



THE TAX INSTITUTE

2018 VIC 6th Annual Tax Forum

11-12 October 2018 | Crown Conference Centre, Melbourne



THE TAX INSTITUTE

SESSION 3C:

Tax Treaties – How to Read Them

Presenter:

David W Marks, QC, CTA



Start with the Words

- Start with domestic law, not the treaty
- Ascertain “with precision” how far treaty adopted, qualified, modified
- Construe only the parts of treaty including qualifications as required in Australia



Testing Propositions

- More liberal approach to interpretation?
- International fiscal language?
- Common approach in application of DTAs?
- Okay to look at practices/cases of other States?
- Primary objective – protect against double taxation?



- When we can use Vienna Convention
- Difference between Articles 31 and 32
- Illustration of difference – use of commentaries
 - *CIR v Lin* – Article 31(3)(a)
 - *Bywater* (HCA) and *Smallwood* (EWCA) – Article 32



Matters sometimes taken into account

- Foreign case law
- Pre-existing state of the law – as context
- Unilateral statement of a State
- Whether Australian Courts will look at later agreements and agreed practices



Basic elements

- Function of the International Tax Agreements Act 1953
- Language – usually as many as two languages being equally authoritative
- Relevance of Article 33 of the VCLT
- Australian statement about approach to interpretation – Tech Mahindra



Version of treaty commentary to use

- OECD model convention or UN model convention (or another)
- Relevance of later amendments to OECD commentary
- New Zealand versus Australian positions
- Additional Australian issue – Australian Constitution
- “International fiscal language”



Worked example - background

- The worked example deals with a request for exchange of information under a DTA
- This example has been chosen as it levels the playing field for the audience – no particular knowledge of substantive tax law in either country is required



Worked example (contd.) - background

- Discussion of developments in Singapore, Australia, New Zealand and elsewhere
- Crucial issues –
 - whether can get disclosure or FOI - of foreign request
 - test of what requestor has to show: “necessary”, “foreseeably relevant”
 - efforts of requestor at home
 - procedural hurdles for taxpayer



Worked example - László's problem

- Australian state of law
- Treaty provision – Article 26
- Compare present OECD Article 26
- “Necessary” versus “foreseeably relevant” – difference in commentary and Article



Worked example - Laszlo problem - Cont'd

- Difference in meaning of words used in equally authentic texts

Tájékoztatás cseré

1. A Szerződő Államok illetékes hatóságai ki fogják cserélni az Egyezmény vagy a Szerződő Államoknak az Egyezmény által érintett adókra vonatkozó belső jogszabályai végrehajtásához szükséges tájékoztatásokat, amennyiben az általuk előírányzott adóztatás nem ellentétes az Egyezménnyel. A kölcsönös tájékoztatást az 1. cikk nem korlátozza. A Szerződő Állam



Worked example - lessons

- Focus on the correct and persuasive foreign material (eg version of commentary)
- Understand how to dismiss less persuasive material
- Use of the rules in the VCLT, for promoting or disparaging arguments
- Skepticism about arguments which do not engage the text (in whichever language)



THE TAX INSTITUTE

Thank you

Please complete your evaluation via the event app.



THE TAX INSTITUTE

Tax Treaties – How to Read Them

© David W Marks 2018

Disclaimer: The material and opinions in this paper are those of the author and not those of The Tax Institute. The Tax Institute did not review the contents of this presentation and does not have any view as to its accuracy. The material and opinions in the paper should not be used or treated as professional advice and readers should rely on their own enquiries in making any decisions concerning their own interests.

Liability limited by a scheme approved under Professional Standards Legislation.



THE TAX INSTITUTE