

Substantive Scope of the Model Conventions (Income and Capital vs Estates, Inheritances, and Gifts)

Conceptual Framework

- What is the substantive scope of the OECD Model Convention on Income and Capital (IC) and the OECD Model Convention on Estates, Inheritances, and Gifts (EIG)?
- What are the differences in structure of Article 2 of both Model Conventions?
- How does the lack of the phrase “*in particular*” in Article 2 (3) OECD EIG affect its interpretation?
- What is the intended relationship between both Model Conventions?
- What are the delimiting criteria between the scope of both Model Conventions?
- Does the possibility for overlap in substantive scope exist and can it be solved by interpretation?

Structural Analysis

- Art. 2 of both Model Conventions share fundamentally the same structure
- Both Model Conventions clearly intend to cover different types of taxes
- Art. 2 OECD IC features an illustrative list that is in principle complete
- In Art. 2 para. 3 of the OECD EIG “*in particular*” is removed, resulting in an exhaustive list at the time of signing the treaty
- Art. 2 para. 1 and 2 OECD EIG are relevant only for the interpretation of similar taxes according to Art. 2 para. 4 OECD EIG

Relationship & Delimiting Criteria

- The relationship between the two Model Conventions is meant to be complementary but also exclusive
- Relevant criteria for delimitation are:
 - Periodicity
 - Market Activity Connection
 - The way the tax is levied
 - Gratuitousness
 - Taxation of flow vs a stock/asset
- No single criteria reliably leads to a clear distinction

Overlap between the scope of both Model Conventions

- Defining a precise boundary between the substantive scope of Art. 2 para. 1 and 2 of both Model Convention is difficult
- The general definitions in Art. 2 para. 1 and 2 do not produce overlap by themselves
- There generally are three cases of overlap in scope according to the literature:
 - The list in Art. 2 para. 3 amplifying the scope of one Model Convention, to include a tax that would be covered by the scope of the other Model Convention
 - Taxation occurring upon a deemed realization upon death or on a gratuitous transfer (e.g. exit taxation)
 - If Art. 20 OECD IC is interpreted broadly, it may also apply to payments given to students or apprentices that come with no conditions attached, which could be categorized as a gift.
- The result of overlap can be double non-taxation and occurs frequently due to amplification of Art. 2 para. 3—therefore it is a result of the States own treaty negotiations.

