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La prévention des abus de conventions fiscales

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Introduction

« L'évasion fiscale n'est pas forcément illégale mais toujours immorale ». Cette citation figure sur l'affiche du documentaire « le prix à payer » qu'Harold Crooks a consacré aux enjeux de la fiscalité et à ses dérives. Même si cette phrase a pour objectif d'accrocher le public et contient un parti pris évident de la part du réalisateur, elle traduit une certaine inquiétude sur les pratiques fiscales des contribuables les plus fortunés. Les scandales très médiatisés des « Luxleaks », « Swissleaks » et plus récemment des « panama papers » n'ont fait qu'attiser les rancoeurs envers ceux qui usent et parfois abusent de schémas complexes et ce peu importe leurs motifs. S'il ne fait aucun doute que les structures mises en place dans le but de favoriser le blanchiment de l'argent, le financement du terrorisme ou la fraude fiscale sont illégales et *a fortiori* immorales, la question de l'évasion fiscale est beaucoup plus discutable. Ce que certains appellent évasion fiscale est, pour d'autres, de la planification fiscale. Cette planification est perçue par les responsables d'entreprises comme un acte de gestion qui consiste à minimiser la charge que constitue l'impôt tout en respectant les législations fiscales applicables à leur situation[1].

Pour favoriser la globalisation de l'économie et le développement de leurs entreprises à l'étranger, les Etats ont signé entre eux des conventions fiscales. Ces conventions sont pour la plupart écrites suivant le modèle fourni par l'OCDE en la matière[2] et ont pour objectif d'éviter la double imposition économique. L'usage de ces conventions est une pratique *a priori* légitime dans le chef d'une entreprise ou d'un groupe d'entreprises qui poursuit des activités au sein de plusieurs pays et souhaite rapatrier ses bénéfices. Pourtant les autorités fiscales des Etats qui ont signé ces conventions dénoncent l'usage dit abusif de ces dernières. Les autorités fiscales dénoncent un manque de substance en ce qui concerne certaines opérations économiques ou l'usage des incohérences et de la mauvaise coordination entre les Etats qui restent avant tout maîtres de leur compétence fiscale. La notion d'abus des conventions fiscales prête à confusion et, comme toute notion vague, est source d'insécurité juridique. Afin de palier à cette insécurité juridique créée par cette notion d'abus fiscal, les Etats se sont dotés d'un arsenal de règles juridiques permettant au contribuable d'identifier les structures et mécanismes autorisés et ceux qui ne le sont pas.

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[1] P. MINNE et S. DOUÉNIAS, *Planification fiscale internationale des sociétés belges*, Bruxelles, Larcier, 2004, p.21

[2] Modèle de convention fiscale concernant le revenu et la fortune

Cet article a pour objectif d'énumérer et de brièvement commenter les mesures qu'ont pris ou que peuvent prendre les Etats pour prévenir les abus de conventions fiscales. Des distinctions devront être opérées entre mesures de droit interne et les clauses introduites dans les conventions, entre les mesures spécifiques et générales ainsi qu'entre principes de droit fiscal dégagées par la jurisprudence et les dispositions législatives. La position de la Belgique quant à ces mesures sera également brièvement commentée.

C'est donc bien à travers l'analyse des législations et principes anti-abus que cet article entend donner une définition des contours de la notion d'abus des conventions en matière fiscale.

Chapitre 1 : Les mesures de droit national

Section 1 : les principes nationaux de « substance over form »

§1 : la simulation

La simulation est un concept de droit civil qui permet de faire prévaloir la substance d'un acte sur sa forme. Selon Henry De Page, "*Il y a simulation lorsque les parties font un acte apparent dont elles conviennent de modifier ou de détruire les effets par une autre convention demeurée secrète*[3] ». La simulation suppose donc l'existence de deux conventions contemporaines. L'une d'entre elles, l'acte apparent, a pour objectif de cacher la réalité de l'opération concernée qui est elle contenue dans l'acte secret[4]. En tant que tiers, l'administration fiscale qui recouvre l'impôt pour le compte de l'Etat peut se prévaloir de l'acte qui contient l'intention véritable des parties : l'acte secret.

La notion de simulation est plus élargie dans les Etats qui n'ont pas inséré de dispositions générales anti-abus dans leur droit interne que dans ceux qui comptent ces dispositions dans leur arsenal anti-abus[5]. Les administrations fiscales préfèrent en effet recourir aux dispositions générales anti-abus afin d'éviter la charge de la preuve qui leur incombe si elles basent leur revendication sur la théorie de la simulation. L'intention des parties est notamment un élément très difficile à prouver devant le juge.

La théorie de la fraude à la loi a été rejetée par la Cour de Cassation belge dans l'arrêt « *Brepols*[6] » et plus récemment dans l'arrêt « *Au Vieux Saint-Martin*[7] ». Le contribuable a donc le droit d'arranger ses affaires en utilisant sa liberté contractuelle de manière à payer le moins d'impôt possible. Néanmoins, les autorités fiscales peuvent rejeter la qualification juridique d'un acte ou d'une opération réalisée par le contribuable en cas de simulation. La

[3] H. DE PAGE, *Traité élémentaire de droit civil*, vol. II, 3e éd, 1964, §618
[4] P. VAN OMMESLAGHE, « La simulation en droit des obligations », *Les obligations contractuelles*, Jeune Barreau de Bruxelles, 2000, p. 147 et s.
[5] F. ZIMMER, "general report : Form and Substance in Tax Law", *Cahiers de droit fiscal international*, IFA, vol. 87a, Kluwer Law International, 2002
[6] Cass., 6 juin 1961, *Pas*. 1961, I, 1082
[7] Cass., 22 mars 1990, *Pas*. 1990, I, 853

simulation représente en quelques sortes la limite entre le choix licite de la voie la moins imposée et l'abus fiscal[8].

La Belgique utilise la simulation plus couramment qu'il n'y paraît car le juge peut déterminer l'existence d'une simulation à partir de présomptions de faits et de circonstances[9] entourant l'acte apparent. Depuis l'entrée en vigueur de la disposition générale anti-abus du CIR[10] en 1993, le nombre de décisions fondées sur la théorie de la simulation a considérablement diminué.

§2 La doctrine Ramsay et la « step transaction »

La doctrine de Ramsay est une doctrine développée aux Royaumes Unis et qui fait office de référence dans les pays de « common law », les pays de droit civil préférant avoir recours à la théorie de la simulation. Introduite en 1982 dans Ramsay v. IRC[11] et confirmée très vite par Furniss v. Dawson[12], c'est dans Craven v. White[13]que le lord Oliver fit la synthèse des 4 éléments essentiels à l'application de cette doctrine qui permet au juge de ne tenir compte que de la substance d'une série de transactions. Il faut (**i**) que la série de transactions soit, au moment où la transaction intermédiaire a été mise en oeuvre, ordonnée de manière à obtenir un résultat précis, (**ii**) que la transaction n'ait pour seul objectif une réduction de l'impôt, (**iii**) qu'il n'y ait aucune probabilité pratique que les événements programmés n'aient pas lieu dans l'ordre préétabli, de sorte que la transaction intermédiaire ne puisse être envisagée comme ayant une existence indépendante; et (**iv**) que les évènement programmés se produisent.

La jurisprudence belge n'a pas développé cette doctrine de common law et préfère se référer à ses principes et dispositions anti-abus existants[14]. La disposition générale anti-abus consacrée à l'article 344 du CIR fait toutefois écho la doctrine « step by step » développée par la jurisprudence anglo-saxonne[15].

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[8] L. Debroe, *International tax planning and prevention of abuse under domestic tax law, tax treaties and EC-law in relation to conduit and base companies*, Amsterdam, Doctoral series, IBFD publications, 2008, p.58
[9] Conformément à l'article 1353 du code civil belge
[10] Code des impôts sur les revenus du 10 avril 1992
[11] *W. T. Ramsay Ltd v. IRC* [1982] AC 300, [1981] STC 174, 54 TC 101
[12] *Furniss v. Dawson* [1984] AC 474, [1984] STC 153, 55 TC 324
[13] *Craven v. White* (1988) S.T.C. 476 (H.L)
[14] D. GARABEDIAN, "Substance over form for Belgium*", Cah. Dr. Fisc*., IFA, vol. 1, 2002, p.156
[15] Art. 344 CIR, *Doc. Parl.*, Chambre, 1992–93, no. 1072/8, p. 101 et Art. 344, *Doc. Parl.*, Sénat, 1992–93, no. 762-2, p. 38.

Section 2 : dispositions anti-abus

§1 dispositions spécifiques

Afin de traiter certaines situations, les législateurs de la quasi-totalité des pays membres de l'OCDE ont introduit des dispositions anti-abus spécifiques. Le nombre et la portée de ces dispositions ne cesse d'augmenter. Ces dispositions varient d'un pays à l'autre en fonction des problèmes rencontrés par les autorités fiscales et des pratiques des contribuables. Certaines mesures sont devenues communes à un grand nombre de ces pays. On peut citer les règles particulières régissant les transactions faites avec les pays à très faible fiscalité ainsi que celles applicables aux CFC's (controlled foreign companies), les règles de capitalisation (think-cap)etc…

Le rapport général du congrès IFA qui s'est tenu à Rome en 2010 distingue quatre types de dispositions spécifiques anti-abus[16]. L'appartenance d'une disposition anti-abus spécifique dépend de la situation qu'elle vise. « *Une disposition peut se concentrer sur la situation où une personne cesse d'être résidente d'un pays, où un revenu est transféré offshore, où la base taxable d'un pays est érodé, et où la nature d'un revenu est modifié*[17] ».

Certains pays ont décidé d'introduire des dispositions spécifiques relatives à un ou plusieurs secteurs de leur économie. La Norvège a une règle spécifique concernant ses exportations pétrolières. Le pétrole qui quitte le territoire norvégien doit avoir été payé au prix en vigueur sur le marché mondial, ce qui est plus objectif et moins malléable que le principe de pleine concurrence. Cette règle s'explique par l'importance qu'ont les exportations de pétrole pour l'économie norvégienne et est facilité par l'accessibilité du prix du pétrole sur le marché mondial. L'Argentine applique un système similaire concernant ses exportations de matières premières. La vente de ces dernières est censée avoir été effectuée au prix en vigueur sur le marché mondial à moins que le contrat avec l'intermédiaire ne prévoie un prix supérieur[18].

La Belgique possède de nombreuses dispositions anti-abus spécifiques[19]. Les plus importantes en nombre sont probablement celles relatives aux prix de transfert[20]. Les articles 26 et 207 du

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[16] S. VAN WEEGHEL, "general report :Tax treaties and tax avoidance : application of anti-avoidance provisions", *Cah. Dr. Fisc*., IFA, vol. 1, 2002

[17] Traduction libre du rapport général *op. cit*. n°16, p.23

[18] L. A. SHEPPARD, "How can vulnerable countries cope with tax avoidance?", *Tax notes international*, 4 février 2013, p. 412

[19] P. A.A. VANHAUTE, "specific anti-avoidance provision and international tax planning", *bitp*, 2008

CIR se base sur le concept d'avantages bénévoles et anormaux pour empêcher le transfert des bénéfices des contribuables belges vers des non-résidents. D'autres règles spécifiques rejettent la déduction de certaines dépenses telles que les paiements au profit de résidents de paradis fiscaux (article 54 CIR). D'autres encore excluent certains dividendes de l'exemption accordée aux société ayant une participation substantielle dans une autre (article 202 et 203 CIR).

Les dispositions spécifiques viennent souvent après la constatation d'un ou de plusieurs abus, selon la volonté politique et la longueur du processus législatif. Elles sont plus techniques et plus précises de sorte que l'administration fiscale ne doive pas trop puiser dans ses ressources pour les faire respecter. Le contribuable voit sa situation fiscale ajustée et ne peut que difficilement contester la décision des autorités. Si ce type de dispositions permet d'assurer la sécurité juridique (pour autant que la mesure soit correctement établie), elles sont facilement contournables en cas de planification fiscale. Il suffit au contribuable ingénieux de se placer hors champ d'application de la disposition, ce dernier étant souvent très rigide et ne permettant que peu de marge de manœuvre à l'autorité fiscale.

§2 dispositions générales

La plupart des Etats membres de l'OCDE disposent d'une règle générale anti-abus[21]. Comme pour les dispositions anti-abus spécifiques, le champ d'application des dispositions générales varie d'un pays à l'autre mais elles ont toutes un effet sur les opérations transfrontalières.

En ce qui concerne leur contenu, le seul lieu commun de toutes ces dispositions générales anti-abus est la simulation. Les théories de l'abus de droit et de *fraus legis* sont présentes essentiellement dans les pays de droit civil. La plupart des dispositions générales anti-abus visent les situations où l'opération ou la série d'opération a pour objectif principal d'éviter l'impôt et, si menée à terme, viole l'esprit et l'objectif de la loi fiscale. Elles permettent à l'administration fiscale de se prévaloir de la véritable opération, celle qui correspond aux faits et qui a voulu être évitée par le contribuable[22].

Les dispositions générales ont l'avantage d'être flexibles et permettent à l'administration fiscale de se pourvoir d'une base légale dans des situations où les règles spécifiques ne

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[20] Notion figurant à l'article 185 du CIR
[21] F. ZIMMER, *op. Cit.* n°5
[22] S. VAN WEEGHEL, *op. Cit.* n°16, p. 22

s'appliquent pas. Si elles ont l'avantage d'être flexibles, elles restent néanmoins vagues et imprécises. Ces inconvénients les rendent difficilement applicables par les juges qui doivent également préserver la sécurité juridique. Utiliser une règle générale anti-abus pour rectifier la situation d'un contribuable, c'est s'exposer à une longue et pénible bataille au sein des cours et tribunaux. Il faut donc beaucoup de moyens et de volonté pour décider d'appliquer ce type de dispositions. Les Etats-Unis, par exemple, ont décidé de ne pas appliquer de dispositions générales anti-abus. A l'inverse, la Chine fait exécuter sa propre disposition de manière plus énergique[23].

Depuis 1993, la Belgique dispose d'une disposition générale anti-abus libellée comme suit : « *N'est pas opposable à l'administration, l'acte juridique ni l'ensemble d'actes juridiques réalisant une même opération lorsque l'administration démontre par présomptions ou d'autres moyens de preuves visés à l'article 340 et à la lumière de circonstance objectives, qu'il y a abus fiscal*[24] ». Cette disposition contient un allègement considérable de la charge de la preuve dans le chef de l'administration. Si le contribuable ne justifie pas par d'autres motifs que l'évitement de l'impôt l'opération considérée comme abusive , l'administration peut rétablir l'impôt conformément à la loi, comme si l'abus n'avait jamais existé[25].

Section 3 : Interactions entre principes et dispositions « substance over form » nationales et conventions fiscales

L'examen des mesures que peuvent prendre les Etats, dans leur droit interne, afin de prévenir les abus des conventions fiscales qu'ils ont conclues aurait été vain si ces mesures ne pouvaient être utilisées en raison même de la conclusion de ces conventions. Autrement dit, la place du droit national par rapport aux conventions fiscales et en particulier de ses dispositions et principes anti-abus par rapport aux conventions fiscales est décisive. Il serait effectivement frustrant pour les Etats de voir leurs contribuables échapper à l'impôt alors même qu'ils rentrent dans le champ d'application des mesures anti-abus nationales. Etant donné l'importance des conventions fiscales dans notre économie globalisée, il serait désastreux de voir les Etats refuser de les conclure de crainte de plus être en mesure de lutter contre l'évasion fiscale.

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[23] L. A. SHEPPARD, *op. cit.* n°18, p. 412
[24] Art. 344 CIR
[25] D. GARABEDIAN, *op. cit.* n°14, pp. 158 et s.

Cette inquiétude était déjà présente en 1977. Les commentaires de l'article 1[26] du modèle de convention traite déjà des conflits potentiels entre conventions fiscales et mesures de droit national ou constructions jurisprudentielles dont l'objectif est d'empêcher les abus de telles conventions. Les conventions fiscales n'ont évidemment pas pour objectif de favoriser l'évasion ou la fraude fiscale[27]. L'OCDE encourageait et encourage toujours les Etats à se doter de règles et de principes afin d'éviter les abus de conventions fiscales. Néanmoins, ces dispositions et principes de droit national ne pouvaient entrer en conflit avec les conventions fiscales de sorte qu'ils ne pouvaient être mis en œuvre en cas d'abus de telles conventions. Il fallait en effet introduire ces principes et dispositions explicitement dans les conventions pour pouvoir en faire usage[28].

Les commentaires de l'article 1 concernant les abus des conventions fiscales basées sur le modèle OCDE ont été radicalement modifiés en 2003. Les commentaires indiquent explicitement que la prévention de l'évasion fiscale et a fortiori de la fraude fiscale font partie des objectifs des conventions OCDE (ce qui n'était pas le cas ou du moins pas dans un langage aussi direct dans la version antérieure des commentaires). Selon l'article 31 de la convention de Vienne, les traités doivent être interprétés à la lumière de leurs objectifs. Etant donné que la lutte contre l'évasion et la fraude fiscale fait indiscutablement partie des objectifs des conventions fiscales, on ne peut que difficilement soutenir que les dispositifs nationaux ayant le même objectif violent les conventions fiscales. De plus, l'exigence de l'inscription des principes et dispositions nationales au sein même des conventions disparaît ce qui laisse le champ libre à l'application des dispositifs anti-abus.

Selon Luc Debroe[29], les commentaires de 2003 n'ont pas entièrement atteint leur objectif en ne réglant pas définitivement en sans ambiguïté le sort des dispositions spécifiques anti-abus de droit national. Il prend l'exemple des règles nationales de capitalisation qui ne doivent pas entrer en conflits avec les dispositions des conventions fiscales[30].

Les pays de common law, et spécialement les Etats-Unis[31], n'ont pas attendu la réaction de l'OCDE et ont très vite admis l'application de leurs dispositifs anti-abus[32]. La jurisprudence

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[26] OCDE Model (1977), Commentaires sur l'art. 1, § 9.1
[27] S. VAN WEEGHEL, *The improper use of tax treaties,* series on international taxation n°19, Kluwer law international, p. 34.
[28] L. DEBROE, *op. cit.* n°8, p. 319
[29] *idem* p. 336
[30] commentaires article 9, §3 et article 11 §35
[31] S. VAN WEEGHEL, *op. cit.* n°27, pp. 178-188

Canadienne refuse également l'application des conventions fiscales en cas de violation des mesures anti-abus Canadiennes[33]. Les opérations économiques conduites dans le cours normal de la vie des affaires ne sont évidemment pas considérées comme abusives[34].

Le rapport général du congrès IFA qui s'est tenu en 2002 à Oslo mentionne les pays qui semblent accepter l'usage des dispositions anti-abus de droit interne et ce, même si elles ne sont pas explicitement citées dans les conventions fiscale[35].

L'action 6 du rapport BEPS a pour objectif d'inclure des règles spécifiques au sein des conventions fiscales afin de ne pas empêcher l'application des règles nationales anti-abus[36].

Chapitre 2 : Les clauses anti-abus dans les conventions fiscales

Section 1 : les clauses spécifiques

Même si une convention fiscale contient déjà une règle générale anti-abus ou celle des Etats signataires est incluse dans la convention, il est utile de rédiger des clauses spécifiques dans les conventions fiscales dans le cas où des techniques d'évasion fiscale spécifiques sont utilisées[37].

Pour certains contribuables, changer de résidence peut s'avérer fiscalement avantageux notamment sur le plan de la taxation des plus-values accumulées sur une longue période. La réponse à ce changement de résidence est d'opérer une taxation lors du départ du contribuable.

Les principes classiques de « substance over form » ne permettent également pas toujours de lutter contre le « treaty shopping ». Les Etats peuvent donc inclure des clauses de limitations des avantages reconnus par les conventions fiscales. Elles font cela en imposant des

[32] *Maximov v. United States*, 373 US 49 (1963)
[33] J. ANGEL BECERRA, *Interpretation and application of tax treaties in North America*, IBFD publication, Amsterdam, 2007 pp. 88 et 89
[34] *RMM Canadian enterprises, Inc. And equilease corporation v. The Queen,* 97 DTC 302 (1997)
[35] F. ZIMMER, *op. cit.* n°5, p.60
[36] OCDE (2015), Exposé des actions 2015, Projet OCDE/G20 sur l'érosion de la base d'imposition et le transfert de bénéfices, OCDE, www.oecd.org/fr/fiscalite/beps-expose-des-actions-2015.pdf
[37] Convention modèle OCDE, Commentaires sur l'article 1, §9(6)

conditions telles que la durée minimum de détention d'une participation pour le résident de l'autre Etat et la non érosion de la base imposable de la société résidente[38].

La notion de bénéficiaire effectif est probablement l'une des plus importantes dans la lutte contre les abus de traités. Ce concept est également l'un des plus discutés en doctrine. Il n'est pas défini par la convention modèle OCDE de sorte que le débat porte sur le fait de savoir si c'est aux droits nationaux de définir cette notion ou si il faut lui donner une interprétation autonome[39]. La Belgique fait référence à ce concept dans toutes ses conventions fiscales.

Section 2 : les clauses générales

§1 clause générale anti-abus explicite

L'ajout, au sein des conventions fiscales, d'une clause générale anti-abus peut s'avérer problématique. Comme l'indique le rapport des Nations Unis rédigé par le sous-comité sur l'utilisation inadéquate des traités[40], l'introduction de clauses générales anti-abus serait un aveu que le traité ne s'oppose pas aux situations d'abus. Cet aveu serait désastreux pour les conventions fiscales ne contenant pas de clause générale anti-abus. C'est probablement pour cette raison que la plupart des pays déclarent valable l'utilisation de leurs dispositions générales anti-abus nationales[41].

L'une des mesures de l'action 6 du plan BEPS est d'introduire une clause générale anti-abus dans la convention modèle OCDE. La clause générale quitte les commentaires dont la nature est controversée pour entrer dans le texte principal via le nouvel article 10 (6). Cette inclusion dans le corps même du modèle OCDE ne laisse plus aucun doute quant à l'existence d'une clause générale anti-abus au sein des traités[42].

Existence d'une règle anti-abus implicite ?

Le principe de bonne foi inscrit dans la convention de Vienne (1969) semble obliger les Etats à accorder les droits qui découlent des conventions fiscales aux contribuables. L'abus de droit

[38] S. VAN WEEGHEL, *op. cit.* n°16, p. 50 et s.
[39] L. DE BROE, N. GOYETTE, P. MARTIN, R. ROHATGI, S. VAN WEEGHEL et P. WEST, « Tax treaties and tax avoidance : application of anti-avoidance provisions", *Bulletin for international taxation*, juillet 2011, p.388
[40] Rapport présenté à la 4ème session du comité des experts en coopération internationale sur les affaires fiscales, 20-24 octobre 2008, E/C. 18/2008/CRP.2
[41] F. ZIMMER, *op. cit*. n°5, p.46
[42] A. WARDZINSKY, "The Limitation on Benefits Article in the OECD Model: Closing Abusive (Undesired) Conduit Gateways », *Bulletin for international taxation*, septembre 2014, p.477

n'est pas reconnu comme un principe général de droit international. Certains auteurs comme K. Voghel[43] et D. Ward[44] soutiennent qu'il existe un principe général de « substance over form ». Les Etats pourraient donc refuser les droits qui découlent des conventions fiscales aux contribuables qui effectueraient des opérations dont le seul objectif est l'obtention des avantages qui découlent de ces conventions[45]. La jurisprudence n'est évidemment pas unanime à ce sujet.

Chapitre 3 : le cadre européen

A part quelques directives, le droit communautaire ne porte en principe pas atteinte à la compétence fiscale des Etats-Membres. La Cour de Justice de l'Union Européenne (ci après CJUE) rappelle ce fait lorsqu'elle est amenée à trancher un litige qui porte sur la matière fiscale. Le droit communautaire s'applique à tous les domaines du droit et les interactions avec le droit fiscal sont nombreuses. Les quatre libertés fondamentales (libre circulation, des biens, des personnes et des capitaux ainsi que la liberté d'établissement) ne peuvent être remises en cause par les législations nationales à moins que la violation ne satisfasse un test de proportionnalité[46]. C'est au moment où le contribuable commet un abus fiscal au sens d'une législation nationale restée compétente en la matière et où ce même contribuable exerce une liberté fondamentale que se croisent ces compétences. C'est à la CJUE de déterminer si la violation de la liberté fondamentale est justifiée par la nécessité de protéger les intérêts fiscaux des Etats-Membres.

De manière générale, la CJUE a toujours maintenu que « nul ne peut se prévaloir du droit communautaire à des fins abusives ou frauduleuses[47] ». La CJUE a donc pour principe de refuser la protection du droit communautaire lorsqu'un agent économique utilise une des libertés fondamentales dans l'objectif d'éviter la législation nationale normalement applicable à sa situation et de se prévaloir de dispositions plus avantageuses d'un autre Etat-Membre. La CJUE refuse également l'octroi d'avantages basés sur le droit communautaire en cas de mauvais usage de ce dernier[48].

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[43] K. VOGEL, *On Double Taxation Conventions,* 3ème ed. 125, Kluwer Law International,1997.
[44] D. WARD, *Ward's Tax Treaties, 1996-1997* , Carswell, 1996.
[45] L. DE BROE, N. GOYETTE, P. MARTIN, R. ROHATGI, S. VAN WEEGHEL et P. WEST, *op. cit*. n°38, pp. 386 et s.
[46] A. MASSON et P. NIHOUL, *Droit de l'Union Européenne,* 3ème éd., Bruxelles, Larcier, 2011, p.455
[47] CJCE, 3 mars 2005, *Fini*, C-32/03, § 32; CJCE, 23 mars 2000, *Diamantis*, C- 373/97, § 33 et CJCE, 12 Mai 1998, *Kefalas*, C-367/96, § 28.
[48] L. De Broe, *op. cit*. n°8, p.563 et s.

En matière fiscale, la restriction des libertés fondamentales communautaires ainsi que la discrimination entre nationaux et non nationaux n'est admise par la CJUE que depuis 10 ans. Il faut en effet attendre les arrêts *Mark et spencer*[49] et *Cadbury Schweppes*[50] pour que la Cour reconnaisse l'évasion fiscale comme un motif suffisant pour discriminer et limiter les libertés communautaires. Ce juste motif qu'est devenu la lutte contre l'évasion fiscale reste soumis à un test de proportionnalité vis-à-vis de la violation du droit de l'Union Européenne.

La Cour tend à prévenir l'utilisation de structures artificielles qui ne reflètent pas la réalité économique et ont pour objectif d'échapper à l'impôt normalement dû sur le territoire national. Le concept utilisé est celui d'évasion fiscale illégitime et est à mettre en lien avec celui d'abus du droit de l'Union Européenne développé par la CJUE. La Cour a également développé un test en deux étapes dans l'arrêt Hallifax[51]. Il y a abus de droit communautaire lorsque deux éléments, l'un subjectif et l'autre objectif, sont réunis. L'élément subjectif est rempli lorsque l'opérateur économique a pour intention d'obtenir un avantage sur base du droit communautaire en mettant en place une structure artificielle. Le fait que cette structure respecte le droit communautaire de manière formelle ne fait pas obstacle à la validation de ce premier élément. L'élément objectif est rencontré lorsque l'octroi de l'avantage est contraire aux objectifs et à l'esprit du droit communautaire[52].

La CJUE a récemment été saisie d'une question préjudicielle en matière TVA et l'arrêt rendu concerne la notion d'abus communautaire[53]. Cet arrêt oppose Webmindlicenses aux autorités fiscales hongroises. La société Hongroise avait, par un contrat de licence, réussi à transférer le lieu de prestation de ses services dans un Etat-Membre dont le taux TVA était plus avantageux.

Après avoir cité le point 70 de l'arrêt *Hallifax* également rendu en matière de TVA : *« La lutte contre la fraude, l'évasion fiscale et les abus éventuels est un objectif reconnu et encouragé par la directive TVA et que le principe d'interdiction des pratiques abusives, qui s'applique au domaine de la TVA, conduit à prohiber les montages purement artificiels, dépourvus de*

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[49] CJCE, 13 décembre 2005, *Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes,* C-446/03, *J.O.,* 2005, I-10837
[50] CJCE, 12 septembre 2006, *Schweppes Overseas Ltd v. Commissioners of Inland Revenue,* C-196/04, *J.O.*, 2006, I-07995
[51] CJCE, 21 février 2006, *Halifax plc, Leeds Permanent Development Services Ltd et County Wide Property Investments Ltd contre Commissioners of Customs & Excise,* C-255/02, *J.O.* 2006, I-01609
[52] L. DEBROE, *op. cit.* n° 8, p.588
[53] CJUE, 17 décembre 2015, *WebMindLicenses Kft. v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatósá,* C-419/14, pas encore publié au J.O.

réalité économique, effectués à la seule fin d'obtenir un avantage fiscal », la cour examine la présence des éléments subjectifs et objectifs qu'elle avait introduit dans ce même arrêt.

Les deux éléments étant réunis, la CJUE renvoie l'affaire devant le tribunal Hongrois en assurant ce dernier que « *Le droit de l'Union doit être interprété en ce sens que, en cas de constatation d'une pratique abusive ayant abouti à fixer le lieu d'une prestation de services dans un État membre autre que celui où il l'aurait été en l'absence de cette pratique abusive, le fait que la taxe sur la valeur ajoutée a été acquittée dans cet autre État membre conformément à la législation de celui-ci ne fait pas obstacle à ce qu'il soit procédé à un redressement de cette taxe dans l'État membre du lieu où cette prestation de services a réellement été fournie*. »

Le droit européen a l'avantage déterminant d'avoir une juridiction autonome. La notion d'abus fiscal est une notion beaucoup plus ciblée en droit de l'Union Européenne qu'en droit fiscal international. Peut-être les enseignements de la CJUE contribueront au développement d'une définition claire et précise de la notion d'abus fiscal.

Conclusion

L'un des problèmes de la globalisation est qu'elle n'est pas encore accessible à tout le monde. Les ouvriers peu qualifiés n'ont pas les mêmes opportunités de profiter de l'ouverture des frontières et la majorité PME n'a pas d'activités à l'internationale. Les conventions fiscales sont essentielles au bon fonctionnement de l'économie telle que nous la connaissons aujourd'hui. Elles représentent, en dépit du bien fondé de leur conclusion, une source d'inégalité entre les contribuables les plus fortunés et ceux qui le sont moins. Si les premiers ont la possibilité de les utiliser afin de réduire leur charge fiscale, les seconds n'ont pas cette chance ou du moins ne l'ont que dans une moindre mesure. En cette période d'effort budgétaire, cette situation est considérée comme intolérable par la majorité de la population qui considère les agissements des multinationales ainsi que ceux des individus les fortunés comme immoraux.

Le droit s'accommode peu d'un concept à géométrie variable telle que la moralité. La sécurité juridique est essentielle au bon fonctionnement de l'économie. Il faut pourtant admettre que certaines pratiques ne peuvent être tolérées en ces temps de restrictions budgétaires. C'est à ce titre que des notions telles que celles d'abus fiscal où d'évasion fiscale illégitime doivent trouver une résonance commune au sein des pays du monde entier. La diversité des économies et de visions de l'impôt compliquent et font parfois même échouer les tentatives d'harmonisation entreprises par l'OCDE. L'Union européenne s'est engagée dans ce travail d'harmonisation et de définition de l'abus fiscal. Si les développements récents sont prometteurs, ils n'en sont qu'à leur début. Chaque nouvel arrêt doit faire l'objet de discussions entre Etats-membres mais également avec les contribuables concernés pour arriver à une entente sur les limites à donner à l'évasion fiscale.

Sans définition précise et idéalement unanime, l'introduction de clauses générales anti-abus dans les législations nationales et au sein même des traités ne permettra pas de définir les limites auxquelles doivent se tenir les contribuables en quête d'efficience sur le plan fiscal. Le plan BEPS prévoit l'introduction de nouvelles mesures spécifiques mais elles sont par nature limitées. L'économie et la vie des affaires en général évoluent à une vitesse impressionnante de sorte qu'il est extrêmement difficile de d'adapter ces clauses aux activités et parfois à l'imagination du contribuable.

Peut-être est-il temps d'aborder des problèmes de fond et en discuter avec les contribuables concernés. Dans le chef de certaines entreprises, l'impôt est considéré comme excessif et même mortel. L'audition d'Apple, entreprise très efficace sur le plan fiscal, au sénat américain a mis en évidence des pratiques relativement agressives. Le plaidoyer d'Apple, et probablement la raison pour laquelle cette entreprise ne sera pas réellement inquiétée, joue sur la concurrence mondiale auquel elle doit faire face. Est-il possible pour Apple de garder sa place de leader sur le marché mondial si elle payait 35% d'impôt global sur les bénéfices de ses sociétés alors que Samsung, son concurrent direct, n'en paie que 15% ? Quelles sont les raisons pour lesquelles les multinationales sont les plus agressives sur le plan fiscal ? Ce qui est sûr, c'est que le lien entre l'impôt et les groupes multinationaux est rompu. Sans cadre précis, les multinationales exploitent les failles de la fiscalité internationale qui, malgré ses évolutions récentes, reste dépassée par la mutation de l'économie.

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International and European Tax Moot Court Competition – 2015/2016

MEMORANDUM FOR THE DEFENDANT

REGISTRATION NUMBER: P/02

I. Table of Contents

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II. Table of abbreviations

- PE: Permanent establishment
- OECD: Organisation for Economic Co-operation and Development.
- BIT: Bilateral investment treaty
- MC: Model Convention
- The Convention: The Convention signed between Rainbowland and Gameland.
- VCLT: Vienna Convention on the law of treaties

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IV. Statement of Facts

1. The Applicant is Mr. von Klempner born on 27 August 1980 in the capital of Rainbowland, Rainbowcity.

2. He has always lived in Rainbowcity and after marrying Countess Peach founded a family of two kids. They all live together in their house in Rainbowcity since 2005.

3. Mr. von Klempner began his professional career at the age of 17 as a professional racer, he put an end to this activity in 2005 after 8 years of racing. He has not had any professional activity between 2005 and 2012.

4. The 2nd of January 2012, the Applicant signed a freelance contract with Sonica as counterparty, a resident company of Playland. Mr. Browers who is not party to the contract, orally specified to the Applicant that there could be an agreement to modify the contract during a one year period. No amendment was made to the contract.

The terms of the contract read as follows:

> *a) nature: the contract was entitled "freelance agreement"; parties recognized that they did not intend to construe the contract in a way that it could be seen as an employment contract;*
> *b) duration: 1 year, renewable for equal periods in the absence of written communication terminating the agreement submitted by either of the parties 1 month prior to the renewal;*
> *c) type of services: business consulting and development, marketing strategy an implementation;*
> *d) confidentiality: the freelancer should maintain secrecy about all business-related issues of the contractor or of any other third party he would be working with;*
> *e) payment: for the provision of the services, Super Dário would be entitled to 10,000 coins per month, paid on the 27th of the month in which the services were provide;*

f) settlement of disputes: in case of any disputes regarding the agreement, they should be solved under the competent courts of Playland;

g) monthly activity reports: Super Dário may be asked to submit monthly reports of his activities. In such a case, the activities to be reported would start from the moment of the request.

5. The same day, an addendum of this contract was signed between the same parties specifying that the Applicant would be working under the supervision of the COO of Noentiendo as an expert provided by Sonica.

The terms of the addendum read as follow:

i) During a period of 1 year, the services are to be provided at one of the offices of Noentiendo, under the instruction of the COO of Noentiendo or the person he delegated. Super Dário is to present a monthly report of his activities to this COO.

ii) Noentiendo is to provide a laptop and a fast internet connection.

iii) Noentiendo is to provide housing (hotels or serviced apartments), health insurance (covering payments in the case of sick days), civil liability insurance and a contribution for a private pension plan.

iv) The services are to be provided from 9:00 a.m. until 18:00 p.m. with a 1-hour lunch break.

v) Super Dário is entitled to use common facilities, such as the restaurant, gym, leisure areas, etc., in the same way that any of the employees working for that specific office would.

vi) Super Dário is to be in charge of the strategy for the operative and marketing development of all the racing games developed by Noentiendo in its different offices. For that, he will need to be present at the premises of the different offices of Noentiendo.

vii) Property: all equipment and materials are the property of Noentiendo.

viii) For the settlement of disputes regarding any provisions of the addendum, Gameland courts are competent.

6. There is an overall agreement framing the relation of Sonica and Noentiendo.

The terms of the contract read as follows:

a) Sonica would provide services and some expert external consultants on a regular basis;

b) the payment of each one of those services/external consultants would be done separately;

c) Sonica's business model is mentioned on their website: they provide external consultants and other experts, and they charge their gross cost plus a 5% surplus fee. They explain that this enables companies to be more flexible in the organization of their workforce while having major tax and social security savings, as the burden in Playland was considerably lower;

d) examining the bank statements of Sonica and Noentiendo, it is observed that a monthly amount is paid on the 20th of each month, and this amount also changes each month. The transfer was labelled "transfer";

e) Sonica would not be the only supplier of services or experts to Noentiendo. Sonica would also provide these services and experts to other companies.

7. The Applicant started working for Sonica after signing his contract until its termination on the 15th of June 2012. The dismissal of Mr. von Klempner was the result of Noentiendo communicating to Sonica the will to end the collaboration due to the excesses of the Applicant in his private life resulting in bad publicity for the company. He was therefore employed by Sonica for a duration of 165 days or 5 months and 13 days. He was paid in full for the month of June 2012, therefore he earned 60.000 coins from Sonica during his employment period.

8. During his employment period, the Applicant worked at the different subsidiaries of Noentiendo in Gameland. He was rotating each week amongst 10 offices spread in Gameland. One week per month, he performed e-working from a touristic place in Gameland. He was under the direct supervision of Noentiendo's COO to carry on his tasks. His remuneration came from Sonica’s bank account located in Playland, he received it on his bank account in Rainbowland.

9. During his employment period, the Applicant would go back to Rainbowland every weekend to see his family and attend sports events and social gathering.

10. On 31 October 2012 the Applicant decided to enter a clinic for medical reasons, he was only authorized to leave the facility when cured of his addiction. He was released on 31 December 2012, staying 2 months or 61 days in the clinic.

11. After being dismissed, the Applicant earned 2800 coins for some appearances in Rainbowland’s nightclub.

12. The Applicant did not send any income tax return to Rainbowland’s tax authorities for 2012.

V. Issues

13. Through this memorandum, the defendant shall demonstrate that the income earned by the Applicant is liable to tax in Rainbowland. The first step will be to determine the legal value and hierarchy of the various legal instruments at stake as well as those invoked by the Applicant. Once it is done, we shall present to the court our arguments proving that the Applicant is unequivocally a resident of Rainbowland. Subsequently we will establish that the state of source of the income is Playland as determined by the documents brought before the court and counter the arguments aiming to make Gameland the state of source of the income earned by the Applicant.

14. The decision of the court to disregard Sonica as the counterparty of the contract and to enforce Gameland as the state of source of the income would lead to an application of the tax treaty between this country and Rainbowland. We will demonstrate that an application of this treaty does not preclude the right of Rainbowland to tax the income of the Applicant. We shall reject any recharacterization of the relation mentioned in the documents and apply the Article 7 of the tax treaty. We thereby contest the application of Article 15 of this treaty. If the court decides to consider the Applicant as an employee, the situation does not preclude the state of residence to tax the income derived from this relation. At last, we consider the hybrid nature of the income on the Applicant. If the court gives ground to all of the allegation of the Applicant, we will defend that a substantial part of the Applicant’s income are royalties and apply for this part the Article 12 of the tax treaty.

VI. Argument

1. Application scope of legal sources at stake

15. In a world with different nations, cultures and legal traditions, divergences over interpretation of treaties appear promptly. Various methods exist to overcome those hurdles; resort to the Vienna Convention on the Law of treaties, to the commentaries of the OECD model or to the general principle of international taxation law. All those elements are parts of the solution towards a better understanding of treaties, but not all those texts are binding by law and their combination might lead to baffling results.

16. The tax treaty between Rainbowland and Gameland[54] was negotiated and patterned on the 2003 version of the OECD MC. This model is highly relevant but not always sufficient by itself to solve international taxation law issues. In that concern, practitioner often need to analyze the commentary of the convention to give the best interpretation of the treaty. But one should not forget that those commentaries are not binding for states. If the guidelines offered by them are helpful, sovereignty of national parliament should be preserved.

17. This plea aims to clarify the position of the tax administration of Rainbowland towards the various international sources and legal texts, their juxtaposition and interpretation methods.

1.1. Double taxation treaty OECD MC and its commentaries

18. This section will discuss the personal and material scope of the Convention and the binding force of its commentaries.

1.1.1. Personal scope

[54] Hereafter: The Convention

19. In the first Article of the Convention we can find that it applies to residents of one of the Contracting States.

"This Convention shall apply to persons who are residents of one or both of the Contracting States."

20. As it is reflected in the facts and developed further down, the Applicant is unquestionably a resident of Rainbowland

1.1.2. Material scope

21. In the second Article of the OECD MC we can find that it applies to taxes on income. The core of the dispute is the taxation of the income earned by the Applicant, therefore we stand within the material scope of the convention.

"This Convention shall apply to taxes on income and on capital imposed on behalf of a Contracting State or of its political subdivisions or local authorities, irrespective of the manner in which they are levied.[...]"

1.1.3. Mandatory force of the commentaries

22. Since the Applicant seems to heavily base its arguments on a strict interpretation and application of the latter commentaries of the OECD MC, we felt the requirement to develop our position toward those commentaries.

23. By using the latter version of the commentaries for the interpretation of the DTC, the Applicant uses in bad faith the improper version of the commentaries.

24. Article 31 of the Vienna Convention on the Law of Treaties states that : *"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and purpose"*

25. In our opinion, the latter commentaries of the DTC cannot be considered in good faith as always constituting the context of the DTC. Only the commentaries in effect at the time of ratification of the DTC should be held as binding for the signing states. In this case the treaty has been concluded in 2004 and negotiated on the 2003 version of the OECD MC.

26. It must be clear that we do not reject the precious informative value of the commentaries regarding the interpretation of the convention. However, when new commentaries of the treaty have such effect that one of the party to the convention could not have reasonably foreseen, the concerned State shall not be bound by the amendment to the OECD MC.

27. Reasoning in another way would imply a violation of Rainbowland's constitutional law[55]. Indeed, allowing the OECD's committees to amend treaty through the use of commentaries would have for effect to bypass the legislative procedure[56] in force in the rule of law state that is Rainbowland.

28. An illustrative case of the development hereinabove is the decision ruled by the Tax Court of Canada in *MIL Investments SA v. Her Majesty the Queen* delivered on 18 August 2006[57].

29. In conclusion, utilization of the latest version of commentaries should not be excluded automatically because those comments still are excellent tools of interpretation and guidelines on the application of the DTC. However, one contracting state of the treaty should not be bound by those commentaries when they amend even in the narrowest way the content of the Convention[58].

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[55] LANG, M., *Introduction to the law of double taxation conventions*, second Edition, Linde, Vienna, 2013, p. 42 no 65.
[56] *Ibidem*, p.56, no 95.
[57] CA, TCC 18 aug. 2006, *MIL Investments SA v. Her Majesty the Queen*. See more this excerpt: "[*86] The Respondent presented the 2003 revisions to the OECD commentary as support for the existence of an inherent anti-abuse rule in tax treaties. Article 31(1)(c) of the Vienna Convention states "there shall be taken into account, together with the context, any relevant rules of international law applicable in the relations between the parties."* ***I interpret that to mean that one can only consult the OECD commentary in existence at the time the Treaty was negotiated without reference to subsequent revisions.****[15] The Respondent's own expert on cross-examination agreed that subsequent revisions should be ignored:"*
[58] K. Vogel, R., « Prokisch, General Report - Interpretation of Double Taxation Conventions » *Cahiers de droit fiscal international*, Volume LXXVIIIa, Kluwer, 1993, n. 1298, p. 65. And K. Vogel, « The influence of the OECD Commentaries on Treaty Interpretation », *Bulletin for international Fiscal documentation*, Volume 54, No. 12, 2000, n. 1328 pp. 612-616.

2. *On the allegedly breach of Article 4(2) OECD MC*

30. Determining the residence of a taxpayer is a fundamental question that should always be answered in international taxation law. Indeed, many states consider this criterion as the main nexus to allocate the power of taxation.

31. The determination of the residence of a taxpayer has three functions[59]:

1) Framing the scope of application of a convention on individuals. Convention only applies on the resident(s) of a contracting state.
2) Solving issues of double taxation due to double residence.
3) Solving issues of double taxation due to tax levied in both source and resident states.

32. In this case, a problem arises from the fact that the Applicant might qualify for being a resident of two States. This issue can be solved by using the convention's tiebreaker rules set in Article 4(2) and 3 of OECD MC. Those tests will help us determine the tax liability towards the right state and hence provide us the right national tax law to apply.

33. The determination of the country of residence will also be relevant to assess a conflict between this state and a potential source state.

2.1 Residence criteria regarding Rainbowland law

34. The Applicant is a resident of Rainbowland and subject to taxation in this country. The residence criteria is determined as the result of three alternative conditions.

[59] Ismer, R. and Reimer, K., in Reimer & Rust (eds), *Klaus Vogel on Double Taxation Conventions*, 4th Edition 2015, Article 4, m.no 2.

"Individuals are considered resident if:

1. they have their habitual abode/main dwelling in that country;

2. they spend more than 110 days within a tax year in the jurisdiction;

3. they have at their disposal a physical place that they can use as a home for more than a mere temporary period."

35. After his marriage, the Applicant decided to settle in Rainbowland, buying a gorgeous house where he raised his two kids. All of his relatives live in Rainbowland. His employment is the only reason he spent so much time abroad. At the end of the week, he used to come back home to attend his football club's games and the Sunday Mass.

36. He was born in Rainbowcity and has always lived there. He built his reputation by attending parties. He is even considered as "*the soul of Rainbowcity's nightlife*". Through his reputation, he helped his brother run a profitable business. This business relies mostly on the appearances of Super Dário at various events. He does not only do that for his personal entertainment, he feels responsible of his brother's business as well.

37. During the 2012 tax year there is no doubt that Mr. Dário has spent more than 110 days in Rainbowland. Although his career path led him to work outside of his home country, he remained at least 133 days in Rainbowland during the year 2012.

38. All the conditions to be considered a resident of Rainbowland are met.

2.2. Residence criteria regarding Gameland law

39. The legislation of Gameland uses the same 3 criteria as Rainbowland. During the 2012 tax year, he spent a lot of time in Gameland, more than 110 days but it was exclusively for business matters. During his stays abroad, he slept in many different hotels proving the absence of any habitual abode. As demonstrated in the previous argument, all his emotional bounds remained in Rainbowland. This explains his returns in his home country when he was unemployed.

40. Since those criteria are alternative and not cumulative, some could uphold that even without any habitual abode and no intention to remain in Gameland for other reason than his employment, he could be defined as a resident of Gameland.

2.3. Residence criteria regarding Article 4.2 of the Convention

41. Even if he was considered as a resident of both states, the conflict of residence should be resolved by the convention concluded between the states involved. The Convention is based on the OECD model convention.

Article 4.2 is structured as follows:

"Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:

a) he shall be deemed to be a resident only of the State in which he has a permanent home available to him; if he has a permanent home available to him in both States, he shall be deemed to be a resident only of the State with which his personal and economic relations are closer (centre of vital interests);

b) if the State in which he has his centre of vital interests cannot be determined, or if he has not a permanent home available to him in either State, he shall be deemed to be a resident only of the State in which he has an habitual abode;

c) if he has an habitual abode in both States or in neither of them, he shall be deemed to be a resident only of the State of which he is a national;

d) if he is a national of both States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement "

42. This Article provides a trickling down presumption to resolve residence conflict under domestic laws. The criteria of permanent home allows the state of Rainbowland to consider Super Dário as a resident of this country. As presented above, the center of the appellant's vital interest is in Rainbowland only. His presence in Gameland is strictly related to his work and cannot be acknowledged as constituting a vital interest for him.

43. Since Mr. Dário is effectively a resident of Rainbowland his income sourced in Playland shall be taxed in his country of residence, Rainbowland.

44. There is no doubt that the administration is in its right to levy a tax on the income of its residents, after all, Mr. Dário and his family are enjoying all the public services provided by Rainbowland's authorities such as educational right and infrastructure.

45. One should note that Ms. Peach, Dário's wife and mother of his children never exercised any kind of gainful activity, she barely had any income on her bank account. It is then certain that MR. Dário is the only financial provider for the whole family living in Rainbowland

46. There is a moral obligation to counterpart the benefits of living in Rainbowland by paying tax proportionally to his real contributing capacity. Not taking into account his abroad income would empty his taxable base and hence would not correspond to any kind of socio-economical reality.

3. Recharacterization and artificiality of the structure

3.1. General issue

47. This section is built upon the determination of the work status of the Applicant. The contract is a freelance agreement. Mr. Dário is a consultant provided by Sonica to Noentiendo. The only relevant contract is the freelance agreement concluded between the Applicant and Sonica.

48. The Applicant seems to challenge the nature of his bounds with Sonica and Noentiendo by supporting being in an employment relationship with Noentiendo and declaring its relation with Sonica to be artificial. We will assert our position towards this affirmation.

49. Once this issue is addressed we will asses the tax treatment that should be applied on the income of Mr. von Klempner in the light of the previous development.

3.2 Non recognition of the sham principle and Ramsay's doctrine[60]

50. The domestic law of Rainbowland does not acknowledge the sham principle as a general principle of law. More globally, there is no general rule that economic "substance" takes precedence over a civil law "form".

51. In Rainbowland, economic relationships do not prevail on the assessment of facts as qualified by private law. Rainbowland tax law has to determine and define the items that are taxable. If the statutes refer to private law concepts, those concepts have to be applied as they exist in private law.

52. The Rainbowland private law is clear on the definition of employment. A working relationship has to be a written one. An employment relationship may only be formed by a written employment contract, named as such, in which the parties expressly recognize that they want to be governed by the rules applicable to employment.

53. Tax law is governed by private law and the concepts used in tax statutes should be interpreted in accordance with their private law meaning. The relation between Sonica and the Applicant cannot be considered as artificial since they have a written agreement.

54. The allegedly agreement between Noentiendo and the Applicant does not have any legal ground. The Applicant had several talks with Bowser, Noentiendo's CEO, but this has

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[60] Based on IFA cahier of 2012 of Netherlands and United-Kingdom.

not lead to any agreement. The lack of a written contract confirms the non-existence of the contract alleged by the Applicant.

55. Freelance contracts and other contracts cannot be prequalified by the judiciary as employment contracts. This orientation was recently reaffirmed by Rainbowland's Supreme Court in the *Donkey Konga v. Tax Authorities* case. In this case, an IT expert working for the tax authorities as a freelancer wanted to recharacterize his contract as an employment contract to create an undefined-term contract with the state, becoming a civil servant for life. The courts considered that this could not be done. Even though many elements of an employment contract were present, one could not just breach legal certainty and change the characterization that the parties gave to the contract at the moment they signed it. It also does not matter whether those elements of an "employment contract" are present from the beginning or if they start to be met from a certain moment.

56. Parties cannot simply, by their behavior, change the nature of a contract (from freelance to an employment contract). Scholars in general agree with this doctrine and there is no dissenting case law.

57. Considering the unanimity of the doctrine and the absence of dissenting case law, the Ramsay doctrine cannot prevail and acknowledge the reign of substance over form.

3.3 Improper application of the principles invoked by the Applicant

58. The Sham principle has already been defined by the Applicant. The court should proceed cautiously if she decides to analyze this principle.

59. The characterization of a relationship must be respected as the reflection of the will of the parties. The Supreme Court of Canada writes: "*absent a specific provision of the Act to the contrary or a finding that they are a sham, the taxpayer's legal relationships must be respected in tax cases. Recharacterization is only permissible if the label attached by the taxpayer to the particular transaction does not properly reflect its actual legal effect*."[61]

[61] Canada - Wolf v. Her Majesty the Queen, 15 March 2002.

60. The definition of sham requires "*a subjective intention amongst the parties that the documentation should give to third parties, such as the tax authority, a false impression of the legal reality of the matter*[62]" for its application.

61. This intention must also be common to both parties: "*[n]o unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived"*

62. The recharacterization of a legal relationship requires the intention of both parties to give a false impression to third parties. The Applicant has never had this intention.

63. If he first was surprised to provide his services through Sonica as a freelance, he still decided to sign the contract. The arguments of Mr. Bowser that all he wanted was a job that will allow him to start a new and successful life convinced the Applicant.

64. Furthermore, the sham principle and the Ramsay's doctrine are not designed to be used by the taxpayer for tax purposes. Therefore, an Applicant pleading the disclaiming of his own scheme to avoid the application to his situation of proper rules of international tax law has to care the burden of proof and this burden is a heavy one[63].

3.4 Recharacterization of the contract

65. The 2 January 2012, a freelance contract was signed between Super Dário resident of Rainbowland and Sonica a company incorporated under Playland law, parties clearly stated that their intention was not to agree on an employment contract.

66. The same day the contract was signed, an addendum was added to it and signed by the parties.

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[62] Zimmer, F., "Substance over form. General Report", *Cah. Dr. Fisc*., IFA, vol. 1, 2002, p. 572.

[63] See the Commissioner's decision in *Hitch V. Stone*, summarised by Arden L.J., 2001, STC 214 at 224.

67. For the tax authority ruling over Rainbowland, there is no doubt that the nature of the contract signed by the parties is a contract of freelance and cannot be requalified under no circumstances.

68. The ruling of the Supreme Court of Rainbowland in the *Donkey Konga v. Tax authorities* case is unambiguous on this matter. This jurisprudence is not contested by scholars and as such can be considered as constant.

69. The nature of a contract must be considered only in respect of a formalist approach such as it is operative in Rainbowland.

70. Even in the presence of elements indicating that the real relationship of the parties is an employment contract, there cannot be recharacterization of the contract going against the original agreement of the parties.

71. Even in the presence of elements indicating that the real relationship of the parties is an employment contract, there cannot be recharacterization of the contract going against the original agreement of the parties.

72. Hence it has been determined that we are in presence of a freelance contract between Sonica and the Applicant. We can state that the Applicant is first liable to be taxed as a freelance in the state of Playland. Nevertheless, Rainbowland has the right to tax the income of the Applicant as well. The Rainbowland's domestic law do not preclude double taxation and this country has not signed any convention with Playland to avoid this.

4. Application of Article 7

4.1 General issue

73. Considering the development hereinabove about the qualification of the contract, we shall now examine the application of the Article 7 of the OECD MC to this situation. Article 7:

"Profits of an enterprise of a Contracting State shall be taxable only in that State unless the enterprise carries on business in the other Contracting State through a permanent establishment situated therein.[...]"

74. Furthermore, we will also analyze the question of whether or not we are in presence of a permanent establishment. This is an essential problem of international taxation law. The resolution of it will allow us to assess the strength of the link between the taxpayer and the state of source.

4.2 Scope of application

75. It has been determined that we are not in presence of an employment contract, we can state that the Article 7, replacing the Article 14 of the Convention should be applied to the present situation. Indeed, we consider that the Applicant is practicing an independent activity. Therefore, his income should be qualified as business profit.

76. The allocation of the profits made by Mr. Dário is determined under the rule of Article 7 of the convention based on the Convention.

77. This Article is applicable to profits made by an enterprise. The term enterprise has a broad scope of application, the usage of such a term does not preclude the application of Article 7 to the performance of Mr. Dário.

78. The term enterprise and business has received an autonomous interpretation[64]. Recourse to the domestic law of contracting member states is no longer required. "The term enterprise does not filter out any type of a professional or any self-employed activity[65].

4.3 Allocation of the taxing power

[64] Vogel, K., *The influence of the OECD Commentaries on Treaty Interpretation, op.cit.,* p. 512.
[65] *Ibidem*, p. 518.

79. The first part of the first sentence of Article 7 incorporates as primary rule that the profits are subject to taxation in the state of residence. As summarized above, Mr. Dário is a resident of Rainbowland and therefore shall be only taxable in this country.

80. The exception contained in the same sentence allocates the taxing power to the state where the business is carried on. Mr. Dário has worked in the Noentiendo offices which are all situated in Gameland. Nevertheless, the taxing power of Gameland is contained to the fact that Mr. Dário's activity has been carried on through a permanent establishment situated in Gameland. The Article 7 excludes taxation by Gameland if the requirements of the permanent establishment have not been met according to Article 5 of the same convention. In this regard a permanent establishment test should be carried out.

4.4 Permanent establishment test

82. The term permanent establishment, hereafter PE, means "*a fixed place of business through which the business of an enterprise is wholly or partly carried on.*" [66]

83. As a premise, it seems very unlikely that a physical person performing personal services would have a fixed base in any other state than of his residence[67].

84. Although it is not disputed that a place of business can be situated in the business facilities of another enterprise, consultancy is the kind of services that benefits to be performed within the client's facilities, the place of business has never been fixed geographically.

85. The Applicant was hired to perform business consulting activities. He provided his services in all of the subsidiaries recently acquired by Noentiendo. He used to rotate every week between the offices of the ten subsidiaries. He even had to change room within the same office depending on the availability. Moreover, one week per month he proceeded e-work in touristic locations in Gameland.

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[66] Article 5 of the Convention.

[67] VOGEL, K., *Double Taxation Conventions: A Commentary to the OECD-, UN-, and US Model Conventions for the Avoidance of Double Taxation on Income and Capital*, 4th Edition, Kluwer, London, 2015, p. 1086.

86. The activities carried on by Mr. Dário lack geographic coherence to be considered as a single place of business. As far as mobile consultants are concerned, the OECD commentaries set against diagonal contractions and acknowledge that "*the single branch location possesses geographical coherence which is absent where the consultant moves between branches in different locations*". Therefore, a PE cannot be determined by combining different locations over time.

87. The UN model convention goes one step further and requires the activities to be linked to a same or connected project. Recently, the Committee of fiscal affairs took into consideration the absence of this additional condition and advises the different states to insert this condition in their bilateral conventions.

88. Due to a legal merger, all of the different offices belong to the same company : Noentiendo. Nevertheless, they keep a certain degree of independence and all of the branches are still developing their own set of games. Because of that, the delivery of services provided by Dário are not connected to a single project and those different projects lack coherence between them.

89. The PE concept has been introduced in order to ensure that foreign investors have enough time to understand and consider the tax and accountancy duties-that they are expected to fulfil. Furthermore, the tax administration of the source state should be relieved to perform his duties when an enterprise has no intention to keep or has only little physical presence in that state.

90. Mr. Dário spent as little time as he could in Gameland and his constant travel across the country made his physical presence hard to assess. The burden of the tax administration to contact and collect the relevant information regarding the business and Mr. Dário himself as well as a potential tax procedure before a court would vastly exceed the potential benefits of taxing his activities. In order to prevent double non-taxation due to a lack of information and a limited presence in Gameland, Rainbowland should be the state levying the tax[68].

[68] Reimer, N. Urban, S. Schmidt, P*ermanent establishment, a domestic taxation,* bilateral tax treaties and OECD perspectives, Wolters Kluwer, 2012, p.55.

91. The 2008 update of the OECD MC Commentaries has reflected the permanent establishment of services. This alternative proposal offers an additional paragraph to acknowledge the existence of a PE. This new "PE test" is based on 183-day rule.

92. In addition, "*Services performed by an individual on behalf of one enterprise shall not be considered to be performed by another enterprise through that individual unless that other enterprise supervises, directs or controls the manner in which these services are performed by the individual"*[69].

93. The Applicant could use the concept of permanent establishment of services but one should not forget that it is only a proposition. The binding effect is beyond those of the commentaries which intend to clarify the Articles of the OECD MC. The effects of this new notion could not have been reasonably foreseen by the parties when they signed the treaty between them.

94. The tax administration of Rainbowland rejects the application of the PE of services.

5. On the allegedly breach of Article 15(2) of the Convention

5.1. General issue

95. The Applicant claims that even though he signed a freelance contract with Sonica on 2 January 2012, this contract must be requalified as an employment contract between Mr. von Klempner and Noentiendo.

96. In our opinion, such a scheme is aggressive and is only motivated by tax reasons.

97. State of work might qualify the employment relationship but it may not change the counterparty of a contract. In casu the parties of the contract are the Applicant and Sonica.

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[69] VOGEL, K., *Double Taxation Conventions: A Commentary to the OECD-, UN-, and US Model Conventions for the Avoidance of Double Taxation on Income and Capital*, *op. cit.*, p. 400.

98. But if the definition in the state of work is broader than what the residence state might have reasonably foreseen at the moment of the signature of the treaty, it may refuse the qualification of the contract. Which is the case here, it is true that the domestic law of Gameland provides that qualification of freelancer contract can be recharacterized under certain circumstances, but changing party of a contract under the pretext of a recharacterization is certainly not a sign of good faith. The result of such method is a serious hint that the reciprocity of the treaties engagement has been tainted.

99. In those conditions it is legitimate for the state of residence to refuse the characterization operated by the authority of the member states applying such a treatment. An illustration of this principle can be found in a case rendered by the Dutch Hoge Raad in 2003[70].

100. If any recharacterization should occur, it would still be a contract between Dário and Sonica.

5.2. The legal principle

101. The first Paragraph of Article 15 gives the right to tax to the state where the employment is exercised. The Applicant considers that Gameland is entitled to tax his income. We have already demonstrated that the actual counterparty is Sonica, a resident of Playland, and that the Applicant was performing his services as a freelance.

102. Even if the Applicant was considered as an employee by the court, the paragraph of the Article 15 brings a general exception to the first paragraph. Indeed, the remuneration derived from the pretended contract of employment would be taxable in Rainbowland, the state of residence if:

a) he had spent less than 183 days in Gameland, in any twelve month period commencing or ending in the fiscal year concerned, and;

[70] Dutche Hoge raad of 5 september 2003, Case No 37.651, *VN 2003/46.7*. Saw in K. Vogel, *op.cit*. p. 1149.

The applicant uses the physical presence test to count the days. This method is contested by the administration on the basis of dissenting doctrine. Even if it doesn't make a huge difference, only the actual working days should be taken into consideration.

The applicant started to work the 2 of January and his contract was terminated the 15 of June. Even if he had stayed during the week-end, he wouldn't have worked more than 166 days since he his contract had only lasted for 24 weeks and was terminated Friday 15st of June.
Even if the physical presence test was carried out, he had only stayed for 171 days which is less than the 183 days required.

He came back in Gameland on 31 October 2012 in order to check into rehab. He had stayed in a famous clinic of Gameland until 31 December 2012. This period could qualify him for the 183 days.

The commentary 5 of the article 15 includes days of sickness for the calculation of the 183 days. However, the commentary add "*unless they prevent the individual from leaving and he would have otherwise qualified for the exemption*". If the applicant entered voluntarily, he couldn't leave the clinic until the doctors told him he was cured. The very next day, the applicant regretted his decision. This means that he wanted to leave earlier but was prevented to do so. The two months spent in the clinic situated within the state of Gameland should not be taken into account for the calculation of the 183 days.

b) he had been paid by, or on behalf of an employer who is not a resident of Gameland, and;

All of the payments made to the Applicant came from a branch of Sonica situated in Playland. The money was directly transferred from Sonica's bank account to the bank account of the Applicant.

c) the remuneration is not borne by a permanent establishment which the employer has in Gameland.

103. The three conditions prescribed in this paragraph must be satisfied for the remuneration to qualify for the exemption. It makes sense that those cumulative conditions are met,

6. Application of Article 12 of the Convention

104. Finally, we consider that a ratio of Mr. von Klempner's income should be qualified as royalties since his added value to Noentiendo is not solely based on his management skills but also on the fact that he endorses the image of the company.

6.1 General issue

105. In our view, MR. von Klempner fees must be partially considered as royalties such as defined in Article 12 of the OECD MC.

106. Royalties revenue are ruled by the special allocation norms that frame the asset generating the income. Special norms apply preferentially to norms based on the nature of activity such as entrepreneurship, Article 7 of OECD MC or employment, Article 15 of OECD MC.

107. Article 12, 1° of the OECD MC provide that royalties shall be taxed in the state of residence of its beneficial owner.

108. Article 12:

"*1. Royalties arising in a Contracting State and beneficially owned by a resident of the other Contracting State shall be taxable only in that other State.*
2. The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, any patent, trade mark, design or model, plan, secret formula or process, or for information concerning industrial, commercial or scientific experience.

3. The provisions of paragraph 1 shall not apply if the beneficial owner of the royalties, being a resident of a Contracting State, carries on business in the other Contracting State in which the royalties arise through a permanent establishment situated therein and the right or property in respect of which the royalties are paid is effectively connected with such permanent establishment. In such case the provisions of Article 7 shall apply.

4. Where, by reason of a special relationship between the payer and the beneficial owner or between both of them and some other person, the amount of the royalties, having regard to the use, right or information for which they are paid, exceeds the amount which would have been agreed upon by the payer and the beneficial owner in the absence of such relationship, the provisions of this Article shall apply only to the last-mentioned amount. In such case, the excess part of the payments shall remain taxable according to the laws of each Contracting State, due regard being had to the other provisions of this Convention. "

6.2 On the notion of Know-How

109. End of paragraph two of the Article 12 OECD MC provide the following: "*payments received as consideration for information concerning industrial, commercial or scientific experience* […]*"*. By doing so it is referring to the notion of Know-how.

110. The Commentary of the OECD MC provides us a definition of the Know-how contractual relation:

"*In the know-how contract, one of the parties agrees to impart to the other, so that he can use them for his own account, his special knowledge and experience which remain unrevealed to the public. It is recognized that the grantor is not required to play any part himself in the application of the formulas granted to the licensee and that he does not guarantee the result thereof.* "[71]

111. Various hints lead us to conclude that the contribution of the Applicant is constituted of Know-how. Dário spent several years developing his image so that he is now recognizable worldwide. He has limited programming skills and has not intended any management courses. We know for a fact that the Applicant was hired in order to attract Rainbowland's media

[71] OECD (2012), *Model Tax Convention on Income and on Capital 2010 (updated 2010)*, OECD Publishing. C(12)-7. *http://dx.doi.org/10.1787/978926417517-en*

interest to Noentiendo. Hence we can deduct that recruitment, endorsement and participation to the development of Noentiendo games by MR. von Klempner are motivated by marketing purposes.

112. Commentary of the OECD developed three criteria to distinguish Know-how and technical services:

— *Contracts for the supply of know-how concern information of the kind described in paragraph 11 that already exists or concern the supply of that type of information after its development or creation and include specific provisions concerning the confidentiality of that information.*

The contract of the Applicant contains a provision regarding confidentiality of his mission and all related information. Moreover, we can reasonably state that this information already existed when the contract was signed since as he was to provide the team with his knowledge of kart racing arising from his own experience as a pilot.

— *In the case of contracts for the provision of services, the supplier undertakes to perform services which may require the use, by that supplier, of special knowledge, skill and expertise but not the transfer of such special knowledge, skill or expertise to the other party.*

Again, it seems to be the exact situation in this case. Mr. von Klempner will share his experience but is an intangible asset that is not subject to transfer. For it is not possible to effectively transfer experience, it can only be shared.

— *In most cases involving the supply of know-how, there would generally be very little more which needs to be done by the supplier under the contract other than to supply existing information or reproduce existing material. On the other hand, a contract for the performance of services would, in the majority of cases, involve a very much greater level of expenditure by the supplier in order to perform his contractual obligations. For instance, the supplier, depending on the nature of the services to be rendered, may have to incur salaries and wages for employees engaged in researching, designing, testing, drawing and other associated activities or payments to sub-contractors for the performance of similar services.*

Anew this criterion is met. Other than what was asked to the Applicant in its contract, nothing specific was demanded to him. He had no large expenditure to his name nor tremendous self investment. We can also see the ease with which he was revoked and the system of rotation as hints of the low level of deep investments made by the Applicant.

117. Seeing those elements coming both from factual and legal perspective, we must come to the conclusion that the major reason he was hired was his know-how which constitute his main added value to the undertaking.

6.3 Application of Article 12

118. Now that we have demonstrated that the Applicant contribution is made of Know-how which according to the commentary is in the scope of Article 12 OECD MC.

119. Paragraph 1 of the Article provides exclusive taxation of royalties in the State of residence the beneficial owner, *in casu*, Rainbowland.

120. Paragraph 3 offers an exception to this rule, if the royalties income arises through a permanent establishment situated in the state where the beneficial owner carries on business and if the intellectual right is connected with such permanent establishment then the provisions of Article 7 shall apply.

121. The intermediary of the payment, Sonica, is not located in the state where the Applicant is carrying on business, Sonica is a resident company of Playland and Dário is working in Gameland.

122. Furthermore, Sonica does not have any right to use the royalties because he can only charge a small commission in addition to Dário's compensation. Sonica has a legal obligation to pass the payment made by Noentiendo to Dário.

123. The exception provided by paragraph 3 will not apply in our case hence the taxation right should be allocated to Rainbowland for the portion of income related to royalties.

6.4 Existence of a mixed contract

124. In our opinion and seeing he development we just made, the contract binding the Applicant and the interested undertakings should be qualified as a mixed contract providing services and covering Know-how.

125. The Commentary discussed this possibility and recommend to break down the remuneration of the payee regarding the information at disposal whether they are found in the contract or factual information in order to accurately determine the tax treatment that should be applied.

126. For example, in the Retief Goosen case[72], a professional golfer was bound through endorsement contracts with different companies notably present in video games and clothe domain. Those contracts also included agreements on performance on some services.

127. The payee was paid in only one payment but the court decided to breakdown his salary in two equal parts, one remunerating his services and the other the royalties he was earning for the endorsement.

128. Courts have repeatedly characterized payments for the right to use a person's name and likeness as royalties because the person has an ownership interest in the right.

129. The characterization of petitioner's on-course endorsement fees and bonuses depends on whether the sponsors primarily paid for petitioner's services, for the use of petitioner's name and likeness, or for both.

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[72] Retief Goosen, Petitioner v. Commissioner of Internal revenu, erspondent.Docket No. 23323-09. Filed June 9 2011.

130. One of the most obvious evidence is the huge amount of money received by the Applicant. During the performing of his services he was paid 10.000 coins per month. This amount exceeds vastly those paid for a common service provider. He did not have any notable skills in strategy or marketing and has not even attended any business school. Considering his appointments, the court should assess that all of the income of the Applicants are in fact royalties after deduction of the income that only a standard wage should be considered as such.

6.5 Allocation of taxing power

131. Our opinion is that such a treatment should be applied to the Applicant since part of his work consist to providing services but he is also remunerated for the Know-how he shares with Noentiendo those treatments should be qualified as royalties' revenue.

132. As we explained it hereinabove, the right to levy taxes on royalties' revenue is allocated to the State of residence of the beneficial owner, here Rainbowland.

133. The Court must assess whether his fees should be breakdown into two categories which shall be taxed accordingly or if the of the provision namely provision of services or provision of Know-how consist by far the main purpose of the contract.

134. In the first hypothesis the income of the appellant shall be treated both as described in this section and as developed above in the section on Article 7 of OECD MC. In the second hypothesis only one of those tax treatment shall be applied.