AN ANALYSIS OF THE APPLICABILITY OF THE OECD MODEL TAX CONVENTION TO NON-OECD MEMBER COUNTRIES: THE SOUTH AFRICAN CASE

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Abstract

Most tax treaties (including South Africa's) are based on the OECD Model Tax Convention on Income and Capital and the related Commentary (the 'OECD Model'). Notwithstanding the uncertainty surrounding its legal status, the courts in many countries use the OECD Model in the interpretation of their tax treaties. The OECD launched an action plan on Base Erosion and Profit Shifting ('BEPS') in 2013, which is aimed at improving international tax cooperation between governments. In South Africa, the importance of combating BEPS is highlighted by the fact that the Davis Tax Committee has appointed a sub-committee specifically to address concerns pertaining to BEPS. South Africa's participation in the BEPS project and its tax treaty negotiations with other countries, especially OECD member states, are of the utmost importance to South Africa's National Treasury. Consequently, it is the primary objective of this article to analyse the applicability of the OECD Model to non-OECD member countries, with particular emphasis on South Africa. It will be argued that, if the treaties of non-member countries are in conformity with the OECD Model and no specific position has been taken, the non-members also accept the provisions of the Model and the Commentary as an interpretative aid.

Keywords

Base Erosion and Profit Shifting; BEPS; double tax agreement; interpretation; OECD Model Tax Convention; tax treaty

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1. BACKGROUND AND FORMULATION OF THE STUDY

1.1 Introduction

A surge in international trade and investment flows (UNCTAD, 2014) has obvious tax consequences, and the tax treatment of income resulting from these cross-border transactions is affected by tax treaties (Brooks, 2009:1). More than 3 000 bilateral tax treaties have been signed to date (Lang & Owens, 2014:6), with South Africa having approximately 80 double tax agreements ('DTAs') in force (SARS, 2015).

The Organisation for Economic Cooperation and Development ('OECD') notes that, in the changing international tax environment, concerns exist about how international standards on which DTAs are based allocate taxing rights between source and residence states (OECD, 2013a:11). Consequently, the OECD launched an action plan on Base Erosion and Profit Shifting ('BEPS') in 2013, which is aimed at improving international tax cooperation between governments (OECD, 2013b:13). Although the BEPS project is orchestrated by the OECD, there has been some participation by over 80 developing countries and other non-OECD countries (OECD, 2016a). This is largely due to the fact that the BEPS initiative was endorsed by the governments of the G20 countries, which extended its application to some non-OECD countries.

In South Africa, the importance of combating BEPS is highlighted by the fact that the Davis Tax Committee has appointed a sub-committee specifically to address concerns pertaining to BEPS. The Davis Tax Committee (2014:17) points out that the BEPS Action Plan entails various issues that fall under international law, especially matters that are dealt with in the context of DTAs. South Africa's participation in the BEPS project and its tax treaty negotiations with other countries, especially OECD member states, are clearly of foremost importance for South Africa's National Treasury.

1.2 Research objective

Notwithstanding that the OECD Model Tax Convention on Income and Capital 2014 and related Commentary (the 'OECD Model') can be of great assistance in the application and interpretation of tax treaties and in the settlement of disputes, it will be seen that their legal relevance remains a globally contentious point. As such, it is the primary objective of this article to analyse the applicability of the OECD Model to non-OECD member countries, with particular emphasis on South Africa. In furtherance of this goal, a synthesis of scholarly opinions will be examined.

1.3 Research method

An interpretive research approach will be adopted for this study, as it seeks to understand and describe (Babbie & Mouton, 2009). As with most legal interpretive research, this study adopts a doctrinal research methodology, as it provides a systematic exposition of the rules governing a particular legal category (in this case, the legal rules pertaining to the OECD Model), explains areas of difficulty and is based purely on documentary data (McKerchar, 2008).

This desktop study entails a literature review of and reference to both foreign and local statutory laws, tax treaties and policy documents, as well as authoritative studies on model tax conventions and double tax agreements. The documentary data to be used will be obtained from published articles, chapters in books, journal and legal databases and reputable websites. The research will reflect the law and policy developments up to and including 30 April 2016, except in certain circumstances where more recent policy developments or tax amendments appear particularly relevant.

2. MODEL TAX CONVENTIONS

2.1 The more prominent models

In an attempt to achieve a degree of standardisation of the contents of treaties by their members, model tax conventions were published by international organisations (Olivier & Honiball, 2011:268). Consequently, in 1963, the OECD Model was prepared by developed countries of the world and it thus embodies rules and proposals by capital exporting countries (Oguttu, 2007:242). As it was drafted by representatives of major Western industrialised countries, lower-income, developing countries were concerned that it resulted in too large a reduction in source country tax (Brooks, 2009:2).

The developing countries responded to the success of the OECD Model by developing their own model convention under the auspices of the United Nations (UN) in 1980. This model was drafted between developed and developing countries and attempts to reflect the interests of developing countries (Oguttu, 2007:242). Although it is based upon the OECD Model, the UN Model Double Taxation Convention between Developed and Developing Countries (the 'UN Model') retains much greater source country taxation.

According to Rohatgi (2002:60), the UN Model has been criticised for not making a significant contribution to tax treaties; an obvious reason for this viewpoint could be ascribed to the fact that, since 1998, the UN Model has followed the changes in the OECD Model. Steenkamp (2013:1109) argues that the acceptance of the OECD Model over other available standards, like the UN Model, for example, could also possibly be explained by the fact that the OECD Model is sponsored by the most developed countries of the world, which are, not coincidentally, also the major capital exporting countries.

The third prominent tax treaty model is the United States model, which is followed by most treaties that the USA has signed with other countries, including South Africa (Oguttu, 2007:242). In addition, Olivier and Honiball (2011:272) make mention of South Africa's own model tax convention (Parliamentary Monitoring Group, 2005), which is used as a basis for treaty negotiations. Admittedly, it could be considered somewhat pretentious for a small country like South Africa to have its own model, but it is 'right and proper' for any country to have a template as its starting point for treaty negotiations (Mazansky, 2009:148).

Also worth mentioning is that the Southern African Development Community ('SADC') published a draft of its own model tax convention in 2001. Once the SADC model is finalised and ratified by all its members, South Africa (as member of the SADC) could use the SADC model as a basis for its negotiations (Olivier & Honiball, 2011:272).

2.2 The accompanying Commentary

It has been the practice of the UN and the OECD that model tax conventions are all accompanied by Commentary notes, which are regularly updated approximately every two years (Ward, 2006:97). The OECD Model Commentary often goes beyond merely explaining the meaning of terms found in the OECD Model – it also provides the background to provisions and explains why certain provisions were considered desirable or necessary (Ellis, 2002:618). Countries may enter reservations to the articles of the OECD Model in order to preserve their freedom to depart from the OECD Model and they may also enter observations to the Commentary to indicate how they will apply the provisions of a particular article (Baker, 2002:para A.08).

The Commentary has been drafted and agreed upon by the experts appointed to the OECD's Committee on Fiscal Affairs and is generally regarded as playing a significant role in the development of international fiscal law (OECD Model, Introduction:para 29). Tax administrations routinely consult the Commentary in their interpretation of bilateral tax treaties, taxpayers use it in conducting their businesses and planning transactions and investments, and the courts are increasingly using the Commentary in reaching their decisions (OECD Model, Introduction:para 29).

In recognition of the need to address new tax issues that arise in connection with the evolution of the global economy, the OECD released the contents of the 2014 update to the OECD Model on 16 July 2014. Previous updates were published in 1994, 1995, 1997, 2000, 2003, 2005, 2008 and 2010. While this recent update affects both the Articles of the OECD Model and the Commentary, most of the changes are in respect of the Commentary. This article is based on the 2014 OECD Model and Commentary.

TABLE 1: OECD member countries

No.	*Country*	*Year of membership*	*No.*	*Country*	*Year of membership*
1	Australia	1971	18	Japan	1964
2	Austria	1961	19	Korea	1996
3	Belgium	1961	20	Luxembourg	1961
4	Canada	1961	21	Mexico	1994
5	Chile	2010	22	Netherlands	1961
6	Czech Republic	1995	23	New Zealand	1973
7	Denmark	1961	24	Norway	1961
8	Estonia	2010	25	Poland	1996
9	Finland	1969	26	Portugal	1961
10	France	1961	27	Slovak Republic	2000
11	Germany	1961	28	Slovenia	2010
12	Greece	1961	29	Spain	1961
13	Hungary	1996	30	Sweden	1961
14	Iceland	1961	31	Switzerland	1961
15	Ireland	1961	32	Turkey	1961
16	Israel	2010	33	United Kingdom	1961
17	Italy	1961	34	United States	1961

Source: OECD (2016)

Most treaties are based on the OECD Model, including treaties entered into between non-OECD member states (Olivier & Honiball, 2011:271). The OECD (2015b) currently has 34 members, mainly representing the major industrialised countries. TABLE 1 indicates the member countries and the year each one joined the OECD. It should be noted that South Africa is not a member of the OECD.

The OECD Model Commentary has become increasingly important in the interpretation and application of DTAs (Brincker, 2010:para 12.11.2). As a result, the OECD opened up the Commentary in 1999 to major non-member countries, including South Africa (Brincker, 2010:para 12.11.2). Although the countries generally agree with the text of the articles of the OECD Model and with the interpretation as explained in the Commentary, each country has been afforded the opportunity to indicate where it disagrees with the text of an article or an interpretation given in the Commentary (Brincker, 2010:para 12.11.2). Since 1999, 33 non-member countries have indicated their position on the OECD Model (OECD Model, Non-OECD economies' positions on the OECD Model tax convention). TABLE 2 catalogues the non-OECD member countries whose positions are reflected in the OECD Model.

TABLE 2: Non-OECD countries whose positions are reflected in the OECD Model

No.	*Country*	*No.*	*Country*
1	Albania	18	Latvia
2	Argentina	19	Lithuania
3	Armenia	20	Malaysia
4	Azerbaijan	21	Morocco
5	Belarus	22	People's Republic of China
6	Brazil	23	Philippines
7	Bulgaria	24	Romania
8	Colombia	25	Russia
9	Croatia	26	Serbia
10	Democratic Republic of Congo	27	Singapore
11	Gabon	28	South Africa
12	Georgia	29	Thailand
13	Hong Kong, China	30	Tunisia
14	India	31	Ukraine
15	Indonesia	32	United Arab Emirates
16	Ivory Coast	33	Vietnam
17	Kazakhstan		

Source: OECD Model: Non-OECD economies' positions on the OECD Model Tax Convention

Although South Africa is not a member of the OECD, it was awarded observer status on the Committee on Fiscal Affairs in 2004 (OECD, 2004). The importance of this relationship is affirmed by the OECD, which stated that South Africa is a key partner in the OECD's work (OECD, 2015a). This means that South Africa participates in some of the OECD's activities, including adherence to OECD instruments and sector-specific peer reviews.

Notwithstanding this constructive relationship between the OECD and South Africa, given that South Africa is not a member country, the legal status of the OECD Model and Commentary in South Africa is debatable. This matter will be addressed in the following paragraph.

3. APPLICABILITY TO NON-OECD MEMBER COUNTRIES

The Committee on Fiscal Affairs is the main forum for the OECD's discussions on taxation, covering international and domestic tax issues and tax policy and administration (OECD, 2013b). It has an extensive partnership programme with non-OECD countries that enables them to participate in the development of international tax arrangements. This partnership is implemented by means of multilateral, regional and bilateral programmes (OECD, 2013b).

The OECD states that most bilateral tax treaties follow both the principles and the detailed provisions of the OECD Model and depicts the model as having considerable influence on the bilateral treaties between non-OECD countries (OECD, 2012:81). Per the OECD (2012:82), nearly 400 treaties between OECD member countries and over 3 000 worldwide are based on the OECD Model.

The legal analysis concerning the interpretation of tax treaties could be different, depending on whether the contracting states are OECD member countries, non-OECD countries that have officially determined and recorded their position on the OECD Model and Commentary, or third (other) countries (Erasmus-Koen & Douma, 2007:340).

In an attempt to facilitate the role of the OECD Model as a standard to prevent double taxation in treaties where non-OECD countries are involved, the OECD engages in an inclusive dialogue with non-OECD countries to discuss developments in the Model and issues related to the negotiation, application and interpretation of bilateral treaties (OECD, 2012:82).

It should be noted that para 3 of the Introduction to the OECD Model refers exclusively to the application of tax treaties by the OECD member countries, wherein their tax authorities are instructed to:

> [F]ollow these Commentary, as modified from time to time and subject to their observations thereon, when applying and interpreting the provisions of their bilateral tax conventions that are based on the Model Convention.

However, a section of the OECD Model is allocated to take into account opinions expressed by non-OECD member countries, titled 'Non-OECD economies' positions on the OECD Model tax convention' (Non-OECD section). The Committee on Fiscal Affairs' work programme is carried out by various groups of national experts. According to the OECD (2012:11), one such unit is the Advisory Group for Co-operation with Non-OECD Economies, which acts as a forum to obtain the perspectives of non-OECD partners in the development of the work of the Committee on Fiscal Affairs, as well as the direction and strategic orientations of the Global Relations programme of events.

The Committee on Fiscal Affairs decided in 1991 that, because the influence of the model tax convention had extended far beyond the OECD member countries, the ongoing process through which the Model would be updated should be opened up to benefit from the input of non-OECD economies. Consequently, in 1996, annual meetings were organised which allowed experts of member countries and certain non-OECD countries to discuss issues related to the negotiation, application and interpretation of tax conventions.

At the same time, it was recognised that these countries should also have the opportunity to identify areas where they are unable to agree with the text of an Article or with an interpretation given in the Commentary (OECD Model, Non-OECD section:paras 1-2). While these countries generally agree with the text of the Articles of the OECD Model and with the interpretations put forward in the Commentary, there are some areas of disagreement for each economy (OECD Model, Non-OECD section:para 5). For example, Indonesia and the People's Republic of China expressly clarified that, in the course of negotiations with other countries, they would not be bound by their stated positions included in this section.

As the OECD Model and Commentary are addressed to the OECD member countries, it could be contended that there is little legal ground for arguing that the positions of non-OECD countries are implicitly reiterated upon the conclusion of a tax treaty (Maisto, 2005:18). On the other hand, various scholars have argued that the Commentary updates on the OECD Model provide strong evidence that the parties to a DTA, particularly if both are OECD member countries – but also non-member countries, if they followed the OECD Model – intend that the meaning established in the Commentary should apply (Sada Garibay, 2011:4).

In the context of tax avoidance, with respect to the interpretation of tax treaties entered into after January 2003, the revisions to the Commentary on Art 1 of the OECD Model will generally be taken into account and given substantial weight by the tax authorities and courts of both OECD and non-OECD countries (Arnold, 2004:258). The effect of the OECD Model Commentary goes beyond the treaties concluded between the OECD member countries, because (Martín Jiménéz, 2004:28):

> [T]he OECD pretends to confer interpretative value on the Commentary with regard to the treaties concluded between OECD countries and non-OECD countries and even to the treaties concluded between two non-OECD countries if the particular treaty provision follows the wording of the OECD Model.

However, notwithstanding the fact that the Commentary can play a role in the interpretation of tax treaties with non-OECD members, it is 'certainly not a decisive one' (Wattel & Marres, 2003:226). Yet, this role could be decisive if the non-member country involved has determined its position with respect to this version of the Commentary without making any observation or reservation (Wattel & Marres, 2003:226). Engelen and Pötgens (2000:266) quote a number of authoritative legal scholars in support of the consensus on the importance of the Commentary for interpretation uses by non-OECD member countries, citing, amongst others, Ward (1996:36):

> In fact, the OECD Model has become so widely used by non-OECD member countries that it can be presumed that the Commentary provides good evidence of all treaty partners' understanding of treaty terms based on the Model.

Nevertheless, the vague and diplomatic language of the Commentary (which is derived from the fact that the OECD member countries wish it to be non-binding) could cause another issue to arise: it would be politically questionable as to how far a choice to govern an important aspect of two sets of tax treaties, unrelated to the OECD Model and the Commentary, would comply with the purpose of the OECD (Cerioni, 2007:382). This could also have political implications for non-OECD countries and could place increased pressure on compliance.

Horner (2001:179) suggests the use of an international tax organisation (apart from the OECD) to take into account the interests of non-OECD countries – especially those of developing countries. The UN Model might provide a way out of this dilemma, but its efficacy is somewhat doubtful.

Another practical difficulty relates to response times, as governments and the OECD have to respond more quickly to changing business models (Owens, 2006:558). In order to achieve such a timeous response, enhanced dialogue between business and governments, closer cooperation and the involvement of all the main players – regardless of whether they are OECD or non-OECD countries – is to be recommended (Owens, 2006:558). Indeed, one of the core issues in the OECD's current tax agenda is the use of tax conventions in the removal of barriers to trade and investment and how to take into account non-OECD countries' views in the development of the OECD Model (OECD, 2012:85).

To this end, the Committee on Fiscal Affairs is supported by the Centre for Tax Policy and Administration, whose 'Global Relations Programme' acts as a bridge between OECD member countries and partner countries outside the OECD. One of the objectives of this programme is to ensure that non-OECD countries have a voice in developing international tax standards and guidelines so that these continue to be of wide relevance and practical use to all in an increasingly interdependent global economy (OECD, 2012:143).

A concomitant obstacle is created by the practice of the courts of both OECD and non-OECD countries of referring to the OECD Model and the Commentary. This increasing involvement of non-OECD countries reveals the need for more legal certainty, which can only be attained by clear texts and guidance in the Commentary (De Goede, Kaur, Kosters & Perdelwitz, 2012:314). One of the topics discussed at the 2001 International Bureau of Fiscal Documentation ('IBFD') seminar in Amsterdam on the future of tax treaties was the involvement of non-OECD member countries and how international coordination and cooperation with respect to tax treaties could be enhanced. In the summary of the proceedings, the participation of non-member countries is addressed as follows (Arnold, Sasseville & Zolt, 2002:98):

> And the recent standard consultations with selected non-member countries on the text of the OECD Model and Commentary, resulting in reservations and observations that these countries file with the OECD, has substantially widened the involvement of these countries in the OECD Model and Commentary. Still, as these countries do not participate in the preparation of the changes and additions to the OECD Model and Commentary, they cannot directly contribute to the deliberations that produce these changes and additions.

The quandary faced by non-member countries is obvious: although they are consulted by the OECD to some extent, they cannot participate in the amendments and additions to the OECD Model. Despite not being a member of the OECD, most of South Africa's treaties largely follow the OECD Model guidelines, as these are regarded as important and influential (Oguttu, 2007:242; Haupt, 2014:493). If the treaties of non-member countries are in conformity with the OECD Model and no specific position has been taken, the non-members also accept the provisions of the Model and the Commentary as an interpretative aid (Wattel & Marres, 2003:224).

A related point of ambiguity regarding the use of the OECD Model Commentary is the version that ought to be used in the interpretation process. This is the subject matter of another article.

4. CONCLUSION

The inclusion of the positions of non-OECD countries reflects the growing need to take account of the views of non-member countries in the development of the internationally agreed standards included in the OECD Model (OECD, 2013c). The time and effort spent by the OECD in assisting non-OECD countries to develop their tax treaty network is to be lauded. Ultimately, developing economies, such as South Africa, can benefit from the BEPS project and OECD standards on tax governance (as embodied in the OECD Model) by participating in global tax governance as well as modernising their own anti-tax evasion systems (Zhu, 2016:4).

It was demonstrated in this article that if the treaties of non-member countries are in conformity with the OECD Model and no specific position has been taken, the non-members also accept the provisions of the Model and the Commentary as an interpretative aid. Also, where a non-member has taken an official position on the OECD Model Commentary, it has more 'political and moral obligation' to adhere to its position as opposed to countries which did not set any position (Kinkladze, 2012:32). Consequently, the persuasive value of the Commentary can differ between OECD member and non-member states.

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