Part Two: Selected Issues in Tax Treaty Law

Chapter 5: The Relation between Tax Treaty Law and National Law in the Definition of Immovable Property under Article 6(2) of the OECD Model

Author

Michael Lang[1]

5.1. Income from immovable property

Articles 6 to 21 of the OECD Model contain the distribution rules relevant for the taxation on income and in article 22 those pertaining to the taxation of capital. The OECD Model contains separate distribution rules for immovable property in articles 6 and 22(1). Article 6 is applicable to income derived by a resident of a contracting state from immovable property situated in the other contracting state. The same applies under article 22(1) to capital situated in the other contracting state. In these cases, the state of situs has the right of taxation.

Articles 6 and 22(1) of the OECD Model only apply if the immovable property is situated in the other contracting state. When the immovable property is situated in a third state or even in the state of residence itself, these provisions do not apply. In these cases, one should consider the application of articles 7 or 21 of the OECD Model. In the case of article 22 of the OECD Model, it would be appropriate to apply paragraphs 2 or 4.

Pursuant to article 6(4) of the OECD Model, paragraphs 1 and 3 of this provision are also relevant for income from the immovable property of an enterprise. As a consequence, in case of overlapping, article 6 shall have precedence over other distribution rules applicable to the income of an enterprise. Therefore, article 6 in any case prevails over the distribution rule of article 7 of the OECD Model pertaining to the profits of an enterprise.[2] To the extent that other distribution rules – such as those of article 17 of the OECD Model – also partly pertain to income of an enterprise, the precedence of article 6 shall also apply in this respect.

No express rules are stipulated, however, as to whether the distribution rules of articles 10 to 12 of the OECD Model governing interest, dividends and royalties prevail over or are subordinate in relation to article 6 of the OECD Model. This question is potentially significant if the assets of an agricultural and forestry enterprise also include debt claims, shares or royalties, so that its income also involves interest, dividends and royalties. Contrary to article 7(4) of the OECD Model, article 6 does not contain any rule according to which this provision is generally subordinated to all other distribution rules – and thus also to articles 10, 11 or 12 of the OECD Model. If one to assume, however, that the provisions for interest, dividends and royalties are of a more particular nature even with regard to article 6 of the OECD Model, the question arises as to what shall be done in those cases in which this income belongs to the immovable property located in the state of situs. Based on their wording, the rules of articles 10(4), 11(4) and 12(3) of the OECD Model (permanent establishment (PE) prerogative) induce only the application of article 7 of the OECD Model – and not of article 6 – and this only when a PE is situated in the source state, to which this income belongs. No mention is made of immovable property. Even if one assumed that the immovable property – e.g. in the case of an agricultural and forestry operation – were a PE[3] and that hence article 10(4), article 11(4) or article 12(3) of the OECD Model were applicable, this income would still not fall under article 6. This is because the legal consequence of the PE prerogative is that article 7 of the OECD Model prevails. Applying article 7 in such constellations, however, would come as a surprise. This possibly suggests that in the case of interest, dividends or royalties belonging to an enterprise falling under article 6 of the OECD Model, articles 10, 11, or 12 should not be applied at all, but only article 6 instead. In the case of an agricultural and forestry enterprise, these could be seen as belonging to the "inventory".[4]

A further question regards the impact that a demarcation between the distribution rules of the OECD Model would have on other provisions of the Model. For example, article 24(3) of the OECD Model provides for the non-discrimination of PEs and thus refers to a term contained only in the distribution rule of article 7 of the OECD Model – but not in article 6. In 1990, Austria's Constitutional Court concluded as a result that the discrimination prohibition for PEs is not applicable on agricultural and forestry operations at all.[5] However, nothing suggests that agricultural and forestry operations cannot be considered enterprises for the purposes of

---

1 Head, Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business); academic director, LLM Program in International Tax Law and the Doctoral Program in International Business Taxation (DIBT) at the same university. The author wishes to thank Ms Draga Turic for the critical debate and her support in drafting the annotations and for proofreading.

2 E. Reimer, *Art. 6* m.no. 6, in K. Vogel & M. Lehner, *Doppelbesteuerungsabkommen 6* (2015).

3 M. Lang & W. Loukota, *Das Erfordernis der Beibringung eines inländischen Besteuerungsnachweises nach § 102 Abs 1 Z 3 Satz 2 EStG*, SWI (2003), p. 70.

4 Reimer, *supra* n. 2, at m.no. 8 ff.

5 AT: VfGH, 15 Mar. 1990, B 758/88, B 759/88, VfSlg 12.326/1990.

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

article 24 of the OECD Model and their immovable property as a PE.[6] Hence, the precedence of article 6 over article 7 stipulated in article 6(4) of the OECD Model does not deprive agricultural and forestry operations of their attribute of an enterprise, nor the immovable property of that of a PE.

The provision on immovable property, however, not only poses questions as to the demarcation between the distribution rules of a treaty themselves and between distribution rules and other treaty provisions, but also as to the relation between treaty law and national law. The definition of the term "immovable property" in article 6 of the OECD Model also refers to national law, but only in part. Therefore, the following sections focus on the relation between treaty law and national law in connection with the definition of article 6(2) of the OECD Model. Before that, however, I would like to go further afield and illuminate the relation between treaty law and national law in the interpretation of treaties in general, so as to better carve out the particularities of the melange contained in article 6(2) of the OECD Model.

5.2. The importance of national law for the interpretation of treaties

5.2.1. Interpretation solely on the basis of treaties

The question of the interpretation of the term "immovable property" must be addressed on the basis of the principles applicable to the interpretation of double tax conventions. DTCs put limits on the national legislations of two states. They can live up to their task of distributing the taxation rights between the two contracting states only if their rules are understood in the same manner in both states. The objective and purpose of DTCs therefore suggests that the terms used in these must be understood without regard to the national laws of the two states. Hence, when the treaty uses the term "immovable property" and the national law of one of the two states or of both of them uses an identical term, one should not immediately assume that this understanding of the term in national law will have an impact on the interpretation of the treaty.

The interpretation rules of the Vienna Convention on the Law of Treaties (VCLT) affirm this. Pursuant to article 31 of the VCLT, international treaty provisions must be interpreted in their context and in the light of their object and purpose. Therefore, terms in treaty law must be understood in the context intended for them: namely that of the treaty itself. A treaty, the terms of which are understood on the basis of the national law of one of the two states, cannot fulfil its task: taxation rights can only be distributed evenly between the two contracting states if the terms used in the DTC are understood in the same manner in both states – and thus independently of national law.[7]

The fact that DTCs are based on the OECD Models confirms and reinforces these considerations: The objective of the OECD Models is for their proposed rules to be equally understood by all states using the Model. This is the only way to considerably harmonize and thus facilitate treaty practices worldwide. The requirement for this is the understanding of the treaty provisions independently of the national law of one of the contracting states.

This does not imply, however, that the national law of the contracting states does not play any role at all in the application of a treaty: the intention of DTC provisions is to limit taxation claims under national law. Therefore, they must entitle those taxpayers who are obliged to pay taxes under national law. Hence, DTCs refer to national law when they use, for instance, the term "residents" in the distribution rules and the method article.[8] This is made clear in article 4(1) of the OECD Model.

It is for the same reasons that DTCs establish a link to the national assessment basis, since their purpose is to reduce it. The term "income" used in article 6 of the OECD Model and in other distribution rules and the method article is of essential importance. Other distribution rules use the term "profits", "remuneration" or "payments" instead. Article 22 of the OECD Model, which is relevant for the taxation of capital, uses the term "property" in every paragraph for this purpose. All these terms refer to the assessment base under national law.[9]

5.2.2. Article 3(2) OECD Model

The OECD Model, however, also contains a separate interpretation provision, which must be taken into account in addition to the rules of the VCLT. At first glance, article 3(2) of the OECD Model seems to imply that national law should be referred to not only in the application of the terms "resident" and "income" or similar terms, but always when treaties use terms that are not defined therein. Occasionally, article 3(2) of the OECD Model is actually interpreted as to mean that in such cases, a term under treaty law should be understood in accordance with the law of the applying state.

Such an interpretation of article 3(2) of the OECD Model, however, would not comply with the objective and purpose of the treaty provision and would ignore the fact that reference to the national law should not be made "unless the context otherwise

6 Lang & Loukota, *supra* n. 3, at 70.
7 M. Lehner, *Grundlagen des Abkommensrechts*, in Vogel & Lehner, *supra* n. 2, at m.no. 113a ff.; M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB (2011), p. 288.
8 M. Lang, *Die Interpretation des Doppelbesteuerungsabkommens zwischen Deutschland und Österreich*, RIW (1992), p. 575 et seq.
9 R. Firlinger, *Die Besteuerung des Vermögens in den DBA*, SWI (1991), p. 271 et seq.; Lang, id., at 576.

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

requires”.[10] This rule suggests that in the interpretation of terms not defined in the treaty, one should also primarily seek a solution in the treaty itself. Apart from the wording, one can take into account teleology, systematics and history. Only when this interpretation attempt fails should one take recourse to national law. When the interpretation methods are carefully used, such recourse is practically never required. Article 3(2) of the OECD Model thus confirms the autonomous interpretation on the basis of the treaty already stipulated in the rules of the VCLT.[11]

In those rare cases in which a reference to national law is necessary under article 3(2) of the OECD Model, the question arises as to which state is the relevant applying state. Avery Jones had argued in favour of regarding only the source state as the state that must “apply” the treaty, since, as a rule, the restrictions resulting from the distribution rules are significant only for this state.[12] The formulation “may be taxed in the other Contracting State” contained in the method article 23 of the OECD Model would then result in the residence state being bound to the relevant right of the source state under article 3(2) of the OECD Model. Several arguments, however, oppose this opinion: article 19 of the OECD Model alone proves that the distribution rules not only impose restrictions on the source state, but also on the residence state.[13] The distribution rules, however, must also be “applied” in the residence state because the method article makes a differentiation according to distribution rules for the definition of the scope of the exemption method and, with regard to the scope of the credit method, also allows only the crediting of the foreign taxes pertaining to the income for which the source state still has a taxation right according to the distribution rules. In addition, article 23 of the OECD Model cannot result in the residence state being bound to the assessment in the source state, simply because the formulation “may be taxed in the other Contracting State” in no way suggests that the law of the source state itself must also be used to assess whether the source state has the taxation right.[14] For these reasons, one must follow the prevailing opinion in assuming that in those extremely rare cases in which recourse must be taken to national law under article 3(2) of the OECD Model, this may involve both the law of the source state and of the residence state.[15]

In the current version of article 3(2) of the OECD Model, the question whether the law currently in force or the law existing on the date the treaty is signed must be used is explicitly settled in favour of a dynamic understanding. Already on the basis of the previous version of article 3(2) of the OECD Model, the general consensus was that the law currently in force should be relevant.[16] This conclusion already follows from the context of the treaty: article 2(4) of the OECD Model also required that any changes to the law introduced after the date of the signature of the treaty would have to be considered.[17]

Article 3(2) of the OECD Model in its current version also makes it clear that the tax laws of the applying state shall prevail over other areas of law of that state. However, the context of this rule led to the same conclusion even in earlier versions. Moreover, in the case of a treaty applicable to taxes on income and on capital, it must be assumed that within the tax legislation of a state, the primary focus will be on the rules governing those taxes to which the treaty applies.[18]

5.2.3. Other references to national law

In addition to the already dissected provision of article 3(2) of the OECD Model, and to the provision of article 6(2) of the OECD Model subsequently debated, the OECD Model contains further provisions that make reference to national law. A prominent example is the definition in article 10(3) of the OECD Model regarding dividends, according to which income from shares is income that is subjected to the same taxation treatment as income from shares by the laws of the state in which the company making the distribution is a resident.

This reference has its limits: the law of the state of the company paying the dividend only applies when “corporate rights” are involved. The question as to whether corporate rights are involved, however, is not a question of national law but of treaty law. The same applies to the term “income from shares”, to which the other income must be assimilated to fall under article 10(3) of the OECD Model. Therefore, national law is only relevant within the described limits imposed by treaty law.

Pursuant to the 1963 OECD Model, this also applied to the definition of interest in the then version of article 11(3) of the OECD Model. In addition to the income from “debt-claims”, interest was also considered the income subjected to the same taxation treatment as “income from money lent” by the taxation law of the state in which the income arises. This equal treatment had to

---

10 Lang, *supra* n. 7, at 287 ff.
11 F. Wassermeyer, *Art. 3* m.no. 77 et seq., in F. Wassermeyer, *Doppelbesteuerung 60* (2014).
12 J.F. Avery Jones et al, *The Interpretation of Tax Treaties with Particular Reference to Art. 3(2) of the OECD Mode* l, British Tax Review (1984), p. 50; J.F. Avery Jones, *Qualification Conflicts: The Meaning of Application in Article 3(2) of the OECD Model*, in H. Beisse, M. Lutter & H. Närger eds., *Festschrift für Karl Beusch zum 68. Geburtstag am 31.10.1993* (1993) p. 47 ff.
13 R. Dürrschmidt, in Vogel & Lehner, *supra* n. 2, at *Art. 19* m.no. 16.
14 M. Lang, *Die Bedeutung des originär innerstaatlichen Rechts für die Auslegung von Doppelbesteuerungsabkommen (Art. 3 Abs. 2 OECD-MA)*, in Burmester & Endres eds., *Außensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis, Festschrift für Helmut Debatin* (1997), p. 287; Lang, *supra* n. 7, at 288 et seq.; W. Loukota, *Grundsätze für die steuerliche Behandlung international tätiger Gastprofessoren*, SWI (1998), p. 459.
15 Lang, *supra* n. 7, at 288 et seq.
16 Id., at 291.
17 R. Ismer, *Art. 2* m.no. 57, in Vogel & Lehner, *supra* n. 2.
18 K. Vogel, *Art. 3* m.no. 103 ff., in Vogel & Lehner, *DBA 5* (2008).

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

result from the legal consequences relevant in the national law. The standard of comparison was the legal consequences for income from money lent. Therefore, what is meant by "income from money lent" did not derive from national law but rather from treaty law.

5.3. The reference to national law in article 6(2) OECD Model

5.3.1. "Property situated in the Contracting State"

It is often pointed out in connection with article 6(2) of the OECD Model that the term "immovable property" results from reference to national law of the applying state. Upon closer scrutiny, however, it becomes clear that, on the one hand, reference to the national law is only part of the definition of article 6(2) of the OECD Model.[19] The definition of immovable property also includes a positive and a negative list, which must be interpreted solely on the basis of the OECD Model. On the other hand, the reference to national law is embedded in the terms of the OECD Model that define limits for such reference – as will be seen below.

According to article 6(2) sentence 1 of the OECD Model, the term "immovable property" has the meaning "which it has under the law of the Contracting State in which the property in question is situated." Therefore, national law is relevant only to the extent that it involves "property" at all. This term is of major significance in article 13 of the OECD Model: obviously, article 13(1) of the OECD Model itself refers to "immovable property", while article 13(2) covers "movable property". Although paragraphs 3 and 4 mention "property" only in passing or not at all, the backup clause of article 13(5) of the OECD Model clearly indicates that this provision applies to the "alienation of any property". Therefore, apart from immovable and movable property as well as ships and aircraft and shares, "property" is also considered everything else that can be subject to alienation.

As a result, the term "property" sets limits for reference to the national law of the source state. To address a case that was the subject of an eventually unresolved mutual agreement procedure (MAP) between Austria and Belarus several years ago[20] – when a state considers gambling machines as immovable property under national law, this will be reflected in treaty law, leading to the application of article 6 of the OECD Model. If, for instance, income of employees operating or situated within the state were to become income from immovable property by way of legal fiction under national law, this cannot have an effect on treaty law, since people cannot be considered "property".

The property must also be "situated" in a specific contracting state. This term can be found in several other passages of the OECD Model. The PE prerogatives of article 10(4), article 11(4) and article 12(3) of the OECD Model clearly demonstrate that a PE can in any case be "situated". This term, however, goes far beyond that: the word "situated" is also often used in connection with "place of effective management", as for instance in the tiebreaker rule of article 4(3) of the OECD Model, but also in connection with shipping and air transport enterprises in article 8, article 13(3) and article 15(3) of the OECD Model. This term does not result in a further limitation of the term "property" because "place of effective management" refers to the place where decisions are taken and this can also be done in places that are not the "property" of the enterprise.

The term "situated", however, may also result in other treaty limits for references to national law: Were a state to generally declare all gambling machines to be immovable property, regardless of where a device is located, income from immovable property would exist only to the extent that the source of this income is situated in this state. Even if this state were to declare income from all gambling machines ever produced in its territory as income derived from its state, pursuant to article 6(2) of the OECD Model this state would have the taxation right only for those gambling machines situated there at the time relevant for the establishment of the tax liability.

An additional limitation of reference to national law may result from the systematics of the OECD Model. Article 13(4) of the OECD Model covers gains derived from the alienation of shares in real estate companies – described in detail. It is conceivable that under national law, certain shares – especially those in real estate companies – are themselves considered immovable property. In recent years, however, article 13(4) of the OECD Model has provided a separate provision in the case of alienation. This could lead to the conclusion that the treatment of certain shares as immovable property under national law would otherwise not have an impact on treaty law. If this is the case for gains from the alienation of shares, this would constitute an argument in favour of assuming the same consequence for current income from shares – covered by article 10(3) of the OECD Model. It is equally conceivable, however, to interpret the relation of article 6(2) to article 13(4) of the OECD Model like the relation between the positive list in article 6(2) of the OECD Model as well as the reference to domestic law in that provision, and to assume that the taxation right of the state of situs in the scope of article 13(4) of the OECD Model exists regardless of whether or not the shares are subjected to the same taxation treatment as immovable property under national law.

---

19 *See also* Reimer, *supra* n. 17, at m.no. 64.

20 W. Gassner & M. Lang, *Double Non-Taxation of a Belgian Tax Law Professor Lecturing in Vienna*, in F. Vanistendael ed., *Liber amicorum Luc Hinnekens* p. 226 (2002).

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

5.3.2. The law of the contracting state

Article 6(2) sentence 1 of the OECD Model refers to the right of the contracting state in which the property is situated. The qualification of this state is therefore also binding for the other contracting state. The reference in article 6(2) of the OECD Model thus distinguishes itself from that in article 3(2) of the OECD Model, which refers to the applying state and hence looks at the source state for the purposes of the source state and at the residence state for the purposes of the residence state. This, however, also delivers a strong counterargument against the aforementioned opinion of Avery Jones: if one would conclude – as he does – from article 3(2) of the OECD Model, on the one hand, and article 23 of the OECD Model, on the other, that the right of the source state is relevant for the residence state, this would render obsolete the reference in article 6(2) sentence 1 of the OECD Model, which results in precisely this legal consequence. It would make little sense to allege that in article 6(2) sentence 1 the authors of the OECD Model declared the right of the source state to be relevant for a narrowly delimited scope of the immovable property, when this legal consequence would already very generally result from article 3(2) of the OECD Model.

The reference to national law in article 6(2) sentence 1 of the OECD Model does not contain an express provision as to whether it primarily refers to tax law. This distinguishes it from article 3(2) of the OECD Model, where the precedence of tax law over other legislation areas is expressly stipulated since 1995. The differences in the wording of the two provisions, however, do not suggest that pursuant to article 6(2) sentence 1 of the OECD Model, the focus should not be primarily on tax provisions: on the one hand, the purpose of the amended wording of article 3(2) of the OECD Model was to expressly enshrine a result obtained through systematic and teleological interpretation.[21] On the other hand, the context in which article 6(2) of the OECD Model is set already suggests, without any express regulation, that tax law should be primarily used while other areas of legislation only as an alternative.[22] Within tax law, considering article 2 of the OECD Model there is a strong case in favour of giving precedence to taxes on income and capital.[23] It is not convincing, however, to differentiate so much as to apply only the terminology used in the area of taxes on income for the purposes of articles 6 and 13(1) of the OECD Model, and only the terminology used in the area of taxes on capital for the purposes of article 22(1) of the OECD Model.[24] After all, the object of the definition of article 6(2) of the OECD Model is to establish, for the purposes of implementing a treaty, a common understanding of the expression "immovable property" for property situated in a contracting state.

It may also be questionable whether the reference in article 6(2) of the OECD Model should be understood in a static or dynamic manner. The express regulation of the dynamic importance of this reference laid down in article 3(2) of the OECD Model since 1995 does not, however, justify a reverse conclusion: it should not be overlooked here either that article 3(2) of the OECD Model was almost unanimously understood as dynamic even prior to the change in its wording. The reason is the same as the one in favour of understanding article 6(2) sentence 1 of the OECD Model in a dynamic manner: article 2(4) of the OECD Model indicates that any changes made to the national law after the date of signature of the treaty shall be relevant in the application of the treaty. This dynamic understanding radiates both upon article 3(2) and article 6(2) sentence 1 of the OECD Model.[25]

It cannot be ruled out, however, that courts may draw the conclusion that this provision is now based on a static understanding, considering the amended wording of article 3(2) of the OECD Model, and due to the fact that article 6(2) sentence 1 of the OECD Model has remained unchanged. The Austrian Administrative Court has fallen victim precisely to this temptation, since it now interprets DTCs that contain the earlier version of article 3(2) of the OECD Model in a static manner due to the different wording.[26] This opinion, however, is just as insufficiently substantiated as a reverse conclusion that would lead to a static understanding of article 6(2) sentence 1 of the OECD Model.[27]

In interpreting the term "immovable property" under article 6(2) sentence 1 of the OECD Model, one must resort to the law of the state of situs as it is understood by the case law of this state.[28] Administrative practice may only be considered with caution: administrative opinions that have not yet been confirmed by courts do not represent a secure source of legal reference on the law of the state of situs.[29] Therefore, it cannot suffice for the assessment in the residence state that the responsible authority of the state of situs believes – and informs the authority of the residence state thereof – that a specific property is considered immovable under the law of the state of situs. Instead, the authority can only contribute to the clarification of this issue by providing the authority of the residence state with the relevant documents – such as legal provisions or high court rulings.

---

21 Lang, *supra* n. 14, at 293 et seq.
22 Reimer, *supra* n. 2, at m.no. 67.
23 Id.
24 Different opinion, id.
25 *See* id., at m.no. 69; W. Kessler & N. Arnold, *Gedanken zur Behandlung von unbeweglichem Vermögen in der deutschen DBA-Verhandlungsgrundlage*, ISR (2014), p. 10.
26 AT: VwGH, 19 Dec. 2006, 2005/15/0158, VwSlg 8193 F/2006.
27 Regarding the criticism of the case law of the Administrative Court, *see* M. Lang, *Die Maßgeblichkeit des innerstaatlichen Rechts für die DBA-Auslegung in der jüngsten Rechtsprechung des VwGH*, SWI (2007), p. 199 ff.; W. Loukota, *Der Einfluss des österreichischen Ertragsteuerrechts auf die Auslegung von Doppelbesteuerungsabkommen*, in R. Beiser et al. eds., *Ertragsteuern in Wissenschaft und Praxis, Festschrift für Doralt* p. 272 (2007).
28 *See* Reimer, *supra* n. 2, at m.no. 68; Kessler & Arnold, *supra* n. 25, at 10; different, Wassermeyer, *supra* n. 11, at Art. 6 m.no. 32.
29 Of a different opinion, Reimer, id.; Kessler & Arnold, id.

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

Another question is how to proceed when the national law does not contain the term “immovable property”. Similar questions also arise in the context of article 3(2) of the OECD Model when the term, which is not defined in the treaty, is not used in national law in this form. There, however, it is not necessary to extend the reference to national law beyond the wording to also include similar national terms: According to the opinion of the present author, article 3(2) of the OECD Model serves to emphasize the importance of an interpretation in the context and any recourse to national law – if at all – is only necessary in rare exceptional cases. In the case of article 6(2) sentence 1 of the OECD Model, this part of the definition of article 6(2) of the OECD Model geared towards national law may be to no avail if the national law contains a similar but not identical term. The definition of article 6(2) of the OECD Model as a whole would nevertheless have a scope to the extent it covers the positive list of article 6(2) sentence 1 of the OECD Model. Moreover, in those cases in which the English or French version is not or not the sole authentic language of the convention, it could be assumed that the contracting parties judiciously translated the term “immovable property” into their national languages, deliberately using a terminology familiar to the respective legal system.

Nevertheless, there are convincing arguments in favour of extending the reference to similar terms in the context of article 6(1) sentence 1 of the OECD Model when the national law does not contain the term used in the treaty.[30] According to some DTCs, the respective national language is not even the authentic language of the treaty, so that in those cases one must not seek an identical term but one that matches “immovable property” in substance. The phrase “property accessory to immovable property” mentioned in the positive list also further illustrates the close connection between article 6(2) sentences 1 and 2 of the OECD Model. Therefore, this phrase would also be of no avail if there were no “immovable property” under article 6(2) sentence 1. The assets mentioned in the positive list, however, above all discernibly define the periphery of “immovable property” and require that the core area is covered by the definition of article 6(2) sentence 1 of the OECD Model, which refers to national law. In practice, however, all this raises very difficult questions as to which criteria a similar term is eligible for the purposes of article 6(2) sentence 1 of the OECD Model and how to proceed, for instance, when the tax law of the state of situs only contains a similar term but an identical term can be found in private law or trade law, or in another area of public law.

5.3.3. Other limits to the relevance of national law?

The aforementioned case of gambling machines, which were declared immovable property by the Belarusian legislator, subsequently became the object of a MAP between Austria and Belarus: the Austrian authorities refused to accept the Belarusian opinion, according to which Belarus would have the taxation right as the state of situs and Austria would have to exempt that income from tax.[31] The arguments discussed so far support the position of the Belarusian authorities: such devices constitute property and when they are situated in Belarus, a Belarusian provision that declares these machines to be immovable property must be accepted under treaty law. The fact that this national provision did not yet exist on the date of the signature of the treaty does not matter either.

The Austrian authorities had claimed that the Belarusian side had amended national law exclusively or primarily with the intention of bringing about consequences under treaty law. From a legal point of view, however, nothing can be obtained in this manner: the OECD Model and the DTCs modelled on it do not contain any written or unwritten rules prohibiting the contracting states from “abusing” the distribution rules of a DTC.[32] The question as to the – anyway hardly verifiable or easily concealable – intention of a national legislator is irrelevant for the assessment under treaty law. Whether the attempt of a contracting state to circumvent a treaty provision succeeds or fails must be resolved solely by way of interpretation of the actually or allegedly circumvented rule.[33] The tenor of the treaty provision obtained through interpretation cannot be limited by any unwritten abuse principle whatsoever: if and when the state of situs has the opportunity to shape the contents of the treaty through reference of the treaty to its legal system, this must be accepted. It is irrelevant whether the national legislator changes its national law because it wishes to exploit precisely this power conferred on it or because of other reasons.

Similarly, one cannot restrict the power of the state of situs to make amendments to national law that have an effect on treaty law by invoking general legal principles such as good faith.[34] According to article 31 of the VCLT, 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.” This provision summarizes the principles that are relevant for the interpretation of international treaties – and probably of all other rules. If, based on these interpretation principles, a provision of an international treaty must be understood as meaning that its provisions refer to a certain extent to national law, this result can no longer be corrected by referring to the mention of “good faith”.[35] Therefore, the only relevant question is whether the wording of article 6(2) sentence 1 of the OECD

30 Reimer, *supra* n. 2, at m.no. 72.
31 Lang, *supra* n. 7, at 293.
32 Gassner & Lang, *supra* n. 20, at 226.
33 M. Lang, *BEPS Action 6: Introducing an Antiabuse Rule in Tax Treaties*, Tax Notes International, p. 663 et seq. (2014).
34 Reimer, *supra* n. 2, at m.no. 70, maintains that the “bona fide concept in international law” sets limits to an “excessive widening” of the national law definition, referring to article 26 of the VCLT.
35 Reimer maintains a different view in, *Seminar I: Unbewegliches Vermögen und DBA*, IStR (2011), p. 678, and believes that the “bona fide clause” in article 31(1) of the VCLT sets “limits to an arbitrary or surprising broadening of the national law definition by the respective state of situs.”. According to Reimer, these limits

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

Model, the development of law, the teleology of this provision or the systematics in which it is embedded result in other limitations of the reference to the law of the state of situs than those postulated herein. In any case, this result cannot be further restricted by invoking the mention of "good faith" in article 31(1) of the VCLT. Although the interpretation of article 6(2) sentence 1 of the OECD Model has demonstrated that reference to national law has its limits, these cannot rule out that gambling machines can be qualified as immovable property by amendment to national law that has an effect on treaty law. Countries that apply the definition of article 6(2) of the OECD Model in their DTCs have to accept that they submit themselves to the amendments of the contracting state's domestic law. If they do not accept this outcome, they must insist on another definition of immovable property at the time of the contract negotiation. If they fail to do so, however, this cannot be corrected later through interpretation.

Similarly, the principle of "*pacta sunt servanda*" mentioned in article 26 of the VCLT can do little to change this interpretation result:[36] "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." This rule merely states that treaties in force must be performed. The requirement for compliance with international treaties, however, would be immanent in these provisions even if it were not explicitly regulated in article 26 of the VCLT. Article 26 of the VCLT therefore states the obvious and is of no independent legal significance. Just as article 26 of the VCLT is not required to convince states to comply with the international treaties they themselves conclude, this provision does not deprive a state of the power to exercise its rights under an international treaty, nor does it grant another state the right to refuse compliance with a treaty provision in a particular case. Therefore, to the extent that the interpretation of article 6(2) sentence 1 of the OECD Model suggests that the term "immovable property" must be understood on the basis of the law of the state of situs, the latter state cannot be denied the power to shape its national law in view of this treaty law rule by invoking article 26 of the VCLT, nor can the residence state, by invoking article 26 of the VCLT, evade the obligation to recognize the qualification under the law of the state of situs, which it accepted by way of article 6(2) sentence 1 of the OECD Model.

5.4. The positive and negative list of article 6(2) sentence 2 OECD Model

5.4.1. Interpretation solely on the basis of the treaty

Article 6(2) sentence 2 contains a positive and a negative list of assets that either definitely or by no means qualify as immovable property. Of course, these two lists are also suitable for setting additional limits to the primarily relevant national law of the state of situs in accordance with article 6(2) sentence 1 of the OECD Model. The assets included in the positive list definitely qualify as immovable property, even if the state of situs does not regard them as immovable property under its national law. Vice versa, the assets excluded in the negative list do not qualify as immovable property for the purpose of the treaty even if they are qualified as such by the national law of the state of situs.

The positive and negative lists distinguish themselves from the first-mentioned part of the definition of immovable property in that they are not defined by reference to national law – with a few exceptions to be described later. According to the opinion held by the author on article 3(2) of the OECD Model, it is clear that these list rules must be interpreted in the context of the treaty and that recourse to national law is inadmissible. Even if one does not subscribe to this view and interprets article 3(2) of the OECD Model as a reference to national law, there are good arguments in favour of not using national law at least in these cases:[37] article 6(2) of the OECD Model must undoubtedly be understood as a definition and immovable property is thus a term defined under the treaty. The clear wording of article 3(2) of the OECD Model excludes terms defined in the treaty from any reference to national law. Although it would be conceivable to consider the individual terms themselves used in the definition as "not defined" and then interpret these terms according to the respective national law of the applying state by invoking article 3(2) of the OECD Model, this would not be compatible with the objective and purpose of the treaty rules: if the authors of the treaty decide to define a term in the treaty, they undoubtedly indicate that they want this term to be understood independently from the national law of each of the contracting states. This intention would be ignored if the words forming part of this definition were not interpreted in the context of the treaty but instead on the basis of the national law of the respective contracting state.

It is equally unconvincing to follow the proposal of Reimer and, in case of doubt, interpret the terms used in these lists according to the law of the state of situs.[38] This opinion may – contrary to the use of the national law of the respective applying state – at least avoid a differing assessment under the treaty in the two contracting states. It ignores, however, the fact that only article 6(2) sentence 1 of the OECD Model refers to the law of the state of situs and that by using the phrase "in any case" in article 6(2) sentence 2 of the OECD Model, the authors of the treaty indicated that sentence 2 contrasts with sentence 1. There is no reason for an analogous application of the reference to article 6(2) sentence 1 of the OECD Model. The fact that the expressions used

---

would be reached "when the state of situs – already at the date of the signature of the convention – for fiscal reasons subjects assets to the same treatment as immovable property which are practically not linked to territory: when luxury objects, cultural goods, or vehicles are collectively treated as immovable property under national law, this should not be reflected on the level of the convention, despite the wording of Article 6 para. 2 sentence 1 OECD Model."

36 *See* reference to article 26 of the VCLT by Reimer, *supra* n. 2, at m.no. 70, which seeks to "put limits ... to the excessive widening of the national law definition" – to whatever extent this is defined.

37 Of a different opinion is Wassermeyer, *supra* n. 11, at *Art. 6* m.no. 16.

38 Reimer, *supra* n. 2, at m.no. 75 ff; approving, Kessler & Arnold, *supra* n. 25, at 10.

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

in article 6(2) sentence 2 are abstract legal terms, the content of which is sometimes not immediately deduced based on their "ordinary meaning",[39] constitutes no reason to abandon their interpretation on the basis of the treaty. In other cases, interpretation is not limited to the wording of a provision either, but uses teleology and systematics, as well as legal development. Just as we do not interrupt the interpretation process in national law because of abstract legal terms when their content cannot be immediately deduced from their wording, it is not justifiable to do so in the area of treaty law either.

5.4.2. The positive list

The task of this chapter is not to present a commentary of the individual phrases in the positive list, but to analyse the relation between the interpretation solely on the basis of the treaty and the relevance of national law. The considerations presented so far have shown that the positive list in article 6(2) sentence 2 of the OECD Model must be generally interpreted in the context of the treaty. There are, however, certain exceptions that need to be addressed.

According to article 6(2) sentence 2 of the OECD Model, the term "immovable property" definitely includes "property accessory to immovable property". Prima facie, it is not clear at this point what the Model means by "immovable property". The definition seems circular, since "immovable property" is explained using precisely this very term. A meaningful interpretation understands the term "immovable property" at the beginning of the positive list of article 6(2) sentence 2 of the OECD Model as a reference to the use of this term up to this point – in the preceding sentences and phrases – and thus to the definition of article 6(2) sentence 1 of the OECD Model referring to the right of the state of situs.[40]

Therefore, the OECD Model rule combines the autonomous treaty interpretation with the relevance of the national law of the state of situs: the term "immovable property" builds on article 6(2) sentence 1 of the OECD Model and thus again indirectly refers to the national law of the state of situs, though within the treaty law limits described above. The term "property" itself is identical with the conforming term of article 6(2) sentence 1 of the OECD Model, which in turn is the central term in the five paragraphs of article 13 of the OECD Model and refers to all assets subject to "alienation". Such an asset must be "accessory" to immovable property to fall within the scope of article 6(2) sentence 2 of the OECD Model. This term also constitutes a treaty term that must be interpreted solely on the basis of the treaty. Therefore, based on treaty law, one must establish how close the connection must be between the asset and the immovable property pursuant to article 6(2) sentence 1 of the OECD Model.

National law is also relevant in a second item: "Rights to which the provisions of general law respecting landed property apply" also necessarily constitute immovable property. Yet in this context, civil law and not tax law must be taken into account.[41] In this case, however – contrary to article 6(2) sentence 1 of the OECD Model – no particular state is expressly mentioned. Therefore, it would be possible to follow the logic contained in article 3(2) of the OECD Model and use the law of the respective applying state. Alternatively – similar to article 6(2) sentence 1 of the OECD Model – it would be possible to consider the right of the state of situs as relevant. It is more convincing, however, to understand the reference to private law as within the meaning of the state of situs.[42] This is favoured not only by the objective proximity to article 6(2) sentence 1 of the OECD Model, but also by the fact that the assessment according to the state of situs will also be relevant for the residence state and the use of national law will thus not provoke qualification conflicts – and subsequently cases of double taxation or non-taxation.

The phrase "livestock and equipment used in agriculture and forestry" is closely linked to the bracketed term of article 6(1) of the OECD Model, according to which income from immovable property also includes "income from agriculture or forestry". Oddly enough, this formulation is not included in the definition of article 6(2) of the OECD Model itself. At first glance, this could raise the question as to whether "agriculture and forestry" belong to immovable property only for the purposes of article 6 of the OECD Model but not for the purposes of other treaty provisions using the term "immovable property" and to this extent implicitly tie in with the definition of article 6(2) of the OECD Model – such as article 13(1) or article 22(1) of the OECD Model. However, the said phrase of article 6(2) sentence 2 of the OECD Model illustrates that no particular significance should be attached to the fact that "agriculture and forestry" was used in article 6(1) of the OECD Model and not only in article 6(2). When even "equipment used in agriculture and forestry" is regarded as immovable property, this must all the more apply to "agriculture and forestry". Therefore, the phrase "agriculture or forestry", just as "equipment used in agriculture and forestry", must be interpreted on the basis of the treaty and "agriculture" and "forestry" thus definitely belong to immovable property, regardless of the understanding of the term "immovable property" in the state of situs according to article 6(2) sentence 1 of the OECD Model.[43]

---

39 Reimer, id., at m.no. 76; similar, Kessler & Arnold, id.
40 Supported by C. Strasser, *Die Auslegung von Quellenstaatsregelungen in Doppelbesteuerungsabkommen* p. 115 (2005); *see also* Wassermeyer, *supra* n. 11, at Art. 6 m.no. 60.
41 Wassermeyer, id., at m.no. 61.
42 *See als* o Reimer, *supra* n. 2, at m.no. 88.
43 A different view is held by Reimer, id., at m.no. 66.

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).

5.4.3. The negative list

The negative list is relatively short: "ships, boats and aircraft" never constitute immovable property, even if they qualify as immovable property under the national law of the source state. Therefore, this negative list further limits the references contained in article 6(2) sentence 1 of the OECD Model and partly also those in the positive list of sentence 2. The last sentence is formulated in a manner that definitely grants it precedence over references to national law in the previous sentences.

The term "ships, boats and aircraft" corresponds to that of article 8 of the OECD Model: "ships" and "aircraft" are covered by article 8(1) of the OECD Model; "boats" in article 8(2) of the OECD Model. It must therefore be assumed that the identical expressions in article 6(2) sentence 3 of the OECD Model and in article 8(1) and (2) of the OECD Model also have the same meaning.[44] They must be interpreted in the context of the treaty. For the reasons mentioned above, recourse to national law according to article 3(2) of the OECD Model is not admissible in the constellation of article 6(2) sentence 2 of the OECD Model. Due to the parallels between article 6(2) sentence 2 of the OECD Model and article 8 of the OECD Model, this also applies to article 8.

Therefore, article 6(2) sentence 2 of the OECD Model also serves to emphasize the precedence of article 8 over article 6 of the OECD Model.[45] Were the application of the first two sentences of article 6(2) of the OECD Model to cause overlaps with article 8, article 6 of the OECD Model would have to recede. However, "ships" and "aircraft" are only covered by article 8(1) of the OECD Model if they are engaged in "international traffic" and according to article 8(2) of the OECD Model, "boats" must be "engaged in inland waterways transport" to fall under this provision. Article 6(2) sentence 2 of the OECD Model does not demand these additional requirements. Article 8 of the OECD Model is also narrower than article 6 to the extent that it requires the "operation" of these means of transport, while "use in any ... form of immovable property" will suffice for article 6(3). Therefore, income from these means of transport is also excluded from article 6 of the OECD Model if it is not covered at all by article 8 of the OECD Model. Overlaps between the two distribution rules are possible, however, when immovable property directly pertains to the operation of ships or aircraft in international traffic.[46] An express provision governing precedence is missing here. However, article 6(4) of the OECD Model could also be applied to this case.[47]

5.5. Outlook

The detailed analysis of article 6(2) of the OECD Model demonstrates that the term "immovable property" is by no means unlimitedly defined according to the national law of the state of situs. As a rule, references to national law can be found in article 6(2) sentence 1 of the OECD Model, yet they are limited by the requirement that the "property" must be "situated" in the other state. Views may differ as to whether shares fall under article 6(2) of the OECD Model because of their treatment as immovable property under national law. Also of importance are the positive and negative lists, which in turn also partly result from reference to the national law.

The complicated interpretation problems resulting from the interaction between interpretation solely on the basis of the treaty and the relevance of national law should provide food for thought and induce a critical review of the definition of article 6(2) of the OECD Model. A definition that forgoes any reference to national law should definitely be given preference over the current version.

---

44 Id., at m.no. 113.

45 *See also* S. Galke, *Art. 6 MA II* m.no. 16, in F. Haase, *Außensteuergesetz Doppelbesteuerungsabkommen 2* (2012).

46 B.J. Arnold, *At Sixes and Sevens: The Relationship between the Taxation of Business Profits and Income from Immovable Property under Tax Treaties*, 60 Bull. Intl. Taxn. 1, p. 11 (2006), Journals IBFD.

47 Id.

© Copyright 2024 IBFD: No part of this information may be reproduced or distributed without permission of IBFD.
Disclaimer: IBFD will not be liable for any damages arising from the use of this information.

Exported / Printed on 26 Apr. 2024 by WU (Wirtschaftsuniversität Wien).