The Missing Keystone of Income Tax Treaties

Joanna Wheeler

Reviewed by Christiana HJI Panayi

Subject: Tax. Other related subjects: International law

This book is based on the doctoral thesis of Joanna Wheeler, a well-known figure in the tax community and a previous general reporter of the International Fiscal Association. The author examines a fundamental flaw in the OECD Model, in that the current approach to granting treaty benefits requires us to find a person to whom the treaty is to apply, and this person is to be resident in one or both states. The focus on a person though, as a means for liability to tax to arise, remains a source of tension in the interpretation and application of tax treaties, she argues. The number of issues that are found to raise basic questions of interpretation have grown dramatically since the publication of the first OECD Model, reflecting the increasing complexity of domestic law. Some of the issues arising with the application of treaties today are considered in Chapter 2, after a brief introductory first chapter which sets out the structure of her book.

In Chapter 3, the author develops her main argument. She argues that there is a fundamental flaw, a missing link or keystone, in the way that the route to treaty entitlement is defined. That keystone is the liability to tax of a person in respect of a specific item of income. The author argues that there is a problem with the current two basic conditions of treaty entitlement. The OECD Model defines the residence of a person in a state on the basis of general liability to tax. It then allocates the taxing rights between the states on the basis that the person has some ownership connection with the item of income for which the benefits are claimed. The author argues that sometimes this method does not work when the legal and economic structures become more sophisticated with not one single straightforward owner of income. Interpretation problems arise if domestic law imposes a tax liability on a person who is not the owner of the income, for example under anti-avoidance legislation or a corporate group regime.

In order to eliminate this fundamental flaw, the author proposes a "new approach" in which the criterion for treaty entitlement is liability to tax on the income, backed up by substantial connections between the income and the treaty claimant and between the treaty claimant and the residence state. This new approach is fully explored in Chapter 4. The author tests the practical application of her new approach in Chapter 5, by setting out some examples of how it would apply to some current problem areas (e.g. double attribution of profits, fragmented treaty entitlement, trusts), also looking into decided cases from various jurisdictions. She concludes in Chapter 6 that her new approach yields the appropriate policy results while respecting the tax sovereignty of states.

In Appendix I of her book, the author offers an experimental model for implementing the new approach, by re-drafting parts of the OECD Model. There is a brief commentary which explains the texts and highlights the main major differences with the OECD Model. This is a very interesting aspect of the book. Certainly, the practical application of the author's argument in Chapter 5, combined with its incorporation in a redrafted OECD Model, further enhances the argument's legitimacy. Perhaps this part of the book ought to have been included in the main text rather than the appendices. In any case, it is a useful addition to the author's book.

The other appendix, Appendix II, examines the domestic law of the Netherlands and the UK in respect of the attribution of income to a person. This was a study which was carried out by the author in order to provide some of the basic groundwork of her doctoral thesis.

Overall, this is an interesting and thought-provoking book, bringing into the discussion some refreshingly new ideas and arguments. The author’s wealth of experience and knowledge in the field is obvious and imbues this book—as well as its main argument—with more importance and credibility.
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