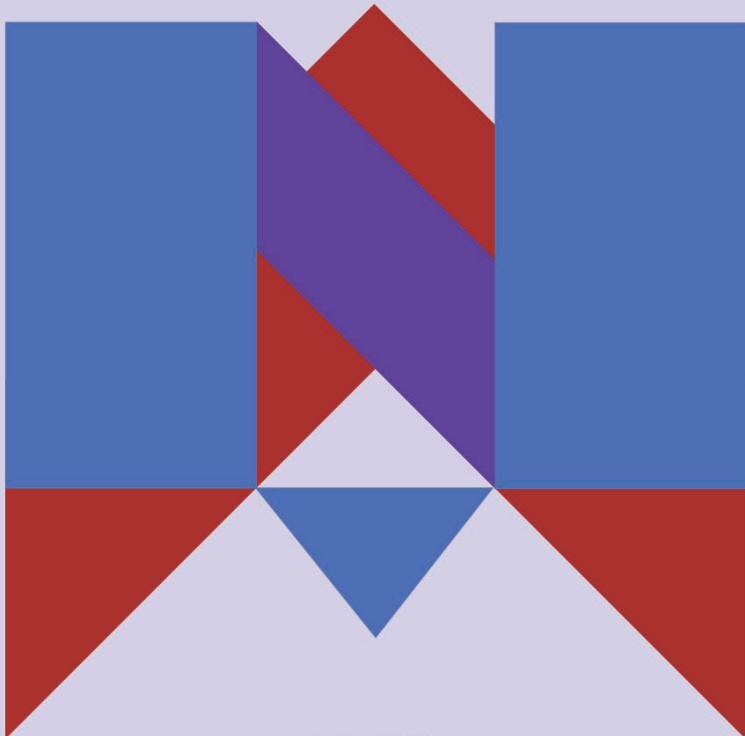


Interpretation and Application of Tax Treaties in North America

Juan Angel Becerra



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Interpretation and Application of Tax Treaties in North America 2nd edition

Why this book?

The book 'Interpretation and Application of Tax Treaties in North America' provides a comprehensive analysis of the tax treaty policy, court cases, competent authority agreements and other relevant tax treaty information from Canada, Mexico and the United States. It is divided into three sections: Section I presents the origins and development of tax treaty law and the general treaty interpretation principles. The work carried out by the League of Nations and the OECD's ultimate codification of customary tax treaty practice are discussed, followed by a discussion of the public international law principles that have been applied to tax treaty situations. Section II presents the general tax treaty interpretation approach, as well as the specific interpretation and application principles which have been applied in Canada, Mexico and the United States. Finally, Section III presents potential solutions and conclusions.

Nearly 100 countries have concluded tax treaties with Canada, Mexico or the United States. Therefore, this book is an important addition to the library of any tax practitioner interested in knowing how a tax treaty situation would be interpreted in these countries.

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International Double Taxation, Tax Evasion and Aggressive Tax Planning

International double taxation, excess taxation, tax avoidance, tax evasion and aggressive tax planning are all related problems¹⁶² and can cease to exist, in the author's opinion, only when a country is able to provide much better taxing platforms which are sustainable over time and reflect the principle of "ability to pay", and of course is able to offer an enhanced legal system which can assure certainty by enduring laws and regulations, including treaties that can easily be read, interpreted and applied.

2.1. International double taxation

The belief that international double taxation is a barrier to the placement of investments abroad developed from the era of the League of Nations (*see* Chapter 1) and is still prevalent today within the OECD.¹⁶³ However, this belief has always been questionable, even during the era of the League of Nations. For example Sir Percy Thompson, a member of the Fiscal Committee, submitted the following resolution in 1930:

That the prevalent view that an undesirable economic result, viz., the creation of an artificial barrier which impedes the free flow of capital into the channels in which it can be most usefully and profitably employed, is produced by double taxation is fallacious: that origin taxation is solely responsible for this undesirable economic result which would remain unaffected if all taxes based on residence were everywhere abolished and in consequence double taxation ceased to exist.¹⁶⁴

This proposition was again discussed in 1931.¹⁶⁵ However, the Fiscal Committee reached the conclusion to request that Sir Thompson provide more economic evidence to support his statement. Sir Thompson soon after left the

162. 1925 Report, at 27 ("we think it desirable to draw attention to the connection which exists between the two problems of tax evasion and double taxation".).

163. 2010 *OECD Model*, Introduction, para. 1 ("Its harmful effects on the exchange of goods and services and movements of capital, technology and persons are so well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries".).

164. 1930 Report, at 9.

165. 1931 Report, at 8.

Committee and no more discussion of his proposition was ever documented by the League of Nations.

In the author's opinion, Sir Thompson's bold statement is absolutely right. It is also true, however, that origin or source taxation may not cease to exist either, because it would create many imbalances in the economies of most developing countries. Also, one must remember that even the United States exerted its influence on the League of Nation's Fiscal Committee to retain origin taxation in the Model Conventions and to provide relief to its tax subjects by a deduction system (equivalent to today's credit system). Origin or source taxation is a necessary evil. It is also born at the very heart of governments dominated by the desire to tax the foreigner.¹⁶⁶

Thus, it is true that the rise, life, development and preservation of tax treaties have never been and are not even today for the avoidance of double taxation. Tax treaties are, with respect to double taxation, all about the attribution of taxing authority as regards items of income produced by parties that are residents of one contracting state and derive from sources located in the other contracting state. The question of double taxation has always been there, in the minds of people studying the problem since the time of the League of Nations¹⁶⁷ and until today.

The International Chamber of Commerce, which influenced the work of the League of Nations, was never concerned about domestic taxation of resident enterprises, but rather was always concerned about the foreign taxation of multinationals.¹⁶⁸ What really triggered the urgent need to find a solution to foreign taxation was the trade expansion of (mainly American and British) multinational enterprises in the early 1920s.

In the author's opinion, the barrier belief is not entirely accurate, and double taxation is or has always been more in the field of an excess taxation equivalent to, what the four economists once studied, a burden.¹⁶⁹ This proposition, and following somewhat Sir Thompson's proposition, can be supported by the fact that an unprecedented amount of investment capital has been flowing into China, India and Brazil, not exactly because of their tax treaty

166. 1923 Report, at 40.

167. *Id.*

168. 1925 Report, at 8. *See* International Chamber of Commerce resolution ("In order to avoid double taxation, the best means would be to accept residence as the basis of the tax on income.").

169. 1923 Report, at 5.

networks, but because those countries have offered much more attractive tax incentives to foreign investment. And they are not even OECD members.

International double taxation, as it is known today, can be categorized as juridical or economic. Juridical double taxation can be defined as “the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter for identical periods”.¹⁷⁰ Typical examples of juridical double taxation include cases where the resident of one contracting state is taxed on items of income in a source state, and those items of income are taxed in the residence state (e.g. interest; royalties; dividends; income from a permanent establishment situated in the source country; or transfer pricing adjustments made in the residence country as regards transactions conducted with the permanent establishment in the source country). Juridical issues can involve not only double taxation but even triple taxation. Consider the following example: A resident of country *A* is doing business in country *B* through a permanent establishment situated therein, which in turn provides a loan to a resident of country *C*. The resident of country *A* would be subject to tax on the same income in three countries: in country *C* based on source rules, in country *B* based on source rules for permanent establishments and in country *A* based on residency rules.¹⁷¹

Economic double taxation can be defined as “the taxation on two different persons in respect of the same income or capital”.¹⁷² The most typical causes of economic double taxation are the rewriting of profits for transactions between associated enterprises, and the simultaneous taxation of a company’s profits at the level of the company and of the dividends at the level of the shareholder.¹⁷³ Economic double taxation issues arising from transfer pricing adjustments in related-party transactions are usually resolved through a mutual agreement procedure.¹⁷⁴ However, situations arising from the taxation of profits at both the company and shareholder levels can be resolved only by a proper combination of both domestic law and tax treaties.

Clearly, the main purpose of the OECD Model has always been the provision of means for resolving on a uniform basis the most common problems that arise in the field of international juridical double taxation.¹⁷⁵

170. 2010 *OECD Model*, Introduction, para. 1.

171. K. van Raad, *Triangular Cases*, 33 *Eur. Taxn.* 9 (1993), at 300.

172. 2010 *OECD Model*, Commentary on art. 9, para. 5.

173. *Id.* Commentary on art. 10, para. 40.

174. *Id.* Commentary on art. 25, para. 10.

175. *Id.* Introduction, para. 3.

Therefore, following the OECD's statement quoted above which first appeared in the 1992 Model,¹⁷⁶ the first conclusion that can be drawn is that the complete elimination of double taxation can be achieved only by domestic law in many cases, and a combination of both domestic law and tax treaties in many others.

Currently, many countries – especially in Europe – provide in their domestic legislation for a “participation exemption” as regards certain categories of income earned by their residents from foreign sources, most commonly dividends and capital gains on the sale of shares or property. In North America, only Canada grants to its corporate residents a participation exemption on qualifying dividends earned from subsidiaries located in a foreign country with which Canada has a tax treaty in effect. Mexico and the United States have a tax credit system in general with limitations.

2.2. Tax evasion and aggressive tax planning

The first proposition under this section is that aggressive tax planning cannot be treated as tax evasion. This is generally the view even in today's OECD work on aggressive tax planning which will be discussed below in this Chapter.¹⁷⁷ Therefore, these two concepts will be developed separately so that readers can easily distinguish one from the other and what has been done by governments to combat these issues. Furthermore, the notion of tax treaty abuse and the OECD efforts to combat this issue will also be discussed separately. Finally, in this chapter various significant court cases decided in the United States and Canada will be considered which have been (and will continue to be) taken into account in the resolution of cases dealing with tax evasion, information exchange and abusive or aggressive tax planning.

2.2.1. Tax evasion

The League of Nations was also appointed to find a solution to tax evasion at the International Economic Conference held in Genoa in April 1922. Following the recommendations of the participants at the Genoa Conference, Resolution 13 of the Financial Commission provides as follows:

176. 1992 *OECD Model*, Introduction, para. 3.

177. OECD, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure* (2011), Introduction, at 11.

We have considered what action, if any, could be taken to prevent the flight of capital in order to avoid taxation, and we are of the opinion that any proposals to interfere with the freedom of market for exchange; or violate the secrecy of bankers' relations with their customers are to be condemned [...].¹⁷⁸

Although there was no reason at that time to believe that bank secrecy was going to be abused by the revenue authorities,¹⁷⁹ which was one of the concerns of the International Chamber of Commerce, the bank secrecy taboo remained untouched for quite a while.

Ninety years later, the era of bank secrecy is over.¹⁸⁰ The OECD, with the support of the G20, moved quickly on an initiative to break down this taboo. The 2011 report on this matter¹⁸¹ states that “Almost EUR 14 billion in additional tax revenue have been secured in the past two years in 20 countries where data is available and there is far more to come”. Out of this EUR 14 billion, almost EUR 200 million comes from Canada, EUR 60 million from Mexico and EUR 2 billion from the United States. In today's GDP global output or even country output, the numbers seem quite irrelevant. This can be read in two ways, either that tax evaders are quite smart and they have not been caught, or there is not much to collect in the end from off-shore undeclared funds. One thing for certain is that banks are becoming much more strict in accepting new foreign clients, and anti-money laundering regulations are becoming tougher and tougher by the year. Thus, in the long run, this bank transparency may provide better results not only in the combating of tax evasion but also in the provision of more reliable business transparency. If transparency is working already one way, it should also work the other way around for the benefit of taxpayers and investors.

An additional challenge that the experts struggled with in dealing with this issue was, surprisingly, public opinion.¹⁸² The experts thought that the recommendations on information exchange would only work in a given country to the extent that the public of that country was ready to accept this possibility. In today's world, mass media (“one-to-many”) approaches used by some countries play an important role in influencing the behaviour of taxpayers, tax advisors and tax shelter promoters regarding tax.¹⁸³

178. 1927 Report, Introduction, note 2.

179. 1925 Report, at 25.

180. OECD, *The Era of Bank Secrecy is Over* (2011).

181. *Id.*

182. 1925 Report, at 26.

183. OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (2011), at 11.

The 1923 Report of the four economic experts did not deal with this matter. It was not until 1925 that the Group of Technical Experts of the Financial Committee dealt with the study of tax evasion from a theoretical perspective. This Group's theoretical definition of the problem was that tax evasion is the transfer of capital abroad with the purpose of escaping taxation which is legally due.¹⁸⁴ However, the Experts also stated that tax evasion may arise from carelessness, forgetfulness or negligence vis-à-vis compliance with tax obligations.¹⁸⁵

Governments have sought to challenge tax evasion in the international arena with information exchange agreements for a very long time. For example the first notion of an information exchange agreement recorded in the 1925 Report is the 1843 convention between Belgium and France for the exchange on information concerning immovable property possessed in one of the contracting states by inhabitants of the other.¹⁸⁶ Another similar treaty was concluded between Belgium and the Netherlands in 1845. There is also a record of the 1907 treaty between France and Great Britain providing for information exchange to combat tax evasion on death duties.¹⁸⁷

The conclusion of the experts in 1925 was that the effective method of avoiding tax evasion is for revenue authorities to undertake and supply to other countries, on the basis of reciprocity, information as may be required to ascertain income and capital of persons and companies in the areas of immovable property, mortgages, business income and securities.¹⁸⁸

The Committee of Experts in 1927 and the General Meeting of Government Experts in 1928 also provided some model conventions to resolve this problem, namely the Draft Bilateral Convention on Administrative Assistance in Matters of Taxation;¹⁸⁹ the Draft Bilateral Convention on Judicial Assistance in the Collection of Taxes;¹⁹⁰ and the final versions thereof in 1928.

Tax evasion has been described in various ways since the time of the League of Nations, for example as a moral problem,¹⁹¹ an evil and so on. However, the experts were also aware that the main cause of tax evasion is precisely

184. 1925 Report, at 22.

185. *Id.*

186. *Id.* at 23.

187. *Id.*

188. *Id.* at 34.

189. 1927 Report, at 22.

190. *Id.* at 26.

191. 1925 Report, at 28.

excess taxation.¹⁹² Notwithstanding this, very little work was carried out by the Fiscal Committee from 1929 to 1946, mainly and surprisingly due to the opposition of governments to change their internal laws to enable them to carry out exchanges of information.¹⁹³ Nevertheless, some treaties are reported in the 1939 Report,¹⁹⁴ e.g. the 1937 Convention between Hungary and Romania for Administrative Assistance and Recovery of Taxes; the 1938 Convention between Germany and Italy on Administrative and Legal Assistance in the Matter of Taxation; and the 1939 Convention between the United States and Sweden on Income and Property.

In present tax treaty practice, both avoidance of double taxation and prevention of fiscal evasion are covered in a single treaty. The OECD has been working hard in the development of rules for administrative assistance in tax collection and information exchange, and in 2003 included a whole new article 27 in the Model dealing with assistance in tax collection.¹⁹⁵ It took only few decades for the OECD to pick up this concept from the previous work already carried out by the League of Nations.

Although current paragraph 41 of the Introduction to the 2010 OECD Model¹⁹⁶ has remained virtually unchanged since its first publication in 1977, the OECD work in the combating of tax avoidance and evasion can be seen in the rapid development of exchange of information agreements by its member countries. Indeed, between 2008 and 2012 the number of this type of treaty reached into the hundreds.¹⁹⁷ Canada has concluded exchange of information agreements recently with countries such as Anguilla; the Bahamas; Bermuda; the Cayman Islands; Dominica; Isle of Man; Netherlands Antilles; San Marino; St. Kitts and Nevis; St. Vincent and the Grenadines; and Turks and Caicos.¹⁹⁸ Mexico has concluded exchange of information agreements with the Bahamas, Bermuda, the Netherlands Antilles and the Cayman Islands,¹⁹⁹ while the United States has concluded such agreements with Antigua and Barbuda, Aruba, the Bahamas, British Virgin Islands, the

192. 1927 Report, at 9.

193. 1938 Report, at 1.

194. 1939 Report, at 18.

195. 2003 *OECD Model*.

196. "The Committee on Fiscal Affairs continues to examine both the improper use of tax conventions and international tax evasion. The problem is referred to in the Commentaries on several Articles. In particular, Article 26, as clarified in the Commentary, enables States to exchange information to combat these abuses".

197. See list and database at <http://www.oecd.org/ctp/exchangeofinformation/taxinformationexchangeagreementsties.htm>.

198. See <http://www.oecd.org/ctp/harmfultaxpractices/43775845.pdf>.

199. *Id.*

Cayman Islands, Dominica, Gibraltar, Guernsey, Isle of Man, Jersey, Liechtenstein, Monaco and Netherlands Antilles.²⁰⁰

Mention should be made that the OECD released its Model Agreement on Exchange of Information on Tax Matters in April 2002.²⁰¹ This Model, including its Commentary, has been, without a doubt, the basis for the negotiation of the substantial number of agreements recently concluded and already in effect.

Thus, it is clear that there is a multinational effort coordinated by the OECD to achieve – once and for all – an end to international tax evasion through the implementation of exchange of information agreements.

As regards domestic actions to combat tax evasion, there is the unforgettable case of KPMG in the United States in 2005. The IRS criminally prosecuted a few partners for conspiracy to commit fraud, including the then deputy chairman of the firm.²⁰² KPMG had to admit to criminal wrongdoing and agreed to pay USD 456 million in fines, restitution and penalties as part of an agreement to defer prosecution of the firm.²⁰³ As a result of this agreement, KPMG also had to terminate its practice areas which provided tax advice to wealthy individuals and had to secure permanent adherence to higher tax practice standards regarding the issuance of certain tax opinions and the preparation of tax returns.²⁰⁴

From this single action to combat tax evasion, the IRS collected more than USD 3.7 billion by August 2005 from taxpayers who voluntarily participated in a parallel civil global settlement initiative called Son of Boss.²⁰⁵ This amount, plus the USD 456 million in penalties, is more than double the amount reported from the abolition of bank secrecy.

Clearly, not only the United States is quite committed to combat tax evasion with the heavy weight of all of the government's sources. Canada has also publically declared war against tax evasion through the imposition of

200. Id.

201. The Model Agreement is available at <http://www.oecd.org/ctp/exchangeofinformation/2082215.pdf>.

202. IR-2005-83 (29 Aug. 2005), available at [http://www.irs.gov/uac/KPMG-to-Pay-\\$456-Million-for-Criminal-Violations](http://www.irs.gov/uac/KPMG-to-Pay-$456-Million-for-Criminal-Violations).

203. Id.

204. Id.

205. Id.

new domestic anti-tax shelter regulations.²⁰⁶ The Canadian government has declared that:

Through Canada's Economic Action Plan, the federal government is committed to combating international tax evasion and to ensuring tax fairness by implementing the standard developed by the OECD for the effective exchange of tax information. In order to do so, in addition to concluding tax treaties, the Government also seeks to conclude tax information exchange agreements (TIEAs) with jurisdictions with which Canada does not have a tax treaty.²⁰⁷

Mexico is also moving forward very quickly in concluding exchange of information agreements with low-tax jurisdictions. Furthermore, Mexican domestic rules targeting low-tax jurisdictions are quite tough, imposing, for example a 40% withholding tax on income paid to residents of such jurisdictions in some cases and to domestic taxpayers, by the imposition of Mexican tax on items of income derived, directly or indirectly, from such jurisdictions. Mexico's actions in this regard have been smart over the last 6 years. Other than its international actions in cooperation with other jurisdictions, Mexico has been implementing new laws to stop or at least discourage tax evasion, for example the Cash Deposits Tax Act.²⁰⁸ Other actions include the limitation of foreign currency held in cash by individuals, as well as the most recent anti-money laundering regulation which may require some consulting firms and law firms to disclose information on their clients regarding, for example real estate transactions or even the mere formation or termination of corporate vehicles.²⁰⁹

2.2.2. The war on aggressive tax planning

As the author asserted at an international tax conference in Acapulco, Mexico in August 2012, simply stated, aggressive tax planning is that tax planning which the tax authorities do not like.²¹⁰ However, the question to be resolved in aggressive tax planning cases is whether the relevant taxpayer

206. Details regarding this matter are available at <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/txshltrs/menu-eng.html>.

207. See <http://actionplan.gc.ca/en/initiative/tax-treaties-and-tax-information-exchange-agreements>.

208. Ley del Impuesto a los Depósitos en Efectivo (1 Oct. 2007), as amended (7 Dec. 2009).

209. Decreto por el que se expide la Ley Federal para la Prevención e Identificación de Operaciones con Recursos de Procedencia Ilícita, Diario Oficial de la Federación (17 Oct. 2012), section 17 XI.

210. XIV Foro de Tributación Internacional, Colegio de Contadores Públicos de México, Acapulco (9-10 Aug. 2012).

has or has not violated any established principle of taxation embodied in a taxing statute.

The League of Nations stated under the concept of tax evasion that some taxpayers, owing to a lack of clarity in the law, take advantage of doubts in legal interpretation.²¹¹ There is no intentional behaviour to attempt to ignore any statute. But taxpayers are and should be free to interpret unclear provisions in their favour.

Aggressive tax planning is not new either. Indeed, it is even older than the League of Nations. Dr M.B. Carroll discussed in a 1935 article²¹² the case of the so-called French dividend tax that was introduced by the Law of 29 June 1872. This dividend tax provision aimed at taxing dividends in a foreign territory to foreign recipients when the foreign company distributing the dividends had a controlling interest in France. Thus, a dividend could have been subject to triple taxation. The article by Dr Carroll discusses how some companies reorganized themselves to set up companies in neighbouring countries which in turn opened branches in France. As the dividends were not then paid in France, no tax should have been due. The French tax administration noticed these tax planning strategies and moved quickly to issue a new decree in December 1872 to modify the previous law and to provide that such taxation was borne by foreign companies having assets in France, thereby reaching those companies which reorganized abroad and set up French branches.

Of course, there was more tax planning. The article by Dr Carroll describes the case of a Swiss company that organized itself in France through a French partnership with two of its directors. However, the Swiss company retained signatures in the French partnership and allotted itself 8% of the partnership's earnings and losses. The Court of Cassation, in a decision rendered in 1913, held that the two enterprises were related and that the French partnership was "fictitious".

More recently, the United States has challenged aggressive tax planning through its particular substance-over-form approaches, which include the so-called economic substance approach, the step approach and the dominion and control approach. In addition to statutory provisions, over the years the courts have developed several doctrines to deny tax benefits that would

211. 1925 Report, at 22.

212. M.B. Carroll, *The Development of International Tax Law; Franco-American Treaty on Double Taxation-Draft Convention on Allocation of Business Income*, 29 Am. J. Intl. L. 4 (1935), at 586-596.

otherwise arise from certain tax-advantaged transactions. These doctrines are not entirely distinguishable, and their application to a given set of facts is often blurred by the courts and the IRS. There is considerable overlap among the doctrines, and typically more than one doctrine is likely to apply to a transaction. Because of these ambiguities, invocation of these doctrines can be seen as at odds with an objective, “rule based” system of taxation. Nonetheless, the doctrines provide a useful tool under present law to police, at a minimum, the most egregious tax shelter abuses.²¹³

For example the US Supreme Court decided in *Knetsch v. United States* to deny the deduction of some interest payments on the following grounds:

The trial judge made findings that “[t]here was no commercial economic substance to the... transaction,” [...] that “[n]o indebtedness of [Knetsch] was created by any of the... transactions,” and that [...] “[n]o economic gain could be achieved from the purchase of these bonds without regard to the tax consequences [...]” [w]hile, in form, the payments to Sam Houston were compensation for the use or forbearance of money, they were not in substance.²¹⁴

The Supreme Court made few other interesting remarks in this case, for example:

Tax avoidance is a dominating motive behind scores of transactions. It is plainly present here. Will the Service that calls this transaction a “sham” today not press for collection of taxes arising out of the surrender of the annuity contract? I think it should, for I do not believe any part of the transaction was a “sham.” To disallow the “interest” deduction because the annuity device was devoid of commercial substance is to draw a line which will affect a host of situations now before us and which, with all deference, I do not think we can maintain when other cases reach here. The remedy is legislative. Evils or abuses can be particularized by Congress.²¹⁵

And:

The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether avoid them, by means which the law permits, cannot be doubted. [...] But the question for determination is whether what was done, apart from the tax motive, was the thing which the statute intended.²¹⁶

213. Joint Committee on Taxation, *Description and Analysis of Present-law Tax Rules and Recent Proposals Relating to Corporate Tax Shelters*, JCX-84-99 (10 Nov. 1999), at 6.

214. *Knetsch v. United States*, 364 U.S. 361, 364-365 (1960).

215. *Id.* at 371.

216. *Id.* at 365, quoting *Gregory v. Helvering*, 293 U.S. 465 (1935).

More recently, the OECD efforts in the fight against aggressive tax planning have been carried out by the Forum on Tax Administration and the Aggressive Tax Planning Steering Group of Working Party No. 10 on Exchange of Information and Tax Compliance of the Committee on Fiscal Affairs (the Forum on aggressive tax planning).²¹⁷ This Forum, with the full political support of the G20,²¹⁸ recently developed some reports²¹⁹ on the matter which address all of the work carried out by the representatives of the tax administrations who get together frequently to share knowledge on the actions carried out by each country to combat aggressive tax planning.

The report on transparency and disclosure addresses the initiatives which have been implemented by several governments to gain information in advance on the strategies implemented by their taxpayers.²²⁰ The benefits – mainly, if not entirely – for the governments are evidently the reduction of time-lags between the creation, promotion and ultimate implementation of the strategies enabling the government to react more efficiently with either targeted audits or even changes in laws to combat aggressive tax planning.²²¹ Canada and the United States reported their disclosure rules in January 2011. However, at the time of publication of this book, such rules have evolved. The current rules in Canada require taxpayers and promoters to disclose their tax shelters. A tax shelter is defined under section 237.1(1) of the Income Tax Act as an investment in property or a gifting arrangement for the purpose of creating losses, deductions or credits.²²² Canadian tax shelters must be registered by their promoter and must be given a tax identification number even before the promoter sells the shelter or accepts any contribution for the same.²²³

The noteworthy aspect is that tax consultants and lawyers, including accounting firms, can be deemed to be promoters when in the provision of their independent professional services they are:

217. OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (2011), Foreword, at 3.

218. OECD, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure* (2011), Foreword, at 3.

219. OECD, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure* (2011); OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (2011); OECD, *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues* (2012).

220. J.A. Becerra, *Cross-Border Tax Planning Information Disclosure*, 12 *Practical Mexican Tax Strategies* 4 (July/Aug. 2012), at 11-12.

221. OECD, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure* (2011), Foreword.

222. See <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/txshltrs/whts-eng.html>.

223. See <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/txshltrs/rgstrng-eng.html>.

[...] responsible for and contribute to the design of any of the tax avoidance elements” of the arrangements or proposed arrangements. For example:

- An adviser who is consulted on the design and explains why the design does not work, or offers suggestions for changes to it *may* be a promoter.
- An accounting firm that is consulted for accounting may be a promoter if, in the course of carrying out its responsibilities, it provides tax advice for the design of any of the tax avoidance elements.
- A law firm (which has a relevant business that includes giving tax advice) that is consulted *may* be a promoter if, in the course of carrying out its responsibilities, it provides tax advice for the design of any of the tax avoidance elements.

The CRA will not view a person as being a promoter where in the course of providing tax advice, they are not responsible for, nor do they contribute to, the design of any of the tax avoidance elements. For example:

- An adviser who is consulted on the design and gives an opinion, without offering any suggestions for changes, that the design achieves its intended effect is *not* a promoter.
- An accounting firm that is consulted for accounting advice may give advice as to the design of the arrangements without becoming a promoter as long as it does not provide tax advice in the course of carrying out its responsibilities.
- A law firm (which has a relevant business that includes giving tax advice) may give advice as to the design of the arrangements without becoming a promoter as long as it does not provide tax advice in the course of carrying out its responsibilities.²²⁴

The United States also has some information disclosure initiatives in place. The one listed in the OECD report on transparency²²⁵ is the loss reportable transactions information disclosure. These initiatives have also evolved. Currently, if a taxpayer claims a loss that falls under the thresholds listed below, the transaction must be reported on Form 8918, either by the taxpayer or its material advisor. The thresholds are as follows:

- for individuals, at least USD 2 million in a single tax year or USD 4 million in any combination of tax years;
- for corporations (excluding S corporations), at least USD 10 million in any single tax year or USD 20 million in any combination of tax years;
- for partnerships with only corporations (excluding S corporations) as partners (looking through any partners that are also partnerships), at least USD 10 million in any single tax year or USD 20 million in any

224. See <http://www.cra-arc.gc.ca/tx/bsnss/tpcs/txshltrs/prmtrs/dvsr-eng.html>.

225. OECD, *Tackling Aggressive Tax Planning through Improved Transparency and Disclosure* (2011).

- combination of tax years, whether or not any losses flow through to one or more partners;
- for all other partnerships and S corporations, at least USD 2 million in any single tax year or USD 4 million in any combination of tax years, whether or not any losses flow through to one or more partners or shareholders;
 - for trusts, at least USD 2 million in any single tax year or USD 4 million in any combination of tax years, whether or not any losses flow through to one or more beneficiaries; and
 - a loss from a foreign currency transaction under Internal Revenue Code section 988 is a loss transaction if the gross amount of the loss is at least USD 50,000 in a single tax year for individuals or trusts, whether or not the loss flows through from an S corporation or partnership.²²⁶

Furthermore, US taxpayers must also disclose their uncertain tax positions (UTPs) on or before the tax return for the year is filed.²²⁷ An uncertain tax position is – by definition – “a position for which a reserve has been booked in the financial statements of the taxpayer under the applicable accounting standards or if no reserve was made, a position which is expected to be litigated or the taxpayer has determined that the IRS has a general administrative practice not to examine the position.”²²⁸ Taxpayers required to disclose an uncertain tax position are those with assets in 2012 of at least USD 50 million; starting in 2014, the asset threshold will be USD 10 million.²²⁹

Readers outside of North America should be aware of the new environment under which tax advice is provided for Canadian and US corporations, as the information disclosure rules currently in place are (or may be) applicable to promoters or material advisors, i.e. tax consultants or lawyers, anywhere in the world. For example any tax advisor providing domestic tax advice to any domestic entity which is a tax resident in the advisor’s own tax jurisdiction but a partnership for US taxation, may be required to report a loss-generating transaction if the parameters discussed above are met.

The world of tax advisors, accounting firms and law firms providing tax advice is changing rapidly in Canada and the United States. The appetite

226. See <http://www.irs.gov/Businesses/Disclosure-of-Loss-Reportable-Transactions>.
227. Extensive information on UTPs is available at <http://www.irs.gov/Businesses/Corporations/Uncertain-Tax-Positions---Schedule-UTP>.
228. IRS Announcement 2010-9 (26 Jan 2010), at 2 - 3. See also J.A. Becerra, *Cross-Border Tax Planning Information Disclosure*, 12 Practical Mexican Tax Strategies 4 (July/Aug. 2012), at 11-12.
229. See also IRS announcement 2010-75, available at <http://www.irs.gov/pub/irs-drop/a-10-75.pdf>.

for aggressive tax planning from taxpayers is coming to an end. Even the language of tax opinions is changing. In the old days, firms used to include in their tax opinions language warning clients about possible disputes with tax authorities if the strategies under evaluation were implemented. Now, any opinion with this language may have to be revealed within a UTP disclosure.

The OECD Report on corporate losses²³⁰ details the abusive tax planning strategies detected by the 17 countries that participated in the preparation of the Report. The clear issue put forward in the Report is the concern of governments as regards the size of tax losses in their jurisdictions and how those losses have been derived from actual transactions, created artificially, but most of all how those losses are or have been used by their taxpayers.

The Report on hybrid entities and transactions²³¹ should be given special attention by readers around the world, as the United States is the primary jurisdiction where foreign partnerships also treated as hybrid entities are used.

Other reports have been issued by the Forum, and surely more are to be anticipated, as the one clear thing is that there is a coordinated multilateral effort to terminate aggressive tax planning once and for all. It is the author's opinion that the object and purpose of these reports are to let the general public (i.e. multinationals and their advisors) know that tax administrations are working and putting together intelligence on a multilateral basis so as to be in a better position to carry out this declared war on aggressive tax planning.

Furthermore, it would be expected that other countries around the world would follow the initiatives conducted and implemented by Canada and the United States, and would modify their legislation to require that taxpayers disclose in advance their tax planning.

230. OECD, *Corporate Loss Utilisation through Aggressive Tax Planning* (2011); see also J.A. Becerra, *OECD's Report on Corporate Loss Utilization Through Aggressive Tax Planning*, 22 North American Free Trade and Investment Report 13 (15 July 2012) at 1, 5-7.

231. OECD, *Hybrid Mismatch Arrangements: Tax Policy and Compliance Issues* (2012); see also J.A. Becerra, *Cross-Border Hybrid Arrangements*, 12 Practical Mexican Tax Strategies 2 (Mar./Apr. 2012), at 1, 14-17.

2.2.3. Tax treaty abuse

The issue of abuse or improper use of tax treaties has been raised by the OECD since its very early 1977 Model. The introduction to the 1977 Model and Commentary stated that the “The Committee on Fiscal Affairs has examined the question of the improper use of double taxation conventions but, in view of the complexity of the problem, it has limited itself, for the time being, to discussing the problem briefly in the Commentary on Article 1 and to settling a certain number of special cases (paragraph 2 of Article 17 and Commentaries on Articles 10, 11 and 12)”.²³² This statement has remained virtually unchanged to date. Another provision introduced in the 1977 Model was the concept of beneficial owner, especially as applicable in the context of articles 10 (dividends), 11 (interest) and 12 (royalties). Thirty-plus years after the OECD adopted this concept from English trust law, the OECD is still working to come up with a general understanding of the ways in which this concept has been interpreted and applied by courts around the world in a tax treaty context, with the aim of proposing changes to a future version of the OECD Model.²³³

Another early reference to improper tax treaty use can be found in the 1977 OECD Model Commentary on article 1.²³⁴ Such commentary stated that, in general, tax treaties should not help promote tax avoidance or evasion.²³⁵

Going further back in time to the reports of the League of Nations, there is scarcely any evidence of a particular concern that taxpayers would use tax treaties in an abusive manner. Perhaps the reason is that the League of Nations always saw the problem of tax avoidance in strict connection to the problem of double taxation, and in fact the Fiscal Committee saw that double taxation was one of the causes of tax evasion.²³⁶

Only as a matter of comment and in view of the fact that the network of exchange of information agreements is growing at a very fast pace, the author raises the point that the new OECD Model Agreement on Exchange of Information in Tax Matters²³⁷ does not raise the concern of improper use or abuse of treaties by the parties or their competent authorities. It would

232. 1977 *OECD Model*, Introduction, para. 31.

233. OECD, *Clarification of the Meaning of “Beneficial Owner” in the OECD Model Tax Convention*, Discussion Draft (29 Apr. 2011).

234. 1977 *OECD Model*, Commentary on art. 1, paras. 7-10.

235. *Id.* at para. 7.

236. 1937 Report, at 1.

237. *OECD Model Agreement on Exchange of Information on Tax Matters* (2002).

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