

IFA 74th Annual Congress

Berlin, Germany

BACKGROUND MATERIAL

RECENT DEVELOPMENTS IN INTERNATIONAL TAXATION

SEMINAR F | Wednesday, 7 September 2022 | 13.30 – 15.30

Chair

Jonathan Schwarz (United Kingdom)

Panel Members

Kristiina Äimä (Finland)

Stine Andersen (Denmark)

Ariadna Artopoulos (Argentina)

Marte Bergmann (Germany)

Chloe Burnett (Australia)

Jisun Choi (United Kingdom)

Ambroise Lecoeur (France)

John Lennard (Canada)

Doelie Lessing (South Africa)

Veronica Melo de Souza (Brazil)

Dieudonné Nzafashwanayo (Rwanda)

Luis M. Viñuales (Spain)

Secretary

Tetyana Zhuravska (Ukraine)

Additional Material submitted but exceeds the time available to discuss.

Australia

1. *Singapore Telecom Australia Investments Pty Ltd v CoT [2021] FCA 1597*, the Australian Federal Court decision.

The Australian Federal Court examined application of the arm's length principle to changes made to the pricing of related party loans.

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/FCA/2021/1597.html>

Austria

2. *Ra 2019/15/0095, ECLI:AT:VWGH:2021:RA2019150095.L00*, Supreme Administrative Court (Verwaltungsgerichtshof (VwGH)); (submitted by IFA Austria (Michael Lang)).

Application of Articles 4(2) 15 (1;2) and Article 16 (employment income v director's fees) of the Austria - Russia Income and Capital Tax Treaty (2000). Authentic language: in the event of diverging interpretation between the German and the Russian texts the English version prevails.

Brazil

3. *Case ADI 2446*, the Supreme Court of Brazil.

The constitutionality of the domestic GAAR. The case gives important pointers to the challenges in determining the limits of legitimate tax planning in the international context.

4. *Case n. 1.618.897*, the Superior Court of Justice; (submitted by IFA Brazil (Helena Taveira Torres/André Gomes de Oliveira)).

Application of the Article 7 of Brazil-France tax treaty to withholding income tax on fees for technical services and whether technical services equate to royalties.

5. *Case n. 1.759.081*, the Superior Court of Justice; (submitted by IFA Brazil (Helena Taveira Torres/André Gomes de Oliveira)).

The case involves the Brazilian-Spanish tax treaty.

The nature of fees for technical services paid by a Brazilian to a Spanish resident under the protocol to the Brazil-Spain treaty which equates technical services to royalties for the purposes of the treaty (Article 12 - Royalties).

Canada

6. *Levett v. Canada (Attorney General)*, 2022 FCA 117.

Exchange of information under Canada- Switzerland treaty. Whether requesting state must first exhaust all domestic avenues to obtain the information sought; whether request based on allegations that were

false and known to be false; illegally sought and obtained solicitor-client privileged information; and illegally disclosed confidential taxpayer information.

[2022 FCA 117 \(CanLII\) | Levett v. Canada \(Attorney General\) | CanLII](#)

7. *Triskelion Projects International, Inc. v. The Queen*, 2022 TCC 63, Tax Court of Canada.

Services PE and method of counting days under the Canada-US treaty.

[2022 TCC 63 \(CanLII\) | Triskelion Projects International Inc. v. The Queen | CanLII](#)

Cyprus

8. *N.K. Shacolas Holdings Ltd* case no 1399/2016, 3 May 2022, Tax Tribunal; (suggested by IFA Cyprus (Demetris Ioannides)).

Whether if a shareholder's participation in a company that owns immovable property situated in Cyprus is diluted due to issue of new shares for which the existing shareholder waives its pre-emption rights, the dilution may be considered as a disposal of shares for capital gains tax purposes.

The European Union - Court of Justice of the EU

9. *Viva Telekom Bulgaria EOOD v. Direktor na Direktsia Obzhalvane i danachno-osiguritelna praktika — Sofia* (Case C-257/20).

Withholding tax on interest free loan.

[CURIA - List of results \(europa.eu\)](#)

10. CJEU Berlin Chemie A. Menarini v Administrația Fiscală pentru Contribuabili Mijlocii București (Case C-333/20), fixed establishment.

[CURIA - Documents \(europa.eu\)](#)

11. *Allianzgi-Fonds Aevn* (Case C-545/19).

Withholding tax on dividends paid to non-resident UCITS not subject to tax in residence state.

[CURIA - List of results \(europa.eu\)](#)

12. *Pharmacie populaire Pharma Santé* (Joined Cases C-52/21 and C-53/21).

Increased rate of tax if certain information is not provided to tax authority on services received from other member states.

[CURIA - List of results \(europa.eu\)](#)

Finland

13. *KHO 2021:127 – 13.9.2021/411 - Korkeimman hallinto-oikeuden ratkaisuja - FINLEX*, the Supreme Administrative Court; submitted by IFA Finland (Vesa-Pekka Nuotio)).

Comparability for transfer pricing. The parties agreed nine independent companies whose profits varied between -0.24 % and 13.5 % were comparable. Whether statistical tools (quartile range), could be used to determine the arm's length range and where along the range is appropriate.

[KHO:2021:127 13.9.2021/411 - Korkeimman hallinto-oikeuden ratkaisuja - FINLEX®](#)

14. *KHO 2021:73 –2.6.2021/357* - Korkeimman hallinto-oikeuden ratkaisuja, (submitted by IFA Finland Vesa-Pekka Nuotio)).

Whether an APA between three countries relating to a European manufacturing group could be used as evidence in considering whether the profit of a Finnish limited risk distributor in the group was arm's length. Whether the same profit of limited risk distributors in other European countries where local tax authorities had approved the level of profit could be used. Whether US and not Finnish GAAP could be used to determine profit where the parent company was a US based, SEC quoted, company.

[KHO:2021:73 2.6.2021/357 - Korkeimman hallinto-oikeuden ratkaisuja - FINLEX®](#)

India

15. *Bennett Coleman & Co Ltd v Deputy Commissioner of Income Tax, ITA Nos: 7523/Mum/2014, 5827/Mum/2015, and 484/Mum/2017, August 30, 2021.*

Compliance with the arm's length principle for interest-free debt funding of an overseas special purpose vehicle which had a corresponding obligation to use the funds for the acquisition of a target company abroad. Quasi-equity, outward bound thin-capitalisation, risk adjusted rate, € Libor v £Libor.

Ireland

16. *Tax appeal 75TACD2021*; Tax Appeal Commissioners; (submitted by IFA Ireland (Deirdre Kirwan)).

Whether a foreign company was within the charge to Irish capital gains tax (CGT) on the disposal of shares in an Irish company that held a limited and non-exclusive contractual licence to use motorway land for the duration of a public procurement contract to build a motorway. Such companies are only within the charge to CGT on the sale of shares if the shares sold derive the greater part of their value, directly or indirectly from "land" in Ireland.

[75TACD2021 - CGT \(taxappeals.ie\)](#)

Japan

17. *Universal Music case decision of 21 April 2022*, Supreme Court; (submitted by IFA Japan (Masui, Yoshihiro)).

The application of Japan's quasi GAAR to a debt push down.

Korea

18. *2022du36155, of June 16, 2022*, Supreme Court; (submitted by IFA Korea (Jung-hong Kim)).

Korea-US Tax Treaty. Royalties for imported computer software sold to domestic companies, in addition to providing connected services such as maintenance, advice, and product-related education.

The Netherlands

19. New tax governance code recently presented and adopted by around 40 large Dutch multinationals. Relationship with public CbC reporting and ESG goals; (submitted by Jos Beerepoot).

20. *Decision No. 20/00439 of 2 June 2022*, the Netherlands Court of Appeal.

Dividend Withholding Tax exemption and artificial arrangement using an interposed Belgian holding company.

21. *TMF Holding BV en Tradman NL, 6 November 2020, (nr 21/01169)*, Supreme Court (Hoge Raad der Nederlanden); (submitted by Reinout de Boer).

German short cum/ex transaction involving a Dutch market maker who held long call options against the short sale. Whether the gain should be exempt under the participation exemption on the long call or allocated to a foreign permanent establishment where the trade was executed.

22. *X NV v. the tax administration (case 21/02654)*, Supreme Court (Hoge Raad der Nederlanden).

Whether a signing bonus awarded to a Belgian football player shortly before being loaned to a Dutch football club taxation was taxable in the Netherlands under the Belgium - Netherlands Treaty.

23. *X BV v. the tax administration (case 20/03826)* and *X BV v. the tax administration (case 20/01414)*; 1 July 2022, the Supreme Court.

Application of remittance basis to profits from a 3rd country and the taxation of business profits received by a Dutch BV established in Malta benefiting from the Maltese remittance base regime.

Nigeria

24. *Nigeria LNG Ltd v FIRS (ITAT)*, Income Tax Appellate Tribunal; (submitted by IFA Nigeria (Theophilus Emuwa/Jibrin Dasun)).

Withholding tax on ship management fees.

25. *CMA CGM Delmasa SA v FIRS (TAT)*, (submitted by IFA Nigeria (Theophilus Emuwa/Jibrin Dasun)).

Are container demurrage, container cleaning income, line agency charges, bonded terminal commission and container sales/damage recovery all income from shipping - Art 8 France-Nigeria treaty?

26. *CTC Mobile v FIRS (CA)*, Court of Appeal; (submitted by IFA Nigeria (Theophilus Emuwa/Jibrin Dasun)).

Withholding tax on foreign loans and management fees relating to vessels leased to a Nigerian resident company.

Norway

27. *Poseidon*, Supreme Court (HR-2021-1243-A); (submitted by IFA Norway (Eivind Furusest)).

Application of continental shelf provisions in Articles 21 and 23 of the Norwegian tax treaties with Belgium and Spain to employment income for work offshore. Does liability include remuneration for work performed within the baseline from which the territorial boundary at sea is determined? Must both active workdays and associated paid days off be taken into account?

28. *Allseas EMEA*, Borgarting Court of Appeal, 18th November 2021 (LB-2020-158590 – UTV-2021-1302); (submitted by IFA Norway (Eivind Furusest)).

Attribution of profits to a PE of a Portuguese company pipe laying and subsea construction on the Norwegian continental shelf under Article 7(2) of the Norway-Portugal treaty. Whether a vast part of the compensation for waiting on weather (WoW) should be attributed to the head office in Portugal.

29. *Mowi*, First instance court (case no. 19-083263TVI-THOD/1); (submitted by IFA Norway (Eivind Furusest)).

Calculation of foreign tax credit: Should tax exempt participation dividends and taxable be included when calculating the maximum foreign tax credit? Are the Norwegian foreign tax credit rules contrary to applicable tax treaties?

Poland

30. *Judgment of 22 March 2022 (II FSK 1688/19)*, Supreme Administrative Court.

Taxation of exchange of a cryptocurrency for another cryptocurrency on online exchanges.

Rwanda

31. *IHS Rwanda v Rwanda Revenue Authority*, Commercial Court, RCOM 00081/2022/TC, 15/06/2022; (submitted by Dieudonné Nzafashwanayo).

Whether a shareholder loan of USD 200M received by the taxpayer from its parent company in 2014 may be recharacterized on the basis of Article 30 of the Income Tax Act 2005 which is similar to Article 9 of the OECD and UN Model Treaties.

32. *RRA v Ducray Lenoir International*, Commercial High Court, RCOMA 00127/2021/HCC, 14/02/2022; (submitted by Dieudonné Nzafashwanayo).

Whether a refund of withholding tax on a payment made to a Mauritian resident company that did not have a permanent establishment in Rwanda, for the supply of lab and medical equipment to Rwandan public institutions, could be refused because the company did not first use the MAP under the Rwanda-Mauritius treaty. Whether the refund was conditional on the taxpayer establishing that it declared and paid tax in Mauritius on the payment.

Spain

33. *Judgement of March 3, 2020*, Supreme Court; (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/Abelardo Delgado)).

Whether the meaning of permanent establishment under Article 5 of the Spain-Switzerland treaty could be based on the definition in a later model convention and its commentaries.

[Consejo General del Poder Judicial: Buscador de contenidos](#)

34. *Judgment of November 5, 2020, Supreme Court*; (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/ Abelardo Delgado)).

Whether Article 9 of the France-Spain treaty provides a justification for denial of a deduction in isolation from domestic transfer pricing or other rules.

[Consejo General del Poder Judicial: Buscador de contenidos](#)

35. *Judgment of July 2, 2020, September 17, 2020 and October 22, 2020, Supreme Court*; (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/Abelardo Delgado)).

Whether different mechanisms for double taxation relief on dividends received from entities in which more than 5 percent of the share capital was owned, that depended on the residence of the entity paying the dividends was contrary to the free movement of capital. Dividends from foreign entities were relieved for foreign tax actually paid while dividends from Spanish entities were fully relieved from the tax payable.

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36. *Judgment of March 2, 2021, Supreme Court*; (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/ Abelardo Delgado)).

Whether dividends from Spanish companies received by Norway's central bank were subject to non-resident dividend tax restricts the free movement of capital, when the Bank of Spain is exempt from corporate income tax for the same type of income.

[Consejo General del Poder Judicial: Buscador de contenidos](#)

37. *Judgments of December 17, 2020 and of December 22, 2020, in appeals 5081/2018, 6746/2018 and 6035/2018, Supreme Court*; (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/ Abelardo Delgado)).

Whether Canadian pension funds that received dividends from Spanish listed entities on which 15% tax was withheld as permitted under the Canada-Spain treaty when under domestic law, resident pension funds were taxed at 0% violates EU law and the sufficiency of exchange of information under Article 26 of the treaty to determine the comparability of Canadian pension and domestic pension funds.

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38. *Judgments of January 21, 2021, in appeals 4768/2018, 5086/2018 and 6760/2018*, the Supreme Court; (submitted by IFA Spain (José Luis Gonzalo/Rafael Calvo/ Abelardo Delgado)).

Whether in determining a violation of free movement of capital due to the different tax treatment for certain investors resident outside the EU or the EEA when compared with their resident counterparts, the nonresident investor is able to show that the excess tax incurred in Spain is not relieved through a deduction of that tax in its country of residence.

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39. *Judgment of May 31, 2021, National Appellate Court*; (submitted by IFA Spain (Rafael Calvo/ Abelardo Delgado)).

Whether the burden of proving abuse of the Parent-subsidiary Directive exemption lies with the tax authorities and whether an abusive purpose can be presumed because the ultimate parent company is established outside the EU (Qatar) or because it is a holding company.

Sweden

40. *Judgement in Lexel case as of 22 March 2022*, Supreme Administrative Court; (submitted by IFA Sweden (Jerome Monsenego/Sara Fjell)).

The Court ruled on the compatibility of interest deduction limitations with EU law following the CJEU Lexel judgement in January 2021.

Domestic application of Lexel

<https://www.domstol.se/globalassets/filer/domstol/hogstaforvaltningsdomstolen/2021/domar-och-beslut/4849-4850-18.pdf>

Follow-up of Lexel, with different circumstances -

<https://www.domstol.se/globalassets/filer/domstol/hogstaforvaltningsdomstolen/2021/domar-och-beslut/2810-18-2811-18.pdf>

Switzerland

41. *Judgment 2C 799/2021 dated 9 May 2022*; Federal Supreme Court.

Foreign entity characterisation and piercing the corporate veil in the context of a Liechtenstein Anstalt and the character of receipts from it by a Swiss resident.

Uganda

42. *Uganda Revenue Authority v Cowi A/S HCCA No. 0034 of 2020*, (submitted by Dieudonné Nzafashwanayo).

Whether a company that carries on a business both in and outside Uganda, the head office and branch are to be considered a single taxable person for VAT purposes, and accordingly, transactions between the two parts of a foreign company fall are supplies for VAT. Reliance on decisions of the CJEU.

The United Kingdom

43. *Oppenheimer v HMRC*, [2022] UKFTT 112 (TC) First-Tier Tribunal.

The application of the tie-breaker in Article 4(2) of the South Africa/UK treaty in a case concerning a very high net and mobile worth individual with interests in several countries.

[JONATHAN OPPENHEIMER v Revenue & Customs \[2022\] UKFTT 112 \(TC\) \(24 March 2022\) \(bailii.org\)](#)

44. *Royal Bank of Canada v HMRC* [2022] UKUT 45 (TCC); Upper Tribunal.

The meaning of immovable property in Article 6(2) of the Model treaties in the context of complex but common arrangements for the exploitation of oil and gas resources and the financing of those activities.

[45.pdf \(bailii.org\)](#)

45. *G E Financial Investments v HMRC* [2021] UKFTT; First-Tier Tribunal.

Whether a UK resident company that is deemed to be a US person for US tax purposes by reason of a stapled stock arrangement is “liable to tax” in the US by reason of residence, place of management etc within Article 4(1) of the UK- United States treaty in the context of a complex cross-border financing structure. The case also concerned the meaning of permanent establishment and credit for foreign tax.

[TC08160.pdf \(bailii.org\)](#)

United States

46. *Vitaly Nikolaevich Baturin v. Commissioner of Internal Revenue*, 20-1648, US Court of Appeals.

Whether payments received by a Russian researcher working in the US were income from employment within Article 15 or research grants within Article 18 of the Russia - US Treaty.

[Vitaly Baturin v Commissioner, Internal Revenue | 20-1648 | Court Records - UniCourt](#)