DOMESTIC ANTI-AVOIDANCE PROVISIONS: TREATY AND EU OVERRIDES[1]

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PART A: INTRODUCTION

Which is the stronger medicine against domestic anti-avoidance provisions – double tax treaties or EU law? Under the pretext of answering that question this note will look at various aspects of the ability to rely on both to neutralise domestic anti-avoidance provisions.

But, first, it is necessary to categorise domestic anti-avoidance provisions in some way which can be applied across different jurisdictions' tax systems. It is suggested that anti-avoidance provisions, or at least those with an international scope, can be categorised as dealing with each of the three standard means of avoiding, or deferring, tax on income or gains:

(a) the person to whom the income or gain arises leaves the domestic tax net.

(b) the income or gain is "diverted" away from the resident taxpayer to whom it would otherwise have arisen. This can be to a non-resident person or else to someone who is taxed more favourably.

(c) the tax base of the resident taxpayer (and therefore indirectly the income or gain) is eroded through expenses (or tax credits) which are considered, by whatever standard, excessive.

The above categorisation is not exhaustive. There is at least one other category – this applies where the income or gain is transmuted into a form which is taxed more favourably (e.g. income into capital). However it will do as a general framework through which to analyse the possible impact of double tax treaties and EU law on domestic anti-avoidance provisions.

PART B: DOUBLE TAX TREATY OVERRIDES

Introduction

Double tax treaties may not be invoked to increase tax. That represents the broad consensus, although some countries consider that the Associated Enterprises Article of the OECD Model does allow for an increase in taxable profits. In December 2009, for example, the Australian Taxation Office expressed the view that the Associated Enterprises Article could be used independently of the domestic transfer pricing code.[2] This used also to be the view of the UK Revenue many years ago (who also, it is understood, harboured similar views with respect to the Business Profits Article).

Double tax treaties clearly provide for relief from what would otherwise be double taxation by "switching off" domestic law provisions which would otherwise apply. To what extent do they switch off domestic *anti-avoidance* provisions?

Category (a): escaping High Tax State's tax net

Domestic provisions which prevent or restrict the taxpayer leaving the domestic tax net (the first category of avoidance identified above) vary and may depend on whether the resident is a company, trust or an individual.

Incorporation rule

As far as companies are concerned, the first restriction on moving out of the domestic tax net may be, as it is in the UK, that a company incorporated in a jurisdiction (let us call it High Tax State) is always to be regarded as resident there. It may not be possible under that domestic law to re-incorporate in another jurisdiction. (Under UK company law for instance a company cannot move its place of incorporation whilst at the same time retaining its identity, except by private Act of Parliament[3].)

Here we can immediately see the possible benefit of a double tax agreement. A cure to the problem identified is to be found in the residence tie-breaker test contained in appropriate double tax treaties. This may well represent the only way for a company incorporated in High Tax State to change its residence.

Exit charges

Individuals, trusts and companies which cease to be resident in High Tax State may be subject to an exit charge in respect of their assets i.e. they may be treated as realising them at market value immediately before they cease to be resident.

Does a double tax treaty does prevent such a charge from arising? The better view is that it does not. This is on the basis that the deemed disposal takes place immediately before becoming non-resident. There is some case law support for this view. The Canadian case of *Davis* (1980) 80 D.T.C. 6,056 concerned a Canadian exit charge, which took the form of a deemed disposal of assets immediately before the individual ceased to be resident. On appeal it was held by the Canadian court that no conflict with double tax treaties arose. The deemed disposal was made when the individual was Canadian resident – and Canada therefore still had taxing rights at the relevant time.

There is a variation to the exit charge which has been adopted by the UK. No exit charge applies to UK resident individuals. However a “re-entry” charge denies the benefit of non-UK residence where the period of non-residence is temporary. (The UK is understood to be the only jurisdiction which has introduced such a provision.) The basic charge applies to the disposals of assets acquired before ceasing to be UK resident and diposed of while non-UK resident. It deems the gain to arise in the year that the individual becomes UK resident again. Although the gain is deemed to arise in the year of residence, the charge relates to a gain realised by a person who was non-resident at the time and may arguably be considered in breach of an OECD Model Capital Gains Article in a treaty concluded between the UK and the jurisdiction of residence. The UK Revenue realised this point and the provisions were re-enacted to make it clear that they overrode treaties in this respect.

This highlights the first key limitation in relying on double tax treaties to avoid a tax charge: they can be overridden by domestic law. This will of course depend on the relevant jurisdiction – some jurisdictions accord a special status to treaties (for instance, it is understood, Belgium) so that they prevail over subsequent and domestic legislation.[4]

The position is quite different then from the EU law position, given that directly effective EU law takes priority over the domestic legislation in all cases.

Category (b): diversion of income to a non-taxable person

Some anti-avoidance provisions proceed on the basis that where income or gains arising to a non-resident taxpayer have been diverted away from a resident taxpayer in whose hands the domestic tax system considers they should properly have accrued, the domestic code imputes these to the resident taxpayer. Provisions within this category with an international focus include:

a) controlled foreign company regimes, which attribute the income and gains of non-resident companies to resident companies with an interest in them;

b) analogous provisions relating to individuals and trusts;

c) provisions which attribute the income of a non-resident person to an individual who has transferred income-producing assets to the non-resident person (where the individual is able to benefit from the income in some way).

A possible conflict with double tax treaties may arise where the income or gains attributed to the resident of High Tax State by High Tax State are income or gains in fact received by a non-resident person and that person is entitled to the benefit of a double tax treaty between its jurisdiction of residence and High Tax State where the treaty protects the income or gain from a charge to tax imposed by High Tax State. It will be clear that the double tax treaty protects the income or gain from tax imposed by High Tax State in the hands of the *non-resident*. The question which arises is whether the *resident of High Tax State* to whom the income or gains have been attributed is similarly protected from a tax charge imposed by High Tax State i.e. whether it can "piggyback" from the non-resident's double tax treaty protection. The issue has not been fully resolved internationally. There is some support for the proposition that, in principle, the resident may benefit from the relevant double tax treaty in these circumstances.

The principle that "the relief from United Kingdom tax accorded by a double tax treaty can enure for the benefit of a third party" was put forward as correct by Millett LJ, with whom Otton LJ agreed, in the UK case of *Bricom Holdings Ltd v CIR*[5]. The case concerned a CFC charge in respect of UK source interest received by the Netherlands subsidiary of a UK parent. The UK resident company was relying on the interest Article of the 1980 Netherlands/UK double tax treaty, which protected UK source interest received by a non-UK resident, from a UK tax charge. The UK resident taxpayer was therefore seeking to piggyback from the protection from UK tax which the double tax treaty afforded to the Netherlands subsidiary. The court appears to have accepted that in principle such protection was available. However this did not form part of the binding reasoning behind the decision since the protection was not in any event available on the facts for different reasons.[6]

The court in *Bricom* cited the 1972 decision in *Lord Strathalmond v CIR*[7] as support for the proposition that "the relief from United Kingdom tax accorded by a double taxation agreement can enure for the benefit of a third party". Under the law with which the

Strathalmond decision was concerned the income of a wife was attributed to her husband. Since, however, Lady Strathalmond was entitled to the benefit of the UK/US double tax treaty which protected the US dividends from UK tax in her hands, her husband was able to resist the assessment. What are the limits of the *Strathalmond* case? The theoretical question of whether a resident of High Tax State to whom the income or gains of a non-resident have been attributed is entitled to rely on a double tax treaty between High Tax State and the state of the non-resident depends, in the writer's view, on whether one (a) applies the double tax treaty at the level of the non-resident and *then* attributes the double tax treaty-protected income or gain to the resident of High Tax State or (b) applies the double tax treaty only *after* the income or gain has been attributed. In the *Strathalmond* case the application of the relevant double tax treaty to the income of Lady Strathalmond clearly fell to be applied before, rather than after, the attribution to Lord Strathalmond as a result of specific statutory language.[8]

In the former case (*Strathalmond*) it is clear that the double tax treaty will protect the resident against a charge imposed by High Tax State. In the latter case, it will not. Which approach applies will depend on the terms of the statutory provision. What Millett LJ may well have touched on in the *Bricom* case is a principle of treaty, rather than pure domestic, law, to the effect that a Contracting State may not circumvent its obligations by attributing the protected income or gains to a resident of that Contracting State. On this basis there is perhaps a presumption, in the absence of statutory wording to the contrary, that the double tax treaty is to be applied *before* attribution.

What has been the experience in other jurisdictions? Other cases have dealt with the point in the CFC context. It is notable that where the OECD Commentary sanctioning the use of CFC legislation (introduced in 1992) has been taken into account the revenue authority of High Tax State usually wins. See *Oy Apb* (2002)[9] and *Gyoko* (2007)[10].

However in cases where the commentary has not been taken into account a different view has been taken. In *Schneider* (2002) the French Conseil d'état found that the Business Profits Article in the 1966 France-Switzerland treaty (which was amended in 1969 and modelled after Article 7(1)) prevented the application of the French CFC code. The OECD commentary at the time the treaty was negotiated (or amended) did not contain any discussion of CFCs. French jurisprudence has a specific principle that later commentaries are not relevant to earlier-signed double tax treaties. (See also *Remy-Cointreau* (1999) and *Strafor* (1996), both again concerning the 1996 France-Switzerland treaty. Again it was held that the treaty precluded the application of the CFC code.)

Herein lies another weakness of double tax treaties therefore. Even if the words are clear, they may be trumped by a contrary interpretation given to them by the OECD Commentary. Since the OECD has its fair share of government representatives as members, it is to be expected that the OECD Commentary may on occasion reflect the desires of its members rather than the meaning of the OECD Model properly construed.

Category (c): excessive expenses

As regards excessive expenses, the paradigm anti-avoidance provision is the transfer pricing code. This is catered for in the "Associated Enterprises" Article i.e. it is specifically permitted. However, Article 7 – the Business Profits Article – in the form in which it was prior to its recent amendment, may give an argument for claiming expenses which would otherwise not be deductible under domestic law. Paragraph (3) states:

> "In determining the profits of a permanent establishment, there shall be allowed as deductions expenses which are incurred for the purposes of the permanent establishment, including executive and general administrative expenses so incurred, whether in the State in which the permanent establishment is situated or elsewhere."

The ability to deduct all expenses which have been incurred for the purposes of the permanent establishment appears, on the face of it, to ride roughshod over those domestic rules which limit the ability to deduct certain expenses. The OECD Commentary seeks to water this point down in its commentary on old Article 7[11], but does not do so satisfactorily. (New r Article 7 is in part a response to this point.) It will of course be a brave taxpayer who relies on old Article 7(3) in this way, although there may be cases where it is appropriate to do so.

Abuse

A number of issues arise in relation to the question of whether double tax treaties can be relied for tax avoidance purposes. There is developing case law in this area. Surprisingly UK tax jurisprudence has been slow to develop a doctrine that treaties may not be relied on for avoidance purposes. That may now be changing. In a recent High Court case, decided in the context of an artificial tax avoidance scheme which relied in part on the application of a treaty to protect a UK resident from a domestic charge, the judge said:

> "The fundamental purpose of double tax treaties is to avoid double taxation. It is not a purpose of double tax treaties to facilitate the complete avoidance of income tax in any jurisdiction, or to allow residents of a particular state to reduce the tax on their income to a level below that which would ordinarily be exacted by the state of residence."[12]

PART C: EU OVERRIDES

Introduction – how can the EC Treaty be relied on to defeat domestic anti-avoidance provisions?

Whereas with double tax treaties the words of the treaty will tell you whether a particular charge is to be disapplied, the EC Treaty says very little about direct tax. Hence the statement – often made by the ECJ – that, although direct taxation falls within the competence of Member States, they must nonetheless exercise that competence consistently with Community law (see for instance *Cadbury Schweppes*, discussed below, at para 40). One therefore needs to start by understanding how it is that the EC Treaty can interfere with a Member State's ability to tax income or gains.

Fundamental freedom must be in point

It is only if the anti-avoidance provision restricts the exercise of a fundamental freedom (or is contrary to a specific piece of EU legislation having direct effect) that an EU law override is possible. So, first, what are the fundamental freedoms? These are:

a. the free movement of goods;

b. the free movement of capital;

c. the freedom to provide and receive services;

d. the freedom of establishment, and

e. the free movement of workers).

It is generally the last four of these which are particularly relevant to direct taxation. There is also the free movement of residence of EU citizens under Article 21.and Article 18 of the EC Treaty[13] (general prohibition on discrimination on grounds of nationality) This "applies independently only to situations governed by European Union law for which the Treaty lays down no specific rules of non-discrimination" (*SGI*[14], at para 31). In other words this applies "as regards all situations which do not fall within the scope of [the freedom of establishment, the free movement of capital and the freedom to provide and receive services]".

What is a restriction?

It follows from the previously quoted ECJ statement (that, although direct taxation falls within the competence of Member States, they must nonetheless exercise that competence consistently with Community law) that there are certain ways of exercising taxation competence which are objectionable and certain ways which are not. Fundamentally, the theme which runs through the ECJ direct tax case law is that a *difference in treatment* by a Member State's tax system is required before a potentially unlawful restriction on a fundamental freedom can be identified. Otherwise Member States are free to mould their tax systems as they wish. Such a difference may be:

a) Between the costs which have been incurred by a person exercising a fundamental freedom and the lesser costs which would have been incurred by the same person had they not exercised a fundamental freedom.

b) Between the costs incurred by non-residents who have exercised a fundamental freedom and the lesser costs incurred by residents who are otherwise in an identical position (in other words discrimination).

It follows from the above that, where there is no unilateral difference in treatment, there is no restriction which amounts to a prima facie breach of the fundamental freedoms – even though there may be circumstances which do give rise to impediments to cross-border activity (for instance because of double taxation).[15]

A good example is *Damseaux*, where both domestic and foreign dividends were taxed in the same manner without granting a credit for any tax paid by the subsidiary. The ECJ considered this not to give rise to a restriction of the free movement of capital. It clearly did however act as a disincentive to overseas investment but there was no unilateral difference in treatment, so no-one country's tax system was at fault in respect of this disincentive. There are a host of other cases to the same effect.

So the EC Treaty is a blunt tool. It is focused on difference of treatment. That is one limitation therefore. However, in identifying a difference, the taxpayer is not required to show that the difference in treatment has in fact had the effect of reducing exercise of the fundamental freedoms.[16] It is a more theoretical test than that. It need only be possible that it may have that effect.

More than one freedom potentially in point

A further obvious limitation is that with one exception (the free movement of capital) the fundamental freedoms only protect intra-EU activity[17].

The free movement of capital extends, in certain cases, to third (i.e. non-EU) countries. Where a non-EU country is concerned, one may well therefore wish to argue that one is exercising one's right to free movement of capital. Suppose however one could also be viewed as seeking to "establish" oneself or to "provide/receive services"? Should this make a difference given that such actions are only protected in an intra-EU context? Logically one would have thought the answer to that question was no. Oddly the correct answer seems to be yes. *Fidium Finanz*[18] concerned the right of a bank which was resident in a non-EU Member State to grant credit to customers established in a Member State. The bank, which was not an EU resident, was not entitled to rely on the free movement of capital, which extends to third countries. This is because the ECJ considered the freedom to provide services to be the principal freedom which was in point while the free movement of capital was "entirely secondary". Since the bank was not entitled to rely on the freedom to provide services (being resident in a non-EU state), it was not entitled to rely on the free movement of capital either. The right to free movement of capital, which did apply to protect movements of capital from outside the EU into the EU, was also restricted by the legislation, but this was simply an "inevitable consequence" of the restriction imposed on the provision of services (para 49). Such a restriction was therefore (and there is a logical jump here – not fully explained by the Court) entirely permissible.

Other issues

Identifying a *prima facie* unlawful restriction is only the start of the analysis. Even if a restriction has been identified, a Member State may nevertheless show that the restriction is justified and proportionate. This is briefly considered in the context of abuse, touched on below.

Let us now consider those categories of anti-avoidance provision which were previously considered to see how the EC Treaty impacts on these.

Category (a): escaping High Tax State's tax net

When looking at double tax treaties, this note previously considered two anti-avoidance measures which prevented a taxpayer resident in High Tax State from avoiding tax by ceasing to be a resident of High Tax State: the rule that a company incorporated in High Tax State is always deemed to be a resident of that state, and exit charges which apply where a person (a company, an individual or a trust) does manage to become non-resident. Both cases will be touched on again now, but in reverse order.

Exit charges

The ECJ has commented on exit charges in various cases. In *de Lasteyrie du Saillant v Ministère de l'Economie*[19] the Court considered a French provision which imposed a charge on unrealised increases in the value of shares when a person emigrated: an individual who remained resident would not have been taxed until actual disposal. This was held to be a breach of the freedom of establishment because it dissuaded a person from moving to another Member State. (It was possible to defer liability but this required the provision of a guarantee, which itself imposed a further restriction on the freedom.)

A similar Dutch provision was considered by the ECJ in *N v Inspecteur,*[20] although liability could be deferred until actual disposal: originally this was only possible if security was provided, but following *de Lasteyrie* the law was amended to remove this requirement. The ECJ held that the exit charge was a restriction on the freedom of establishment, as was the need for a guarantee. The provisions could *prima facie* be justified on the grounds of achieving an allocation of taxing power in accordance with the principle of territoriality: however the need for a guarantee meant the legislation was disproportionate to the justification. The implication is that, in the absence of the need for security, an exit charge can be justified provided that liability only arises upon subsequent disposal of the asset.

As regards companies, the question of whether exit charges are capable of constituting a restriction, because they give rise to an additional cost as compared to remaining resident in High Tax State, is a difficult one. The issue is whether residence in High Tax State is the price for being entitled to rely on EC Treaty freedoms in the first place: "abandon your residence in High Tax State and you have abandoned your right to be treated as a national of a Member State, which gives you the ability to rely on the fundamental freedoms", is the argument for High Tax State's taxing authorities.

It is doubtful that this argument can be made by High Tax State where the company in question is not incorporated in High Tax State, but is resident there purely through being managed there. As regards a company which *is* incorporated in High Tax State, the *Daily Mail* case[21] is often said to provide support for the argument of High Tax State that it is free to impose exit charges on companies achieving non-residence. Here the ECJ pointed out that, in treating companies as nationals of a Member State so as to allow them to enjoy the freedom of establishment, the EC Treaty places on the same footing – as connecting factors – the registered office, central administration and principal place of business of a company. This seems to have been taken as conferring on Member States the right to deprive those companies which cease to have one of those connecting factors with that state, of the right to freedom of establishment. This is on the basis that it is only because of those connecting factors that they are treated as nationals entitled to the freedom of establishment in the first place. However the logic of that argument is far from clear, particularly in a case (such as that of the Daily Mail itself) where the Member State in question (the United Kingdom) had chosen the law of incorporation as the connecting factor, and not principal place of business (which is broadly what it was sought to move offshore to achieve non-UK tax residence). If the answer to this conundrum is "well, the freedom of establishment only protects certain kinds of establishment and not those kinds which are linked to the central administration and principal place of business of a company", the question is "why not, particularly if, on the facts, central administration and principal place of business are irrelevant to the recognition of the company as a national?". The Advocate General in the *Cartesio*[22] case has rightly described such a distinction between different kinds of establishment as unconvincing.

The *Daily Mail* case was not dealing with a domestic law provision which imposed an exit charge, but with a domestic law provision which required government consent to move tax residence of the company abroad. There may be something in the point that a provision of this kind was closer to a company law requirement imposed on UK companies (which is part and parcel of being a UK national) than an exit charge would be, and this may have influenced the ECJ's reasoning. The recent decision in *Cartesio* does not resolve all doubts in favour of High Tax State either. Here the Hungarian entity wanted to transfer its operational headquarters to Italy while still remaining registered in Hungary, notwithstanding Hungarian law required entities constituted under Hungarian law to maintain their seat in Hungary. The ECJ held that the freedom of establishment did not give it such a right, and the relevant Hungarian law was compatible with the freedom of establishment. That scenario was different, however, from a case where an entity wishes to move its tax residence and can do so without affecting its status under company law (a distinction in fact recognised by the ECJ in its judgment[23]). So the *Daily Mail* case is far from a universal excuse for High Tax State to impose exit charges in all cases where tax residence is moved offshore.

Incorporation rule

By contrast with exit charges, the rule that a company incorporated in High Tax State should always be deemed to be resident in High Tax State, even if managed and controlled in another state, does seem close to the kind of provision found to be compatible with the EC Treaty in the *Daily Mail* case. If that is right, only double tax treaties can assist on this.

Category (b): diversion of income to a non-taxable person

The attribution provisions comprised in the UK's CFC code were held to be an unlawful restriction on the freedom of establishment in *Cadbury Schweppes*[24]. This again raises an interesting issue about the comparison required in order to identify a restriction on a fundamental freedom. It was mentioned previously that a difference is required. Does one look at a difference in treatment of the group as a whole or of each company in the group on a solus basis?

The ECJ appears to view group entities on a single basis in testing whether there has been a restriction. In *Cadbury Schweppes* the ECJ considered a CFC apportionment to give rise to a restriction, even though, actually – viewing the group in the round – there would not have been an additional cost incurred as a result of establishing an Irish subsidiary as compared to a UK subsidiary. Overall the tax paid in respect of the subsidiary's profits would have been the same in either scenario – a UK subsidiary would have paid tax at 30%, whereas in the case of the Irish subsidiary, there was Irish corporation tax paid by the subsidiary plus a top-up tax, paid by the parent through the CFC apportionment, which took the tax rate borne by the group in respect of the Irish profits to 30%. However, the ECJ focused on the position of the UK parent; it, as a solus entity, faced a cost where it had established itself through an Irish subsidiary which it did not face where it merely held a UK subsidiary. The group position appears to have been irrelevant.

The Advocate General in the recent *SGI*[25] case was prepared to contemplate hypothetically that "it is appropriate to view the group of companies as a whole for the purposes of evaluating the tax provisions". However, it made no difference on the facts, and the analysis was in any event not adopted by the ECJ which focused on solus entities.

Category (c): excessive expenses

The issue of artificial erosion of the taxpayer's tax base is considered below in the context of abuse. The *SGI* case found that a targeted transfer pricing provision was compatible with the fundamental freedoms. However *Eurowings*[26] makes clear that it not open to Member States to penalise their resident taxpayers simply because an expense has been paid to a non-resident as opposed to a resident.

Abuse

The ECJ took a taxpayer-friendly line in *Cadbury Schweppes*. It held that it was open to the UK parent to seek to benefit from Ireland's low tax rates. It is in other words open to residents to benefit from low tax rates available in other Member States. On other hand, a national measure restricting freedom of establishment may be justified (therefore excusing a prima facie restriction from being unlawful) where it specifically relates to wholly artificial arrangements aimed at circumventing the application of the legislation of the Member State concerned. However an arrangement is not wholly artificial simply because the intention is to obtain a tax advantage. In order to find that there is such an artificial arrangement there must be, in addition to a subjective element consisting in the intention to obtain a tax advantage, objective circumstances showing that, despite formal observance of the conditions laid down by Community law, the objective pursued by freedom of establishment has not been achieved.

The recent *SGI* case considered transfer pricing provisions. By contrast to – say – the CFC rules in *Cadbury Schweppes*, these were found to target wholly artificial arrangements and to do so proportionately. It is important to note that the affected company was given the opportunity to demonstrate a commercial justification for that transaction.

Parallels can be drawn between the abuse doctrine as it applies for EU law and that which may be applicable in the double tax treaty context.

PART D: CONCLUSIONS

EU law is a stronger but, in its current state at least, blunter tool to defeat domestic anti-avoidance provisions. Double tax treaties can be overridden more easily, but may assist in areas which EU law cannot reach.

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[1] The following is the text of a paper given at a meeting of the International Tax Planning Association in March 2010.

[2] http://www.publications.pwc.com/DisplayFile.aspx?Attachmentid=2841&Mailinstanceid=14420

[3] See for instance the Smith Kline & French Laboratories, Australia, and Menley & James, Australia, Act 1991.

[4] As far as the UK is concerned, the provisions which give effect to double tax treaties in the UK domestic tax code are stated to be "notwithstanding anything in any enactment" i.e. a treaty will prevail over domestic law. This does not however mean that treaties will override domestic law in all circumstances. It may be absolutely clear, expressly or by implication, that a provision of domestic law is intended to override a double tax treaty in which case it will do so. There may well be "no scope for application of any presumption against ...breach of International Law" - *Padmore v Commissioners v Inland Revenue (No.2)* 73 TC 470 per Lightman J at [16].

[5] 70 TC 272 (at 290)

[6] What was sought to be taxed on the UK resident parent was not the interest itself but the full profits of the subsidiary. These were computed on a basis which had the result that the interest ceased to be recognisable in what was taxed by the UK. This leaves open the possibility that, had it been possible to do so, reliance on the Business Profits Article of the double tax treaty, had it been appropriate, may have proved more successful.

[7] 48 TC 537

[8] See s354 Income Tax Act 1952. In particular, the "wife to husband" attribution mechanism contained a proviso that "the question whether there is any income of [the wife] chargeable to income tax for any year of assessment…shall not be affected by the provisions of this section [which deem the wife's income to be her husband's]". Thus it was only income chargeable to income tax which was to be attributed and, in identifying such taxable income, the double tax treaty was to be applied on the basis that the income was received by Lady Strathalmond.

[9] Here the Supreme Administrative Court of Finland found that the Finnish CFC regulations were not in breach of 1976 Finland-Belgium treaty. The court relied heavily on the OECD Commentary even though the commentary post-dated the treaty. Nevertheless the court seems to have considered the fact that the double tax treaty was amended in 1991 as significant and sanctioned the use of later commentaries.

[10] The Japan-Singapore treaty had been signed in 1995. The court clearly had regard to the OECD Commentary in coming to its conclusion that the CFC regime was not precluded by it.

[11] Paragraph 30 of the Commentary on Article 7. This states: "Also, paragraph 3 only determines which expenses should be attributed to the permanent establishment for purposes of determining the profits attributable to that permanent establishment. It does not deal with the issue of whether those expenses, once attributed, are deductible when computing the taxable income of the permanent establishment since the conditions for the deductibility of expenses are a matter to be determined by domestic law, subject to the rules of Article 24 on Non-discrimination".

[12] *R v HMRC, ex parte Huitson* [2010] EWHC 97 at para 76(iv)

[13] Following the Treaty of Lisbon, its full title is The Treaty on the Functioning of the European Union.

[14] C-311/08

[15] Another restriction which does not give rise to a prima facie breach is a restriction which is intrinsic to being a national of a Member State. This is discussed below in the context of exit charges.

[16] As the ECJ said in *SGI* (at para 50): "it should be noted that for legislation to be regarded as a restriction on freedom of establishment, it is sufficient that it be capable of restricting the exercise of that freedom in a Member State by companies established in another Member State, without there being any need to establish that the legislation in question has actually had the effect of leading some of those companies to refrain from acquiring, creating or maintaining a subsidiary in the first Member State (see Case C‑524/04 *Test Claimants in the Thin Cap Group Litigation* [2007] ECR I‑2107, paragraph 62, and Case C‑231/05 *Oy AA* [2007] ECR I‑6373, paragraph 42)."

[17] To be more precise intra-EEA activity.

[18] C-452/04

[19] Case C-9/02

[20] Case 470/04

[21] Case 81/87

[22] Case C-210/06, at [28]

[23] See at [111]

[24] Case –C196/04

[25] Case C-311/08

[26] Case C-294/97