

The Interpretation of Tax Treaties in Relation to Domestic GAARs

Eivind Furueth

Thesis
submitted to the University of Oslo
in fulfilment of the requirements for the degree of
Doctor of Law

Degree awarded on 15 September 2016



Volume 43
IBFD Doctoral Series

Table of Contents

Preface		xiii
Abbreviations		xv
Part I Introduction		
Chapter 1: Setting the Scene		3
1.1.	The relationship between domestic anti-avoidance rules and tax treaties	3
Chapter 2: Possible Ways of Dealing with a Potential Conflict between Domestic Anti-Avoidance Rules and Tax Treaties		7
2.1.	Resolving the issue	7
Chapter 3: Developing the Research Question		11
3.1.	Introduction	11
3.2.	Circumventing domestic legislation without benefiting from a tax treaty	12
3.3.	The benefit from the transaction/arrangement follows from the tax treaty	13
3.3.1.	Use of domestic legislation as a tool to circumvent tax treaties	13
3.3.1.1.	Introduction	13
3.3.1.2.	A definition in the tax treaty covers the transaction	14
3.3.1.3.	No definition covering the transaction in the tax treaty	15
3.3.2.	Use of a tax treaty as a tool to circumvent domestic legislation	16
3.3.2.1.	Treaty shopping	16
3.3.2.2.	Directive shopping	18
3.3.2.3.	Back-to-back transaction	19
3.3.2.4.	Other distributive rule	20

Table of Contents

3.4.	The relevance of tax treaty GAARs and/or SAARs for the application of domestic anti-avoidance rules	20
Chapter 4:	Outline of the Book	23
4.1.	Explanation	23
Chapter 5:	Legal Sources	25
5.1.	Introduction	25
5.2.	OECD Comm.	26
5.3.	OECD reports and other reports	31
5.4.	UN Comm. as a source of law in the interpretation of tax treaties based on the OECD MC	32
5.5.	Domestic case law as a source of law	34
Chapter 6:	Delimitations	41
6.1.	Tax evasion and sham	41
6.2.	EU/EEA law	41
6.3.	Analysis of domestic anti-avoidance rules	42
6.4.	The concept of beneficial owner	44
6.5.	Formalities	45
Part II OECD and UN Documents Relevant for the Applicability of Domestic Anti-Avoidance Rules in a Tax Treaty Situation		
Chapter 7:	Introduction	49
7.1.	The relationship between domestic anti-avoidance rules and tax treaties	49

Chapter 8:	Historical Overview of OECD Comm. Art. 1 and UN Comm. Art. 1	51
8.1.	OECD Comm. Art. 1	51
8.1.1.	Abuse-of-treaty and domestic anti-avoidance rules	51
8.1.2.	Object and purpose	60
8.1.3.	Is there an inherent “guiding principle” in tax treaties?	63
8.1.4.	2003 OECD Comm. and BEPS	66
8.2.	UN Comm. Art. 1	67
8.3.	Summary	69
Chapter 9:	Interpretation of the Treaty in its Context: The OECD Comm. and the UN Comm.	71
9.1.	OECD Comm. Art. 1 views on domestic anti-avoidance rules	71
9.1.1.	OECD Comm. Art. 1 – In general	71
9.1.2.	OECD’s use of the term “facts” – Various interpretations	78
9.1.3.	The applicability of domestic anti-avoidance rules in relation to articles in the OECD MC other than OECD MC Art. 1	81
9.1.4.	The relevance of the OECD Comm. 2003 and 2017 revision for pre-2003 and pre-2017 treaties	89
9.1.4.1.	Introduction	89
9.1.4.2.	Changes in the Commentary relating to changes in the OECD MC	90
9.1.4.3.	Changes in the Commentary without any changes in the OECD MC	91
9.2.	UN Comm. Art. 1 views on domestic anti-avoidance rules	97
9.2.1.	In general	97
9.2.2.	Specific legislative anti-abuse rules found in domestic law	98
9.2.3.	General legislative anti-abuse rules found in domestic law	99
9.2.4.	Judicial doctrines that are part of domestic law	100
9.2.5.	Specific anti-abuse rules found in tax treaties	101

Table of Contents

9.2.6.	General anti-abuse rules in tax treaties	101
9.2.7.	The interpretation of tax treaty provisions	103
9.2.8.	The applicability of domestic anti-avoidance rules in relation to other articles in the UN MC than UN MC Art. 1	103
9.2.9.	2001 UN Comm. vs 2011 UN Comm.	106
9.3.	Differences and similarities between the OECD Comm. and the UN Comm. regarding Art. 1	109
9.4.	Summary	110
Chapter 10:	Relevance of the Object and Purpose for the Interpretation of Tax Treaties	111
10.1.	The legal background	111
10.2.	The object and purpose of a tax treaty	118
10.2.1.	How to determine the object and purpose of a tax treaty?	118
10.2.2.	More than one object and purpose of a tax treaty	121
10.2.3.	GAARs applied in a tax treaty situation	122
10.2.3.1.	Introduction	122
10.2.3.2.	Increased risk of double taxation	122
10.2.3.3.	Conflicting interests between the two main objects of the tax treaty	125
10.2.4.	GAARs not applied in a tax treaty situation	126
10.2.5.	GAARs applied but only to the extent that the domestic GAAR is in accordance with the guiding principle	128
10.3.	Summary	132
Chapter 11:	The Guiding Principle in 2017 OECD Comm. Art. 1 Para. 61	135
11.1.	Introduction	135
11.2.	First condition of the guiding principle – Main purpose of the transaction is to secure a favourable tax position which would not have been possible without the transaction	138

11.2.1.	The purpose test	138
11.2.2.	The purpose of the transaction	143
11.3.	Second condition of the guiding principle – Obtaining reduced taxation on the transaction or arrangement is contrary to the object and purpose of the relevant provision of the treaty	144
11.3.1.	Introduction	144
11.3.2.	Do the distributive rules have their “own” object and purpose?	145
11.3.3.	Is double non-taxation an object of the treaty?	147
11.3.4.	Summary	152
11.4.	Summary	152
Chapter 12:	Observations on the OECD Comm.	155
12.1.	In general	155
Part III		
Domestic GAAR/SAAR but no Treaty GAAR/SAAR		
Chapter 13:	Introduction	163
13.1.	Alternative ways of dealing with the issue	163
Chapter 14:	Use of Domestic Legislation to Circumvent Domestic Legislation without Benefiting from a Tax Treaty	165
14.1.	Introduction	165
14.2.	Without benefiting from the tax treaty – Domestic anti-avoidance rules outside the scope of the treaty?	171
14.3.	Summary	175

Chapter 15:	The Benefit from the Transaction/Arrangement Follows from the Tax Treaty	177
15.1.	Introduction	177
15.2.	Use of domestic legislation as a tool to circumvent tax treaties	178
15.2.1.	Introduction	178
15.2.2.	A definition in the tax treaty that covers the transaction	179
15.2.3.	No definition in the tax treaty itself	188
15.3.	Use of a tax treaty as a tool to circumvent domestic legislation	201
15.3.1.	Introduction	201
15.3.2.	Redetermination of a counterparty of a transaction	202
15.3.2.1.	In general	202
15.3.2.2.	Outbound situations	206
15.3.2.3.	Inbound situations	218
15.3.2.4.	The relevance of active income in the intermediate company	220
15.3.3.	Recharacterization of a transaction	224
15.3.4.	Secondary adjustment	225
15.4.	Summary	230
Chapter 16:	The Potential Conflict Resolved in the Tax Treaty	235
16.1.	Introduction	235
16.2.	Which anti-avoidance rules are covered by the treaty provision?	236
16.3.	Written or unwritten rules?	238
16.4.	Only explicit anti-avoidance rules or also rules with anti-avoidance effect?	239
16.5.	Amendment of domestic anti-avoidance legislation	242
16.6.	Restricted by the guiding principle	242

16.7.	Unilateral regulation of the applicability – Reciprocity	243
16.8.	The consequence when some tax treaties expressly allow domestic anti-avoidance rules while others do not	244
16.9.	Summary	250
Chapter 17: Both Contracting States Agree on the Anti- Avoidance Situation		251
17.1.	Introduction	251
<p>Part IV</p> <p>The Relevance of a GAAR/SAAR in the Tax Treaty</p>		
Chapter 18: GAARs in the Tax Treaty		255
18.1.	Introduction	255
18.2.	Does a tax treaty GAAR exclude the applicability of a domestic GAAR?	258
18.3.	Tax treaty GAAR in some tax treaties but not all	261
18.4.	Tax treaty GAARs and the abuse-of-treaty doctrine	262
18.5.	Summary	265
Chapter 19: SAARs in the Tax Treaty		267
19.1.	Introduction	267
19.2.	Does a tax treaty SAAR exclude the applicability of a domestic SAAR (which applies in the same way as the tax treaty SAAR but is also broader)?	269
19.3.	Does a tax treaty SAAR exclude the applicability of a domestic GAAR?	272
19.4.	Summary	280

Part V
Conclusions and Final Remarks

Chapter 20: Conclusions	285
20.1. Introduction	285
20.2. Use of domestic legislation to circumvent domestic legislation without benefiting from a tax treaty	287
20.3. The benefit from the transaction/arrangement follows from the tax treaty	288
20.3.1. Introduction	288
20.3.2. Use of domestic legislation as a tool to circumvent tax treaties	288
20.3.3. Use of a tax treaty as a tool to circumvent domestic legislation	289
20.4. The relevance of tax treaty GAARs and/or SAARs for the application of domestic anti-avoidance rules	290
Chapter 21: Final Remarks	293
21.1. Recommendation to resolve the potential conflict between domestic anti-avoidance rules and tax treaties	293
21.1.1. Specific provision in the tax treaty regulating the relationship between domestic anti-avoidance rules and the tax treaty	293
21.1.2. Include a GAAR in the OECD MC and UN MC	294
21.1.3. Clear statement in the OECD Comm.	295
Bibliography	297