TAX TREATY INTERPRETATION BY SUPREME COURTS: CASE STUDY OF CFC RULES

Błażej Kuźniacki[1]

MA in Law (2010) and in European Law (2009). Research Fellow at the Department of Public and International Law, Faculty of Law, University of Oslo.

1. Introduction. 2. Analysis of Case Law of Supreme Courts in Cases Regarding the Compatibility of CFC rules with Tax Treaty Law. 2.1 The Finish Supreme Administrative Court's ruling of 20 March 2002 in the case A Oyj Abp [Case. No. KHO:2002:26]. 2.2 The French Supreme Court's ruling of 28 June 2002 in the Schneider case [Case no. 232276, RJF 10/2002]. 2.3 The Swedish Supreme Administrative Court in case no. 2655-05. 2.4 The Japanese Supreme Court's ruling of 29 October 2009 in the case Gyo-Hi [case number: 2008 (Gyo-Hi) No. 91]. 2.5 The Brazilian Supreme Court's ruling of 3 April 2013 (not published yet). 3. Conclusions.

I. INTRODUCTION

Controlled foreign companies (CFC) rules are currently in force in 29 countries across the world, *inter alia*, in three of five BRICS[2] countries (Brazil, China and South Africa), and in other two BRICS countries (Russia and India) these rules are proposed to be introduced[3] . Hence, the application of CFC rules in tax treaties situations is of high relevance for all BRICS countries. The importance of the topic in question is furthermore justified in the light of the current global initiative of the Organisation for Economic Co-operation and Development (OECD) regarding Base Erosion and Profit Shifting (BEPS).[4] Namely, pursuant to number 3 of the Action Plan on BEPS[5], CFC rules should be strengthened[6] and for this purpose the OECD will develop recommendations regarding the design of CFC rules.

1 blazej.kuzniacki@jus.uio.no.
2 BRICS is an acronym first used by Jim O'Neill in a 2001 paper entitled Building Better Global Economic BRICSs, and it refers to the countries of Brazil, Russia, India and China, which are all deemed to be at a similar stage of newly advanced economic development. This acronym has come into widespread use as a symbol of the shift in global economic power away from the developed G7 economies towards the developing world, see Beth, 2009. Since 14 April 2011 BRIC is to be known BRICS due to the new membership of South Africa. Read more: http://www.southafrica.info/global/brics/brics-080411.htm#ixzz2elKqwksC.
3 DITS, 2012.
4 OECD, 2013A. This initiative was publicly endorsed by leaders of the G20 during their summit in Saint Petersburg on 4/5 September 2013, see: G20, 2013, p. 3 et seq. There are CFC rules in all G20 countries, with the exception of 4 developing countries (Argentina, India, Indonesia and Russia).
5 OECD, 2013B, p. 16.
6 The term "strengthened" with regard to countries without CFC rules means the implementation of such rules into the domestic tax laws.

CFC rules in details differs across states; however, in general, CFC rules can be defined as specific anti-tax avoidance domestic measures aimed to prevent the loss of tax revenue in the CFC's shareholders states by curbing the use of international companies established for the sole purpose of avoiding income taxation.[7] Broadly speaking, CFC rules grant to the CFC's shareholders state the right to attribute income of the CFC to its shareholders and subsequently levy tax on it. These rules may be applied either by regarding the CFC as a transparent entity (look through approach) or by deeming a distribution of the undistributed profits received and generated by the CFC to its shareholders (deemed profits approach). Under those rules, shareholders of the CFC are taxed currently on their proportionate share in the CFC's share capital[8] either with regard to all of the CFC's income (entity approach) or only to the CFC's tainted income (transactional approach)[9]. Furthermore, CFC rules may be applicable only to CFCs established in low tax jurisdictions (jurisdictional approach) or to all CFCs irrespective of their place of establishment (global approach). In fact, these approaches are rarely used in their pure form, as some of them are complementary (for instance: entity approach one the one hand and transactional approach on the other), whilst the other ones are rather mutually exclusive (for instance: legal entity approach vs. deemed dividend approach).

One of the fundamental principles in tax treaties based on the OECD Model Tax Convention on Income and on Capital (OECD Model) in relation to taxation of companies is that each taxable company (according to the tax laws of the Contracting State) is treated as a separate taxpayer both for purposes of applying domestic tax laws and tax treaties. Hence, shareholders of companies are personally taxable only on those profits which are distributed to them by the company. The application of the CFC rules, in contrast, results in attributing of CFC's profits its controlling shareholders even though such profits were not distributed by the CFC to them. It *prima facie* contradicts the basic structure of tax treaties based on the OECD MTC. Thus, if a contracting State applying these rules has not included a provision specifically allowing for the application of CFC rules in their tax treaties, the so called safeguarding clause, the question of the compatibility of the CFC rules with tax treaty law arises. This question has been addressed by scholars, tax authorities and domestic courts; yet, unfortunately, no uniform and definitive solution has been found so far. Moreover, there is no international court or tribunal with jurisdiction to decide on relations between domestic and international tax law, and nothing shows that initiatives in this field will develop considerably in near future[10]. They are, however, visible developments with respect to mechanisms for compulsory arbitration in cases regarding cross-border tax cases[11]; although, still with no prospects for establishing international tax court.

7 Maisto, Pistone, 2008, p. 505.
8 See Arnold, 1986; Sandler, 1998; Land et al., 2004.
9 See Prebble, 2006, p. 3.
10 Historically see: Maktouf, 1988, pp. 32-51.
11 See Article 25(5) of the OECD MTC added in 2008; The European Union arbitration convention of 1995, 90/436/EEC; In literature see Irish, 2011.

Since there is no international court with jurisdiction to decide in cases concerning relations between tax treaty law and domestic tax law, the case law of domestic courts may constitute a relevant guidance on discussed issue. Thus, taking into account similarities of CFC rules across states and similar content of tax treaties patterned on the OECD Model, it seems to be fully justifiable for domestic courts to make use of the case law of courts in other states when deciding about the compatibility of CFC rules with tax treaties.[12] This assertion is also valid with respect to BRICS countries, because even though they are non-OECD member states, their tax treaties are usually based on the OECD Model[13] with some provisions patterned on the UN Model.[14] Moreover, all of BRICS countries discuss issues related to the negotiation, application and interpretation of tax treaties with the OECD, and, like OECD-member countries, they have the possibility to identify the areas where they are unable to agree with the text of an Article of OECD Model with an interpretation given in the Commentary by reflecting their positions in that regard in the form of observations and reservations.[15] BRICS countries are also key partners that contribute to the OECD's work in a sustained and comprehensive manner. The OECD explicitly stated that the promotion of direct and active participation of BRICS countries in the work of substantive bodies of the OECD constitutes a central element of "enhanced engagement the programme"[16]. The enhanced cooperation between the OECD and BRICS counties is fully understandable and justified, since it is estimated that economies of the latter countries could overtake the combined GDP of the G7 nations by 2027.[17]

The cases that will be discussed in this paper were analysed by Supreme Courts of OECD-countries, with exception of the Brazilian Supreme Court, but due to the reasons mentioned above such case law is also of high relevance for interpretation of CFC rules and tax treaties by BRICS countries. Moreover, it is visible tendency that references to the OECD Commentaries are also made in cases regarding tax treaties signed between OECD and non-OECD countries. For instance, Norwegian Supreme Court (*Høyesterett*) in ruling of 8th June 2004 in the case *PGS* referred to the OECD Commentary even though the case concerned the interpretation of tax treaty between Norway and Ivory Coast (non-OECD country).[18] Referring to the OECD Commentaries is also noticeable among tax authorities and courts of non-OECD countries; for instance, although Brazil is not an OECD Member country, the Brazilian Administrative Court (*Conselho de Contribuintes*) referred to the OECD MTC and the OECD Commentary when reaching its decision of 19 October 2006 in the case *EAGLE I* considered the compatibility of the current Brazil's CFC rules with tax treaty signed between Brazil and Spain.[19] Furthermore, as it is argued by F. Engelen[20] that under certain circumstances the OECD Commentaries are of relevance and importance in interpreting tax treaties among non-OECD countries, which cooperate with OECD (for example BRICS countries).

12 Dell Products case of 2nd December 2011, point 51.
13 With respect to the practice of tax treaties negotiation by China see Li, 2012, pp. 452-479.
14 It must be clarified here that the UN Model is based heavily on the OECD Model, see Arnold and McIntyre, 2002, p. 7.
15 Currently, there are 31 non-OECD countries that have set out their positions on the OECD Model and the Commentary on it, see OECD, 2010, pp. 3-4.
16 OECD, 2013.
17 Foroohar, 2009.
18 Rt. 2004, p. 957; Zimmer, 2004, pp. 128-131.
19 Case no. 101-95.802.
20 Engelen, 2004, p. 469-472.

II. ANALYSIS OF CASE LAW OF SUPREME COURTS IN CASES REGARDING THE COMPATIBILITY OF CFC RULES WITH TAX TREATY LAW

In this section the case law of Supreme Courts on the issue in question will be discussed. The reason why it is put focus only on Supreme Courts' case law is the very fact that these courts play an important role in the development of law by its interpretation, and constitute the final courts of appeals for the vast majority of cases, including tax law cases, in many legal jurisdictions.[21] Thus, the case law of Supreme Courts constitutes a very important and useful source of interpretation of law.

2.1 The Finish Supreme Administrative Court's ruling of 20 March 2002 in the case A Oyj Abp [Case. No. KHO:2002:26]

The Finish Supreme Administrative Court (*Korkein Hallinto-Oikeus: KHO*) in the case *A Oyj Abp* stated that Art. 7 (1) of the 1976 Finnish-Belgium tax treaty does not prevent the taxation of the Finnish parent company *A Oyj Abp* under the Finnish CFC rules on the profits of the Belgian subsidiary, even though the latter did not have a permanent establishment in Finland and its effective management was based in Belgium.

The Court admitted that a classification of the CFC income attributed to its shareholders pursuant to the CFC rules is ambiguous; therefore, the classification has to be decided on a case-by-case basis. Despite the fact that the Finnish CFC rules were based rather on the deemed profits approach (deemed dividend distribution) than the disregarded legal entity approach, the Court qualified the Belgium CFC income attributed to its Finish parent company as business profits, not as dividends or other income, and consequently analysed the problem of compatibility of the Finnish CFC rules with the Art. 7 of the Finnish-Belgium tax treaty.

[21] Role of the Supreme Court, 2013.

The Court decided that the Finnish CFC rules are compatible with the Art. 7 of the Finnish-Belgium tax treaty based primarily its decision on the objective and purpose of the tax treaty as well as the observations expressed in the 1987 OECD Report on Double Taxation Conventions and the Use of Conduit Companies and on the Commentary to the OECD Model released in 1992. In particular the Court stated that: (i) tax treaties based on the OECD MTC, for instance the Finnish-Belgium tax treaty, do not aim to avoid double economic, but only double juridical taxation, and the Finnish CFC rules do not result in the latter; (ii) the object and purpose of tax treaties is not only to avoid double juridical taxation, but also to avoid international tax avoidance; (iii) tax treaties do not prevent the application of domestic anti-avoidance rules, including the CFC rules, and (iv) the large majority of OECD states regards CFC rules as compatible with tax treaties.

Taking into consideration the facts of the case, only the first argument of the Court may be considered appropriate for the *A Oyj Abp* case, as all remaining arguments were based on documents released by the OECD respectively 7 and 12 years after the Finnish-Belgium tax treaty was negotiated. The amendments to the OECD Commentary made after the conclusion of the Finnish-Belgium tax treaty were not known by the Contracting States, and consequently, as it was stated before, these amendments could not have influenced intentions of the Contracting States upon conclusion of the treaty.[22] Due to the fact that the treaty was negotiated in 1976, it would have been more proper if the Court had was relied on the OECD Commentary released on 1977 as *travaux préparatoires* of this version of the OECD Commentary may have been known by the contracting states. According to this version of the OECD Commentary, if contracting states intend to retain the application of domestic anti-avoidance provisions in situations covered in tax treaties, they should specifically safeguard those provisions in their tax treaties.[23]

2.2 The French Supreme Court's ruling of 28 June 2002 in the Schneider case [Case no. 232276, RJF 10/2002][24]

The French Supreme Court (*Conseil d'Etat*) in the *Schneider* case came to the opposite conclusion that the Finish Supreme Administrative Court. The Court stated that pursuant to Art. 7 (1) of the French-Swiss tax treaty (1966) profits of Paramer, a Swiss company established in Geneva and wholly owned by Schneider SA – a company resident in France – cannot be taxed in France under the French CFC rules (Art. 209 B CGI *Code général des impôts*)[25], since the Paramer did not have a permanent establishment in France and its effective management was based in Switzerland.

22 Avery Jones, 2002, p 103; Lang and Brugger, 2008, pp.102-106. Contrary: Vogel, 1997, p. 47.
The author believes that there is possible to claim that in certain circumstances newer version of the Commentary on the OECD Model may be used to interpret older tax treaties. It seems to be right if the wording of the newer Commentary is only a sensible interpretation of what was already written in older versions. Besides, it should be determined to what extent such a "dynamic" reference to the later versions of the OECD Commentaries is permissible under the constitutional law of the Contracting States.
23 OECD, 1977, para. 7 on Article 1.
24 Interestingly, in this case there was no reference to the ruling in the Finish A Oyj Abp case. It was perhaps caused by the fact that the time lapse between these cases was too short – approximately 3 months, to be familiar with the outcome of the Finish case by French judges of Conseil d'Etat.
25 Gutmann and Meziane, 2011, p. 4.

The Court's analysis was the following: if the French tax treaty itself does not contain the specific provision safeguarding the application of the French CFC rules, in this case the French-Swiss tax treaty, then the application of the French CFC rules violates the Art. 7 of the tax treaty, and combating international tax avoidance and evasion cannot, *per se,* justify such violation of the tax treaty provisions.

It seems that the Court assumed that the income attributed and subsequently taxed in the hands of the Schneider SA under the CFC rules constituted in fact the income of the Paramer (profits of enterprise) that had no permanent establishment in France. As a result, pursuant to the tax treaty provision patterned on Art. 7 of the OECD Model, the income might be taxed exclusively in the residence state of the Paramer, i.e. in Switzerland.

The outcome of this ruling suggests that the Court thought that the main object and purpose of tax treaties is to avoid double taxation in cases when income is taxed twice in the hands of different taxpayers. In discussed case it regarded taxation in the hands of the Schneider SA under the CFC rules and its Swiss subsidiary according to Swiss domestic tax law; therefore, it was the case of economic double taxation, not juridical double taxation.[26] Taking into account the fact that the former is not usually covered in tax treaties, this statement of the Court at first glance was not convincing. Nevertheless, even if it is not a general purpose of tax treaties to avoid economic double taxation, the fact that the application of the CFC results in unreasonable economic double taxation may be a relevant argument against the compatibility of these rules with tax treaty. The economic double taxation caused by applying French CFC rules was, however, relieved through the tax credit.

In addition, it seems that in the view of the Court the interpretation of the tax treaty resulting in avoidance of double taxation prevails over any other interpretation. Precisely, the Court stated that it even though one of the purposes of the French-Swiss tax treaty was to prevent tax avoidance and tax evasion and the object of the CFC rules is to combat tax avoidance[27]; this purpose cannot lead to violation of Art. 7 of the treaty, i.e. taxation of the undistributed profits of the Swiss subsidiary in the hands of its French parent. Certainly, the outcome of this case was also influenced by the fact that the Court refused to rely on the Commentary issued in 1992 which stated that domestic anti-avoidance provisions, for instance the CFC rules, are generally compatible with tax treaties.[28]

26 Lang, 2003, p. 57.
27 Mbwa-Mboma, 2002, p. 149.
28 So far Conseil d'Etat has never used OECD Commentaries older than the tax treaties in question, Ward, 2005, pp. 101-103.

2.3 The Swedish Supreme Administrative Court in case no. 2655-05

The Swedish Supreme Administrative Court (*Regeringsrätten* before 2011, and since then is called *Högsta förvaltningsdomstolen*) in its ruling of 3 April 2008 in case RÅ 2008[29] regarding the compatibility of the Swedish CFC rules with the Swedish-Swiss tax treaty (1987) totally disregarded the wording of the treaty. Instead of analyzing the CFC rules and the treaty, the Court concluded that this is a case of conflict between two equivalent legal acts. Due to fact that Sweden is a dualist state and the Swedish CFC rules are of later date than the Act of incorporation of the treaty, the former prevails. Needless to say, the Court solved the problem by applying the principle *lex posterior derogat legi priori* without looking into the Swedish-Swiss tax treaty at all.[30]

In the literature, but not itself in the ruling, was interestingly claimed that the outcome of the ruling was driven by the aim and narrow scope of the CFC rules. The Swedish CFC rules were applicable to taxpayers with determined ownership share in certain entities, in this case in foreign insurance companies. Furthermore, foreign insurance companies established in Switzerland was specifically mentioned in the statute as entities towards which the Swedish CFC rules may be applicable.[31] In other words, these rules were applicable to specific situations and they aimed at countering tax avoidance through the use of the CFCs. Thus, they fall within the scope of permissive tax treaty overriding by a contracting state.[32]

Interestingly, in newer case from December 2010 regarding relations between the Swedish domestic tax law (trailing taxes) and the Swedish-Greek tax treaty[33], the Swedish Supreme Administrative Court stated that it is well established principles that tax treaties will limit the application of domestic tax provisions. Moreover, the Court stated that in such situations the principle *lex posterior derogat legi priori* may not normally be used.[34] Otherwise the principle *paxta sunt servanda,* which is applicable to tax treaties, will be frustrated.

In the view of newer Swedish case law concerning tax treaties, it is likely that the Court in future case regarding the CFC rules and a Swedish tax treaty will take a different approach and articulate how the CFC rules should be interpreted as being in line with a tax treaty. Taking into account the anti-avoidance aim of the Swedish CFC rules, it presumably may be done by interpreting a tax treaty in a way which leads to prevent tax avoidance.

---

29 Case no. 2655-05.
30 This ruling was heavily criticized by tax scholars as well as tax practitioners, Hilling, 2008, pp. 455-461; Benktsson and Johansson, 2010, pp. 761-762
31 Wiman, 2012 (in:) Lang et al., p. 302.
32 Avi-Yonah (in:) G. Maisto (ed.), 2006.
33 Case no. RÅ 2010 ref. 112.
34 Wiman, 2012, p. 302.

2.4 The Japanese Supreme Court's ruling of 29 October 2009 in the case *Gyo-Hi* [case number: 2008 (Gyo-Hi) No. 91]

The Japanese Supreme Court (*最高裁判所: Saikō-Saibansho*) in *Gyo-Hi* case stated that the Japanese CFC rules were compatible with Art. 7 (1) of the Japan-Singapore tax treaty (1995). The Court claimed that the application of the CFC rules results in taxing the income of the Japanese shareholder, not income of the Singapore CFC. Consequently it does not violate Art. 7 (1) of the tax treaty.[35] The Court also referred to the OECD Commentary on the Art. 7 of the OECD MTC and concluded that the OECD Commentary clearly states that CFC rules do not violate the OECD MTC and their application is a widely accepted by the international community.

Nevertheless, it should be noted that the Japanese CFC rules were based rather on the deemed profits approach than the disregarded legal entity approach. In consequence, as Justice Wakui Norio suggested in his concurring opinion, that the Court should rather qualify the Singapore CFC's income attributed to its Japanese parent under the CFC rules as capital gains, since in the said case the CFC's income came from the sale or cancellation of shares that were held by the CFC in its subsidiary company. In other words, the retained income of the CFC constituted capital gains. According to Art. 7(6) of the Japan-Singapore tax treaty, in cases where profits include different items of income, the relevant provisions in the Japan-Singapore tax treaty concerning the respective items of income shall prevail. Thus, it was more proper to analysed the problem of compatibility of the Japanese CFC rules with the Art. 13 instead of Art. 7 of the Japan-Singapore tax treaty.

35 Hegawa, 2010, pp. 463-464.

2.5. The Brazilian Supreme Court's ruling of 3 April 2013 (not published yet)

The Brazilian Supreme Court (*Supremo Tribunal Federal*) has never decided on the compatibility of the Brazilian CFC rules with tax treaties[36]; however, for purposes of the current discussion it is relevant to focus on the *ADI 2588* case from 2001 concerning the issue of constitutionality of these rules.[37] At the time of the writing this paper, the ruling had not yet been published. Nevertheless, based on the Court's press release of 10 April 2013[38] and articles published by Brazilian tax lawyers[39] it is known that of the 11 Supreme Court justices, one was not able to vote because he had acted previously in this case, the ten remaining justices voted as follows:

- ✓ four justices concluded that the Brazilian CFC rules were compatible with the Constitution;
- ✓ four other justices concluded on the contrary;
- ✓ one justice concluded that these rules were incompatible with the Constitution to the extent that they resulted in taxation of income derived from foreign profits accrued by companies that were not controlled by the Brazilian entity;
- ✓ the last justice concluded that the CFC rules were incompatible with the Constitution when taxing income derived from profits accrued by foreign companies located outside tax havens.[40]

Taking into account the number of the votes, the outcome of this ruling leads to four different conclusions; namely, Brazilian CFC rules are considered to be: (i) unconstitutional if their application result in taxation of uncontrolled companies located outside tax havens (6 votes in favour of unconstitutionality) and (ii) constitutional if their application result in taxation of controlled companies located in tax havens. In two remaining situations, i.e. when these rules apply to: (iii) controlled companies outside tax havens or (iv) uncontrolled companies located in tax havens, the outcome is inconclusive (5 votes against and 5 votes in favour).

Furthermore, the Brazilian Supreme Court stated that any application of the Brazilian CFC rules which results in retroactive taxation is unconstitutional.

---

36 However, this issue was analysed by lower Brazilian courts, among the others in landmark cases EAGLE I of 19 October 2006 (Case no. 101-95.802) and EAGLE II of 17 December 2008 (Case no. 101-97.070).
37 Ação Direta de Inconstitucionalidade, or ADI, No. 2588/01.
38 Available at: www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=235582. It is possible to follow the case online at: http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?incidente=1990416.
39 Orsini and Orsini Marcondes, 2013.
40 Orsini and Orsini Marcondes, 2013, p. 337. Under Brazilian domestic tax law, the general concept of tax havens applies both to low-tax jurisdictions and preferred tax regimes. There is no certain whether the ruling of the Court to be published will cover merely low-tax jurisdictions or low-tax jurisdictions and preferred tax regimes.

It should be noted that at the same session the Court decided on the extraordinary appeal no. 541090, which dealt with a case where a Brazilian entity controlled foreign companies located outside tax havens, among the other in Italy and China, i.e. countries with which Brazil has tax treaties.[41] Regrettably, the Brazilian Supreme Court did not examine the tax treaty issue (the Court chose to return to the original lower court), however, two of the justices (Rosa Weber and Teori Zavascki) during the debate on tax treaties stated that applying the Brazilian CFC rules are not generally blocked by tax treaties in question. Since treaties with Italy and China did not include an exemption from taxation of dividends received from qualifying equity stakes, the statement of the justices is not conclusive to the treaties with such an exemption.[42]

The conclusions presented by the Court are indeed remarkable if keep in mind that the Brazilian the CFC rules apply even to a foreign company: (i) with seat in a country where the relevant income has been subjected to taxation that is comparable to that in Brazil; (ii) over which Brazilian taxpayers do not exercise substantial influence or do not have a control; and (iii) derived an active income.[43] That is to say, these rules apply without any presumptions of tax avoidance. The Court clearly limited the application of these rules under the Constitution either to controlled companies located in tax havens, but their application to controlled companies outside tax havens and uncontrolled companies located in tax havens is still dubious.

As a matter of fact, the narrowed application of the Brazilian CFC rules only to controlled companies established in tax havens may fulfil international standards of these rules and may be in line with the OECD guidelines (para. 26 of the Commentary on the Art. 1 of the OECD Model). In such situations, one may assume that an abuse of a tax treaty exists and therefore applying the Brazilian CFC rules will not be in conflict with a given tax treaty. The higher standards, for instance those developed by the case law of CJ EU, will still not be fulfilled, since in the view of the Court the Brazilian CFC rules may apply to controlled companies established in tax havens even if they are involved in a genuinely business activity in these jurisdictions.

41 Ibided, p. 338.
42 Ibidem.
43 Pires, 2013, p. 296.

III. CONCLUSIONS

In the rulings discussed above, the Courts have reached different conclusions on the issue of compatibility of CFC rules with the tax treaties based on the OECD Model. However, only in French case, the Court decided that CFC rules are incompatible with the applied tax treaty, whereas in other case courts reached the opposite conclusion. It shows that this issue, although highly controversial, becoming more uniform in case law of supreme courts. Nevertheless, a brief analysis of these cases reveals that the courts sometimes wrongly interpreted CFC rules and provisions of the tax treaties.

Generally speaking, the French Supreme Court based its ruling on the assumption that the interpretation of the tax treaty resulting in avoidance of double taxation prevails over any over interpretation, including combating tax avoidance. In cases of CFC schemes that aim solely for tax avoidance with the (ab)use of tax treaties, the statement of the French Court does not seem to be the appropriate.

The Finish Supreme Administrative Court disregarded the wording of Art. 7 of the Finnish-Belgium tax treaty and based its reasoning on the version of the OECD Commentary of doubtful relevance.[44]

The another general observation is that all courts (except Swedish which did not analyse this issue at all) in analysed cases qualified the CFC's income attributed to its shareholders as business income, regardless of differences in: (i) wording of domestic CFC rules in question; (ii) wording of applicable tax treaties; and (iii) facts of the case. This may stem from the fact that a correct classification of the CFC's income attributed to its shareholders under CFC rules for purposes of the application of a tax treaty's provision is an arduous task. Besides, there is also not one clear position among tax scholars and practitioners whether the approach of the CFC rules (mainly the look-through or deemed dividend) does, or should, make any difference to its tax treaty compatibility.[45]

Further, the Swedish Supreme Court totally disregarded the tax treaty by applying the principle *lex posterior derogat legi priori*. However, the heavy criticism of this approach from the side of Swedish tax scholars align with the new case law of the Swedish Supreme Court suggests that it will not be followed by this Court in future.

The decision of the Brazilian Supreme Court regarding the constitutionality of the Brazilian CFC rules limits the application of these rules to situations, which may be considered to be abusive in a tax treaty context. The issue of compatibility of these rules with tax treaties is, however, far from clear.

44 The Finish case law in cases regarding tax treaties issues shows that the Finish Courts award the OECD Commentaries an exceptionally high value during the process of interpretation tax treaty provisions, see Helminen (in:) Lang et al., 2004, p. 206.
45 Wheeler, 2007, p. 44.

The above analysed case law implies that generally courts may be more willing to state that CFC rules are compatible with tax treaties based on the OECD Model if aim of such rules is to prevent tax avoidance, which is also one of the main operative aims and purposes of tax treaties, at least those newer (conducted after 1992 or/and 2003).[46] In other words, courts may claim that CFC rules are compatible with tax treaties based on the OECD Model by explicitly referring to the OECD Commentary after its revision of the 2003. This line of reasoning was actually employed by the Finish Supreme Administrative Court to approve the compatibility the CFC rules with tax treaty at stake.

Interestingly, the very fact that tax treaties were concluded before adding to the OECD Commentary that CFC rules are compatible with tax treaties generally did not prevent courts before referring to the newer version of the Commentary, i.e. from 2003 and later. The only exception with that regard so far was the ruling of the French Court. It suggests that for the previously mentioned courts, there was no significant difference between tax treaties concluded before and after 2003 with relation to the compatibility of CFC rules with tax treaties based on the OECD Model. Nevertheless, it is open question whether courts in other countries will come to similar conclusions.

To sum up, the analysed case law shows that even in the absence of safeguarding clauses in a tax treaty, it is most likely that courts would confirm the compatibility of the CFC rules with tax treaties based on the OECD Model. Generally, it may be done by referring to the OECD Commentary and stating that the application of CFC rules results in taxing the income of domestic shareholders, not the income of the foreign company, and due to purely domestic taxation, no tax treaty issues arise[47] (e.g. ruling of the Japanese Supreme Court) or by stating that the aim of CFC rules is to prevent tax avoidance, which is also one of the main aim of tax treaties (e.g. ruling of the Finish Supreme Administrative Court).

[46] De Broe, 2008, p. 634; Li and Sandler, 1997, p. 946.

[47] In practice, however, when the credit method applies, the application of CFC rules may contribute to timing mismatches that may lead to problems with providing the credit for the taxes in the CFC's country, see Helminen (in:) Lang et al., 2004, p. 213.

IV. BIBLIOGRAPHY: "TAX TREATY INTERPRETATION BY SUPREME COURTS: CASE STUDY OF CFC RULES"

Literature

Arnold, B.J., McIntyre M. J., *International Tax Primer,* Second Edition, Kluwer Law International 2002.

Arnold, B.J., *The Taxation of Controlled Foreign Companies: An International Comparison*, Canadian Tax Paper no. 78, Canadian Tax Foundation 1986.

Avery Jones J., The Effect of Changes in the OECD Commentaries after a Treaty is Concluded, *IBFD Bulletin 2002*.

Avi-Yonah, R. S., *Tax Treaty Overrides: A Qualified Defense of U.S. Practice*, (in:) *Tax Treaties and Domestic Law*, G. Maisto (ed.), Amsterdam 2006, pp. 65—80.

Benktsson, A., Johansson, A., *National Report. Sweden*, (in:) *International tax avoidance and tax treaties: application of anti-avoidance provisions*, 64th IFA Congress, Rome 2010.

Beth, K., *For Mr. BRIC, nations meeting a milestone*, CNNMoney.com, published at 17.06.2009,http://money.cnn.com/2009/06/17/news/economy/goldman_sachs_jim_oneill_interview.fortune/index.htm. Accessed online at: 9.06.2013.

Bundgaard, J., Schmidt, K. *National Report. Danmark*, (in:) *International tax avoidance and tax treaties: application of anti-avoidance provisions*, 64th IFA Congress, Rome 2010, pp. 270-271.

Constantinesco, L.J., Traité de droit comparé. La Méthode comparative. Paris 1974, vol. II, p. 124 et seq.

Da Silveira, R. M., De Moraes e Castro, L. F., International Tax Planning in Brazil: What to Expect Following Recent Case Law, *Bulletin for International Taxation 2010,* no. 10.

De Broe, L., *International Tax Planning and Prevention of Abuse*, Vol. 14, Doctoral Series IBFD, the Netherlands 2008.

De Moraes e Castro, L. F., Brazilian CFC Rules: Background and Status After Eagle II Case, *Latin American Law & Business Report 2010, no. 3*, pp. 12-15.

DITS (2012). Controlled Foreign Company Regimes Essentials, Deloitte International Tax Source (DITS) 2012, s. 1-56.

Engelen, F., *Interpretation of Tax Treaties under International Law*, IBFD 2004.

Fontana, R., The Uncertain Future of CFC Regimes in the Member States of the European Union – Part I, *European Taxation 2006*, no. 6, p. 261.

Foroohar, R., *BRICs Overtake G7 By 2027*. The Daily Beast. Published online at 20.05.2009. Article available online at: http://www.thedailybeast.com/newsweek/2009/03/20/power-up.html. Accessed at: 09 June, 2013.

Gutmann, D., Meziane, F., *The French CFC Regime*, Conference paper, Washington, DC, October 17, 2011, International Taxation and Competitiveness, p. 4, footnote no. 13, access online at: http://www.americantaxpolicyinstitute.org/conf_10-17.php. Accessed at: 12 October, 2013.

G20, *Tax Annex to the St. Petersburg G20 Leaders' Declaration*, September, 2013. Available online at: http://en.g20russia.ru/news/20130906/782776427.html. Accessed 12 October, 2013.

Hegawa, Y., *National Report. Japan,* (in:) *International tax avoidance and tax treaties: application of anti-avoidance provisions,* 64th IFA Congress, Rome 2010.

Helminen, M., Better Late Than Never – The Finnish CFC Case and the Requirement To Repeal Final Decisions That Conflict with EU Law, *European Taxation 2011*, no. 7.

Helminen, M., *National Report Finland* (in:) Lang M., Aigner H-J., Scheuele U., Stefaner M. (eds.), *CFC Legislation, Tax Treaty and EC Law*, Vienna 2004.

Hilling M., The Swedish Supreme Administrative Court Totally Disregards Tax Treaty, *Intertax 2008*, vol. 36, issue 10, pp. 455-461.

Irish, Ch. R., Private and Public Dispute Resolution in International Taxation, *Contemporary Asia Arbitration Journal 2011*, no. 4, pp. 121-124.

Lang M., Brugger F., The role of the OECD Commentary in tax treaty interpretation, 23 *Australian Tax Forum 2008*, no. 23.

Lang, M., Aigner, H-J., Scheuele, U., Stefaner, M. (eds.), *CFC Legislation, Tax Treaty and EC Law*, Eucotax on European Taxation Series, Kluwer Law International 2004.

Lang, M., CFC Regulations and Double Taxation Treaties, *Bulletin for International Bureau of Fiscal Documentation 2003*, no. 2.

Li, J., Sandler, D., The Relationship Between Domestic Anti-Avoidance Legislation and Tax Treaties, *Canadian Tax Journal 1997*, Vol. 45, No. 5.

Li, J., The Great Fiscal Wall of China: Tax Treaties and Their Role in Defining and Defending China's Tax Base, *Bulletin for International Taxation 2012*, Volume 66, No. 9.

Lowe, V., *How domestic anti-avoidance rules affect double taxation conventions: proceedings of a seminar held in Toronto, Canada*, During 48th Congress of the International Fiscal Association, Deventer 1994.

Maisto, G., Pistone, P., A European Model for Member States' Legislation on the Taxation of Controlled Foreign Subsidiaries (CFCs) – Part 1, *European Taxation 2008*, October/November.

Maktouf, L., Resolving International Tax Disputes through Arbitration, *4 Arbitration International 1988*, pp. 32-51.

Mbwa-Mboma, M., France-Switzerland Treaty Overrides CFC Regime, French Tax Court Rules, *Tax Notes International*, 8 July 2002, no. 27, pp. 146-147

Nyhegn-Eriksen, L., *Revision & Regnskabsvæsen 2007*, no. 8, p. 64.

OECD, *Members and Partners – Key Partners*. Article available online at: http://www.oecd.org/about/membersandpartners/. Accessed at: 09.06.2013.

OECD (2010), *Non-OECD Economies' Positions on the OECD Model Tax Convention*, pp. 3-4 [in:] *Model Tax Convention on Income and on Capital*, Full Version as it read on 22 July 2010.

OECD (2013A), *Addressing Base Erosion and Profit Shifting,* Published on 12 February 2013,

Available online at: http://dx.doi.org/10.1787/9789264192744-en, Accessed at: 20 September, 2013.

OECD (2013B), *Action Plan on Base Erosion and Profit Shifting*, Published on 19 July 2013, Available online at: http://dx.doi.org/10.1787/9789264202719-en, Accessed at: 19 September, 2013.

Peixoto Orsini, E., Peixoto Orsini Marcondes, D., New Brazilian Supreme Court Decision on CFC rules, *International Transfer Pricing Journal 2013,* September/October , pp. 336-338.

Pires, L., The Brazilian Controlled Foreign Company Regime: A Comparative Analysis from an International Tax Law Perspective, *Bulletin for International Taxation 2013*, no. 6, p. 296.

Prebble, J., Controlled Foreign Company Regimes and Double Taxation, *Asia-Pacific Tax Bulletin 2006*, January/February, p. 3.

Role of the Supreme Court. Text available online at: http://www.supremecourt.gov.uk/about/role-of-the-supreme-court.html. Accessed at: 09 June, 2013.

Sandler D., *Tax treaties and controlled foreign company legislation: pushing the boundaries*, Kluwer Law International 1998.

United Nations Model Double Taxation Convention between Developed and Developing Countries, United Nations, Department of Economic & Social Affairs, New York, 2011.

Vogel, K., *Introduction - Interpretation of Double Tax Treaties,* (in:) Klaus Vogel (ed.), *Double Tax Conventions. A Commentary to the OECD, UN and U.S. Model Conventions for the Avoidance of Double Taxation of Income and Capital, With Particular Reference to German Treaty Practice*, London 1997.

Violin, P., Brazil's Controlled Foreign Company Regime in Question, *Bulletin for International Taxation 2012, no. 2,* pp. 93-99.

Ward, D. A., The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model, *IBFD Publications BV*, 2005.

Wheeler, J. C., *General Report: Conflicts in the attribution of income to a person,* Cahiers de droit fiscal international Vol. 92b; IFA Congress 2007, Kyoto.

Wiman, B., *Sweden: trailing Taxes and CFC rules vs Tax Treaties*, (in:), Lang, M., Pistone, P., Schuch, J., Staringer, C., Storck, A., De Broe, L., Essers, P., Kemmeren, E. C.C.M., Vanistendael, F., *Tax Treaty Law Around the Globe – 2011*, Eucotax, vol. 34, Wolters Kluwer Law & Business 2012.

Zimmer, F., Norwegian Court: Ivory Coast Exploration Doesn't Qualify as PE, *Tax Notes International 2004*, July 12, pp. 128-131.

Case law (chronologically)

Finish Supreme Administrative Court's ruling of 20 March 2002 in the case *A Oyj Abp*, KHO:2002:26, *International Tax Law Reports 2002*, no. 4, p. 1009 et seq.

Société Schneider Electric, 28 June 2002, Conseil d'Etat, No. 232276, RJF 10/2002, International Tax Law Reports 2002, no. 4, p. 1077 et seq.

Norwegian Supreme Court (Høyesterett) in ruling of 8th June 2004 in the case PGS, HR-2004-1003-A, Rt. 2004, p. 957, UTV-2004-649.

Dutch Supreme Court (Hoge Raad) in ruling of 21 February 2003 , case no. 101-95.802].

Brazilian Taxpayers' Council (Conselho de Contribuintes) in decision of 19 October 2006 in the EAGLE I case, case no. 101-95.802..

Swedish Supreme Administrative Court in case no. 2655-05 of 2008. Case 2655-05 of 3rd April 2008, RÅ 2008 ref. 24.

Japanese Supreme Court decision dated 29 October 2009, case number: 2008 (Gyo-Hi) No. 91, access on line at the official website of the Japanese Supreme Court: http://www.courts.go.jp/, [DOA: 27.09.2012].

Swedish Supreme Administrative Court in case RÅ 2010 ref. 112 (the Greece case).

Norwegian Supreme Court (Høgsterett) in Dell Products case of 2nd December 2011, HR-2011-02245-A, case no. 2011/755,

Finish Supreme Administrative Court in its ruling of 11 April 2011[Case no. KHO 2011/1018 (38).