

Introduction to the Law of Double Taxation Conventions

Michael Lang

2nd edition



Linde

Content

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

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

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

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

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