Financial instruments in the OECD model tax convention

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Valorisation Addendum

1 Relevance

For the scientific and practical relevance of this doctoral thesis reference is made to section 1.1.3.

2 Target groups

This dissertation contains an abstract theoretical part with fundamentals in section 2, an abstract methodological part with interpretations in section 3 and a practical application part with subsumptions in section 5. With these main contents, this thesis is aimed to reach the broadest possible audience of interested readers.

The abstract theoretical part with fundamentals addresses primarily law-making and related function holders such as tax policy makers, politicians in the field of regulatory governance or interdisciplinary scholars, as well as jurisprudence and other interested conceptualists. These could include, for instance, national ministries, other public authorities and expert committees in the field of tax affairs, supra-national organizations, think tanks and sectoral working groups, (law) faculties of universities, courts or conceptual specialists in such institutions.

The abstract methodological part with interpretations addresses primarily legal practitioners entrusted with the interpretation of the law, but also jurisprudence. In addition to the previously mentioned target groups, this could include, for instance, lawyers and professional chambers, sectoral and economic interest groups as well as other interested legal experts, for example from other disciplines parallel to tax law.

The practical application part addresses primarily legal practitioners entrusted with solving concrete cases, such as generalists, specialised media and educational institutions. In addition to the previously mentioned target groups, this could include, for instance, tax consultants and tax officers of companies, philanthropy and administrative authorities, specialised publishers as well as specialised educational programmes in universities and colleges.

3 Activities/Products

This study intends to have a descriptive purpose in the sense that it attempts to respect and interpret the OECD MTC as it actually is (de lege lata). In particular it does not intend to have a normative purpose in the sense that it indicates any evaluative suggestion beyond the OECD MTC as it actually is (de lege ferenda). In the background of this general intention, the following concrete activities/products emerge as outcomes of this dissertation for the potential audiences mentioned before:
Referring to the law-making audience, one aim of this thesis is to point to the conceptual limits, ruptures and weaknesses of the OECD MTC related to financial instruments and to critically challenge its capabilities and expedience. On the other hand, it should also be demonstrated which far-reaching possibilities an interdisciplinary and structural interpretation methodology offers in acceptance of these (possibly necessary or unavoidable) limits and weaknesses. In that regard, this dissertation is also intended to encourage acknowledging the findings of other areas of scientific research and to exploit these for the jurisprudence in an unconventional and value-adding way.

Referring to the law-interpreting audience, a further objective of this thesis is to develop a concrete tie-breaking test in order to distinguish shares yielding dividends pursuant to Art. 10(3) OECD MTC, debt-claims yielding interest pursuant to Art. 11(3) OECD MTC, capital gains pursuant to Art. 13(5) OECD MTC and other income pursuant to Art. 21(1) OECD MTC. This test shall be capable of solving the conceptually most ambiguous and controversial use cases discussed to date in research and practice; in doing so the main focus is on the systematic element of interpretation. For the target properties or characteristics of such a test reference is made to section 1.1.2.

Referring to the law-practicing audience, another goal of this thesis is to apply a concrete catalogue of those conceptually most ambiguous and controversial use cases based on that test. On the one hand, this should validate and demonstrate the capability and expedience of the self-developed test. On the other hand it should contribute a consistent own opinion on the tax treatment of the relevant financial instruments for the expert discussion.

4 Innovation

From the author’s point of view, this dissertation draws its innovative character from several methodological approaches and techniques:

As a subject of tax law and thus of the OECD MTC, this study goes comparatively deep into the economic structure and dependencies of financial instruments (e.g. finance theory). This results, on the one hand, from the intentional and, secondly, the systematic element of interpretation of the OECD MTC, which aim both to address these relationships appropriately.

At this level of those relatively fundamental economic structure and dependencies, this thesis also draws analogies from other legal-like systems with similar problems (e.g. IAS / IFRS) by transferring their more advanced approaches and techniques to the OECD MTC. In addition, this paper also makes legal comparisons with some more advanced approaches and techniques of other tax laws (e.g. US federal tax law), which have already adopted the findings of those other research areas mentioned above and use them to solve the conceptual problems dealt with herein.
A reverse approach from the perspective of European interpretation methodology also results from the “funnel approach” taken in this study: it starts with the general and fundamental principles, which are embedded in the systematic legal setting afterwards. The results are condensed or broken down to potential differentiators and only then are they interpretatively tested against the concrete legal texts.

Finally, this study also represents an attempt to conceptually and terminologically unlink the autonomously interpreted concepts and norms of the OECD MTC as well as components of them from the patterns of local tax laws to the maximum possible extent. Through this generic approach, the above-mentioned test and the differentiating criteria flowing into it should attain a particularly high degree of universality and objectivity.

For further aspects of the approach taken here reference is made to section 1.3.

5 Implementation

The aforementioned activities/products for the respective audiences could be implemented by the following examples:

Referring to the law-making readers, the conceptual limits and weaknesses of the OECD MTC identified in this thesis could be the subject of subsequent scientific studies. As part of a fundamental consideration of dogmatic and pragmatic arguments, these studies would at first have to clarify the normative question to what extent the possibilities for tax avoidance and tax structuring of financial instruments resulting from those weaknesses are acceptable. To the extent any need for change is identified, they could further derive technical and/or fundamental suggestions from this thesis for improving the capabilities and expediency of the OECD MTC.

Irrespective of these normative possibilities for further development, the structural inter-dependencies and criteria identified in this dissertation could be analogously applied to similar use cases. In particular, transactions cited herein are those such as insurance, letting and leasing, royalties and annuities, betting and gambling or those embedded in MTC taxonomy (e.g. business or employment). Such a transfer could potentially address also a variety of further research issues, as there are, for instance, the systematic relationship of Art. 10, 11, and 13 OECD MTC with those of other distributive articles (e.g. Art. 12 OECD MTC). Perhaps, such an analysis would ultimately lead to the fundamental question to what extent the OECD MTC that is tied in physical patterns is even capable to actually deal with economic substance. In other words: in which relation the material object (axiom) and the formal evidence (pragmatics) necessary for its recognition stand.

Also for the law-interpreting audience the tie-breaking test developed in this study could be further developed for both normative and descriptive purposes. Normative in a way that the structural interdependencies flowing into that test could be used for the design of revised income articles by developing the test back into a suggested wording. Descriptive in the sense that the identified differentiators could be amplified into a practice guide on the classification and treatment of financial instruments pursuant to international tax law. Irrespective of this, the test and possibly also those differentiators could eventually be used as guidelines for
potential compatibility or harmonisation efforts where appropriate (e.g. between different domestic tax laws or with other disciplines such as accounting law).

For the law-practicing audience, the tie-breaking test and the differentiators can at first be used for tax structuring (in particular the development of innovative financial instruments), as long as the legislators continue to leave the fundamental problem of the legal discrepancy between the economic substance and its physical medium unsolved. In addition, the tie-breaking test developed in this thesis could be used as a guideline for a comparative study of the treatment of financial instruments under various domestic tax laws (e.g. in the form of a practitioner handbook).