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Recent Developments in International Taxation

Chair: Jonathan Schwarz
Date: 7 September 2022

Speakers

Chair: **Jonathan Schwarz**, (United Kingdom)

Secretary: **Tetyana Zhuravska** (Ukraine)

- **Ariadna Artopoulos** (Argentina)
- **John Lennard** (Canada)
- **Doelie Lessing** (South Africa)
- **Kristiina Äimä** (Finland)
- **Stine Andersen** (Denmark)
- **Malte Bergmann** (Germany)
- **Chloe Burnett SC** (Australia)
- **Jisun Choi** (United Kingdom)
- **Ambroise Lecoeur** (France)
- **Verônica Melo de Souza** (Brazil)
- **Dieudonné Nzafashwanayo** (Rwanda)
- **Luis M. Viñuales** (Spain)

Tax Treaties and General Anti-Abuse Rules

Key decisions of the highest courts in several countries on GAARs, some of which are very similar to the PPT, in their application to double tax treaties.

These cases give important pointers to the challenges in determining the limits of legitimate tax planning in the international context.

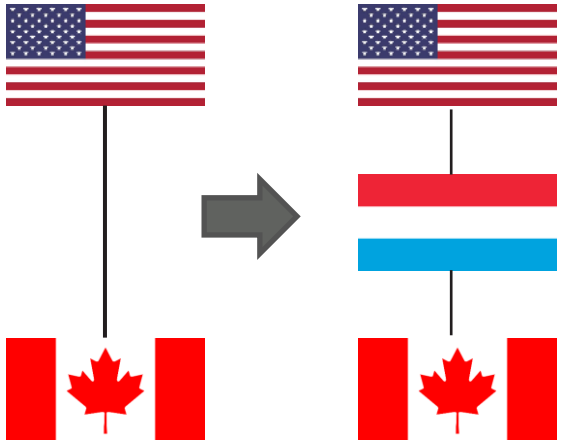
Speakers:

- Ariadna Artopoulos (Argentina)
- John Lennard (Canada)
- Doelie Lessing (South Africa)

Canada v. Alta Energy Luxembourg S.A.R.L.,
2021 SCC 49 (November 26, 2021)
John J Lennard

Alta Energy – Timeline

April 2011	• American investors set up Canadian oil and gas exploration company (Alta Canada) using a Delaware LLC (Alta US) as the direct parent.
April 2012	• Alta US transfers the shares of Alta Canada to Alta Luxembourg • No gain or loss: proceeds on the sale = cost
2013	• Alta Luxembourg sells shares of Alta Canada to arm's length party for a substantial gain. • Claims exemption as business property under Canada–Luxembourg Treaty art 13(4) and 13(5) • Canada's tax authorities deny Treaty exemption under domestic GAAR



Alta Energy – Canadian domestic GAAR analysis

- Three-part process:
  1. Is there a tax benefit arising from a transaction?
     - Treaty exemption under Art. 13
  2. Is the transaction an avoidance transaction?
     - Restructuring not primarily for a *bona fide* purpose other than to obtain a tax benefit
  3. Is the avoidance transaction abusive?
     - Interpret the provisions relied on for the tax benefit to determine their purpose
     - Factual analysis to determine whether the avoidance transaction frustrates the purpose of the provisions

Alta Energy – Lower Court Decisions

Tax Court of Canada	• GAAR does **not** apply • Preamble ("*avoidance of double taxation and the prevention of fiscal evasion*") too vague to assist in application of specific treaty articles. • GAAR analysis must identify the rationale underlying Arts. 1, 4 and 13, not a vague policy supporting a general approach to the interpretation of the Treaty. • Purpose of Arts. 1, 4 and 13 is "to exempt residents of Luxembourg from Canadian taxation where there is an investment in immovable property used in a business".
Federal Court of Appeal	• GAAR does **not** apply • The purpose of the relevant Treaty provision is reflected in the words • No requirements to be a resident of a contracting state beyond those set out in Art 4(1). • "Nothing inherently proper or improper with selecting one foreign regime over another" and "the shopping or selection of a treaty to minimize tax on its own cannot be viewed as being abusive"

Alta Energy – Supreme Court of Canada

- Majority(6 of 9 judges) : GAAR does **not** apply

- On Arts. 1 and 4

  - **Purpose** : To allow all persons that are residents under the laws of a contracting state to claim treaty benefits if their residence status could expose them to comprehensive tax liability in that state.

  - Luxembourg law (consistent with international norms) treats corporations as resident in the country in which they have their legal seat or central management

  - Had Canada and Luxembourg intended to deviate from this norm, they have explicitly signaled this intention (eg art 28(3), which denies Treaty benefits to some Luxembourg holding companies).

  - Thus, the purpose is **not** to reserve the benefits of the treaty to residents that have "sufficient substantive economic connections" to their country of residence.

Alta Energy – Supreme Court of Canada Majority

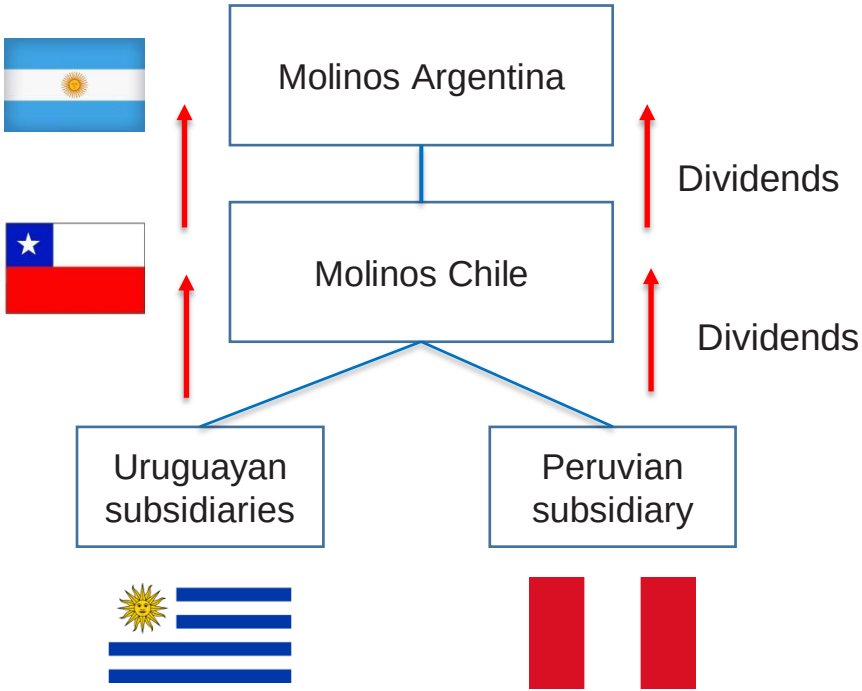
- On Art. 13(4) and 13(5)
  - **Purpose** : to foster international investment in Canada by exempting residents of Luxembourg from Canadian capital gains tax on shares that principally derive their value from immovable property used in carrying on the Canadian resident's business.
  - Canada and Luxembourg deviated from the OECD model treaty, with Canada giving up its right to tax Luxembourg residents on certain transactions in exchange for economic opportunities the exemption would provide.
  - Use of Luxembourg conduit corporations was well known and foreseen at the time the Treaty was signed – Canada could have limited access to the business property exemption by negotiating a "subject-to-tax clause" or including a beneficial owner requirement in the Treaty but chose not to do so.
- In sum, a broad assertion of "treaty shopping" does not conform to a proper GAAR analysis; GAAR must not be premised on a value judgment of what is "right" or "wrong" or on theories about what tax law ought to be or ought to do.

Alta Energy – Supreme Court of Canada

- Minority (3 of 9 judges)
- GAAR **does** apply
  - The purpose of the relevant Treaty provisions is to assign taxing rights to the state with the "closest economic connection" to the taxpayer's income (theory of "economic allegiance").
  - Article 13(4) gives Luxembourg the right to tax its residents' indirect gains from immovables situated in Canada used in a business. Luxembourg is deemed to have the closer economic connection with the taxpayer's income because the business activity, rather than the immovable property itself, drives the value of the property.
  - In this case, Alta Luxembourg was "a mere conduit" that "utterly lacks a genuine economic connection with Luxembourg".
  - The common intention of Canada and Luxembourg could not have been to provide avenues for residents of third-party states to indirectly obtain benefits from Luxembourg's tax regime they could not obtain directly, despite the absence of genuine ties to that state.

Molinos Río de la Plata S.A.,
Argentine Supreme Court (Sept 2, 2021)
Ariadna Artopoulos

Molinos Río de la Plata – Background & facts



- 1976 Argentina - Chile Treaty (terminated in 2012).
- Patterned on Andean Model Treaty - Primary taxing rights to source state.
- Article 11: exclusive taxing rights on dividends to state of domicile of dividend paying company.
- Chile: domestic law exemption of dividends under Investment Platform (holding) Companies regime.
- Double non- taxation.

Molinos Río de la Plata - Arguments on treaty abuse

Tax Authorities:

- Domestic GAAR does apply.
  - Economic reality and misuse of legal form principles.
  - Molinos Chile was a mere conduit company.
  - Molinos Chile had no economic substance or business objects.
  - Dividends received were immediately distributed.
  - Exclusive double non-taxation purpose.

Taxpayer:

- No abuse: purpose was international expansion and not to avail any tax benefit.
- Domestic GAAR does not apply
  - GAAR was not expressly included in Treaty.
  - Legal hierarchy of Treaty over domestic law meant Treaty prevented GAAR application.
- Chile's domestic waiver of its taxing right allocated by the Treaty did not allow Argentina to exercise its own right.
- Previous rulings from both tax authorities confirmed Treaty application to Molinos Chile.
- 2012 Treaty termination implied recognition of Argentina's lack of taxing rights.

Molinos Río de la Plata - Lower Court Decisions

National Tax Court

- Domestic GAAR does apply.
- There was treaty abuse.
  - Molinos Chile was not the beneficial owner (the concept was built into the GAAR).
  - No real economic link between Molinos Chile and its subsidiaries.
  - Treaty might be used to mitigate or reduce the tax burden, but not to eliminate the tax burden altogether (double non-taxation).

Court of Appeal

- Domestic GAAR does apply.
  - Lack of anti-abuse clauses in the Treaty allowed application of domestic GAAR.
- There was treaty abuse.
  - Sole purpose of Molinos Chile was to obtain tax benefits under the Treaty.
  - Molinos Chile was a mere conduit.
  - Taxpayer's interpretation of the Treaty contravened the good faith principle in the VCLT.

Supreme Court: Procuradora Fiscal Monti

- No anti-abuse provision in the Treaty that required a commercial purpose or minimum substance. A conduit company does not per se mean abuse.
- GAAR was not expressly included in the Treaty - the hierarchy of rules means domestic anti-abuse rules cannot apply.
- Argentina and Chile adopted the source state model, limiting the taxing powers of each state to taxable events within that state. Argentina´s only mechanism to counter abuse was to terminate the Treaty - a new treaty was concluded in 2015.
- Legal certainty and the constitutional requirement that only Congress can make tax law means the new Treaty is limited to future taxable events.
- “The honest effort on behalf of taxpayers to minimize their tax burdens is not per se illegal; that is, legal tax savings are not questionable”.

Molinos Río de la Plata - Supreme Court- Majority

Judges Maqueda and Rosatti

- Treaty may not be invoked abusively regardless of the existence of an anti-abuse rule in the treaty itself.
- VCLT art 26 good faith and domestic principle of reasonableness may not be resorted to justify non-fulfilment.
- The apparent textualism in art VCLT 31(1) does not prevent “complementary interpretation” if a strict application of *pacta sun servanda* leads to an absurd or unreasonable result.
- Treaty art 11 must be understood and applied only to avoid double taxation.
- Double non-taxation was beyond the material scope of the Treaty construed in good faith.
- Argentine GAAR allows disregard of legal form and consideration of the actual economic situation pursued under the private law legal form which would have applied, if there was a manifest discrepancy between the economic substance and the legal form chosen by the taxpayer.

Molinos Río de la Plata - Supreme Court - Majority

Judge Lorenzetti, concurring

- Art. 11 is unambiguous, but the interpretation given to it by the taxpayer is contrary to the principles prohibiting the abuse of rights and requiring interpretation in good faith, both present in Argentine Civil and Commercial Code and the VCLT.
- Achieving double non-taxation does not fall within the material scope and validity of the Treaty.
  - The competent authority has concluded that domestic GAAR should apply in the absence of Treaty rules.
  - A common understanding of the Treaty was shown by a Chilean IRS interpretation circular adopting the OECD beneficial ownership concept to prevent use of conduit companies.
    - *OECD Commentaries may be used as a supplementary means of interpretation in accordance with VCLT art 32.*
  - The new treaty in 2015 was accompanied by a Memorandum of Understanding which contemplated a PPT, beneficial ownership and express authority to apply domestic GAARs.

Molinos Río de la Plata – Supreme Court - Dissent

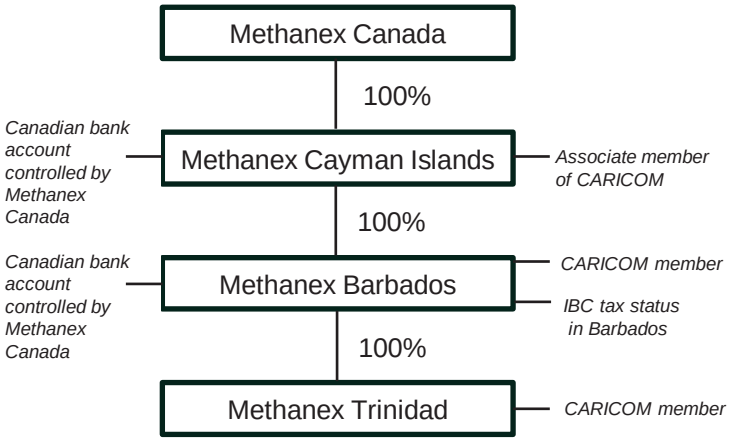
Judge President Rosenkrantz

- The wording of art 11 did not present interpretative complexities.
- Treaty benefits applied regardless of a subsequent domestic law change.
- Neither the preamble nor particular clauses suggested that the parties intended to prevent double non taxation.
- The source principle in the Treaty carried the possibility that neither of the contracting parties would tax an item of income.
- The Treaty lacked rules allowing disapplication of art 11, or combatting conduit companies though beneficial ownership or similar principles with the same aim (e.g. GAAR).
- By not applying art 11 to its full extent, the Argentine tax authorities contradicted expectations arising from its own actions as well as the principle of good faith, particularly considering that, years before, Chile had considered that the platform entities were entitled to the benefits of the Treaty.

Methanex Titan (Trinidad) Unltd v BIR
TT 2020 CA 42
Doelie Lessing

Group Structure & Key Transactions Features

Group Structure



Key Transactions Features

1. 2007- four dividends up the chain from Trinidad to Canada.
2. Email requests for funding from Methanex Canada in peremptory terms. Flow of dividends executed in accordance with requests.
3. Methanex Barbados on-distributed same amounts immediately.
4. Methanex Cayman Islands on-distributed, less expenses.

CARICOM Treaty & Trinidad Domestic Law

CARICOM Treaty

- Art 11 – dividends paid by a company resident in a Member State to a resident of another Member State taxed only in the source state at a rate of zero per cent.
- No beneficial ownership requirement.
- No purpose test or anti-abuse provisions.

Trinidad Income Tax Act

- Section 67(1):

  Artificial or fictitious transactions may be disregarded and taxed according to their substance.

- Section 93(1):

  The provisions of tax treaties "*shall notwithstanding anything in any written law have effect…*"

Taxpayer's Tax Treatment & Arguments

- Methanex Trinidad did not withhold tax on the dividends paid to Methanex Barbados.
- Claimed CARICOM treaty exemption for dividends to another member state (Barbados).
- Argued that:
  - Section 93 excludes application of section 67 when transactions are covered by CARICOM treaty.
  - Not relevant whether transactions are "artificial or fictitious" when treaty applies.
  - Methanex Barbados is a "resident" of a member state, despite its IBC status (favourable tax treatment in Barbados), and within the ambit of the CARICOM treaty.

Trinidad Revenue Authority's Assessment & Arguments

- Trinidad Revenue Authority denied CARICOM treaty exemption and assessed 5% withholding tax permitted by Canada -Trinidad Treaty. It argued that:
  - S 67 not excluded by s 93. In order to determine whether transactions fall within the ambit of treaty, their substance must be established under s 67.
  - The dividends were, in substance, dividends from Trinidad to Canada, as the dividends to Barbados and Cayman Islands were "artificial and fictitious".
  - Dividends from Trinidad to Canada not covered by CARICOM treaty, but by the Canada -Trinidad Treaty Canada – reduced local rate from 10 to 5%.
  - Methanex Barbados not "resident" in Barbados for treaty purposes, because of its IBC status (taxed at reduced rates). CARICOM treaty would never apply to any dividends (even if not artificial/fictitious) from Methanex Trinidad to Methanex Barbados.

Court of Appeal of Trinidad & Tobago

- S 67 is applicable to determine substance of transactions, because the CARICOM treaty only applies to transactions legitimately entered into between residents of Trinidad and Barbados. The treaty does not apply to transactions which are, in substance, between residents of Trinidad and Canada.
  - "*It cannot be a sensible or logical interpretation of s 93 that the mere **claim** by the Appellant, that the dividend payments were to a parent resident in Barbados, would as a matter of law preclude the BIR from examining under s 67 whether those payments were either artificial or fictitious.*"
  - "*Whether or not the double taxation agreement with CARICOM or the double taxation agreement with Canada **applies** to any transaction is a matter which requires examination of the actual transaction.*"

Court of Appeal of Trinidad & Tobago (cont)

- Dividends to Barbados and Cayman Islands were artificial and fictitious, and fall to be disregarded under s 67, because:
  - Transmitted onwards with "extraordinary rapidity" – did not retain or exercise ownership over the funds, as the funds were received in Canadian bank accounts controlled by Methanex Canada.
  - Acted in accordance with email requests as directed by Methanex Canada.
  - Mere conduits.
- Dividends were, in substance, from Trinidad to Canada and the appropriate treaty was between Trinidad and Canada – reducing the tax to 5%.
- Indications that the court may have limited the "override" of treaty provisions by local anti-avoidance laws to situations of "substance over form" – to determine whether the transactions fall within the ambit of a treaty:
  - Broader issue of the taxpayer's right to engage in tax planning specifically mentioned not to be an issue in the case. The group structure was not challenged.
  - Methanex Barbados is a "resident" of Barbados for purposes of CARICOM treaty despite its IBC status. *Bona fide* dividends from Trinidad would therefore qualify for the zero rate.

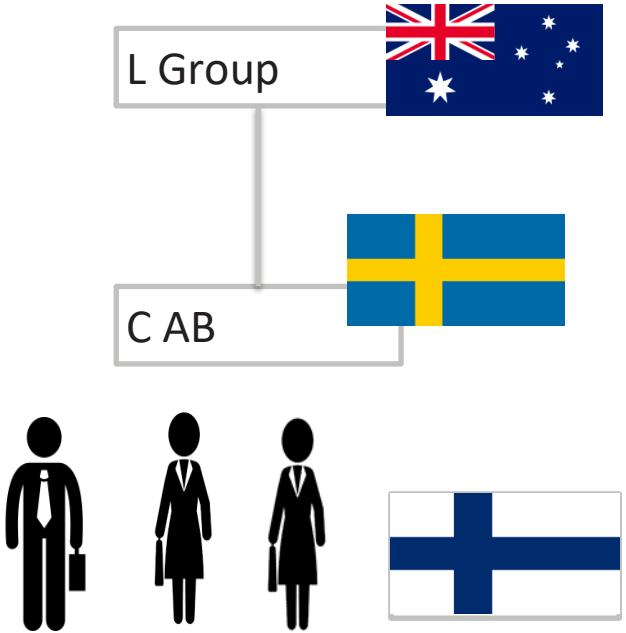
Other Recent Cases of International Significance

- The focus of this part of the seminar is on selected recent judicial decisions on key international tax topics such as tax treaties, enforcement of foreign tax laws & cum/ex fraud, as well the Court of Justice of the EU.
- **Speakers:**
- Kristiina Äimä (Finland)
- Stine Andersen (Denmark)
- Malte Bergmann (Germany)
- Chloe Burnett SC (Australia)
- Jisun Choi (United Kingdom)
- Ambroise Lecoeur (France)
- Verônica Melo de Souza (Brazil)
- Dieudonné Nzafashwanayo (Rwanda)
- Luis M. Viñuales (Spain)

SAC decision KHO 2021:171
Kristiina Äimä (Finland)

Finland: Supreme Administrative Court, KHO 2021:171

- Australian based pharmaceutical group
- Swedish subsidiary
  - 3 employees working remotely from home in Finland.
  - Employees gave presentations on the pharmaceutical products to medical doctors and other medical experts.
  - No office space in Finland.



Supreme Administrative Court

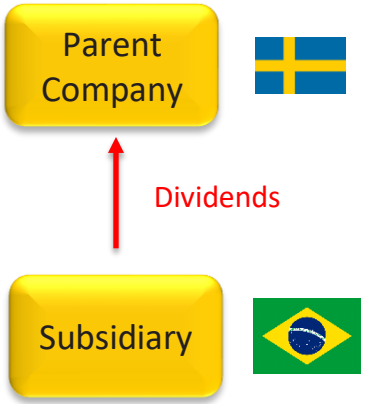
- Tax Authority: the employees working from Finland form a PE
  - The employees promote the Swedish company's core business in Finland
  - Remote work has been permanent since 2009
- Lower Administrative Court
  - The employees actively participated in Swedish company’s sales activities

- Supreme Administrative Court: the company did not have a PE in Finland
  - The company's core business is not the presentation of products.
  - The company does not generate income directly from the presentation of products in Finland
  - The employees has no authority to take any legally binding actions on the behalf of the company
  - The activities were preparatory or auxiliary within the meaning of article 5(5)(e) of the Nordic Treaty.

Volvo Case – 460.320

Verônica Melo de Souza (Brazil)

Brazil: Supreme Court, Volvo Case – 460.320



- Domestic law: dividends paid to
  - non-residents subject to 15% WHT
  - Brazilian residents exempt
- GATT: art 3 non-discrimination also nationality based
- Brazil-Sweden Treaty: art 24(1)non-discrimination

The nationals of a Contracting State shall not be subjected in the other Contracting State to any taxation or any requirement connected therewith which is other or more burdensome than the taxation and connected requirements to which nationals of that other State in the same circumstances are or may be subjected.

- Legal hierarchy- National Tax Code art 98:

International treaties and conventions revoke or modify domestic tax legislation and will be respected by any that supersedes them.

Supreme Court

- Volvo: art 24(1) provides the principle of non-discrimination in taxation, so that residents of Brazil and Sweden could not, in identical situations, have different tax treatment
- Leading vote on non-discrimination:
  - WHT exemption is residence based
  - mixing up different criteria such as residence and nationality would make incomparable situations equivalent
  - GATT art 3 is the same
- Majority on legal hierarchy:
  - Treaties prevail over domestic law based on the principles of mutual cooperation between States, good faith and *Pacta Sunt Servanda*
- Minority:
  - Normative equivalence between treaties and domestic law, which should be resolved by applying the criteria of specialty and chronology

Addy v Commissioner of Taxation [2021] HCA 34

Chloe Burnett (Australia)

Australia: Addy v Commissioner of Taxation, 2021

- British citizen in Australia on 2-year Working Holiday ("Backpacker") Visa
  - Australian resident for tax purposes
- Australian "backpacker tax" applied holders of Working Holiday visa's employment income
  - No tax-free threshold, different rates
  - Result for Ms Addy was higher tax than an Australian resident national doing same work and earning same income
- Australia-UK Treaty art 25 the same as OECD art 24

High Court of Australia

- “Backpacker tax” legislation contravened non-discrimination article
  - More burdensome taxation was imposed on Ms Addy owing to her nationality
  - Rejected argument that, because an Australian national cannot hold a working holiday visa, no comparison of the kind required by art 25(1) is possible, and the article is not engaged
  - Visa status, a characteristic which depends on foreign nationality is the very attribute protected by art 25(1)
  - “In the same circumstances” means in all respects relevant to taxation excluding the protected characteristic and consequences flowing from the protected characteristic
  - Outcome: Ms Addy taxed as if she was an Australian national

RRA v Ducray Lenoir International
RCOMA 00127/2021/HCC
Dieudonné Nzafashwanayo (Rwanda)

Rwanda: Rwanda Revenue Authority v Ducray Lenoir International RCOMA 00127/2021/HCC

- Payments made by Rwandan public institutions to a Mauritian company for supply of medical and lab equipment in Rwanda
- Domestic 15% WHT applied by purchaser
- Mauritian company had no PE in Rwanda under art 5 of Mauritius-Rwanda treaty
- RRA refused to refund tax withheld

Rwandan Commercial High Court, 2022

RRA arguments:

- The case should be dismissed as Mauritian company did not use MAP before commencing legal proceedings before Rwandan courts
- WHT should not be refunded as no proof of declaration and payment of tax in Mauritius was furnished

Commercial Court held:

- WHT was applied contrary to art 7 of the Treaty as the Mauritian company did not have a PE in Rwanda

Commercial High Court held:

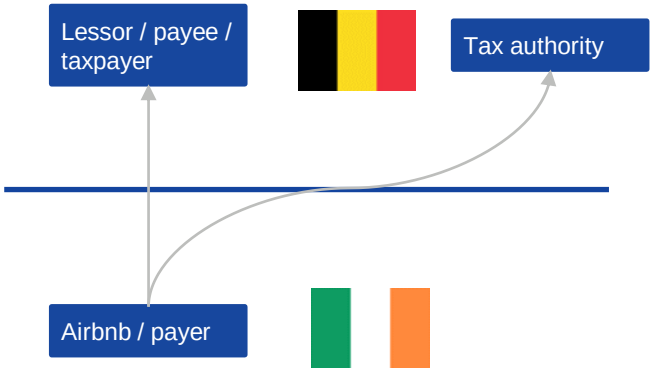
- WHT should be refunded
- In the absence of a PE, business profits are exclusively taxable in the country of residence irrespective of whether that state exercises its taxing right or not
- MAP is an optional remedy—not a pre-condition for the exercise of domestic law remedies including judicial proceedings

*CJEU: AirBnb Ireland cases C-674/20 and C-83**/21***
Stine Andersen (Denmark)

Airbnb Ireland UC v Région de Bruxelles-Capitale (CJEU case C-674/20)

Belgian tax reporting requirements for property intermediation services

- Airbnb is an intermediary between lessees and the lessors and thus a provider of property intermediation services
- Belgian law, requires of property intermediation services providers to report certain data on tourist accommodation transactions



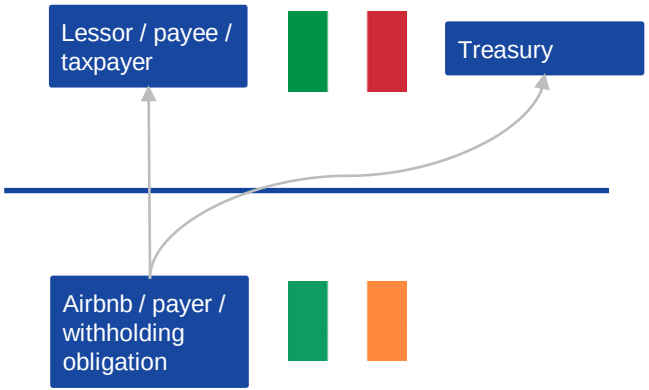
CJEU:

- Directive on electronic commerce, if applicable, would preclude restrictive measures on free movement of services
- The “field of taxation” is specifically excluded from the scope of the Directive
- The reporting requirements fall within the “field of taxation” and therefore the Directive is not applicable in this case
- Member State legislation requiring property intermediation services providers to supply tax authorities with:
    - Particulars of the operator, details of the tourist accommodation establishments, the number of overnight stays, and accommodation units operated during the past year
- According to the CJEU, this does not breach the EU free movement of services required by art. 56 TFEU.
- The measure is not considered a restriction
    - Applicable to all operators exercising their activity on national territory,
    - The purpose of which is not to regulate the conditions concerning the provision of services by the undertakings concerned, and
    - Any restrictive effects on the freedom to provide services are too uncertain and indirect for the obligation laid down to be regarded as being capable of hindering that freedom.

Airbnb Ireland and Airbnb Payments UK (CJEU case C-83/21) – AG opinion

Italian law obligations

- Collect and send information relating to rental contracts concluded as a result of the intermediary's activity to the tax authorities ;
- Withhold tax on amounts paid by lessees to lessors and pay that tax to the Treasury, where intermediaries are involved in the payment of rent
- Appoint a tax representative if the intermediary does not have a permanent establishment in Italy



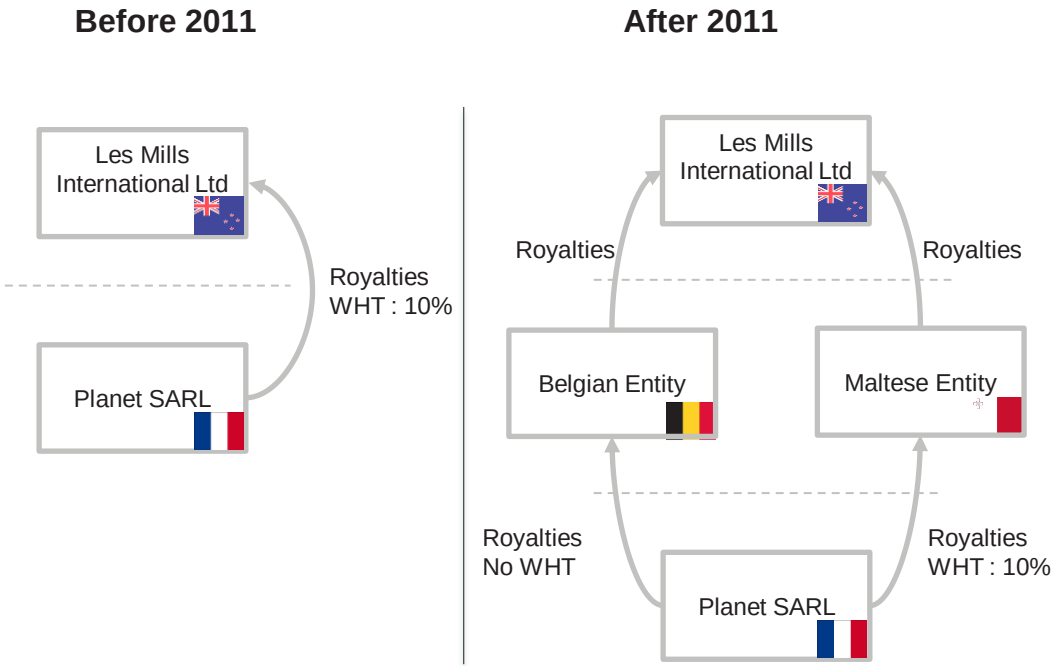
Advocate General's opinion:

- Information and withholding obligations are restrictive measures
- However, article 56 TFEU does not preclude information and withholding obligations as:
  - They are measures to secure effective collection of taxes that constitute reasons in the public interest, capable of justifying a restriction on a freedom of the internal market
  - This obligation to withhold tax is not disproportionate in light of the legitimate objectives of effective collection of tax and preventing tax evasion
- The obligation to appoint a tax representative is also a restrictive measure
  - However, such measure is not justified – the obligation is a disproportionate restriction on the freedom to provide services and, therefore, contrary to Article 56 TFEU

- NB: DAC7 - from 2023 onwards, Member States' tax authorities will receive and automatically exchange information on income earned by sellers on digital platforms, including income derived from the provision of accommodation services.

n°444451 *Sté Planet*
Ambroise Lecoeur (France)

France: n°444451 *Sté Planet*, 20th May 2022



- French tax authorities challenge post-2011 WHT exemption on royalties paid to the Belgian entity
- Initial licence agreement, applicable before 2011 still in force and real beneficiary is New Zealand company;
- 10% WHT as per France and New Zealand treaty art 12

French Supreme Administrative Court

- In triangular situations (i.e. where the receiving entity is not the beneficial owner) the treaty between France and beneficial owner's State may apply, even where of an entity established in a third country is interposed
- Principle derived from a broad and economic interpretation of treaty terms:
  - Treaties' purposes of eliminating double taxation to the benefit of the "true" beneficiary, as illustrated by the OECD 1977 Commentary applicable to the treaty concluded in 1979 and later Commentary
  - "paid to a resident" in art 12(1) seems not to prevent the application of the treaty with beneficial owner's State
  - Art 12(2) refers to "recipient [which] is the beneficial owner"
  - Public Reporter said both art 12(1) and (2) must be construed in the same way
- Court did not decide on the merits:
  - Court of Appeal to consider which company was the beneficial owner

Colgate Palmolive España SA v Administración General del ESTADO
Luis M. Viñuales (Spain)

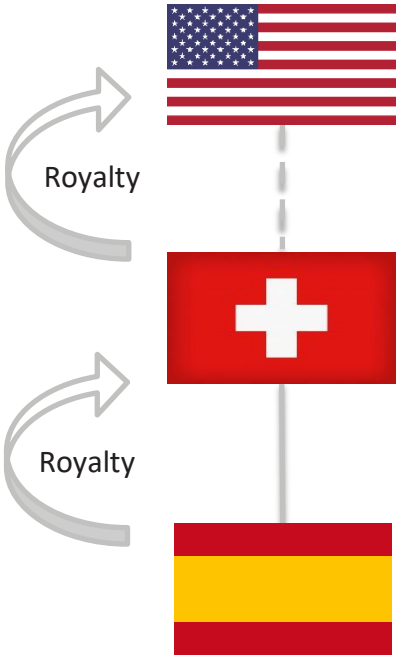
Spain: Colgate Palmolive España SA v Administración General del ESTADO, September 23, 2020

- Spanish withholding tax under domestic law:
  - 24% - 2006
  - 25% - 2007

- 1966 Spain - Switzerland treaty:
  - 5% WHT on royalties
  - No beneficial owner requirement in arts 10(dividends), 11 or 12 (royalties)
  - 2006 Protocol included beneficial ownership in arts 10 and 11 but not in art 12
  - 2011 Protocol did not include it either

- Spain-US treaty 10% WHT on royalties

- Spanish Tax Agency (STA):
  - Colgate Switzerland was not the beneficial owner of the royalties so domestic law applied



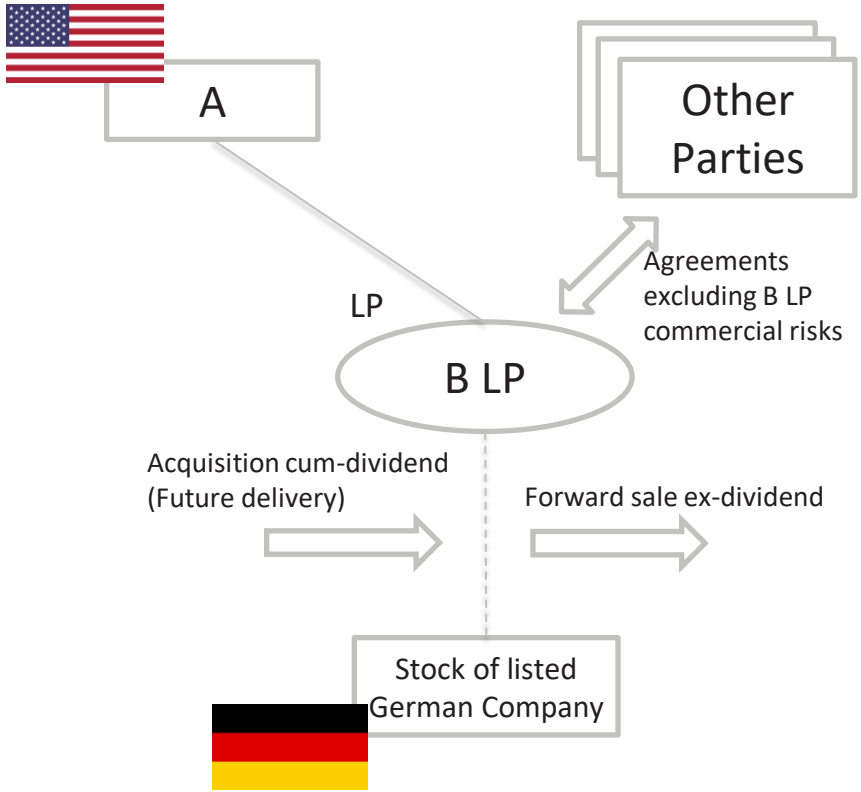
Supreme Court

- Confirmed 5% WHT under art. 12 of the Spain-Switzerland treaty although Colgate Switzerland was not the beneficial owner
- There was a clear intention by the contracting states not to include the beneficial owner requirement in the Treaty for royalties
- Overturned the National Appellate Court ruling that beneficial ownership was required, based on a dynamic interpretation of the treaty, taking into account OECD Commentaries on beneficial ownership in 1977 and 1995
- Ruled that this is not a case for dynamic interpretation of treaties because of the clear intention of the contracting states
- Criticized the lower court for not at least applying the 10% rate in the US-Spain treaty on the beneficial ownership rationale that the lower court sustained
- Accepted dynamic interpretation and the value of “soft law” such as OECD Commentary to interpret unclear legal provisions, but:
  - The will of the contracting states at the time of signing the treaty must prevail
  - OECD Commentaries are not a source of law

BFH I R 22/20, 2.2.2022
Malte Bergmann (Germany)

Germany: BFH I R 22/20, 2.2.2022

- US pension fund (A) was limited partner of a (tax transparent) Gibraltar Limited Partnership (B LP)
- B LP concluded agreements with various parties, including service providers, to the effect that:
  - B LP acquired listed stock cum-dividend with a future date of delivery and payment of the price after the day of dividend distribution
  - B LP agreed on the same day to sell the same stock ex-dividend on the same day to another party, only to be executed one or to days after the day of the distribution of the dividend
  - Economic risks of the acquisition of stock of B LP and thus, of A, were transferred to other parties
  - The depositary bank issued dividend statements to A
  - A claimed a refund of dividend WHT tax under Germany- US Treaty art 10
  - Refund refused by German tax authorities



Federal Fiscal Court

- WHT refund denied.
  - Entitlement requires beneficial ownership of the shares by the person claiming the refund in addition to other requirements.
- Beneficial ownership
  - Interpreted by reference to German domestic tax law as the term is undefined in the treaty per art 3(2).
  - Definition in Fiscal Code(Abgabenordnung), s 39 applied.
- Beneficial ownership criteria under German tax law
  - Legal ownership: By default, the legal owner also is the beneficial owner. Only if relevant economic rights are with another person, can such other person be the beneficial owner.
  - Risk allocation: An overall view must be taken including contracts relating to the shares the claimant has with other parties and not only the contractual relationship between the claimant and the seller of the shares.
- Beneficial ownership must be determined before application of the GAAR is considered.

Skat v Solo capital [2022] EWCA Civ 234
Jisun Choi (United Kingdom)

The UK: Skatteforvaltiningen v Solo Capital Partners [2022] EWCA Civ 234

- **Revenue Rule:**
- "[English] courts have no jurisdiction to entertain an action … for the 'enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state'

- **Background**

  - Skatteforvaltningen (***SKAT***), the Danish Customs and Tax Administration, brought claim in the English Commercial Court against 114 defendants for €1.7 billion
  - Seeking to recover refunds of Danish withholding tax wrongly paid
  - Defendants are individuals and corporate entities who are said to have procured or been involved in the making of applications for refunds and who received the bulk of the sums extracted from SKAT
  - Treaty refunds of Danish withholding tax on dividend payments fraudulently reclaimed multiple times under schemes pursuing cum-ex strategies

Court of Appeal

- Revenue Rule did not apply to SKAT's claim
  - Which was that defendants never had any shares, received no dividends, paid no tax, nor had a tax liability
  - Not a claim to recover unpaid or overdue taxes
  - Amounts paid by SKAT were not of tax at all but the abstraction of SKAT's general funds by fraud
  - SKAT's claim was for restitution by a victim of fraud for recovery of the monies of which it has been defrauded
- EU Mutual Assistance Directive 2010/24 (MARD) of no relevance
- SKAT's claim did not amount to an attempt to exercise sovereign power extra-territorially
  - Claiming to recover the monies of which it was defrauded, SKAT was not enforcing a sovereign right, nor seeking to vindicate a sovereign power
  - Claim was as a victim of fraud as if it were a private citizen
- Same conclusions by the Malaysian Court of Appeal and US District Court for Southern New York in parallel cases brought by SKAT