Paul Kirchhof, Moris Lehner, Kees van Raad,
Arndt Raupach and Michael Rodi (eds)

International and Comparative Taxation

Essays in Honour of
Klaus Vogel

Series on International Taxation

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Paul Kirchhof, Moris Lehner, Kees van Raad, Arndt Raupach
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Prof. Dr. Dr. h.c. Klaus Vogel turned 70 on 9 December 2000. For his students, colleagues and friends all around the world this event provided the opportunity to honour him, as a teacher and academic but also a researcher and leader, with a Festschrift. This Festschrift, with over 65 contributions in German and in English, appeared under the title *Staaten und Steuern* (*States and Taxes*) with C.F. Müller Verlag in Heidelberg. With the permission of the German publisher, in the current volume the 16 English language contributions are published separately by Kluwer Law International.

Paul Kirchhof, Moris Lehner, Kees van Raad,
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International and Comparative Taxation

Essays in Honour of Klaus Vogel

The original comprehensive German edition was edited by:
Paul Kirchhof, Moris Lehner, Arndt Raupach, Michael Rodi

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Klaus Vogel

Translation of the Preface to the original comprehensive German edition of this Festchrift

Prof. Dr. Dr. h.c. Klaus Vogel turned 70 on 9 December 2000. For his students, colleagues and friends all around the world this event provided the opportunity to honour him not only as a teacher and academic but also a researcher and leader with this Festschrift under the title 'States and Taxes'.

While 'States and Taxes' represent the focal points of Klaus Vogel's lifelong endeavours in legal research and analysis, it must be recognized at the same time that the title of this Festschrift cannot fully reflect the variety and depth of his work. Klaus Vogel personifies post-war German public law. At the same time he is a founding father of today's international tax law.

We wish Klaus Vogel for the years to come good health, continuing creativity and much happiness.

Paul Kirchhof, Moris Lehner, Arndt Raupach, Michael Rodi

Preface to the English edition

As is indicated in the preface to the comprehensive German edition of the Festchrift, Klaus Vogel has made major contributions to two distinct branches of law: public law and international tax law. The English language contributions in the Festschrift, all by foreign scholars, focus on five areas of international tax law: tax treaty law (Avery Jones, Hamaekers, Maisto, Mutén, van Raad, and Skaar), tax competition law (Ault and Malherbe), comparative tax law (Kaneko, Lindencrona, Masui, McNulty and Murai), EC tax law (Mattson and Wiman), and the relation with trade agreements (McDaniel).

In view of the worldwide recognition of the contributions made by Klaus Vogel to international tax law, it was widely felt that it would be appropriate to publish these English language contributions to the original Festschrift that all focus on aspects of international tax law, as a separate volume as well. In this way the tribute made to Klaus Vogel will reach more people than a single German edition will do. I am grateful to C.F. Müller Verlag for granting permission for this second publication.

Kees van Raad

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Tax Competition: What (If Anything) To Do About It?

Hugh J. Ault[1]

Introduction and Background

It is commonplace that increased globalization of trade and investment has made national economies and policies more interconnected. One only has to look at the recent Asian economic crisis for an example. In the tax area, that has meant that policies which have historically been developed in a closed economy now have increasingly important impacts on other countries as economies have become more open. This in turn has lead to concerns about "harmful tax competition", where one country's tax system can have a potentially negative impact on other countries. In particular, this increased openness has resulted in the appearance of special tax regimes and practices aimed at attracting tax base from other jurisdictions through legislative and administrative tax measures which were tailored to attract foreigners. Beyond these special regimes, some countries have been concerned about the effect of low business tax rates generally and their impact on investment patterns. Finally, the greater mobility of capital, coupled with improvements in communication and in particular the development of electronic commerce, have increased significantly the role of tax havens in international transactions, as more and more sophisticated techniques are used to "hive off" profits into havens. Thus havens too, are involved in the overall problem of tax competition.

Two international initiatives are currently underway to deal with various aspects of these issues. In 1996 the OECD Ministers charged the organization to develop measures to combat "harmful tax competition" and the result of that mandate was the report entitled *Harmful Tax Competition: An*

[1] Boston College, Newton, Massachusetts; Special Advisor OECD, Paris.
This material represents the personal view of the author and in particular does not necessarily reflect the position of the OECD as an organization or of any of its Member countries.

Emerging Global Issue (the "Report") which was prepared by the Committee on Fiscal Affairs and was adopted by the OECD Council in April, 1998. At roughly the same time, the European Union began a similar project, building on the OECD work, which resulted in a Code of Conduct for the taxation of business income which was actually approved in December 1997, before the OECD Report.

In this paper, I would like to focus on the OECD Report, examining both the theoretical framework on which the Report is based, the institutional structure which it establishes, and the practical consequences which flow from the implementation of the Report. It seemed a particularly appropriate subject for a *Festschrift* for *Klaus Vogel*, whose writings have dealt with many related aspects of international tax relationships.

Identifying "Harmful" Tax Competition

In carrying out the mandate from the Ministers, the first issue for the OECD Committee on Fiscal Affairs was to develop some framework for determining when and in what circumstances tax competition can be appropriately characterized as "harmful". This issue has been the subject of a long and ongoing debate in the economic literature about the benefits and detriments of tax competition. Some see tax competition as a good and healthy thing – it keeps the Hobbesian Leviathan in check, limits the State's tendency to expand, promotes more efficient government and governmental services, and limits political pandering to domestic interest groups.

On the other side, there are those who see tax competition as resulting in a destructive "race to the bottom". Tax competition causes "bidding wars" in competing for mobile activities, ultimately resulting in no tax at all on mobile capital; it makes redistributive non-benefits-based income taxation impossible; it may require states to shift to other revenue sources, taxing less mobile activities and particularly labor more heavily, or it may force a reduction in public expenditures to a suboptimal level; it can prevent the implementation of democratically arrived at tax policy decisions as to tax mix and tax level, and generally leaves all countries worse off.

As in many situations which are characterized by polar views, there is an element of truth in both positions. The OECD Report endorses the international movement in the direction of a broader tax base with fewer preferences and general lower rates which was in part a result of "competitive" reactions to changes in the US and UK systems in the mid-80s. This kind of tax competition has had a positive impact on the development of tax systems. It has forced the elimination of wasteful and inefficient tax preferences and excessively high marginal rates, and in general increased

efficiency. This kind of "good" tax competition is consistent with the OECD's general commitment to free market principles.

What then, is "harmful" tax competition? Here the Report focuses on a low or zero effective rate of tax on particular types or classes of income, when that low rate is coupled with other factors which tend to indicate that the particular tax regime was introduced primarily to attract tax base from other jurisdictions. These factors include "ring-fencing", that is, the regime excludes operations in the domestic economy or domestic investors; lack of transparence in the operation of the regime; and lack of effective exchange of information which can prevent other countries from assessing the impact of the regime on their taxpayers.

On the other hand, the issue of what general rate of income tax to have, or whether or not to even have an income tax at all, are basic questions of national policy and sovereignty which every country, at least historically, has been able to decide for itself. In the end, the participating OECD countries accepted the right of each country to establish its own general tax policy. If a country wants to introduce a general low rate of tax, it is free to do so without running afoul of the prescriptions for the Report, even though the effect of the system may indeed be to attract investment from other countries. Thus the countries recognize, on a reciprocal basis, the sovereign right to have whatever tax rate they wish as long as it is applied generally. A country is willing to accept a general low rate of tax in *another* country as part of preserving its own right to have that rate – or some other rate – a matter of *its* own domestic policy.

Thus what the Report does is to distinguish between an overall low rate which applies to all taxpayers in the jurisdiction and a special regime or practice offering no or low effective taxation and which is combined with other features which make it likely that the effect, and in all probability, the purpose of the regime was simply to attract tax base from elsewhere. The first situation is not covered by the Report and the second may constitute harmful tax competition. So to take two examples, if a country introduces a general non-discriminatory, across the board 20% corporate tax rate, that is not harmful tax competition in terms of the Report. On the other hand, if the country has a special zero tax regime for corporations engaged in offshore banking where only foreign investors can invest, those corporations are not permitted to do business in the domestic economy, and the country will not exchange information with the other country with regard to the income of such corporations so that country could try to continue to tax its residents on the income arising in the regime, that would constitute harmful tax competition. The Report emphasizes that the decision is to be made on the basis of all the factors taken together in context.

The concept of harmful tax practice extends to administrative practices which can have the same effect as a special regime. For example, allowing

income to be determined on an artificially low cost plus or spread basis in the case of foreign headquarters companies or conduit licensing or financing companies or, in general, by failing to follow the OECD transfer pricing guidelines, could contribute to the finding of a harmful tax practice if other factors were present.

Looking at the definition from a more theoretical point of view, which may not come out so clearly in the Report itself, the Report recognizes that a domestic tax system can in effect create externalities or spillover effects on other countries. That is a necessary aspect of the interaction of tax systems in an open economy. However, if the country is willing to in effect "pay" for the negative effects it causes, by foregoing the revenues from its own domestic taxpayers through a low generally applicable rate, then that is an acceptable tax system. The positive benefit, recognized on a reciprocal basis, of allowing countries to adopt whatever general tax structure or mix they want, outweighs the possible negative spillover effect which might be created. This is not the case however, where the whole purpose of the specially constructed regime is to create externalities for other jurisdictions. There the harmful effects are not offset by the need to effectuate any general domestic tax policies, and harmful tax competition is present.

Institutional Structure

The OECD Report has established a new subsidiary body within the OECD, the Forum on Harmful Tax Practices which will administer a set of Guidelines on tax practices which set out certain obligations on those countries which adopted the Report. Under the Guidelines adopted by the Report, the participating countries agree to review their own domestic measures in the light of the criteria set out in the Report in self-review process and to eliminate within a stipulated period of time those measures which are found to constitute harmful tax competition as defined. In addition, they agree not to introduce any new measures which would constitute harmful tax competition.

This "roll back" and "standstill" process has started and the countries are currently carrying out the self-review exercise. The self-review process in the end rests on each country's carrying out in good faith the obligations it has undertaken in the Report. However, there is another mechanism foreseen in the Report which strengthens the disciplines established in the Report. This is a "peer review" process which begins for existing measures after the initial self-review period. Under this procedure, a country can ask the Forum to review the measure of another country which was not listed in the self-review and the Forum can give an opinion as to whether or not the regime constitutes harmful tax competition. Thus if a

Member country, either by mistake or intentionally, fails to list a potentially harmful practice, its judgment may be challenged by another Member country in subsequent proceeding, thus reinforcing the incentive for countries to take the self-review obligation seriously.

A final institutional question is the status of the obligations set out in the Report. As a formal matter, the Reports deals with Recommendations – a defined term of art in the OECD Treaty – which are not binding international law commitments. Under the Treaty, countries undertake to make a strong political commitment to follow the Recommendations, but the Treaty expressly recognizes that there may be circumstances in which a country is not able to fulfill its commitment or needs to delay compliance. This kind of obligation has become known as a "soft" international undertaking, not binding legally but with substantial peer pressure to act in accordance with the Recommendation.

This technique has been successful in the OECD in the past in a number of instances. Most recently, in 1994, in the tax area, there was a Recommendation to Member countries to deny a tax deduction for payments made to bribe foreign governmental officials. Member countries have by and large complied with the Recommendation and by 1999 no Member State will allow a deduction for bribes. So the fact that the Recommendations are not formally binding doesn't necessarily mean that they will not be effective. Peer pressure and "soft" obligations can have surprising force.

Defensive Measures

The basic focus of the OECD Report is to try to get Member countries to eliminate harmful tax competition. But the Report also sets up a number of coordinated defensive measures which can be taken against harmful tax competition. These are in general terms measures which can counteract the effects of the harmful tax competition in various ways. For example, if the residence country can tax the income which arises in the offshore regime directly, that can have the effect of discouraging its taxpayers from using the regime in the first place. Any country can unilaterally introduce such measures but they are more effective if done on a coordinated basis and that is the course recommended by the Report. Similarly, in some cases harmful tax competition is the result of the utilization of favorable provisions in a tax treaty. A Recommendation urges countries to modify treaties to exclude from treaty benefits income and entities benefiting from measures found to constitute harmful tax competition and urges the Model Convention which forms the basis for treaty negotiations to be similarly modified. In this connection there will be a

list, possibly published, of exclusion provisions found in existing treaties, special holding company regimes and the like, which will make it easier to be on guard against harmful tax competition when negotiating treaties.

Tax Havens and Non-Member Countries

Tax Havens

The OECD Report deals with tax havens explicitly since there is a clear perception that there has been a great deal of loss of tax base by Member countries, especially in the financial services area, to tax havens. In addition, havens have become increasingly significant for locating portfolio investment as communications technology has improved. While portfolio investment is not covered by this phase of the project, extending the inquiry to havens is a first step in dealing with the portfolio interest problem.

The first issue here is again one of definition. What is a tax haven? That would seem to be an easy question on its face – a country with no or nominal taxes but on closer examination, the question is more complex. As in the case of harmful preferential regimes, the Report again fashions a definition by looking at the combination of no or nominal rates and other factors including lack of effective exchange of information, lack of transparency and a lack of substantial activities in the jurisdiction. The Forum on Harmful Tax Practices is currently engaged in consultations with a number of potential tax haven jurisdictions to better understand how the criteria of the Report relate to those jurisdictions.

Tax havens present a real problem, since again in economic terms, mostly what they do is create externalities for other countries. On the other hand, for the havens themselves the letterbox company industry is in many cases a major economic factor and there would be significant economic effects if the financial flows which run through the havens were suddenly lost. Some have argued for the need to develop some sort of assistance or aid for havens which are willing to cooperate in eliminating the harmful features of their regimes. The damage havens do to "real" economies is huge in relation to the benefits they gain in terms of jobs and infrastructure. It is the domestic tax avoider who receives the bulk of the benefits.

Preferential Regimes in Non-Member Countries

One of the main concerns which the OECD Member countries had in agreeing to the disciplines of the Recommendations was the possible impact of harmful tax practices in non-Member countries. What good does it do for Member countries to agree among themselves to eliminate harmful tax competition and to take action in connection with tax havens, if the tax base will then just be shifted to regimes in non-Member countries

which are not classified as tax havens? There the Report adopts several related approaches. The first is to support a dialogue with non-Member countries to try persuade them that it is in their long-term interests to be associated with the principles set forth in the Report. They are also subject to the same kind of "race to the bottom" concerns about protecting their own domestic tax base which the Member countries have. Here the Member countries are in a position to provide technical assistance in the design of tax systems and in the implementation of principles of good tax administration. For example, cooperating non-Member countries are now being involved in the formulation of provisions of the Model treaty and are participating in exercises involving the Transfer Pricing Guidelines.

Where attempts at dialogue are not successful, there remain the defensive measures foreseen in the Report. For example, there are Recommendations to modify or terminate treaties, to consider the denial of deductions for payments in connection with regimes which are found to be harmful, or the imposition of withholding tax on such payments.

An Assessment and a Look Ahead

Viewed from one perspective, there has been an amazing amount of progress in international cooperation in the direct tax area in the past few years. In particular, the level of cooperation necessary to develop the OECD Report would have been unthinkable even a decade ago. This development clearly represents governmental reactions to the necessarily increased interdependence of economies created by the combination of technological advances and the elimination of barriers to international trade and investment. It parallels similar antecedent substantive and institutional developments in the trade area. In particular, the Forum on Harmful Tax Practices, though currently functioning as a subsidiary body of the Committee on Fiscal Affairs, has the potential to develop into a more broad-based institution which could provide the necessary conditions for a "level playing field" in the tax area in much the same way as the World Trade Organization does for trade.

On the other hand, the scope of the OECD activities is currently quite limited. The Report is quite explicit that it is dealing only with geographically mobile financial and other services activities.[2] The obligations set forth in the Report and Recommendations do not extend to other types

[2] The Report is limited to geographically mobile financial and other service activities as it was felt that these types of activities posed the most serious current problems. The Report recognized that there will be other areas in which issues of harmful tax competition will have to be explored but does not take that work forward in the Report.

of commercial activities nor to perhaps the most vexing problem in the area of tax competition, the taxation of portfolio interest. What sort of system of exchange of information, source country withholding or some combination of the two will be the appropriate structure to deal with portfolio investment, remains to be explored.

Where these developments will take us is not clear at this point. Is this the beginning of a "new international tax order", with the elimination of harmful tax competition, no more tax havens, a level playing field for fair tax competition and with *Voltaire*, we are on the way to the best of all tax structures in the best of all possible worlds. Or, more pessimistically, is it simply a futile King Canuate effort to try to hold back the tide sweeping away a dying income tax? Time will tell but the preliminary signs are, at least in my view, very encouraging.

Problems of Categorising Income for Tax Treaty Purposes

*John F. Avery Jones**

Introduction

Everyone who is interested in tax treaties owes an enormous debt to Prof. *Vogel* for his work in this area. For many years, he and I have been carrying on a friendly debate about the interpretation of tax treaties when two countries categorise income differently. On this occasion I should like to go back to a prior stage and look at the problems of one country categorising income correctly for the purpose of applying the treaty, and in particular how to resolve cases where two treaty articles apparently apply. The UK has a schedular tax system by which different types of income are measured by different rules and the total income is then taxed. One might expect that this would make it easier to categorise income for treaty purposes in the UK since we have to categorise income for internal law purposes. But because of the different origins of the internal law schedules in the UK and the treaty categories, the existence of a schedular system probably makes treaty categorisation more difficult. I suspect that civil law countries find this task easier because of the closer relationship between their internal law and the treaty categories. It would be interesting to know whether this is the case.

The UK income tax had a different philosophy from the *impôts reels*, which were a series of separate taxes imposed on different types of income on a source basis, such as a tax on land, a tax on business profits etc., existing in most European countries at the time the treaty categories originated. First, the UK tax was a true income tax, which taxed income on a residence basis as well as on a source basis[1] and therefore taxed foreign income. Second, it was comprehensive, including within its scope in

* Speechly Bircham, London.

1 Pitt's Act of 1799 taxed only non-resident British subjects on a source basis; Addington's 1803 tax charged all non-residents on a source basis.

principle all types of income. But from the point of view of taxing the income of non-residents, which is what tax treaties are about, these differences are less material than the scope of the source basis.

While the concept of schedular taxes is similar to the European source-based taxes, the content of the schedules were not influenced by the European taxes, perhaps not surprisingly since the purpose of the original income tax was to raise money for the war with France. The real difference was that the UK categories developed independently and do not fit well into the treaty categories which have developed out of the European source-based taxes. Compared to the categories of the Model, the UK categories are fewer. One of the problems is that the UK tax system developed for the rural world of Jane Austen's novels at the beginning of the nineteenth cen-tury in the pre-industrial revolution era, and has never really changed. If it had developed later it might have looked more like the European taxes which influenced the development of the Model.

Categorising Income for Treaty Purposes

In the light of these differences between the treaty and internal law categories of income, I can turn to the difficulties which this entails in applying the treaty. I shall assume throughout that the UK is the source state.

Defined Expressions

Income is categorised for treaty purposes first by applying the treaty definitions. There are definitions of immovable property, dividend, interest and royalties, and an inclusive definition of professional services comprising part of independent personal services. These definitions may not correspond to the UK internal law scope of the category of income. For example, income from immovable property (or rather land since immovable property is not a concept used in internal law in the UK outside conflict of laws) does not include income from farming which is taxed as trading income, and income from commercial woodlands is not taxable at all. Similarly, dividend in internal law is an example of a distribution, so we normally provide in our treaties that the definition of dividend includes distributions. Most of the other items mentioned in the treaty definition of dividend, such as jouissance shares or rights, mining shares or founders' shares are unknown in the UK.

Although the concept of a royalty is perfectly understandable in the UK, there is no internal category that taxes royalties.[2] Indeed many royalties

[2] The Tax Law Rewrite Project in Exposure Draft No. 2, Savings and Investment Income of Individuals: Part 1, has a chapter entitled royalties etc. An Inland Revenue Technical

are not liable to withholding tax when paid to a non-resident. Film copyright royalties are specifically exempt,[3] and royalties for intangible assets other than patents and copyrights are liable to withholding tax only if they fall within the category of an annual payment.[4] The UK concept of annual payment requires that the recipient has no expenses to set against it. Royalties paid to a non-resident trader who does have expenses to set against the royalty are not annual payments and are not taxed under internal law.

The permanent establishment provision is central to the Model. Here we have the difficulty in the UK that neither the concept of permanent establishment nor the concept of enterprise is known in internal law. The UK taxes profits from a trade, profession or vocation, a narrower concept than enterprise, which might be equated to business (also a concept not used in charging income tax although it is referred to in some contexts which gives rise to uncertainty about its scope, and it is used in VAT). I understand that in many civil law countries a company automatically carries on an enterprise. This is not the case in the UK; a company can be a trading company, an investment company, or neither of these. Its status is determined in the same way as any other taxpayer by looking to see if the person carries on a trade or has a business of making investments. We consider investment income to be attributable to a permanent establishment only if the taxpayer is carrying on a financial trade like a bank. I assume that in civil law countries an investment company does carry on an enterprise and so the permanent establishment concept is relevant.

So far as the jurisdictional aspect is concerned, we tax a trade carried on in the UK which is potentially much wider than the permanent establishment concept. If a contract for sale is made in the UK, because the acceptance is posted in the UK, this may amount to trading in the UK even if there is no presence in the UK at all. Obviously in these circumstances taxation is unlikely in practice but can be levied if an agent in the UK regularly acts for the non-resident whether or not he makes contracts.

The agency provisions of UK law are also quite different, since the principal can be taxed in the name of[5] the agent even though the agent does

(*Contd.*)

Note, Reform of the taxation of intellectual property (March 1999), proposes introducing a withholding tax on royalties on the lines of the definition in the Model.

[3] Income and Corporation Taxes Act 1988 (hereinafter "TA 1988") s. 536(2).

[4] TA 1988 ss. 348, 349.

[5] A familiar expression in this context but having its literal meaning and having no connection with Article 5(5) of the Model.

not have power to conclude contracts binding on the principal. The concept of a contract made by an agent not binding the principal is another concept unknown in UK law, because all contracts made by an agent bind the principal; there is no concept of indirect agency and no equivalent to a *commissionnaire*. One similarity exists: Article 5(6) of the Model closely follows a 1925 UK provision.[6] The current law excludes a foreign principal being taxed through a non-regular agency or through a broker acting in the ordinary course of his business, receiving not less than the customary rate of remuneration.[7] This still has similarities to the Model.

Reference to Internal Law

If there is no treaty definition, one applies internal law by virtue of Article 3(2) of the Model unless the context otherwise requires. As can be seen from the previous discussion, this can be difficult if internal law does not have similar taxing categories. There are corresponding internal law categories for government service, pensions, and artists and sportsmen. Pensions provide the best fit in that, although pensions are taxed under the same schedule as employment income, all pensions paid by a UK resident are taxable in internal law.[8] There is, however, no definition of pension in UK tax law, except a statement that for the avoidance of doubt includes a voluntary pension or one which is capable of being discontinued.[9] Non-resident artists and sportsmen also have an equivalent taxing category in internal law through a withholding scheme[10] but its scope is not identical. The treaty category applies not only to non-residents in internal law but residents of the source state who are dual residents, whose dual residence is resolved in favour of the other state.

Government service could be considered to be a separate category of income in internal law since it is taxable even though the employee is non-resident.[11] Internal law is, however, both wider and narrower than the Model. It is wider in that foreign, locally-engaged staff working outside the UK are deemed to be working in the UK and are therefore taxable. By virtue of an extra-statutory concession,[12] tax is not charged on locally

[6] See Agents as Permanent Establishments under the OECD Model Tax Convention (1993) British Tax Review 341 at 355; also 33 European Taxation (1993) 154 at 163.

[7] Finance Act (hereinafter "FA") 1995 s. 127.

[8] TA 1988 s. 19(1) para. 3, 133 (voluntary pensions).

[9] TA 1988 s. 133(2).

[10] TA 1988 s. 555-8 and Income Tax (Entertainers and Sportsmen) Regulations 1987 SI 1987 No. 530.

[11] TA 1988 s. 132(4). This result is achieved by deeming the duties to be performed in the UK.

[12] Extra-statutory concession A25.

engaged staff working abroad who are not resident in the UK whose pay is below a limit. The result for such locally-engaged staff is therefore the same as Article 19(1)(b) of the Model but without the requirement that they are nationals of their residence state. Higher paid locally-engaged staff who are nationals of their residence state will have to claim the treaty exemption. Internal law is narrower in that it covers only duties of a public nature whereas the Model covers all state employment other than in connection with a business, and includes, for example hospital employees and teachers employed by a local authority for which the normal internal law employment income rules apply. There are probably not many residents of a treaty partner state in such employment.

Capital gains are difficult to fit into this approach of applying internal law. I shall explore this separately.

Ordinary Meaning

It is necessary to apply the ordinary meaning of the terms for other categories, such as shipping (taxed as trades), independent personal services (professions are taxed in the same way as trades except for some minor differences, which is also the case in the Model, making it difficult to see why there is a separate category in the Model), directors' fees (taxed in the same way as employment income and therefore narrower than the Model since internal law does not tax work carried out abroad by a non-resident[13]), and students (no specific taxing category). Sometimes such a category relies partly on internal law definitions. For example, although directors' fees are taxed as employment income, there are various definitions of director for different purposes in UK tax law which includes not only a member of a board of directors but also a single director, and, if the affairs of a company are managed by the members themselves, the members, and also a shadow director (a person in accordance with whose directions or instructions the directors are accustomed to act).[14] Would this definition be relevant to interpreting the Model? Probably the reference in the Model to a member of the board of directors would exclude cases where the company did not have a board, such as the single director or the company managed by its members. There is also the point that company has a different definition in internal law from that in the Model.

[13] There is no directors' fees article in some UK treaties, including the US–UK treaty. Should these be taxed as employment income, in accordance with internal law, or the equivalent of Article 14 on the ground that a director is not dependent, or Article 21?

[14] TA 1988, ss. 136(5) (share options), 168(8) (benefits in kind), 202B(5) (different definition of receipt of remuneration), 417(5) (close company, a different definition including a manager controlling 20% of the ordinary share capital).