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Tax Treaties – How to read them

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We start with the words.[1]

Surprisingly, we start with the domestic law, not the treaty (as such).[2]

We must find out, "with precision", how far the treaty has been adopted, qualified, or modified, by domestic law.[3]

This is because a treaty does not become part of Australian law by, for example, Executive act. It becomes part of domestic law when, and to the extent, adopted by Parliament. (Parliament may equip the Executive to give effect to a treaty.)[4]

Having ascertained the domestic law with precision, we construe "so much only of the [treaty] and any qualifications or modifications of it, as Australian law requires".[5]

This is where technique begins. The objective of this paper is to arm you with both sides of arguments about fundamental questions, dispel myths, and apply what we have learnt in a contemporary context.

Prof. Roy Rohatgi says (emphasis added):[6]

> … Tax treaties tend to be less precise and require a broad purposive "substance over form" interpretation. …
> [A] neutral interpretation and common understanding requires the use of an international fiscal language, which may not be found in the domestic laws and may provide a definition quite independent from domestic laws.
>
> …
>
> The primary purpose of double tax treaties is to avoid and relieve double taxation … Tax treaties require a common approach by both Contracting States to achieve this goal. Common interpretation also leads to an international tax language and terminology and to reliance on similar legal decisions and practices in other countries, where appropriate.

Let us unpack that. We can test these propositions:

- There is a particular approach to the language. Mr Rohatgi actually speaks of a more liberal approach to interpretation.[7]
- There is a need for – and we can thus assume the existence of – an "international fiscal language".
- It is legitimate to drive toward common approaches in application of the DTA, at least between Contracting States.

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[1] There is a large literature on treaty interpretation: see *Klaus Vogel on Double Taxation Conventions* (4th ed), volume 1, pp.34-35 para 70. The objective of this paper is more focussed – to give a contemporary and challenging view of a few key issues, in the Asia-Pacific.

[2] *NGBM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, [2006] HCA 54, [61]

[3] *NGBM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, [2006] HCA 54, [61]

[4] *Minister for Foreign Affairs & Trade v Magno* (1992) 37 FCR 298, 303; [1992] FCA 566

[5] *NGBM v Minister for Immigration and Multicultural Affairs* (2006) 231 CLR 52, [2006] HCA 54, [61]

[6] Roy Rohatgi, *Basic International Taxation* (2nd Edition, 2007), volume 1 page 39.

[7] *Ibid*. He references the Australian understanding of "liberal", in ruling TR 2001/13. See below.

- In doing so, it is legitimate to look at practices and case law of other States.
- This flows from the primary objective, of a DTA, to protect against double taxation.

These propositions represent very respectable positions. But this is a field where there is a contest of ideas. It is exciting and challenging.

The way to proceed is to look at a number of controversial issues, and how they have been settled. Finally, we will look at a particular topic of interest in the Asia Pacific realm, and see how it is being dealt with in Courts in this region.

1 VCLT

An essential tool in the armoury is the *Vienna Convention on the Law of Treaties* (***VCLT***).[8]

Australia is party to the treaty. The substance of the primary interpretative provisions in Articles 31 & 32 are applied by Australian courts, even where the other Contracting State is not party to the VCLT, as those articles represent "the customary rules for the interpretation of treaties".[9]

However some care must be taken where you are dealing with a treaty prior to the entry into force of the VCLT with respect to a State.[10] As a matter of substance, given that Articles 31 and 32 reflect customary international law, there is no substantive effect on the analysis apart from having to ensure it is clear that you are referring to the correct body of law. The relevant date for entry into force of the VCLT was 27 January 1980.[11]

This point actually does crop up occasionally, as in *Bywater Investments Ltd v Commissioner of Taxation*, in relation to the Australian-Swiss Treaty, a relatively recent treaty which however was concluded prior to entry into force of the VCLT for Switzerland.[12]

1.1 Articles 31 & 32

Turning then to Articles 31 & 32 of the VCLT:

> **SECTION 3: INTERPRETATION OF TREATIES**
> Article 31 **General rule of interpretation**
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
> (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
> 3. There shall be taken into account, together with the context:
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

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[8] [1974] ATS 2. I have referred to a standard text, Dörr & Schmalenbach (eds) *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed, 2018)

[9] *Theil v Commissioner of Taxation* (1990) 171 CLR 338, 356.5 per McHugh J, approved by Mason CJ, Brennan & Gaudron JJ at 344.6. Dawson J says that "the relevant rules which it lays down are applicable, being no more than an indorsement or confirmation of existing practice": page 349.3. This approach was also followed by the UK Supreme Court, in a case involving the DTA between the UK and USA, the latter not being party to the VCLT: *HMRC v Anson* [2015] 4 All ER 288; [2015] UKSC 44, [54].

[10] Article 4 of the VCLT.

[11] *Vienna Convention on the Law of Treaties: A Commentary*, above, page 95 para 14.

[12] Refer to the analysis in the judgment of Gordon J, (2016) 260 CLR 169; [2016] HCA 45, [149], [181].

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.
Article 32 **Supplementary means of interpretation**
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

1.2 Illustrating the difference between Articles 31 & 32

A critical question with treaties based on the OECD Model Convention is the extent to which the OECD Commentaries may be considered.

It is important to note how such material is received. This is because "supplementary means of interpretation" received under Article 32 can only go to three purposes, and then only once the meaning according to Article 31 has otherwise been ascertained:

- "To confirm the meaning resulting from the application of article 31";
- To determine the meaning, when the Article 31 interpretation either leaves the meaning ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.

On the other hand, if such commentaries are received under Article 31, they are either "context for the purpose of the interpretation of a treaty", or other mandatory material that must be taken into account "together with the context".

I would hazard that too little has been made of these differences by the Courts in the past. This may be a fertile area for drawing distinctions. It may suit one or other side to keep the Court away from the Commentaries, or restrict the use to which the Commentaries can be put. I commend this idea for future analysis.

For example, in *Russell v Commissioner of Taxation*, Logan J simply says that it is "settled that, in construing such an agreement, a court may have regard to, inter alia, the OECD commentary on its model agreement".[13] Logan J does not then distinguish how that material is received in terms of the VCLT or customary international law, as applicable.

The passages to which Logan J refers in *Thiel v Commissioner of Taxation* are in fact the contradictory analyses of Dawson J, and McHugh J (with whom the other members of the High Court of Australia agreed). McHugh J considered that the Commentaries were supplementary means of interpretation in terms of Article 32.[14] Dawson J considered that the Commentaries fell within Article 31 - as "context" - being an instrument "which was made by one or more parties in connexion

[13] (2009) 74 ATR 466; [2009] FCA 1224, [118].
[14] At pages 356-357.

with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty". However Dawson J noted doubts in the literature as to the applicability of Article 31 to the Commentaries, and explained then why they would nevertheless fall within Article 32 as supplementary means of interpretation.[15]

The position in England seems certainly that the OECD Commentaries are taken into account (subject to what I mention below about later commentaries than the commentary applicable at date of making the treaty). Curiously, the New Zealand Court of Appeal in *Commissioner of Inland Revenue v Lin* has recently found that the Commentaries amount to "subsequent agreement about the treaty's interpretation". This would place the Commentaries within Article 31(3)(a) of the VCLT, rather than Article 32, and represents a deviation from Australia.[16]

Unfortunately, this view appears to have arisen from the New Zealand Court of Appeal's reading of the following paragraph in a decision of the UK Supreme Court, *HMRC v Anson*:[17]

> The contemporary background of a treaty, including the legal position preceding its conclusion, can legitimately be taken into account as part of the context relevant to the interpretation of its terms …

With respect, that paragraph does not support giving the OECD Commentaries the additional weight accorded by Article 31 of the VCLT.

The most recent view from the High Court of Australia is the judgment of Gordon J in *Bywater*, where her Honour favours Article 32.[18] This accords with the England and Wales Court of Appeal in *Smallwood*.[19]

[15] At pages 349-350.
[16] [2018] NZCA 38, [19].
[17] Above, at [58].
[18] (2016) 260 CLR 169; [2016] HCA 45, [167].
[19] [2010] EWCA Civ. 778; 80 T.C. 536, [26].

2 Whether matters within Articles 31 or 32

Above I have noted the potential for a difference of views, even within this region, about whether the OECD Commentaries fall within Article 31 or Article 32 of the VCLT.

Here I will deal briefly with other matters that crop up.

2.1 Foreign case law

I cannot see how case law would fit within Article 31. But since cases from foreign jurisdictions are often cited, I deal with the topic here.

There are decisions in Australia and New Zealand which are more welcoming of foreign case law. Gzell J in *Unisys Corporation Inc v Commissioner of Taxation*[20] said:

> In addition, courts have had regard to decisions in other jurisdictions in international comity in an attempt to achieve international uniformity.

Ellis J in *Chatfield & Co Limited v Commissioner of Inland Revenue* [2016] NZHC 1234, [15] quotes at length from Singaporean authority, dealing with a similar issue. Her Honour does not address an institutional difference between Singapore and New Zealand, which was fully argued later in the Singapore courts when institutions changed there.[21] This is a danger with using foreign cases as nuances of the foreign State's governmental processes may have been important..

The English put this best. The Court of Appeal has said that "decisions of foreign courts on the interpretation of a convention or treaty text depend for their authority on the reputation and status of the court in question".[22]

Thus, although not within Article 31, and probably not within Article 32, foreign cases may be looked at depending on their inherent persuasiveness.

It is difficult to lay down a hard and fast rule about this.

Sometimes sensitivity to the foreign legal system is required. In the complicated commercial case of *Indofood International Finance Ltd v JP Morgan Chase Bank* the English courts were incidentally required to consider the application of DTAs between Indonesia and each of Mauritius and The Netherlands.

The terms of a loan enabled redemption of the loan notes by the issuer in the event of a change in the law of Indonesia impacting the withholding tax burden, but only where the obligation could not be avoided by the issuer taking reasonable measures.

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[20] 2002 ATC 5146, [44].

[21] Refer heading 6.1.7.

[22] *HMRC v Smallwood* [2010] EWCA Civ 778; [2010] STC 2045, [26] (6).

Thus the English Court heard evidence of the effect of the two DTAs with Indonesia, including expert evidence about the Indonesian system of law.

What emerged was that Indonesian law was based on the civil law, that there was no doctrine of precedent, and there was no decision of an Indonesian Court concerning one of the relevant treaties.[23]

So the important facts for the English Court were that there was no Indonesian case law, and even if there had been it would not have bound a subsequent Indonesian Court. Again, this emphasises the need to understand the standing of a foreign court's decision.

The point came up more directly in *Lamesa Holdings BV v Commissioner of Taxation* for an Australian Court. Einfeld J found:[24]

> I do not think recourse can be had to decisions of the Dutch court in the interpretation of tax agreements between the Netherlands and countries other than Australia, but I think that an interpretation of the Netherlands-Australia DTA by the Hoge Raad [the Netherlands' highest court in relation to tax matters] would be both admissible and persuasive given that uniformity in the application of the Agreement in both countries is desired.

With respect, that is likely to be useful guidance in future. There will always be cases where, for example, an ultimate appellate court, dealing with an identical DTA article, under a materially similar DTA, will be considered sufficiently persuasive for an Australian court to pay attention. The only hesitation I have about Einfeld J's decision in 1997 (shortly after the commencement of the Commonwealth *Evidence Act 1995*) is that his Honour deals with the matter, at least in part, as a matter of evidence rather than as a matter of submission alone.

On appeal, the Full Federal Court made this observation about the reception of evidence about foreign law:[25]

> We would, however, express our agreement with the distinction drawn … between the content of foreign law which is receivable in evidence and the application of that law to facts once its content has been ascertained which is not. However, where the construction of an international treaty arises, evidence as to the interpretation of that or subsequent treaties in one of the participating countries forms part of a matrix of material to which reference could properly be made in an appropriate case. As presently advised we would not wish it to be thought that a limited view of the material to which reference could be made in interpreting a double tax treaty should be taken. Had there been some decision of an appropriate Dutch court interpreting a treaty with identical or similar language, then, in our view, evidence of such a decision might well have been admissible.

The important qualification there is "identical or similar language", and as we have seen it is also material that the foreign court be "appropriate". As to the former I make the following observations.

In truth, DTAs (as opposed to simpler treaties for the exchange of tax information) have each been the subject of hard negotiation, with particular known and unknown agendas on each side, resulting in a bespoke product.

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[23] [2006] EWCA Civ 158 [24].
[24] (1997) 35 ATR 239, 248.6.
[25] (1997) 77 FCR 597, 603.

In another context, involving industrial instruments in Australia, the High Court of Australia has warned:[26]

> The Award itself is the result no doubt of compromises. It is not for this Court to reach a compromise of those compromises. The flexibility that casual work offers, and the desire of workers to engage in it, might well have been regarded as recompense for some other advantage foregone, either by the employee or employers or both of them. The casual 'loading' … might have been intended to offset all disadvantages, or may be less than it would be, but for the obligations that the Appellant owes under the [superannuation guarantee Acts]. The framing of the definition of 'ordinary hours' in the way that it was might itself have been of importance and advantage to casual employees as well as to the Appellant. … [An] assumption that compatibility be achieved or should be attempted between different classes of employees can provide no certainty or justifiable basis for the construction of the Award.

That was said in relation to the compromises inherent, in each case, for classifications of employees dealt with within the one Award for one industry in one country. The web of bilateral treaties cover many people in many countries. Too much can be made of the existence of the OECD Model Convention, when the truth is that the Model Convention is simply a point of departure (even then subject to known, and unknown, reservations by States) for lengthy bilateral negotiations.

As will be seen elsewhere in this paper, I respectfully disagree with some of the observations of the New Zealand Court of Appeal in the recent decision, *Commissioner of Inland Revenue v Lin*. However, their Honours are particularly clear-eyed about the process of treaty negotiation:[27]

> It is perhaps trite to observe that each treaty is the result of a discrete round of bilateral negotiations. The final instrument reflects the parties' agreement on what terms and conditions are appropriate to their particular relationship. … Each treaty must be construed discretely, in accordance with its own particular terms.

2.2 Pre-existing state of the law: Context

2.2.1 History of treaties and legislation

It seems that the English Courts will readily look at the history of the bilateral relationship in question. In *HMRC v Anson*, above, it was material to trace through the 1945 UK-USA DTA, its 1966 Protocol, changes to the taxation of dividends domestically in the UK, to the 1975 treaty.

This was not done idly. For example, one of the parties was arguing that a provision of the 1975 DTA had no work to do. Working through the sequence of the treaties, in the context of changes in domestic law, gave context (presumably admissible in terms of Article 31 of the VCLT) for the construction of the disputed provision.

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[26] (2003) 77 ALJR 1806, [43].
[27] [2018] NZCA 38, [20].

2.2.2 Explanatory memorandum

The Federal Court of Australia has also found it useful to look at the Explanatory Memorandum which accompanied the Bill for amendment to the *International Tax Agreements Act 1953*, when the Canadian DTA was updated by a protocol. The OECD commentary on the 2002 Model Convention noted Canada's reservation concerning the definition of "royalty". The EM explicitly noted how the protocol was to deal with royalties, in light of that reservation.[28]

2.3 Unilateral statement of a State

Each State may have its own explanation of a DTA. For example, ATO issues various interpretative products including public rulings. In the international field, one product which has proved particularly valuable to advisers is the US Treasury's Technical Explanations, which are prepared for USA domestic purposes.

Neither an Australian tax ruling, nor a US Treasury Technical Explanation could easily fit within Article 31, at least absent cogent evidence that such an explanation is accepted by another party to the treaty.

Klaus Vogel is closest the mark in only admitting such a document, if proved to reproduce contents of letters or notes exchanged between the initialling, and the final signature, of a convention. Otherwise, *Klaus Vogel* considers that such unilateral statements fall within neither of Articles 31 nor 32.[29]

There has been a contrary view in the region. The New Zealand Court of Appeal's decision in *Commissioner of Inland Revenue v JFP Energy Inc* considered that the US Treasury's Technical Explanation of the USA-NZ DTA was useful. This was so, on the basis of the desirability of a uniform approach to the DTA by the Contracting States.[30] This decision is an outlier.

2.4 For Australian purposes - later agreements and agreed practices

Whatever the position elsewhere, the High Court of Australia appears against accepting items that might otherwise fall within Article 31(3)(a) and (b), being a subsequent agreement or subsequent practice in the application of the treaty, regarding or establishing the agreement of the parties regarding interpretation of the treaty or its application.

Though not in the tax context, the decision of *Minister for Home Affairs v Zentai*[31] has subsequently been cited in a tax context.[32] In *Zentai* the High Court rejected the Executive's contention that the

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[28] *Task Technology Pty Ltd v Commissioner of Taxation* 2014 ATC 20-437; [2014] FCA 38, from paragraph [12]; and also referred to on appeal, (2014) 224 FCR 355; [2014] FCAFC 113, [13]. The relevant Explanatory Memorandum was also referred to by the Full Court in *Tech Mahindra Ltd v Commissioner of Taxation* (2016) 250 FCR 287; [2016] FCAFC 130, from [32].
[29] Page 40 paragraph 86.
[30] [1990] 3 NZLR 536, 542.
[31] (2012) 246 CLR 213; [2012] HCA 28, [65].
[32] *Tech Mahindra Ltd v Commissioner of Taxation* (2015) 101 ATR 755; [2015] FCA 1082, [60].

Court should take into account a subsequent understanding between two Contracting States about what a limitation contained in an extradition treaty meant. The High Court of Australia said:

> The meaning of the limitation … is to be ascertained by the application of ordinary principles of statutory interpretation. The limitation is not susceptible of altered meaning reflecting some understanding reached by the Ministry of Justice of Hungary and the Executive branch of the Australian government.

3 Basic elements

3.1 Domestic law giving the DTA force

Section 5 of the *International Tax Agreements Act 1953* gives force of law to the larger part of Australia's current stock of DTAs. Some DTAs have different, specific provisions, usually to do with commencement.[33]

This Act formerly reproduced the text of the DTAs and any protocols. For the most part, the drafter now refers the reader to the *Australian Treaties Series* for the texts.[34]

The Act does a number of things, beyond giving the DTAs force of law in Australia:

- It clarifies the meaning of "profits" of an activity or business.[35] This potentially solves a dilemma under Article 3(2) of the current OECD model convention.
- Likewise it clarifies the meaning of "immovable property", for the same reason.[36]
- And it attempts to clear up some puzzles about trusts, in relation to interest and royalties.[37]
- It unilaterally modifies some treaties (where the DTA in question has not been revised since the *Lamesa* decision), by applying a look-through approach, down a chain of entities, to determine whether the value of the assets is wholly or principally attributable to land.[38]
- Part IVA *Income Tax Assessment Act 1936* retains primacy over the text of a treaty.[39]
- Some administrative provisions, such as debt-collecting and information gathering, are facilitated.[40]

3.2 Language

Usually a DTA done in 2 languages specifies that both languages are equally authoritative.[41] It is legitimate to call evidence of the meaning of the foreign language text.[42]

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[33] See for example s 11R *International Tax Agreements Act 1953*, for the Austrian agreement.
[34] This is a database available through Austlii. I keep the Wolters Kluwer annual paperback, *Australian Tax Treaties*, to hand.
[35] Section 3(2)
[36] Section 3(5)
[37] Sections 3(3) & (4)
[38] Section 3A
[39] Section 4(2)
[40] The USA agreement's terms for assistance in debt-collecting are dealt with by s 20. Information gathering at the instance of a counterparty is facilitated by s 23. I anticipate that these matters will increasingly by dealt with via a multilateral instrument, instead the bilateral instruments.
[41] The new Australian-German DTA, for example, concludes: "Done at Berlin … in duplicate in the English and German languages, both texts being equally authentic".
[42] *Thiel v Commissioner of Taxation* (1990) 171 CLR 338, 349; [1990] HCA 37, [9]

This topic requires reference to Article 33 of the VCLT.

> Article 33 **Interpretation of treaties authenticated in two or more languages**
> 1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
> 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
> 3. The terms of the treaty are presumed to have the same meaning in each authentic text.
> 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Usually Articles 33(1) & (2) will not be an issue, on the OECD model used. Article 33(3) drives toward an interpretation that has both authentic texts read the same way. However, this may not always be possible, and doubt may yet have to be resolved under Article 33(4).

Thus most of the work under DTAs done with Australia is potentially around the last two sub-Articles. *Klaus Vogel* considers:

> If the two (or more) versions are irreconcilable - which can result, eg, from a drafting error - the interpretation is to be guided by Articles 31 and 32 VCLT (ie, by considering the object and purpose of the treaty, its context and any supplementary means of interpretation). If this approach is not possible, the treaty is defective due to the contradiction and the case is not governed by the treaty provision in question.

It seems that the practice adopted in relation to Article 33(4) of the VCLT is intended to avoid that result as much as possible. *Vienna Convention on the Law of Treaties: A Commentary* (above) considers that Article 33(4) "aims at an interpretative solution which respects the different languages, but extracts from the treaty the best reconciliation of the differences". Once Article 33(4) is engaged, "the interpreter enjoys **much greater freedom** in finding a reasonable meaning of the treaty clause in question, simply by adopting a teleological[43] approach. The interpretative effort is released from the strings of the general rules of interpretation, and the purpose of the treaty is singled out as the essential guarding element of interpretation".[44]

I cannot point to an example of the application of Article 33(4) in the context of a DTA. The process is thought to be best illustrated by the non-tax decision of the International Court of Justice, *LaGrand* [2001] ICJ Rep 466, paragraphs 101-102. *Klaus Vogel* does give a couple of examples, both foreign, of conflicts between the authentic languages of a couple of double tax agreements, which the authors say either led, or would potentially lead, to invalidity of the article in the foreign capitals DTA. One example, apparently judicially ruled upon in Germany last century, involved the German version of a DTA excluding from benefit dividends on shares of a German limited liability company, whereas the Italian version of the same article would have included shares of a German limited liability company.[45]

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[43] A tremendous word. Per *Macquarie Dictionary* – "teleological argument" – *an argument for the existence of God based on the assumption that order in the universe implies an orderer and cannot be a natural feature of the universe".*

[44] At page 649 paragraphs 36-38.

[45] *Klaus Vogel*, above, page 41 paragraph 88.

3.3 Australian approach to interpretation

The most recent authoritative statement of an intermediate appellate court in Australia is in *Tech Mahindra Ltd v Commissioner of Taxation*, above, [22]:

> The principles to apply in the interpretation of the Article were not in dispute and are well settled. A wholistic approach is to be taken to the interpretation of the Indian Treaty, in line with the rule of interpretation in Art 31 of the *Vienna convention on the law of treaties* … The written text has primacy but the Court must also have regard to the context, object and purpose of the treaty provisions …

The word "liberal" is occasionally used. It is easy to find language of courts which tends either to expand or contract the degree of liberality with which the Court may operate. It is hard to pin down the notion.

In *Commonwealth v Tasmania*[46] Murphy J drew attention to the difference between a treaty, on the one hand, and contractual obligations in terms of municipal law. He spoke of "the imprecise standards of obligation under international law" in finding that a particular Article of the treaty there in question imposed a real obligation.

The Full Federal Court in *Commissioner of Taxation v Lamesa*[47] discusses the interpretation of treaties including DTAs at length. Their Honours place the sometimes made statement that treaties should be interpreted liberally in this context (at page 605):

> Third, the mandatory requirement that courts look to the context, object and purpose of treaty provisions as well as the text is consistent with the general principle that international instruments should be interpreted in a more liberal manner than would be adopted if the court was required to construe exclusively domestic legislation.[48]

The ATO view on the requirement to interpret treaties liberally is given in ruling TR 2001/13, paragraphs 93-94. What is said is that the requirement for a "liberal" interpretation "is directed to the rules of construction to be adopted, rather than being directed at the width and ambit of the content" of an Article. With respect, this is conventional, if perhaps difficult to apply.

On the other hand, the New Zealand Court of Appeal decision, *Commissioner of Inland Revenue v Lin*[49] appears with respect to be wrong in saying that the DTA there under consideration, "… like all double tax treaties, is to be interpreted according to the same principles applying to private contractual instruments".[50] The Court of Appeal cites a decision of the UK Supreme Court, but the passage cited does not stand for the principle.

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[46] The Franklin Dam case, (1983) 158 CLR 1, 178.
[47] (1997) 77 FCR 597, from 603.
[48] Here the Court is quoting from a judgment of the High Court of Australia in a non-tax context, but the passage has the force of a decision of the Full Federal Court at the least.
[49] [2018] NZCA 38, no appeal filed.
[50] At [19].

4 Version of Treaty Commentary to Use

The first point to note is that you may not be dealing with a treaty modelled on the OECD Model Convention. (In many cases you will.)

Thus, the Full Federal Court had regard to the commentary accompanying the *United Nations Model Double Taxation Convention between Developed and Developing Countries, 1980,* when construing the equivalent royalties article under the Australian-Indian DTA.[51]

The OECD Model Conventions have gradually gained ascendancy, and for the purposes of this discussion we will focus on those products.

Which version of the OECD Commentary should we use?

Sometimes the wording of a provision of a treaty has remained the same, but the OECD commentary has been updated. This could occur, for example, because a new model treaty has been adopted.

It would seem logical that the version of the Commentary extant at the time of the treaty ought to be used. That is what older Australian authorities demand. But this logical reaction has recently been challenged in New Zealand.

In *Chatfield & Co Ltd v Commissioner of Inland Revenue*[52] the question concerned Article 25 of the New Zealand-Korean DTA.

Chatfield, a tax agent firm, challenged decisions of the NZ CIR to issue notices for production of documents.

NZ was acting at the instance of Korea, under a request made under a DTA.

To make good its Court challenge, Chatfield sought copies of documents exchanged between Korea and New Zealand. This included Korea's original request under the DTA, that the New Zealand Commissioner obtain and provide information relating to some of Chatfield's clients.[53]

Ellis J considered that this DTA was "*generally based*" on the OECD *Model Tax Convention on Income and on Capital*, and that Article 25 "*generally follows*" the terms of Article 26 of the 1977 Model Convention.

At date of the case, Article 26 of the Model Convention had last been revised in 2012. The New Zealand Revenue tendered in evidence the "*latest OECD commentary*" on that Article.[54]

In particular, the NZ Competent Authority deposed that under Article 25 of the New Zealand-Korean DTA, "*information exchanged by the respective competent authorities is treated as secret*". He further deposed that the 2012 update to the OECD Model Convention "*clarifies that the confidentiality rules in Article 26 [the equivalent of the actual Article 25] cover competent authority letters, including the letter*

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[51] *Tech Mahindra Ltd v Commissioner of Taxation* (2016) 250 FCR 287; [2016] FCAFC 130, [36].
[52] (2015) 27 NZTC 22-024; [2015] NZHC 2099 (Ellis J)
[53] (2015) 27 NZTC 22-024; [2015] NZHC 2099, [2]-[3]
[54] (2015) 27 NZTC 22-024; [2015] NZHC 2099, [7], [8], [13]

requesting the information, and that in the case of a breach of confidentiality, the other State, may suspend assistance until proper assurances are provided."[55]

Ellis J said:[56]

> There is, however, apparently some debate about whether changes made over time to the OECD Commentaries should be used as an aid to interpretation of DTAs entered into prior to those changes. For example Dawson J in *Thiel* and Einfeld J in *Lamesa Holdings BV* …. have expressed the view that amendments to the Model Convention and Commentaries are only relevant to those DTAs concluded *after* the changes are effected.

The view indicated on the basis of Australian authority is still the law in Australia.[57]

However, Ellis J puts forward a new reason to look beyond the OECD Commentaries current at date of making of the treaty.

> [61] On the other hand, in the time since those decisions were issued, the Introduction to the OECD Commentaries has itself been amended to indicate more clearly that the later Commentaries are intended by Member States to be used in interpreting and applying DTAs concluded before their adoption, except where the Commentaries relate to areas in which substantive changes have been made to the Model Convention itself …. [Her Honour then quotes paragraphs 35 and 36 from the then most recent update to the Commentaries, as at 15 July 2014, set out below].
>
> [62] On that approach, any changes to the Commentaries (where there has been no relevant substantive change to the Model Convention) are to be viewed not as recording an agreement about a *new* meaning but as reflecting a common view as to what the meaning is and always has been.

Since that decision, a condensed version of the *Model Tax Convention on Income and on Capital* was published by the OECD as at 21 November 2017. The critical paragraphs quoted by Ellis J read as follows, together with a further paragraph 36.1 (underlining added):

> [35] Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles (see, for instance, paragraph 4 of the Commentary on Article 5. <u>However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.</u>
>
> [36] Whilst the Committee considers that changes to the Commentaries should be relevant in interpreting and applying conventions concluded before the adoption of these changes, it disagrees with any form of a *contrario* interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous wording resulted in consequences different from those of the modified wording. Many amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries, and such a *contrario* interpretations would clearly be wrong in those cases.

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[55] (2015) 27 NZTC 22-024; [2015] NZHC 2099, [12]
[56] (2015) 27 NZTC 22-024; [2015] NZHC 2099, [60]
[57] For example, Logan J in *Russell v Commissioner of Taxation* (2009) 74 ATR 466; [2009] FCA 1224, [118].

> [36.1] Tax authorities in member countries follow the general principles enunciated in the preceding four paragraphs. Accordingly, the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties.

Is it possible for the OECD to lift itself up by its bootstraps, like this?

First there is the significant hurdle, in Australia, that the Full Federal Court has gently cautioned against looking beyond the version of the Commentary extant when the treaty was made:[58]

> Certainly the commentary has been used to assist in the interpretation of double tax agreements based upon it, although there may be a theoretical difficulty in using commentary published after the adoption of a double taxation agreement as relevant to the construction of that agreement. Hence, the High Court of Australia in *Thiel* had regard to the commentary to the 1977 OECD Model Convention in construing the business profits Article in the Swiss-Australian double taxation agreement.

That has been heeded.[59] It accords with what I take to be the conventional understanding expressed by Roy Rohatgi in *Basic International Taxation* (2nd Edition, 2007). He says that "context" in terms of Article 31(2) of the BCLT extends to "additional materials included in any related agreement or instrument, such as protocols, notes, letters, explanations or memoranda of understanding, which were mutually agreed upon by all treaty partners at the time the treaty was concluded".[60]

What this leaves out of account is article 31(3) which particularly mentions:

- A subsequent agreement between the parties "regarding the interpretation of the treaty or the application of its provisions"; and
- "Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation".

Likewise, the current edition of *Klaus Vogel on Double Taxation Conventions* (4th Edition, 2015) says:

> 105 When interpreting treaties concluded by OECD member countries, only that edition of the MC Commentary which was applicable **at the time of the treaty's completion** can be binding … This conclusion is particularly compelling if, as previously discussed, the MC Comm. conveys the 'ordinary meaning' of the treaty under Article 31(1) VCLT and thus is binding, or in the sense of Article 31(4) conveys a 'special meaning' which the contracting parties attributed to a particular term …, for only the Comm. that was available at the time of the treaty's conclusion was able to determine the wording, and hence the 'ordinary meaning' of the parties. If one does not subscribe to that view, it is unclear from the outset how the obligation to consider the MC Comm. in interpreting treaties could ever be derived from the VCLT. It is hardly convincing to consider ensuing changes to the Comm. as a subsequent agreement **of the treaty parties** in the sense of Article 31(3)(a) VCLT.

The above passage from *Klaus Vogel* might have been more persuasive if the authority cited for the very first proposition in that quote withstood scrutiny. The learned authors cite *Sun Life Assurance Co of Canada v Pearson*[61], a decision of the High Court of England and Wales. But Vinelott J's real

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[58] *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134; [2005] FCAFC 67, [42]

[59] See fn 57.

[60] At p.41.

[61] [1984] STC 461, 513 (EWHC, Vinelott J).

quibble with looking at the commentary on the 1980 Model Convention was that the 1967 treaty had "a different origin". His Honour actually says:[62]

> The commentary is not, of course, a commentary on the 1967 treaty which has a different origin, but the views of the experts who sat on the fiscal committee on the regulation of double taxation are clearly entitled to very great weight.

In the Court of Appeal, it was common ground that the Court was "entitled to consider" the commentary on the later Model Convention.[63] (Thus the England & Wales Court of Appeal made no decision on that issue.)

This appears to have been qualified by the later decision of the England & Wales Court of Appeal, *HMRC v Smallwood*, above: "Subsequent commentaries … have persuasive value only depending on the cogency of the reasoning".

Practically, Australian trial and intermediate appellate courts may find it difficult to accept the OECD's position that later commentaries can be relevant to the interpretation of an earlier treaty, simply because of the considered comment of Dawson J in *Thiel v Commissioner of Taxation* (emphasis added):[64]

> For my part, I do not see why the OECD Model Convention and Commentaries should not be regarded as having been made in connection with and accepted by the parties to a bilateral treaty subsequently concluded in accordance with the framework of the Model.

That "caveat" is noted by Einfeld J in *Lamesa Holdings BV v Commissioner of Taxation*.[65] And, as we have seen, it is noted by then as orthodox by Logan J in *Russell v Commissioner of Taxation*[66], and as a "cautionary note" (to use Logan J's terminology) in *McDermott*.[67]

The change in 2000 to the OECD commentary, effectively bootstrapping later additions and changes to the commentary into consideration of pre-existing DTAs, is noted as an area of debate in Ruling TR 2001/13, [106]-[108]. However, it is apparent that the Commissioner of Taxation is endeavouring to give effect to paragraph 36.1of the present OECD Commentary, which says that tax authorities "follow the general principles enunciated" and that "tax payers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties" by this passage in that ruling.

For mine, I consider that there is a debate to be had on two fronts here:

- If a later commentary is said to fall within Article 31(3)(a) of the VCLT as a "subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions" - there will be questions of proof;
- Moreover in an Australian Chapter III Court, the idea that the Executive might agree upon the meaning of words given force of law by a statute of the Legislature will not sit well.

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[62] At 513j.
[63] [1986] STC 335, 347 (EWCA)
[64] (1990) 171 CLR 338, 349; [1990] HCA 37, [9].
[65] (1997) 35 ATR 239, 247, ll.37-39.
[66] (2009) 74 ATR 466; [2009] FCA 1224, [118].
[67] (2005) 142 FCR 134; [2005] FCAFC 67, [42].

As to the former point - if it is said to be a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" - proof of practice in tax matters has proved messy in the past.

The High Court of Australia, for example, could find no uniform practice in *Macoun v Commissioner of Taxation*, in relation to an exempting provision in the *Convention on the Privileges and Immunities of the Specialized Agencies*.[68] And again, but in a more profound way, it will not go well for the Executive to say that the meaning of words, given force by the Legislature, has now been determined by action or inaction of the Executive, rather than by decision of the Judicial branch.

I see this as a developing field. Not only is it challenging intellectually, but there will be profound challenges of proof if one or other side chooses to take the point.

When one looks at the decisions of *Sun Alliance* and *Chatfield*, we have to be conscious that neither the United Kingdom nor New Zealand, at the times in question, would have had quite the straightjacket of the Australian Constitution which mandates a strict separation of powers in relation to interpretation of the laws.[69] In this region, this leaves Ellis J's decision in *Chatfield*, as an outlier for the time being.

[68] (2015) 257 CLR 519; [2015] HCA 44, [82].

[69] See discussion at heading 2.4.

5 "International fiscal language"?

Occasional claims are made that a common interpretation across tax treaties, and (for the one tax treaty) between the Contracting States, leads "to an international tax language and terminology". Further this leads to "reliance on similar legal decisions and practices in other countries".[70]

By now, it should be apparent that there are significant hurdles to achievement of this goal. While it is possible to argue with other aspects of the New Zealand Court of Appeal's decision in *Commissioner of Inland Revenue v Lin*, there is much wisdom in the following passage:[71]

> It is perhaps trite to observe that each treaty is the result of a discrete round of bilateral negotiations. The final instrument reflects the parties' agreement on what terms and conditions are appropriate to their particular relationship. … He sought to pre-empt an interpretation difficulty for Ms Lin arising from the plain meaning of art 23 of the China DTA by referring to comparable provisions in double tax agreements negotiated by New Zealand with two other countries shortly after the China DTA. In [the appellant's] submission we should construe art 23 in the same way as differently worded companion provisions in the other treaties. We do not accept that submission. Each treaty must be construed discretely, in accordance with its own particular terms.

That said, there are obviously passages in judgments of well regarded Courts which speak of an international tax language or an international fiscal language. For example, the England and Wales Court of Appeal in *Indofood International Finance Ltd v JP Morgan Chase Bank* does credit passages from the OECD commentary and from a learned text writer to show, in the context of the interest article, that the term "beneficial owner":[72]

> … is to be given an international fiscal meaning not derived from the domestic laws of contracting states. As shown by those commentaries and observations, the concept of beneficial ownership is incompatible with that of the formal owner who does not have "the full privilege to directly benefit from the income".

Dawson J in *Thiel v Commissioner of Taxation* considered that "… an expression such as the word 'enterprise' may have no exact counterpart in domestic tax laws, being part of an 'international tax language'."[73]

Klaus Vogel[74] solves the problem by contending that the "ordinary meaning" of terms used in DTAs "is not necessarily that of everyday usage". To the extent that "an internationally uniform legal usage or a legal usage consistent between the Contracting States has developed, or to the extent that a specific technical language has developed in certain specialised areas, such as tax law," the learned authors argue that this is the "ordinary" usage within the meaning of Article 31(1) VCLT. The learned authors distinguish this from the possibility that Contracting States may have ascribed a meaning to a term "that deviates from the ordinary meaning". The latter is a matter for Article 31(4).

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[70] Refer footnote 6.
[71] [2018] NZCA 38, [20].
[72] [2006] EWCA Civ 158, [42].
[73] (1990) 171 CLR 338, 349.
[74] At page 39 paragraph 84.

At this stage, I consider that the advocate must pitch such arguments with care in Australia, and certainly be wary in New Zealand (in light of *Commissioner of Inland Revenue v Lin*, above).

6 Worked example

We are seeing a deal more exchange of information between countries than a decade ago. A contemporary context to apply interpretive principles is a hypothetical request by NZ under the DTA with Australia.

Although this may increasingly be done under multilateral arrangements, for the purpose of this exercise we will assume a request under the DTA.

I begin with some background, so the problem is understood. I then move to a worked example.

6.1 International exchange of tax information[75]

This litigation is on the increase. Some of it has been hard fought. I discuss some trends. Each of *Chatfield*, *ABU*, *Derrin Bros*, *MH Investments* and *Larsen* involved appellate consideration of administrative action by a local revenue authority. Lower court activity also sheds light on practical features of these disputes.

Australian authority shows that information so obtained - even if there was a serious procedural error by the offshore Revenue authority in giving Australia the information - is admissible in a tax appeal, and can found a viable notice of assessment of tax. See Hua Wang and the related Anglo American Investments, respectively.

6.1.1 *Chatfield*- Discovery - NZCA

Chatfield involved a requirement to produce information, issued to a NZ accountant by the NZ CIR. NZ was acting in attempted compliance with a request by Korea under a Double Tax Agreement or "DTA".

One of the interlocutory skirmishes in was about gaining disclosure by the NZ CIR of various documents, including the Korean request.

The decision of the New Zealand Court of Appeal,[76] on a point about disclosure (discovery), was subject to an application for leave to appeal to the Supreme Court of New Zealand, but the application was dismissed.[77] The lower court decisions are also instructive.[78]

Essentially, the decisions so far illustrate the difficulties for a person, challenging local action to gather information at the instance of a foreign authority. In sum:

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[75] See more generally Marks "Exchange of tax information: a growth area, but litigation is increasing" 2017 WTB 10 [299]
[76] [2016] NZCA 614
[77] [2017] NZSC 48 (11 April 2017)
[78] *Chatfield & Co Limited v Commissioner of Inland Revenue* [2015] NZHC 2099, [9] *et seq* (Ellis J); again [2016] NZHC 1234 (Ellis J). Also, there was a largely successful application to strike out the accountants' pleading, decided by Lang J, [2016] NZHC 2289. An appeal was dismissed: [2017] NZCA 148, as was an application for leave to appeal further: [2017] NZSC 118.

Because the citizen does not know what the tax authorities have said to each other, the citizen has difficulty formulating a viable application for review.

- Consequently, it is difficult to point to some viable ground of review to justify an application for disclosure.
- Without disclosure, it is difficult to formulate a viable ground of review.
- Therefore your application is struck out.
- Thus the decision of the local Revenue is unexaminable and the citizen loses.[79]

With that unsuccessful history, including interlocutory losses on discovery and on the pleadings, it is a tribute to Chatfield that they succeeded at trial – see below, heading 6.1.6

But it is worth pausing at the point about disclosure. For reasons outlined above, this can be crucial.

Notably, but against the trend of authority, Quin J gave disclosure in the Caymans case, *MH Investments*, at a preliminary hearing.[80]

6.1.2 *ABU* – Singapore CA[81]

In *ABU*, the Singapore Comptroller sought documents from a bank, following a request from Japan under a DTA.

The Singapore Court of Appeal looked at how you can attack the local revenue authority's decision, to act on the foreign request under a DTA.

The local court looks at the face of the foreign request. This is not an opportunity to run a case testing the substantive merits of the foreign tax issue.

The Singapore Court of Appeal discouraged judicial review turning into a full blown trial with witnesses, going to foreign tax questions.

Ellis J cited this decision favourably in *Chatfield*, in her Honour's decision in the NZ High Court. (This was the decision later upheld by the Court of Appeal.)

That is also the approach favoured by the Jersey courts, when doing the same exercise under a Tax Information Exchange Agreement or TIEA: *APEF Management Company 5 Limited v Comptroller of Taxes*;[82] & *Volaw Trust & Corporate Services Limited and Larsen v The Office of the Comptroller of Taxes*.[83]

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[79] This demonstrates the limits of legal remedy, and is not a criticism of the New Zealand courts. The courts have produced transparent, well-reasoned decisions, which are supportable on general principles & are in accord with the trend of authority.
[80] Unreported, No.G391/2012, 24/01/13, George Town, Quin J, at [89]-[132]
[81] *ABU v Comptroller of Income Tax* [2015] SGCA 4
[82] [2014] 1 JLR 100; [2013] JRC 262
[83] [2013] JCA 239; [2013] 2 JLR 499

The exception internationally was a little-known decision of the Court of Appeal of the Cayman Islands,[84] upholding the well-known decision at trial by Quin J.[85]

The more recent decision of the Singapore Court of Appeal, *AXY*, is discussed below.

6.1.3 *Hua Wang* – EWCA, NSWCA, FCAFC, Cayman Islands CA

Closer to home, we now have a decision of the UK Court of Appeal, concerning information notices issued by the UK Commissioners of Inland Revenue, at the instance of Australia, under a DTA. In the UK, that litigation is known as *Derrin Bros*. In Australia, it was *Hua Wang*. (In the Cayman Islands, a related case is *MH Investments*, involving Australia's request under a TIEA.)

In short, challenges to a notice issued by the UK Revenue have been unsuccessful in the English courts: *Derrin Bros*.[86]

But, in an unfortunate turn of events, the Cayman Islands authorities provided Australia with information under the TIEA, in breach of Caymans law. (Necessary procedures were not followed in the Caymans.)

This spawned the *MH Investments* litigation, there, and various challenges in Australia.

The Grand Court of the Cayman Islands said that, for procedural reasons, the request should not have been complied with.[87] The Court ordered that Caymans seek that:

- Australia undertake not to divulge the documents in Australian proceedings, and
- Australia return or destroy the documents.

The Court of Appeal of the Cayman Islands dismissed an appeal.[88]

Australia did not comply with the requests for undertakings and destruction, made by the Caymans.

Australian tax assessments, allegedly based on that material, have so far withstood studied attack, in Australia: -

- There was no defence in debt-collecting proceedings: *Anglo American Investments Pty Ltd v DCT*.[89]

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[84] Unreported, No. CICA No.31/2013, Chadwick P, Mottley & Newman JJA, 23/04/15

[85] *MH Investments v The Cayman Islands Tax Information Authority* (unreported, No. G391/2012, Quin J, George Town, 13/9/13)

[86] The UK Supreme Court refused permission to appeal: *R (Derrin Bros Properties Ltd) v First-Tier Tribunal (Tax Chamber)* [2016] 1 WLR 4936. The initial court decision was [2014] EWHC 1152 (Admin); and the intermediate appellate decision is [2016] 1 WLR 2423, [2016] EWCA Civ 15.

[87] *MH Investments v The Cayman Islands Tax Information Authority* (unreported, No. G391/2012, Quin J, George Town, 13/9/13)

[88] Unreported, No. CICA No.31/2013, Chadwick P, Mottley & Newman JJA, 23/04/15

[89] (2017) 347 ALR 134; (2017) 105 ATR 35; [2017] NSWCA 17

- The ATO has successfully tendered those documents in a tax appeal: *Hua Wang Bank Berhad v FCT (No.7)*.[90]

An important point, which the ATO resisted on the facts, was that ATO was not in contempt in using a treaty to obtain documents in the midst of a domestic legal case: *Hua Wang Bank Berhad v FCT (No.2)*.[91]

6.1.4 *Larsen* – Jersey CA

Larsen (also litigated as *Volaw*) saw Jersey acting because of a request under its TIEA with Norway.

This was very hard fought. Mr Larsen was being pursued on criminal charges (of which he was ultimately acquitted), and also was concerned about large tax assessments being raised.

Norway originally requested assistance from Jersey in 2006, under another law only concerning transnational investigation of criminal matters. There was a concern that Norway's prosecutors might give Jersey material to the Norwegian Tax Authority. Through Jersey authorities, Norway had tendered an undertaking not to use the material for tax investigations.[92]

But Norway then sought release from the undertaking. Twice.

In 2010, the Norwegian Tax Authority requested assistance from Jersey under their newly established TIEA.

By the time the matter reached the Jersey Court of Appeal in 2013 the issues were tied to Jersey's changing regulatory landscape, and infused with European human rights law. Thus, aspects of the litigation are of no interest here. I will concentrate on findings that can be generalised to Australia.

In short, the Jersey Court of Appeal decided that a request by Norway, in aid of a criminal tax prosecution, under that TIEA, could be for documents pre-dating the TIEA.[93]

Next, the Court of Appeal dismissed an argument that Jersey should, as a matter of discretion, have declined to comply with a request from a country that allegedly discriminated against a Jersey company. But the treaty spoke of a "national" or a "citizen" of Jersey. This did not include a company. (A similar issue arises under at least some Australian TIEAs.)

Mr Larsen said there were no reasonable grounds for Jersey to have acted on the request, and went into evidence to dispute the Norwegian indictment. He relied on a Singapore High Court decision, *Income Tax Comptroller v AZP*.[94]

But in AZP, the Indian request to Singapore did not provide a solid link to the person in Singapore.

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[90] [2013] FCA 1020; 217 FCR 1
[91] [2012] FCA 938; 298 ALR 178
[92] [2013] JCA 239, [59] *et seq*
[93] [2013] JCA 239, [117]. (Note the opposite finding, in relation to civil matters, by the Caymans court in *MH Investments*, above.)
[94] [2012] SGHC 112

In contrast, Norway's supporting material was detailed. Thus, Jersey's decision to act on the Norwegian request would not be second-guessed, despite Mr Larsen's affidavit evidence (on which Mr Larsen had not been cross-examined by Jersey).[95]

Indeed, the Court of Appeal said Jersey was entitled to assume Norway had a proper basis for its indictment.[96] (Mr Larsen was later acquitted in Norway.)

The Jersey Court of Appeal confirmed that, despite the information being requested in aid of a criminal tax matter, under the TIEA, Norway would be free to use the information to raise an assessment of tax. Thus there was nothing to an allegation that Jersey should not have provided co-operation based on a fear of such use of the information.[97]

The Privy Council has denied leave to appeal.[98]

6.1.5 Unreported BVI decision favouring disclosure

Harneys, in the BVI, have noted a decision of Ellis J[99] in their Administrative Court by which her Honour decided that:

- there is at common law a duty of procedural fairness to which public bodies like the ITA are subject, particularly when exercising functions with a power of compulsion
- the Learned Judge found that procedural fairness requires that the ITA furnish the Companies with sufficient information to enable them to determine whether the Notices were lawfully issued (and therefore comply) or were unlawful and therefore liable to challenge and susceptible to being quashed
- in agreeing with the Companies' submissions, Ellis J. expressly rejected the ITA's argument that the duty of confidentiality to which they are subject prevails over common law rights of procedural fairness

Ellis J. made an order of mandamus. This is a public law remedy requiring that the ITA disclose to the Companies sufficient material pertaining to the request so as to enable the Companies to perform an assessment of whether or not the Request is valid.

The decision is said to be *Quiver Inc & Friar Tuck Limited v International Tax Authority* (31 March 2017). This would be an important decision if available.[100] I include a link below to Harneys' website.[101]

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[95] [2013] JCA 239, [159]-[164]
[96] [2013] JCA 239, [160]
[97] [2013] JCA 239, [242]
[98] This is noted in a later decision of the Royal Court of Jersey: [2015] JRC 104, [2]. I understood that, as of the end of 2016, there might have been a further application to the Privy Council about a later matter in this long-running litigation. I cannot locate definite details.
[99] This is a different judge from the NZHC judge who gave 2 decisions in the *Chatfield* litigation.
[100] At present, it still has not gone up on the East Caribbean High Court's judgment website, though another decision of a different judge about another phase of that litigation has gone up. There is also an appellate decision, equally uninformative, about costs.
[101] http://www.harneys.com/publications/legal-updates/tieas-and-your-companys-right-to-information-new-court-guidance

6.1.6 Chatfield – Trial – Wylie J

The NZ High Court quashed the Commissioner of Inland Revenue's information notices issued to New Zealand tax agents, Chatfield & Co, requesting information for possible exchange under the NZ/Korea DTA.[102]

Korea requested information from NZ under the DTA "Exchange of information" article.

The NZ Commissioner exchanged information she held. She exchanged information she obtained from public registers and sources.

However, the NZ Commissioner thought it necessary to take further steps to respond to Korea's request. The NZ Commissioner issued notices to the tax agents, Chatfield.[103]

The sole purpose in issuing the information notices was to obtain information requested by Korea "for possible exchange" under the DTA.

In its case, Chatfield ran evidence that was intended to show that:

- the Korean authority may not have exhausted Korean sources of information. A former associate of a taxpayer had received a Korean information notice. Meanwhile, the tax audit in Korea was 'suspended', whatever that meant;
- the Korean authority may be out of time to amend taxes for some periods for which information was sought. There was an outer limit of 10 years in Korea, and usually only 5 years;
- information may have been sought for purposes beyond administration of the DTA's "taxes covered". One affidavit read by the applicants suggested that the Korean tax authority was investigating a named company "in relation to alleged exchange control breaches" involving other named companies, the latter companies being the subject of information notices: [51]. (I do not suggest any wrong-doing.)

The Commissioner declined to run evidence providing specific background to the Korean request and the notices. (This important forensic decision is discussed below.)

Wylie J's decision, if unaltered on appeal,[104] has seismic implications for the defence of information notices issued under this and like procedures.

As noted above,[105] the tax agent did not get court ordered disclosure of documents held by the Commissioner. Worse, at an interlocutory stage, Chatfield had part of its pleadings struck out.[106]

In short, without disclosure by the Commissioner, an applicant faces real problems stating specifically what error infects the decision to issue an information notice. Unable to be specific, the applicants face difficulty in justifying court-ordered disclosure. It is a "Catch 22" situation.

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[102] *Chatfield & Co Ltd v Commissioner of Inland Revenue* [2017] NZHC 3289 (Wylie J, 22 December 2017)

[103] The power to issue information notices is similar to Australia's: s 353-10 of Sch 1 to the *Taxation Administration Act 1953.*

[104] The appeal was heard in Wellington this year, and a decision remains pending.

[105] Heading 6.1.1

[106] [2016] NZHC 2289 (Lang J)

And without documents, it is difficult to plead and prove an error.

Since Chatfield had been denied disclosure, this makes its success doubly important.

It indicates that the court will act on slight evidence from the applicant, if the Commissioner (who may be assumed to have the information) is unwilling to place contradictory evidence before the court.

And the court will not simply accept the say-so of an official that she has made all necessary checks, and satisfied herself as to the foreign request.

Whether NZ High Court should hear the case

The NZ Commissioner argued that her decision to issue the information notices was not even susceptible to judicial review: [37].

This was a surprising development. It may be hoped we do not see this ventured again in a democracy where the Executive is subject to the rule of law.

In short, the argument was that it was "simply not in the public interest for judicial review to be available in the circumstances of this case". The Commissioner argued that the application to court had undermined NZ's reputation internationally by delaying provision of information, despite the DTA's requirements.

And it was argued that the matter dealt with relations between States, dealing with each other through senior public servants, the Competent Authorities. Rather, the peer review system under the auspices of the OECD was said to provide a safeguard.

Wylie J considered that this case simply involved him assessing compliance with a domestic statute, and was justiciable: [40].

His Honour's reasons were more elaborate, but that is the gist. It is a simple answer, in the face of overreach in the Executive's argument.

Testing Lawfulness of Information Notices

Chatfield succeeded in showing that the decision to issue the information notices had miscarried. The Competent Authority was not shown to have made appropriate enquiries, to justify issuing the notices.

The Competent Authority "needed to satisfy himself that the information sought [by Korea] came within the terms of the DTA and [NZ's] tax laws, that the nature of the information sought was (or at least appeared to be) consistent with the grounds for the request, and that the type of information sought was broadly what would be expected to be necessary for or relevant to any inquiry of the nature indicated": [47].

Article 25 of this DTA provided for the exchange of information necessary to prevent fiscal evasion, or for carrying out:

- the provisions of the DTA, or
- the domestic laws of Korea and NZ concerning taxes covered by the DTA.

The word "necessary" meant "required or needed". This meant something "more than simple expediency or desirability": [75].

Article 26 of the current OECD model convention refers instead to "such information as is foreseeably relevant". That is a different concept. That language is picked up in some Australian DTAs (eg Germany), but not all (eg Hungary). It is also in our Taxation Information Exchange Agreements, and the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (Article 4).

Thus, so far as Chatfield depends on concepts of necessity, check against the language of the treaty you are considering.[107]

In terms of Article 25 of the Korean-NZ treaty, and under the older language of "necessary", Wylie J found that the Competent Authority had to satisfy himself, by clear and specific evidence, that:

- all of the information requested by Korea was needed or required in relation to an investigation into, or other action being taken by Korea against a Korean taxpayer;
- the information was in regard to a tax covered by that treaty or fiscal evasion.

The Competent Authority also had to be satisfied that any information exchanged "would only be used in relation to those taxes, and that [Korea] had been unable to obtain the information in Korea": [78].

How Chatfield showed decision unlawful

Although not having the benefit of court ordered disclosure, and apparently lacking meaningful response under NZ's freedom of information laws, the evidence compiled by Chatfield tended to show:

- At least some of the same information sought by the NZ information notices had also been sought in Korea by the Korean authority, from a former associate of the principal of taxpayers of interest. This tended to show that information was available in Korea to the Korean authority under Korean law.
- The Korean authority had issued a notice suspending the Korean tax audit, giving a reason related to seeking information abroad.
- Enquiries concerned some years now outside Korea's tax amendment periods.
- Enquiries potentially touched on areas related to Korea's investigation of a non-tax matter.

This evidence for the applicants was relatively weak: but the evidence of the NZ Commissioner was described as vague and non-specific: [80] & [89].

Wylie J said at [85]:

[107] Interestingly, this change of language did not materially affect the result of the application for disclosure in *AXY v Comptroller of Income Tax* [2015] SGHC 291, [7]-[9], [22] (Singapore High Court). Given the way *Chatfield* and *AXY* [2017] SGHC 42 were ultimately run, I doubt that will be decisive in future cases. Rather, it is the course of administrative decision-making, by the receiving jurisdiction, which is attacked.

> The days when a Court will accept an official's simple assertion that a power has been exercised lawfully are long over.

And Wylie J said at [89]:

> Chatfield has been able to raise relatively little, but the little it has raised rings alarm bells, albeit quietly. Those bells ring a little louder given the vague affidavits of [the investigator and the Competent Authority]. There is a high duty on public authority respondents to assist the Court with full and accurate explanations and to give the Court all the facts relevant to the matter in issue. Here, the relevant facts and the supporting documents are in the possession of the Commissioner. It should have been a relatively straightforward matter for the Commissioner to produce them but they have not been produced. Rather, I am left with the non specific evidence of the officer responsible for undertaking the necessary enquiries. In my view, the Commissioner has not been as candid in her conduct of this case as might have been expected."

NZ Commissioner wanted to give secret evidence

There was another interesting feature of this case.

Where there is a claim for public interest immunity, the State may have the court cleared, and place material before the court in private. But the point of that procedure is usually to persuade the court to exclude evidence. For example, the Crown may wish to prevent disclosure of Cabinet papers or the like. So the point is often exclusionary.

Here, the NZ Commissioner sought to clear the High Court, to run positive evidence, by giving Wylie J the background documents. We can speculate, given what is said, that those background documents would have been Korea's request, the NZ Competent Authority's notes, and correspondence with the Korean Competent Authority: [63] & [65].

Wylie J said that this was not satisfactory.

His Honour explored whether the background documents might be provided only to the applicants' counsel (under a confidentiality undertaking); or even to counsel appointed as amicus curiae, as had happened in another case, Avowal Administrative Attorneys Ltd v District Court at North Shore [2008] 1 NZLR 675.

Neither course was satisfactory to the NZ Commissioner.

Wylie J said: "I record my surprise at the Commissioner's stance …" in not agreeing to permit amicus counsel to be appointed to review the background information and assist the Court in the absence of the applicant: [71].

Rather, so far from being matters of high policy and international relations, his Honour pointed out that [71]:

> It is clear from the … DTA, that documents exchanged may be disclosed by officials in the contracting states in public Court proceedings or in judicial decisions.

It is not unusual in Australia for documents to be provided to some members of a legal team (and relevant witnesses), under confidentiality undertakings: *Ex parte Fielder Gillespie Ltd*.[108]

Whilst that can cause ethical dilemmas, it is a better solution, in most cases, to the alternative, being appointment of amicus curiae who comes in cold, and may lack the same exposure to this specialist field.

Lessons for Conduct of Defence

This matter involved potentially sensitive matters of international relations. There is the potential for misunderstanding, given the differing systems of administration and law in the 2 countries involved, NZ and Korea. I do not mean to be critical, but to find the lessons to be drawn from the case.

The weakness in the NZ Commissioner's case was that she would not allow the taxpayer's counsel (nor even allow amicus counsel) to see the background materials, which potentially would have quelled doubt.

The NZ Commissioner may well have had her hands tied by other parties, in making these forensic decisions. We will never know.

But our courts conduct their business in public. States making and receiving requests for information should take note.

Here, if the NZ Commissioner had felt free to disclose (and had disclosed) the basic background documents, in 2015, one can speculate whether the matter would have resolved quickly, or at least whether the trial in 2017 could have been conducted without this prejudicial overhang.

Further, the clear message is that the courts will not simply accept the say-so of the Executive. The requesting and receiving States must be prepared for common law courts to require frankness in response to judicial review.

6.1.7 AXY – Singapore Court of Appeal[109]

The difference between the changes in domestic, administrative arrangements since *ABU*, above, and this case, seem larger than the Singapore Court of Appeal allowed. *ABU* was decided under markedly different arrangements, at least in the eyes of an outsider.

Formerly, a request for exchange of information came before a judge of the High Court, and the judge paid deference to the overseas requesting authority's request for 2 practical reasons. First the High Court was not armed with powers enabling a request for elaboration of the request. Secondly, the judicial arm of government was usually constrained from calling into question the *bona fides* of a foreign State's request.[110]

Essentially, the Court of Appeal considered this unimportant, when looking back to the older cases, as *ABU* continued to "the relevant legal principles concerning the assessment of EOI [exchange of

[108] [1984] 2 Qd R 339
[109] [2018] SGCA 23 (Sundaresh Menon CJ, Tay Yong Kwang & Steven Chong JJA)
[110] [2018] SGCA 23, [46]

information] requests".[111] The institutional change meant that it was not possible to apply standards once imposed on the Courts, on the new decision-maker, the Comptroller. But this was more "a gloss than a fundamental change in position".[112]

AXY does gather together principles in a useful way.

- Singapore legislated the information to be included with an EOI. The 3 requirements highlighted by the Court of Appeal match requirements in the OECD Model Convention. These are statements:
    - of the information requested etc.
    - that the request is in conformity with the law and administrative practices of the requesting State, and that the competent authority is authorised to obtain the information under the laws and practices of the requesting State.
    - that the requesting State has "pursued all means available in its own territory … except those that would give rise to disproportionate difficulties".
- All that was required, for the Comptroller to act, was these statements.
- Once such a statement is made, the requesting State will "ordinarily be regarded as having complied with those requirements".[113]
- The Comptroller is not obliged to hold a "mini-trial" to test these statements.[114] So long as he holds reasonable grounds for belief or opinion on the material before him, he may act.[115] The Comptroller is not obliged to go behind these statements.[116]
- But the Comptroller cannot act "unthinkingly" or "uncritically" in processing an EOI request. Rather, in examining the request and seeking any necessary clarifications, he balances competing interests:
    - Facilitating exchange of tax information "to the widest possible extent"; and
    - Safeguarding confidentiality of taxpayer information.[117]
- It is not merely the requesting State's belief that is material. The requested State may seek clarification, may consult with the requesting State, and need not facilitate mere fishing expeditions.[118] Ultimately, a difference may – according to the OECD Commentary – be resolved through diplomatic channels.

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[111] [2018] SGCA 23, [40]
[112] [2018] SGCA 23, [46]
[113] [2018] SGCA 23, [49]
[114] [2018] SGCA 23, [53]
[115] *Ibid*, citing *Volaw* [2013] JCA 239, [32]
[116] [2018] SGCA 23, [57]
[117] [2018] SGCA 23, [58]
[118] [2018] SGCA 23, [59]-[61]

- The Comptroller was, however, only obliged to seek clarification from a requesting State:[119]

> … only if he was of the view that there was "doubt or lack of clarity regarding whether the necessary requirements for the validity of a request were met.

The Court of Appeal then turned to particular aspects of Singapore law (about how to deal with judicial review of a covert information request) which are not immediately relevant here. But before doing so, the Court summarised its decision thus far as:

> 67 Hence, *in general*, the Comptroller is not expected to go behind the assertions made by a foreign tax authority pursuant to an EOI request. The Comptroller should consider the request and the assertions that are put forward, and make reasonable inquiries to satisfy himself that the requirements in the Eighth Schedule have been complied with. In doing so, the Comptroller should be aw are that ultimately, the EOI Standard of foreseeable relevance is intended to provide for the exchange of information relating to tax matters "to the widest possible extent".

6.1.8 What we have learnt

It can be difficult to challenge assessments in Australia, even if offshore procedures used to gather information were flawed: *Hua Wang* & *Anglo American Investments.*

I turn to Australian action on behalf of another country. In Australia, section 23 *International Tax Agreements Act 1953* (Cth) authorises use of information gathering provisions,[120] for the purpose of gathering information to be exchanged in accordance with the Commissioner's obligations under an international agreement. Section 23 is not limited to a case where information sought relates to Australian tax.

The Commissioner's authority to make a request of a foreign tax authority under such an article comes from the Commissioner's general power of administration.[121]

Given the volume of litigation we have seen, it is not surprising that differences have emerged:

- *Chatfield* and *MH Investments* come to different results, concerning getting access to the foreign request by litigation disclosure. Close attention to the treaty is required, as later DTAs may use words requiring secrecy.
- *Chatfield*, *ABU*, *AXY* and *Volaw* emphasise, in a way we would recognise in Australia, the limits of the ability to challenge a local information notice on the basis of the merits of the foreign investigation. But *AZP* shows that the foreign request must at least make sense, in making a realistic connexion with the administrative action the ATO wishes to take. *AXY* does not give the requesting State enormous deference.
- *Chatfield* shows how to challenge a decision of the requested State. See heading 6.1.6.

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[119] [2018] SGCA 18, [62]

[120] Nowadays, ss 353-10 & 353-15 *Taxation Administration Act* 1953

[121] *Hua Wang Bank Berhad v Commissioner of Taxation (No. 2)* [2012] FCA 938; 298 ALR 178, [24] (Perram J)

6.2 Scenario for worked example – a work of fiction

This Scenario is a work of fiction. I have picked Hungary only because of its old-style treaty. I do not suggest either Hungary or Australia would intentionally allow a matter to play out like the following fictitious plot.

However, the style of treaty is useful to consider. The Australian-Hungarian DTA is on an older model, done in 1999 in English and Hungarian (both texts being "equally authentic").

6.2.1 László's problem

You are engaged by László Ladislaus,[122] a long-time resident of Melbourne. He is known to you from lengthy property dealings, over decades. You know his interests lie in Singapore and Australia, and that he has no ties to Hungary any more. He left the country of his birth in 1960, as an infant.

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.

László tells you that his cousin, Andor Ladislaus,[123] 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 family gathering in New York. Andor has been involved in USA property for about as long as László has been developing property in Singapore and Australia.

László tells you 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:

- As expected - disclosure could prejudice an investigation of a breach of a law about taxation;[124]
- Curiously - disclosure could cause damage to the international relations of the Commonwealth.[125]

László is beside himself. He says he has been sedulous in his compliance with Australian and Singapore tax laws, and says that – if anything – he has overpaid tax in both places where there was an ounce of doubt. Reading between the lines, the FOI officer has indicated (albeit negatively) that:

- There is an investigation into László's affairs.
- It is not a wholly domestic matter. This clearly indicates that a foreign State is involved.

László has brought with him a notice referred, perhaps as a courtesy, 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".

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[122] This is meant by the author to be a fictious name. No reference is intended to any person, alive or dead.
[123] This is meant by the author to be a fictious name. No reference is intended to any person, alive or dead.
[124] Section 37 *Freedom of Information Act 1982*
[125] Section 33(a) *Freedom of Information Act 1982*

László has no USA bank accounts. (Everyone dealing in Asia has a US dollar account with a bank, but László does not have such an account with a USA bank.)

He tells you 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 abroad.

You say you will look into the matter.

6.2.2 Enquiries reveal

Your 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. Business associates, former business joint venturers, bankers and major suppliers have all had informal or formal requirements delivered. Interviews have occurred, at which bemused business associates have been quizzed, and have left thinking that László is in a lot of trouble. Melbourne is agog, but no-one has felt able to reach out to László.

You turn 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. Its 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.

Enough is enough. László denies any business or financial connexion with Hungary, ever. 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.

You put this to the ATO asking that they desist.

ATO feel unable to discuss the matter.

László asks that you commence proceedings to review this latest formal notice, and to injunct compliance in the meantime.

6.2.3 Suggested analysis

First you ascertain the state of Australian domestic law.

Without change to the common law, it is likely that the ATO would not have been able to assist a foreign revenue authority. And Division 355 of Sch 1 to the *Taxation Administration Act* would otherwise make such disclosure an offence.

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.

Plainly, section 353-10(1)(a) allows that Commissioner to make such requirements "for the purpose of the administration or operation of a *taxation law".

Section 23 *International Tax Agreements Act 1953* entitles the Commissioner to use – relevantly – 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.[126]

It is helpful to 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:

Hungarian Agreement Article 26	Present OECD Article 26
Exchange of information	**EXHANGE 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.	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) 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:	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.
(a) to carry out administrative measures at variance with the laws or the administrative practice of that or of the other Contracting State; or	3. In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:
(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	(a) to carry out administrative measures at variance with the laws and administrative practice 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 to supply information the disclosure of which would be contrary to public policy.	(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

[126] Section 5 *International Tax Agreements Act 1953*

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.

You notice that the Hungarian text has equal status to the English text.

Sub-article (1) reads:

26. CIKK

Tájékoztatáscsere

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 kepcsolatos jogorvoslatra vonatkozó határozatokkal foglalkoznak, és csak ilyen célokra használhatják fel azokat. A tájékoztatást nyujtó Szerződő Állam kivánságára a kapott tájékoztatást titokban kell tartani.

You make enquiries of Hungarian tax lawyers, to ascertain how "necessary" is rendered in the Hungarian text. You 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.

The following then occurs, as the litigation progresses:

- In the Federal Court proceedings, you seek voluntary disclosure of, but are denied, copies of the Hungarian request. The ATO points to the plain terms of Article 26(1). You point to the current OECD commentary, which says that information may be released to the taxpayer.[127] You apply to Court for an order for disclosure.

- You allege that the competent authority has not handled the request properly, 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 accounts). You say this cannot be a request by Hungary which is "necessary" in terms of Article 26(1). ATO counters with a deal of caselaw from overseas indiscriminately dealing with the test on the basis of "foreseeably relevant".[128]

- You allege that there is a subtle difference between "necessary" and "szükséges".[129] For the sake of this exercise, assume your translator's evidence is that the Hungarian text looks more at what is "required".[130] You say 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 you point to lack of proof of any "requirement", as opposed to what the Hungarian competent authority asserts to be "necessary".

Fortunately, for the sake of this exercise, after the expert witnesses and the lawyers have drunk deeply from the well of this case, the Inspector-General of Taxation requests that the Commissioner reconsider further action on the request from Hungary. The true "Thomas" Ladislaus has been identified by the IGT's operatives, using the age-old technique of social media stalking.

Media advisers to the Commissioner and your client 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". Calm is restored.

David W. Marks QC

Chambers

Level 16, Inns of Court

28 October 2018

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[127] Commentary on Article 26, para 12

[128] The otherwise excellent judgments in *AXY* 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.

[129] I have the genuine Hungarian text from the UN Repository.

[130] 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.

