Robert Danon (ed.)
Vikram Chand

The Interaction of Domestic Anti-Avoidance Rules with Tax Treaties

(with special references to the BEPS project)

Tax policy

Schulthess §

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TO MY LOVING PARENTS: MR ASHOK CHAND AND DR SHOBHA CHAND

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Abbreviations

General

Art.	Article
BEPS	Base Erosion and Profit Shifting
CFA	Committee of Fiscal Affairs
CFC	Controlled Foreign Company
EBIDTA	Earnings Before Interest Depreciation Taxation and Amortization
EFTA	European Free Trade Agreement
EC	European Community
EU	European Union
FC	Fiscal Committee
FMV	Fair Market Value
GAAR	General Anti-Avoidance Rule
IBFD	International Bureau of Fiscal Documentation
IFA	International Fiscal Association
ILC	International Law Commission
ITLR	International Tax Law Reports
LOB	Limitation of Benefit
MAP	Mutual Agreement Procedure
No.	Number
OECD	Organisation for Economic Cooperation and Development
p.	Page
pp.	Pages
Para.	Paragraph

Paras.	Paragraphs
PE	Permanent Establishment
PPT	Principal Purpose Test
SAAR	Specific Anti-Avoidance Rule
TFEU	Treaty on the Functioning of the European Union
TP	Transfer Pricing
UK	United Kingdom
UN	United Nations
US	United States
USA	United States of America
USD	United States Dollar
Vol.	Volume
WP	Working Party

Courts

AHC	Australian High Court
ASAC	Austrian Supreme Administrative Court
CTC	Canadian Tax Court
CFCA	Canadian Federal Court of Appeals
CSC	Canadian Supreme Court
DSC	Dutch Supreme Court
ECHR	European Court of Human Rights
ECJ	Court of Justice of the European Union
FSAC	Finnish Supreme Administrative Court
FSC	French Supreme Court
GFFC	German Federal Fiscal Court
ICJ	International Court of Justice

ITAT	Indian Income Tax Appellate Tribunal
ISC	Supreme Court of India
JSC	Japanese Supreme Court
KSC	Korean Supreme Court
SATC	South African Tax Court
SSCA	South African Supreme Court of Appeals
SPSC	Spanish Supreme Court
SSAC	Swedish Supreme Administrative Court
SFCA	Swiss Federal Commission of Appeal
SFSC	Swiss Federal Supreme Court
UK SC	UK Special Commissioners
UK HOL	UK House of Lords
UK HC	UK High Court
UK COA	UK Court of Appeals
UK SSC	UK Supreme Court
US TC	US Tax Court
US FC	US Court of Federal Claims
US COA	US Court of Appeals
US SC	US Supreme Court

PART I: INTRODUCTION

1. Introduction

1.1. Cross border tax avoidance

1. Cross border tax avoidance[1], which, particularly leads to BEPS is a problem for every State[2] because it adversely affects a tax system[3]. This is mainly because tax avoidance practices are contrary to "*fiscal equity, have serious budgetary effects and distort international competition and capital flows*"[4].

2. At the outset, it should be noted that tax avoidance does not mean tax evasion. There is general agreement that tax evasion[5] refers to criminal activity that is punishable by criminal sanctions as it involves the use of illegitimate means to evade the payment of tax[6]. Tax avoidance, on the other

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1 Also known as "*aggressive tax planning*" or" *unacceptable tax planning*". LAMPREAVE, Avoidance, p. 50.

2 ARNOLD, 2003 changes, p. 244.

3 PREBBLE, PREBBLE, Tax Avoidance, p. 22; THURONYI, Comparative tax, p. 151.

4 OECD, Tax Evasion Report, Para. 10.

5 Also known as "*tax fraud*". LAMPREAVE, Avoidance, p. 50.

6 *Commentators*: THURONYI, Comparative tax, p. 157; LAMPREAVE, Avoidance, p. 49; TOOMA, Thesis, p. 14; KARIMERI, Avoidance, p. 297; FREEDMAN, Interpretation, p. 70; KELLOUGH, Tax Avoidance, p. 1821; LI, SANDLER, Abuse, p. 894; BAKER, Tax avoidance, pp. 6-9; FROMMEL, Avoidance, p. 57; SEELY, GAAR, p. 4. *Courts*: The ISC (Justice Reddy) has held that "*tax evasion is illegal*". See ISC: Commercial Tax Officer v. MC Dowell and Company Limited, 1986 AIR 649 (SC), April 17th 1985; The UK HOL (Lord Goff) has held that tax evasion is a "*label which is perhaps better kept for those transactions which are traditionally so described because they are illegal*". See UK HOL: Craven (Inspector of Taxes) v White, [1988] STC 476, July 21st 1988; The Privy Council in New Zealand has held that "*Evasion occurs when the commissioner is not informed of all the facts relevant to an assessment of tax. Fraudulent evasion may lead to a criminal prosecution as well as reassessment".* See Privy Council: Commissioner of Inland Revenue v Challenge Corporation Ltd, [1986] STC 548, October 20th, 1986; The ECJ has held that "*tax evasion…is illegal".* See ECJ: Halifax plc and others v Customs and Excise Commissioners, Case No: C-255/02, February 21st 2006; The OECD considers tax evasion as a "*term that is difficult to define but which is generally used to mean illegal arrangements where liability to tax is hidden or ignored, i.e. the taxpayer pays less tax than he is legally obligated to pay by hiding income or information from the tax authorities"* OECD, Glossary of Tax Terms; The Committee of experts on international cooperation in tax matters provide that *"Tax evasion is usually associated with the commission of a criminal offense. It can be considered to consist of willful and conscious non-compliance with the laws of a taxing jurisdiction which can include a deliberate*

hand, can be distinguished from tax evasion[7]. The key distinction is that tax evasion is illegal whereas tax avoidance is not[8].

3. Tax avoidance is not synonymous with tax mitigation[9] either but the distinction between them is much harder to define. Tax mitigation can be defined as a reduction in tax in such a way that the taxing legislation clearly encourages or permits[10]. In contrast, tax avoidance seems to exist somewhere between tax evasion and tax mitigation and is generally understood to mean a reduction in tax in such a way that the transaction undertaken by a taxpayer

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concealment of facts from revenue authorities. Tax evasion is an action by which a taxpayer tries to escape legal obligations by fraudulent or other illegal means. It may result from the evasion of tax on income that arises from illegal activities, such as smuggling, drug trafficking, and money laundering. In a broader sense, tax evasion may also encompass a reckless or negligent failure to pay taxes legally due, even if there is no deliberate concealment of income or relevant information. Notwithstanding unintended evasion normally leads to only a tax payment with interest and penalties". See COMMITTEE OF EXPERTS, Tax evasion, Para. 71.

7 However, it has been argued that the distinction between tax avoidance and tax evasion is blurred for the tax authorities as tax avoidance has been treated as tax evasion. TLRC, Countering tax avoidance, p. 10; COMMITTEE OF EXPERTS, Tax evasion, Para. 73.

8 *Commentators*: THURONYI, Comparative tax, p. 157; LAMPREAVE, Avoidance, p. 49; TOOMA, Thesis, p. 14; KARIMERI, Avoidance, p. 297; KELLOUGH, Tax Avoidance, p. 1821; FROMMEL, Avoidance, p. 57; SEELY, GAAR, pp. 4-6; ARNOLD, 2003 changes, p. 244; STRENG, YODER, JAAR, p. 599. *Courts*: The ISC (Justice Reddy) has held that "*Tax avoidance, it seems, is legal*". See ISC: Commercial Tax Officer v. MC Dowell and Company Limited, 1986 AIR 649 (SC), April 17th 1985; The ECJ has held that "*With respect to the notion of tax avoidance in the United Kingdom, it is legal".* See ECJ: Halifax plc and others v Customs and Excise Commissioners, Case No: C-255/02, February 21st 2006, footnote 72; The OECD considers tax avoidance as a "*term that is difficult to define but which is generally used to describe the arrangement of a taxpayer's affairs that is intended to reduce his tax liability and that although the arrangement could be strictly legal it is usually in contradiction with the intent of the law it purports to follow"* OECD, Glossary of Tax Terms; The Committee of experts on international cooperation in tax matters provide that *"Tax avoidance… involves the attempt to reduce the amount of taxes otherwise owed by employing legal means. Tax avoidance occurs when persons arrange their affairs in such a way as to take advantage of weaknesses or ambiguities in the tax law. Although the means employed are legal and not fraudulent, the results are considered improper or abusive".* See COMMITTEE OF EXPERTS, Tax evasion, Para. 73.

9 Also known as "*tax planning*" or "*acceptable tax avoidance*". LAMPREAVE, Avoidance, p. 49.

10 PREBBLE, PREBBLE, Tax Avoidance, p. 22; THURONYI, Comparative tax, p. 156; LAMPREAVE, Avoidance, p. 49; TOOMA, Thesis, p. 17; ITP, Fundamentals, pp. 51-53; BAKER, Tax avoidance, p. 9; SEELY, GAAR, pp. 4-6.

falls within the letter of the law but runs counter to its spirit and purpose[11]. Courts have generally provided a similar distinction. To illustrate, Lord Templeman in the *Challenge Corporation case*[12] outlined the difference between tax avoidance and mitigation. He defined tax mitigation as occurring "*where the taxpayer obtains a tax advantage by reducing his income or by incurring expenditure in circumstances in which the taxing statute affords a reduction in tax liability"*. In contrast, tax avoidance arises "*when the taxpayer reduces his liability to tax without involving him in the loss or expenditure which entitles him to that reduction. The taxpayer engaged in tax avoidance does not reduce his income or suffer a loss or incur expenditure but nevertheless obtains a reduction in his liability to tax as if he had"*. Likewise, Lord Nolan in the *Willoughby case*[13] outlined the difference between tax avoidance and mitigation by providing that "*The hall mark of tax avoidance is that the taxpayer reduces his liability to tax without incurring the economic consequences that Parliament intended to be suffered by any taxpayer qualifying for such reduction in his tax liability. The hall mark of tax mitigation, on the other hand, is that the taxpayer takes advantage of a fiscally attractive option afforded to him by the tax legislation, and genuinely suffers the economic consequences that Parliament intended to be suffered by those taking advantage of the option"*[14].

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[11] PREBBLE, PREBBLE, Tax Avoidance, p. 22; THURONYI, Comparative tax, p. 156; LAMPREAVE, Avoidance, p. 50; TOOMA, Thesis, p. 17; ITP, Fundamentals, pp. 51-53; BAKER, Tax avoidance, p. 9.

[12] See Privy Council, New Zealand: Commissioner of Inland Revenue v Challenge Corporation Ltd, [1986] STC 548, October 20th 1986.

[13] UK HOL: Inland Revenue Commissioners v Willoughby and related appeal, [1997] STC 995, July 10th 1997.

[14] The OECD has put forward a similar distinction. OECD, Tax Evasion Report, Annex II; The Committee of experts on international cooperation in tax matters provide that *"Many countries make a distinction between acceptable tax avoidance and unacceptable tax avoidance. Unacceptable tax avoidance is achieved by transactions that are genuine and legal but involves deceit or pretense or sham structures; it is an indirect violation or an improper use of the tax laws or treaties. Acceptable tax avoidance methods or tax planning however reduces tax liability through transaction or other activities that are intended by legislation".* See COMMITTEE OF EXPERTS, Tax evasion, Para. 74.

1.2. The response to cross-border tax avoidance at the domestic tax law level: Domestic anti-avoidance rules

1.2.1. Introductory comments

4. Domestic anti-avoidance rules are rules of domestic tax law that are intended to curb avoidance of tax (including avoidance of tax in cross-border situations)[15]. The rules can either be established through judicial precedent[16] or introduced by the legislature in statutory law[17].

1.2.2. The judicial response to tax avoidance

5. It is fair to say that tax avoidance thrives on the literal interpretation of the tax legislation[18]. Thus, in order to strike down a tax avoidance scheme a literal interpretation of the legislation should be discounted. In this respect, it should be noted that a courts approach towards statutory (tax legislation) interpretation is of primary importance as the approach adopted by courts gives an indication as to how restraining or accommodating the legal climate of a State is vis-à-vis tax avoidance[19]. Generally, if a court adopts an approach to interpreting tax legislation, which takes into consideration the purpose or intention behind it then such an approach will less likely leave room for tax avoidance. On the other hand, if a court disregards the purpose or intention of the legislation in the interpretation process then such an approach will more likely foster tax avoidance[20]. While courts in several jurisdictions consistently recognize the right of taxpayers to avoid taxes by means that are within the law[21] – they have nonetheless also found that tax

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15 GERZOVA, POPA, Anti Avoidance, p. 421.

16 The question arises as to whether it is possible for Courts to develop anti-avoidance rules or doctrines. The author submits that the answer to this question varies from jurisdiction to jurisdiction. Generally, in the US, it has been contended that no constitutional rule has prohibited the courts from developing anti-avoidance rules. However, in other jurisdictions such as Canada, it is contended that courts cannot create anti-avoidance rules. ZIMMER, JAAR, pp. 40-41.

17 MICHEL, Anti Avoidance, p. 414.

18 FREEDMAN, Interpretation, p. 63; FREEDMAN, Tax Avoidance, p. 1039.

19 PEREZ, BAEZ, 2003 changes, pp. 139-143.

20 THURONYI, Comparative tax, p.151; KARIMERI, Avoidance, p. 298; ZIMMER, JAAR, p. 37.

21 VOGEL, Commentary, p.116; VOGEL, 2015 Commentary, p.124; ZIMMER, JAAR, p. 47.

laws should be interpreted so as to prevent their avoidance by the use of transactions that have no economic or commercial or business rationale. Thus, through their process of statutory interpretation, courts tend to develop judicial anti-avoidance doctrines to curb tax avoidance. The most common judicial doctrines applied by Courts are the "*sham*", "*simulation*", "*substance over form*", "*economic substance*", "*step transaction*", "*fraus legis*", "*business purpose*" or "*abuse of rights*" doctrines. These doctrines attempt to interpret the tax legislation in manner, which curtails tax avoidance. However, it should be noted that no State applies all of these doctrines nor are they applied consistently from one State to another.

1.2.3. The legislative response to tax avoidance

6. Once the legislature identifies a tax avoidance scheme, the most common response is to introduce a SAAR that combats that particular tax avoidance transaction[22]. However, a common outcome following the enactment of a SAAR is that taxpayers, more often than not, find new avoidance opportunities not curtailed by such SAARs. Accordingly, as a general measure to counter tax avoidance, States may introduce a statutory GAAR. Though similar to judicial anti-avoidance doctrines, there is considerable variation in the form that the statutory GAARs take. Nevertheless, the various forms have approximately the same effect in the sense that the statutory GAAR is a tool to deny the tax benefits of tax avoidance transactions or arrangements believed not to have any commercial substance or business purpose[23]. Many States currently have SAARs in place as opposed to statutory GAARs[24] but this trend may change in light of international developments, especially, the OECD's BEPS project.

[22] EY, GAAR, p. 2.
[23] EY, GAAR, p. 2.
[24] EY, GAAR, pp. 4-9.

1.3. Tax treaties

1.3.1. The residence vs source principle

7. In general, States use the "*residence*" concept to tax their taxpayers (natural or juridical persons) on a worldwide income basis (or at least for some income categories). The right to tax on a worldwide basis stems from the fact that a resident taxpayer has close personal and economic ties to that country. Similarly, States use the "*source*" concept to tax non-residents. The right of the source State to tax on a limited basis stems from the fact that such a taxpayer derives income from the territory of that country. Thus, more often than not, when a resident of one country derives income from another country, both the residence and source States exercise their taxing rights over that item of income thereby giving rise to double taxation[25].

1.3.2. Types of double taxation

8. Double taxation, in cross-border scenarios, can either be juridical or economical double taxation. Juridical double taxation is defined as "*the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods*" [26]. Conversely, economic double taxation is defined as a situation wherein "*two different persons are taxable in respect of the same income or capital*" [27]. Such double taxation can have a harmful effect on the movement of persons, capital, goods, services and technology between countries.

1.3.3. Tax treaties: Their role and structure

9. To reduce the harmful effects of double taxation, States enter into tax treaties. The role of these international agreements is to foster cross-border movement of persons, capital, goods, services and technology by eliminating double taxation[28]. Such agreements, which are primarily based on the OECD Model Convention (last updated in 2014 – all references in this thesis will be made to 2014 version of the OECD Model unless stated otherwise), "*limit*

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25 VOGEL, Commentary, p. 9; VOGEL, 2015 Commentary, p. 12.
26 2014 OECD Comm. Introduction, Para. 1.
27 2014 OECD Comm. Art 23. Para. 2.
28 VOGEL, Commentary, p. 10; VOGEL, 2015 Commentary, p. 13.

the content of tax law of both contracting States"[29] and, in general, do not impose taxes.

10. The OECD Model consists of seven chapters. Chapter I deals with the "*scope"* (Art. 1-2) of the treaty. Chapter II deals with "*definitions*" (Art. 3-5) of treaty terms. Chapter III and IV, which deal with the core provisions of these agreements provide the "*distributive rules*" (Art. 6-22) that allocate taxing rights among States with respect to items of income and capital. Chapter V deals with rules for the residence State to provide "*relief*" from double taxation by either utilizing the exemption method (Art. 23A) or credit method (Art. 23B). Moreover, Chapter VI contains "*special provisions*" that deal with non-discrimination (Art. 24), dispute resolution (Art. 25), exchange of information (Art. 26), assistance in collection of taxes (Art. 27), members of diplomatic missions and consular posts (Art. 28) and territorial extension (Art. 29). Finally, Chapter VII of the model contains provisions with respect to entry into force (Art. 30) and termination of a tax treaty (Art. 31).

1.4. Purpose of the thesis: to analyze the interaction of domestic anti-avoidance rules with tax treaties

11. Tax avoidance schemes, including cross border tax avoidance schemes, are counteracted at the domestic law level through domestic anti-avoidance rules such as judicial doctrines; statutory GAARs and SAARs. The purpose of this thesis is to analyse the impact of tax treaties on such domestic anti-avoidance rules as it is generally accepted that tax treaties are rules that limit domestic law and if a conflict arises between the domestic law and tax treaty – the latter prevails[30]. However, whether this position is correct, especially with respect to domestic anti-avoidance rules, is questionable. Accordingly, the thesis discusses the interaction of domestic anti-avoidance rules with the provisions of tax treaties to ascertain if a conflict exists and the extent to which such domestic rules are limited by tax treaties.

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[29] VOGEL, Commentary, p. 20; VOGEL, 2015 Commentary, p. 22.

[30] VOGEL, Commentary, p. 20; VOGEL, 2015 Commentary, p. 22; VAN RAAD, Fundamental rules, pp. 587-590.

1.5. Previous studies on this topic

12. The thesis topic has been discussed and debated by the OECD and the UN on several occasions and the view of these international organizations has evolved over a period of time (from 1961 – 2015: *see chapter 8*). The topic has also been discussed at several IFA congresses. For instance, it was briefly discussed as part of a congress subject during the 37th IFA congress held in Venice (1983)[31]. Thereafter, the topic was discussed in a detail at a seminar held during the 48th IFA congress in Canada (1994)[32]. The topic was, once again, briefly touched upon in the 56th IFA congress held in Oslo (2002)[33]. Subsequently, it was discussed and debated as part of a congress subject during the 64th IFA congress held in Rome (2010)[34]. In addition, several commentators have explored the topic in books[35] or articles[36]. However, to date, no thesis has been published which exclusively deals with this subject in a holistic manner. In 2013, the OECD launched its project on BEPS[37]. It is reasonable to predict that pursuant to this project several States will introduce domestic anti-avoidance rules or restore the effectiveness of existing anti-avoidance rules to counteract BEPS[38]. Accordingly, it is important to analyse whether tax treaties might curtail such domestic measures.

1.6. Thesis methodology and structure

13. The thesis analyses the interaction of domestic anti-avoidance rules with tax treaties. Clearly, all the domestic anti-avoidance rules of all States cannot be analysed. Consequently, the author has restricted himself to analyzing only domestic anti-avoidance rules that can be used to counteract cross-border tax avoidance schemes. Accordingly, the questions arise as to what the typical cross border tax avoidance schemes are and what are the most

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31 UCKMAR, Tax Avoidance.
32 IFA, Abuse.
33 ZIMMER, JAAR.
34 VAN WEEGHEL, Tax Avoidance.
35 For instance, see DE BROE, Thesis; VAN WEEGHEL, Thesis; ARNOLD, VAN WEEGHEL, Abuse.
36 For instance, see ARNOLD, 2003 changes; PEREZ, BAEZ, 2003 changes; MARTIN JIMENEZ, 2003 changes.
37 2013 OECD, Addressing BEPS.
38 2013 OECD, Addressing BEPS, p. 10.

common domestic anti-avoidance rules that can be used to counteract such schemes? These questions are dealt with in the *second part* of the thesis. This part starts by providing a general overview of the types of schemes that taxpayers undertake to reduce the source or the residence State's tax base (*see chapter 2*). Thereafter, this part provides a comparative overview of the judicial doctrines, statutory GAARs or SAARs that are applied by the source or residence States to counteract cross-border tax avoidance schemes. A comparative analysis is essential as the scope; application and outcome of a domestic anti-avoidance rule can vary significantly from one jurisdiction to another. This part also lays down the method for ascertaining the "*effect*" of applying domestic anti-avoidance rules (*see chapter 3*). Later on in the thesis, these effects, applicable from the source or residence State's perspective, are tested against the provisions of tax treaties to ascertain whether a conflict arises or not. Of course, it is impossible to compare the tax systems of all States. Thus, the comparative analysis is restricted to domestic anti-avoidance rules that are applied in cross-border scenarios in both common law States (such as Canada, India, USA and UK) and civil law States (such as France, Germany, the Netherlands and Switzerland)[39].

14. As the thesis analyses the interaction of domestic anti-avoidance rules with tax treaties, as an initial step, it is essential to examine the relationship between tax treaties and domestic law or tax law (as domestic anti-avoidance rules are a part of domestic tax law). In particular, the question arises as to how tax treaties are incorporated in domestic law so as to apply to a taxpayer and, when applied, how do States resolve conflicts between their domestic law and tax treaty law? Ideally, if a conflict arises the tax treaty prevails as it can be considered to be "*lex specialis*". However, do all States agree with this position, especially with respect to posterior domestic law rules? A related concern is the issue of treaty override: essentially, can States override their treaty obligations? Does such an override conflict with the provisions of international law, in particular, Art. 26 and Art. 27 VCLT? What remedies are available to the compliant States? This analysis lays down the basis for examining whether the application or introduction of a posterior domestic anti-avoidance rule can be considered to be a treaty override or not? These issues are explored in the *third part* of this thesis (*see chapter 4*).

[39] ZIMMER, JAAR, p. 22.

15. Also, prior to analysing the interaction of domestic anti-avoidance rules with tax treaties, it is essential to lay down the basis for tax treaty interpretation. This is examined in the *fourth part* of this thesis. It is well accepted that the VCLT governs the interpretation of treaties. Nevertheless, the question arises as to the extent to which the VCLT's interpretation principles, found in Art. 31 and Art. 32, are relevant for the interpretation of tax treaties? (*see chapter 5*). The majority of the tax treaties in the world are based on the OECD Model. Further, it is widely accepted that the OECD Commentary plays an important role in the interpretation of a tax treaty based on the OECD Model. Accordingly, the role of the OECD Commentary in the tax treaty interpretation process needs to be determined as the OECD's position on the interaction of domestic anti-avoidance rules with tax treaties has evolved over a period of time. Even the impact of the UN Commentary that accompanies the UN Model (last updated in 2011 – all references in this thesis will be made to the 2011 version of the UN Model unless stated otherwise) needs to be examined. This is because, at the moment of writing this thesis, the view expressed in the UN Commentaries on the interaction of domestic anti-avoidance rules with tax treaties was more comprehensive and structured than that in the commentaries to the OECD Model. Also, the commentary in the BEPS 2014 report on preventing tax treaty abuse (hereafter "2014 TTA report") as well as the BEPS 2015 report on preventing treaty abuse (hereafter "2015 Final TTA report") is inspired by the UN Commentary (*see chapter 6*). Even though the provisions of the VCLT govern the interpretation of tax treaties, a tax treaty cannot be viewed in isolation from domestic law. This is because several provisions of tax treaties, notably Art. 3(2) of the OECD Model, provide that treaty terms have to be interpreted in light of the relevant domestic law. An analysis of Art. 3(2) is essential for this thesis in order to determine the extent to which such domestic law definitions can be incorporated into a tax treaty (*see chapter 7*).

16. The *fifth part*, which is the core of the thesis, analyses the interaction of domestic anti-avoidance rules with tax treaties. The view of the OECD and the UN, as expressed, in various versions of the working documents, reports and commentaries is put forward. Furthermore, the view of the OECD, as provided in the 2014 TTA report and 2015 Final TTA report, is also discussed. The view of these international organizations is examined in chronological order as expressed in various statements issued in the period from 1961 to 2016 (*see chapter 8*). Thereafter, the author comments on

selected issues that arise from the views expressed by the OECD and UN that are relevant to the issue at stake. Notably, the author discusses the role of the OECD Commentary and UN Commentaries in interpreting previously concluded tax treaties (especially tax treaties concluded before 2003); the object and purpose of tax treaties; the guiding principle (the PPT rule too) and its various components; the saving clause; and the observations made by States to these Commentaries (*see chapter 9*). An analysis of these issues is essential in order to debate on the interaction of domestic anti-avoidance rules with tax treaties.

17. It is contended that no conflict should arise between a tax treaty and a domestic anti-avoidance rule if the former contains a provision (safeguard clause) to preserve the latter. The author analyses whether this position is correct or not and the impact of such a position on other treaties concluded by the same State that do not contain such a clause (*see chapter 10*). It is also contended that a conflict does not arise between a tax treaty and a domestic anti-avoidance rule when the treaty contains an undefined term and that term is then defined pursuant to a domestic anti-avoidance rule as a result of Art. 3(2) or a provision that refers to the domestic law. The author analyses whether this position is correct or not and puts forward the limits to such a position (*see chapter 11*).

18. Thereafter, the author discusses the interaction of domestic anti-avoidance rules with tax treaties. To elaborate, the effects of applying domestic anti-avoidance rules, as ascertained previously (*see chapter 3*), are tested against the provisions of tax treaties. To begin with, the author tests the interaction of sham/simulated transactions (*see chapter 12)* with treaty provisions. Then, the interaction of domestic anti-avoidance rules, when applied from the source State's perspective, with treaty provisions is considered. Specifically, the domestic anti-avoidance rules that re-determine the taxpayer (*see chapter 13*), re-characterize an item of income (*see chapter 14*), deny a treaty benefit (*see chapter 15*) or deny interest deductions (*see chapter 16*) are tested with tax treaties. Finally, the interaction of domestic anti-avoidance rules, when applied from the residence State's perspective, and treaty provisions is examined. Specifically, domestic anti-avoidance rules that deem non-residents to be residents in a jurisdiction (*see chapter 17*), impute income derived by a non resident taxpayer to a resident taxpayer (*see chapter 18)*, deem a taxpayer to dispose of its assets prior to its

migration (*see chapter 19)* and deny relief from double taxation to a taxpayer (*see chapter 20*) are considered in the light of treaty provisions.

19. It should be noted that the author follows a common structure in the aforementioned chapters to discuss the interaction of domestic anti-avoidance rules with tax treaties *(chapters 13-20*). Each chapter starts by presenting the effect of the domestic anti-avoidance rule and puts forward a case study to demonstrate its applicability. Thereafter, the view expressed by the OECD, UN and Courts (from around the world)[40] on the interaction of that domestic anti-avoidance rule with tax treaties is discussed. The author then provides his own view on the impact of tax treaties on the domestic anti-avoidance rule in question. He also comments on whether the introduction or application of the anti-avoidance rule, after the conclusion of a tax treaty, amounts to treaty override or not based on his previous findings (*see chapter 4*).

20. In the *sixth part* of the thesis, the author analyses the relationship between various domestic anti-avoidance rules and various treaty anti-avoidance rules and finally presents a case study (from the source States perspective) to illustrate the interaction between domestic anti-avoidance rules and tax treaties, in particular, whether treaty SAARs or treaty GAARs prevent the application of domestic anti-avoidance rules (*see chapter 21*).

21. It should be noted that the thesis deals with the interaction of domestic anti-avoidance rules with tax treaties. EU law that is relevant to taxes i.e. the fundamental freedoms (such as the free movement of workers, the freedom of establishment, the free movement of capital and the freedom to provide services), the EU directives (such as the Parent-Subsidiary directive, Interest and Royalties directive, the Merger Directive and the recently introduced Anti-Tax Avoidance directive) and the case law of the ECJ in tax matters will not be examined in detail. Nevertheless, as EU law does have an impact on the application of domestic anti-avoidance rules, a high level analysis of the interaction of domestic anti-avoidance rules with EU Law is undertaken for the sake of completeness in the *seventh part* of the thesis. Essentially, the limitations imposed by EU law are discussed (*see chapter 22*).

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[40] In the author's opinion, a decision rendered by the highest Court of State A, on a treaty concluded by State A, is not binding on a tax treaty concluded by State B with State C. Nevertheless, references can be made to such decisions to interpret the State B and State C tax treaty. See WARD, Courts, pp. 185-187. Also, *see section 7.2.6.2*.

22. Finally, in the *eighth part* of the thesis, the author concludes his main findings (*see chapter 23*) and provides model provisions that States can incorporate into their treaties (treaty policy) to ensure that conflicts do not arise between their domestic anti-avoidance rules (even those introduced after the conclusion of a treaty) and their tax treaties (*see chapter 24*).

1.7. Limitations

23. With respect to the research underpinning the analysis in the thesis, it should be noted that there was a language limitation. Given, the author's Indian background, the author is fluent in English and Hindi. However, as the thesis also analyses the law and jurisprudence of non-English speaking countries, on several occasions the author could not find appropriate English translations of non-English literature or when the literature was sourced the translations (in the author's view) were not appropriate. Also, tax law is a dynamic subject. While writing the thesis, the author observed that the domestic tax law (approach of the legislature and the judiciary) in several jurisdictions was changing rapidly. Accordingly, the domestic law and jurisprudence examined in *chapter 3* represents material as available on Jan 1st 2016 (nevertheless, at the time of the thesis defense, this chapter has been updated with recent scholarly literature). The analysis in the other *chapters*, especially in *chapter 4* to *chapter 24* is up to date and reflects material as available on June 7th, 2017 (including the BEPS outcome).

Tax avoidance schemes, including cross-border tax avoidance schemes, are counteracted at the domestic law level through the application of domestic anti-avoidance rules such as judicial doctrines, statutory general anti-avoidance rules or statutory specific anti-avoidance rules. The issue then arises as to what is the impact of tax treaties on such domestic anti-avoidance rules. In general, it is accepted that tax treaties are rules that limit domestic law and if a conflict arises between the domestic law and tax treaty – the latter prevails. However, whether this position is correct with respect to domestic anti-avoidance rules is highly questionable, especially, in light of the controversial update to the OECD Commentary in 2003, the update to the UN Commentary in 2011 and the OECD/G20 BEPS deliverables. Accordingly, in this work, the author analyses the interaction of domestic anti-avoidance rules with tax treaties, in particular, the question of whether the effects of applying domestic anti-avoidance rules, from a source or residence States perspective, can be curtailed by tax treaties. The analysis takes into consideration the various changes proposed by the BEPS Action Plan, notably, Action 6 on preventing treaty abuse and Action 15 on the Multilateral Convention. Moreover, the thesis makes policy recommendations in the form of treaty provisions that States can incorporate in their tax treaty network in order to ensure that conflicts do not arise between domestic anti-avoidance rules and tax treaties.

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