Dear Colleagues:

The IATJ will be holding its 3rd Assembly in Munich, Germany on October 18 and 19, 2012. The Assembly planning is still ongoing. For your information, I can advise you that the five educational items that will likely be in the program are:

1. Judicial Independence;
2. Interpretation of Tax Treaties;
3. GAAR and judicial anti-abuse documents;
4. VAT
5. Permanent establishments – OECD commentary revisions 2014

Attached are full particulars of the Program.

I also invite you to solicit your colleagues, take this opportunity and attend the 3rd Assembly. It is a tremendous opportunity to meet fellow colleagues from around the world and discuss issues of mutual concern. Also, I solicit your support for membership in the IATJ and I encourage your active participation in the IATJ as much as possible. Again, thank you for your continued support.

Kindest personal regards,
E.P. Rossiter, President

The 2011-2012 executive for the IATJ is:

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The Missing Keystone of Income Tax Treaties

Joanna Wheeler

Introduction

It is, maybe, the fate of the judiciary to deal regularly with legislation which is revealed by the case before them not to be as well thought through as one might have hoped. Often this phenomenon is a feature of the domestic law of states, but this article focuses on treaties for the avoidance of double taxation on income. It is based on the research carried out by the author for her doctoral thesis,[1] in which she argues that there is a fundamental flaw in the structure of tax treaties which lies at the root of many current difficulties in determining whether a person is entitled to treaty benefits. The thesis goes on to make proposals for correcting this flaw and suggests a draft treaty text for of a re-write of the OECD Model.

The issue of entitlement to treaty benefits has become a hot topic in recent years, for two reasons. One reason is the policy measures taken by states to protect their treaties from treaty shopping by restricting entitlement to treaty benefits through limitation on benefit (LOB) articles, anti-conduit provisions and more general anti-abuse provisions in treaties. The other reason, of more immediate importance to the judiciary, is the many questions which arise about the interpretation of treaties with a view to determining which persons are entitled to treaty benefits. A number of recent cases, some of which are discussed below, illustrate that, even though this is a basic conceptual issue, the answers can be far from clear.

This article first sketches some of the most basic current problems in determining whether treaty benefits are available. It then explains the feature that is referred to as the "missing keystone" in the title and expands on the problems that arise because this keystone is missing. Finally it explains the solution suggested by the author in her thesis, but this part is kept to a brief outline as the concerns of the judiciary are focussed on the current treaty structure.

Current issues with entitlement to treaty benefits

The treaty entitlement of a person

One of the most basic issues in the OECD Model arises immediately out of Art. 1; the Model is defined to apply to persons, but this prescription is not always appropriate as states do not always impose an income tax liability on a person as such. One aspect of this issue concerns partnerships and other "quantities" (to use a neutral word) which may be subject to a tax liability without being a person in any legal sense.[2] The other aspect is

[1] The author's thesis has the same title as this article and will be published in April by the IBFD as Vol. 23 of its "Doctoral Series".

[2] The OECD has considered this issue in its reports on partnerships and CIVs: OECD Committee on Fiscal Affairs, *The Application of the OECD Model Tax Convention to on Partnerships* (Paris:

the imposition of different tax liabilities on one person in different capacities, the classic example being a trustee who has, in addition to his/its own tax liability, a separate tax liability in respect of every trust for which he/it acts as trustee. The wording of the OECD Model seems to require that these different liabilities are all aggregated for the purpose of applying the treaty, yet this is clearly the wrong result in policy terms.[3]

A further issue with the treaty entitlement of "persons" stems from the definition of residence in Art. 4, in particular the requirement that the person be "liable to tax" in the state in which residence is claimed. The problems in this connection with exempt bodies, such as pension funds, have been well documented elsewhere. In an extensive study of corporate residence for treaty purposes, Robert Couzin concludes that many of these problems arise because the "liable to tax" test is not a binary one that produces a yes/no answer but that there are, rather, many shades of grey between a person that is fully liable to tax and a person that is not liable.[4] And Richard Vann, in an extensive discussion of the residence concept in respect of companies, concludes that a flexible approach is needed, but also states that "it is difficult to extend that flexibility to cover territorial tax systems, tax-exempt charities and other cases while using it to exclude dual resident and conduit companies."[5]

The availability of treaty benefits for specific income

Once a person has been identified who is entitled to treaty protection, the next question is whether that protection can be claimed in respect of specific items of income. One set of questions centres on the beneficial ownership requirement of Arts. 10, 11 and 12, and the problems with this concept have also been well documented elsewhere.[6] Here it suffices to note that the discussion concerns, not only the meaning of the term, but also its very role in the treaty, in other words whether it is an anti-avoidance rule or whether its role is

2000); OECD Committee on Fiscal Affairs, *The Granting of Treaty Benefits with respect to the Income of Collective Investment Vehicles* (Paris: 2010).

[3] On this point, see: Prebble, J., "Trusts and Double Taxation Agreements", 2 *eJournal of Tax Research* 2 (2004), pp. 192-209 at p. 198

[4] Couzin, R., *Corporate Residence and International Taxation* (Amsterdam: IBFD, 2002), Sec. 3.1.1.

[5] Vann, R., "'Liable to tax' and Company Residence under Tax Treaties", pp. 197-272 in: Maisto, G. (ed.), *Residence of Companies under Tax Treaties and EC Law*, EC and International Tax Law Series Vol. 5 (Amsterdam: IBFD, 2009).

[6] See for example: Oliver, J.D.B., et al., "Beneficial Ownership", 54 *Bulletin for International Fiscal Documentation* 7 (2000), pp. 310-25; Bernstein, J., "Beneficial Ownership: An International Perspective", 45 *Tax Notes International* 12 (2007), pp. 1211-6; Arnold, B., "Tax Treaty News", 1. More on Beneficial Ownership, 63 *Bulletin for International Taxation* 5/6 (2009), p. 175 et seq.; Martín Jiménez, A., "Beneficial Ownership: Current Trends", 2 *World Tax Journal* 1 (2010), pp. 35-63; Du Toit, C., "The evolution of the term 'beneficial ownership' in relation to international taxation over the past 45 years", 64 *Bulletin for International Taxation* 10 (2010), pp. 500-9. On 29 April 2011 the OECD issued a discussion draft on the beneficial ownership requirement: OECD Centre for Tax Policy and Administration, *Clarification of the Meaning of "Beneficial Owner" in the OECD Model Tax Convention*, (Paris: 2011). Both the discussion draft and the reactions to it are available on the OECD website.

more limited.[7] There are also structural issues with the beneficial ownership requirement, as Arts. 10 and 11 of the OECD Model appear to impose a double condition for treaty benefits; the income must be paid to a person resident in a contracting state and the beneficial owner must also be resident in that state.[8] In Art. 12, on the other hand, the only condition is that the beneficial owner is resident in one of the contracting states.

More generally, once a person is found who is resident in a state, as defined in the treaty, and therefore entitled to the benefit of the treaties concluded by that state, the OECD Model says very little about which income is protected by the treaty in the hands of that person. The Model uses a variety of terms to denote the income covered, such as dividends and interest "paid to" the person, income "derived by" the person from immovable property or from employment, and the profits "of" an enterprise or, in Art. 21,other income "of" the person. All these terms appear to require some degree of ownership of the profit or income on the part of the treaty claimant, but it is far from clear how many, or which, ownership attributes are required if that person does not have full ownership of the income.[9]

The missing keystone

More fundamental, however, than either set of issues in their own right, is that these two sets of issues do not join together satisfactorily. The residence definition looks for a general liability to tax on a person, whereas the distributive rules are based on some form of ownership of income of the person. But the ownership of an item of income and the imposition of a tax liability in respect of that item of income do not necessarily go hand-in-hand, and treaty interpretation problems arise when they are separated.

The Canadian *TD Securities* case[10] provides a clear illustration of this fundamental flaw in the current treaty framework. TD Securities (TDS) was a company incorporated in the United States which had a branch in Canada. There was no dispute that the branch constituted a permanent establishment for the purposes of the Canada–US treaty, and the only issue was whether TDS was able to claim a reduction of the Canadian branch tax granted by the treaty. The sole shareholder of TDS was a company resident in the US and the US treated TDS as a flow-through entity under its domestic law, attributing all of its income to its parent company for tax purposes.

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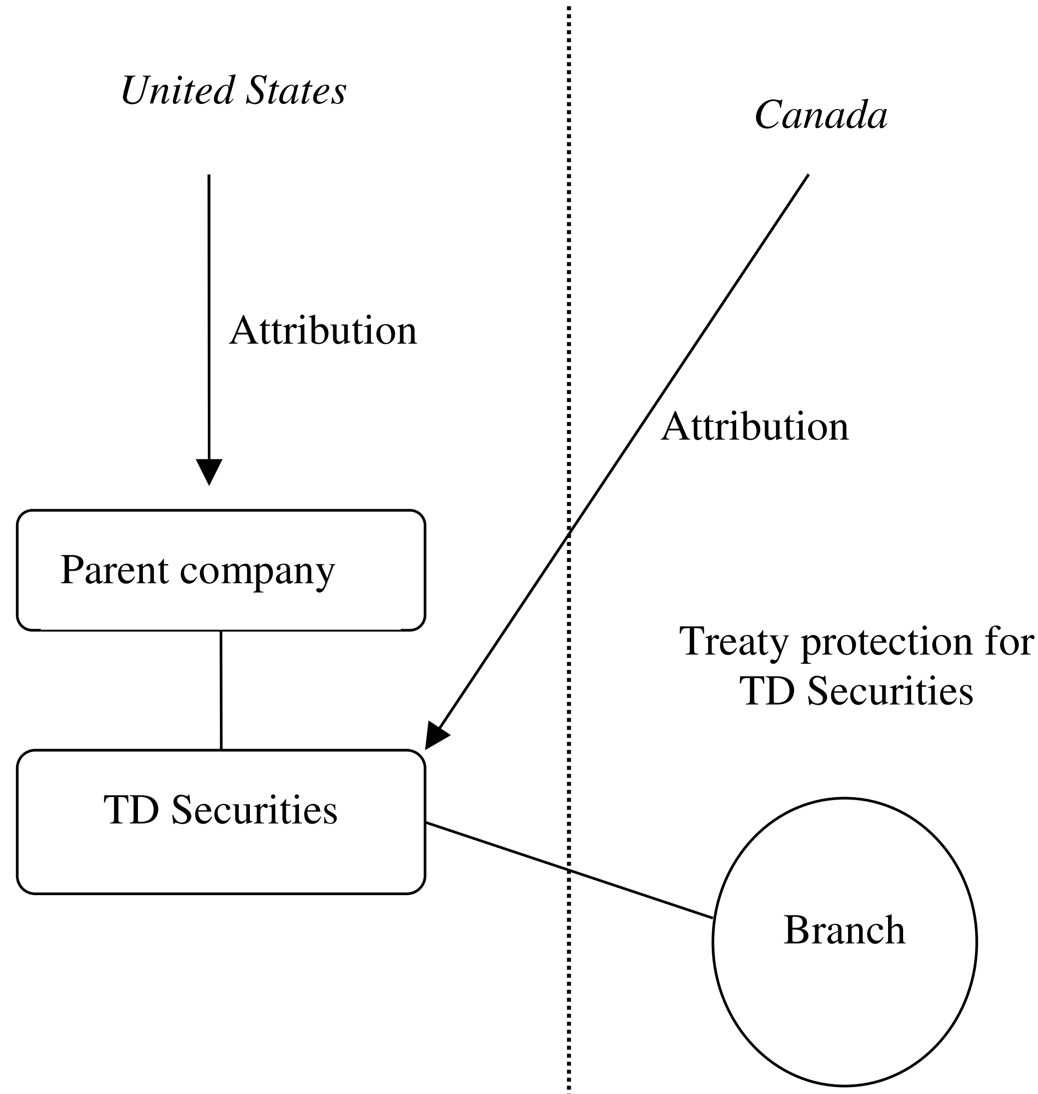
[7] See, for example, Li, J., "Beneficial Ownership in Tax Treaties: Judicial Interpretation and the Case for Clarity", in: Baker, P., and Bobbett, C. (eds.), *Tax Polymath: A life in international taxation* (Amsterdam: IBFD, 2010), pp. 187-210.

[8] This possible double condition for treaty benefits seems to have underlain the position of the tax authority in the Canadian *Prévost* case, which concerned the claim of a company resident in the Netherlands to the application of the dividend article in the Canada-Netherlands treaty.

[9] In the *Royal Dutch* case in the Netherlands there was also an issue as to whether the ownership requirement refers to the income or the underlying asset. The Supreme Court held that the beneficial ownership condition in the dividend article refers only to the dividend, not to the shares, and that the purchaser of a dividend coupon could be the beneficial owner of the dividend for treaty purposes even though it did not own the shares.

[10] *TD Securities (USA) LLC v.Her Majesty the Queen* 12 ITLR (2010) 783, 2010 TCC.

TD Securities case



Instinctively one feels that treaty protection should be available, and the court clearly felt the same way. The problem, however, was that neither of the companies were able to substantiate a claim to treaty benefits under the wording of the treaty; the parent company did not own the branch profit, and the subsidiary was not "liable to tax" in the US. As Nikolakakis puts it in his comment on the case, "the structural problem ... would be that the *wrong person* is liable to tax."[11]The facts, in other words, did not comply with the assumption underlying the OECD Model that the person who owns the income for which treaty protection is claimed is also the person who is "liable to tax" in respect of it. The court did hold that treaty protection was available, but admitted that it had to adopt a liberal interpretation of the treaty in order to do so.[12]

This lack of attention for the attribution issue is the missing keystone referred to in the title of this article. Curiously, the OECD Model has no place for a consideration of why a specific item of income is attributed to a specific person, even though this attribution process is what connects the general tax liability of a person to a specific item of income. The problem in the *TD Securities* case is not, however, the only result of this missing keystone by any means and the following section explores some of its other consequences.

Consequences of the missing keystone

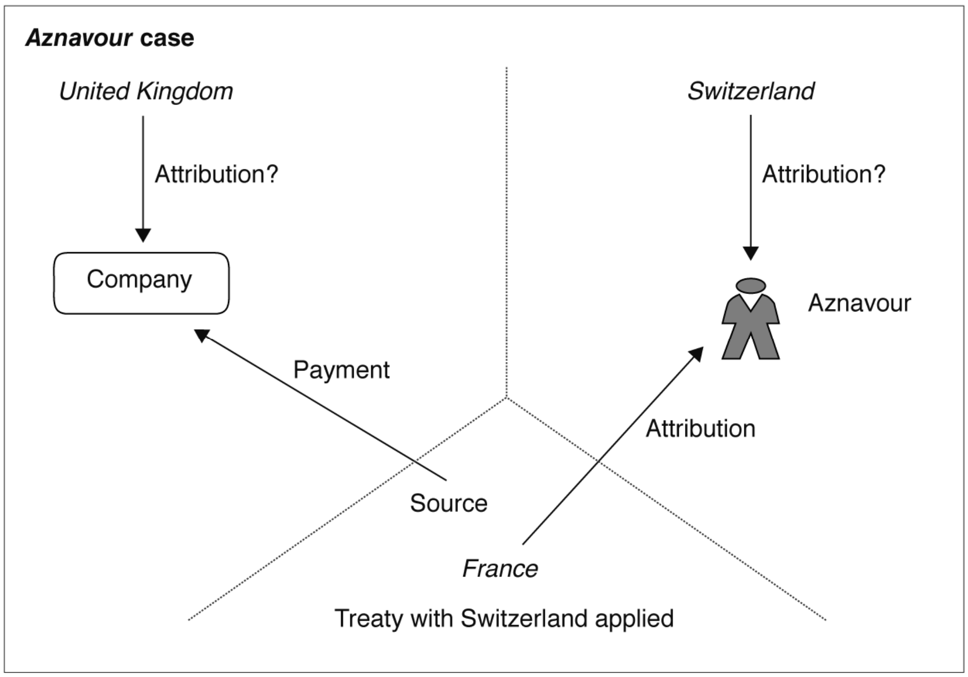
The role of attribution in the OECD Model

Maybe the most fundamental issue to be asked in respect of the attribution of income is what its role is, or should be, in the OECD Model.This issue can be illustrated by two recent cases, both of which concerned domestic legislation which attributed income whichlegally belonged to a company to an individual who performed the activity for which the income was paid.

In the *Aznavour* case[13] the French Supreme Court decided the case from the perspective of the source state. Aznavour was a famous singer resident in Switzerland who gave a concert in France. The fee for the concert was paid to a company resident in the United Kingdom, but French domestic law[14] attributed the fee to the individual for tax purposes. There must have been some connection between Aznavour and the UK company, but the precise nature of the connection is not explained in the decision.[15]The issue before the court was whether the company could claim the benefit of the France – UK treaty. In holding that it could not, the court looked first at its own domestic law, which attributed

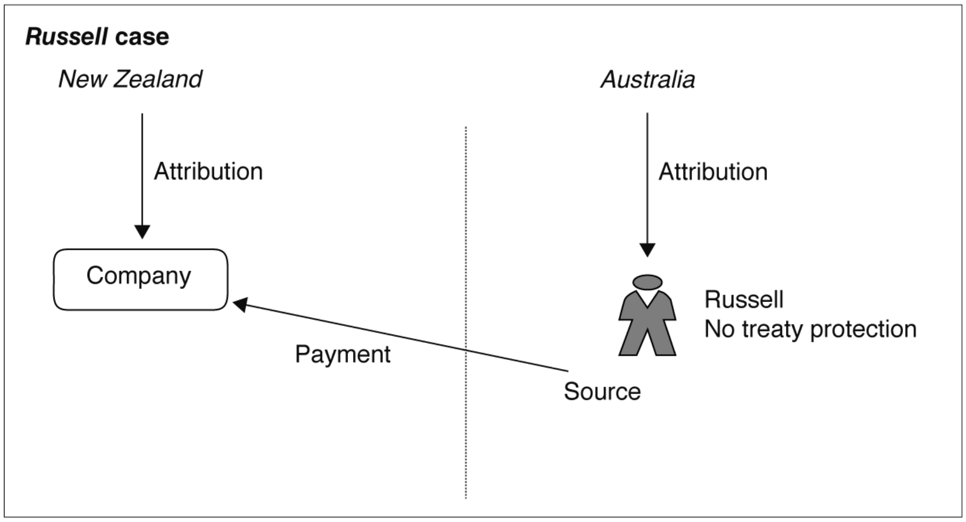
[11]Nikolakakis, A., "Commentary", *TD Securities (USA) LLC v. HM the Queen*, 12 ITLR 783, at pp. 797-8. Emphasis in the original.
[12]In Paras.51, 75, 87, 88, 94 and 96-10 of the decision.
[13] France: *Conseild'Etat*, 28 March 2008, No. 271366, Tax Treaty Case Law IBFD.
[14]Art. 155 A *Code Général des Impôts*.
[15]The relevant French legislation attributed income to the individual in three circumstances: if the individual controlled the company either directly or indirectly; if the individual was unable to establish that the company carried on a predominant substantial commercial or industrial activity other than the provision of services; or if the company benefited from a privileged tax regime in a foreign country.

the income to the individual resident in Switzerland, and therefore applied only the treaty with Switzerland. It is assumed here that the fee would have been taxable in the UK in the company's hands, but one cannot assume as easily that Switzerland would have taxed the fee in Aznavour's hands (although Switzerland would undoubtedly have taxed any remuneration or dividend derived by him from the company).The Court did not, however, give any explicit consideration to the taxation of the fee in the hands of either Aznavour or the company in their respective residence states.



In the Australian *Russell* case,[16] a similar issue arose but now from the perspective of the residence state. Russell was an individual resident in Australia, who provided services through a company incorporated in New Zealand which formally employed him. Although the company was wholly owned by his wife, it fulfilled all the conditions for characterization as a personal services company in Australia and, accordingly, the company's income was directly attributable to Russell under Australian domestic law.[17] Most of the services provided by the New Zealand company were provided to a single client resident in Australia. The case raised a number of questions, but the one that is important here is whether it was contrary to the treaty between Australia and New Zealand for Australia to tax the fees for the services in Russell's hands. The Federal Court held that it was not, because the phrase "profits of an enterprise" in Art. 7 of the treaty referred to the profits of an identifiable taxpayer, in this case the company. The Australian law, on the other hand, attributed the income to the individual and therefore the Australian tax liability did not constitute taxation of the company that was prohibited by the treaty. In effect, the attribution rule of the Australian law meant that this case, in the Australian perception, was a purely domestic one.

[16] *Russell v. Commissioner of Taxation* [2011] FCAFC 10.
[17] Part 2-42 Income Tax Assessment Act 1997.



Two points can be drawn from these cases: (1) it is far from clear what the role is of the attribution process in the interpretation of a treaty; and (2) the attribution of income to a person is a crucial element in the interpretation because this is the element that determines which treaty applies, if any. Similar issues are likely to arise in any situation in which income is attributed by domestic law to a person who is not the legal owner of the income.

Problems are also likely to arise when the contracting states to a treaty do not agree, under their domestic law, as to the attribution of the income to a person. This latter point is not an esoteric issue of limited importance; the author's thesis includes an extensive comparative study of Netherlands and UK which reveals many differences in the way in which they deal with the attribution issue. The very broad principles in both countries are similar and predictable: legal entitlement to income generally provides an initial indication of the person to whom income should be attributed; and carrying on an income-producing activity is a strong indicator for the attribution of active income. But as soon as one starts to look at a more detailed level the countries diverge, due to their differing property law, the differing basic attribution principles expressed in their legislation, the differing reaches of their anti-avoidance legislation and the differing imperfections in their legislation. It is hardly conceivable that a comparison of any other pair of countries would reveal differences that are substantially fewer in number or of a lesser importance.

What then, should be the interaction between the domestic law of the contracting states and the treaty between them? Does a treaty have its own attribution principles? And, if so, what are they? Or should it rely on the domestic law of the contracting states and step in only to resolve differences? Take as an example two states which both, under their domestic law, attribute fees for certain personal services directly to the individual who renders the services, rather than to the company which is legally entitled to the fees. Can we say that there is no treaty issue between these two states because they agree with each other on the attribution of the income? Or is there nevertheless a treaty issue because the company is the legal owner of the income and therefore the starting point is that it is the company that is able to claim treaty benefits in respect of the fees?

The significance of the grounds for the domestic attribution rule

The lack of attention for the attribution of income to a person in the OECD Model also means that there is no scope for taking into account the reason for which income is attributed to a specific person. Anti-avoidance legislation raises some interesting questions in this context, as it often attributes income for tax purposes to a person who whose connection with the income is rather remote, to the extent that it is not based on anything that would usually be regarded as “ownership”. In the UK, for example, an individual who is ordinarily resident in the UK and who transfers assets to a non-resident person may continue to be taxable in respect of the income from the assets if he, or his spouse, has “power to enjoy” the income.[18] An individual is regarded as having that power if it is possible that he will obtain the assets that produce the income at some time in the future, however remote that possibility is. An individual may therefore be taxed in respect of income which he does not receive and from which he does not benefit. In the current treaty framework the individual would find it hard to substantiate a claim to treaty benefits for technical reasons; the income is not “paid to” him and as he is not the owner of the income it would seem impossible to argue that he is the beneficial owner. Yet one can question this result in policy terms, as the individual is subject to juridical double taxation, which is precisely what tax treaties are intended to prevent. On the other hand, if the UK’s treaty partners find this attribution rule unacceptably extreme, should they be bound to apply the treaty?

The mirror-image question arose in the UK *Smallwood* case.[19]This case raised many interesting issues and is too complex to explain fully here, but the main question before the court was whether trustees were entitled to the protection of the Mauritius-UK treaty in respect of a capital gain they realized on trust assets. The decision against the trustees turned largely on the finding that they were resident in the UK, not Mauritius, for treaty purposes and therefore could not invoke the treaty to prevent the UK from taxing the gain. What is interesting for our purposes, however, is an issue that was not addressed in the judgment. This issue has been described by Philip Baker as the issue of vicarious treaty benefits,[20]because the UK legislation[21] attributed the gain to the settlor and taxed it in his hands. Any treaty protection granted to the trustees would, therefore, actually have been enjoyed by the settlor. Seen in the light of this rule, the case might have been much easier to decide, as the settlor was clearly resident in the UK; apparently he had never even been to Mauritius, let alone been resident there. But the technicalities of the treaty required the trustees to claim treaty benefits, as the settlor had no ownership of the gain.

[18]Secs.714-751 Income Tax Act 2007, as amended.
[19]*HMRC v. Smallwood and another*, [2010] EWCA Civ 7; 12 ITLR 1002; [2010] STC 2045; United Kingdom: CA, 8 July 2010, Tax Treaty Case Law IBFD.
[20]Baker, P., “Commentary”, *Smallwood and another v. Revenue and Customs Commissioners*, 11 ITLR 943, pp. 945-55. This comment was written about the High Court decision, which was subsequently reversed by the Court of Appeal.
[21]Sec. 77 Taxation of Chargeable Gains Act 1992.

Put in more conceptual terms, the issue here is whether a treaty should be interpreted with a greater cognizance of the domestic law of the contracting states to the treaty in this respect.If one assumes that that is the case, there is then an issue as to how far states should be expected to accept the attribution rules of their treaty partners as basis for granting treaty benefits. This issue does not only concern anti-avoidance legislation; the different views of states, for example, on the justification for taxing trust income in the hands of trustees creates some fundamental issues of treaty interpretation. In particular, to what extent should a source state be expected to grant treaty benefits to trustees resident in another state if the source state does not know the trust concept and its domestic law does not allow the taxation of trust income in the hands of a trustee?[22]

The significance of the tax liability as such

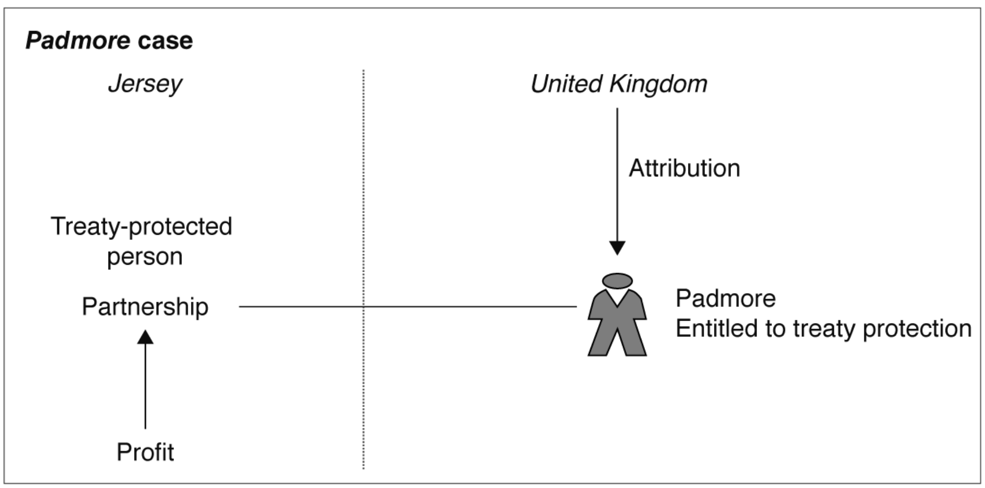
Because the current treaty structure pays no attention to the attribution of income to a person in the domestic law of the contracting states, there is also no structural place for a consideration of the tax burden on that specific item of income in the hands of that person. Sometimes this element is added at the end of the process of determining entitlement to treaty benefits, in the form of subject-to-tax clauses and remittance base clauses which exclude treaty benefits if the potential treaty claimant is not actually taxed on the income in his residence state. Yet, given that the point of the distributive rules in a treaty is to prevent double taxation, one would have expected some structural consideration of whether the tax liability of the treaty claimant in the residence state is substantial enough as a basis on which to grant treaty benefits.

This issue is particularly acute in respect of passive income, as the usual pattern is that the source state grants treaty benefits by reducing or eliminating a withholding tax on the gross income whereas the residence state imposes tax on the net income. In respect of interest and royalties derived by companies, in particular, if the treaty claimant uses the income to make deductible payments to other persons, the difference between the gross and net amounts can be huge, so that the revenue sacrifice made by the source state may bear no relation to the tax collected by the residence state. The remedy offered by the OECD Model against conduit structures which exploit this phenomenon is the beneficial ownership requirement, but there can be little wonder that the use of the beneficial ownership requirement in this way is such a fraught issue, as it uses a solution based on the ownership of the income to resolve a problem stemming from quite a different issue, namely a mismatch of tax liabilities on the income.

[22]The only countries that have, to the knowledge of the author, included specific provisions in their treaties in this respect are New Zealand and the US. New Zealand treaties generally state explicitly that a trustee is regarded as the beneficial owner of trust income if he is taxable in respect of the income. US treaties generally include provisions granting treaty benefits in respect of trust income to the extent that a person resident in one of the contracting states is taxable in respect of the income.

Is the OECD Model subjective or objective in nature?

The disconnection between the two basic conditions for treaty entitlement creates one final set of issues, because Art. 1 of the OECD Model states unequivocally that the treaty applies to persons whereas the distributive articles of the treaty are largely written as though they apply to the income as such. This question was specifically considered in the UK *Padmore* case.[23] Padmore, an individual resident in the UK, was a member of a partnership established in Jersey. In both Jersey and the UK the amount of tax due on partnership income was computed by looking separately at each partner's share, but the profit was assessed to tax in the name of the partnership. The court held that the partnership was a person for treaty purposes,[24] that the tax liability in Jersey was due to the residence of the partnership in Jersey, and that the partnership was therefore entitled to treaty protection. It was clear that the partnership had no permanent establishment in the UK, so the UK was prohibited from taxing the profits of the partnership.



The issue was then whether the treaty also prohibited the UK from taxing Pad more on his share of the partnership profits. The Court of Appeal held that it did; it reasoned that, as the treaty prohibited the UK from taxing the entirety of the profits of the partnership, it must also prohibit the UK from taxing a share of them.[25] The logic of the court is impeccable if one follows the wording of the treaty, but nevertheless the decision surprised many commentators. It is also inconsistent with the decision in the *Russell* case, discussed above.

Conclusion on the consequences of the missing keystone

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[23] *Padmore v. Inland Revenue Commissioners* [1989] STC 493; United Kingdom: CA, 19 May 1989, Tax Treaty Case Law IBFD.

[24] Jersey–United Kingdom arrangement of 24 June 1952, which has the same form and function as a double taxation treaty.

[25] The UK then introduced legislation to reverse the decision: Sec. 62 Finance (No. 2) Act 1987, amending Sec. 153 Income and Corporation Taxes Act 1970. In a subsequent case the High Court found that the legislation was effective to overturn the first decision (although it also stated that the legislation was in breach of the treaty): *Padmore v. Commissioners of Inland Revenue (No. 2)* [2001] STC 280.

The cases that have been discussed in this article illustrate a number of treaty interpretation problems which reflect the structural flaw identified at the beginning of the discussion, namely that the two basic conditions for entitlement to treaty benefits do not join up properly. In the current OECD Model these two conditions are joined through the person who is entitled to treaty benefits; that person is the fulcrum on which the application of the treaty balances. There is, therefore, a great deal of pressure on a correct identification of the treaty-entitled person and the interpretation of the treaty becomes strained when it is not possible to make a simple, direct correlation between a person's liability to tax and that person's ownership of the income for which treaty benefits are claimed.

A proposal to eliminate the fundamental flaw
The new approach

The author's thesis argues that this focus on the treaty-entitled person is misplaced and that the essential element leading to treaty entitlement should be, rather, the liability to tax in respect of a specific item of income. The remainder of the thesis proposes a new structure for granting entitlement to treaty benefits and suggests a revised text of the OECD Model to implement this structure. This new approach uses many of the elements found in the current treaty framework, but places them in a more logical structure.

The essence of this "new approach" is that the basic criterion for entitlement to treaty benefits is the imposition of a liability to tax in respect of the income in one of the contracting states to a treaty. In contrast with the current treaty structure, the new approach applies this test to single items of income. A single item of income cannot be subject to a mixture of taxability and non-taxability in the same way that a person can, and the test applied in this way is therefore generally capable of a simple yes-or-no answer.

The claim to treaty benefits then has to be substantiated by considering the connection between the income and the claimed residence state. This testing proceeds in two stages. The first stage is to determine whether there is enough substance in the connection between the income and the person. This would clearly be the case if the person has full ownership of the income, but the source state would probably also be willing to accept more limited connections, such as the person having economic ownership of the income. In any event, the grounds for attributing income to a person which are considered acceptable would be named in the treaty. The second stage is to determine whether there is sufficient substance in the connection between the person and the claimed residence state. Unlike the current OECD Model, this test would go straight to material connections, such as an individual having a permanent home in the state or a company having its management and control in the state. Source states that are concerned about the level of the tax liability in the residence state could add provisions to address this concern; such a provision would apply at the initial stage of establishing the liability to tax that constitutes the entry requirement for treaty entitlement and would stipulate conditions as to the level of taxation required to give entitlement to treaty benefits.

The advantages of the new approach

The new approach has many advantages over the current treaty structure. First and foremost, of course, is that it eliminates the fundamental flaw that was identified at the beginning of this article. Rather than imposing two conditions for treaty entitlement which do not join up satisfactorily, the new approach takes a claim to treaty benefits through a series of steps, each of which focuses on a single aspect of treaty entitlement and follows logically from the previous step. It can also eliminate the problem which arises because the current OECD Model is expressed to apply to "persons"; in the new approach the tax liability that forms the basic entry criterion into the treaty would also determine which person, taxable quantity or taxable capacity of a person may be entitled to treaty benefits if the remaining conditions are fulfilled.

As the new approach pays specific attention to the reasons for which income is attributed to a person, it is capable of dealing with situations in which states disagree about the attribution. The solution suggested is a tiebreaker provision which sets out a hierarchy of connections between the income and a person in order to determine which attribution takes priority for treaty purposes.

In taking the imposition of a tax liability on income as the basic entry criterion, the new approach adopts a more objective method of determining entitlement to treaty benefits. This aspect enables it to provide a solution for situations such as that in the *TD Securities* case, in which the elements of treaty entitlement were fragmented between the two companies. It is entirely consistent with the more objective methodology of the new approach to allow those fragments to be aggregated in order to substantiate the claim to treaty benefits for the income, and the proposed re-draft of the OECD Model to implement the new approach includes such a provision.

Finally, a logical path to establishing treaty entitlement would go a long way towards obviating the need for the anti-abuse measures of states such as LOB articles and anti-conduit provisions.

Conclusion

There are already indications that the underlying policy of the new approach is the preferred policy of states. The OECD Commentaries on Arts. 10, 11 and 12, for example, imply that an agent or nominee is not the beneficial owner of income because he is not taxable in respect of it,[26]and there are strong similarities between the new approach suggested here and the principles enunciated in the OECD partnership report.[27]The problem at the moment is that in each case this policy has to be grafted onto a different

[26]For example, para. 12.1 of the Commentary to Art. 10, which states that "Where an item of income is received by a resident of a Contracting State acting in the capacity of agent or nominee it would be inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption merely on account of the status of the immediate recipient of the income as a resident of the other Contracting State. The immediate recipient of the income in this situation qualifies as a resident but no potential double taxation arises as a consequence of that status since the recipient is not treated as the owner of the income for tax purposes in the State of residence."

[27] See note 2.

issue that does not go to the heart of the problem, or it has to be squeezed into an interpretation of the treaty that goes beyond its wording.
Clearly we are a long way from the new approach being adopted, if it ever is adopted, and in the meantime the judiciary has to deal with the structure of treaties as they are written now. One of the consequences is that, for example, in all the cases discussed in this article the courts were asked to apply a treaty provision to a situation for which it was not written. The courts have usually arrived at an appropriate answer from a policy point of view, but they have sometimes had to adopt a rather forced interpretation of the treaty in order to do so.

The brief explanation given here cannot do justice to the subtleties of the new approach proposed by the author. There is also a very large question as to the practicalities of making such a radical departure from the accepted treaty framework, however many advantages it may offer in theoretical terms. It is submitted that it is, nevertheless, useful to think about how the new approach would work, as this exercise throws the conceptual problems with the current treaty framework into sharp relief. The author also hopes that the ideas in this article will help you in your consideration of problem cases and in formulating the most appropriate answer in the current treaty structure.

IATJ 3rd Assembly Munich 2012 (Draft)

Thursday, October 18, 2012

Topic	Schedule	Chairman	Panellists
Tax Treaty Interpretation	10:15-12:30	Wim Wijnen Manuel Hallivis-Pelayo	1. Introduction: Wim Wijnen (The Netherlands) 2. The use of the Vienna Convention: Christian Levedag (Germany) 3. Legal bindingness of the OECD MC Commentaries: Hans Pijl (The Netherlands) 4. Article 3(2) of the OECD Model: Manuel Hallivis-Pelayo (Mexico) 5. Conflicts of qualification: problems with the translation of the word "enterprise" (Art. 7 OECD MC) to other languages and recent case law in Brazil concerning its application: João Francisco Bianco (Brazil)) 6. Static vs. dynamic approach: Peter Wattel (The Netherlands) 7. Methodology, summary and discussion: Manuel Hallivis-Pelayo (Mexico)
Anti-Avoidance Rules	14:00-15.30 15:45-17:15	Gerald J. Rip	1. Patrick Boyle, (Canada) 2. ECJ: N.N. (France) 3. Bernard Peeters (Belgium) 4. Anette Kugelmüller-Pugh (Germany) 5. Anthony D. Gafoor (Trinidad & Tobago)

Friday, October 19, 2012

Topic	Schedule	Chairman	Panellists
Judicial Independence	9:00-10:30 10:45-11:30	Jan Robert Koopman	Peter Panuthos (U.S.A.) Pramod Kumar (India) French speaker to be nominated Brahim Zaim (Morocco)
Agency permanent establishment – the commissionaire question	11:30-12:30 14:00-15:30	Hans Pijl	Introduction and case studies: Hans Pijl (The Netherlands) Norwegian jurisdiction: Clement Endresen French jurisdiction: Philippe Martin Spanish jurisdiction: Manual Garzon
VAT	15:45-17:15	Friederike Grube	Interpretation of Art. 90 of the Directive 2006/112/EC(ECJ C-588/10) Dagmara Dominik-Oginska (Poland) Friederike Grube (Germany)