

## HOT TOPICS IN TAX TREATY INTERPRETATION

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## Vienna Convention on the Law of Treaties (VCLT) - I

- Customary law
- Art 31 par 1 VCLT:
  - Good faith
  - Ordinary meaning
  - Context
  - Object and purpose
- Art 31 par 2 VCLT:
  - Context
- Art 31 par 4 VCLT:
  - Special meaning: if parties so intended



## Vienna Convention on the Law of Treaties (VCLT) - II

- Art 32 VCLT
  - 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.

## Consequences for Tax Treaties I

- Unilateral legislative material: Not relevant
- OECD Commentaries (already existing at the time of the conclusion of the treaty)
  - Art 32 VCLT: Supplementary Means of Interpretation
  - Art 31 par 4 VCLT: Special meaning
  - Art 31 par 1 and 2 VCLT: Context
  - Therefore: Part of the interpretation process but not the only relevant material

## Vienna Convention on the Law of Treaties (VCLT) III

- Art 31 par 3 VCLT:
- “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;

## Consequences for Tax Treaties II

- Changed Version of the OECD Commentaries
  - Frequent Changes
  - Motive
  - Constitutional issues in many countries
    - Separation of power
    - Lack of official publication
  - Decision of OECD is neither agreement nor practice (Art 31 par 3 VCLT)
  - Practice is not necessarily „practice“ of government
  - Different relevance of Art 31 par 3 VCLT in different areas of law

## Consequences for Tax Treaties III

- Practical Examples:
  - Changes in Commentaries to non-discrimination clauses
  - Changes in commentaries to exchange of information clauses
  - Partnership Report

## Consequences for Tax Treaties IV

- Mutual agreement
  - Art 31 par 3 VCLT
  - Interpretation versus change of treaty
  - „take into account“
  - Different relevance of Art 31 par 3 VCLT in different areas of law
  - Constitutional issues: Stepping down of courts

## Consequences for Tax Treaties V

- Relevance of other treaties
  - Limited relevance of comparisons with other treaties
  - Treaties are result of compromises

## Vienna Convention on the Law of Treaties (VCLT) IV

- Art 33: Interpretation of treaties 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.
  - 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.

## Vienna Convention on the Law of Treaties V

- The terms of the treaty are presumed to have the same meaning in each authentic text.
- 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.

## Consequences for Tax treaties VI

- OECD Model Convention:
  - English and French
- UN Model Convention

## Art 3 par 2 OECD Model Convention I

- Term not defined
- Recourse to domestic law
- „Unless the context otherwise requires“

## Art 3 par 2 OECD Model Convention II

- Static or Dynamic Approach?
- Dynamic Approach
- Canadian Judgment
- „Clarification“ in OECD Model Convention
- Consequences

## Art 3 par 2 OECD Model Convention III

- „unless the context otherwise requires“
  - Ignoring this phrase
  - Putting a lot of emphasis
  - Compromise?
- German case law as an example
- Room for domestic law:
  - Taxpayer
  - Tax Base
  - Explicite References

## Summary

- OECD Commentaries
- Mutual Agreements
- Languages
- Art 3 par 2 OECD Model Convention





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