article 60 of the EC Treaty (now Article 50 EC) preclude a national provision such as that at issue in the main proceedings which, as a general rule, takes into account gross income when taxing non-residents, without deducting business expenses, whereas residents are taxed on their net income, after deduction of those expenses.

2. However, those articles of the Treaty do not preclude that same provision in so far as, as a general rule, it subjects the income of non-residents to a definitive tax at the uniform rate of 25%, deducted at source, whilst the income of residents is taxed according to a progressive table including a tax-free allowance, provided that the rate of 25% is not higher than that which would actually be applied to the person concerned, in accordance with the progressive table, in respect of net income increased by an amount corresponding to the tax-free allowance.

Wathelet
Timmermans
Edward

Jann
Rosas

Delivered in open court in Luxembourg on 12 June 2003.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber

1: Language of the case: German.

JUDGMENT OF THE COURT (Fifth Chamber)

12 December 2002 (1)

(Freedom of establishment - Tax provisions - Corporation tax - Covert distribution of profits - Tax credit - Coherence of the tax system - Tax evasion)

In Case C-324/00,

REFERENCE to the Court under Article 234 EC by the Finanzgericht Münster (Germany) for a preliminary ruling in the proceedings pending before that court between

Lankhorst-Hohorst GmbH

and

Finanzamt Steinfurt,

on the interpretation of Article 43 EC,

THE COURT (Fifth Chamber),

composed of: M. Wathelet (Rapporteur), President of the Chamber, C.W.A. Timmermans, D.A.O. Edward, P. Jann and A. Rosas, Judges,

Advocate General: J. Mischo,

Registrar: L. Hewlett, Principal Administrator,

after considering the written observations submitted on behalf of:

- the German Government, by W.-D. Plessing and T. Jürgensen, acting as Agents,

- the Danish Government, by J. Molde, acting as Agent,

- the United Kingdom Government, by J.E. Collins, acting as Agent, assisted by R. Singh, Barrister,

- the Commission of the European Communities, by R. Lyal, acting as Agent, assisted by R. Bierwagen, Rechtsanwalt,

having regard to the Report for the Hearing,

after hearing the oral observations of Lankhorst-Hohorst GmbH, represented by J. Schirmer and J.A. Schirmer, Steuerberater; of the German Government, by W.-D. Plessing and G. Müller-Gatermann, acting as Agent; of the United Kingdom Government, represented by J.E. Collins, assisted by R. Singh; and of the Commission, represented by R. Lyal, assisted by R. Bierwagen, at the hearing on 30 May 2002,

after hearing the Opinion of the Advocate General at the sitting on 26 September 2002,

gives the following

Judgment

1. By order of 21 August 2000, received at the Court on 4 September 2000, the Finanzgericht (Finance Court) Münster referred to the Court of Justice for a preliminary ruling under Article 234 EC a question on the interpretation of Article 43 EC.

2. That question was raised in proceedings brought by Lankhorst-Hohorst GmbH (hereinafter 'Lankhorst-Hohorst'), a company established in Rheine, Germany, against the Finanzamt Steinfurt, a German tax authority, concerning payment of corporation tax for 1997 and 1998.

The national legislation

3. Paragraph 8a of the Körperschaftsteuergesetz (Law on corporation tax), in the version in force from 1996 to 1998 (hereinafter 'the KStG'), is headed 'Capital borrowed from shareholders'. Paragraph 8a(1) provides as follows:

'Repayments in respect of loan capital which a company limited by shares subject to unlimited taxation has obtained from a shareholder not entitled to corporation tax credit which had a substantial holding in its share or nominal capital at any point in the financial year shall be regarded as a covert distribution of profits,

...

2. where repayment calculated as a fraction of the capital is agreed and the loan capital is more than three times the shareholder's proportional equity capital at any point in the financial year, save where the company limited by shares could have obtained the loan capital from a third party under otherwise similar circumstances or the loan capital constitutes borrowing to finance normal banking transactions. ...'

4. It is apparent from the order for reference that there is no entitlement to corporation tax credit, first, for non-resident shareholders and, second, for corporations governed by German law which are exempt from corporation tax, namely legal persons governed by public law and those carrying on business in a specific field or performing tasks which should be encouraged.

The main proceedings and the question referred for a preliminary ruling

5. Lankhorst-Hohorst sells boating equipment, goods for watersports, leisure and craft items, leisure and work clothing, furnishings, hardware and similar goods. In August 1996 its share capital was increased to DEM 2 000 000.

6. The sole shareholder in Lankhorst-Hohorst is Lankhorst-Hohorst BV (hereinafter 'LH BV'), which has its registered office in the Netherlands, at Sneek. The sole shareholder in LH BV is Lankhorst Taselaar BV (hereinafter 'LT BV'), which also has its registered office in the Netherlands, at Lelystad.

7. By agreement of 1 December 1996 LT BV granted Lankhorst-Hohorst a loan of DEM 3 000 000, repayable over 10 years in annual instalments of DEM 300 000 from 1 October 1998 (hereinafter 'the loan'). The variable interest rate was 4.5% until the end of 1997. Interest was payable at the end of each year. LT BV received interest payments of DEM 135 000 in 1997 and DEM 109 695 in 1998.

8. The loan, which was intended as a substitute for capital, was accompanied by a *Patronatserklärung* (letter of support) under which LT BV waived repayment if third party

creditors made claims against Lankhorst-Hohorst.

9. The loan enabled Lankhorst-Hohorst to reduce its bank borrowing from DEM 3 702 453.59 to DEM 911 174.70 and thus to reduce its interest charges.

10. For 1996, 1997 and 1998, the balance sheet of Lankhorst-Hohorst showed a deficit not covered by equity capital; in 1998 it amounted to DEM 1 503 165.

11. In its corporation tax assessment notices of 28 June 1999, in respect of the years 1997 and 1998, the Finanzamt Steinfurt took the view that the interest paid to LT BV was equivalent to a covert distribution of profits within the meaning of Paragraph 8a of the KStG and taxed Lankhorst-Hohorst on them as such at the rate of 30%.

12. According to the Finanzgericht, the exception laid down in Paragraph 8a(1), Head 2, of the KStG for cases in which the company in question could also have obtained the loan capital from a third party under identical terms could not apply in the main proceedings. Having regard to the over-indebtedness of Lankhorst-Hohorst and its inability to provide security, it could not in fact have obtained a similar loan from a third party, granted without security and covered by a *Patronatserklärung*.

13. By decision of 14 February 2000, the Finanzamt Steinfurt rejected as unfounded the objection lodged by Lankhorst-Hohorst against the corporation tax assessment notices.

14. In support of its action before the national court, Lankhorst-Hohorst stated that the grant of the loan by LT BV constituted a rescue attempt and that the interest repayments could not be classified as a covert distribution of profits. It also submitted that Paragraph 8a of the KStG was discriminatory in the light of the treatment accorded to German shareholders, who are entitled to the tax credit, unlike companies such as LH BV and LT BV which have their registered offices in the Netherlands. Consequently, Paragraph 8a infringed Community law and Article 43 EC in particular.

15. Lankhorst-Hohorst added that regard should be had to the purpose of Paragraph 8a of the KStG, which is to prevent tax evasion by companies limited by shares. In the present case, however, the loan was granted with the sole objective of minimising the expenses of Lankhorst-Hohorst and achieving significant savings in regard to bank interest charges. Lankhorst-Hohorst claimed in that regard that, prior to reduction of the bank loan, interest charges had been twice the amount subsequently paid to LT BV. This is accordingly not a case of a shareholder with no right to a tax credit seeking toavoid tax chargeable on true distributions of profits by arranging for the payment of interest to itself.

16. The Finanzamt Steinfurt submitted that the application of Paragraph 8a of the KStG may indeed exacerbate the situation of companies in difficulty, but the German legislature had taken that circumstance into account in providing for an exemption in the third sentence of Paragraph 8a, Head 2, of the KStG. That exemption is not, however, applicable in the present case. The Finanzamt also submitted that the wording of Paragraph 8a does not suggest that the existence of tax evasion is one of the conditions for its application, and the Finanzgericht has confirmed that submission.

17. Nevertheless, the Finanzamt submitted that Paragraph 8a of the KStG is not contrary to the Community principle of non-discrimination. Many countries have adopted provisions with a similar objective, particularly in order to combat abuses.

18. The Finanzamt also submitted that the distinction made in Paragraph 8a of the KStG - between persons who are entitled to tax credit and those who are not - does not entail disguised

discrimination on the basis of nationality, since Paragraph 5, relating to exemption from corporation tax, read together with Paragraph 51 of the KStG, also excludes several categories of German taxpayers from entitlement to tax credit.

19. The Finanzamt contends in addition that the principle of once-only levy of national taxation and the coherence of the German tax system justify the application of Paragraph 8a of the KStG in the circumstances of the main proceedings.

20. The Finanzgericht Münster has expressed doubts, in the light of the case-law of the Court of Justice, as to the compatibility of Paragraph 8a of the KStG with Article 43 EC (see, inter alia, Case 270/83 *Commission* v *France* [1986] ECR 273; Case C-311/97 *Royal Bank of Scotland* [1999] ECR I-2651; Case C-294/97 *Eurowings Luftverkehr* [1999] ECR I-7447). It observes that, according to the case-law of the Court, a national of a Member State who has a holding in the capital of a company established in another Member State which gives him a definite influence over the company's decisions is exercising his right of establishment (Case C-251/98 *Baars* [2000] ECR I-2787).

21. According to the Finanzgericht, there is an infringement of the right of establishment where the less favourable tax treatment of a subsidiary is based solely on the fact that the parent company has its seat in a Member State other than that in which the subsidiary is established and there is no objective justification for such treatment.

22. The Finanzgericht observes in that regard that the rule in Paragraph 8a of the KStG is not directly linked to nationality, but to whether the taxable person enjoys a tax credit.

23. It states that, in those circumstances, a shareholder which has its seat outside Germany is systematically subject to the rule in Paragraph 8a of the KStG, whereas, of shareholders established in Germany, only a clearly defined category of taxable persons is exempt from corporation tax and, in consequence, is not entitled to the tax credit. However, the latter category of corporations is not in a position comparable to that of the parent company of Lankhorst-Hohorst.

24. As regards the justification for applying Paragraph 8a of the KStG, the Finanzgericht observes that considerations relating to the coherence of the tax system may be relied on only where there is a direct link between a fiscal advantage granted to a taxable person and the taxation of that same taxable person (judgment of the Bundesfinanzhof of 30 December 1996, I B 61/96, BStBl. II 1997, 466, and *Eurowings Luftverkehr*, cited above, paragraph 42). In the present case, it can discern no such link.

25. In the circumstances, the Finanzgericht decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is the requirement of freedom of establishment for nationals of a Member State in the territory of another Member State laid down in Article 43 of the Treaty of 10 November 1997 establishing the European Community to be interpreted as precluding the national rule contained in Paragraph 8a of the German Körperschaftsteuergesetz?'

Reply of the Court

26. It should be remembered that, according to settled case-law, although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law and, in particular, avoid any discrimination on grounds of nationality (Case C-80/94 *Wielockx* [1995] ECR I-2493, paragraph 16, Case C-107/94 *Asscher* [1996] ECR I-3089, paragraph 36, *Royal Bank of Scotland*, cited above, paragraph 19, *Baars*,

cited above, paragraph 17, and Joined Cases C-397/98 and C-410/98 *Metallgesellschaft and Others* [2001] ECR I-1727, paragraph 37).

The existence of an obstacle to freedom of establishment

27. Article 8a(1), Head 2, of the KStG applies only to 'repayments in respect of loan capital which a company limited by shares subject to unlimited taxation has obtained from a shareholder not entitled to corporation tax credit'. As regards the taxation of interest paid by subsidiary companies to their parent companies in return for loan capital, such a restriction introduces a difference in treatment between resident subsidiary companies according to whether or not their parent company has its seat in Germany.

28. In the large majority of cases, resident parent companies receive a tax credit, whereas, as a general rule, non-resident parent companies do not. As stated in paragraph 4 of this judgment, corporations incorporated under German law which are exempt from corporation tax and, consequently, not entitled to tax credit are essentially legal persons governed by public law and those carrying out business in a specific field or performing tasks which should be encouraged. The situation of a company such as the parent company of Lankhorst-Hohorst, which is carrying on a business for profit and is subject to corporation tax, cannot validly be compared to that of the latter category of corporations.

29. It is therefore apparent that, under Article 8a(1), Head 2, of the KStG, interest paid by a resident subsidiary on loan capital provided by a non-resident parent company is taxed as a covert dividend at a rate of 30%, whereas, in the case of a resident subsidiary whose parent company is also resident and receives a tax credit, interest paid is treated as expenditure and not as a covert dividend.

30. In reply to a question put by the Court, the German Government stated that the interest paid by a resident subsidiary to its, likewise resident, parent company on a loan of capital from the parent company is also treated for tax purposes as a covert dividend in a case where the parent company has issued a *Patronatserklärung*.

31. That fact is not, however, such as to affect the existence of a treatment which differs according to the seat of the parent company. The classification of an interest payment as the covert distribution of profits results, in the case of a resident company which has received a loan from a non-resident parent company, solely and directly from application of Paragraph 8a(1), Head 2, of the KStG, irrespective of whether or not a *Patronatserklärung* has been issued.

32. Such a difference in treatment between resident subsidiary companies according to the seat of their parent company constitutes an obstacle to the freedom of establishment which is, in principle, prohibited by Article 43 EC. The tax measure in question in the main proceedings makes it less attractive for companies established in other Member States to exercise freedom of establishment and they may, in consequence, refrain from acquiring, creating or maintaining a subsidiary in the State which adopts that measure.

Justification for the obstacle to freedom of establishment

33. It must still be established whether a national measure such as that in Paragraph 8a(1), Head 2, of the KStG pursues a legitimate aim which is compatible with the Treaty and is justified by pressing reasons of public interest. In that event, it must also be such as to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see, in particular, Case C-250/95 *Futura Participations and Singer*[1997] ECR I-2471, paragraph 26, and Case C-35/98 *Verkooijen* [2000] ECR I-4071, paragraph 43).

34. First, the German, Danish and United Kingdom Governments and the Commission submit that the national measure at issue in the main proceedings is intended to combat tax evasion in the form of the use of 'thin capitalisation' or 'hidden equity capitalisation'. All things being equal, it is more advantageous in terms of taxation to finance a subsidiary company through a loan than through capital contributions. In such a case, the profits of the subsidiary are transferred to the parent company in the form of interest, which is deductible in calculating the subsidiary's taxable profits, and not in the form of a non-deductible dividend. Where the subsidiary and the parent company have their seats in different countries, the tax debt is therefore likely to be transferred from one country to the other.

35. The Commission adds that Paragraph 8a(1), Head 2, of the KStG does indeed provided for an exception in the case of a company which proves that it could have obtained the loan capital from a third party on the same conditions, and fixes the permissible amount of loan capital in comparison with equity capital. However, the Commission points to the existence, in the present case, of a risk of double taxation since the German subsidiary is subject to German taxation on interest paid, whereas the non-resident parent company must still declare the interest received as income in the Netherlands. The principle of proportionality requires that the two Member States in question reach an agreement in order to avoid double taxation.

36. It is settled law that reduction in tax revenue does not constitute an overriding reason in the public interest which may justify a measure which is in principle contrary to a fundamental freedom (see Case C-264/96 *ICI* [1998] ECR I-4695, paragraph 28; *Verkooijen*, cited above, paragraph 59; *Metallgesellschaft and Others*, cited above, paragraph 59, and Case C-307/97 *Saint-Gobain ZN* [1999] ECR I-6161, paragraph 51).

37. As regards more specifically the justification based on the risk of tax evasion, it is important to note that the legislation at issue here does not have the specific purpose of preventing wholly artificial arrangements, designed to circumvent German tax legislation, from attracting a tax benefit, but applies generally to any situation in which the parent company has its seat, for whatever reason, outside the Federal Republic of Germany. Such a situation does not, of itself, entail a risk of tax evasion, since such a company will in any event be subject to the tax legislation of the State in which it is established (see, to that effect, *ICI*, cited above, paragraph 26).

38. Moreover, according to the findings of the national court itself, no abuse has been proved in the present case, the loan having been made in order to assist Lankhorst-Hohorst by reducing the interest burden resulting from its bank loan. Furthermore it is clear from the case-file that Lankhorst-Hohorst made a loss in the 1996, 1997 and 1998 financial years and its loss largely exceeded the interest paid to LT BV.

39. Second, the German and United Kingdom Governments submit that Paragraph 8a(1), Head 2, of the KStG is also justified by the need to ensure the coherence of the applicable tax systems. More specifically, that provision is in accordance with the arm's length principle, which is internationally recognised and pursuant to which the conditions upon which loan capital is made available to a company must be compared with the conditions which the company could have obtained for such a loan from a third party. Article 9 of the Model Convention of the Organisation for Economic Cooperation and Development (OECD) reflects that concern in providing for inclusion in profits for tax purposes where transactions are concluded between linked companies on conditions which do not correspond to market conditions.

40. In Case C-204/90 *Bachmann* [1992] I-249 and in Case C-300/90 *Commission* v *Belgium* [1992] ECR I-305 the Court held that the need to ensure the coherence of the tax system may justify rules which restrict the free movement of persons.

41. However, that is not the case with the rules at issue here.

42. Although in *Bachmann* and *Commission* v *Belgium*, since the taxpayer was one and the same person, there was a direct link between deductibility of pension and life assurance contributions and taxation of the sums received under those insurance contracts and preservation of that link was necessary to safeguard the coherence of the relevant tax system, there is no such direct link where, as in the present case, the subsidiary of a non-resident parent company suffers less favourable tax treatment and the German Government has not pointed to any tax advantage to offset such treatment (see, to that effect, *Wielockx*, paragraph 24; Case C-484/93 *Svensson and Gustavsson* [1995] ECR I- 3955, paragraph 18; *Eurowings Luftverkehr*, paragraph 42; *Verkooijen*, paragraphs 56 to 58, and *Baars*, paragraph 40).

43. Third, the United Kingdom Government, referring to paragraph 31 of the judgment in *Futura Participations and Singer*, submits that the national measure at issue here could be justified by the concern to ensure the effectiveness of fiscal supervision.

44. It is enough to find in that regard that no argument has been put to the Court to show how the classification rules contained in Paragraph 8a(1), Head 2, of the KStG are of such a nature as to enable the German tax authorities to supervise the amount of taxable income.

45. Having regard to all the foregoing considerations, the answer to be given to the national court must be that Article 43 EC is to be interpreted as precluding a measure such as that contained in Paragraph 8a(1), Head 2, of the KStG.

Costs

46. The costs incurred by the German, Danish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the question referred to it by the Finanzgericht Münster by order of 21 August 2000, hereby rules:

Article 43 EC is to be interpreted as precluding a measure such as that contained in Paragraph 8a(1), Head 2, of the Körperschaftsteuergesetz (Law on corporation tax).

Wathelet
Timmermans
Edward

Jann
Rosas

Delivered in open court in Luxembourg on 12 December 2002.

R. Grass

M. Wathelet

Registrar

President of the Fifth Chamber

1: Language of the case: German.

57th Congress of the
International Fiscal Association
Sydney, Australia
August 31 – September 5, 2003

Seminar F
The Lankhorst-Hohorst Decision of the European Court of Justice

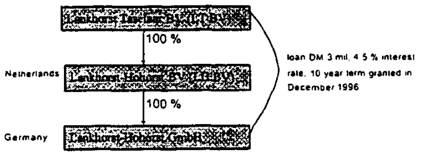
Dr. Klaus Sieker, Flick Gocke Schaumburg, Frankfurt (Germany)

Overview

- Facts of the case
- Essentials of Germany's statutory thin capitalization rule
- The decision of the ECJ
- The reaction of the German Tax Authorities
- Proposed legislative measures

1

Facts (1)



Shareholder loan was equity replacing
LT BV had provided LH GmbH with letter of comfort
LH GmbH used funds received from LT BV to retire bank debt
LH GmbH was over-indebted (on a book basis)
LH GmbH was unable (on a stand alone basis) to obtain 3rd party financing

2

Facts (2)

- Local tax office treated the 1997 and 1998 interest payable to LT BV as a hidden profit distribution under Sec. 8 a CTA
  - Disallowance of interest expense
  - Amount disallowed treated as a dividend subject to withholding tax
- LH GmbH appealed tax assessment notice; appeal was rejected
- LH GmbH took the case to the Lower Tax Court of Münster

3

Facts (3)

- Lower Tax Court of Münster has expressed doubts as to compatibility of Sec. 8a CTA with Art. 43 EC and referred to the ECJ a question on the interpretation of Art. 43 EC for a preliminary ruling (order of August 21, 2000)
- ECJ decided that Sec. 8 a CTA is not compatible with Art. 43 EC (decision of December 12, 2002)

4

Essentials of Germany's Statutory Thin Capitalization Rule (1)

- Purpose: Combat perceived abuse through "excessive" shareholder financing of German corporations by foreign (or German tax-exempt) shareholders
- Original version first time applicable as of fiscal year 1994
- Interest expense on shareholder loans granted to a German corporation to be treated as hidden profit distribution if
  - shareholder owns a substantial participation (>25%) and
  - shareholder is not entitled to imputation tax credit attached to dividends received from German corporation
- Debt to equity safe haven (3 to 1 or 9 to 1 for holding companies)

5

Outline

on

Seminar G

of the

2003 Sydney Congress

Article 9 OECD Model Convention "What is an associated enterprise?"

Thursday 4 September 2003
from
12.00-14.15

Room : Auditorium 2
Sydney Convention and Exhibition Centre

IFA Congress Sydney 2003
Seminar G
Article 9 OECD Model Convention
"WHAT IS AN ASSOCIATED ENTERPRISE?"

1. Transfer pricing constitutes the main international approach to allocate taxable profits to associated enterprises, and to head offices and permanent establishments within the same enterprise (the other approach is formulatory apportionment). The criteria for setting transfer prices for tax purposes is the arm's length principle ("ALP").

   The ALP applies to associated enterprises ("AE") as defined in article 9(1) of the OECD Model Convention (MC)[1] and in the tax legislation of a great number of countries (see annex).

2. Being qualified as an AE under the tax laws of many countries triggers the application of provisions and requirements which are normally not applicable to non-related enterprises engaged in international business, such as extensive documentation requirements, reversed burden of proof, penalties. It is therefore of great importance to employ clear definitions - both on a domestic level and internationally - of the scope of the concept of AE.

   Unfortunately, neither the Commentary to article 9 of the OECD MC nor the OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations provide for guidance on the term that defines AE: "participate(s) directly or indirectly in the management, control or capital". In particular the span of the word "control" may cause problems, as also in mere open market situations a degree of control among business partners may exist.

   An additional problem is that domestic definitions widely vary. Some countries follow the OECD formula, others include exclusive agents (Brazil), companies deriving a substantial part of their turnover from one other party abroad (India) and parties engaged in "unusual transactions" (Australia) in the definition of AE.

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1 "Where

(a) an enterprise of a Contracting State participates directly or indirectly in the management, control or capital of an enterprise of the other Contracting State, or

(b) the same persons participate directly or indirectly in the management, control or capital of an enterprise of a Contracting State and an enterprise of the other Contracting State, ..."

3. The purpose of the seminar is:
   (1) to analyze the wording and scope of the definition of AEs in article 9 OECD MC;
   (2) to assess the role of article 9(2) OECD MC, providing for double taxation relief, in relation to the definition of AE in article 9(1);
   (3) to analyze the relationship of article 9 OECD MC with articles 11(6) and 12(4) OECD MC ("special relationships");
   (4) to discuss the role of the definition of AE in article 9(1) OECD MC vis à vis domestic definitions and interpretations of AE;
   (5) to discus whether the definition of AE in article 9(1) OECD MC should be clarified or changed and, if so, how.

   A comparison with the definitions of AE for other purposes than transfer pricing will be made.

International Fiscal Association Sydney Congress
August-September 2003

Seminar H: Offshore Investment Fund Regimes

Thursday 4 September 12.00 – 14.15

Outline

Contents

Introduction

Seminar H on 4 September 2003 at the 57th Congress of the International Fiscal Association, in Sydney, will address foreign (or "offshore") investment fund regimes. In this context, "foreign investment fund" has a specialised meaning. From the point of view of a taxing jurisdiction that employs a foreign investment fund regime, the term is used to refer to entities in countries other than the taxing jurisdiction, being entities in which residents of the taxing jurisdiction may invest but with investments that are too small or too scattered to bring the investment entity within the scope of controlled foreign company legislation.

Foreign investment funds are typically mutual funds but they may be companies with wide shareholdings, or unit trusts, superannuation funds, or a myriad of other investment vehicles with interests that are widely held. The importance is not the form of the investment entity but the fact that by investing abroad in an entity that does not distribute all its income year by year taxpayers are able to defer or avoid tax on foreign-source income.

Panellists

- Professor John Prebble, New Zealand.
- Dr Wolfgang Oho, Germany.
- Mr Ronald Durand, Canada.
- Associate Professor Lee Burns, Sydney.
- Dr Jean-Blaise Eckert, Switzerland.
- Associate Professor David White, New Zealand.

Policy

Most jurisdictions levy income tax on residents simply by virtue of their residency. Some jurisdictions employ other factors in addition, such as source of income or citizenship of the taxpayer. Foreign investment fund regimes are calculated to frustrate efforts to avoid tax that is imposed on the basis of residence. In the absence of special rules, residents can sometimes avoid tax by contriving for their income to be derived instead by foreign entities. Take, for instance, a taxpayer in a high-tax country who has savings available for portfolio investment. He decides to invest in a mutual fund of a kind that plans to roll all income up within the fund and eventually to liquidate and to distribute at some time in the future. The taxpayer can invest in a local fund with these characteristics, but, ordinarily, the income will suffer tax as the fund derives it. Alternatively, the taxpayer can invest in a fund that is established in a low-tax country where such funds suffer little or no tax on income. When the fund eventually liquidates and distributes its rolled-up investments and income to its members the members will have enjoyed a deferral of tax during the life of the fund. Members who live in countries that have no capital gains tax may even avoid tax altogether. A high-tax jurisdiction that allows its residents to invest abroad in this manner is in effect offering a tax preference to foreign portfolio investment.

The problem described in the previous paragraph is seen in a different form when people make foreign investments not in mutual funds or in other varieties of portfolio investments, but when they establish their own companies in low-tax countries and use those companies as bases for foreign trade or investment, with such base companies sheltering the income from tax imposed by the country of residence. Typically, high-tax countries respond by enacting controlled foreign company regimes that attribute the income of controlled foreign companies to their local owners.

Controlled foreign company regimes cannot address the problem of tax deferral in the context of portfolio investment because they operate on the assumption that, as controllers, local owners are able to obtain information about the income of their controlled foreign companies that enables them to report their presumptive share of that income to be taxed. If jurisdictions wish to address tax deferral in respect of foreign portfolio investment a different kind of regime is needed.

Such a regime, a foreign investment fund regime, operates also as a buttress for a controlled foreign company regime. If people tailor their investments so as to escape a controlled foreign company regime (for instance, by ensuring that investors have interests in the foreign company in question that are below the threshold for controlled foreign company interests) then, depending on the policy of the jurisdiction in question, a foreign investment fund regime may bite.

Bearing in mind the broad policy considerations discussed above, the major policy elements that drive most foreign investment fund regimes include one or more of the following: anti-avoidance and anti-deferral; capital export neutrality; a buttress for controlled foreign company regimes; the taxation of investments in collective investment institutions whether organised at home or abroad; the taxation of other direct investments that do not amount to controlled foreign company interests; the taxation of income derived within structures like superannuation funds and life policies that are substitutable for the main targets of foreign investment fund regimes. Finally, some jurisdictions apply penal rates of tax to foreign investment fund income, apparently to discourage all investment in foreign investment funds.

Structure

The term, "foreign investment fund regime" is a little misleading in that, strictly speaking, the taxable subjects of such regimes are neither foreign nor investment funds. Rather, the taxable subjects are local residents who have invested in foreign investment funds. A foreign investment fund regime taxes a local resident on his share of the income (or, more often, the estimated income) of a foreign entity in which he has invested. Typically, a foreign investment fund regime will have a number of elements.

The first such element is a series of rules that defines the foreign entities to which the regime applies. The policy is to tax local residents rather than foreign funds. The corollary is that a jurisdiction that enacts a foreign investment fund regime may well have no concern as to the particular structure of the investment vehicles that are its target. As a result, some foreign investment fund regimes may employ what may be colloquially called *"omnium gatherum"* terminology that embraces all foreign entities.

Secondly, there are rules to define interests of local taxpayers in foreign investment funds. One or more of the factors of voting interest, income interest as a shareholder, and other kinds of income interests are likely to be relevant. Interest-defining rules need a sub-set of rules to specify when measurement takes place: at the end of the income year? Or throughout the year? Or some combination? Rules to cover people who become resident in the taxing jurisdiction during the year are also needed.

Thirdly, the rules as to entities and interests will typically cover issues that arise at the interface of a jurisdiction's foreign investment fund regime with its regimes that address controlled foreign companies, grantor trusts, and other foreign entities within which local residents may have interests. For instance, the same foreign entity in another jurisdiction may be a foreign investment fund for one local taxpayer and a controlled foreign company for another.

Fourthly, there is the question of foreign investment fund losses. May local taxpayers import these foreign losses and set them off against local income? Or will the losses be quarantined and set off against foreign income only, or against the income of the fund in question only?

Fifthly, jurisdictions that enact foreign investment fund regimes face a number of questions as to scope. Will the regime apply to funds in all countries, or is there an exception for funds in high-tax countries with robust international anti-avoidance regimes? Such an exception would be justified on the basis that a resident who invests in a fund in such a jurisdiction would not enjoy significant advantages of avoidance or deferral. Alternatively, a jurisdiction that is primarily concerned with anti-avoidance measures may apply its foreign investment fund regime only to entities in countries on a black list of tax havens. These are the primary questions of scope, but there are others. For instance, should there be a *de minimis* exception for small investments?

Calculation of income

As is the case in respect of controlled foreign company regimes, one of the largest elements of a foreign investment fund regime is likely to comprise the rules that set out how domestic taxpayers must calculate the income of the fund in which they have invested. There is, however, a difference from controlled foreign company calculation methods. Controlled foreign company income calculation rules assume that people who are caught by the regime can discover enough information to calculate the income of the company, in order then to calculate their own share. This calculation is sometimes called a "branch equivalent" calculation because the domestic taxpayer calculates the income of the foreign company as if it were a branch rather than a separate company. Foreign investment fund rules, on the other hand, assume that taxpayers will not necessarily be able to obtain the information necessary for a branch equivalent calculation. They therefore provide for surrogate calculations of income, usually offering several options.

Sometimes, investors will be able to obtain full details of income from fund organisers. Bearing this possibility in mind, foreign investment fund rules may provide that, optionally, taxpayers may use a branch equivalent calculation. If this option is available there will ordinarily be rules to explain how and to what extent domestic tax rules apply to the branch equivalent calculation.

A foreign investment fund regime may provide for a number of alternatives to a branch equivalent calculation, including: (a) "accounting profits", that is, profits according to an acceptable accounting measure, which will ordinarily be easier to apply than a full branch equivalent calculation; (b) "deemed rate of return", which values the taxpayer's holding in a foreign investment fund and attributes to it a rate of return based on a deemed rate, usually specified by legislation; or "c" "increase in market value" (that is, increase over a tax year) where interests in the fund are tradable. These alternatives may be optional or taxpayers may be required to use them in a stipulated priority, depending on the practicality of each method in the circumstances that prevail.

Rules of the kinds described above (together with considerable detail) will ordinarily form the core of the income calculation elements of a foreign investment fund regime. In addition, one can expect rules to address the following, which is not a complete list: (a) taxpayer's dispositions or acquisitions of interests in foreign investment funds; (b) changing from one method of calculation to another; (c) credit for tax on distributions of income from a foreign investment fund when that income has been attributed to the taxpayer in an earlier year by virtue of one of the income calculation methods; (d) relief for foreign taxes; (e) translation between currencies; and (f) funds that move from one jurisdiction to another.

The seminar and the papers

The panellists plan to cover the material summarised above in papers that are to be available to participants. Oral addresses will outline the fundamentals of foreign investment fund regimes, but will concentrate on selected, more complex issues. In addition, Dr Oho and Dr Eckert will respectively discuss counterpart regimes in Germany and Switzerland. Papers are also planned on the qualifying fund system proposed in a recent United Kingdom Inland Revenue discussion document and on certain aspects of the statutory architecture of foreign investment fund regimes.