

Interaction of tax treaties and domestic anti-avoidance rules: Australian perspective

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History of anti-avoidance rules

- ★ Statutory from beginning: section 260 of Income Tax Assessment Act 1936
- ★ Case law revealed problems
 - Choice doctrine
 - False start doctrine
 - Protection of specific provisions only
 - No power of reconstruction

New start 1981

★ Part IVA

- ★ Scheme
- ★ Tax benefit
 - Express elections not tax benefit unless scheme to place taxpayer in position to make election
- ★ Dominant purpose to obtain tax benefit in light of specific factors
- ★ Power of reconstruction

Judicial doctrines?

☀ Interpretation

- ☀ Purposive approach
- ☀ Acts Interpretation Act ss 15AA, 15AB very similar to Vienna Convention arts 31, 32

☀ Sham

- ☀ No judicial anti-avoidance doctrine: John's case 1988 rejected UK Ramsay doctrine

International application

- ✦ General provisions applied in cases
 - ✦ Spotless Services 1996
 - ✦ WD & HO Wills (Australia) 1996
 - ✦ Consolidated Press 2001
- ✦ Specific international provisions
 - ✦ Foreign tax credits
 - ✦ Withholding tax avoidance

Application to treaties

- ✦ Expressly applied to treaties

- ✦ International Tax Agreements Act s.4:

- ✦ (1) Subject to subsection (2), the Assessment Act is incorporated and shall be read as one with this Act.
- ✦ (2) The provisions of this Act have effect notwithstanding anything inconsistent with those provisions contained in the Assessment Act (other than section 160AO or Part IV of that Act) or in an Act imposing Australian tax.

Case law on avoidance & treaties

★ Lamesa Holdings BV (1997)

- ★ Classic treaty shopping case
- ★ Refused to pierce corporate veil
- ★ Commissioner did not argue Part IVA
 - investment was made via the Netherlands because of the taxpayer's concern that there was no protection under the US treaty
 - ATO was concerned that the position under the US and Dutch treaties was the same and so was doubtful that the general anti-avoidance rule could be applied

Avoidance of foreign tax

- ★ Part IVA does not apply
 - ★ Public Ruling TR 98/21 on cross border leasing (LILO transactions with US to get US tax benefits not of concern to Australia)

Incorporation in treaty text

- ★ Australia UK Treaty 2003 – Exchange of Notes

- *1. With reference generally to the application of the Convention (including these Notes), the Contracting States agree that:*
 - (e) nothing in the Convention shall be construed as restricting, in any manner, the application of any provision of the laws of a Contracting State which is designed to prevent the avoidance or evasion of taxes.

... driving the message home

- ★ (d) the expression "any provision of the laws of a Contracting State which is designed to prevent the avoidance or evasion of taxes" **includes:**
 - (i) measures designed to address thin capitalisation, dividend stripping and transfer pricing;
 - (ii) controlled foreign company, transferor trust and foreign investment fund rules;
 - (iii) measures designed to ensure that taxes can be effectively recovered (conservancy measures)


Application of OECD 2003

✦ Existing treaties

- ✦ OECD ambulatory view
- ✦ Cases to contrary? Lamesa, NatWest

✦ New treaties

- ✦ OECD countries
- ✦ Non-OECD countries?
 - Publication of positions does not include India yet



So what if anti-avoidance rules apply to treaties?

✦ Arbitrage

- ✦ Which country will apply its anti-avoidance rules

✦ Cherry picking

- ✦ How can combinations of favourable domestic and treaty law be covered by anti-avoidance rules?

Tax administration

★ Recent developments

● Exchange of information

- Bank secrecy 2000-
- Tax havens 1998-

● Assistance in collection 2003

● Joint International Tax Shelter Information Centre Memorandum of Understanding 2004

- JITSIC is based in Washington DC and involves Australia, Canada, the UK and the US