interpretation NOW!

Episode 53 – interpretation of DTAs

Australian Government
Australian Taxation Office

Australian courts in recent years have had much to say on the interpretation of Double Tax Agreements (DTAs), elaborating on earlier decisions like *Thiel*. The Full Federal Court decisions in *SNF (Australia)*, *Chevron*, *Satyam* and *Burton* have reiterated the key principles. They again show how important it is to keep in mind the overarching objectives of DTAs, namely the avoidance of double taxation (on specified types of income) and the combatting of fiscal evasion. They promote the interpretation of the particular Article being applied that best aligns with its scope and objective and avoid interpretations that are manifestly absurd or unreasonable. Remember to get the facts right because they define the treaty issue and are critical to framing the answer.

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1 Start with the domestic law

Start with the domestic law, not the treaty. A treaty does not become part of Australia's domestic law until it has been legislated by parliament[1]. The Agreements Act gives our DTAs the force of law and requires the Assessment Acts to be 'read as one' with the Agreements Act[2]. Thus, the legislated DTA text becomes part of the overall legislative framework for assessing the income tax liabilities of relevant taxpayers and has priority over the Assessment Acts.

2 Text, context, text

Art 31 of the *Vienna Convention of the Law of Treaties* provides that a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context'. The courts have said that a holistic approach is to be taken in line with Art 31[3]. The text must be given primacy in the interpretation process and regard should be had to the 'four corners of the actual text'[4]. Same mantra applies – text>context>text.

3 Object & purpose

Art 31 requires a DTA to be interpreted in light of its object and purpose. DTAs pursue a number of objectives – the sharing of taxing rights, the avoidance of double taxation and the prevention of fiscal evasion, including through the exchange of information between tax authorities. They are not intended to promote tax avoidance, nor are they limited to conferring benefits on taxpayers; they do not operate only as a *shield*[5]> see Episode 47!

4 Liberal approach

DTAs should be interpreted in a 'more liberal manner' than domestic legislation[6] because DTAs are negotiated texts and often fail to demonstrate the precision of drafting seen in domestic legislation. Hence, they cannot be expected to be applied with 'taut logical precision'[7]. TR 2001/13 (at [93-4]) provides that the need for a liberal interpretation is directed to the rules of construction to be adopted, rather than the width and ambit of the content of any DTA provision.

5 Other languages

DTAs are often written in multiple languages. Each authenticated version is equally valid and can be relied on[8] (unless the DTA provides or the parties agree that, in case of divergence, a particular text shall prevail). The terms of the DTAs are presumed to have the same meaning[9]. In the case of a difference between the meanings, Art 33(4) says that the one which best reconciles the texts, having regard to the object and purpose, shall be adopted.

6 Supplementary means of interpretation

Under Art 32, supplementary materials can be used when an Art 31 interpretation produces an 'ambiguous or obscene' meaning or 'a result which is manifestly absurd or unreasonable'. Remember: (1) never go straight to the commentary, (2) DTAs are negotiated texts so commentaries are often of limited use, and (3) the safer course of action is to construe the words of the DTA itself in their context[10]. Commentary cannot override the DTA text.

7 Version of commentary

Some say commentaries are only applicable to DTAs *subsequently* concluded[11]. The OECD says later commentaries can be used for interpreting earlier treaties except when the OECD model has changed in *substance*[12]. Well-reasoned commentaries thus provide insight as to what the meaning is and has always been, unless there has been a substantive change. Note that Div 815 specifies the relevant version of OECD commentary to use in transfer pricing cases.

8 Foreign case law

Beware of relying too heavily on foreign case law. Decisions of foreign courts are not binding and there are often fundamental differences between how countries give effect to DTAs and their approaches to interpretation can influence the tax outcomes of foreign cases[13]. The persuasiveness of a decision will depend on the reputation and status of the court in question[14] and whether the foreign court is interpreting a DTA with 'identical or similar language'[15].

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[1] Teoh [1995] HCA 20 (at [25]), NBGM [2006] HCA 54 (at [61]).
[2] ss 4 & 5 of the *International Tax Agreements Act 1953* (Cth), Episode 19.
[3] Task Technology [2014] FCAFC 113 (at [12]), Episode 3.
[4] McDermott [2005] FCAFC 67 (at [38]), Burton [2019] FCAFC 141 (at [122]).
[5] Satyam [2018] FCAFC 172 (at [26]).
[6] Lamesa (1997) 77 FCR 597 (at 605), Morrison [2002] HCA 44 (at [16]).
[7] Applicant A (1997) 190 CLR 225 (at 254-255).
[8] Thiel (1990) 171 CLR 338 (at [9]).
[9] Article 33(3) of the Vienna Convention on the Law of Treaties [1974] ATS 2.
[10] Burton [2019] FCAFC 141 (at [124]), Kabushiki (2005) 224 CLR 193 (at [126]).
[11] Lamesa (1997) 97 ATC 4229 (at 4237), McDermott [2005] FCAFC 67 (at [42]).
[12] OECD Model Tax Convention 2017 (at [35-36]), TR 2001/13 (at [106-108]).
[13] Satyam [2018] FCAFC 172 (at [21]), for example.
[14] *Smallwood* [2010] EWCA Civ 778 (at [26]).
[15] Lamesa (1997) 77 FCR 597 (at 603).

Episode 54 – unsatisfactory consequences; purpose and objects (again); status of notes; teleological approach

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