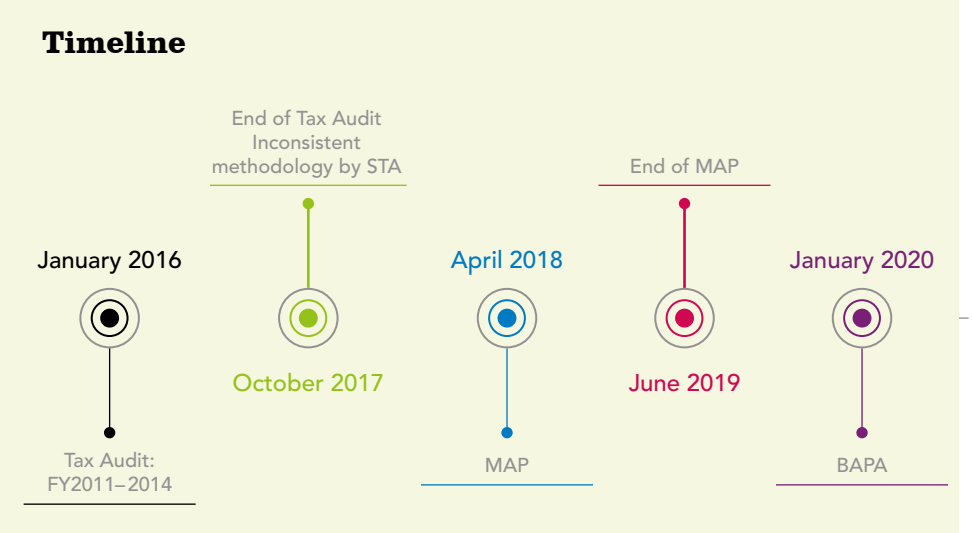
Vienna LL.M. News

Tax Lunch Talks – a series to be continued

A series of Tax Lunch Talks were held in the previous months bringing together LL.M. students and researchers of the Institute for Austrian and International Tax Law. They covered recent tax developments in Spain, India, and Indonesia.

TAX CERTAINTY: A NOVARTIS CASE



Novartis is a global healthcare company based in Switzerland that works to reimagine medicine to improve and extend people's lives. Novartis products reach nearly 800 million people globally. To do so, Novartis has operating entities in various countries (known as Country Pharmaceutical Organisation or "CPO") that are mainly engaged in distribution activities (i.e., Limited Risk Distributors or "LRD"). The activities performed by the Novartis CPOs vary from country to country. In the case of Spain, the CPO also performs routine services.

In this context, the Spanish Tax Authorities (STAs) initiated a tax audit in January 2016 that covered the period of 2011-2014. After extensive interviews with various employees of the CPO, the STAs agreed with the functional profile and the delimitation of the transactions proposed by Novartis. Notwithstanding, all of the benchmarking analyses were challenged.

In this context, on the one hand, with respect to the routine services, the STAs adjusted the Spanish CPO to the third quartile without further justification. On the other hand, regarding the distribution activity, the CPO was adjusted to the median for only those years in which the profitability was below the median (even if it was within the interquartile range).

Given the inconsistent methodology applied by the STAs, in April 2018, Novartis initiated a Mutual Agreement Procedure (MAP) in accordance with the Convention between Switzerland and Spain. During the MAP, Novartis had no opportunity to participate in the negotiations between both administrations.

In January 2020, Novartis decided to begin a bilateral advanced pricing agreement in order to apply the terms agreed between Switzerland and Spain.

From the above, it can be concluded that achieving tax certainty is a lengthy and costly process that requires an important investment from both TAs and MNEs. In this context, joint audits have proven to be both timesaving and effective. Joint audits are powerful instruments for both TAs and MNEs for obtaining legal certainty and planning security at an early stage. What is more, since all TAs involved are engaged at an early stage and the taxpayer has direct opportunities to participate, unlike in a MAP, the trust between the tax administrations and the taxpayers is clearly strengthened.

Marc Gonzalez Gonzalvo, Spain, Part-time 2021/23

In Class

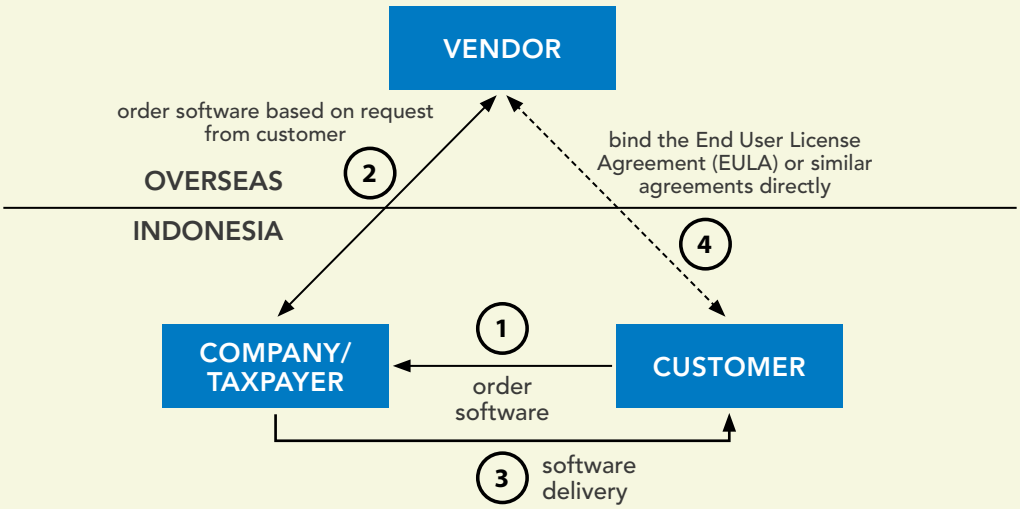
INDONESIAN TAX CASE CONCERNING SOFTWARE PAYMENT TO NON-RESIDENT PROVIDER (MICROSOFT, SYMANTEC, ETC.): BUSINESS PROFITS VS ROYALTIES

The dispute is mainly about the income characterization of software purchases and whether it falls under the provision of 'royalty' or 'business profits'. As there is no permanent establishment for the software providers in Indonesia, the corporation did not withhold any income from them. However, the tax authority assessed and characterized such income as royalties at a 20% tax rate and disregarded the tax treaty provisions of tax allocation.
The main debates on the disputes revolve around the facts of the case and all relevant rules. Regarding the facts contained in the relevant documents (i.e. agreements), the company has no right, it is prohibited, it is not allowed, it does not have permission, and it has no right to reproduce, copy, duplicate, modify, and publish the software products with that reproduction. The tax authority argued that the company conducted modification/customization/ configuration in accordance with its customer request or needs. However, the modification/customization/ configuration conducted by the company, in this case, did not change the software code as it is fully encrypted by the software vendors and changing such code is beyond the rights granted by the vendor.

The company also argued that the payment of rights to distribute copies of software programs shall fall under the business profits article in a double tax avoidance agreement. Based on the text in the tax treaty that emphasized more the OECD Model Tax Convention Commentaries on Article 12, paragraph 14.4, it can be concluded that software distribution with minor customization cannot be characterized as a royalty payment.
As a result, the Indonesian Tax Court, reinforced by the Supreme Court, concluded that the software income with only minor customization shall fall under business profits instead of royalty payment based on all relevant and related sources of law. However, the tax court judges were not unanimous in their opinion. One judge (out of three) dissented with an opinion that the software had been redesigned and readjusted by the taxpayer to fit its customers' needs. Therefore, the vendor had given the intellectual property rights to the taxpayer to earn economic benefits.

Riyhan Juli Asyir, Elisa Glendys Benedicta, Atika Ritmelina Marhani, Yurike Yuki
Indonesia, Full-time 2021/22

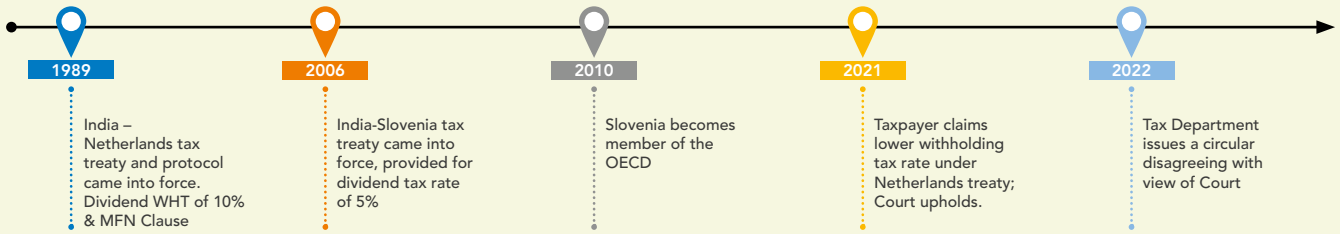
Fact of the case



In Class

INTERPRETATION OF MFN CLAUSES IN INDIAN TAX TREATIES

Interpretation of the MFN Clause



CONTENTS OF THE MFN CLAUSE

Text of the MFN Clause under the Protocol to the India-Netherlands tax treaty
"If after the signature of this convention under any Convention or Agreement between India and a third State which is a member of the OECD India should limit its taxation at source on dividends, interests, royalties, fees for technical services or payments for the use of equipment to a rate lower or a scope more restricted than the rate or scope provided for in this Convention on the said items of income, then as from the date on which the relevant Indian Convention or Agreement enters into force the same rate or scope as provided for in that Convention or Agreement on the said items of income shall also apply under this Convention."

Recently, the most favoured nation (MFN) clause of Indian tax treaties has been a matter of debate for courts, the tax administration, and tax practitioners. As per the MFN clause in the protocol to the India-Netherlands tax treaty, if India enters into a tax treaty with a third state that is a member of the OECD after signing the India-Dutch treaty, then any lower rate of tax or scope of tax with regards to dividends, interests, royalties, etc. provided in the tax treaty with the third state should be applicable to the India-Dutch tax treaty from the date of signing the tax treaty with the third state. The India-Dutch tax treaty provided a withholding tax rate of 10% on dividends whereas the treaty with Slovenia/Lithuania provided a dividend withholding tax rate of 5%. However, at the time of entering the India-Slovenia/Lithuania tax treaty, Slovenia and Lithuania were not a part of the OECD, and such treaties were in place prior to the India-Dutch tax treaty. The High Court in *Concentrix Services*[1] was faced with the interpretation of the MFN clause and held that it applies to the India-Dutch tax treaty under which the taxpayer could take benefit of a 5% withholding tax rate on dividends. Importantly, the High Court took the view that the India-Dutch tax treaty has to be read and applied at the time at which the payment of dividends is being made, and the state of affairs at that point in time should be relevant, i.e. at the time of application of the tax treaty whether Slovenia was a member of the OECD and able to apply the MFN clause. The Central Board of Direct Taxes (Indian tax administration) then issued a circular[2] to set out its position regarding the MFN Clause. It opined that the MFN clause applies only if the third state should have become an OECD member at the time of the conclusion of the treaty with India. Further, the lower rate should apply from the entry of force of the treaty between India and the third state that is a member of OECD and not from the date the third state becomes an OECD Member. However, a circular by the tax administration is only binding on the tax authorities and not on the taxpayer[3]. The difference of opinion between the Indian tax administration and the Indian High Court is likely to be resolved only at the final court (Supreme Court of India). Several questions are raised as to whether it was the policy of the Indian Government at the time of treaty negotiation to extend a lower withholding tax rate to the Netherlands, and what the teleological interpretation should be when considering that a literal reading of the provision does not suffice. Further, the Delhi High Court's view that, when the foreign tax administration takes a different view from the Indian tax administration, such a view is regarded as a "common interpretation" and should be given precedence over a teleological approach does not appear to be in accordance with the principles of tax treaty interpretation.

Shipra Padhi, India, Full-time 2021/22

[1] Concentrix Services v. ITO, WP (C) 9051/2020
[2] CBDT, Circular 3/2022 dated 3 February 2022
[3] East India Hotels Ltd. v. Shekhar Reddy (CR) (1998) 230 ITR 622 (Kar)

Miscellaneous

DOCTORAL STUDENTS VERSUS MASTER STUDENTS – THE INSTITUTE'S TRADITIONAL SOCCER MATCH

WU's traditional football match, which had been halted because of the Covid-19 Pandemic crisis that began in 2020, was held on May 22 at 4 pm in KSV, 1020 Vienna with DIBT and LLM International Tax Law students participating. The match, which was played by 21 people, drew approximately 20 spectators, including Professor Lang, and Tomohiko's (LLM Fulltime Program) lovely child, Kento. Teams were formed based on the number of doctorate and graduate students in each group.
The first half was dominated by doctoral students; a high effort football game was played with the team defense of the master students. However, in the first half, there were doctoral students who were able to reflect on the high-level understanding of team play created by being together for many years and were able to score. Additionally, from the first whistle of the match, the support of teams was provided strongly by their classmates who accompanied with cheers. In the second half, master students brought balance to the game. They could not find the opportunity to score goals in the first half but were able to benefit from many prospects in the second half. In some moments, the master students wore out the opponent's defense with consecutive attacks. The abundance of long balls, counterattacks, and set pieces enabled football to be played with great physical strength and acrobatics. Friendship won as a result of this match for which no one counted the goals. In addition, Sandhya (LLM Fulltime Program) being the only female player in the match was appreciated.
I had not played football for so many years since high school. Confessions that began after the match among the football players made everyone smile. Following later, there was an evening of pleasant conversations and good food accompanied by football players and fans under the beautiful green and joyful texture of Prater Amusement Park and Liliputhbahn's whistles in the Kolarik Restaurant. After a long, challenging, educational, and fun year, all participants had a great experience in the last week of May, the herald of summer, whether they played in the game or not.

Ibrahim Demirkol, Turkey, Full-time 2021/22

JOB FAIR

In April, Prof. Lang hosted the traditional job fair for our current LLM students. The full-time 2021/22 students will finish the program in June 2022 and were afforded the opportunity to meet representatives of several companies to discuss career options. The companies on site were Aurifer, Deloitte, Grant Thornton, Henkel, LeitnerLeitner, and WTS.

2023-25 COURSES

In September 2023, another part-time and full-time course will begin. All details in connection with the 2023-25 courses including online application will be available on our website as from late September 2022. Make sure you become a member of the global LL.M family.
www.international-tax-law.at

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