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**THE INTERPRETATION OF TAX
TREATIES: MYTH AND REALITY**

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Thesis

- **Myth:**
tax treaties are interpreted differently (more broadly and liberally) than domestic tax statutes
- **Reality:**
interpretation is a fundamental, intuitive human activity that cannot be reduced to rules

Outline

- comments on the nature of language in general
- comments on interpretive provisions of the Vienna Convention
- comments on differences between tax treaties and domestic tax statutes that might justify different interpretive approaches

Language in General

- surprisingly little known
- study of the origins of language prohibited for over 100 years from 1866
- now involves computer modeling, genetics, neuroscience, psychology, linguistics, and animal communication

Language in General

- English has become the dominant language of international tax and tax treaties
- English consists of between 700,000 and 2 million words
- English has borrowed words from over 350 other languages

Interpretation in General

- words are arbitrary associations between sound and meaning
- language allows words to be combined in different patterns infinitely
- language is complex and flexible

Examples

- hedged positives (not unreasonable, not insignificant, not inconsistent)
- “boys will be boys”; “enough is enough”
- a blonde; a woman with blonde hair
- cut off the end of a ribbon; swim underwater
- mass nouns (“hair”, “gravel”)
- count nouns (“hairs”, “pebbles”)
- digital camera; digital cameras

The Meaning of Language

- the meaning of language is generally indeterminate
- words do not have a single, true, objective meaning
- all language requires interpretation

Ambiguity and Vagueness

- ambiguity and vagueness are the primary sources of the indeterminacy of language
- types of ambiguity:
 - words with multiple meanings (sanction)
 - syntactical ambiguity
 - situational ambiguity
- vagueness:
 - involves problem of classification

Ambiguity and Vagueness

- problems of ambiguity and vagueness are resolved by reference to context
- context means all relevant information, including purpose
- meaning of words is often clear, not absolutely, but in a particular context
- disputes arise because ordinary meaning is not clear

Ambiguity

Supreme Court of Canada:

“I realize . . . agile legal minds could probably find an ambiguity in as simple a request as “close the door please . . .”

- Is the meaning clear and plain, or ambiguous?

Ambiguity

“Wednesday’s meeting has been moved forward two days.”

- Has the meeting been moved to Monday or Friday?

Vagueness

No vehicles allowed in public parks.

Vehicle (OED) — A means of conveyance provided with wheels or runners and used for the carriage of persons or goods; a carriage, cart, wagon, sledge etc.

Success of Ordinary Communication

- communication through language is usually effortlessly successful
 - not because words have plain meaning
 - because of shared cultural background, general knowledge, instinctive language skills, and assumed goodwill between speaker and listener

Woman: I'm leaving you.

Man: Who is he?

In re Castiolini
[1891] QB 149

Stephen J.:

“ . . . it is not enough to attain to a degree of precision which a person reading in good faith can understand, but you must attain, if you possibly can, to a degree of precision which a person reading in bad faith cannot misunderstand. It is all the better if he cannot pretend to misunderstand it.”

Success of Ordinary Communication

- no general rules for interpretation that we learned or were taught as children
- language is governed by rules, and we learn these rules without being taught
- we understand that language is purposive and context-dependent

Examples

- Load the wagon with hay.
- Load hay into the wagon.
- Fill the wagon with hay.
- Fill hay into the wagon.
- Pour milk into the glass.
- Pour the glass with milk.

Examples

- Klaus threw the ball to him.
- Klaus threw him the ball.
- Klaus lifted the box to him.
- Klaus lifted him the box.

Speech and Writing

- interpretation applies to both speech and writing
- language is instinctive; writing, which developed much later, must be learned
- writing is more structured and less complex, but interpretation of writing is more difficult because of the absence of tone and gesture

Summary

- 1) language is incredibly flexible and complex
- 2) interpretation is always necessary
- 3) interpretation occurs naturally without any rules

The Myth

- tax treaties are interpreted differently from domestic tax rules
- the interpretation of tax treaties can be reduced to rules

Vienna Convention — Article 31(1)

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Vienna Convention — Article 31(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.

Vienna Convention — Article 31(3)

There shall be taken into account together with the context:

- 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 regarding its interpretation;
- c) any relevant rules of international law applicable in the relations between the parties.

Vienna Convention — Article 31(4)

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

Vienna Convention — Article 32

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.

Vienna Convention — Article 31(1)

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Vienna Convention — Article 31(1)

- basic interpretive approach is not novel, but self-evident
- same as interpretation of language generally
- text, context, and purpose
- Article 31(1) can support any type of interpretive approach (literal, contextual, or purposive)

Vienna Convention — Article 31(1)

- does not — and cannot — deal with the issue of weight
- some try to construe Article 31(1) as meaning: no recourse to context and purpose unless ordinary meaning is ambiguous

Vienna Convention — Article 31(1)

- Article 31(1) is not comprehensive or exclusive (e.g., history, consequences)
- several countries interpret tax treaties in accordance with “the intentions of the parties”
- ILC: “inadvisable” to attempt to codify principles of interpretation
- ILC: principles of interpretation are “principles of logic and good sense valuable only as guides”

Literal Interpretation

- inappropriate as method
- different from literal result after applying broader method
- examples:
 - permanent establishment
 - present for 183 days in Article 15(2)

Vienna Convention — Article 32

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Vienna Convention — Article 32

- represents attempt to limit use of supplementary materials
- recourse to supplementary materials is never precluded
- but Article 32 doesn't deal with weight to be accorded to supplementary materials, and no hierarchy between Articles 31 and 32

Vienna Convention — Article 32

- distinguishing between supplementary and other, more authentic, materials is problematic
 - example: OECD Commentaries
- identification of ambiguity, obscurity, manifest absurdity, or unreasonableness is problematic
 - too vague to provide guidance for interpretation
 - literally requires interpretation based on 2 different sets of information after both sets have been considered

Vienna Convention — Article 32

1. Determine the meaning of the words in question exclusively on the basis of the Article 31 material;
2. Determine if that meaning is ambiguous, obscure, manifestly absurd or unreasonable;
3. If the result of step 2 is that the meaning is not ambiguous, obscure, manifestly absurd or unreasonable, determine if the Article 32 materials confirm the meaning reached in step 1;
4. If the Article 32 materials do confirm the meaning reached in step 1, that is the end of the matter;

Vienna Convention — Article 32

5. If the Article 32 materials do not confirm the meaning reached in step 1, that is also the end of the matter because in this situation the Article 32 materials must be disregarded; [Result: the supplementary materials are irrelevant in any case where the meaning reached in step 1 is not ambiguous, etc.]
6. If the result of step 2 is that the meaning is ambiguous, obscure, manifestly absurd or unreasonable, determine the meaning on the basis of the material covered by both Article 31 and 32.

Vienna Convention — Conclusion

- sometimes cited, sometimes not cited
- Article 31 is too vague and self-evident to provide meaningful guidance
- Article 32 is meaningless because it allows recourse to supplementary materials and then attempts to limit use, but not weight
- Articles 31 and 32 probably do not have any practical effect on outcome of cases

Interpretation of the OECD Commentaries

- Commentaries are very important but require interpretation
- how should they be interpreted?
- same issue applies to all extrinsic material
- unless Commentary is part of context of treaty, Articles 31 and 32 of Vienna Convention do not apply
- despite absence of rules, Commentaries are regularly interpreted and applied

Interpretation of Tax Treaties under Domestic Law

- beyond scope of this talk
- similar to or different from interpretive provisions of the Vienna Convention?
 - constitutional or statutory provisions concerning interpretation
 - judicial rules or approaches
- in general, considered to be different but not clear

Comparison of Interpretation of Domestic Tax Laws and Tax Treaties

- identify significant differences
- analyze whether these differences justify different interpretive approaches
- if so, which interpretive approach should apply to tax treaties?

Differences between Domestic Tax Laws and Tax Treaties

- tax treaties are agreements between sovereign states
- reciprocity
- the importance of common interpretation
- drafting style
- the language of tax treaties differs from the language of domestic tax laws
- tax treaties follow the OECD Model
- tax treaties do not impose tax, but provide relief from domestic tax

Tax Treaties are Agreements Between Sovereign States

- domestic tax laws are unilateral; tax treaties are bilateral
- can sovereignty justify literal approach?
- does deference to legislature or executive justify literal approach?
- does bilateral nature of treaties justify broader approach?
- broader extrinsic materials for treaties

Reciprocity

- what is reciprocity?
- reciprocity does not mean that treaty has equal effects in both countries
- does reciprocity have any implications for the method of interpretation?

The Importance of Common Interpretation

- treaty should have same meaning in both countries
- this is more likely if both countries use same interpretive approach
- but which approach?
- meaning in the other country should be taken into account irrespective of interpretive approach

Drafting Style

- wording of tax treaties is broad and general
- wording of domestic tax law is detailed
- does this mean that treaties should be interpreted broadly and domestic tax laws narrowly?

Language of Tax Treaties Differs from Language of Domestic Tax Laws

- treaties use different terminology (international fiscal language)
- does this justify a different interpretive approach?
- if so, which approach?
- note the intimate relationship between domestic law and tax treaties

Tax Treaties follow the OECD Model

- OECD Model and Commentary have special importance for the interpretation of tax treaties
- but this is true regardless of the interpretive approach used and can be accommodated by any interpretive approach

Tax Treaties Do Not Impose Tax, but Provide Relief from Domestic Tax

- broad interpretation to ensure that relief is effective?
- related to purpose of treaty in order to avoid double taxation
- but prevention of fiscal evasion and tax avoidance is also a purpose
- Neither purpose points to any particular interpretive approach

Conclusion

- interpretation is an intuitive human activity that requires consideration of all relevant information
- weight to be given to any particular information depends on each case
- interpretation requires judgment
- interpretation cannot be reduced to rules
- interpretive rules must be interpreted, and who performs that function?