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Double Taxation, Tax Treaties, Treaty-Shopping and the European Community

Summary

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Double taxation can be an enormous disincentive to cross-border investment. This was recognised early on by the international community and attempts were made to mitigate its effect. In my thesis, I examine the problem of double taxation, tax treaties and treaty-shopping from a general perspective as well as the European Community perspective. The contents of this thesis are based on materials available up to the 30th December, 2006.

In the first chapter, I concentrate on some important principles of international taxation. I examine the principles of jurisdiction to tax. The understanding of these principles is an important pre-requisite to the understanding of the jurisdictional conflicts that lead to double (or multiple) taxation. Following this, the problem of double taxation and methods of relief are examined in detail. Emphasis is placed on tax treaties. Tax treaties are examined both historically and in the context of the current models.

In the second chapter, improper use of tax treaties and more specifically treaty-shopping are considered. The anti-treaty-shopping policies of the OECD, the UK and the USA are analysed. The various reasons advanced to justify the polemic against the phenomenon and their cogency are assessed, in order to see what types of treaty-shopping structures are improper. The theoretical objections to treaty-shopping are also examined. The aim is to depict what it is about treaty-shopping, from an empirical and theoretical perspective, that renders it an improper use of tax treaties and whether there is or should be a difference of approach between different types of treaty-shopping structures.

In the third chapter, I examine how a federation of fiscally independent states such as the USA has dealt with double taxation and tax location shopping – the latter as an analogue to treaty-shopping. I consider how, notwithstanding the absence of complete tax harmonization, US interstate commerce is sheltered from multiple state taxes. It is shown that in the USA, the solution to the problem of double state taxation is found in constitutional provisions, judicial ingenuity, state activism and the federal system of governance. Bilateral tax treaties have no

place. Whilst some regional arrangements were put in place in order to deal with administrative issues, the sharing of the taxable base has come about in a more concerted and multilateral way.

In the fourth chapter, I explore the European Union's attitude to juridical double taxation and tax treaties. The European Union is aspiring to become a successful economic union such as the USA. However, it is equally beleaguered by the problem of double taxation internally. In this chapter I examine the way in which juridical double taxation is tackled through positive and negative integration and the implications of this approach on tax treaties. Analogies from the USA are drawn in order to show the similarities and divergences of approach.

I argue that in the European Union ('EU'), there has not really been a concerted effort to find ways of averting internal double taxation at the Community legislative level. The Community defers to the established tax treaty network in dealing with the problem. However, there has been a lot of speculation as to the future of tax treaties in the Community legal order. I trace some of the relevant case law of the European Court of Justice ('ECJ') and its effect on the tax treaty debate. It is suggested that tax treaties continue to play an important role in the fight against double taxation. Not only have they survived in the recent cases referred to the ECJ but, in fact, tax treaties seem to have obtained enhanced status following those cases.

In the fifth chapter, I examine whether treaty-shopping practices enjoy the protection of fundamental freedoms and more specifically protection under freedom of establishment and free movement of capital. The analysis focuses on several variations of the treaty-shopping model with different degrees of artificiality. Then I consider whether anti-treaty-shopping clauses prevent the enjoyment of fundamental freedoms. This is done through a set of case studies involving Member States and third countries, which takes into account established and recent case law. This chapter draws together elements from the previous chapters and questions whether there is a divergence of approach as to how the OECD, the US and the EU deal with treaty-shopping practices and anti-abuse provisions.

Finally, the thesis concludes with some final thoughts on double taxation, tax treaties, treaty-shopping and Community law.