

# Administration of the Application of Bilateral Tax Treaties

Richard A. Altshuler  
Professor Emeritus of Tax Law  
Boston College Law School

Brian J. Arnold  
Senior Adviser  
Canadian Tax Foundation

UN-ITC Workshop on Administration of Tax Treaties  
and Addressing Base-Eroding Payments  
Berlin 1-16-2014

## Introduction

Administration of issues related to  
on Administration of Double Taxation

Purpose of presentation

- Some background
- Description of the topic
- Identification of the issues

Focus on developing countries  
and emerging economies

## Topic

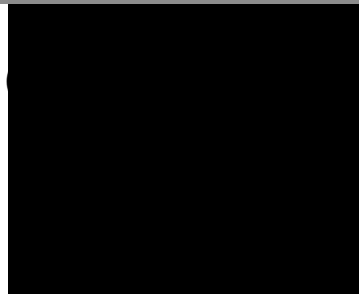
Administration or practical application of treaties

Comes after negotiation of treaty

In (or) (as) practical issues (how) does a country provide the benefits of a treaty?

---

' +tline of ' (er



## Relationship between and domestic

Tax treaties generally have  
domestic law in the event of

This priority may be a constitutional  
statutory or judicial requirement

Can domestic law override a tax treaty?

- E.g., domestic anti-avoidance rules
- Possible in some countries, but not in others

7

## Application rules in T

every few application rules in  
models

Commentary indicates how provisions of  
treaty are applied is a matter for domestic  
law

Paragraph 1 < Commentary on Article 1 >  
Paragraph 1? of Commentary  
on Article 11

8

## Application of Articles in T

Articles 11 and 15

The competent authorities of the Contracting States shall by mutual agreement settle the manner of application of these limitations

Where provided

Country is free to require withholding at treaty rate or at domestic rate and require nonresidents to apply for refund

OECD Commentary expresses preference for withholding at treaty rate

9

## Other Treaty Application

Article 7(4) Non-discrimination

– Article 7(4), (5) and (6) apply to requirements

Commentary indicates that additional information requirements and reversed burden of proof on domestic enterprises owned or controlled by nonresidents is not discriminatory

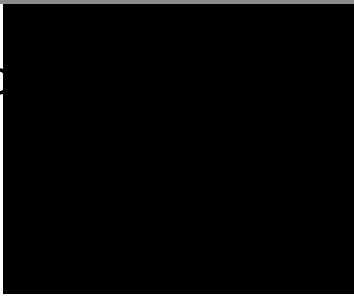
Article 7(5) and (6) do not extend to nonresident requirements

10



---

Appli"ation **6**+les in !c







## Role of the Tax Authority

Where is responsibility for tax treaties located in the tax administration?

- Centralized unit or decentralized
- International unit
- Separate unit for nonresidents

Development of expertise concerning tax treaties

17

## Role of the Tax Authority

Tax authorities must have the necessary power under domestic law to investigate information and collect tax

Tax authorities should provide information to taxpayers

- Text of treaties
- Forms
- Information required
- Time limits

Possibility of binding rulings or informal guidance

18

## Persons Entitled to Treat

### Residence determinations

- Person (relatively easy to determine)
  - Resident for Articles 1 & 2 ( $\leq \$70,750$  and  $\leq 183$  days)
    - 3 Easy to determine as "country applies its own domestic law")
  - Resident for most articles determined under law of the other state
    - 3 Resident "certificates"
- ! Dual residents  
\* Hybrid entities

19

## Beneficial Ownership

### Definition for Articles 1 & 2

### 9 any issues and much more

- International fiscal meaning or meaning under domestic law) 3
- 'EC! Commentary (used in  $\leq 175$  indicates term has an international fiscal meaning
- Broad anti-avoidance rule or limited to agents, nominees and pre-conditions 3

20

## Application of Tax Treaties Countries in 6e

Important primarily for relief from  
taxation and nondiscrimination  
\$7075 and 0&5

Article 19 relief by way of exemption or  
foreign tax credit

- Most countries use both methods

! Details for application supplied by domestic  
law. Article 19 is broad and general

21

## Article 4 Issues

### Credit method

- Timing of income, foreign exchange, limit
- Need proof as to foreign tax paid and information about foreign income
- Tax-sparing provisions

23

## Application of Tax Treaty to Nonresident

15 Identify nonresidents subject to tax

5 Gather information

5 Determine whether nonresident qualifies for treaty benefits

75 Determine the reduction in source country tax and the manner of delivery

5 Collecting tax

## Nonresidents Earning Profits

Once it has been determined that a nonresident is entitled to benefits of participation, the applicable article is determined by the following:

### Possibilities

- Article 8:4 immovable property
- Article 14:4 business profits
- Article 17:4 international shipping and air transport
- Article 17:4 professional and independent services
- Article 1A:4 entertainment and sports activities
- Article 14:4 other income

25

## Issues under Article 8

Identify nonresidents carrying on business in the country

Determine the country in which the tax liability arises

Threshold is business carried on through a PE

- Intense factual
- Requires good information

Does another article apply? see Article 8:5

Determination of profits attributable to PE

- Computation of income under domestic law
- Net income - Articles 5(6) and 6(6)
- Taxable income under treaty

26



## Investment Income

Same steps as for nonresidents generally

Which article applies depends on the type of payment

Beneficial owner retirement for Articles 11 and 13

Most countries use final withholding so that

withholding agent is responsible for determining treaty benefits

Article 13 Capital gains presents special difficulties

29

## Tax Avoidance and Tax

Topic is covered in detail in Commentary  
Article 1

Most tax treaties prevent the application of  
domestic anti-avoidance rules

- The subsequent commentarial issue

Anti-avoidance rules in tax treaties

Commentary cautions against excessive reliance  
on specific rules

Interpretation of tax treaties to prevent abuse

30

---

## Tax Avoidance and Tax

### The guiding principle

The guiding principle is that the benefits of a double tax convention should not be available where a taxpayer enters into certain transactions or arrangements solely or primarily to secure a more favourable tax position and obtaining that more favourable treatment in these circumstances would be contrary to the object and purpose of the relevant provisions.

Important to ensure need to prevent abuse and



