Course Number: LAW 569B.001

Title: Topics in International Taxation

Subtitle: Tax Treaties

Credits: 2

Style: Seminar

Dates: May 16-27, 2016

Instructor Name: Professor Jonathan Schwarz

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Instructor Bio: Jonathan Schwarz BA, LLB (Witwatersrand), LLM (UC Berkeley), FTII is an English Barrister at Temple Tax Chambers in London, a South African Advocate and an Alberta Barrister and solicitor. His practice focuses on international tax disputes as counsel and as an expert and advises on solving cross-border tax problems.

He is a visiting professor at the Dickson Poon School of Law, King’s College London where he leads the LLM(International Tax Law) programme. He also teaches regularly at the International Tax Centre, Leiden University where he is on the advisory board for the AdvLLM (Transfer Pricing) and at the University of Zurich.

Publications include Schwarz on Tax Treaties 4th Ed and Booth and Schwarz: Residence, Domicile and UK Taxation 18th Ed He is a former First Vice President of the International Fiscal Association, former Vice-Chairman: Committee (N) Taxes, International Bar Association and has been listed as a leading tax Barrister in both the Legal 500 by reference to recommendation for international corporate tax, and Chambers’ Guide to the Legal Profession by reference to international transactions and particular expertise in transfer pricing. The Legal 500 has commented that ‘Jonathan Schwarz is a client favourite, particularly for international transactions.’ In the Chambers Guide he is commended for his ‘encyclopaedic knowledge of double tax treaties’

He was appointed to the EU Commission Group of experts on removing tax problems facing individuals who are active across borders within the EU in June 2014.

Course Description:
*This intensive seminar will meet in [Allard Rm xx] May 16-27, 2016; M-F, 10:00 a.m.-12:30 p.m. To make up for the school closure on Monday, May 23, there will be an afternoon session added to Tuesday, May 24, from 2:00 p.m. – 4:30 p.m. Priority registration to LLM students. Open to JD students if space available. Time-conflicts are allowed for this seminar.*

Tax treaties are the major international coordination mechanism between different countries’ income tax systems. This course provides an international and comparative view of tax treaties in the context of increasing globalization of world economies. Through examination of key issues involving the OECD and UN Model Tax Conventions on which comprehensive tax treaties are based, you will gain an understanding, of the large body of shared experience in the interpretation and application of tax treaties as well as the role that international organizations play in the development of international taxation and of tax treaty policies including the OECD/G20 Base Erosion and Profit Shifting (BEPS) project, the UN and EU.

Prerequisites: [Law 220, Law 407 or Law 561.]

Evaluation: One short written assignments (maximum 1000 words) worth 10% and a take-home exam worth 90%. The take-home exam will involve a mix of short problems and essays (3500 words maximum).

Syllabus:

Seminar

**Interpretation of tax treaties**

The aim of this seminar is to gain an international perspective on understanding what tax treaties mean. Does every country interpret treaties in the same way? In this seminar we compare decisions of senior courts in several countries to see how they approach basic principles of interpretation, sources of law, the role of experts and other factors.

*Required Reading*

*Anson v HMRC* [2015] UKSC 44, at [54] to [59], [92] to [100] and [110] to [110].
http://www.bailii.org/uk/cases/UKSC/2015/44.html


*Crown Forest Industries Ltd. v Canada*, [1995] 2 SCR 802

*Further Reading*
Schwarz, J, Schwarz on Tax Treaties, (4th ed) (CCH 2015), Chapter 1, paras 9-050, 9-100, 9-150, 9-300 and 9-350; Chapter 4.


*Prevost Car Inc. v. The Queen*, [2008] 5 CTC 2306; [2008] DTC 3080 2008 TCC 231(CanLII), at [41], [53] to [54].


*Relevant Provisions*

VCLT articles 31 to 33

OECD Model, Article 3

OECD Model, Article 1 and 3(1)(a) and (b);

**Treaties and EU law**

The aim of this seminar is to develop an understanding of the relationship between tax treaties and the fundamental freedoms in EU law and between tax treaties and EU tax directives.

*Required Reading*


**BEPS and treaties**

The aim of this seminar is to gain an understanding of (a) the role played by tax treaties in the way multinational enterprises have organised themselves and (b) the effect that the OECD BEPS project will have on the shape of tax treaties and their interpretation.

*Required Reading*

Students should try to read the executive summaries for each of the actions. Existing tax strategies are discussed in Final Report on Action 1 Chapter 5 and Annex B.

*Further Reading*

Final reports on the treaty-related actions are set out below and are for reference.
http://dx.doi.org/10.1787/9789264241046-en

http://dx.doi.org/10.1787/9789264241138-en

http://dx.doi.org/10.1787/9789264241695-en

http://dx.doi.org/10.1787/9789264241220-en

http://dx.doi.org/10.1787/9789264241633-en

http://dx.doi.org/10.1787/9789264241688-en

Non-discrimination

The aim of this seminar is to gain an understanding of (a) the meaning of discrimination in model tax treaties, (b) its application to cross-border taxation and (c) most-favoured nation treatment in tax treaties.

Required reading


Further Reading

Friedlander, L, *The role of non-discrimination clauses in bilateral income tax treaties after GATT 1994*  
British Tax Review 2002, 2, 71-118

Relevant Provisions

OECD Model Tax Convention Article 24

OECD Model Articles 3(1)(g), 7, 9(1), 11(6) and 12(4)

Canada -US Art 25; Canada- South Africa Treaty Article 23

Harmful Tax Practices
The aim of this seminar will be to examine the concept of harmful tax practices, the OECD work in relation to them and the legal instruments that aim to address such practices including the OECD BEPS Action 5 and EU state aid investigations.

Required reading

Schwarz, J EU State Aid investigation into Apple, Starbucks and Fiat, Tax Journal, 20 June 2014

http://dx.doi.org/10.1787/9789264241190-en Executive summary

Reading on Commission investigations

Ireland- Apple Investigation - State aid SA.38373

Letter to Ireland informing decision to investigate C(2014) 3606 final 11.06.2014

Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (2014/C 369/04) JOCE 17.10.2014

The Netherlands- Starbucks - State aid SA.38374

Letter to the Netherlands informing decision to investigate C(2014) 3626 final 11.06.2014

Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union(2014/C 460/03) JOCE 19.12.2014

Luxembourg - Fiat Finance - State aid SA. 38375

Letter to Luxembourg informing decision to investigate C(2014) 3627 final11.06.2014

Invitation to submit comments pursuant to Article 108(2) of the Treaty on the Functioning of the European Union (2014/C 369/05) JOCE 17.10.2014

Luxembourg - Amazon - State aid SA.38944

Letter to Luxembourg informing decision to investigate C(2014)7156 final15.01.2015 JOCE 06.02.2015

CASE STUDIES

Fact patterns and legal questions will be handed out in advance of each class. You should come prepared to discuss your answer at the seminar.

Entity characterisation

The aim of this case study is to consider how foreign entities are characterised for tax treaty purposes.
Relevant Provisions

OECD Model, Article 1 and 3(1)(a) and (b);

Required Reading

Commentary to Article 1, paras 2 to 6.7; Commentary to Article 23, paras 32.1 to 32.7.

TD Securities (USA) LLC v The Queen, 2010 TCC 186 (CanLii)
Anson v HMRC [2015] UKUT 44

Further Reading


CTJ (2010) Vol 58, No 3, 646

Place of effective management

The aim of this case study is to consider the interpretation and application of art 4(3) of the OECD Model and variants of it in a common corporate context.

Relevant Provisions

OECD Model, Article 4(1) and 4(3); Canada-UK Treaty Article 4(3)

Required Reading

Commentary to OECD Model Article 4, paragraphs 21 to 24.1.


Further Reading


Cross border employment

The aim of this case study is to analyse the treaty implications for employees who are sent overseas by their employers to work under a variety of contractual arrangements.
Permanent Establishments and business restructuring

The aim of this case study is to examine the impact on the existence of, and the attribution of profits to, a permanent establishment in the light of modern manufacturing and distribution strategies (smartphone manufacture and distribution).

Treaty characterisation of income

The aim of this case study is to (a) introduce key differences between the OECD and UN Model treaties and (b) to analyse the application of tax treaties based on the UN Model in a common commercial transaction (satellite operation).