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How to read treaties – Worked Example László’s problem - 9 June 2020

Table of Contents

1	Who is the real “Thomas Ladislaus”?	2
1.1	Ima’s client	2
1.2	The cousin, who also goes as “Thomas”	2
1.3	ATO receives a request from Hungary	2
2	Enquiries reveal	4
3	Analysis	5
3.1	First ascertain the state of Australian domestic law	5
3.2	How far has the treaty been adopted, modified, or qualified?	5
3.3	Language versions equally authentic	7
3.4	Questions arising during the litigation	9
4	The wash-up	10

1. This is a fictionalised, worked example. In fact, Competent Authorities at both ends do a deal more checking. Thus, this ‘scenario’ is unlikely to occur like this in real life. **The fictitious facts have been accentuated as a learning exercise to generate a useful worked example for a general audience who have a limited time.**
2. The names of the people involved are intended to be fictitious – no resemblance to any person is intended.
3. The Hungarian DTA was chosen for 2 reasons. This language is difficult for many Australians, so most of us will be unable to guess the meaning of the quoted passage. The current DTA is old, and uses old concepts, pre-dating the present OECD commentary.

1 Who is the real “Thomas Ladislaus”?

1.1 Ima’s client

4. Ms Ima Lawyer, solicitor, is engaged by László Ladislaus, a long-time resident of Melbourne. He is known to Ms Lawyer from lengthy property dealings, over decades. Ms Lawyer knows his interests lie entirely in Singapore and Australia, and that he has no ties to Hungary. He left the country of his birth in 1960, as an infant.
5. László goes by the name “Thomas”, in most of his business dealings, having given up telling Australians and Singaporeans how to spell his Christian name with the proper accents.

1.2 The cousin, who also goes as “Thomas”

6. László tells Ms Lawyer that his cousin, Andor Ladislaus, also goes by “Thomas”, and is also a well-known property developer. He has not seen Andor in years, but last caught up at a huge family gathering in New York. Living between Budapest and New York, Andor has been involved in USA property for as long as László has been developing property in Singapore and Australia.

1.3 ATO receives a request from Hungary

7. László tells Ms Lawyer that the ATO has been asking questions of his business associates recently, which seem directed at property development activities of his cousin in the USA. His tax agent had requested from the ATO all documents relating to any current investigation of László’s tax affairs but had naturally been rebuffed. The FOI officer listed 2 grounds:

- (a) As expected - disclosure could prejudice an investigation of a breach of a law about taxation;¹
- (b) Curiously - disclosure could cause damage to the international relations of the Commonwealth.²
8. László is beside himself. He tells Ms Lawyer he has been careful and open in his compliance with Australian and Singapore tax laws. He tells her that – if anything – he has overpaid tax in both places where there was an ounce of doubt.
9. Reading between the lines, the FOI officer has indicated (albeit negatively) that:
- (a) There is an investigation into László’s affairs.
- (b) It is not a wholly domestic matter. This clearly indicates that a foreign State is involved.
10. At his meeting with Ms Lawyer, László has brought with him a notice referred to him by his banker. The ATO has requested from the bank details of all transfers to a list of USA bank accounts maintained in the name of “Thomas Ladislaus”.
11. László has no USA bank accounts. (Everyone dealing in Singapore has a US dollar account with some bank, but László does not have such an account with a USA bank.)
12. He tells Ms Lawyer that he suspects there has been a mix up, and that someone is checking up on his cousin, who also goes as “Thomas” in business dealings. But these inquiries are placing stress on his relations with his bankers, at a critical time in the financing of new projects here and Singapore.
13. Ms Lawyer says she will look into the matter.

¹ Section 37 [Freedom of Information Act 1982](#)

² Section 33(a) [Freedom of Information Act 1982](#)

2 Enquiries reveal

14. Ms Lawyer's enquiries reveal that there are indeed a number of information notices, and requirements for interview, investigating all aspects of László's (non-existent) dealings in the USA.
15. Business associates, former business joint venturers, bankers and major suppliers have all had informal or formal requirements delivered. Bemused business associates have been quizzed, and been left thinking that László is in a lot of trouble. Melbourne is agog, but no-one has felt able to reach out to László.
16. Ms Lawyer turns up an information notice recently delivered to a key supplier, asking for details of all bank accounts from which payment has been made by László, for the last 15 years. That supplier is perplexed, and worried at the diversion of resources required to comply. The supplier's solicitor had sought reasons for the decision to issue the section 353-10 notice. In response, a statement of reasons under the *Administrative Decisions (Judicial Review) Act* mentions (as the relevant laws applicable) – section 353-10 of Sch 1 to the *Taxation Administration Act*; section 23 *International Tax Agreements Act 1953*; and article 26 of the Hungarian DTA.
17. László tells Ms Lawyer: 'Enough is enough'. László denies any business or financial connexion with Hungary, ever. He left as a babe in arms almost 60 years ago. He considers there has been a mix-up with his cousin, owing to similar age, occupation, and adoption of the same English first name for business purposes.
18. Ms Lawyer puts this to the ATO.
19. ATO feels unable to discuss the matter.
20. László asks that Ms Lawyer commence proceedings to review this latest formal notice, to the valued supplier (para 15) and to injunct the supplier against compliance in the meantime.

3 Analysis

3.1 First ascertain the state of Australian domestic law³

21. Without change to the common law, it is likely that the ATO would not have been able to assist a foreign revenue authority.⁴
22. And Division 355 of Sch 1 to the *Taxation Administration Act* would otherwise make such disclosure an offence.
23. Further, without change to the common law, the ATO would not be able to compel the valued supplier to do anything, let alone to compile lists of bank accounts from which it had been paid by its customer.⁵
24. Section 353-10(1)(a) allows the Commissioner to make such requirements “for the purpose of the administration or operation of a *taxation law” but this, itself, does not overcome the point at paragraph 20.

3.2 How far has the treaty been adopted, modified, or qualified?

25. Section 23 *International Tax Agreements Act 1953* entitles the Commissioner to use an information gathering power allowing provision of information, “for the purpose of gathering information to be exchanged in accordance with the Commissioner’s obligations under an international agreement. The Hungarian agreement is such an agreement.⁶
26. I set out article 26 of the Hungarian agreement in parallel with that in the current OECD Model Convention, highlighting one small change for the sake of this exercise:

³ *NBGM v Minister* (2006) 231 CLR 52, [61]

⁴ *Rothwells Ltd (in Liq.) v Connell* 93 ATC 5106, 5113; 27 ATR 127, 143. Note this issue of assisting a foreign revenue authority was recently restated in *Webb v Webb* [2017] CKCA 4, and note the appeal currently reserved before the [Privy Council](#).

⁵ *Entick v Carrington* (1765) 2 Wilson KB 275; [95 ER 807](#)

⁶ Section 5 *International Tax Agreements Act 1953*

Hungarian Agreement Article 26

Exchange of information

(1) The competent authorities of the Contracting States shall exchange such information **as is necessary** for the carrying out of this Agreement or of the domestic laws of the Contracting States concerning the taxes to which this Agreement applies in so far as the taxation thereunder is not contrary to this Agreement. The exchange of information is not restricted by Article 1. Any information received by the competent authority of a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes to which this Agreement applies and shall be used only for such purposes. Any information received will be treated as secret on request of the Contracting State giving the information.

(2) In no case shall the provisions of paragraph (1) be construed so as to impose on the competent authority of a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State; or

(b) to supply particulars which are not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State; or

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or to supply information the disclosure of which would be contrary to public policy.

Present OECD Article 26

EXCHANGE OF INFORMATION

1. The competent authorities of the Contracting States shall exchange such information **as is foreseeably relevant** for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is not restricted by Articles 1 and 2.

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above. Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States and the competent authority of the supplying State authorises such use.

3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:

(a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

(b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

(c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (*ordre public*).

4. If information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes. The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information.

5. In no case shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity or because it relates to ownership interests in a person.

27. For completeness, my searches show that the Hungarian DTA has not been modified by the MLI (multi-lateral instrument) – perhaps processes are in hand.
28. That is not as relevant as the fact that both States are party to the [*Convention on Mutual Administrative Assistance in Tax Matters*](#) of 1988.
29. If the Hungarian requests were made under the *Mutual Assistance Convention*,⁷ the operative language of the treaty would have been broader.
 - (a) Article 4 refers to information “that is foreseeably relevant for the administration and enforcement” of the requesting State’s domestic laws concerning covered taxes.
 - (b) Article 5 provides for this kind of request - that is, in a particular case.
30. But our worked example is under the older wording of the Hungarian DTA.

3.3 Language versions equally authentic

31. The Hungarian text has equal status with the English text.⁸

⁷ That treaty seems to be covered by section 23(4) of the *International Tax Agreements Act*.

⁸ Refer execution clause at end of Hungarian DTA: “Done ... in the English and Hungarian languages, both texts being equally authentic”.

32. Re-read the English version of sub-article 26(1), above, and now read the Hungarian version:

26. CIKK

Tájékoztatás-csere

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 illetékes hatóságának a kapott tájékoztatást titokban kell tartania, ugyanúgy, mint ennek az Államnak a belső jogszabályai alapján kapott tájékoztatásokat, és csak olyan személyeknek vagy hatóságoknak /beleértve a bíróságokat és az államigazgatási szerveket/ lehet hozzáférhetővé tenni, amelyek az Egyezmény alá eső adók kivetésével vagy beszedésével, ezen adók érvényesítésével vagy az azokra vonatkozó perléssel, vagy az ezekkel az adókkal kapcsolatos jogorvoslatra vonatkozó határozatokkal foglalkoznak, és csak ilyen célokra használhatják fel azokat. A tájékoztatást nyújtó Szerződő Állam kívánságára a kapott tájékoztatást titokban kell tartani.

33. Enquiries are made of Hungarian speakers, to ascertain how “necessary” (English version) is rendered in the Hungarian text.
34. The key word in the Hungarian text is “szükséges”. See line 4 of the quote.
35. Ms Lawyer alleges that there is a subtle difference between “necessary” and “szükséges”.⁹

⁹ I have the genuine Hungarian text from the UN Repository.

36. I want to emphasise that I am making this up for the sake of the exercise only: but assume for this exercise only that her translator’s evidence is that the Hungarian text looks more at what is “required”, not the word used in the English version, “necessary”.¹⁰
37. ATO’s solicitors assess whether a translator ought to be engaged. The point of this is to ascertain the state of the Australian law, since the DTA expressly recognises the Hungarian text as equally authentic with the Australian text. This is contemplated by Article 33 of the VCLT.

3.4 Questions arising during the litigation

38. The following then occurs, as the litigation progresses:
39. In the Federal Court proceedings, Ms Lawyer seeks voluntary disclosure of, but is denied, copies of the Hungarian request. The ATO points to the plain terms of Article 26(1). Ms Lawyer points to the current OECD commentary, which says that information may be released to the taxpayer.¹¹ Ms Lawyer applies to Court for an order for disclosure.
- (a) Can you look at the OECD Commentary? For what purpose?¹²
- (b) Do you look at the present OECD Commentary, or the version current at time of making the DTA?
40. Ms Lawyer says that the competent authority has not followed a procedure in handling Hungary’s request. She says as the information requested is about a man with no known connexion to Hungary, nor to the USA (the latter relevant to enquiries about USA bank

¹⁰ I have made this up using Google Translate for the sake of the exercise. I advise you to use an accredited translator, not a machine, in real life. (Please note that in real life an acquaintance, who is a native Hungarian speaker, has told me that “necessary” is a reasonable rendering of “szükséges”.)

Use an accredited translator, not Google Translate nor your non-accredited friend.

¹¹ Commentary on Article 26, para 12

¹² For the basic rules of interpretation of treaties, to which Australia has agreed to be bound, see [Vienna Convention on the Law of Treaties](#), articles 31-32. There is a deal of case law referred in my paper: David W Marks QC “Tax Treaties: how to read them” (2019) 53(6) *Taxation in Australia* 314-321.

accounts). Ms Lawyer says this cannot be a request by Hungary which is “necessary” in terms of Article 26(1).

41. ATO is aware of a deal of caselaw from overseas dealing with the test on the basis of “foreseeably relevant”,¹³ and wonders whether that case law assists under this old Treaty’s different wording.

(a) Can you use foreign case law? How useful is it? What if the agreements involved in the foreign case-law have substantial differences from the present Hungarian-Australian DTA?

42. Going back to the translation dilemma, Ms Lawyer says no information is “required” in relation to a man who has no connexion with Hungary all his adult life and most of his childhood. And she points to lack of proof of any “requirement”, as opposed to what the Hungarian competent authority asserts to be “necessary”.

(a) How do you resolve a difference between equally authentic language texts?¹⁴

4 The wash-up

43. Fortunately, for the sake of this exercise, after the expert witnesses and the lawyers have drunk deeply from the well of this case, the Commissioner reconsiders further action on the request from Hungary. The true “Thomas” Ladislaus, who is the subject of Hungary’s requests – being the USA cousin - has been identified by the age-old technique of social media stalking.

44. Media advisers to:

(a) László,

(b) the National Tax and Customs Administration of Hungary (NTCA); and

¹³ The otherwise excellent judgments in *AXY v Comptroller of Income Tax* [2018] SGCA 23 from Singapore do not make it clear why the Court was referred to the current commentary, in relation to an old treaty between Singapore and Korea.

¹⁴ [Vienna Convention on the Law of Treaties](#), article 33

(c) the ATO

agree a joint press release under which the Commissioner “hails a new era of tax co-operation” with Hungary, which has enabled “popular local business identity”, Mr László Ladislaus, to assist Hungary in putting down tax evasion being carried out “on the other side of the globe using a deceptively similar name”.

45. Calm is restored, and elbow bumps occur.

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