INTERPRETATION OF TAX TREATIES

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To the memory of Prof. Dr. Adnan Tezel (1941-1997)

Abstract

Nations benefit economically when their companies work abroad and develop their strength in international markets. Economic power also brings international political power and prestige. When dealing with international business, taxation is one of the most important problems. Double taxation, which is to tax the same profit by two or more countries, is a serious obstacle that confronts international enterprises. Unless double taxation is avoided it will be difficult for enterprises to conduct international business profitably. Without the existence of a general multilateral tax treaty, in practice countries use bilateral tax treaties to prevent international double taxation. An important source of difficulty lies in the interpretation of treaties. When the terms in international double taxation agreements are not clear, uncertainities are created. This affects countries' tax revenues, because , two different interpretations are possible. The conflict between countries regarding the lack or existence of an obligation can translate into extremely large amounts of money. In practice some guidelines are used, such as the Vienna Convention on the Law of Treaties. Also, some schools of though offer liberal, strict or teleological interpretation to find the real meaning of the terms. In general, courts have tended to use a liberal interpretation, in order to find the countries' intention concerning the relevant articles or terms. However, in some cases the strict interpretation has been used which is based on the meaning of the words used in the main text.

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1. Introduction

Tax treaties, as treaties in general, are international agreements and they are binding on the contracting states under international law[1]. Although treaties attempt to provide assistance through the provision of definitions of various terms, in many cases important terms are often undefined. For example in most double taxation treaties the term "income from international transportation" is commonly used without any attempt to define the types of activities which constitute transportation[2]. Where this occurs, the terms of such agreements require interpretation. The aim of interpretation is to achieve the closest possible approximation to the genuine shared expectations of the parties[3].

When the meaning of the term is clear, the treaty is simply applied, but, if the terms used by the contracting parties in the treaty are not clear, they will have to be interpreted[4]. However, when we say the terms are not clear two different situations may be exist. First, there is a fault with the words themselves such as grammatical error. Second, it is not clear that the factual situation is covered by the related term. In the latter, the word may be open textured or in terms of technological developments it is not clear whether the precise words cover new situation such as the meaning of a ship or aircraft. Even the decision that the text of the treaty is clear in itself and there is no need to interpret the related term, the text is really clear is a process of interpretation[5]. For this reason it is possible to say that interpretation can be made in any stage for application of treaty.

Although for the satisfactory operation of tax treaties both for states and taxpayers the interpretation of tax treaty is extremely important[6], in terms of different approaches by various jurists the interpretation is a difficult part of treaty of law. The undefined words used in the tax treaties have technical meanings in different countries and, for this reason, it is difficult to find a universal meaning of the words under complicated tax law systems[7]. It has been mentioned that "...there is no part of the law of treaties which a text-writer approaches which more trepidation than the question of interpretation"[8].

The difficulty has been expressed in *Bohemian Union Bank v. Administrator of Austrian Property*[9], by Clauson J. that "...while recognising

that my duty consists in construing this Treaty and that the consequences in one sense have nothing to do with it, still in construing a document of so much complication as this and one which bears on the face of it traces of inaccurate drafting, I think *I am bound to give consideration to what I must suppose to have been in the minds of those who formed the treaty* (emphasis added)..."

When interpretation is required, question can be raised as to what kind of rules will be followed? At that point, one of the possible problems occurs when, for example, the country of residence and the country of source have applied separately to their national courts to interpret the term of the treaty under their domestic laws. If two parties define the related term in the same manner there is no problem. However, when different meanings may be given to this treaty term, a dispute between two contracting parties is inevitable.

It is believed that if the country that is levying tax is, for example, the country of source, it would be much better to leave the interpretation to the source country[10]. However, in practice the problem is complex by virtue of countries' demands to interpret the terms in a way that is compatible with their tendency towards enforcing their own national interests.

When interpreting tax treaties, the contracting states of the treaty are free to apply to the Vienna Convention on the Law of Treaties[11] or the related articles of the OECD, the United Nations or the United States Models. However, if one or both of the contracting states do not use, for example, the OECD Model Treaty, it may not be appropriate to expect them to use the OECD Model rules regarding interpretation. It is also mentioned that since the OECD Model is a treaty text, it must be interpreted according to the Vienna Convention[12].

Generally, the parties anticipate some difficulties of interpretation of terms used in the treaty and definitions are put into the treaty. In addition, they can make an agreement about the interpretation procedure in the event of disputes and in that case these provisions are applied before general rules of interpretation[13].

In the case of difficulties or doubts arising from interpretation of the term, if the competent authority[14] of the participating country cannot reach a satisfactory solution, they should contact the competent authority of the other to reach an agreement about the meaning of the term. This is the "mutual agreement procedure" discussed later[15].

2- Statute or Contract

One problem is which approach should be taken for the interpretation of tax treaties. On the basis that a treaty is a statute, the rules of statutory interpretation should be applied. In this case domestic law rules will apply for interpretation. On the other hand if a treaty is a contract, it is possible to apply the appropriate international law rules on the interpretation. As Raoul Lenz[16] has said[17]:

"International agreements for the avoidance of double taxation are bilateral treaties and thus belong to the law of nations in the same way as any other political or economic treaty. If the meaning of a treaty provision is not clear then the problem will be solved in the first place by applying the usual rules governing the interpretation of international public law. However, double taxation agreements have a purpose substantially differing from that of normal political or economic treaties because they are intended to reconcile two national fiscal legislation's and to avoid the simultaneous taxation in both countries.

...The rapporteurs...particularly stress the fact that double taxation agreements are bilateral conventions and thus belong to the law of nations, but when they have been ratified and are put into effect by the contracting States, they also belong to the domestic law of such States. An agreement is thus simultaneously subject to the rules of interpretation applicable to international and domestic public law, the rules of public international law taking precedence in cases of dispute."

It can be argued that, even after the approval of parliament, tax treaties are still contracts between the sovereign states. The enacting of appropriate legislation does not change their character as explained by Goulding J. in *Commissioner of Inland Revenue v. Exxon Corporation*[18].

Harman J. agreed with Goulding J. in *Union Texas Petroleum Corporation v. Critchley*[19], stating, "...a double taxation agreement is an agreement. It is not a taxing statute, although it is an agreement about how taxes should be imposed..."

For this reason tax treaties should firstly be interpreted under international law rules, secondly under commentaries of the Model Treaty and the negotiation procedure of the agreements. Otherwise, if tax treaties are treated as statutes, domestic law rules of interpretation will apply, causing problems where the respective domestic rules differ.

3- The Vienna Convention on the Law of Treaties

In international law the principles of interpretation are mainly based on Article 31, 32 and 33 of the Vienna Convention on the Law of Treaties. It has an authoritative character, since it declares the customary international law of treaties[20]. The text of Article 31 of the Vienna Convention is as follows:

"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 connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection 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;

(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."

As seen the main rule is to follow the ordinary meaning of the relevant article, although if there is a special meaning that the parties intended, this meaning should be given. Within the context of ordinary meaning "principle of contemporaneity" is used by Fitzmaurice to explain that "the terms of a treaty must be interpreted according to the meaning which they possessed, or which would have been attributed to them, and in the light of current linguistic usage, at the same time when the treaty was originally concluded"[21].

The treaty to be interpreted in good faith, without malice, fraudulent intent or circumvention[22] and treaty should not lead to a result that would be manifestly absurd or unreasonable[23]. The principle of interpretation in good faith flows from the rule *pacta sunt servanda* in Article 26 of the Vienna Convention[24]. Although the principle of good faith is self-evident[25], it is formulated that a state must have bona fide reasons for what it does, and not act arbitrarily or capriciously[26]. The principle of good faith in paragraph 1 of the Article is the good faith of the parties to the treaty[27]. However, if the parties seek an interpretation of the text from a third party, he also applies the good faith of the treaty partners[28].

The term "context" in paragraph 1 of the Article 31 is open textured although it is defined in paragraph 2. The preamble and annexes to a treaty are included to explain the term "context". It has been stated that "...the preamble is the normal place in which to embody, and the natural place in which to look for, an express or explicit general statement of the treaty's object and purposes. Where these are stated in the preamble, the latter will, to that extent, govern the whole treaty"[29].

The term "context" can be taken with a narrower or wider meaning. The text and other documents related to the conclusion of the treaty is within the narrower meaning. An addition of the subsequent agreements and practice enlarge this meaning[30]. In *A-G v. Prince Ernest Augustus of Hanover*[31], it has been expressed that "...I use "context" in its widest sense, which I have already indicated as including not only other enacting provisions of the same statue but its preamble..."

In *Ealing Borough Council v. Race Relations Board*[32], five methods of approach were identified:

"...(1) examination of the social background, as specifically proved if not within common knowledge, in order to identify the social or juristic defect which is the likely subject of remedy; (2) a conspectus of the entire relevant body of the law for the same purpose; (3) particular regard to the long title of the statute to be interpreted (and, where available, the preamble), in which the general legislative objectives will be stated; (4) scrutiny of the actual words to be interpreted in the light of the established canons of interpretation; (5) examination of the other provisions of the statute in question (or of other statutes in *pari materia*) for the light which they throw on the particular words which are the subject of interpretation."

In this case the Vienna context includes items 3,4,and 5 (without brackets) and items 1,2 and brackets in item 5 are wider context[33]. In another classification, internal context includes everything within the Act itself and external context includes the other items[34].

Also in paragraph 2 of the Article 31, two other instruments are mentioned. First one is any agreement relating to the treaty and the second one is any instrument in connection with the conclusion of the treaty. However, these two types of documents are not necessarily to be considered as an integral part of the treaty and it depends on the intention of the parties in each case[35]. If the agreement and instrument part of the "context" of the treaty they become an element in the general rule of interpretation rather than supplemantary materials[36].

It is an open question as to whether the Commentaries constitute "context". The Commentaries could be "context" in terms of Article 31(2)(b) of the Vienna Convention that any instrument made by the parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. However, it is difficult for the term "in connection with" to fit Commentaries since they even exist whether or not any particular bilateral treaty is concluded without conclusion of a bilateral treaty[37]. The Commentaries exist to help to the contracting parties and are not binding on them[38]. Therefore, it could be a supplamentary means

of interpretation rather than "context", because it is not within the context of treaty itself and fall within the Article 32 of the Vienna Convention.

Another article related to interpretation in Vienna Convention on the Law of Treaties is Article 32 as follows:

"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 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."

After the application of Article 31 if the meaning of the term is not clear it is possible to apply Article 32. In this case, some other sources would be researched to confirm the meaning of the term after the application of Article 31[39].

Although the term "preparatory work"[40] is not officially defined, it is explained that "those extrinsic materials which have a formative effect on the final draft of a treaty, and which assist to this extent in the disclosure of the parties' aims and intentions"[41]. As an example, an agreed conference minute of the understanding was held to be relevant and helpful in *Fothergill v. Monarch Lines* [42]. In the same case Lord Scharman stated that "...if there be ambiguity or doubt, or if a literal construction appears to conflict with the purpose of the convention, the court must then, in my judgment, have recourse to such aids as are admissible and appear to it to be not only relevant but helpful on the point (or points) under consideration...".

Under liberal interpretation[43] the text of the treaty and its preparatory work on the same level to determine the real intentions of the parties, however, under strict interpretation[44] the text is the basic material of interpretation and the preparatory work has a secondary or supplementary means of interpretation[45]. If the text of a convention is clear in itself there is no need to apply to preparatory work[46].

Under Article 33 of the Vienna Convention on the Law of Treaties, unless otherwise stated, the text is equally authoritative in each language[47]. Also, the terms used in the treaty should have the same meaning in both languages. If there is a doubt about the meaning of the text, articles 31 and 32 will be applied.

Also, some researches have been made by different institutes on treaty interpretations. For example, in 1991, the American Law Institute issued recommendations on suitable aids to income tax treaty interpretation and compared the United States system with the Vienna Convention. The results are summarised as follows:

"1- Consistent with Article 31 of the Vienna Convention and United States judicial precedents, a treaty's express language, giving the terms thereof their ordinary meanings, will apply unless to do so would be clearly at odds with the parties' mutual expectations.

2- Material relevant to treaty interpretation should be given weight based on when it was prepared, whether it was published, and whether preparation was unilateral or bilateral. Pre-ratification materials published by both negotiating countries should be conclusive; great weight should be given to post-ratification agreements published by the competent authorities or administrative agreements and bilateral practices; and little or no weight should be given to unpublished material (unless no other materials exist), the views of individual negotiators, or unilateral post-ratification material published in connection with pending or threatened disputes.

3- In addition to materials that are generally deemed relevant under the principles of the Vienna Convention, practicality dictates that certain items not directly tied to the negotiation of a particular treaty nevertheless be referred to in interpreting that treaty. Those items include the OECD Model (together with its commentary), the United States Treasury Department's technical explanation of the treaty at issue, and any court decisions that can be found which interpret similar treaty provisions.

4- The study recommends restricting use of unpublished materials to cases in which no published items are available, or to cases in which those that are available are not responsive to the question at hand."[48]

4- The OECD Model

a- Article 3(2)

The OECD Model and its Commentaries are not binding on the OECD Member States, because the Model is not an actual treaty and they are used for guidance[49]. Article 3 of the OECD Model is devoted to "General Definitions". Paragraph 2 of the Article 3 states that:

"*As regards the application of the Convention by a Contracting State, any term not defined therein shall, unless otherwise required, have the meaning which it has under the law of that State concerning the taxes to which the Convention applies.*".

Although this paragraph was used for the first time in the 1963 OECD Model[50], it was used in United States-United Kingdom Income Tax and Estate Tax Treaties of 1945 without the term "unless the context otherwise requires"[51].

An important question is when internal law rules may be used for the interpretation? The OECD Model Article 3(2), refer to the internal law to find the meaning of undefined terms[52]. For example, Article 10(3) of the OECD Model made reference to the tax law of the distributing company's residence state to find the meaning of dividends. Under the existance different meaning in tax law, the appropriate one should be used, including the general law meaning[53].

The idea of reference to internal law as a last resort is supported by some authors and German Supreme Court that "...it is necessary to interpret the article in the first instance on the basis of the context of the treaty itself, and in the second instance on the basis of the principles of German domestic law. It has to be taken into account what the contracting parties' intentions were..." [54]. However, this approach is rejected by some authors on the authority Article 3(2) of the OECD Model , which directs the use of internal law unless otherwise required[55].

In another example, it is possible to apply to internal law for the term "territory". When countries have offshore oil, their tax jurisdiction could be

extented to tax exploration and exploitation activities in their continental shelf area[56]. For example, in the United Kingdom, they are taxed as if they were carried on in the territory[57]. The references to the territory in the United Kingdom in Acts of Parliament are ambulatory[58], because, to extend its territory is within the prerogative power of the Crown[59].

The use of the OECD Model tax convention as an aid for interpretation is recognised in *Hinkley v. M.N.R.*[60] by the Tax Court of Canada. In *Qing Gang K. Li v. The Queen*[61], the Federal Court of Appeal in Canada made reference to the decisions of Courts in the OECD States to decide the meaning of the words in similar situation in double taxation agreements.

b- The OECD Commentaries

The OECD Commentaries may be referred to as a guide for interpretation in many countries[62] including the United Kingdom[63]. For example, the OECD Commentary on Article 8[64] reviews the necessity of providing interpretation in the following terms:

"The principle that the taxing right should be left to one contracting state alone makes it unnecessary to devise detailed rules, e.g. for defining the profits covered, this being rather a question of applying general principles of interpretation."

The Commentaries are essential sources for courts seeking a common interpretation[65]. The Committee on Fiscal Affairs referred to the 1963 Draft Model and the Commentaries stated that " ...the existence of the Commentaries has facilitated the interpretation and enforcement of bilateral conventions along common lines."

In the 1992 OECD Model Convention, the effect of the Commentaries have been stated to be as follows[66]:

"As the commentaries have been drafted and agreed by the experts appointed to the Committee of Fiscal Affairs by the Governments of Member countries, they are of special importance in the development of international fiscal law. Although the Commentaries are not designed to be annexed in any manner to the conventions to be signed by Member

countries, which alone constitute legally binding international instruments, they can nevertheless be of great assistance in the application and interpretation of the conventions and, in particular, in the settlement of any disputes."

Also, the Council of OECD regarded the Commentary as an aid to the interpretation of the Model[67]when concluding new bilateral conventions or revising existing bilateral conventions.

When the changes made to the Commentaries the question can arise as to which version of commentaries apply to a particular agreement. For example when a double taxation agreement was signed in 1989, the problem should the Commentary of 1977 or 1992 be applied. The 1992 Model mentions that[68], 1977 approach is taken into account after the changes on 1963 Model. In 1977 Model the Committee on Fiscal Affairs said that "...existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries, even though the provisions of these conventions did not yet include the more precise wording of the 1977 Model Convention."[69]. In other words, the latest Commentary is applied.

c- The Competent Authority

A competent authority[70] is a person who is a resident or national of the Contracting State who has power to resolve problems arising from the interpretation or application of a double taxation agreement under mutual agreement procedure.

When taxpayer of one of the contracting parties has a problem from the application of double taxation agreement, he applies to the court or his own govenment to solve the problem. If the competent authority find taxpayer's claim serious, tries to find a solution by himself and may advice to change some rules in tax system to his own government. . Otherwise, he refuses the application of the taxpayer.

If the competent authority can not solve the problem by himself, he must speak to the competent authority of the other contracting party. They can reach an agreement to solve the problem or can not find a solution. When there is no solution to the problem of the taxpayer, he can apply to the

courts. If there is a solution it applies to the taxpayer's situation immediately.

The OECD Model uses the term "competent authority" within the context of mutual agreement procedure which is placed in Article 25:

"2- The competent authority shall endeavour, if the objection appears to it to be justified and if it is not itself able to arrive at a satisfactory solution, to resolve the case by mutual agreement with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented notwithstanding any time limits in the domestic law of the Contracting States.

3- The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. They may also consult together for the elimination of double taxation in cases not provided for in the Convention."

Although mutual agreements are made by the competent authorities under the OECD Model, the Vienna Convention Article 31(3) mention only parties. However, the result is same since the competent authority is representing the related parties[71].

The United Nations Model has more detailed explanation than the OECD Model about the mutual agreement procedure in Article 25(4):

"The competent authorities of the Contracting States may communicate with each other directly for the purpose of reaching an agreement in the sense of the preceding paragraphs. The competent authorities, through consultations, shall develop appropriate bilateral procedures, conditions, methods and techniques for the implementation of the mutual agreement procedure provided for in this article. In addition, a competent authority may devise appropriate unilateral procedures, conditions, methods and techniques to facilitate the above-mentioned bilateral actions and the implementation of the mutual agreement procedure."

The United States Model Article 25 also contains a list that differs from the OECD and United Nations Models, when application may be made by the competent authorities to each other:

"...3- The competent authorities of the Contracting States shall endeavour to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application of the Convention. In particular the competent authorities of the Contracting States may agree

a- to the same attribution of income, deductions, credits, or allowances of an enterprise of a Contracting State to its permanent establishment situated in the other Contracting State;

b- to the same allocation of income, deductions, credits, or allowances between persons;

c- to the same characterisation of particular items of income, including the same characterisation of income that is assimilated to income from shares by the taxation law of one of the Contracting States and that is treated as a different class of income in the other state;

d- to the same characterisation of persons;

e- to the same application of source rules with respect to particular items of income;

f- to a common meaning of a term;

g- to advance pricing arrangements; and

h- to the application of the provisions of domestic law regarding penalties, fines, and interest in a manner consistent with the purposes of the Convention.

4- The competent authorities also may agree to increases in any specific amounts referred to in the Convention to reflect economic or monetary developments.

They may also consult together for the elimination of double taxation in cases not provided for in the Convention."

The "competent authority" is not always the same person in every case. For example, under the Canada-United States tax convention[72], the Canadian competent authority is the Minister of National Revenue or his authorised representative that are listed[73] in the following order: Deputy Minister, Assistant Deputy Minister (Taxation Programs Branch), Director

General (Audit Programs Branch), Director (International Audits Division), Chief (Competent Authority Cases Section).

In the United States the competent authority is the Secretary of the Treasury or his delegates who are[74], in order, Commissioner of the Internal Revenue Service, Senior Deputy Commissioner, Deputy Commissioner (Operations), Assistant Commissioner (International), Director (Office of International Programs), Chief (Tax Treaty Division).

Under Turkey-United Kingdom double taxation agreement[75], the competent authority of Turkey is the Minister of Finance and Customs or his authorised representative, and the competent authority of the United Kingdom is the Commissioners of Inland Revenue or their authorised representative.

When a competent authority faced with the problem of interpretation of treaties it considers all different aspects of the problem. It examines the policies of its country in that specific area to solve the problem. Contact with other parties' competent authorities may be helpful for an effective and quick solution. Therefore, it seems a useful system to solve the problems arising from the application of double taxation treaties.

5- The methods of interpretation

There are three main schools of thought on treaty interpretations in international law[76] :

1- Intentions of the parties, or founding fathers school,
2- The textual, or ordinary meaning of the words, school,
3- The teleological, or aims and objects school.

"The teleological or aims and objects school" is the method usually applied to general multinational, in particular social or humanitarian treaties rather than tax treaties which try to establish original intentions of the parties[77]. A liberal approach is preferred by the "intention of the parties school" for the interpretation of tax treaties. "The textual school" is the more conservative view and important point is the natural and plain meaning of the terms[78]. It is based on the Vattel's famous statement that "The first

general rule of interpretation is that it is not permissible to interpret what has no need of interpretation..."[79]. In practice, these latter two schools are referred as liberal and strict interpretations, respectively.

The object of the "intention of parties" approach is to ascertain and give effect to the intentions of the parties[80]. However, for the "aims and objects" school the important point is the general purpose of the treaty itself[81]. Although it is possible to say that these two school have similar approaches for treaty interpretation, there are some differences. For example, the "intentions of parties" school try to find the intention of parties in concluding this treaty.

The teleological school seems a combination of the intention of the parties school and the textual school, since the objects and purposes of the treaty are expressed in the text and preamble and it also tries to find the original aims of the parties in concluding the treaty referring to the negotiations and the circumstances of its conclusion[82]. However, it is also expressed that the teleological interpretation is a separate category, because, first the objects and purposes of a treaty can be found to exist at the time of interpretation, not at the time of its conclusion and second it is independent of the original intentions of the parties[83].

Also, the teleological school is critised that the interpretors may fall into the position of a judge or arbitrator[84] since the school tries to find the object and purpose of the treaty.

In order to establish the intention of the parties the court may consider other evidence which may be available outside the treaty[85] such as the documents that contain information about treaty negotiations between two parties. For example, in *Fothergill v. Monarch Airlines Ltd.*[86] it has been stated that:

"...courts charged with the duty of interpreting legislation in all the major countries of the world have recourse in greater or lesser degree to 'travaux preparatoires' or 'legislative history' (as it is called in the United States)[87] in order to resolve ambiguities or obscurities in the enacting words...an English Court should have regard to any material which the delegates themselves

had thought would be available to clear up any possible ambiguities or obscurities."

In the same case Lord Diplock stated that " The language of an International Convention...should be interpreted unconstrained by technical rules of English legal precedent, but on broad principles of general acceptation."

In some cases such as *IRC v. Commerzbank AG*[88] some principles are listed for international tax treaties:

"1- One should to look first for a clear meaning of the words,
2- It should be interpreted unconstrained by English law,
3- Interpretation should be made in good faith under Article 31 of the Vienna Convention,
4- Supplementary means of interpretation under Vienna Convention Article 32 may be used,
5- Commentaries to treaties and decisions of foreign courts may be used,
6- Discretionary use of 'travaux preparatoies', international case law and the writings of jurists."

A review of cases, starting as early as 1798 in *The Santa Cruz*[89], reveal that British courts generally tend to favour a liberal interpretation[90] as stated by Lord Stowell that "...for such a treaty of alliance is not a thing *stricti iuris*, but ought to be interpreted with liberal explanations...".

It has been expressed in *Maltass v. Maltass* in 1844 by Dr. Lushington that[91]"...we cannot expect to find the same nicety of strict definition as in modern documents, such as deeds, or Acts of Parliament; it has never been the habit of those engaged in diplomacy to use legal accuracy, but rather to adopt more liberal terms..."

In the following years, the liberal interpretation is also supported in various cases[92].

Lord Denning, in *Bulmer Ltd. v. Bollinger S.A.*[93], clearly relied on the important point, "the purpose and intent" of the treaty which seems a mixture of the liberal and teleological interpretation. He expressed his view that:

"The draftsmen of our statutes have striven to express themselves with utmost exactness. They have tried to foresee all possible circumstances that may arise and to provide for them. They have sacrificed style and simplicity. They have foregone brevity. They have become long and involved. In consequence, the judges have followed suit. They interpret a statute as applying only to the circumstances covered by the very words... How different is this treaty! ... Seeing the differences, what are English Courts to do when they are faced with a problem of interpretation. They must follow the European pattern. No longer must they examine the words in meticulous detail. No longer must they argue about the precise grammatical sense. They must look to the purpose and intent."

However, on occasion the strict interpretation is also used by the courts in the United Kingdom. For example, in *Avery Jones v. I.R.C.*[94], Walton J. said that, to find the meaning of the words the document must be checked word by word and "...as far as it is humanly possible, a document must be construed so as to give effect to every word used by the parties and, in deciding what the meaning of those words is, one must look at the document as a whole to see whether those words occur elsewhere, as, if possible, the same construction should be placed on them in both context..."

Other examples of the strict interpretation are *Nothman v. Cooper*[95], *Oppenheimer v. Cattermole*[96] and *I.R.C. v. Commerzbank; I.R.C. v. Banco do Brasil SA*[97].

Turning to Canada, it is stated in the Interpretation Act of Canada[98] that, "...Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best insures the attainment of its object."

The Canadian Courts have also opted for the liberal interpretation. For example, the liberal interpretation has been supported by RWS Fordham in *Saunders v. M.N.R.*[99]:

"...Where a tax convention is involved ... a liberal interpretation is usual, in the interests of the comity of nations. Tax conventions are negotiated primarily to remedy a subject's tax position by the avoidance of double taxation rather then to make it burdensome. This fact is indicated in the preamble to the Convention. Accordingly, it is undesirable to look beyond the four corners of the Convention and Protocol in seeking to ascertain of a particular phrase or word therein."

Other examples of the liberal interpretation in Canada are *Canadian Pacific Ltd. v. The Queen*[100] , *J.N. Gladden Estate v. The Quenn*[101], *Appleby v. M.N.R.*[102], *Tara Exploration and Company Limited v. M.N.R.*[103], *Consolidated Premium Ores Limited v. M.N.R.*[104] and *Union Texas Petroleum Corporation v. Critchley*[105].

However, in *Stickel v. The Queen*[106], the strict interpretation has been supported by the Court:

"The consensus of all writers is that treaties are to be construed in the most liberal spirit provided, however, that the sense is not wrested from its plain and obvious meaning....In my view, the duty of the Court is to construe a treaty as it would construe any other instrument public or private, that is, to ascertain the true intent and meaning of the contracting States collected from the nature of the subject matter and from the words employed by them in their context..."

Also, in *British Columbia Railway Co. v. The Queen*[107] and *Sydney S. Fetcher v. M.N.R.*[108], the strict interpretation is supported by the Federal Court.

The United States Courts have also supported the liberal interpretation of treaties[109]. As early as in 1880, it is expressed in *Hauenstein v. Lynham*[110], that "Where a treaty admits two constructions, one restrictive as to the rights that may be claimed under it, and the other liberal, the latter is to be preferred..."

Ten years later, the Supreme Court of the United States followed the same line of thought in favor of liberal interpretation in *Geofroy v. Riggs*[111]. After it has been mentioned that "...it is a general principle of construction

with respect to treaties that they should be construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them...", the same expression in *Hauenstein v. Lynham* is repeated.

Another example of the liberal interpretation is *Factor v. Laubenheimer*[112]. In this case the expression about to secure equality and reciprocity from *Geofroy v. Riggs* is repeated after stating, "...in choosing between conflicting interpretations of a treaty obligation, a narrow and restricted construction is to be avoided as not consonant with the principles deemed controlling in the interpretation of international agreements..."

In *Maximov v. United States*[113], the Supreme Court rejected the strict interpretation and mentioned the necessity to examine not only language but the entire context of the agreement. Also, in the Suez case[114], the intent and purpose of the Convention is examined.

The liberal, strict or teleological terms of interpretation exist not only for international treaties but also for national legislation. For example, in *Bon-Secours v. Communaute Urbaine de Quebec*, Gonthier J. listed five rules for interpretation[115]:

1- The interpretation of tax legislation should follow the ordinary rules of interpretation;

2- A legislative provision should be given a strict or liberal interpretation depending on the purpose underlying it, and that purpose must be identified in light of the context of the statute, its objective and the legislative intent: this is the teleological approach;

3- The teleological approach will favour the taxpayer or the tax department depending solely on the legislative provision in question, and not on the existence of predetermined presumptions;

4- Substance should be given precedence over form to the extent that this is consistent with the wording and objective of the statute;

5- Only a reasonable doubt, not resolved by the ordinary rules of interpretation, will be settled by recourse to the residential presumption in favour of the taxpayer.

In my opinion the liberal interpretation is more appropriate than the strict interpretation. The main idea is more important than details and difficulties of expression should not rule out the effectiveness of the agreements. Otherwise, the elaboration of treaties must express all the possible small details in order to cover the countries' aims.

6- Static or Ambulatory interpretation

Another problem area is whether interpretation should be static or ambulatory. In other words, should reference be made to the state's internal law at the time the treaty was concluded or at the time the treaty is applied?[116].

Belgium, Germany, the Netherlands, Norway and the United States adopt an ambulatory interpretation but Sweden adopts a static interpretation[117]. The Supreme Court of Canada made its decision in favour of static interpretation in *The Queen v. Melford Developments Inc.*[118], but reversed this afterwards by legislation[119]. Under section 3 of the Income Tax Conventions Interpretation Act of Canada, if the word is fully defined in the tax treaty, section 3 is not applicable. Otherwise, the meaning of the word must be consistent with the ambulatory meaning in the Income Tax Act.

Section 3 provides as follows:

"Nothwithstanding the provisions of a convention or the Act giving it the force of law in Canada, it is hereby declared that the law of Canada is that, to the extent that a term in the convention is

a- not defined in the convention,

b- not fully defined in the convention, or

c- to be defined by reference to the laws of Canada,

that term has, except to the extent that the context otherwise requires, the meaning it has for the purposes of the Income Tax Act, as amended from time to time, and not the meaning it had for the purposes of the Income Tax

Act on the date the convention was entered into or given the force of law in Canada if, after that date, its meaning for the purpose of the Income Tax Act has changed." [120]

In Turkey, an ambulatory interpretation has been adopted since the OECD Model is in use.

In the United Kingdom the situation of the static or ambulatory interpretation is not clear since no application has been made to the Courts. Baker argues that an ambulatory interpretation is preferred by Parliament, since a transitional relief was provided for existing treaties from the changed definition of the term "distributions" under Section 32 of the Finance Act 1966[121].

In the 1992 OECD Model the ambulatory interpretation has been adopted[122]. This is also the case in later amendments of the OECD Model[123].

The OECD Article 3(2) Commentary paragraph 11 states that:

"...the question arises as to which legislation must be referred to in order to determine the meaning of terms not defined in the Convention, the choice being between the legislation in force when the Convention was signed or, on the contrary, that in force when the Convention is being applied, i.e., when the tax imposed. the Committee on Fiscal Affairs concluded that the latter interpretation should prevail."

The OECD Article 3(2) Commentary paragraph 12 states that:

"...ambulatory interpretation of internal law is not required if the change in domestic legislation is so significant as to no longer correspond to 'the intention of the contradicting parties when signing the Convention'".

The people who support static interpretation states that changing internal law by the state would prevent the effectiveness of the treaty[124]. However, for the people who support the ambulatory interpretation points the difficulty of static interpretation that it takes time to find the related article which is difficult for treaties signed long time ago[125].

Conclusion

When countries sign a double taxation agreement, some terms may still remain unclear or ill-defined. In this case the interpretation of the treaty is essential. In order to arrive at the true meaning of the terms, certain interpretation methods can be used by courts. In most cases, liberal interpretation is preferred over strict interpretation which not only looks at the meaning of the words in the text, but also analyses the purpose and intention of the parties who drew up and signed the treaty.

Although the need of interpretation of unclear words gives a difficult time to treaty interpretors, the existence of some guidelines, such as the Vienna Convention, and different methods eases their task. To follow some principles as guidelines will be helpful to solve disputes about treaty interpretation for both parties and international jurists. The interpretation process is also shortened by the mutual agreement procedure.

There is a limit to how far these different schools if interpretation will give use to different results in practice. When the courts interpret an article of the treaty, they must look at first to the words which are used by the parties. When there are not clear they can try to find the meaning of the term from supplementary material. However, when they are, at the same time, try to establish the intentions of the parties and the purposes of the treaty, they consider the meaning of the term in question under the light of these intentions and purposes. At this point in the three methods of interpretation became very close to each other.

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