

Michael Lang

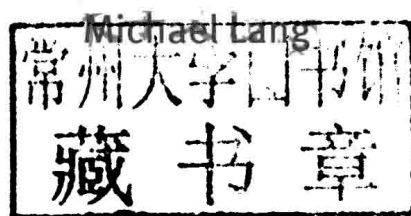
Introduction to the Law of Double Taxation Conventions

2nd edition



Linde

Introduction to the Law of Double Taxation Conventions



2nd edition



Linde

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Das Werk ist urheberrechtlich geschützt. Alle Rechte, insbesondere die Rechte der Verbreitung, der Vervielfältigung, der Übersetzung, des Nachdrucks und der Wiedergabe auf fotomechanischem oder ähnlichem Wege, durch Fotokopie, Mikrofilm oder andere elektronische Verfahren sowie der Speicherung in Datenverarbeitungsanlagen, bleiben, auch bei nur auszugsweiser Verwertung, dem Verlag vorbehalten.

ISBN 978-3-7073-2196-8 (Linde)

ISBN 978-90-8722-198-0 (IBFD)

Es wird darauf verwiesen, dass alle Angaben in diesem Fachbuch trotz sorgfältiger Bearbeitung ohne Gewähr erfolgen und eine Haftung der Autoren oder des Verlages ausgeschlossen ist.

© LINDE VERLAG Ges.m.b.H., Wien 2013
1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

IBFD

H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands
Tel.: 31-20-554 0100, Fax: 31-20-622 8658
www.ibfd.org

Druck: Hans Jentzsch u Co. Ges.m.b.H.
1210 Wien, Scheydgasse 31

Content

Preface	5
Preface	7
List of abbreviations	15
Literature cited in the text	19
List of court cases	23
1. The problem of double taxation	27
1.1. Basics of international law	27
1.2. Circumstances giving rise to double taxation	27
1.2.1. Taxation of worldwide income (full tax liability) in two states	27
1.2.2. Full tax liability and limited tax liability	28
1.2.3. Limited tax liability in two states	29
1.2.4. Economic double taxation	29
1.3. Elimination of double taxation	30
1.3.1. Double taxation conventions	30
1.3.2. Unilateral measures	30
2. State practice in the conclusion of DTCs	32
2.1. Conventions in international law	32
2.2. The importance of model conventions	32
2.3. The importance of the OECD Model	33
2.4. Bilateral peculiarities	34
3. The effects of DTCs	35
3.1. The allocation of taxing rights	35
3.2. The limiting effects of DTCs	36
3.3. The relationship to domestic law	36
3.3.1. Implementation of DTCs into domestic law	36
3.3.2. Priority of DTC law	36
3.3.3. Priority of domestic law	38
3.3.4. What to consider first in practice: DTC or domestic law?	38
4. The interpretation of double taxation conventions	41
4.1. Principles of interpretation in international law	41
4.2. The use of principles of interpretation stemming from international law with respect to DTCs	44
4.2.1. Autonomy of DTC law	44
4.2.2. The importance of domestic law	45
4.2.3. The importance of the OECD Model and its Commentary	48

4.2.4.	The importance of changes in the OECD Model and its Commentary	50
4.2.5.	The importance of OECD reports	54
4.2.6.	The importance of administrative practice	55
4.2.7.	The importance of other countries' court decisions	55
4.3.	The importance of interpretation rules set out in DTCs	56
4.3.1.	Art. 3(2) OECD Model	56
4.3.2.	The binding qualification of the source state according to Art. 23(1) OECD Model	59
4.3.3.	The relevance of later commentaries	62
5.	Treaty abuse	64
5.1.	Denial of treaty benefits	64
5.2.	The application of domestic anti-abuse principles?	64
5.3.	The application of abuse rules of international law?	65
5.4.	The importance of statements by the OECD Committee on Fiscal Affairs in the Commentary	66
5.5.	DTC circumvention as a problem of interpretation	68
5.6.	Special anti-abuse provisions	69
6.	The structure and system of DTCs	70
6.1.	Applying the convention	70
6.2.	Persons covered	71
6.3.	Taxes covered	72
6.4.	Allocation rules	72
6.5.	Methods for elimination of double taxation	74
7.	Persons covered	76
7.1.	Full tax liability as a prerequisite for the application of the DTCs	76
7.1.1.	Full tax liability	76
7.1.2.	Effects of the DTC non-discrimination rules	77
7.1.3.	Effects of other DTCs	78
7.2.	Treaty entitlement of corporate entities that are subject to limited tax liability	79
7.2.1.	Public law corporations	79
7.2.2.	Corporate entities that are exempt from full tax liability	80
7.3.	Treaty entitlement of partnerships and/or partners	80
7.4.	Treaty entitlement and treaty abuse	82
7.5.	Residence state in the case of dual residence	83
7.5.1.	Necessity of determining the residence state	83
7.5.1.1.	Allocation rules	83
7.5.1.2.	Method article	83

7.5.2. Criteria	84
7.5.2.1. Permanent home	84
7.5.2.2. Centre of vital interests	85
7.5.2.3. Habitual abode	85
7.5.2.4. Nationality	86
7.5.2.5. Mutual agreement procedure	86
7.5.2.6. Place of effective management	86
8. Taxes covered	88
8.1. Taxes on income	88
8.2. Taxes on capital	88
8.3. Comparability	89
8.4. Inheritance and gift taxes	89
9. Allocation rules	90
9.1. Income from immovable property	90
9.1.1. Immovable property	90
9.1.2. Allocation of taxing rights	90
9.2. Business profits	91
9.2.1. Business profits	91
9.2.2. Allocation of taxing rights	92
9.3. Shipping, inland waterways transport and air transport	98
9.3.1. Shipping, inland waterways transport and air transport	98
9.3.2. Allocation of taxing rights	99
9.4. Dividends	99
9.4.1. Dividends	99
9.4.2. Allocation of taxing rights	100
9.5. Interest	103
9.5.1. Interest	103
9.5.2. Allocation of taxing rights	104
9.6. Royalties	105
9.6.1. Royalties	105
9.6.2. Allocation of taxing rights	106
9.7. Capital gains	107
9.7.1. Alienation	107
9.7.2. Allocation of taxing rights	107
9.8. Independent personal services	110
9.8.1. Independent personal services	110
9.8.2. Allocation of taxing rights	112
9.9. Income from employment	114
9.9.1. Income from employment	114
9.9.2. Allocation of taxing rights	114

9.10. Directors' fees	116
9.10.1. Directors' fees	116
9.10.2. Allocation of taxing rights	117
9.11. Artistes and sportsmen	118
9.11.1. Artistes and sportsmen	118
9.11.2. Allocation of taxing rights	118
9.12. Pensions	119
9.12.1. Pensions	119
9.12.2. Allocation of taxing rights	120
9.13. Government service	121
9.13.1. Government service	121
9.13.2. Allocation of taxing rights	122
9.14. Students	123
9.14.1. Payments to students and business apprentices for their maintenance, education or training	123
9.14.2. Allocation of taxing rights	123
9.15. Other Income	124
9.15.1. The concept of "other income"	124
9.15.2. Allocation of taxing rights	125
9.16. Taxation of capital	125
9.16.1. Capital	125
9.16.2. Allocation of taxing rights	126
10. Methods for elimination of double taxation	128
10.1. The importance of the method article	128
10.1.1. Relation to the allocation rules	128
10.1.2. Credit and exemption method	128
10.1.3. Switch-over clauses	129
10.1.4. No effect of the method articles	130
10.2. Exemption method	131
10.2.1. Effects	131
10.2.2. Exemption from tax base	132
10.2.3. Progression	133
10.3. Credit method	136
10.3.1. Effects	136
10.3.2. Amount of allowable tax	138
10.3.3. Maximum credit	140
11. The implementation of treaty benefits in both contracting states ...	143
11.1. Source state	143
11.2. Residence state	144
11.3. The importance of the evidence of taxation in the other contracting state	144

12. The arm's length principle of Art. 9 OECD Model	146
13. Non-discrimination	149
13.1. Scope of application of non-discrimination rules	149
13.2. Non-discrimination on the grounds of nationality	149
13.3. Non-discrimination on the grounds of the PE of an enterprise	150
13.4. Non-discrimination according to Art. 24(4) OECD Model	151
13.5. Non-discrimination in connection with the shareholders/ partners of a company	152
14. Mutual agreement procedure	153
14.1. Mutual agreement procedures	153
14.2. Consultation procedure	155
14.3. Arbitration procedure	155
15. Exchange of information	157
15.1. Scope of application of the exchange of information	157
15.2. Types of exchange of information	158
15.3. Limitations on the exchange of information	159
15.4. Tax secrecy, DTCs and tax information exchange agreements	159
15.5. Competence and obligation of secrecy	160
16. Assistance in the collection of taxes	162
17. Inheritance tax treaties	164
17.1. Structure	164
17.2. Scope of the convention	164
17.3. General definitions	165
17.4. Allocation of taxing rights	165
17.5. Special provisions	166
Annexes	167
OECD Model Convention with Respect to Taxes on Income and on Capital	167
UN Model Double Taxation Convention between Developed and Developing Countries (2011 update)	186
OECD Model Convention with Respect to Estate, Inheritance and Gift Taxes	208
Index	217

List of court cases

	m.no.
AT (Austria)	
VwGH (<i>Verwaltungsgerichtshof</i>) 25 Feb. 1970, 1001/69; ÖStZB 1970, 122	215
VwGH (<i>Verwaltungsgerichtshof</i>) 22 Mar. 1991, 90/13/0073; ÖStZB 1991, 531; also available at www.ris.bka.gv.at	215
VwGH (<i>Verwaltungsgerichtshof</i>) 31 Jul. 1996, 92/13/0172; available at www.ris.bka.gv.at ; AT, VwGH 31 Jul. 1996, TTCL IBFD	89, 118
VwGH (<i>Verwaltungsgerichtshof</i>) 10 Dec. 1997, 93/13/0185; available at www.ris.bka.gv.at ; AT, VwGH 10 Dec. 1997, TTCL IBFD	149
VwGH (<i>Verwaltungsgerichtshof</i>) 21 May 1997, 96/14/0084; available at www.ris.bka.gv.at ; AT, VwGH 21 May 1997, TTCL IBFD	89
VwGH (<i>Verwaltungsgerichtshof</i>) 20 Sep. 2001, 2000/15/0116; available at www.ris.bka.gv.at ; AT, VwGH 20 Sep. 2001, TTCL IBFD	89
AU (Australia)	
FCA (Federal Court) 10 Oct. 2008, <i>Virgin Holdings SA v. Federal Commissioner of Taxation</i> ; AU, FCA 10 Oct. 2008, TTCL IBFD	231
FCA (Federal Court) 3 Feb. 2009, <i>Undershaft (No. 1) Ltd. v. Federal Commissioner of Taxation</i> ; 11 ITLR 4 (2009); AU, FCA 3 Feb. 2009, TTCL IBFD	231
CA (Canada)	
FCA (Federal Court of Appeal) 19 Oct. 1998, <i>Cudd Pressure Control Inc. v. Her Majesty the Queen</i> ; CA, FCA 19 Oct. 1998, TTCL IBFD	104
FCA (Federal Court of Appeal) 15 Mar. 2002, <i>Wolf v. Her Majesty the Queen</i> ; [2002] 3 CTC 3; CA, FCA 15 Mar. 2002, TTCL IBFD	335
TCA (Tax Court of Canada) 18 Aug. 2006, <i>MIL Investments SA v. Her Majesty the Queen</i> ; TCC 460; CA, TCA 18 Aug. 2006, TTCL IBFD	99
FCA (Federal Court of Appeal) 18 Aug. 2006, <i>Hertel v. MNR</i> ; 93 DTC	216
FCA (Federal Court of Appeal) 26 Feb. 2009, <i>Prévost Car Inc. v. Her Majesty the Queen</i> CA; FCA 26 Feb. 2009, TTCL IBFD	285
CZ (Czech Republic)	
NSS (<i>Nejvyšší Správní Soud</i>) 10 Feb. 2005, 2Afs 108/2004–106; 8 ITLR 2 (2006) 178 et seq.; CZ, NSS 10 Feb. 2005, TTCL IBFD	297
ES (Spain)	
TEAC (<i>Tribunal Económico-Administrativo Central</i>) 17 Apr. 2008, 3604/2006; ES, TEAC 17 Apr. 2008, TTCL IBFD	121

FI (Finland)

KHO (*Korkein hallinto-oikeus*) 14 Jun. 1999; 14.06.1999/1600; 281
 FI, KHO 14 Jun 1999, TTCL IBFD

FR (France)

CAM (*Court of Appeal of Marseille*) 11 Mar. 2003, No. 99-232, 4th 220, 488
 ch CE (*Conseil d'État*) 15 Dec. 2004, No. 257337 CE (*Conseil d'État*)
 26 Jan. 1990, 69.853; FR, CE 26 Jan. 1990, TTCL IBFD

CAA (*Cour Administrative d'Appel*) Paris, 28 Dec. 1995, 94PA01491; 218
 FR, CAA 28 Dec. 1995, TTCL IBFD

GE (Germany)

FG (*Finanzgericht*) München, 13 Jun. 2003, 7 K 3871/00 195

BFH (*Bundesfinanzhof*) 20 Jul. 1988, I R 49/84; BStBl II 1989, 140 267

BFH (*Bundesfinanzhof*) 1 Feb. 1989, I R 74/86; BStBl II 1990, 4 112

BFH (*Bundesfinanzhof*) 13 Aug. 1997, I R 65/95; BStBl II 1998, 21; 87

GE, BFH 13 Aug. 1997, TTCL IBFD

BFH (*Bundesfinanzhof*) 10 Dec. 2001, I B 94/01; BFH/NV 2002, 479; 66

GE, BFH 10 Dec. 2001, TTCL IBFD

BFH (*Bundesfinanzhof*) 19 Dec. 2001, I R 63/00; BStBl II 2003, 302; 431

GE, BFH 19 Dec. 2001, TTCL IBFD

BFH (*Bundesfinanzhof*) 15 May 2002, I R 40/01; BStBl II 2002, 660 431

BFH (*Bundesfinanzhof*) 17 Dec. 2003, I R 14/02; BStBl II 2004, 260 431

BFH (*Bundesfinanzhof*) 23 Feb. 2005, I R 46/03; IStR 2005, 458; 359

GE, BFH 13 Feb. 2005, I R 46/03, TTCL IBFD

BFH (*Bundesfinanzhof*) 10 Mar. 2005, II R 51/03; IStR 2005, 745 492

FG (*Finanzgericht*) Düsseldorf, 31 Jan. 2006, 3 K 846/03 E; EFG 2006, 432

970; GE, FG Düsseldorf 31 Jan. 2006, TTCL IBFD

BFH (*Bundesfinanzhof*) 25 Oct. 2006, I R 81/04; BFH/NV 2007, 593; 68

GE, BFH 25 Oct. 2006, TTCL IBFD

BFH (*Bundesfinanzhof*) 4 Apr. 2007, I R 110/05; BStBl II 2007, 521 431

BFH (*Bundesfinanzhof*) 17 Oct. 2007, I R 96/06; BStBl II 2008, 953; 425

GE, BFH 17 Oct. 2007, TTCL IBFD

BFH (*Bundesfinanzhof*) 2 Sep. 2009, I R 111/08; BStBl II 2010, 387 92

BFH (*Bundesfinanzhof*) 11 Nov. 2009, I R 84/08; BStBl II 2010, 390 66

IN (India)

AAR (Authority for Advance Rulings) 3 Jul. 2006, *Rajiv Malhotra*, 3
 AAR/671/2005; 284 ITR 564

AAR (Authority for Advance Rulings) 30 Apr. 2008, <i>KnoWerX Education (India) Pvt. Ltd. v. Inland Revenue</i> , AAR/744/2007; IN, AAR 30 Apr. 2008, TTCL IBFD	260
ITAT (Income Tax Appellate Tribunal) 30 Jun. 2008, <i>Epcos AG v. Assistant Commissioner of Income Tax</i> , No. 398/PN/2007; 11 ITLR 4 (2009) 599 et seq.; IN, ITAT 30 Jun. 2008, TTCL IBFD	59
ITAT (Income Tax Appellate Tribunal) 13 Aug. 2008, <i>DDIT v Balaji Shipping</i> ; 11 ITLR 1 (2009) 103 et seq.	85
ITAT (Income Tax Appellate Tribunal) 29 Oct. 2009, No. 1876/Mum/2006; <i>Meera Bhatia v. ITO</i> ; [2010] 1 taxmann.com	73
AAR (Authority for Advance Rulings) 5 Mar. 2010, <i>Real Resourcing Limited v. DIT (International Taxation)-II New Delhi</i> , AAR/828/2009; IN, AAR 5 Mar. 2010, TTCL IBFD	253
IE (Ireland)	
HC (High Court of Ireland) 31 Jul. 2007, <i>Kinsella v. Revenue Commissioners</i> [2007] IEHC 250; 10 ITLR 1 (2007); IE, HC 31 Jul. 2007, TTCL IBFD	116, 231
IL (Israel)	
IDC (Israel District Court) 30 Dec. 2007, <i>Yanko-Weiss Holdings (1996) Ltd. v. Assessing Officer of Holon</i> , 5663/07; IL, IDC 30 Dec. 2007, TTCL IBFD	136
IT (Italy)	
AE (<i>Agenzia delle Entrate</i>) 3 Jul. 2008, <i>Risoluzione N.277/E</i> ; available at www.agenziaentrate.it	448
LU (Luxembourg)	
CA (<i>Luxembourg Cour Administrative</i>) 23 Apr. 2002, case 14442 C; LU, CA 23 Apr. 2002, TTCL IBFD	126
NL (The Netherlands)	
HR (<i>Hoge Raad</i>) 3 Jul. 1991, Case 25.308; BNB 1991/248	314
HR (<i>Hoge Raad</i>) 6 Dec. 2002, Case 36.773; NL, HR 6 Dec. 2002, TTCL IBFD	140
HR (<i>Hoge Raad</i>) 5 Sept. 2003, Case No. 37.657; NL, HR 5 Sept. 2003, TTCL IBFD	370
SE (Sweden)	
RR (<i>Regeringsrätten</i>) 2 Oct. 1996, RÅ 1996 ref 84 (6301-1994); SE, RR 2 Oct. 1996, TTCL IBFD	197
RR (<i>Regeringsrätten</i>) 24 Apr. 2008, RÅ 2008 ref 30 (6639-06); SE, RR 24 Apr. 2008, TTCL IBFD	223

UK (United Kingdom)	
HCCD (High Court, London, Chancery Division) 9 Feb. 1990, <i>Commerzbank AG and Banco do Brasil SA v. Inland Revenue Commissioners</i> ; [1990] STC 285, 302b	112
SCITD (Special Commissioners of Income Taxes Division) 19 Nov. 2008, <i>Bayfine UK Products v. Revenue and Customs Commissioners</i> ; 11 ITLR 3 (2009) 440 et seq.; UK, SCITD 19 Nov. 2008, TTCL IBFD	13, 417
EWCA (England & Wales Court of Appeal – Civil Division) 2 Mar. 2006, <i>Indofood International Finance Ltd. v. J.P. Morgan Chase Bank N.A.</i> ; EWCA 2 Mar. 2006, TTCL IBFD	286
USA (United States of America)	
9th Cir. (US Court of Appeals for Ninth Circuit) 18 Sep. 2002, <i>Union-BanCal Corporation v. Commissioner of Internal Revenue</i> ; US, 9th Cir 18 Sep. 2002, TTCL IBFD	499
ECJ (European Court of Justice)	
6 Dec. 2007, Case C-298/05, <i>Columbus Container Services BVBA & Co v. Finanzamt Bielefeld-Innenstadt</i>	56

Introduction to the Law of Double Taxation Conventions

Michael Lang

2nd edition



Linde

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Das Werk ist urheberrechtlich geschützt. Alle Rechte, insbesondere die Rechte der Verbreitung, der Vervielfältigung, der Übersetzung, des Nachdrucks und der Wiedergabe auf fotomechanischem oder ähnlichem Wege, durch Fotokopie, Mikrofilm oder andere elektronische Verfahren sowie der Speicherung in Datenverarbeitungsanlagen, bleiben, auch bei nur auszugsweiser Verwertung, dem Verlag vorbehalten.

ISBN 978-3-7073-2196-8 (Linde)

ISBN 978-90-8722-198-0 (IBFD)

Es wird darauf verwiesen, dass alle Angaben in diesem Fachbuch trotz sorgfältiger Bearbeitung ohne Gewähr erfolgen und eine Haftung der Autoren oder des Verlages ausgeschlossen ist.

© LINDE VERLAG Ges.m.b.H., Wien 2013
1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

IBFD

H.J.E. Wenckebachweg 210, 1096 AS Amsterdam, The Netherlands
Tel.: 31-20-554 0100, Fax: 31-20-622 8658
www.ibfd.org

Druck: Hans Jentzsch u Co. Ges.m.b.H.
1210 Wien, Scheydgasse 31

Preface

The first edition of this book was published in June 2010. Since then, legislation, case law and academic discussion have developed further.

Accordingly, this book takes these new developments into account: We were able to deal with the new UN Model published in 2011, the latest version of article 7 of the OECD Model published in 2010, the on-going discussions relating to bank secrecy, the question of an effective exchange of information and the beneficial ownership concept.

I would like to thank the entire team of the Institute for Austrian and International Tax Law that has considerably supported me over several months in the course of this project. Especially, research and teaching associates Eline Huisman and Markus Seiler and DIBT (Doctoral Program in International Business Taxation) collegiates Raffaele Petruzzi and Daniel Fuentes Hernández have worked intensively towards the publication of this book. I would like to thank them with all my heart for their excellent commitment and efforts as well as for their numerous critical remarks that have substantially enriched the contents of this book. Moreover, I am grateful to the publishing houses Linde (Vienna) and IBFD (Amsterdam), who have taken over this publication project. I am happy about this cooperation, which will ensure that the book will be available globally.

Vienna, January 2013

Michael Lang