TR 2001/13 - Income tax: Interpreting Australia's Double Tax Agreements

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Generated on: 4 June 2026, 06:36:55 AM

Taxation Ruling
Income tax: Interpreting Australia's Double Tax Agreements

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Preamble

This document provides administratively binding advice. It is not a public ruling for the purposes of the Taxation Administration Act 1953.

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What this Ruling is about

1. This Ruling sets out the Commissioner's view on interpreting Australia's double tax agreements (DTAs). The manner in which DTAs are interpreted is in some respects different from, and in some respects similar to, the way in which domestic tax legislation is interpreted.

2. The first half of the Ruling (comprising the 'What this Ruling is about' section and Parts 1 and 2 of the Ruling section) discusses general treaty concepts affecting treaty interpretation. The second half (comprising Parts 3 and 4 of the Ruling section) explains specific interpretative rules and principles relevant to interpreting DTAs. Within this framework, the 'What this Ruling is about' section provides an initial explanation of DTAs and how they are incorporated into Australian domestic law. Part 1 of the Ruling section addresses the methods utilised in DTAs to avoid double taxation, and how taxing rights are allocated between the two countries that have concluded a DTA.

3. Part 2 of the Ruling section then explains that while there are two major international 'Models' for DTAs, each DTA is a result of separate bilateral negotiations; consequently, each treaty has its differences. Having examined these broad concepts, Parts 3 and 4 of the same section identify specific interpretative rules which should be used.

3A. When referring to specific DTAs, this Ruling adopts the definitions in sections 3AAA and 3AAB of the *International Tax Agreements Act 1953* (the Agreements Act). The Australian Treaty Series citation for each DTA is set out in a note under the relevant definition in those sections.

3B. References in this Ruling to the 'OECD Model' or 'OECD Model Convention' and to its Commentaries, are references to the 2017 update[A1] unless otherwise indicated.

4. Each of Australia's DTAs is a bilateral agreement between Australia and another country[1] under which Australia undertakes to apply its taxation laws in accordance with the terms of the agreement it has negotiated. Australia meets its obligations under its DTAs by incorporating them directly into our domestic law.[1A] Each Australian DTA is given the force of law domestically under the Agreements Act.[2]

4A. Relevant to the application of its bilateral DTAs, Australia is also a party to the *Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting* done at Paris on 7 June 2017[2A] (also known as the Multilateral Instrument or MLI). The MLI was developed to enable jurisdictions to swiftly modify their bilateral DTAs to give effect to tax integrity rules agreed internationally as part of the OECD/G20 Base Erosion and Profit Shifting (BEPS) project and to improve dispute resolution processes.

4B. Like Australia's DTAs, the MLI is also given force of law in Australia under the Agreements Act. The MLI modifies the majority of Australia's DTAs that existed when it entered into force. Therefore, it needs to be considered when determining tax liability in a DTA case. The general principles of treaty interpretation discussed in this Ruling will also be relevant to interpreting any changes made to a DTA by the MLI.

5. As well as giving DTAs and the MLI the force of law, the Agreements Act clarifies the status of these agreements with respect to

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[A1] OECD, 2019, *Model Tax Convention on Income and on Capital 2017 (Full Version)*, OECD Publishing, Paris.

[1] The *Taipei Agreement* (Schedule 1 to the Agreements Act) is a special case, and is differently framed, but the interpretative approaches discussed below would equally apply. Some DTAs are formally termed Double Tax '*Conventions*', but that is a matter of form and does not denote any difference of substance.

[1A] The provisions of Australia's DTAs are incorporated by reference. The text of the agreements is set out in the Australian Treaty Series which is accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au). The *Taipei Agreement* is an exception – it is incorporated as a Schedule to the Agreements Act.

[2] Most of Australia's DTAs are given force of law under section 5 or 5A of the Agreements Act, however some are given force of law by other provisions of that Act. Note, as an exception, that the *Non-Discrimination* Article (Article 23) of the *United States Convention* was not implemented in our domestic law, but operates only at the international level: subsection 5(2) of the Agreements Act. Article 23 therefore cannot give rise to legally enforceable rights for taxpayers and only the respective governments can take action on it internationally.

[2A] [2019] ATS 1.

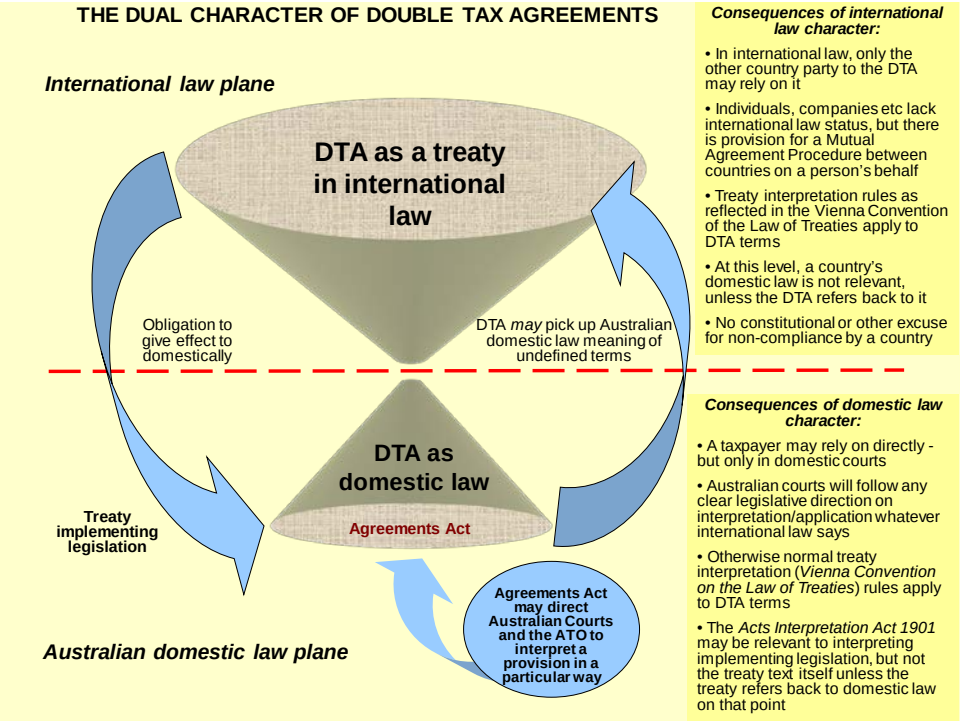
the 'Assessment Act'[3] and the various Acts which impose Australian tax. The effect of subsection 4(1) of the Agreements Act, in particular, is that the DTAs are to be interpreted and read as one with the Assessment Act. While each *DTA itself* is a treaty, and only the other country party to it can take action on it internationally, the provisions of the DTAs become part of Australian domestic law by legislative action, and are just as legally effective in domestic law as the provisions of the Assessment Act. The provisions of a DTA can therefore be relied on, in their implemented form, by individual taxpayers before Australian courts.

6. Subsection 4(2) of the Agreements Act deals with possible conflicts by effectively providing that the terms of the DTAs override those of the Assessment Act (except for the general anti-avoidance provisions in Part IVA of the *Income Tax Assessment Act 1936* and Acts imposing Australian tax, in the event of any inconsistency.

7. The above analysis reflects the fact that our DTAs have two parallel characters and operate simultaneously on two levels. They first of all represent obligations that Australia has undertaken at the international law level, and on which only the other country may directly rely. Once they are implemented by legislation they also, however, represent domestic law obligations, on which individual taxpayers may rely before Australian courts. While issues will usually arise in the context of the domestic law implementation of DTAs, those issues can only be properly analysed, and their implications fully understood, when the 'parallel lives' of Australian DTAs are kept in mind. Some of the consequences flowing from this character are considered in more detail below, particularly at Parts 3 and 4 of this Ruling.

[3] The reference to the 'Assessment Act' is to the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997*, as appropriate, as indicated by the definition at subsection 3(1) of the Agreements Act.

8. The dual character of DTAs may be diagrammatically expressed as follows:



Ruling

Part 1: How DTAs avoid double taxation

Introduction

9. The main structural mechanism by which a DTA avoids double taxation is to 'distribute' or 'allocate' taxing rights over 'income'[4] between those countries that are parties to the DTA and to require the 'residence' country to relieve double taxation for any 'source' taxation levied in accordance with the treaty. By this means they essentially reconcile competing domestic law taxing claims based on the residence of the taxpayer and the source of the income concerned.

10. This Part discusses the different methods of 'allocating' these rights between the countries. It also addresses the issue of whether a DTA may create a taxing right where such right previously did not exist under a country's domestic law and, finally, it considers the consequences of a country not exercising a taxing right 'allocated' to it under the DTA's terms.

[4] The term 'income' is used in this Ruling in a broad sense, to cover all fiscal receipts the subject of a DTA, including, as an example, capital gains.

11. The basis for the 'allocation' of taxing rights varies for different categories of income. For some categories of income the taxation right is reserved solely to the country of 'residence' (for the purposes of the DTA) of the taxpayer. For other categories, the DTAs provide for both countries to tax the income (with in some cases the tax of the country of source being limited) with the country of residence providing relief for tax paid in the other country, thus avoiding double taxation. In some rare cases, the country in which the income is sourced may be given an exclusive taxing right.

Resolution of dual residence and dual source cases

12. Unrelieved double taxation can arise where, because of differing domestic law rules, two countries both claim to be the country of 'residence' of the taxpayer[5] and/or the country of 'source' of the income concerned. Moreover, as these are the basic criteria for the distribution or allocation of taxing rights under a DTA, it is important that they be clearly defined for the purposes of the DTA.

13. Accordingly, the DTAs contain 'tie-breaker' rules to ensure that a dual resident 'person' (whether an individual, company or other entity) is treated as a resident of only one of the countries for the purposes of applying the DTA.[6] These tie-breaker rules do not directly affect whether the person is a resident of a country at domestic law – the 'person' remains a domestic law resident of each country.[6A] Therefore, a dual resident who is treated as solely a resident of another country for the purposes of an Australian DTA remains a resident of Australia for the purposes of the Assessment Act.

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[5] For example, the country of a company's incorporation (country A) may regard the company as resident there on that basis, according to its domestic law, while the other country (country B) may regard it as resident in country B on the basis of its central management and control being there, with that being a test of 'residence' under its domestic law.

[6] The *United States Convention* is an exception in that it only has such 'tie-breaker rules' for individuals, not companies. It should also be noted that the application of some 'tie-breaker' rules can result in dual residents being denied the benefits of a DTA in certain cases (see, for example, Article 4(3) of the *German Agreement*).

[6A] The DTA will override the general domestic law only to the extent of inconsistency, such as where it limits taxing rights over 'non-residents' under the treaty. In some cases a country's domestic law may make domestic law residence status or the operation of particular domestic tax rules depend on treaty residence status after application of the tie-breaker test. For example, see the definition of 'prescribed dual resident' at subsection 6(1) of the *Income Tax Assessment Act 1936* and of 'Part X Australian resident' at section 317 of the same Act.

[7] [Omitted.]

[8] [Omitted.]

[9] [Omitted.]

13A. Australia's DTAs also generally contain a *Source of Income* Article, or other provisions, to clarify the source of the various categories of income subject to the 'distributive' rules and other double tax relief provisions in the DTA.[9A] In the case of some DTAs, those source provisions are to be found in the Agreements Act.[9B]

Residence country-only taxation

14. As noted above, DTAs provide that some types of income are to be taxed only by the country of residence of the recipient for the purposes of the DTA (the 'residence country'). A common example of a 'residence country-only' taxing right under a DTA is that provided for in relation to international shipping and airline profits[10], mainly because of the difficulties associated with determining the source of such profits. Pensions are also often taxable only in the country of residence of the pensioner under Australia's DTAs.[11]

The case of 'business profits': Residence country-only taxation, or full taxation by both countries with residence country relief

15. The DTAs provide, as a more complex example, that a country may not tax 'business profits' derived by an enterprise of the other DTA party unless the profits are attributable to a permanent establishment ('PE')[12] situated in the first ('host') country through which the enterprise carries on business. Where there *is* such a PE, both the host country to the PE and the country of residence of the enterprise may tax income derived by it through that PE, with a credit or exemption being given by the second (residence) country for tax paid in the host country of the PE.

Full source country taxation – with residence country relief

16. For some other categories of income, DTAs also allow what can be termed for present purposes the country of 'source' of the income to fully tax, but again require the residence country to

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[9A] See, for example, Article 22 of the *Vietnamese Agreement*).

[9B] Examples are section 11S of the Agreements Act, in relation to the *Chinese Agreement* and subsections 11ZF(2) and (3) of the Agreements Act, in relation to the *Taipei Agreement.*

[10] Article 8 in most DTAs.

[11] Article 18 in most DTAs. See the discussion at paragraph 21 of this Ruling for an exception.

[12] The term 'permanent establishment' is a key term that is defined in some detail in DTAs, usually at Article 5. As Paragraph 1 of the Commentary to Article 5 of the OECD Model says: '[t]he main use of the concept of permanent establishment is to determine the right of a Contracting State to tax the profits of an enterprise of the other Contracting State'.

effectively reduce or eliminate its taxes so that there is no double levy of taxation.

17. An example is the *Alienation of Property* Article usually found at Article 13 of Australia's DTAs. It provides, amongst other things, that where real property situated in a country is disposed of by a resident of the other DTA country, the first country may tax the resulting profit. A credit or exemption must be given by the second (residence) country to relieve double taxation, in accordance with the *Methods of Elimination of Double Taxation* Article, which is at Article 23 in most of Australia's DTAs.

18. The *Alienation of Property* Article in Australian DTAs negotiated during the period after the introduction of the general Australian 'capital gains tax' also incorporated a 'sweep-up' provision. This allows each country to apply its domestic law to tax gains of a capital nature derived from an alienation of property not otherwise dealt with by the Article, with the residence country providing the usual relief from double taxation under the *Methods of Elimination of Double Taxation* Article.[13] However some of Australia's more recent DTAs, concluded since 2006, include a *residence* country-only sweep-up based on the OECD Model.[13A]

Source country taxation limited by rate – with residence country relief

19. In other cases the source country may tax the income, but only to a specified extent. For example, dividends, interest and royalties may usually be taxed by both countries - with the source country tax rate being limited and with the residence country providing double tax relief. This may be dealt with in the DTA by requiring a DTA party to give a credit for foreign tax actually paid. The other major method for relieving double taxation is where the DTA requires a country to give an exemption for tax on the relevant income. Australia uses the credit method in its DTAs (with the DTA partners often providing for an exemption, on their part) though sometimes at domestic law Australia

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[13] See, for example, Article 13(5) of the *Vietnamese Agreement*. This provision differs from the OECD Model Convention, which provides a residence country-only sweep-up in these circumstances. Until 2008, Australia had a 'Reservation' to the OECD Model expressing its different approach on this issue. As to Reservations, see paragraphs 109 to 111 of this Ruling. The Australian provision which reflected that Reservation is closely related to the alternative 'sweep-up' provision provided for in the United Nations Commentary on Article 13 of the UN Model Tax Convention (Department of Economic and Social Affairs, 2011, *United Nations Model Double Taxation Convention between Developed and Developing Countries*, United Nations, New York, p 237 (UN Model).

[13A] See, for example, Article 13(5) of the *German Agreement*. Australia withdrew its Reservation in relation to the residence country-only sweep-up provision in the 2008 update to the OECD Model and its Commentaries.

goes further than is required of it by the DTA and provides an exemption.[14] The use of the domestic law exemption method of double tax relief, rather than the credit method specified by the DTA, is common internationally and is regarded by the ATO as fully consistent with Australia's treaty obligations.

20. The source country tax rate on interest or royalties is typically[15] limited to 10% of the gross amount of the interest or royalties. Dividend withholding tax rates are often limited to a maximum of 15%, but in Australia's more recent DTAs some categories of dividends may be taxed at lower rates (such as 5%[16]) or may not be taxed at all by the source country.[17] Of DTAs currently in force in Australia, most of the earlier ones, such as the *Netherlands Agreement*, have a flat 15% maximum rate of source country taxation on all dividends.

Exclusive source country taxation

21. As mentioned earlier, it is comparatively rare for a DTA to provide an exclusive taxing right to the 'source' country. However, the OECD Model Convention and some of Australia's DTAs provide for certain government service remuneration and pensions to be treated as taxable only in the source country. Article 19 of the *Spanish Agreement* provides an example of this.

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[14] By making the relevant income 'exempt income' or 'non-assessable non-exempt income' under the Assessment Act. Even where there is no DTA, double tax is often in practice avoided through a 'unilateral' foreign tax credit or exemption system under a country's domestic law (such as Division 770 and Subdivision 768-A of the *Income Tax Assessment Act 1997* and sections 23AG and 23AH of the *Income Tax Assessment Act 1936* in Australia's case). A DTA may sometimes simply confirm that domestic law position in an instrument binding at international law.

[15] Though not always; the *Indian Agreement* provides, for example, for a maximum interest withholding tax of 15% (Article 11) and differentiated rates of royalty withholding tax of up to 20% (Article 12).

[16] Where, for example, dividends flow to a treaty partner resident company shareholder, directly holding at least 10% of the voting power in the Australian company paying the dividends (see Article 10(2) of the *Swiss Convention*). As in that Agreement, the criteria for the lower dividend withholding tax rate may be different for dividends paid by the treaty partner resident companies to Australian company shareholders.

[17] Where, for example, dividends flow to a treaty partner resident company shareholder, holding at least 80% of the voting power in the Australian company paying the dividends (and where certain other conditions are also met). See Article 10(3) of the *Swiss Convention*.

[18] [Omitted.]

[19] [Omitted.]

The words used to allocate taxing rights

22. The distributive rules in the DTAs allocate taxing rights on a 'shall be taxable only' or 'may be taxed' (by one of the countries) basis. As demonstrated by the decision in *Chong v Commissioner of Taxation*[20] (*Chong*), the inclusion of the word 'only' in the former case denotes the allocation to one of the Contracting States of an *exclusive* taxing right over the category of income flow concerned. The latter formula ('may be taxed') does not itself affect the taxing right of the other Contracting State although, as noted already, the *Methods of Elimination of Double Taxation* Article may require the residence country to give relief by means of a credit or exemption.

23. A common mistake in the practical consideration of a DTA is to see the phrase 'may be taxed' as indicating that the country referred to (usually the source country) is the only one *entitled* to tax that category of income, but that it need not do so (because of the word 'may') while viewing the phrase 'shall be taxable only' as *requiring* the country mentioned (usually the residence country) to tax that income. In fact, a country is never *required* by a DTA to exercise a taxing right under that DTA if it does not wish to. What the phrase 'may be taxed' normally means is that the country mentioned (the source country) has a non-exclusive *entitlement* to tax the income. Under normal international tax principles, the other (residence) country may also continue to tax its residents (where its domestic law so provides) on the income, wherever sourced, unless the DTA explicitly prevents it from doing so.

24. Correspondingly, the phrase 'shall be taxable only' limits the exercise of a domestic law taxing power to the country concerned – that country has an exclusive taxing right. For the other country to exercise a domestic law taxing right would be contrary to the DTA, and that attempt would be ineffective at domestic law anyway, to the extent that the treaty as implemented takes precedence (in the country's domestic law) over other domestic law in the event of a conflict.

25. Where the DTA requires a credit to be given by the residence country, there are 'shared taxing rights'. However, the source country is said to have the 'primary taxation right' because the residence country must give relief for the tax paid to the source country and therefore only effectively receives tax equal to the difference between the tax payable in the source country and the tax payable in the residence country. That may be nothing if the residence country has lower rates than the source country. If the DTA requires the other country to give an exemption (as Austria is required to do in certain circumstances, under the *Austrian Agreement*[21], for example) there is,

[20] [2000] FCA 635.
[21] Article 23(3)(a).

of course, effectively no 'secondary taxing right' given to the residence country. Even though the income cannot be taxed in the residence country in such cases, the DTA may provide for the exempted income to affect the tax levied on other income of its resident under the 'exemption with progression' system which a number of exemption countries apply.[22]

26. It follows from the different types of 'distributive rules' in the DTAs, and the varying ways in which they allocate the taxing rights over income between countries, that it is essential to decide which DTA category the income falls within, because that will determine which country may or may not tax it.

Domestic law taxing rights not addressed by a DTA

27. Goldberg J noted in *Chong*[23] that:

> When one refers to an allocation of taxing power one is doing no more than saying that in an area where both contracting states have the right to impose taxation, and may have already imposed taxation, they have agreed that one contracting state, rather than the other or, as the case may be, both contracting states, shall have the right to impose taxation in that area. Whether one uses the language of allocation of power or the language of limitation of power, the result is the same: there is designated or agreed who shall have the right under the agreement to impose taxation in the particular area.

28. It follows from his Honour's analysis that in an area where a DTA party exercises, or both parties exercise, a domestic law right to impose taxation, a DTA which does not allocate that area of taxation to either country will leave the domestic law exercise of taxing rights unaffected, rather than implicitly rendering them ineffective. This is the generally accepted view internationally, and it represents the ATO view.

Are DTAs a 'shield' rather than a 'sword' for taxing rights?

29. As indicated above, DTAs are generally seen as intended to operate in a 'permissive' manner in relation to the domestic laws of the Contracting countries, not in an 'empowering' fashion so as to impose, through the words of the DTAs, a further liability to tax. It has often been said that they thus provide a 'shield' against double taxation but not a 'sword' for the respective revenue authorities to rely on.

30. For example, in *Chevron Australia Holdings Pty Ltd v Commissioner of Taxation (No 4)*[23A] the Court considered whether

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[22] As specifically provided for in the *Austrian Agreement,* Article 23(3)(c).
[23] [2000] FCA 635 at [26].
[23A] [2015] FCA 1092.

Article 9 (*Associated Enterprises*) of the *United States Convention* could be relied on, effectively as a 'sword', independently of the domestic transfer pricing provisions. Having considered a number of cases in relation to the 'permissive' manner in which DTAs allocate taxing rights, as well as the terms of the particular treaty, Robertson J concluded that Article 9 did not have any freestanding substantive operation that could be relied on to support the relevant amended assessments.[23B]

30A. Nevertheless, there may be instances where the countries could, if they wished, provide, through the clear words of a treaty, to expand the existing areas of domestic tax liability, and (once implemented in a way that alters the pre-existing domestic laws) this would expand the areas of domestic tax liability as compared to those existing before. This could only occur within constitutional limits, of course, and the constitutions of some countries may entirely prevent such an expansion of applicable domestic law.

31. While an examination of DTAs under the interpretative rules discussed in this ruling would usually show that such an intention (that is, an intention of expanding domestic taxing liability) did *not* objectively exist in the case of a particular DTA, there may be some instances where this can occur.

32. [Omitted.]

33. [Omitted.]

Deemed source of income provisions

34. However one approaches the 'shield, but not a sword' issue discussed above, some of Australia's DTAs may operate to have what amounts to some 'sword-like' effect in practice because of the inclusion in them of a *Source of Income* Article (or the existence of corresponding provisions in the Agreements Act itself) of the type already noted.[27]

35. These *Source of Income* Articles or legislative source provisions provide broadly that items of income that one of the Contracting States may tax under the DTA shall be treated as having a source there for the purposes of domestic law, as well as for relevant DTA purposes.[27A] One purpose of these rules is to ensure that each

[23B] [2015] FCA 1092 at [51-61].
[24] [Omitted.]
[25] [Omitted.]
[26] [Omitted.]
[27] At paragraph 13 of this Ruling.
[27A] The *Source of Income* Articles in some of Australia's more recent DTAs only apply for the purposes of domestic law. For example, see Article 21 of the *Swiss Convention.*

country is empowered in its domestic law to exercise the taxing rights allocated to it (in the DTA) over residents of the other country. Those DTA source rules thus prevent any argument that the income does not have, by domestic law rules, a source in the country that is, under the DTA rules, entitled to tax that income in the hands of a resident of the other country.

36. The other purpose is that (as intended by the *Methods of Elimination of Double Taxation* Article) double taxation relief will be given by the country of residence in respect of tax levied by the other country in accordance with the taxing rights allocated to it, through the income being treated as foreign income for credit or exemption purposes.[28]

37. This is consistent with the approach of looking at the intent of the parties as manifest in the DTA's wording, since the *Source of Income* Article is designed on Australia's part (it has been an Australian 'specialty' to seek this provision in our DTA negotiations) as an add-on to domestic law to ensure that domestic law will fully implement the intent of the other, more substantive, articles of the DTA. That is not to say that domestic law may not have already given the same result, in a particular case, without these special provisions.

37A. In *Satyam Computer Services Limited v Commissioner of Taxation* [2018] FCAFC 172, the Full Federal Court held that the *Source of Income* Article in the *Indian Agreement*[28A] was effective in deeming certain royalties to have an Australian source for the purposes of the Assessment Act. The Court also noted that the Source of Income Article prevails in the event of any inconsistency with the provisions of the Assessment Act.[28B]

38. In the absence of the *Source of Income* Article or legislative source provisions mentioned above, the normal Australian source rules would be applied by the Courts to determine if the relevant income subject to the DTA distributive rule had an Australian or foreign source, as the case may be. Accordingly, because under the applicable common law rules a finding of source is essentially a practical matter of fact to be determined by the circumstances of each case[29], the Court's decision as to the source of income might

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[28] It should be noted that this ensures consistency with the foreign tax credit provisions of section 160AF of the *Income Tax Assessment Act 1936* applying only in respect of foreign source income. It should also be noted that, under section 23AH of the *Income Tax Assessment Act 1936*, foreign branch income and foreign branch capital gains derived by an Australian company from a business carried on in a 'listed' country are usually exempt from Australian tax. The listing is done by regulation, and all DTA partners are currently listed.

[28A] Article 23.

[28B] [2018] FCAFC 172 at [15–16].

[29] *Nathan v Federal Commissioner of Taxation* [1918] HCA 45; (1918) 25 CLR 183 at 189-190; *Commissioner of Taxation v Mitchum* [1965] HCA 23.

sometimes give a result that would be contrary to the result which the DTA objectively indicates was intended by Australia and the DTA partner.

39. [Omitted.]

Unexercised DTA taxing rights

40. As well as not dictating that the allocated taxing rights *must* be exercised by a country, DTAs also do not, except in certain respects to ensure their effectiveness,[30] dictate *how* they are to be exercised. Whether and how those rights are exercised is usually left to the respective ordinary domestic laws (that is, the domestic laws other than the DTA as domestically implemented). It is therefore possible, and unexceptional, to have a situation where there is a right under a treaty to impose a form of taxation, but where the legislature has not decided to impose (or has positively decided *not* to impose) such a tax liability under domestic law. A future legislature may pass legislation exercising the right, and that would be consistent with the treaty. When new legislation is being proposed, the consistency of such legislation with Australia's treaty obligations will sometimes be an issue for these reasons.

41. As an example of where allocated rights are not fully exercised in domestic law, Australia has the ability to impose withholding tax (at a maximum rate specified in the DTA) on dividends paid by an Australian resident company to a treaty partner resident shareholder.[31] However, it will often be the case that no Australian tax is levied or payable because of the domestic law exemption from withholding tax of franked dividends paid by Australian resident companies to non-resident shareholders[32], regardless of whether Australia has concluded a DTA with the country of the shareholder's residence.

42. The following is a diagrammatic expression of how taxing powers under a DTA relate to domestic law and powers to tax. Note that the segments and relationships in this diagram are not drawn to scale:

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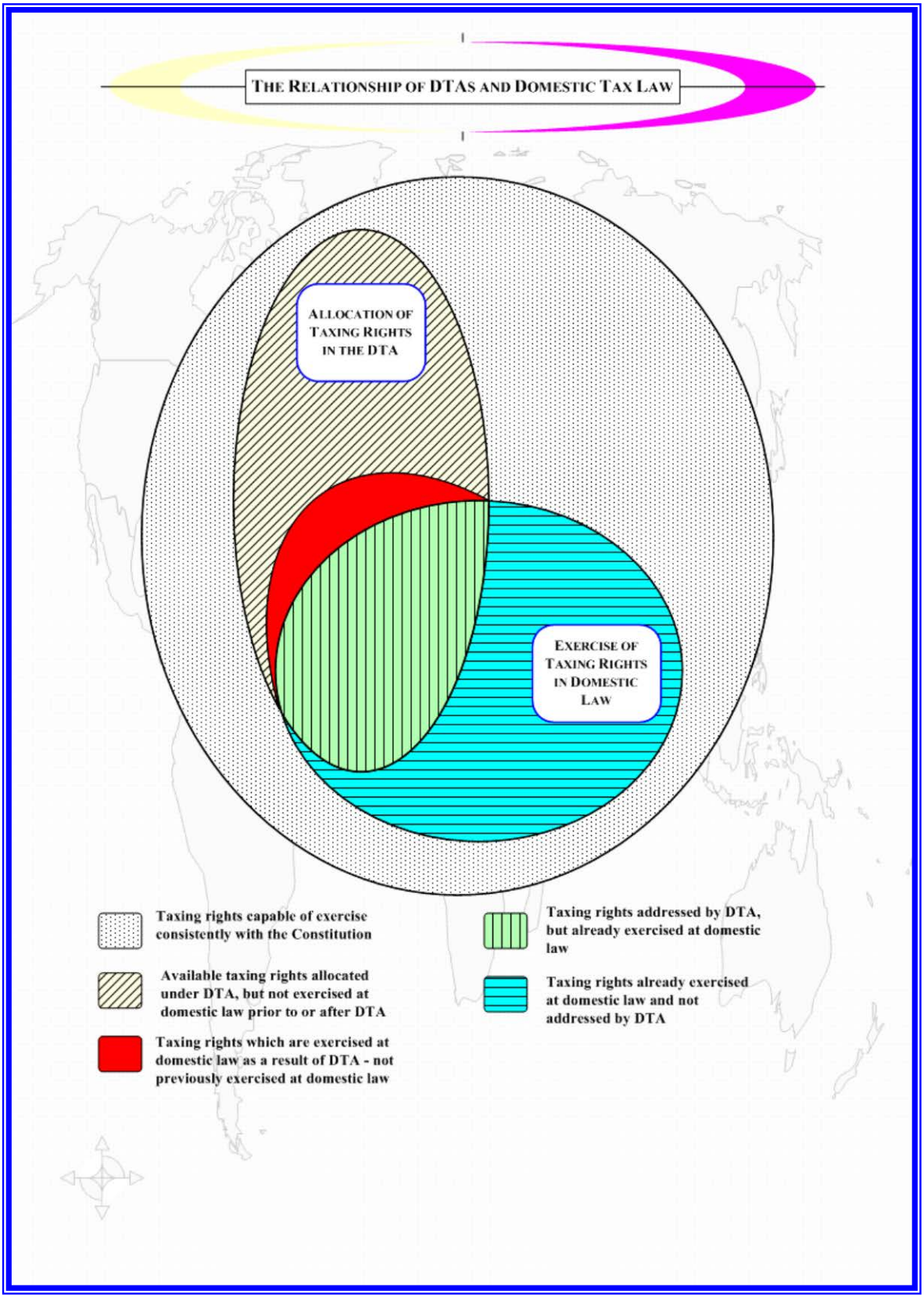
[30] Such as the application of the separate enterprise and arm's length principle requirements of the *Business Profits* Article.

[31] In the case of a United Kingdom resident shareholder, for example, the specified rate is 15% under Article 10(2)(b) of the *United Kingdom Convention*.

[32] Paragraph 128B(3)(ga) and section 128D of the *Income Tax Assessment Act 1936*.


THE RELATIONSHIP OF DTAS AND DOMESTIC TAX LAW
ALLOCATION OF TAXING RIGHTS IN THE DTA
EXERCISE OF TAXING RIGHTS IN DOMESTIC LAW
Taxing rights capable of exercise consistently with the Constitution
Available taxing rights allocated under DTA, but not exercised at domestic law prior to or after DTA
Taxing rights which are exercised at domestic law as a result of DTA - not previously exercised at domestic law
Taxing rights addressed by DTA, but already exercised at domestic law
Taxing rights already exercised at domestic law and not addressed by DTA

Determining tax liability in a DTA case

43. The above explanations point to a general approach that could be taken when determining liability for Australian tax where a DTA may be applicable. This approach is as follows:

- first, determine whether any tax liability appears to arise on its face and, if so, the quantum of that liability, under the relevant Assessment Act and the Rates Acts;
- secondly, determine whether any Article of the DTA (as relevantly modified by the MLI) operates to preclude or limit the liability, to 'pick up' domestic law concepts or to support the general domestic law provisions. It is just as significant to establish whether the relevant DTA leaves an issue unaddressed and dealt with by domestic law; and,
- thirdly, determine whether a provision of the DTA (as relevantly modified by the MLI) or of the Agreements Act dictates how the taxing right is to be exercised, or whether the *Source of Income* Article or a corresponding provision in the Agreements Act operates to require that the first step be revisited.

44. Sometimes it will be better to work back from step three to step one where, for example, the DTA makes clear that Australia has no taxing right, or where the question of general law domestic liability is a much more complex one than the operation of the DTA. However, as with all such treaty issues, it is not desirable to be overly 'linear' in analysing any DTA issue.

45. The general domestic law and the terms of the DTAs may at various stages inform the meaning and operation of each other, and they must often be kept in mind simultaneously, in the sense of requiring 'parallel processing' and a disciplined approach to interpretation.

Part 2: Variations between DTAs

46. It is important for interpretation purposes to remember that *each* DTA is the product of a separate bilateral negotiation process. Accordingly, while there is a general template structure to Australia's DTAs, each contains variations in terms from other DTAs because they are negotiated against the background of the particular languages, legal systems, tax rules, tax treaty and wider economic policies and expectations of the respective countries at the time, as well as some historical influences.

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[33] [Omitted.]

47. Those factors, and the fact that treaty negotiations are conducted against the general background of the OECD and United Nations Model Tax Conventions (which, being products of international compromise and consensus, are couched in comparatively broad terms) mean that the Australian negotiators, administrators and courts cannot expect the terms of the DTAs to be expressed with the same precision as our ordinary domestic tax legislation. Nor is it possible to always maintain consistency in how the terms of a particular Article are expressed in the various DTAs, because of the different 'mix' of the above factors in different negotiations and the 'give and take' that is a necessary incident of international negotiations.

48. This is an important point to bear in mind, because it means that the network of DTAs is not drafted in an absolutely uniform manner in relation to residents of all treaty partners, or in relation to similar activities or situations.

49. Differing wording in two DTAs may represent the same intended meaning (such as, in the ATO's view, the terms 'beneficial entitlement' in the *Dividends, Interest and Royalties* Articles of some DTAs and 'beneficial ownership' in the corresponding Articles in other DTAs).[33A] Often such differences exist because a country wants to avoid unintentionally 'picking up' a domestic law usage for an undefined term that may be different to the international tax meaning of the phrase more usually relied on. Alternatively, it may be because a country does not recognise a particular concept and regards the use of a term as potentially creating uncertainty before its courts and in the administration of the DTA.[34]

50. In other cases, differences in wording may represent specific negotiating intentions.

51. It is sometimes possible that the same wording in different DTAs could present a different intended meaning. DTA negotiators will generally seek to identify the differences between a DTA under negotiation and their existing treaty network wording and as far as possible avoid the same wording having different usages, but that will not always be possible.

[33A] See also, for example, *Undershaft (No 1) Limited v Commissioner of Taxation* [2009] FCA 41 where Lindgren J stated (at [61]) that there was no difference in substance between the expressions the "Commonwealth income tax" and "the Australian income tax" in the former *United Kingdom Agreement* and the *Netherlands Agreement* respectively.

[34] Such as the concepts of 'citizenship' and 'nationality' – frequently only one or the other of these has a clear domestic law meaning for a DTA party, or the meaning may differ as between the Parties. Because of this, an Article such as the *Government Service* Article in the *Austrian Agreement* and some of Australia's other DTAs refers to 'a citizen or national' of a country.

[35] [Omitted.]

52. One practical example of the potential significance of different wording between DTAs is that, although the business profits/permanent establishment ('PE') principle[36] is common to all the DTAs, the definition of a PE in one DTA may be substantively different to the definition in another DTA. Accordingly, Australia may have a taxing right under the *Business Profits* Article of one DTA but not under another DTA in respect of like profits of a comparable enterprise.

53. [Omitted.]

54. Similarly, although some Australian DTAs provide an exemption from Australian tax for independent personal (including professional) services income derived by a treaty partner resident individual who makes a short-term visit to Australia, usually of no more than 6 months, the conditions under which that exemption applies can vary from DTA to DTA.

55. Take the case, for example, of an Australian resident company that engages two foreign engineering consultants, one being solely a resident of the United States and the other being solely a resident of Thailand. They are engaged to carry out a business study in Australia for a period not exceeding 183 days in a year of income. The company claims that the fees paid by it to the two foreign consultants are not taxable by Australia because of the *Independent Personal Services* Articles found in the *United States Convention*[39] and the *Thai Agreement*[40] respectively.

56. Although the two DTAs contain similar conditions that need to be satisfied before Australia is prevented from taxing the consultants, the *Thai Agreement* contains an *extra* condition not found in the *United States Convention*, namely that the income is not deductible in determining taxable profits of an enterprise or a permanent establishment situated in Australia (Article 14(2)(c)).[40A]

57. [Omitted.]

58. [Omitted.]

59. [Omitted.]

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[36] That is, the general principle noted above (at paragraph 15) that business profits sourced in a country may only be taxed by that country where there is a permanent establishment (as defined by the DTA) in that country.

[37] [Omitted.]

[38] [Omitted.]

[39] At Article 14.

[40] At Article 14.

[40A] The rationale for that condition is that if the amount *paid* to the consultant is tax deductible (for Australian tax purposes) for the payer, Australia should not be obliged to then exempt from tax the corresponding income *earned* by the consultant in Australia.

60. If we assume that neither visitor has a fixed base in Australia, the result of applying the respective *Independent Personal Services* Articles would be that while the *United States Convention* would operate to preclude Australia from taxing the income derived by the visiting United States consultant, no such restriction would apply under the *Thai Agreement* in the case of the visiting Thai consultant where the fee paid to that consultant by the Australian resident company is a tax deductible item for it.

61. These examples demonstrate how important it is to pay close attention to the particular terms of the relevant DTAs when determining whether they operate to limit or preclude the ordinary domestic law tax liability in the case, or group of cases, under consideration.

Part 3: DTAs as implemented into Australian law

Specific definitions and deeming provisions in Australia's DTAs

62. Just as for ordinary domestic law provisions, the starting point for the interpretation of a substantive treaty provision should be the definitions provided in the treaty itself, and any relevant deeming provisions. As a result of the 'parallel lives' of a DTA noted above[41], however, the definitions of terms and any specific directions about how a DTA should be interpreted, as it applies *in our domestic tax law*, may be found in:

- the particular Article concerned (e.g., the definitions of 'resident', 'permanent establishment' 'dividends', 'interest', 'royalties' and clarifications as to the source of income in the relevant specific Articles);
- the *General Definitions* Article (usually Article 3);
- a 'Miscellaneous' or 'Specific Provisions' Article (e.g., Article 27 of the *United States Convention*);
- a Protocol to the DTA. A Protocol may be concluded as part of the original DTA[42], such as the Protocol to the *German Agreement* (an 'original protocol'), or may be entered into later to amend the original DTA, in which case it is an 'amending protocol'.[44] As the Protocols make clear, they are to be read as integral parts of the DTAs (which means that they have equal international and domestic law force); or,

[41] At paragraph 7 of this Ruling.
[42] Usually for presentational reasons, such as because it departs from the usual Model of one of the negotiating parties.
[43] [Omitted.]
[44] See, for example, *Indian protocol (No.1)* which amended the *Indian Agreement*.

- a provision of the Agreements Act (e.g., subsections 3(2) to 3(11A) and sections 3A, 11ZF and 18) which indicates how the DTA should be interpreted in Australian domestic law.[44A] This does not *necessarily* mean that the provision will bear the same interpretation in the other country, although such implementing provisions, particularly when they are part of the original implementing legislation for the DTA, often reflect understandings explicitly reached during the negotiations.

'Undefined terms' in a DTA

63. One of the central practical issues in treaty interpretation is the extent to which the treaty allows reference back to domestic law to determine what a term used in the treaty, but not defined there, means. A set of specific 'rules' for interpreting DTAs is set out in the *General Definitions* Article, which is present in all of Australia's DTAs.

64. Australia's older DTAs in all substantive respects use the wording of the 'undefined terms' provision that appeared in the then current *General Definitions* Article of the OECD Model Double Taxation Convention. The domestic law meaning for this purpose may, for Australia, be the statute-defined meaning, or where there is no relevant statutory definition, the 'common law' meaning of the term. For example, Article 3(2) of the *United States Convention* states:

> As regards the application of this Convention by one of the Contracting States, any term not defined herein shall, unless the context otherwise requires, have the meaning which it has under the laws of that State relating to the taxes to which this Convention applies.

65. From approximately 1990 Australian DTAs have utilised a provision which clarifies that the domestic law to be looked at is not generally that existing at the time a treaty is entered into, where that has changed, but is rather the law as it stands when the DTA party applies that DTA. For example, Article 3(3) of the *Chinese Agreement* provides:

> In the application of this Agreement by a Contracting State, any term not defined in this Agreement shall, unless the context otherwise requires, have the meaning which it has under the laws of that State from time to time in force relating to the taxes to which this Agreement applies.

[44A] See, for example, subsection 3(5) of the Agreements Act in relation to the meaning of 'immovable property'.

[45] [Omitted.]

66. The OECD Model was similarly amended in 1995 to read as follows, with the immediately relevant changes from the previous (1977) OECD Model italicised:

> As regards the application of the Convention *at any time* by a Contracting State, any term not defined shall, unless the context otherwise requires, have the meaning that it has *at that time* under the law of that State for the purposes of the taxes to which the Convention applies, *any meaning under the applicable tax laws of that State prevailing over the meaning given to the term under other laws of that State.*

67. These changes reflect the fact that the OECD members, first of all, wished to clarify that the law to be looked at is the law at the time of the DTA being applied to the relevant fact situation, not the historical meaning at the time of the DTA's conclusion. In this respect the provision adopts what is termed an 'ambulatory' approach.

68. Second, the OECD members sought to clarify that where the context allows a specific domestic tax law meaning and a domestic non-tax law meaning, the former should prevail.

68A. While both these changes are now reflected in Australian practice, they are regarded by the ATO as only reflecting what is implicit in earlier DTAs anyway.

68B. Support for the ambulatory approach discussed above can be found in the decisions of *Virgin Holdings SA v Commissioner of Taxation* [2008] FCA 1503 at [43] and *Undershaft (No 1) Limited v Commissioner of Taxation* [2009] FCA 41 at [108-109].[46A]

69. This recognises that a DTA is designed with a view to ensuring that it continues to meet its objects and purposes by adapting itself to a fast-changing area of domestic law, yet at the same time is not to be read so flexibly as to allow those objects and purposes to be subverted. When interpreted in this light, the DTA will therefore continue to live and as far as possible (consistent with the balance of the bargain that has been struck) keep up to date over the long period that it is likely to remain in force, without developing a 'life of its own'.

70. The OECD Commentaries also support this general approach[46B]; they recognise that the 1995 amendments were intended to be *clarificatory* only, rather than changing the meaning. The Commentaries state:

> … the wording of paragraph 2 provides a satisfactory balance between, on the one hand, the need to ensure the permanency of commitments entered into by States when signing a convention (since a State should not be allowed to make a convention partially inoperative by amending afterwards

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[46] [Omitted.]

[46A] In *Virgin Holdings* Edmonds J preferred an ambulatory approach, however he did not consider it necessary to decide.

[46B] As recognised by Edmonds J in *Virgin Holdings* at [43].

> in its domestic law the scope of terms not defined in the Convention) and, on the other hand, the need to be able to apply the Convention in a convenient and practical way over time (the need to refer to outdated concepts should be avoided).[47]

71. In determining what constitutes a term's meaning under the applicable domestic rules relating to tax, the normal domestic rules of interpretation are applied to that domestic law. This could, in Australia's case, involve consideration of sections 15AA and 15AB of the *Acts Interpretation Act 1901*, which are addressed at paragraphs 80 to 82 of this Ruling.

Does the 'context' require a different meaning?

72. The undefined terms provision of the *General Definitions* Article picks up the meaning that the relevant term has for the purposes of the domestic tax laws of the country applying the DTA 'unless the context otherwise requires'. This aspect of the *General Definitions* Article in Australia's DTAs is closely based on the corresponding OECD Model Convention provision. For the reasons dealt with at paragraphs 101 to 111 of this Ruling , it is therefore highly relevant to consider what the OECD Commentaries to that Model say about this provision.

73. Paragraph 12 of the OECD Commentary on the *General Definitions* Article emphasises that the interpretation set out in the 'undefined terms' provision applies 'only if the context does not require an alternative interpretation', and then states:

> The context is determined in particular by the intention of the Contracting States when signing the Convention as well as the meaning given to the term in question in the legislation of the other Contracting State (an implicit reference to the principle of reciprocity on which the Convention is based).

74. This contextual limitation on referring to the domestic law places a significant qualification on the use of this provision in practice, requiring a careful scrutiny of both the context and the domestic law. Reliance cannot necessarily be placed on an undefined term in a DTA being interpreted according to its domestic law meaning as the context of its use in the DTA may indicate that such a meaning is inappropriate (in that it would not be an accurate representation of the 'bargain' or '*consensus ad idem*' which objective evidence shows has been reached by the negotiating countries).

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[47] Paragraph 13 of the OECD Commentary on the *General Definitions* Article (Article 3). Paragraph 13.1 notes that 'Paragraph 2 was amended in 1995 to conform its text more closely to the general and consistent understanding of Member states'.
[48] [Omitted.]
[49] [Omitted.]

75. Although there is some debate concerning the meaning of 'context' when used in the 'undefined terms' provision at Article 3(2) or similar in our DTAs, the ATO view is that it is to be broadly interpreted and that it includes the full range of materials open to consideration under Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the Vienna Convention – considered at paragraphs 95 to 100A of this Ruling) and not just those specifically referred to as the 'context' in Article 31 of that Convention.[51] This broad approach to 'context' is also consistent with the approach of Australian courts in domestic law cases.[52]

76. [Omitted.]

Australian legislation implementing DTAs

77. [Omitted.]

78. Where a treaty is implemented by Australian legislation it is critical to determine precisely the extent to which that legislation adopts, qualifies or modifies the treaty.[53A] Therefore, although the Agreements Act generally gives force of law to the provisions of Australia's DTAs, it is important to note that this is subject to other sections of that Act which may bear on the DTA specifically, or on it as one of many affected DTAs.

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[50] [Omitted.]

[51] See on this point: Avery Jones et al, 'The Interpretation of Tax Treaties with Particular Reference to Article 3(2) of the OECD Model – Part II' 1984 *British Tax Review*, vol 90 pp 90-105 (*Avery Jones et al Part II*). See also, to similar effect, Michael Edwardes-Ker, 1994, Tax Treaty Interpretation, Queen Mary and Westfield College, University of London, London (*Edwardes-Ker*) at paragraphs 7.06 and 23.15, noting the wide meaning of the term 'context' implicit in paragraph 13 of the OECD Commentary on Article 3. The interpretative significance of the OECD Commentaries is addressed at paragraphs 101 to 111 of this Ruling.

[52] In *Chaudhri v FC of T* [2001] FCA 554, the Full Federal Court (Hill, Drummond and Goldberg JJ) noted that:

> The guiding principle of statutory interpretation may be summed up as being the ascertaining of the meaning of the words which Parliament has used by reference to the context in which they appear, where "context" has the wide meaning which extends to the legislative history, the Parliamentary intention and the mischief to which a particular provision has been directed as well as the narrower meaning which would dictate reading the words to be construed by reference to the immediately surrounding or otherwise related provisions.

See also the joint judgment of Brennan CJ, Dawson, Toohey and Gummow JJ in *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384 at 408, which was relied on in *Chaudhri*.

[53] [Omitted.]

[53A] *NGBM v Minister for Immigration and Multicultural Affairs* [2006] HCA 54 at [61] and *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [146].

79. If the implementing *legislation* is clear, it must be applied and enforced whether or not the result might be regarded as in contravention of accepted principles of international law. Ultimately, the implementing legislation itself is the authentic expression of the Parliamentary intent in implementing the treaty and it cannot be impugned constitutionally on the basis that it is contrary to the international obligations in the DTA itself. Where there is any ambiguity or obscurity in the implementing legislation, however, a Court may look to the DTA itself to assist in determining what the legislature intended.[54]

80. A Court will have regard to the Vienna Convention in examining the *text* of the DTA itself, as negotiated by the two DTA parties. It may have recourse to sections 15AA and 15AB of the *Acts Interpretation Act 1901*, which are similar to the Vienna Convention interpretation rules[55], in interpreting an implementing provision such as subsection 3(11) or section 3A of the Agreements Act (which prescribe how a particular DTA provision is to be interpreted and applied in domestic law in defined circumstances).[56]

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[54] *Polites v The Commonwealth* (1945) 70 CLR 60, *Horta v Commonwealth* [1994] HCA 32, *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 745-746, 152 ALR 540 at 571-572, *AMS v AIF and AIF v AMS* [1999] HCA 26 (17 June 1999). The High Court said in *Horta* (at [10]):

> It was submitted on behalf of the plaintiffs that the enactment of the two Acts would be beyond the legislative power conferred by s.51(xxix) if the Treaty were void under international law either on the ground that it was contrary to international law or on the ground that Australia's entry into or performance of it would be in breach of Australia's obligations under international law. There is, however, a short answer to that submission. That answer is that even if the Treaty were void or unlawful under international law or if Australia's entry into or performance of the Treaty involved a breach of Australia's obligations under international law, the Act and the Consequential Act would not thereby be deprived of their character as laws with respect to "External affairs" for the purposes of s.51(xxix). [……..] In particular, there is simply no basis either in s.51(xxix) or in any other provision of the Constitution for the plaintiffs' submission that the legislative power conferred by s.51(xxix) must be confined within the limits of "Australia's legislative competence as recognized by international law".

[55] See, for example, David H Bloom, 'Report on Australia', in CAHIERS DE DROIT FISCAL INTERNATIONAL: INTERPRETATION OF DOUBLE TAXATION CONVENTIONS', 1993 Vol 78a, International Fiscal Association, 179 at 183. The Vienna Convention rules were referred to in the Attorney-General's Department discussion paper which preceded the drafting of section 15AB of the *Acts Interpretation Act*: EXTRINSIC AIDS TO STATUTORY INTERPRETATION, AGPS 1982 at 9.

[56] *Edwardes-Ker* notes in this respect that 'a uniform domestic approach cannot be identical to any one particular State's approach to the interpretation of its purely domestic tax statutes – because such approaches do not take sufficient account of the fact that a bilateral tax treaty is a treaty which must be interpreted in accordance with the common understanding of *both* states': *Edwardes-Ker*, paragraph 1.05 and Chapter 5.

81. The focus of the *Acts Interpretation Act 1901* is essentially on the presumed intention of Parliament when enacting, for example, treaty-implementing legislation, while the Vienna Convention rules (discussed at paragraphs 95 to 100A of this Ruling) basically focus on the presumed intention of the drafters of the actual treaty text. Quite apart from the similarity of the rules, there does not appear to be any scope for the two sets of interpretation rules to apply simultaneously on exactly the same point (because of the parallel, but distinct lives of a DTA already noted) so that the issue of conflict between the two sets of rules does not appear to arise.

82. The *Acts Interpretation Act 1901* provisions are also potentially relevant where the DTA *General Definitions* Article takes us back to an examination of a concept under Australian domestic law, because this will necessarily involve applying Australia's domestic law *interpretative* provisions. In certain cases, it could take us back to specific definitions in the *Acts Interpretation Act 1901*.

83. [Omitted.]

84. [Omitted.]

Part 4: General treaty interpretation rules

Overview: characteristics of DTAs that may affect their interpretation

85. Some of the specific features of DTAs that in practice impact on their interpretation include:

- DTAs are written in very much more general terms than domestic law so that there is perhaps more room for courts to give an interpretation based on purpose, the consideration of 'substance over form', etc.;
- DTAs use an international tax terminology which may not exist in domestic law (or if it does was usually drawn from treaties so that the international treaty meaning applies; for example, see the consideration of the domestic tax law definition of 'royalties' (which was influenced by treaty meanings) in TR 98/21 on cross border leasing)[56A];
- there are internationally accepted OECD Commentaries on the meaning of tax treaties which need to be taken account of to fully understand the DTA and its international usages and context where the DTA

[56A] See also TR 2002/5 which notes that the definition of PE in subsection 6(1) of the *Income Tax Assessment Act 1936* is based on the concept of PE used in Australia's DTAs.

reflects the OECD Model Commentaries.[57] As noted below, the same can apply for some UN Model materials[58];

- because of the common terms used internationally and the Commentaries, treaties are the subject of a much broader and internationally focused jurisprudence in cases, texts and administrative rulings than domestic tax law, and foreign case law may be particularly relevant; and
- tax treaties often have a life of 20 to 30 years and so have to be flexible enough to cope with many changes in domestic law, while remaining true to the negotiated bargain and the agreed balance of obligations and concessions between the two countries.[59]

86. These characteristics necessitate a different conceptual approach to interpretation than is required in construing a statute.

The approach of Australian courts

87. [Omitted.]

88. The legislature, when legislating the DTA into domestic law (by giving force of law to its provisions), is taken to expect that it be interpreted in the light of the normal rules for interpreting treaties. As the Full Federal Court said in *Commissioner of Taxation v SNF (Australia) Pty Ltd*[62A]:

> [I]t is crucial to observe that the whole text of each treaty has been given domestic effect. In cases where the exact text of a whole treaty has been given effect by domestic legislation it would be surprising if it were interpreted without keeping that fact in mind. It should be noted that these taxation treaties stand in a very different position to, for example, the Refugee Conventions whose text is not given the force of law. Where Parliament expressly decides to incorporate the whole text of a treaty in domestic law and makes it plain, as here, that it is doing so, then it is appropriate to construe the provisions in accordance with the ordinary principles governing the interpretation of treaties. This is because the

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[57] See paragraphs 101 to 111 of this Ruling.
[58] See paragraph 112 of this Ruling.
[59] This is not to say that the bargain reached envisages that *every change in the law* will be brought within the scope of the treaty.
[60] [Omitted.]
[61] [Omitted.]
[62] [Omitted.]
[62A] *Commissioner of Taxation v SNF (Australia) Pty Ltd* [2011] FCAFC 74 at [119–120]; see also, for example, *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 at [2–4]; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCA 53 at [34] and *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [147–150].

> Parliament's use of the treaty shows its intention to fulfil its international obligations. This has been accepted by the High Court in respect of the double taxation treaties: *Thiel v Federal Commissioner of Taxation* (1990) 171 CLR 338.
>
> This conclusion is unsurprising. The double tax treaties are designed to ensure that the taxing regimes of two jurisdictions do not result in double taxation. If they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question their point would be frustrated. It is true, as Dorsett J has observed in *Russell* (at 455-456), that the High Court has indicated in the context of the Refugee Conventions that domestic courts must recall that their task is to interpret the *Migration Act 1958* (Cth) and not the Conventions. But unlike the present legislation, that Act does not adopt and apply the whole text of a treaty.

89. An 'exception' already noted[63] would be where the implementing legislation directs how a particular DTA provision is to be interpreted or applied (thus evincing a particular Parliamentary intent). Even that way of dealing with an issue has often been agreed by the negotiating countries as a way of addressing the issue without altering the DTA wording, particularly if it is only an issue for one of the negotiating countries and departs from the other country's usual treaty practice.

90. The High Court first endorsed reference to broader international law principles when interpreting tax treaties in *Thiel v Commissioner of Taxation*.[65A] McHugh J's judgment (with which the majority agreed in their joint judgment) outlines the applicable international law principles in interpreting DTAs.[66] His Honour's comments confirm that it is necessary as a matter of practice to apply international law principles when interpreting a DTA as incorporated in the Australian taxation law:

> The Agreement is a treaty and is to be interpreted in accordance with the rules of interpretation recognised by international lawyers: *Shipping Corporation of India Ltd v Gamlen Chemical Co (A/Asia) Pty Ltd* (1980) 147 CLR 142 at p 159. Those rules have now been codified by the Vienna Convention on the Law of Treaties to which Australia, but not Switzerland, is a party. Nevertheless, because the interpretation provisions of the Vienna Convention reflect the customary rules for the interpretation of treaties, it is proper to have regard to the terms of the Convention in interpreting the Agreement: even though Switzerland is not a party to that Convention: *Fothergill v Monarch Airlines Ltd* (1981) A.C. 251 at pp. 276, 282, 290; *The Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 155 C.L.R. 1 at p. 222; *Golder case* (1975) 57 I.L.R. 201 at pp. 213-214.

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[63] At paragraphs 79 to 82 of this Ruling.
[64] [Omitted.]
[65] [Omitted.]
[65A] [1990] HCA 37 (*Thiel*); 90 ATC 4717.
[66] [1990] HCA 37; 90 ATC 4717 at 4727. See also the similar comments of Dawson J at 4722.

> ... [because the term enterprise is ambiguous] it is proper to have regard to any 'supplementary means of interpretation' in interpreting the Agreement. In this case the supplementary means of interpretation are the 1977 OECD Model Convention for the avoidance of Double Taxation with respect to Taxes on Income and Capital, which was the model for the Agreement and Commentaries issued by the OECD in relation to that model convention.

91. The importance of examining DTAs as international law agreements to which the Vienna Convention applies has been restated and emphasised also in several more recent Court decisions, such as *Commissioner of Taxation v Lamesa*[67], and *Chong v Commissioner of Taxation*[68], *McDermott Industries(Aust) Pty Ltd v Commissioner of Taxation*[68A], *Commissioner of Taxation v SNF (Australia) Pty Ltd*[68B], *Task Technology Pty Ltd v Commissioner of Taxation*[68C], *Tech Mahindra Limited v Commissioner of Taxation*[68D] and *Bywater Investments Limited v Commissioner of Taxation*.[68E]

92. The rules applicable to the interpretation of DTAs are now well settled. The following general principles can be drawn from the approach of Australian courts.[69]

- the Vienna Convention rules apply to tax treaties just as for other treaties;
- reflecting the need for negotiating compromises, treaties are usually less precise than domestic legislation. Consequently, treaty interpretation should be based on a view that treaties cannot be applied with the 'taut logical precision' that might be appropriate for statutes. International instruments should therefore be interpreted more 'liberally' than domestic legislation;
- Article 31 of the Vienna Convention requires a 'holistic'[70] approach to treaty interpretation - that is, a simultaneous examination of:
  - the 'ordinary meaning' of the relevant words;
  - their 'context'; and

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[67] [1997] FCA 785 (*Lamesa*).
[68] [2000] FCA 635.
[68A] [2005] FCAFC 67.
[68B] [2011] FCAFC 74.
[68C] [2014] FCAFC 113.
[68D] [2016] FCAFC 130.
[68E] [2016] HCA 45.
[69] This analysis is drawn primarily from the approach adopted by McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* ([1997] HCA 4 at [67–78], which was referred to with approval by the Full Court of the Federal Court in *Lamesa* [1997] FCA 785; 97 ATC 4752 at 4758–4759, in relation to DTAs. The first listed principle is drawn from cases such as *Thiel* and *Lamesa*.
[70] *Lamesa* (Full Federal Court, citing McHugh J in *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4 at [78].

- the 'object and purpose' of the treaty they form part of;

nevertheless, the text of the treaty is the starting point and has primacy in terms of the interpretative process. This means that the Vienna Convention rules do not look to the subjective intent of the negotiating parties as the primary inquiry – the rules therefore reject the 'subjective intention-based' approach to treaty interpretation in favour of an essentially 'textual' approach.[71]

The requirement to interpret treaties 'liberally'

93. The requirement that DTAs be interpreted 'liberally' does not mean that the terms of DTAs to be read as *broadly* as possible. The ATO considers that the requirement for a 'liberal' interpretation is directed to the rules of construction to be adopted, rather than being directed at the width and ambit of the content of particular DTA provisions.

94. In other words, when the courts speak of DTAs being given a more 'liberal' interpretation than domestic legislation, in the ATO's view they mean that the rules of construction will not be as detailed and rigid as they might be if the courts were to interpret domestic legislation or domestic instruments[72], and gaps, imprecision and ambiguities should be accepted as sometimes inevitable in such a text, and to some extent accommodated or 'smoothed over' in a way that addresses the context and meets the object and purpose of the DTA.

The Vienna Convention on the Law of Treaties

95. The Vienna Convention entered into force internationally on 27 January 1980 and applies *as a treaty* to the interpretation of all

[71] The 'textual' method looks to determine the intent of the negotiators primarily through analysing what they said in the text, which is presumed to be the final, authentic and most reliable expression of their intent. It only looks beyond the text in limited cases, such as where the text leaves the question unanswered. See, for example, McHugh J in *Applicant A* at [52]: '... Art 31 does not justify, to adopt the words of the International Law Commission, "an investigation *ab initio* into the intentions of the parties" in order to achieve a result which is thought to further those intentions' [footnote omitted]. The Full Federal Court in *Lamesa*, citing McHugh J's judgment, accepted this principle (at 4759).

[72] But note that the Full Federal Court in *Lamesa* stated at 4759 'We should add that, while we pay heed to the admonition of McHugh J to adopt a 'liberal approach', cases such as *Cooper Brookes (Wollongong) Pty Ltd v FC of T* (1981) 147 CLR 297, 81 ATC 4292 suggests that interpretation of municipal tax law should also not involve the application of narrow legalistic principles.'

treaties since concluded as between Australia and any other countries which are also parties to the Vienna Convention.

96. In any case, it is almost universally considered that the Vienna Convention's rules for treaty interpretation are declaratory of 'customary international law'[73], and that the rules therefore apply to all countries, whether or not they are parties to the Convention itself and whether or not the treaty being examined was entered into before or after the Vienna Convention entered into force. The High Court, as already noted[74], recognised the former point in *Thiel*[75] where the rules were applied although Switzerland was not a party to the Vienna Convention. The latter point has also been recognised by our courts.[76] The Vienna Convention rules should therefore be applied when interpreting any of Australia's DTAs, as a matter of practice.

97. The relevant provisions of the Vienna Convention are Articles 31 and 32, which read as follows:

> **Article 31: General rule of interpretation**
>
> (1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to terms of the treaty in their context and in the light of its object and purpose;
>
> (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> (3) There shall be taken into account, together with the context:

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[73] That is, the body of international law rules which have their source in the customary practice of countries, with a recognition by countries that these rules apply *as a matter of international law*. In other words, a country can be bound by these rules without having explicitly agreed to them in a treaty. Most customary rules of international law can be modified between countries by a differing treaty rule, however.

[74] At paragraph 90 of this Ruling.

[75] [1990] HCA 37; 90 ATC 4717 at 4723 and 4727. See also *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 at [53].

[76] See, for example, the discussion in the Judgment of Katz J, with whom the other members of the Federal Court agreed on this point, in *Minister for Immigration and Multicultural Affairs v Savvin* [2000] FCA 478 at [90–91]. While the Vienna Convention does not apply *as a treaty* to the interpretation of treaties concluded by countries before the Vienna Convention entered into force for them (as provided by Article 4), the operation of the customary international law rules codified by it is not so limited.

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties relating to its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

(4) A special meaning shall be given to a term if it is established that the parties so intended.

Article 32: Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.

Treaties in more than one language

98. Article 33 of the Vienna Convention provides that the different language texts of a treaty authenticated in two languages are equally authoritative, unless the treaty provides to the contrary. Australia's DTAs with foreign language treaty partners are usually prepared in the required language of the other DTA party, as well as in English, and are carefully checked by language experts to ensure there are no discrepancies of meaning. Both texts are then signed, usually by Ministers or Ambassadors of the two countries.

99. Where DTAs are concluded in two languages, the very last line of the substantive treaty text (just before the signature block) usually provides that the two texts are both equally authentic. Although the English text is the only one set out in the Australian Treaty Series, our courts have been willing to look to the foreign language text for clarification.

100. In *Thiel*[77], for example, the High Court was prepared to consider the German language version of the DTA when determining the DTA reference to an 'enterprise'. In *Lamesa*[78] and *Chong*[79], the Federal Court noted the equal authenticity of the foreign language text, although the point was not critical to the decisions.

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[77] [1990] HCA 37; 90 ATC 4717 from 4719. With no evidence led on the meaning of the German language text, and no agreement as to its interpretation, the court did not ultimately rely on the German language text, however.
[78] [1997] FCA 785; 97 ATC 4752 at 4755.
[79] [2000] FCA 635 at [47].
[80] [Omitted.]

100A. Sometimes a DTA provides that one text, usually the English language one, prevails in the event of a conflict between the two texts in different languages.[80A]

The OECD Model Tax Convention & Commentaries: status and interpretative value

101. Recommendations of the OECD Council (which were adopted on 23 October 1997) request member countries to conform to the OECD Model when entering into new DTAs or renegotiating existing ones. While not binding (since they are not formal OECD 'Decisions', binding on OECD members under the OECD Constitution), the OECD Model and Commentaries create a general or 'quasi-political', rather than 'legal', expectation that OECD members will basically comply, subject to specific 'Observations' and 'Reservations' lodged with the OECD. Those Observations and Reservations place on record that the relevant DTA policies and practices of the countries concerned are based on a different approach than that indicated in the OECD Model or its Commentaries. Australia has lodged various Observations and Reservations to the OECD Model and Commentaries over time which (like Observations and Reservations lodged by other OECD member countries) are reproduced in the OECD Commentaries. The status and interpretative relevance of Observations and Reservations is considered further below.[81]

102. In *Thiel*, the High Court judges all accepted that the OECD Model's official Commentaries may be relevant to the interpretation of DTAs based on the OECD Model. In *Thiel*, McHugh J (with whom the majority agreed in their joint judgment) approved recourse to the OECD Model and Commentaries under Article 32 of the Vienna Convention (that is, as supplementary means only available for consideration when there is ambiguity or the like, or to confirm a meaning reached by examining Article 31 materials).[82]

103. Dawson J also approved reference to the Model and Commentaries 'as a supplementary means of interpretation to which recourse may be had under Article 32 of the Vienna Convention'.[83] His Honour went further than the other judges, however, by expressing the view that the OECD Model and Commentaries were also relevant under Article 31 of the Vienna Convention, as primary materials to be considered even when there was no ambiguity or the

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[80A] See, for example, the *Indian Agreement* (which states '*both texts being equally authentic, the English text to be the operative one in any case of doubt*').
[81] At paragraphs 109 to 111 of this Ruling.
[82] *Thiel v Commissioner of Taxation* [1990] HCA 37; (1990) 90 ATC 4717, at 4727 and 4720
[83] *Ibid,* at 4723.

like.[84] In so doing, Dawson J nevertheless acknowledged that 'some doubts have been expressed about the applicability, as a matter of language, of Article 31 to the Commentaries in the case of a bilateral treaty such as a double taxation agreement'.[85]

103A. The courts have referred to the OECD Model and Commentaries in a number of cases since *Thiel* to assist in ascertaining the meaning of DTA provisions. For example, in *Bywater Investments* Gordon J referred to the Commentaries as a supplementary means of interpretation under Article 32 of the Vienna Convention (to confirm, in that case, the meaning of 'place of effective management' resulting from the application of Article 31).[85A]

104. The Commentaries, with the various Observations and Reservations of OECD member countries which they reproduce (and which are further considered below[86]), therefore provide important guidance on interpretation and application of the OECD Model and as a matter of practice will often need to be considered in interpretation of DTAs, at least where the wording is ambiguous, which (as noted above[87]) is inherently more likely in treaties than in general domestic legislation.

105. In addition, the Commentaries, with the Observations and Reservations, do provide part of the historical context of the DTA negotiations. They also have a role in testing the interpretation reached by other means.

105A. It is important to remember, however, that the text of the DTA has primacy in the interpretative process because the ordinary meaning of the words used 'are presumed to be the authentic representation of the parties' intentions'.[87A] It follows that the

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[84] Dawson J, in his discussion of Article 31 of the Vienna Convention at 4723, had stated:

> 'For my part, I do not see why the OECD model convention and commentaries should not be regarded as having been made in connection with and accepted by the parties to a bilateral treaty *subsequently concluded* in accordance with the framework of the model'. (emphasis added).

[85] *Thiel v Commissioner of Taxation* [1990] HCA 37; 90 ATC 4717, at 4723;. He cited, as to the doubts, *Avery Jones et al Part II* at 92. *Edwardes-Ker* similarly considers that the OECD Commentaries do not fall within the meaning of Article 31(2) of the Vienna Convention: paragraph 15.03.

[85A] *Bywater Investments Limited v Commissioner of Taxation* [2016] HCA 45 at [167]; (2016) 260 CLR 169. See also, for example, *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [42]; *Commissioner of Taxation v Seven Network Limited* [2016] FCAFC 70 at [85]; and *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCAFC 113 at [35].

[86] Paragraphs 109 to 111 of this Ruling.

[87] See paragraph 94 of this Ruling.

[87A] *Applicant A v Minister for Immigration and Ethnic Affairs* [1997] HCA 4; (1997) 190 CLR 225 at 252-253.

Commentaries should not be considered to the exclusion of the words in the treaty.[87B]

Subsequent revisions to OECD Commentaries

106. There is some debate over whether subsequent changes to the OECD Commentaries should be used as an aid to interpretation of earlier DTAs.

106A. On one hand, there is the view that the OECD Commentaries are only relevant to those DTAs subsequently concluded. Einfeld J expressed this view in the Federal Court decision of the first instance in *Lamesa Holdings BV v Commissioner of Taxation*.[88A] His Honour referred to the Full High Court decision in *Thiel* and to the comments made by Dawson J in that case[88B]:

> Further extrinsic material, referred to in *Thiel* as permissible by Mason CJ, Brennan and Gaudron JJ, who agreed with McHugh J, is consideration of the 1977 OECD Model and Commentaries in construing a double tax agreement. Dawson J added an important caveat to this view, namely that the OECD model and commentaries are only applicable to those bilateral treaties subsequently concluded.

107. On the other hand, the Introduction to the OECD Commentaries now indicates more clearly that the later Commentaries are intended by OECD member states to be used for interpretation and application of DTAs concluded before their adoption, except where the OECD Model has been changed in substance. The OECD Model and Commentaries states:

> 35. Needless to say, amendments to the Articles of the Model Convention and changes to the Commentaries that are a direct result of these amendments are not relevant to the interpretation or application of previously concluded conventions where the provisions of those conventions are different in substance from the amended Articles (see, for instance, paragraph 4 of the Commentary on Article 5). However, other changes or additions to the Commentaries are normally applicable to the interpretation and application of conventions concluded before their adoption, because they reflect the consensus of the OECD member countries as to the proper interpretation of existing provisions and their application to specific situations.
>
> 36. Whilst the Committee considers that changes to the Commentaries should be relevant in interpreting and applying conventions concluded before the adoption of these changes, it disagrees with any form of *a contrario* interpretation that would necessarily infer from a change to an Article of the Model Convention or to the Commentaries that the previous wording resulted in consequences different from those of the modified wording. Many

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[87B] *Russell v Commissioner of Taxation* [2011] FCAFC 10 at [31].
[88] [Omitted.]
[88A] See also Logan J in *Russell v Commissioner of Taxation of the Commonwealth of Australia* [2009] FCA 1224 at [118]; and *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [42].
[88B] 97 ATC 4229 at 4237.

> amendments are intended to simply clarify, not change, the meaning of the Articles or the Commentaries, and such *a contrario* interpretations would clearly be wrong in those cases.
>
> 36.1 Tax authorities in member countries follow the general principles enunciated in the preceding … paragraphs. Accordingly the Committee on Fiscal Affairs considers that taxpayers may also find it useful to consult later versions of the Commentaries in interpreting earlier treaties.

108. These changes to the Commentaries reflect the fact that the Commentaries are usually expressed not as forming an agreement between countries as to a *new* meaning but as reflecting a common view as to what the meaning is *and always has* been. Accordingly, unless it is apparent that the substance of the OECD Model has itself changed since a DTA was negotiated or the treaty in question does not conform to the OECD Model, or unless the Commentaries make clear that a former interpretation has actually been substantively altered, (rather than merely elaborated), the ATO considers it appropriate to consider, at least, the most recently adopted/published OECD Commentaries as well as others which may have been available at the time of negotiation.[89] Often, if a DTA provision is to be fully understood, the changes that have occurred to the relevant OECD Commentaries over time will need to be examined and considered.[90]

Observations & Reservations

109. OECD member countries lodge *'Reservations'* when they do not agree with either the relevant text of an OECD Model Article or any variations in text permitted by the Commentaries (and where they therefore wish to put other countries on notice of their views and intentions in negotiating the terms of the DTA). Countries enter *'Observations'* if they do not object to the Model Article's text, but do not concur with the interpretation of that text set out in the Commentaries.

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[89] This approach may also be justified in terms of Article 31(3) of the Vienna Convention, with the Commentaries representing either 'a subsequent agreement between the parties regarding the interpretation of the treaty' (Article 31(3)(a)) or 'any subsequent practice in the application of the treaty which establishes the agreement of the parties relating to its interpretation' (Article 31(3)(b)). In *Lamesa*, Einfeld J in fact referred to the 1977 OECD Commentaries when interpreting the 1976 *Netherlands Agreement* on the basis that the relevant part was based on an OECD Report released in 1974 and widely available.

[90] An example is the 1992 amendment to paragraph 8 of the Model Commentaries on Article 5 (permanent establishments) (in response to a 1983 Report). The amendments treated the leasing of industrial, scientific and commercial equipment as a matter for the Business Profits Article, rather than the Royalties Article. Australia and some other countries disagreed at that time, and lodged a 'Reservation' (a concept discussed at paragraphs 109 to 111 of this Ruling) to the OECD Model *Royalties* Article, to this effect: see paragraph 39 of the OECD Model Commentary on Article 12. However Australia amended its Reservation to remove the reference to equipment royalties in 2005.

110. The theory behind the Observations and Reservations is most clearly stated in the Introduction to 'Non-OECD Economies' Positions'[91] section in the OECD Model Convention Commentaries. The Introduction reads:

> 2. ... Recognising that non-OECD economies could only be expected to associate themselves to the development of the Model Tax Convention if they could retain their freedom to disagree with its contents, the Committee also decided that these economies should, like member countries, have the possibility to identify the areas where they are unable to agree with the text of an Article or with an interpretation given in the Commentary.
>
> 5. ... For each Article of the Model Tax Convention, the positions that are presented in this document indicate where an economy disagrees with the text of the Article and where it disagrees with an interpretation given in the Commentary in relation to the Article.

111. Observations and Reservations may be of considerable relevance in explaining variations from the OECD Model, both when interpreting implementing legislation under section 15AA of the *Acts Interpretation Act 1901* and when applying Article 31 of the Vienna Convention. They are a supplementary aid to interpretation as they may not ultimately be admissible in court except to confirm the interpretations otherwise reached under those provisions (or when considering ambiguous provisions under Article 32 of the Vienna Convention or, possibly, under section 15AB of the *Acts Interpretation Act 1901*).

United Nations Model and Commentaries

112. Although not as well developed as the processes and procedures that surround the OECD Model Convention, the UN Model Convention and its Commentaries and materials that explain the provisions of that Model[92] may constitute a supplementary aid to interpretation where Australia's DTAs draw upon the UN Model.[92A] In a formal sense, the admissibility of this material is subject to the same general limitations as applies to the OECD Model and Commentaries, although as it forms the main basis of negotiations for fewer DTAs than does the OECD Model, more evidence may be required as to its relevance and its weight.

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[91] The term 'positions' is used since economies that are not OECD members cannot formally lodge Observations or Reservations to the OECD Model.

[92] Including the UNITED NATIONS MANUAL FOR THE NEGOTIATION OF BILATERAL TAX TREATIES BETWEEN DEVELOPED AND DEVELOPING COUNTRIES of 1979, which preceded the 1980 UN Model. A 2011 version of the UN Model and Commentaries is the most recent version to be published.

[92A] For example, see *Tech Mahindra Limited v Commissioner of Taxation* [2016] FCAFC 130 at [36] where the Court considered Commentaries to the United Nations Model to confirm the meaning of Article 12(4) of the *Indian Agreement*.

113. [Omitted.]

114. [Omitted.]

115. [Omitted.]

Explanatory Memoranda

116. The Explanatory Memoranda for the enabling Bills when Australia's DTAs are implemented domestically (and sometimes the Second Reading Speeches) can be particularly useful as evidencing the Australian negotiators' understanding of the DTA's terms, and Parliaments understanding and expectations when the legislation was passed.

117. The courts have been prepared to consider these Explanatory Memoranda, even to the extent that they bear upon *substantive* DTA provisions (that is, on matters other than the specific *implementing* provisions[94]). For example, in *Task Technology*, Davies J used the relevant Explanatory Memorandum for the purposes of interpreting Article 12(7) of the *Canadian Convention*.[95]

117A. In examining Explanatory Memoranda, it must be borne in mind that 'statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning'.[95A]

Other Instruments

118. Often the DTA provides for matters such as the updating of certain references under the DTA to be dealt with by an exchange of

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[93] [Omitted.]

[94] For an example of where an Explanatory Memorandum was considered in construing an *implementing* provision (section 3A of the Agreements Act) see *Resource Capital Fund IV LP v Commissioner of Taxation* [2018] FCA 41 at [149].

[95] *Task Technology Pty Ltd v Commissioner of Taxation* [2014] FCA 38 at [16]. For other examples where Explanatory Memoranda were used to support the interpretation of DTAs see *Satyam Computer Services Limited v Commissioner of Taxation* [2018] FCAFC 172 at [24]; *Tech Mahindra v Commissioner of Taxation* [2016] FCAFC 130 at [32-35] and *Resource Capital Fund III LP v Commissioner of Taxation* [2013] FCA 363 at [63]. See also *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 where the court considered the relevant explanatory memorandum but ultimately found that it offered little assistance.

[95A] *SAEED v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252 at 264-265 (per French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

letters between relevant Ministers (such as under Article 23(5)(b) of the *Vietnamese Agreement*[96]) rather than amendment of the DTA.[97]

Foreign court decisions

119. Since Australian courts have recognised that interpretation in a way conducive to producing a uniform international interpretation is an important goal in interpreting treaties[98], it follows that foreign court decisions on identical or similar provisions may give valuable guidance about the meaning of a term. They need to be treated with some caution however, since they may be founded on different interpretative principles or approaches. Some courts may, for example, less strictly follow the Vienna Convention rules, or may apply a domestic law meaning of a term when they should apply an accepted international tax meaning. A court may also, quite properly, apply a domestic law meaning to a term left undefined by the DTA, whereas the same approach before Australian courts may lead to a different domestic law meaning being 'picked up'.

120. Nevertheless, a foreign court's decisions, including on the foreign language text, may provide important insights. In *Lamesa*, the Full Federal Court did not need to (or wish to) express a concluded view on the issue. The Court noted, however, that[99]:

> We would, however, express our agreement with the distinction drawn by Lindgren J in *Allstate Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79 between the content of foreign law which is receivable in evidence and the application of that law to facts once its content has been ascertained which is not. However, where the construction of an international treaty arises, evidence as to the interpretation of that or subsequent treaties in one of the participating countries forms part of a matrix of material to which reference could properly be made in an appropriate case. As presently advised we would not wish it to be thought that a limited view of the material to which reference could be made in interpreting a double tax treaty should be taken. Had there been some decision of an appropriate Dutch court interpreting a treaty with identical or similar language, then, in our view, evidence of such a decision might well have been admissible.

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[96] Dealing with 'tax sparing' whereby tax foregone by Vietnam to encourage investment in certain sectors is treated by Australia as actually paid, for the purposes of our foreign tax credit system. This means the Australian resident investing in Vietnam receives the full benefit of the special concession by Vietnam. This provision only applied to income years up to the year ended 30 June 2003 (see Article 23(8)).

[97] Section 4A of the Agreements Act provides for notification in the *Gazette* of certain 'events', such as an exchange of letters. In practice, the relevant Minister usually also notifies the event by means of a Media Release.

[98] See paragraph 92 of this Ruling.

[99] 97 ATC 4229 at 4757.

121. There are also strong reasons to consider the decisions of courts from countries other than the treaty.[99A] However, any such consideration would need to be consistent with the comments of the High Court in *Cook v Cook*[100] that:

> Subject, perhaps, to the special position of decisions of the House of Lords given in the period in which appeals lay from this country to the Privy Council, the precedents of other legal systems are not binding and are useful only to the degree of the persuasiveness of their reasoning.

ATO materials

122. There are many advice products containing ATO views in relation to specific DTA issues, as well as other products that contain general guidance in relation to DTAs. The significance of any such materials in a particular case will, of course, depend upon the inherent status of those materials and their relevance to the issue under consideration. As with all such material, it is important to ensure that the material is up to date, and that any relevant addenda have been taken into account.

123. [Omitted.]

124. [Omitted.]

Other materials

125. Extrinsic materials of various types are extensively relied on by some countries. Some, such as the 'Technical Explanations' which are a feature of United States domestic procedures for consideration of a DTA, may help explain the views being put by the relevant DTA partner or a taxpayer.

125A. In *Resource Capital Fund IV LP v Commissioner of Taxation*[105] Pagone J referred to these 'Technical Explanations' as a supplementary means of interpretation under Article 32 of the Vienna Convention.

[99A] In the first instance decision of *Tech Mahindra Limited v Commissioner of Taxation* [2015] FCA 1082 at [96], Perry J found support in a decision of the High Court of Karnataka at Bangalore in the case of *Commissioner of Income Tax v De Beers India Minerals Pvt Ltd* that concerned the construction of a similar provision in a double tax treaty between India and the Netherlands.

[100] [1986] HCA 73; (1986) 162 CLR 376 at 390, Mason, Wilson, Deane and Dawson JJ.

[101] [Omitted.]

[102] [Omitted.]

[103] [Omitted.]

[104] [Omitted.]

[105] [2018] FCA 41 at [63]. Davies J also referred to the Technical Explanations in the subsequent appeal.

125B. As the 'Technical Explanations' are, however, developed as part of the internal processes of the United States when implementing a DTA, they are of little or no usefulness in objectively *proving* the intent of both parties to a DTA. They are primarily designed to reflect the views of the United States negotiators, upon which there may not necessarily be a *consensus ad idem* ('meeting of minds').[106] In any event, they may in some cases provide useful signposts to that *consensus* and better inform an understanding of the DTA as a whole.

Date of effect

126. This Ruling applies to years of income commencing both before and after its date of issue. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 and 76 of Taxation Ruling 2006/10 *Public Rulings*).

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127. Below is a detailed contents list for this Taxation Ruling:

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[106] In *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* [2005] FCAFC 67 at [66], the court doubted the appropriateness of using the views of a Treasurer of one of the Contracting States to support the interpretation of a bilateral treaty where the other Contracting State may have had a different view.

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Previous draft:

Not previously released in draft form

Related Rulings/Determinations:

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ATO References
NO: T2001/019336
BO:
ISSN: 1039-0731