

IFA 74th Annual Congress

Berlin, Germany

OUTLINE

RECENT DEVELOPMENTS IN INTERNATIONAL TAXATION

SEMINAR F | Wednesday, 7 September 2022 | 13.30 – 15.30

Chair

Jonathan Schwarz (United Kingdom)

Panel Members

Kristiina Äimä (Finland)

Stine Andersen (Denmark)

Ariadna Artopoulos (Argentina)

Marte Bergmann (Germany)

Chloe Burnett (Australia)

Jisun Choi (United Kingdom)

Ambroise Lecoeur (France)

John Lennard (Canada)

Doelie Lessing (South Africa)

Veronica Melo de Souza (Brazil)

Dieudonné Nzafashwanayo (Rwanda)

Luis M. Viñuales (Spain)

Secretary

Tetyana Zhuravska (Ukraine)

This permanent seminar brings the latest and most important issues that impact international taxation around the world. The main focus of this seminar will be on recent judicial decisions on key international tax topics such as tax treaties, transfer pricing and domestic tax rules with cross-border implications. We aim to bring topics and perspectives on current international tax issue that are not subject to in-depth analysis in other Congress seminars.

National branches were invited to suggest decisions, all of which are listed with the names of the contributors even though we only have time to discuss a selection. Many thanks to all the contributors, especially for the useful summaries that have assisted in designing the seminar.

Theme 1

Tax Treaties and General Anti-Abuse Rules

The Principal Purpose Test (PPT) in Article 7(1) of the MLI and Article 29(9) of the OECD and UN Model Treaties has not yet been subjected to judicial scrutiny. Nonetheless, we have seen important decisions of the highest courts in several countries have examined General Anti-Abuse Rules (GAARs), some of which are very similar to the PPT in their application to double tax treaties. The Supreme Courts of Argentina and Canada as well as the Court of Appeal in Trinidad & Tobago have all recently decided cases that involve treaty shopping by reference to domestic GAARS. These cases give important pointers to the challenges in determining the limits of legitimate tax planning in the international context.

1. Canada: *Canada v. Alta Energy Luxembourg S.A.R.L.*, 2021 SCC 49 (CanLII), Supreme Court of Canada, 26 November 2021. **John Leonard**

<https://canlii.ca/t/jktl6>

2. Argentina: *Molinos Río de la Plata S.A. v Dirección General Impositiva*, Argentine Supreme Court, 2 September 2021. **Ariadna Artopoulos**

<https://sjconsulta.csjn.gov.ar/sjconsulta/documentos/verDocumentoByIdLinksJSP.html?idDocumento=7691671&cache=1660336780831>

3. Trinidad and Tobago: *Methanex Trinidad (Titan) Unlimited v. Board of Inland Revenue* TT 2020 CA 42; (suggested by IFA Canada (Lyn Moen) (decision provided by Miguel Vasquez, Trinidad and Tobago)). **Doelie Lessing**

Theme 2

Other recent cases of international significance

Tax Treaties

1. Finland: KHO 2021:171 3.12.2021/H4294 - Korkeimman hallinto-oikeuden ratkaisuja, Supreme Administrative Court. **Kristiina Aima**

A Swedish company with three employees in Finland whose task was to give presentations on the products of the company to medical doctors and other experts in the field of medicine did not have a PE in Finland as the activities were preparatory or auxiliary. The employees did not have an office but instead worked from home.

<https://www.finlex.fi/fi/oikeus/kho/vuosikirjat/2021/202104294h?search%5Btype%5D=pika&search%5Bpika%5D=vero%2A>

2. Australia: *Addy v CoT* [2021] HCA 34, High Court of Australia. **Chloe Burnett**

High Court of Australia (Australia's highest court) has ruled on nationality-based discrimination under the equivalent of Article 24(1) of the OECD and UN Model Treaties giving clear guidance on the characteristics of tax related discrimination.

[Addy v Commissioner of Taxation \(hcourt.gov.au\)](https://www.hcourt.gov.au/judgments/2021/202104294h)

3. Brazil: *Volvo Case* n. 460320, Supreme Court. **Verônica Melo**

Non-discrimination Article 24 (1) of Brazil - Sweden Treaty and Article 98 of the National Tax Code, Article 3 of the GATT. Nationality vs. Residence. Withholding tax on dividends paid to residents of Sweden but not on dividends to Brazilian residents. Relationship of treaties with domestic law.

<https://portal.stf.jus.br/processos/downloadPeca.asp?id=15344605955&ext=.pdf>.

4. Rwanda: *RRA v Ducray Lenoir International*, Commercial High Court, RCOMA 00127/2021/HCC, 14/02/2022. **Dieudonné Nzafashwanayo**

Whether a refund of withholding tax on a payment made to a Mauritian resident company that did not have a permanent establishment in Rwanda, for the supply of lab and medical equipment to Rwandan public institutions, could be refused because the company did not first use the MAP under the Rwanda-Mauritius treaty. Whether the refund was conditional on the taxpayer establishing that it declared and paid tax in Mauritius on the payment.

5. France: Supreme Administrative Court (Conseil d'État) 20 May 2022, n° 444451, *Sté Planet*; (submitted by IFA France Daniel Gutmann/Philippe Martin). **Ambroise Lecoœur**

Identification of the beneficial ownership of French-source royalties and the applicable treaty when paid to companies resident in Belgium and Malta and in turn to a company resident in New Zealand.

<https://www.legifrance.gouv.fr/ceta/id/CETATEXT000045820179>

6. Spain: Supreme Court *Colgate Palmolive España SA v Administración General del ESTADO*, judgement of September 23, 2020 (cassation appeal 1996/2019); (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/ Abelardo Delgado)). **Luis M. Viñuales**

Beneficial ownership of royalties paid to a Swiss entity owned by a US entity under Article 12 Spain-Switzerland treaty which did not refer to the beneficial ownership in the royalties article but had been amended to include it for dividends and interest.

<https://www.poderjudicial.es/search/AN/openDocument/a4a88f00a8ec5463/20201014>

Enforcement of foreign tax laws & cum/ex fraud

7. Germany: Federal Fiscal Court (“BFH”) decision of 2 February 2022. **Malte Bergmann**

Germany-US Treaty Tax law concept of beneficial ownership of shares and dividends in relation to on cum/ex frauds.

8. United Kingdom: *Skat v Solo capital* [2022], Court of Appeal. **Jisun Choi**

The scope of the Revenue Rule- the principle by which one country will not enforce the tax laws of another country in relation to cum/ex strategies used to defraud tax authorities in Denmark in connection with withholding taxes on cross-border dividends.

[Skatteforvaltningen v Solo Capital Partners LLP \[2022\] EWCA Civ 234 \(25 February 2022\) \(bailii.org\)](#)

Court of Justice of the EU

9. CJEU *Airbnb Ireland and Airbnb Payments UK* (Case C-83/21). **Stine Andersen**

AG Szpunar opinion that the freedom to provide services does not preclude reporting and withholding obligations imposed on online providers of certain intermediation services.

[CURIA - Documents \(europa.eu\)](#)