

Legal Interpretation of Tax Law

Second Edition

Edited by

Robert F. van Brederode
Richard Krever



Wolters Kluwer

Summary of Contents

Editors	v
Contributors	vii
Preface to the First Edition	xxvii
Preface to the Second Edition	xxix
List of Abbreviations	xxxi
CHAPTER 1	
Legal Interpretation of Tax Law: A Reflection on Methods and Issues <i>Richard Krever & Robert F. van Brederode</i>	1
CHAPTER 2	
Legal Interpretation of Tax Law: Australia <i>Richard Krever & Peter Mellor</i>	15
CHAPTER 3	
Legal Interpretation of Tax Law: Brazil <i>Luís Eduardo Schoueri</i>	47
CHAPTER 4	
Legal Interpretation of Tax Law: Canada <i>Kim Brooks</i>	75
CHAPTER 5	
Legal Interpretation of Tax Law: China <i>Dongmei Qiu</i>	99

Summary of Contents

CHAPTER 6	
Legal Interpretation of Tax Law: The European Union	
<i>Robert F. van Brederode & Gerard Meussen</i>	133
CHAPTER 7	
Legal Interpretation of Tax Law: France	
<i>Thomas Dubut</i>	191
CHAPTER 8	
Legal Interpretation of Tax Law: Germany	
<i>Caroline Heber & Christian Sternberg</i>	213
CHAPTER 9	
Legal Interpretation of Tax Law: Hong Kong	
<i>Wilson Chow</i>	239
CHAPTER 10	
Legal Interpretation of Tax Law: Italy	
<i>Carlo Garbarino</i>	263
CHAPTER 11	
Legal Interpretation of Tax Law: Japan	
<i>Yoshihiro Masui</i>	303
CHAPTER 12	
Legal Interpretation of Tax Law: Russian Federation	
<i>Danil V. Vinnitskiy</i>	317
CHAPTER 13	
Legal Interpretation of Tax Law: Republic of South Africa	
<i>Robert C. (Bob) Williams</i>	347
CHAPTER 14	
Legal Interpretation of Tax Law: United Kingdom	
<i>John Snape</i>	373
CHAPTER 15	
Legal Interpretation of Tax Law: United States of America	
<i>Steve R. Johnson</i>	401
Bibliography	439
Table of Cases	471

Table of Contents

Editors	v
Contributors	vii
Preface to the First Edition	xxvii
Preface to the Second Edition	xxix
List of Abbreviations	xxxi
CHAPTER 1	
Legal Interpretation of Tax Law: A Reflection on Methods and Issues <i>Richard Krever & Robert F. van Brederode</i>	1
§1.01 What Is Interpretation of Law?	1
§1.02 Some Considerations on the Interpretation of Tax Law	7
§1.03 The Additional Challenges of Tax Law Interpretation	9
§1.04 Comparative Study of Tax Interpretation	12
CHAPTER 2	
Legal Interpretation of Tax Law: Australia <i>Richard Krever & Peter Mellor</i>	15
§2.01 Australia's Tax System: Constitutional Background	15
[A] Introduction	15
[B] Constitutional Restrictions on State Taxation	16
[1] Indirect Tax	16
[2] Income Tax	18
[C] Limitations on Commonwealth Taxation Powers	20
§2.02 Income Tax Interpretation	23
[A] The Key Concept of 'Ordinary Income'	24

Table of Contents

[B]	The Concept of 'Capital' Expenses	26
[C]	Literal and Purposive Interpretation of Substantive Provisions and the General Anti-avoidance Provision	29
[D]	'Plain English' and Principle-Based Drafting of the Income Tax Legislation	32
§2.03	Interpretation of GST/VAT	35
[A]	Introduction	35
[B]	Approaches to Interpretation	36
[C]	Interpretation: Some Specific Instances	39
[1]	The Transitional Provisions and Long-Term Contracts	39
[2]	Exemptions and Classifications	40
§2.04	Treaties	42
[A]	Background	42
[B]	Interpretation of Australia's Taxation Treaties	43
§2.05	Summary	46
CHAPTER 3		
Legal Interpretation of Tax Law: Brazil		
	<i>Luís Eduardo Schoueri</i>	47
§3.01	Tax Jurisdiction Allocation Within Brazilian Federalism	47
§3.02	The Complementary Law in Tax Matters	49
§3.03	Concepts of Private Law and Interpretation of the Constitution	51
[A]	The Role of Article 110 of the National Tax Code	51
[B]	The Expression "Payroll"	52
[C]	The Leasing of Movable Goods and the Rendering of Services	54
[D]	Revenues from Billings	55
[E]	Financial Leasing and Rendering of Services	58
[F]	Software and the Concept of Merchandise	59
§3.04	Interpretation of Tax Planning	62
[A]	Administrative Procedures in Brazil	62
[B]	Tax Planning in CARF Case Law	63
§3.05	Interpretation of Tax Treaties	69
[A]	Introduction	69
[B]	The Vienna Convention on the Law of Treaties	70
[C]	The OECD Commentaries	71
[D]	Income from the Supply of Technical Services	71
§3.06	Conclusions	74
CHAPTER 4		
Legal Interpretation of Tax Law: Canada		
	<i>Kim Brooks</i>	75
§4.01	Introduction	75
§4.02	Canada's Tax System	76

	[A] Federal System Informs the Legislative Framework	76
	[B] Design of Adjudication Framework	77
§4.03	Tax Interpretation: The Underlying Theory of Interpretation Reflected by Tax Decisions at the Supreme Court of Canada	78
§4.04	Canada's Approach to the Resolution of Common Dilemmas of Legal Interpretation in the Context of Tax Law	82
	[A] The Special Nature of Tax Law: The Legacy of the Early British Case Law	82
	[B] The Interaction Between Tax Legislation and Common Law	85
	[C] The Role of Administrative Guidance	86
	[D] The Role of Accounting Principles	86
§4.05	Interpretive Aids	87
	[A] The Role of Legislative Intent and Parliamentary Documents	88
	[B] The Role of Secondary Materials and Materials from Other Jurisdictions	89
§4.06	Interpretive Conventions	90
	[A] Two Official Languages and Two Legal Systems	90
	[B] Maxims of Word Usage	91
	[C] Maxims Based on Conventions of Grammar	93
	[D] Maxims Based on Overlap	93
§4.07	The GAAR	94
§4.08	GST Interpretation	96
§4.09	Treaty Interpretation	97
§4.10	Summary	97
CHAPTER 5		
Legal Interpretation of Tax Law: China		
	<i>Dongmei Qiu</i>	99
§5.01	Introduction	99
§5.02	Rules on Legal Interpretation in General	100
§5.03	Tax System in China	101
§5.04	Judiciary Interpretation: A Weak Role in the Interpretation of Tax Law	105
	[A] Cultural Barriers	108
	[B] Legislative Obstacles	109
	[C] Political or Institutional Hindrance	111
	[D] Understatement of the Verdicts	112
§5.05	Administrative Interpretation: The Leading Force in Tax Law Interpretation and Policy Development	112
§5.06	Interpretation of Tax Law in Practice: A Prelude	116
	[A] Interrelation Between Judicial Interpretation and Administrative Interpretation	117
	[B] Interrelation Between the SAT and Local Tax Agencies on the Interpretation of Tax Law	118

Table of Contents

	[C] Interpretation of Double Tax Treaties	119
	[D] Interpretation of Anti-avoidance Rules	121
§5.07	Interpretation of Tax Law in Practice	123
	[A] <i>Weihai</i> (November 2010)	124
	[B] Recharacterization of Service Income as Dividends	125
	[C] Who Is the 'Beneficial Owner' under Tax Treaties?	127
	[D] Permanent Establishment Arising from Cross-Border Secondment	129
§5.08	A Brief Summary	132
CHAPTER 6		
Legal Interpretation of Tax Law: The European Union		
	<i>Robert F. van Brederode & Gerard Meussen</i>	133
§6.01	Introduction	133
§6.02	The Essential Role of Taxation in Realising the Internal Market	136
§6.03	Cooperation Between National Courts and ECJ	138
	[A] Function of Preliminary Rulings	138
	[B] Conditions for Preliminary Ruling Request	141
	[1] Relevance	141
	[2] Acte Eclairé	142
	[3] Acte Clair	142
§6.04	Interpretation of EU Tax Law	144
	[A] General Approach of ECJ and Sources	144
	[B] Application of European Legal Principles	145
	[C] Transplanted Categories	150
	[D] Conforming Interpretation	151
	[E] Case Law on VAT	154
	[1] General Remarks	154
	[2] Strict or Restricted Scope Interpretation	155
	[3] Teleological Interpretation: General	158
	[4] Teleological Interpretation: Neutrality Principle	164
	[F] Case Law on Corporate Income Tax	168
	[1] General Remarks	168
	[2] Freedom of Establishment and Host Member States	171
	[a] Comparability	172
	[b] Objective Justification and General Interest Justifications	173
	[3] Freedom of Establishment and Origin Member States	174
	[4] Strict or Restricted Scope Interpretation	176
	[5] OECD Model Treaty Standards as Source of Interpretation	177
	[a] Introduction	177
	[b] The Interaction Between Double Tax Conventions and EU Law	179

	[i] General Remarks	179
	[ii] The National Treatment Principle	180
	[iii] Reverse Discrimination	181
	[c] Neutralisation	182
§6.05	Abuse of Law in the EU	183
§6.06	Conclusions and Final Remarks	187
CHAPTER 7		
Legal Interpretation of Tax Law: France		
	<i>Thomas Dubut</i>	191
§7.01	Introductory Remarks on the French Legal System	191
	[A] The Continental Character of the French Legal System	191
	[B] The Dual System of Courts in France	192
	[C] The Judicial Review of Legislation Enacted by the Parliament in France	193
	[D] The Place of Tax Law in the French Legal and Jurisdictional Order	195
§7.02	Meaning and Functions of Legal Interpretation in French Legal Theory	196
	[A] The French Debate on Interpretation	196
	[B] The Various Meanings of the Term 'Legal Interpretation'	197
§7.03	The Absence of Interpretation Rules in French Tax Law	198
§7.04	Legal Interpretation of Tax Law by the French Tax Administration	198
	[A] The Role of the 'Administrative Doctrine'	198
	[B] The Main Orientations of the 'Administrative Doctrine'	199
	[C] The Legal Effects of the 'Administrative Doctrine'	200
§7.05	Legal Interpretation of Tax Law by the Judge	201
	[A] The French Debate over the 'Autonomy of Tax Law'	201
	[B] The Strict Interpretation of the Tax Rules by the Courts	202
	[C] The Cases of Creative Interpretation	204
	[D] The So-called Economic Reasoning in Tax Case Law	205
	[E] The So-called 'Neutralizing Interpretation'	206
	[F] The Interpretation of Double Tax Treaties by the French Courts	207
§7.06	Legal Interpretation of VAT Law	209
§7.07	Conclusion	210
CHAPTER 8		
Legal Interpretation of Tax Law: Germany		
	<i>Caroline Heber & Christian Sternberg</i>	213
§8.01	Introduction	213
§8.02	The Canon of Interpretation Rules	214
	[A] The Wording of a Provision	216
	[B] Statutory System	217

	[C] Purpose of a Provision	218
	[1] Historical Interpretation: Legislative Intent	218
	[2] Purpose of a Statute	219
	[a] Purpose of Tax Laws	219
	[b] Tax Law in the Overall Legal Framework and Transplanted Categories	220
	[c] Economic Approach	221
	[d] Argument for a Contrary Treatment	222
§8.03	Further Development of the Law by Judicial Interpretation	223
	[A] Analogy	224
	[B] Teleological Reduction and Extension	225
	[C] The Rule of Law and the Principle of Separation of Powers	226
§8.04	Tax Planning, Economic Approach and General Anti-abuse Rules	226
§8.05	Interpretation in the Light of Constitutional Law and European Union Law	230
	[A] Constitutional Law	230
	[B] Interpretation of German Tax Law in Conformity with European Union Directives	230
§8.06	Special Rules for International Tax Law	234
	[A] Dualism	234
	[B] Principles for the Interpretation of International Agreements	234
	[1] General Observations	234
	[2] Vienna Convention on the Law of Treaties	235
	[3] OECD Materials	236
	[C] Treaty Override	237
§8.07	Final Remarks	238
CHAPTER 9		
Legal Interpretation of Tax Law: Hong Kong		
	<i>Wilson Chow</i>	239
§9.01	Introduction and Background	239
	[A] The Taxation System in Hong Kong	239
	[B] Relations Between the Central and Sub-central Government in Terms of Taxing Power, Tax Collection and Revenue Sharing	240
	[C] The Role of the Doctrine of Precedent for the Courts When Interpreting Tax Law	241
	[D] No Value Added Tax / Goods and Services Tax in Hong Kong	242
	[E] Double Tax Agreements	242
§9.02	Domestic Rules for Interpreting Tax Law	242
	[A] Historical Perspective	242
	[B] The Modern Approach	243
	[C] The Tax Avoidance Context	245
	[D] What External Sources Can a Court Consider When Interpreting Legislation?	248

[E]	Principles of Commercial Accounting	249
[F]	Legislative Mistakes	250
[G]	The Effect of the Bill of Rights Ordinance on Statutory Interpretation	250
[H]	Transplanted Categories	251
[I]	Administrative Concessions	252
[J]	IRD Interpretation and Practice Notes	252
[K]	Judicial Precedents and Judgments of Foreign (Commonwealth) Courts	253
§9.03	What Do the Courts Actually Do?	254
[A]	The Tax Avoidance Context in a Nutshell: The Instructive Case of <i>Arrowtown</i>	254
[B]	Unfairness and the Difficulties in Applying the Purposive Approach: <i>Braitrim</i>	255
[C]	The Problems of Balancing and Choosing Between Competing Considerations: <i>Turner Entertainment Networks</i>	257
§9.04	Conclusions	260
CHAPTER 10		
Legal Interpretation of Tax Law: Italy		
	<i>Carlo Garbarino</i>	263
§10.01	Introduction	263
[A]	Definitional Concepts About Interpretation in the Italian Tax System	263
[B]	Actor-Based Interpretative Approaches and Italian Tax Law in Action	266
[C]	Complexity of Tax Laws and Its Impact on Interpretation	268
§10.02	Strict Interpretation of Tax Laws	270
[A]	The Plain Meaning of the Text	271
[B]	Legislative Definitions and Conceptual Transplants	272
§10.03	Different Types of Purposive Interpretation of Tax Laws	274
[A]	Intention-Based and Systemic Interpretation	275
[B]	Analogical Interpretation	276
[C]	Extensive Interpretation	278
[D]	Conforming Interpretation	279
[E]	Tax Implied Norms and Tax Principles	281
§10.04	The Use of Purposive Interpretation to Address Tax Avoidance	283
[A]	Basic Anti-avoidance Interpretation	283
[B]	The Interpretive Argument Based on Substance over Form Established by the Italian GAAR	284
[C]	Judicial Approaches to the Abuse of Tax Laws Leading to a GAAR	286
§10.05	Interpretive Tax Norms and Guidelines	291
[A]	The Conundrum of Statutory Interpretive Norms	291

Table of Contents

	[B] Non-statutory Interpretive Guidelines	293
§10.06	Interpretation of Tax Treaties	294
	[A] Strict Versus Purposive Interpretation and Three Methods to Interpret Tax Treaties	294
	[B] Renvoi and Strict Interpretation of Tax Treaties	296
	[C] Contextual and Autonomous Interpretation of Tax Treaties	297
	[D] The Role of the OECD Commentary in the Interpretation of Italian Tax Treaties	298
§10.07	VAT Interpretation	300
CHAPTER 11		
Legal Interpretation of Tax Law: Japan		
	<i>Yoshihiro Masui</i>	303
§11.01	Introduction	303
§11.02	Background	304
	[A] Constitutional Background	304
	[B] More Institutional Backgrounds	305
	[1] Accumulated Number of Court Cases	305
	[2] Tax Mix	305
	[3] Federalism Aspects	305
	[4] NTA's Interpretation	306
	[5] National Tax Tribunal	306
	[6] Judiciary	306
	[7] Contrast with Other Areas of Law	306
§11.03	Interpretation of VAT Law	307
	[A] International	307
	[B] Domestic	307
	[1] In General	307
	[2] VAT and Income Tax Compared	307
	[3] Objective and Purpose of the Provision	308
	[4] Predecessor Indirect Tax Laws	308
§11.04	Interpretation of Income Tax Law	309
	[A] International	309
	[1] <i>Glaxo</i> Case	309
	[2] Other Treaty Cases	310
	[B] Domestic	310
	[1] Literal/Teleological Interpretation	310
	[2] Transplanted Category	311
	[3] Tax Avoidance: SAARs	312
	[4] Tax Avoidance: Judicial Activism	314
	[5] Common Sense	314
	[6] Estoppel	315
§11.05	Conclusions	315

CHAPTER 12

Legal Interpretation of Tax Law: Russian Federation

<i>Danil V. Vinnitskiy</i>	317
§12.01 Introduction	317
§12.02 Tax Authorities, Taxation and Judicial System	319
[A] The Interpretative Power of the Tax Authorities	319
[B] System of Courts and Their Interpretative Jurisdictions	320
[C] Tax System and Principles	323
[1] General Overview of the Russian Tax System and Recent Trends in Tax Policy	323
[a] Tax on Income of Natural Persons	323
[b] Tax on Profits of Organizations	323
[c] Other Business Taxes	323
[d] Value Added Tax	324
[e] Excises	324
[f] Recurrent Taxes on Capital	324
[g] Non-recurrent Taxes on Capital	325
[h] Compulsory Social Security Contributions Paid to Government	325
[i] Environmental Taxes	325
[j] Other Taxes	325
[2] Principles of Russian Tax Law and Interpretation Rules	326
[a] General Constitutional Framework for Legal Interpretation by the Tax Authorities	326
[b] Principle of Legality in Russian Tax Law	327
[c] Principle of Determinacy in Russian Tax Law	327
[d] Principle of Equality and Proportionality in Russian Tax Law	328
[e] Presumption of Bona Fides and the Burden of Proof in Russian Tax Law	328
[f] Right of Appeal and Comprehensive Court Control	328
[g] Compensation for Damages Incurred as the Result of Unlawful Actions	329
§12.03 Administrative Interpretation in Russian Tax Law	329
[A] Individual Acts of Interpretation Issued by Tax Authorities	329
[1] General Overview	329
[2] Legal Framework and Nature	330
[3] Subjective Scope and Objective Scope of a Tax Ruling	332
[a] Applicants Entitled to Obtain a Ruling	332
[b] Issues for Which a Ruling May Be Requested	333
[4] Issuing Authorities: Tax and Financial Bodies	333
[5] Protection Enjoyed by the Recipient of a Ruling (Act of Official Interpretation)	334

Table of Contents

§12.04	Juridical Interpretation in Russian Tax Law	336
	[A] Introduction	336
	[B] Judgments of the Courts as Acts of Interpretation and Sources of Law	336
	[1] Approaches of Academics and Practitioners	336
	[2] The Legislative Basis for the Judicial Role	338
	[3] Special Cases of Procedural Retroactivity in Judicial Interpretation	339
	[C] Judicial Interpretation and Anti-avoidance Doctrines in Russian Tax Law	340
	[1] General Overview	340
	[2] Fluctuations in Precedent	340
§12.05	Interpretation of Tax Treaties in the Russian Legal System	343
	[A] General Overview	343
	[B] Case Law on Thin Capitalization Rules and Non-discrimination Clause as Examples of Tax Treaty Interpretation	344
	[1] General Overview	344
	[2] The Application of Domestic Anti-avoidance Measures to Deny Treaty Benefits	345
§12.06	Conclusion	346
CHAPTER 13		
Legal Interpretation of Tax Law: Republic of South Africa		
	<i>Robert C. (Bob) Williams</i>	347
§13.01	Introduction	347
§13.02	The Interpretation of Fiscal Legislation	351
	[A] The Intention of the Legislature	351
	[B] There Is No Equity About a Tax	356
	[C] <i>Contra Fiscum</i> Principle	357
	[D] The <i>Natal Joint Municipal Pension Fund</i> Case	359
	[E] Interpretation Notes and Advance Tax Rulings	361
§13.03	Disguised Transactions	362
§13.04	Double Taxation	362
§13.05	No Doctrine of Economic Equivalence	363
§13.06	Latin Maxims in Statutory Interpretation	363
	[A] <i>Expressio Unius Est Exclusio Alterius</i>	363
	[B] <i>Eiusdem Generis</i>	364
	[C] <i>Mutatis Mutandis</i>	364
§13.07	The Interpretation Act	364
§13.08	Statutory Definitions	364
§13.09	Commencement of Statutes, Retrospectivity and Repeal	365
§13.10	The Tax Court	365
§13.11	The Tax Board	366
§13.12	The Doctrine of Judicial Precedent	366

§13.13	Internal Practices of the SARS	368
§13.14	Constitutional Aspects of Tax	369
§13.15	Double Tax Agreements	370
CHAPTER 14		
Legal Interpretation of Tax Law: United Kingdom		
	<i>John Snape</i>	373
§14.01	Introduction	373
§14.02	The UK Tax System	374
§14.03	General Principles of Tax Law Interpretation in the UK	377
	[A] Literal Versus Purposive	377
	[B] International Tax Issues	382
	[C] Domestic Tax Issues	383
§14.04	Interpreting Corporation Tax Law	384
	[A] Literal Interpretation Generally Absent	384
	[B] Legislative Amendment by Judges Occasionally Possible	386
	[C] Reception and Rejection of Transplanted Categories	387
	[D] Statutory Interpretation and the GAAR	387
§14.05	Interpreting Value Added Tax Law	389
	[A] Distinctiveness of Administrative Approaches to Statutory Interpretation	389
	[B] Irrelevance of Predecessor Taxes	390
	[C] 'Economic Equivalence' Approaches	393
	[D] Mismatch Between Receipts and VAT Consideration	396
	[E] Significance of Reduced-, Zero-rated and Exempt Supplies	397
§14.06	Conclusions	400
CHAPTER 15		
Legal Interpretation of Tax Law: United States of America		
	<i>Steve R. Johnson</i>	401
§15.01	Governmental, Fiscal, and Judicial Structures	401
	[A] Governmental Structures	401
	[B] Fiscal Structures	402
	[C] Judicial Structures	402
§15.02	Interpretation of International Tax Agreements	403
§15.03	Interpretation of Domestic Law (VAT)	404
	[A] Absence of Federal VAT	405
	[B] State VATs	406
	[C] Judicial Interpretation of State VATs	407
§15.04	Interpretation of Domestic Tax Law (Non-VAT)	408
	[A] Sources of Tax Law	408
	[B] Interpretational Elements	410
	[1] Text and Context	410

Table of Contents

	[2] Purpose	411
	[3] Canons of Construction	412
	[4] Administrative Interpretations	413
	[5] Judicial Precedents	415
§15.05	Interpretational Approaches	415
	[A] Competing Approaches	416
	[1] Literalism	416
	[2] Textualism	417
	[3] Intentionalism	418
	[4] Purposivism	420
	[5] Dynamism	422
	[6] Pragmatism	423
	[B] Prevalent Approaches	424
	[1] Interpretive Body	424
	[2] Era	425
	[3] Institutional Reactions	426
	[4] Is Tax Different?	427
§15.06	Particular Interpretational Issues	428
	[A] Transplanted Character	428
	[1] Accounting Principles	428
	[2] Predecessor Regimes	429
	[3] Law from Other Jurisdictions	429
	[B] Legislative Direction of Interpretation	430
	[C] Correcting Legislative Errors	431
	[D] Incidence of Tax	432
	[E] Interpreting Concessions	432
	[F] Abuse of Law	434
	Bibliography	439
	Table of Cases	471