

ACTION 6: TREATY ABUSE

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OECD Proposal for Art X Par 7 OECD MODEL Convention

- “Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income and capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.”

Context

- General trend
- Different suggestions (UK, India, EU etc)
- Consequences of changes in tax treaties

Scope I

- “Benefits under this convention”
- No benefit under domestic tax law
- No benefit under treaties
- Definitions?
- Allocation rules
- Method article
- Art 24 OECD Model Convention?
- Art 25 OECD Model Convention?
- Articles 26 and 27 OECD Model Convention?

Scope II

- Per country or overall approach?
- Different allocation rules
- Lex specialis?

Principal purpose

- Objective analysis?
- Intention of taxpayer
- “Reasonable to conclude”
- Other persons?
- “sole purpose”, “essential purpose”, “Main purpose”, “principal purpose” – “one of the principal purposes”
- EU: ECJ Competence
- Treaties: Domestic courts: In dubio pro patria
- Relaxing the criteria through Commentaries?

Object and purpose

- Additional requirement
- “established”
- Regular legal methodology
- Consequence: Literal interpretation in all other cases?
- Consequence: Art X par 7 irrelevant

Legal consequences

- “shall not be granted”
- Example: Art 11: which other rule?
- Consequence in other country?
- Triangular situations?

Discretionary Relief

- ***8. Where a benefit under this Convention is denied to a person under paragraph 7, the competent authority of the Contracting State that would otherwise have granted this benefit shall nevertheless treat that person as being entitled to this benefit, or to different benefits with respect to a specific item of income or capital, if such competent authority, upon request from that person and after consideration of the relevant facts and circumstances, determines that such benefits would have been granted to that person in the absence of the transaction or arrangement referred to in paragraph 7. The competent authority of the Contracting State to which the request has been made will consult with the competent authority of the other State before rejecting a request made under this paragraph by a resident of that other State.***

Conclusions

- Anti-abuse-rules destroy the legal culture
- Only bad lawyers need it
- Opposition from the US?
- Multilateral Instrument?