

## INVITATION

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Online-Conference

### **"TAX TREATY CASE LAW AROUND THE GLOBE"**

WU (Vienna University of Economics and Business)

May 06-07, 2021, Vienna, Austria

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Organized by the Institute for Austrian and International Tax Law, WU, Vienna, in joint venture with the European Tax College, Tilburg.

The Institute for Austrian and International Tax Law of WU (Vienna University of Economics and Business) and the European Tax College of Tilburg University are proud to invite you to the Conference **"TAX TREATY CASE LAW AROUND THE GLOBE"**.

Our Conference aims at presenting and discussing the most interesting Tax Treaty Cases, which had been decided in 2020 all over the world. We are grateful that outstanding experts from 23 jurisdictions have agreed to present the most relevant decisions taken in their countries. The main topics we identified have been clustered into eight "baskets" which will be dealt with in our eight conference sessions:

- Session 1: Personal and Substantive Scope (Art 1, 2 and 4 OECD Model)
- Session 2: Business Profits (Art 6, 7 and Art 14 OECD Model) and Permanent Establishments (Art 5 OECD Model)
- Session 3: Associated Enterprises (Art 9 OECD Model)
- Session 4: Passive Income (Art 10, and 11 OECD Model)
- Session 5: Employment Income, Directors' fees, Artistes and Sportsmen, Pensions, Students and Other Income (Art 15, 16, 17, 18, 19, 20 and 21 OECD Model Convention)
- Session 6: Methods to avoid double taxation (Art 23 OECD Model Convention)
- Session 7: Non-discrimination, mutual agreement and mutual assistance (Art 24 – 27 OECD Model Convention)
- Session 8: Interaction between domestic anti-avoidance rules and double tax treaties

In each session of the Conference three to six tax treaty cases will be presented and subsequently analyzed in a critical discussion, including the possible impact of the cases on the interpretation and application of tax treaties in other countries. For further details please refer to the programme attached.

The scientific results of the conference will be published in a book.

Due to the current situation with regard to COVID-19 the conference will be held fully on-line. The working sessions will be held all day on May 06 and 07, 2021 at WU (Vienna University of Economics and Business). The link for participation will be sent shortly before the conference.

The participation fee for the online Conference is EUR 900.--. A waiver of the participation fee may be granted to (full-time) academics and other researchers who are employed at a university or other academic institutions (wherever located) and have been engaged in research activities related to the respective topic. The participation fee must be paid not later than April 05, 2021, and will not be refunded in the case of cancellation one week prior to the conference.

If you are interested, please send us the application form as soon as possible, stating whether you would like to register as a regular participant or apply for a waiver of the participation fee. Please send your applications via e-mail to **Layomi Gunatilleke-Jester**, [layomi.gunatilleke-jester@wu.ac.at](mailto:layomi.gunatilleke-jester@wu.ac.at) and **Julia Leitner**, [julia.leitner@wu.ac.at](mailto:julia.leitner@wu.ac.at)

**Prof. DDr. Georg Kofler**

Professor at the Institute for Austrian and International Tax Law WU (Vienna University of Economics and Business)

**Prof. Dr. DDr.h.c. Michael Lang**

Head, Institute for Austrian and International Tax Law WU (Vienna University of Economics and Business)

**Prof. Dr. Jeffrey Owens**

Director of the WU Global Tax Policy Center at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business)

**Prof. Dr. Pasquale Pistone**

Jean Monnet *ad personam* Professor at the Institute for Austrian and International Tax Law, WU (Vienna University of Economics and Business)

**Prof. Dr. Alexander Rust**

Professor at the Institute for Austrian and International Tax Law WU (Vienna University of Economics and Business)

**Prof. Dr. Josef Schuch**

Professor at the Institute for Austrian and International Tax Law WU (Vienna University of Economics and Business)

**Prof. Dr. Karoline Spies**

Professor at the Institute for Austrian and International Tax Law WU (Vienna University of Economics and Business)

**Prof. Dr. Claus Staringer**

Professor at the Institute for Austrian and International Tax Law WU (Vienna University of Economics and Business)

**Prof. Dr. Peter Essers**

Director of European Tax College, Professor at the Fiscal Institute Tilburg (Tilburg University)

**Prof. Dr. Eric C.C.M. Kemmeren**

Director of European Tax College, Professor at the Fiscal Institute Tilburg (Tilburg University)

**Prof. Dr. Daniël S. Smit**

Professor at the Fiscal Institute Tilburg (Tilburg University)

**Dr. Cihat Öner (LL.M.)**

Associate Professor at the Fiscal Institute Tilburg (Tilburg University)

## PROGRAMME

Online - Conference

### "TAX TREATY CASE LAW AROUND THE GLOBE"

WU (Vienna University of Economics and Business)  
May 06-07, 2021, Vienna, Austria

**Thursday, May 06, 2021**

#### **Session 1**

09:00 – 11:00

#### **Personal and substantive scope (Art 1, 2 and 4 OECD Model)**

*Chairs: Michael Lang  
Ton Stevens*

#### **Austria (Georg Kofler)**

Supreme Administrative Court (VwGH), 15 October 2020, Ro 2019/13/0007	n/a
DTC between Austria and Slovakia	
Attribution of dividend income in case of a „sandwich structure“ where the Austrian shareholder of a hybrid Slovak company received dividends from an Austrian corporation through that hybrid Slovak company.	

#### **Australia (Michael Dirkis)**

Full Court of the Federal Court of Australia (FCAFC), 22 September 2020, [2020] FCAFC 158	Commissioner of Taxation v Pike
DTC between Australia and Thailand	
The Federal Court of Australia had to decide the residence of an individual taxpayer for tax treaty purposes pursuant to the tie-breaker rule under Art. 4.2 of the treaty.	

**France (Pierre Burg)**

Supreme Court, 16 July 2020, No. 436570	n/a
DTC between France and Brazil	
The Supreme Court of France interpreted the concept of habitual abode in accordance with the OECD Commentary even though it is later in time than the treaty itself.	
Supreme Court, 09 June 2020, No. 434972	n/a
DTC between France and China	
The Supreme Court of France had to decide whether a person may be resident in a country for DTC purposes even if that person is not subject to tax on foreign-source income.	

**Italy (Pasquale Pistone & Sergio Messina)**

Italy, Supreme Court of Cassazione judgement of 8 October 2020, n. 21696	Tiziano Ferro
DTC between Italy and UK	
The Italian Supreme Court upholds the view that Italians that are resident non domiciled in UK do not meet the requirement under article 4(1) second phrase OECD Model.	

**India (Ashrita Prasad Kotha)**

Income Tax Appellate Tribunal, 13 October 2020, ITA No. 7075/DEL/2017	Giesecke & Devrient [India] Pvt Ltd v. The Addl. Commissioner of Income Tax
DTC between India and Germany	
The Tribunal had to decide whether the Indian Dividend Distribution Tax (DDT) introduced after the conclusion of the treaty was covered by the treaty and whether or not the unilateral domestic provision prevailed over the DTC.	

11:00 – 11:15

Coffee Break

**Session 2****Business profits and permanent establishments**

(Art 5, 6, 7, 8 and 14 OECD Model)

11:15 – 13:30

*Chair: Kasper Dziurdz***Denmark (Soren Friis Hansen)**

Tax Council Case: SKM2020.208.SR	n/a
DTC between Denmark and Germany	
Tax Council Case: SKM2020.382.SR	n/a
DTC between Denmark and China	
The cases concern whether Denmark has taxing right over taxpayers who/whose employee are stranded in Denmark due to Covid-19 under Art. 7 and 14 of the DTCs.	

**France (Daniel Gutmann)**

Supreme Court, 11 December 2020, n. 420174, CE, Plen. Sect.	Conversant International Ltd
DTC between France and Ireland	
For the first time the Council d'Etat explicitly refers to subsequent commentaries and decides that in a "Google-type" situation, the non-resident Irish company has a PE in France.	

**Turkey (Billur Yalti)**

Istanbul Regional Administrative Court 1st Tax Chamber, 26 October 2020, No. E. 2020/496, K. 2020/1420	n/a
The Istanbul Regional Administrative Court had to decide whether the 15% Taxation of Digital Advertising Services Income pursuant to a Turkish domestic law introduced in 2016 on non-resident companies is in compliance with the DTC.	

**UK (Philip Baker)**

First-tier tribunal, 23 June 2020, [2020] UKFTT 267 (TC)	Royal Bank of Canada v Revenue and Customs Commissioners
DTC between UK and Canada	
In this case, the court had to decide whether the payment in question falls within Art. 6 of the UK-Canada double tax convention. Secondly, given both French and English texts are equally authoritative language of the treaty, the question arose whether expert evidence should have been obtained as to the meaning of the French text.	

**UK (Jonathan Schwarz)**

England and Wales Court of Appeal (Civil Division), [2020] EWCA Civ 1128 (28 August 2020)	Irish Bank Resolution Corporation Ltd v Revenue and Customs
DTC between UK and Ireland	
The case deals with whether the 2003 UK domestic law on attribution of profits to a PE, specifically the capital attribution provisions, are compatible with Art. 8 of the 1976 UK-Ireland DTC (reproducing Art. 7 OECD Model 1963) and the role of various versions of the OECD Model and Commentary in interpreting the article.	

**Spain (Adolfo Martin Jiménez)**

Court: Tribunal Supremo, No. 308/2020	n/a
DTC between Spain and Switzerland	
The case concerns the interpretation of the concept of auxiliary activities for the purposes of the permanent establishment concept in the Spain-Switzerland tax treaty where the Supreme Court of Spain has denied later commentaries to be taken into account to interpret previous tax treaties.	

13:30 – 14:30

Lunch Break

**Session 3****Associated Enterprises** (Art 9 OECD Model)

14:30 – 15:30

*Chair: Georg Kofler***Norway (Eivind Furuseth)**

Supreme Court, May 2020, No. HR-2020-1130-A	n/a
The case concerns the question whether the cost allocation agreement could be considered a Cost Contribution Arrangements (CCA) and further, whether the allocation of the R&D costs incurred by Norske Shell, should have been allocated to the other group companies, including whether they had had any benefit from R&D activity in Norway.	
Appeal Court, Jan 2020, n. LB-2018-84331	n/a
The case concerns the question whether the income allocated to Orange Norway according to the PSM methods suggested by the TPG	

is correct or instead, as the tax administration submits, the PSM would not reflect sufficiently the arm's length price and the TNMM should have been used instead.

**US (Yariv Brauner)**

United States Tax Court, 18 Nov 2020, 155 T.C. No. 10 UNITED	Coca Cola V. Commissioner
A key transfer pricing case where the government wins for the first time in decades. Bases its decision on CPM and rejects literal arm's length – most possibly in contradiction to the TPG – no treaty analysis, but there should have been one.	

15:30 - 15:45

Coffee break

**Session 4**

**Passive income** (Art 10, Art 11, Art 12, and Art 13 OECD Model)

15:45 – 17:45

Chair: Caroline Heber

**Switzerland (Michael Beusch & Moritz Seiler)**

Swiss Supreme Court, 19th May 2020, 2C_880/2018	n/a
Swiss Supreme Court, 16th December 2019, 2C_209/2017 - BGE 146 I 105	n/a
This case concerns the interpretation of beneficial ownership under the Switzerland and UK DTC, where the Swiss Supreme Court applied dynamic approach to take into account the 2014 Update on the OECD Model.	

**Russia (Danil Vinnitskiy; Denis Kurochkin; Elena Kilinkarova; Andrey Savitskiy)**

Commercial Court of the Far Eastern District, 30 June 2020, No F03-1016/20201	KCA Deutag Drilling (Yuzhno-Sakhalinsk, Russia) vs. Tax Authorities
DTC between Russia and Cyprus	
Commercial Court of the Moscow District, 17 November 2020, No. A40-282232/20192	Chukotskaya gorno-geologicheskaya kompaniya" (Moscow, Russia) vs. Tax Authorities
DTC between Russia and the Netherlands & DTC between Russia and Canada	
Both cases, KCA Deutag Drilling (Yuzhno-Sakhalinsk, Russia) vs. Tax Authorities and Chukotskaya gorno-geologicheskaya kompaniya" (Moscow, Russia) vs. Tax Authorities, show Russian's jurisprudence lack of consistency in the application of the beneficial ownership criteria, with regard to dividends paid to investment companies which participate in intergroup financial transactions.	
RF Supreme Court (Ruling), 10 June 2020, No. 307-ЭС19-87193	Logistic-Park "Yanino" (Leningrad region, Russia) vs. Tax Authorities
DTC between Russia and the Netherlands & DTC between Russia and Finland	
The case deals with the possible treaty repercussions of domestic thin capitalization rules.	

**Bulgaria (Ivan Lazarov)**

Supreme Administrative Court 07.10.2020 and No. 12349	n/a
Supreme Administrative Court 19/05/2020, No. 5778	n/a
The two decisions are related to the interpretation of the relevant factors to determine BO.	

**Spain (Adolfo Martin Jiménez)**

Tribunal Supremo. Sala de lo Contencioso, 23 September 2020, No. 1196/2020	n/a
In this case, the Supreme Court also denied the dynamic approach in relation to the BO concept under Art. 12 of the DTC. It also gave this interpretation to correct the unfair outcome of the lower court judge on the meaning of BO as equivalent to a GAAR.	

<b>Friday, May 07, 2021</b>
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**Session 5****Employment Income, Directors' fees, Artistes and Sportsmen, Pensions, Students and Other Income** (Art 15, 16, 17, 18, 19, 20 and 21 OECD Model Convention)

09:30 – 11:15

Chair: Pasquale Pistone

**Germany (Alexander Rust)**

Finanzgericht Hessen, 27 February 2020, No. 9 K 353/19, IStR 2020, 680	n/a
DTC between Austria and Germany	
The case concerns the allocation of taxing right over a severance payment if the taxpayer exercised his employment in several countries.	

**Switzerland (Raphaël Gani & Alice Fadda)**

Swiss Supreme Court, 6th February 2020, No. 2C_510/2018	n/a
The Swiss Supreme Court had to decide whether the pension benefit in question fell under the special provision of Treaty Article 18 para. 2. Furthermore, the Court had to clarify the time aspect of Treaty Article 18 para. 2 given the fact that the taxpayer had been in his career employed by numerous employers.	

**Poland (Karolina Tetlak)**

Supreme Administrative Court, 27 November 2019, No. II FSK 157/18	n/a
The case concerns the apportionment of the remuneration paid to players in a game in Poland by the foreign company or federation and the remuneration that constitutes income of the company or federation as an agent, organizer, administrator, impresario, etc.	

**US (Yariv Brauner)**

US Tax Court, 18 Dec 2019, 153 T.C. No. 10 UNITED	VITALY NIKOLAEVICH BATURIN, Petitioner v. COMMISSIONER OF INTERNAL REVENUE, Respondent
In this case, the Court had to decide whether a Russian citizen who worked as a research scientist at a research facility in the United States under the exchange visitor program was entitled to exempt his wages from federal income tax under Article 18 of the Russia-U.S. tax treaty, on the ground that his wages were similar to a grant or allowance.	

11:15 – 11:30

Coffee Break

**Session 6**

11:30 – 12:30

**Methods to avoid double taxation** (Art 23 OECD Model Convention)*Chair: Karoline Spies***Bulgaria (Ivan Lazarov)**

Supreme Administrative Court, 13 January 2020, No. 409/13.01.2020	n/a
DTC between Bulgaria and Italy	
The decision concerns whether or not DTCs allow taxpayers to claim tax credit for taxes levied not in accordance with the DTC.	

**Portugal (Ana Paula Dourado)**

Central Administrative Court (South), 05.November.2020 n.º 52/09.8BESNT	n/a
DTC between Portugal and Spain	
This case dealt essentially with factual matters with regard to the proof of the exercise of work in Spain.	

12:30 – 13:30

Lunch Break

**Session 7**

13:30 – 15:30

**Non-discrimination, mutual agreement and mutual assistance**

(Art 24 – 27 OECD Model Convention)

*Chair: Pasquale Pistone***Australia (Michael Dirkis)**

Full Court of the Federal court of Australia, 6 August 2020, [2020] FCAFC 135	Commissioner of Taxation v Addy
DTC between Australia and UK	
The case concerns whether the implementation of a special tax rate imposed upon persons holding certain classes of holiday working visas by Australia was discriminatory and contravened Article 24(1) of Australia/United Kingdom tax treaty.	

**Belgium (Luc de Broe)**

Council of State, 9th Court Chamber on Administrative Law, 2 June 2020, Judgment no. 247.694	A.224.757/IX-9262 in re XXX v. Belgian State
The case dealt with the access of a taxpayer (caught in a dual resident dispute between Belgium and the UK) to the files of the tax authorities in a MAP.	
Supreme Court of Belgium, 17 September 2020, No. F.19.0021.F	Belgian State v. PDV & IDR
MAP between Belgian and French tax authorities interpreting the nationality-clause in the Belgian/French DTC against the terms of the Government Service-provision found to be unenforceable against the taxpayers by Supreme Court.	

**Portugal (Ana Paula Dourado)**

Arbitration Court (CAAD), 09.November.2020, n.º 882/2019-T	n/a
DTC between Portugal and UK	
This case illustrated that interest payments made by permanent establishments must be treated in the same way as those payments made by entities resident in Portugal for the purposes of the application of domestic tax incentives.	



**Brazil (Luis Eduardo Schoueri)**

Brazilian Supreme Court, Extraordinary Appeal no. 460.320	Volvo do Brasil Veículos Ltda. ("Volvo Brazil") vs. Federal Union
DTC between Brazil and Sweden	
The Case discusses the extension of non-discrimination clauses in view of taxpayer's personal connecting factors (nationality and residence) and the relation between such clauses and the constitutional principle of equality in taxation.	

**Germany (Alexander Rust)**

Bundesfinanzhof, 25 September 2019, I R 82/17, IStR 2020, 305	n/a
Initiating an arbitration procedure in accordance with the EU Arbitration Convention is compulsory and not at the discretion of the tax administration. However, if the enterprise is liable to a serious penalty in the sense of Art. 8(1) Arbitration Convention the tax administration is no longer obliged to initiate the arbitration procedure. In this case, the Court interprets the meaning of the term "serious penalty".	

15:30- 15:45

Coffee break

**Session 8****The interaction between domestic anti-avoidance rules and double tax treaties**

15:45 – 17:00

*Chair: Alexander Rust***Canada (David Duff)**

Federal Court of Appeal, 12 February 2020, 2020 FCA 43 (FCA)	Canada v. Alta Energy Luxembourg
DTC between Canada and Luxembourg	
In this case, the Federal Court of Appeal had to decide whether the Canadian general anti-avoidance rule applied to deny the benefit arising from the DTC between Canada and Luxembourg.	

**Israel (Ilan Benshalom)**

TA 50783-01-14	Prosol Holding S.A. v. Tax Commissioner TLV 5
DTC between Israel and Luxembourg	
In this case, the Court had to decide whether the change of corporate status (which was legal and even desirable from Luxembourg's corporate law perspective) to benefit from the exemption of Israeli tax under the treaty between Israel and Luxembourg amounted to an illegitimate tax planning.	

**Argentina (Mirna Solange Screpante)**

Federal Court of Appeals San Martin, 23 September, 2020	Praxair Argentina SRL
DTC between Argentina and Spain	
The case dealt with whether the "substance over form" principle (domestic GAAR) set forth in Argentine law should apply to deny benefit arising from 22(4) of the DTC between Argentina and Spain (1992).	

**Estonia (*Priit Lätt*)**

Tallinn Circuit Court, 12 December 2019, Case No 3-18- 979	n/a
DTC between Estonia and the Netherlands	
The case concerns the question whether the domestic GAAR can be applied when the treaty does not contain such a provision – arose in the context of avoidance of double taxation under the Estonia-Netherlands tax treaty.	

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We would like to inform you that this event will be photographed. Should you not wish to be photographed, we kindly ask you to avoid the camera and/or inform Ms. Layomi Gunatilleke-Jester: [layomi.gunatilleke-jester@wu.ac.at](mailto:layomi.gunatilleke-jester@wu.ac.at). Photos will be used to inform the public about the activities of the Institute.