



International Fiscal Association



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OUTLINE

THE LINKING OF TAX SYSTEMS: DEPENDENCE OF DOMESTIC TAXATION ON FOREIGN TAX TREATMENT

SEMINAR A | Monday, 5 September 2022 | 13.30 – 15.30

Chair

Madeleine Simonek (Switzerland)

Panel Members

Kimberly Blanchard (USA)

Mark Brabazon (Australia)

Daniel Fehling (Germany)

Elizabeth Gil Garcia (Spain)

John Peterson (OECD)

Secretary

Thomas Dilen (Switzerland)



I. General Introduction

Why this topic? Overview of the seminar. "Linking of tax systems" interpreted in this seminar in a broad sense, any kind of provisions that compel a state, the state of residence or the source state, to deviate from its domestic qualification and domestic law and to follow the qualification and the law of the other state.

II. Purpose and grounds of the linking of tax systems

Can the linking of tax systems and the dependencies be based on underlying principles of international tax law? Should the single-tax-principle be considered an underlying principle? What are the limits of such rules? What are the implications for fiscal sovereignty? Should linking rules (and their implicit goals) be restricted to combatting tax avoidance and tax evasion or applied in a general manner in international tax law?

III. Specific forms of dependencies

1. Dependencies connected with the method of avoiding double taxation, in particular subject-to-tax and switch-over clauses

On what exactly does domestic taxation depend when subject-to-tax and switch-over clauses are applied, in particular on the concrete foreign individual taxation or on the foreign legal order?

2. Dependencies stipulated in domestic tax law to avoid double deduction or non-inclusion situations, in particular hybrid mismatch rules and the ATAD

On what exactly does domestic taxation depend when applying hybrid mismatch or other linking rules which aim at avoiding non-taxation situations? On the concrete foreign individual taxation or on the foreign legal order?

3. Dependencies caused by Pillar Two

To what extent and in what constellations is foreign law relevant when applying the In-come Inclusion Rule, Undertaxed Payments Rule and the Subject To Tax Rule? Even though Pillar Two applies a different methodology compared to the linking rules under hybrid mismatches, implementing the Pillar Two Model Rules will exert an influence on other states' tax law and create dependencies. What are the effects of the dependence on both foreign taxation and domestic taxation?

4. U.S. approach

U.S. hybrid mismatch rules and dual consolidation rules: functioning of the linking to foreign law and possible differences to the OECD/EU approach. What are the differences between the OECD/EU approach and the U.S. approach, in particular with regard to GILTI and BEAT? What is



the influence of the new Final Regulations (4 January 2022) introducing an attribution requirement, which a foreign income tax needs to fulfill to be creditable?

IV. Discussion of selected issues

1. Binding effect of foreign law

Which method is preferable: linking to the individual taxation or to the legal order of the other state? Pros and cons of these two options. What does "is taxed" in the other State means? What happens in a loss situation or if taxation in the other state is no longer possible because of a statute of limitations or other procedural requirements? Can an administrative or judicial decision taken by foreign authorities be binding on the authorities or courts of another state?

2. Burden of proof, timing issues

Who has to prove the foreign law and by what means? Is foreign law a matter of fact or a matter of law? What happens if no proof is possible? In particular, if the tax treatment of another taxpayer needs to be proven? Does the taxpayer have the right to re-quest a reopening of the final assessment if domestic taxation subsequently changes due to dependence on foreign law? Does the taxpayer have a right to appeal against an incorrect assessment of foreign law? In both states?

3. Complexity and effectiveness

How to cope with the increased complexity of international tax law and the necessity to know and understand foreign tax law? How to secure an effective and timely tax assessment procedure? How to secure tax certainty?

4. Discrimination

Does the linking of tax systems cause discrimination between cross-border and internal transactions or structures? Does the linking of tax systems cause discrimination between multinational enterprises and local mid and small sized businesses?

V. Final statements and conclusions