International

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# Administrative Aspects of the Application of Tax Treaties

**The administrative implications of the application of tax treaties are often considered to be a somewhat uninteresting subject. The author, in this contribution, however, demonstrates that the topic has great significance, especially with regard to the issue of double taxation. In this context, the author first outlines the relevant issues, and then considers the lack of cross-border coordination and the implications of public law principles before examining what case law there is on the issue.**

## 1. Introduction

The administrative aspects of the application of tax treaties is a subject that is considered by most to be boring and unchallenging.[1] Although often neglected, the topic is of great relevance, as double taxation may arise due to the lack of effective administrative procedures to apply treaty provisions. Even if double taxation does not arise, the lack of effective administrative procedures to apply treaty benefits may result in an allocation of tax revenues that is inconsistent with the agreement made by treaty partners. This article is intended to raise awareness, particularly in relation to the increasing number of individuals and small enterprises that cross borders for business reasons and often face double taxation for purely procedural reasons. It does not claim to be comprehensive or detailed. It also does not deal in depth with the issue of collective investment vehicles and portfolio investments made through a chain of intermediaries, where the same problems are found in even greater degree and which is currently being addressed by the OECD.[2] After an overview of the basic issues that states face when applying a tax treaty, the article describes the applicable international law principles and summarizes some of the existing case law. The article ends with some wishful thinking on the part of the author.

## 2. Outline of the Issues

### 2.1. Introductory remarks

When outlining the issues related to the administration of tax treaties, it is necessary to view the situation from both the perspective of the source state and that of the residence state, as well as from the perspective of the investor. In general, whilst the source state is interested in granting treaty benefits only to those who are actually entitled to them, the residence state is concerned that its resident taxpayers do, in fact, obtain the treaty benefits they are entitled to and that it is aware that they are deriving income from abroad. The investor is primarily concerned that he obtains the treaty benefits to which he is entitled, without having to comply with procedural requirements that are disproportionately burdensome or costly. This article primarily considers the issues arising from the perspective of the source state, i.e. how to ascertain the taxpayer's entitlement to treaty benefits and whether or not treaty benefits should be granted directly, i.e. through "relief at source", or through a refund procedure.

### 2.2. How to verify entitlement to treaty benefits

The main issue in ascertaining a taxpayer's entitlement to treaty benefits is often ultimately how to verify that the taxpayer is a resident of the other contracting state. In practice, residence for treaty purposes is currently generally proven by the taxpayer through a "certificate of residence".[3] It may, however, also be proven in other ways, such as a self-statement or by presenting documents that show residence in a certain jurisdiction (for example, an identity card).[4]

A certificate of residence can be loosely defined as a certificate issued by the relevant tax authorities, which certifies that the taxpayer is resident in that jurisdiction for tax (treaty) purposes. This may be done through a specific form to be completed by the taxpayer and stamped by the relevant tax authorities or through an ordinary letter written by the relevant tax authorities. In many cases, the tax authorities of the state of residence are required to confirm the residence of the taxpayer on forms issued by the source state of the income. These forms may have been prepared by the source state specif-

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1. The only references the author was able to find in literature, besides comments on case law in various countries, are David W. Williams, "Practical issues in the application of double tax conventions", *Cahiers de Droit Fiscal International*, Vol. 83b (The Hague: Kluwer Law International, 1998) and Michael Lang, "The Procedural Conditions for the Implementation of Tax Treaty Obligations Under Domestic Law", *Intertax*, Vol. 35 (2007-3), pp. 146-151.
2. See the Informal Consultative Group Report, "Possible Improvements to Procedures for Tax Relief for Cross-Border Investors", available at www.oecd.org/dataoecd/34/19/41974569.pdf ("the ICG Report").
3. The ICG Report recommends as a best practice that source states replace requirements for certificates of residence with requirements for investor self-certification or that they take other steps to reduce the burden of such requirements. See the ICG Report, Paras. 142-144.
4. See, for example, the declaration to be submitted to the Danish tax authorities available at www.skat.dk/blanketter/49047.pdf. Similarly, see form W8-BEN, Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding, which is available at www.irs.gov/pub/irs-pdf/fw8ben.pdf.

ically for residents of that other contracting state or, in general, for non-residents.[5] The forms may also have been prepared for treaty application in general or in relation to a specific item of income.[6]

Generally, the taxpayer must submit certain information to its tax authorities and request the certificate of residence through a specific form.[7] It is increasingly possible to file a request via fax, e-mail or a form-free letter. In some states, however, the personal appearance of the applicant at the office of the tax official handling the request may still be required and this may be extraordinarily burdensome.[8]

Certification of residence is generally made by the residence state tax authorities for a given past period. It is usually given up to the date of its signature, sometimes by making it explicit that it is based on information available at a certain date. Sometimes, the certificate refers to a specific tax year or period,[9] or even a specific date in the past.[10] In the latter case, if the source state requires the certification to be valid at the time the payment is made, this will, in practice, render impossible the application of the treaty directly and the only way to claim treaty benefits will be through refund procedures. In many cases, source states accept a certificate of residence issued in the past for a given period, subject to the condition that, if the factual circumstances have changed, the taxpayer must inform the tax authorities of the source state.[11]

A certificate of residence is generally issued in the language of the issuing state. More and more frequently, states are issuing forms in English, in other languages, or in their own language with translation into other languages. This is particularly important when the residence state is asked to certify residence based on standard forms issued by the source state. Some source states require the certificate to be translated into their own language and the translation to be legalized; for example, an authorized translator, a local court or the local consulate must certify that the document has been properly translated. This may be extremely onerous in practice.

The content of the certificates of residence drafted by different countries often varies. Some certificates expressly state that the taxpayer is liable to tax on a specific item of income, whilst others simply state that the taxpayer is generally liable to tax in a given jurisdiction. Standard forms to certify treaty entitlement issued by the source state are often issued per item of income. They frequently also require a certification that the person claiming the benefits of the treaty meets certain other conditions (for example, in respect of interest income, that the taxpayer is the beneficial owner of the income, that it does not maintain a permanent establishment in the source state to which the income is attributable, and that there is no special relationship between the payer and the payee). This may create a problem, as the residence state may not necessarily have this information, but it is still required to certify that the conditions are met. It appears that, in practice, residence states simply check whether or not the taxpayer is resident in their jurisdiction and, if so, routinely certify the source state's form, generally to "the best of their knowledge".

Finally, another issue on which state practices vary involves recurrent claims, i.e. where the same taxpayer receives more than one payment from the same state, whether or not through the same withholding agent. In some states, when the same taxpayer receives more than one payment from the same state, a separate request with the necessary documentation must be made for each payment. In other states, the same request may also be used for other payments or the supporting documentation does not need to be reproduced, although a separate request has to be made.

### 2.3. Direct application versus refund procedure

Once the taxpayer's treaty entitlement is verified, the next question is whether treaty benefits should be granted directly or through a refund procedure. Under a system of "direct application of the treaty" (also referred to as "relief at source"), the level of withholding tax imposed in the source state is automatically reduced at the time of payment to the maximum amount allowed under the tax treaty. The way treaty benefits are "directly" granted in practice varies between states. In some states, once the withholding agent has all the necessary documentation, it can directly apply the reduced treaty rate. In other states, the automatic application of the treaty rate may still be subject to the pre-approval or pre-clearance of the tax authorities of the source state. Under a "refund" system, a state imposes tax at the full domestic rate and it subsequently refunds the difference between the tax so levied and the maximum amount allowed under the tax treaty.

5. For an example of the first type, see the Danish form to be used by residents of the United Kingdom, available at www.skat.dk/getFile.aspx?ID=14949. For an example of the second type, see the UK form for non-resident companies deriving interest or royalties from the United Kingdom, available at www.hmrc.gov.uk/cnr/dtcompany.pdf.

6. For an example of the first type, see the Austrian form, to which more specific forms have to be attached, available at http://formulare.bmf.gv.at/service/formulare/BMF/Internet/2004/ZSQU1.pdf. For an example of the second type, see the Netherlands form to be used by Luxembourg residents for claiming treaty benefits on dividends, available at http://download.belastingdienst.nl/belastingdienst/docs/gedeeltelijke_vrijstel_of_terruggaaf_divbel_ib09523pllux.pdf.

7. See, for example, the US form for this purpose and the related instructions, available, respectively, at www.irs.gov/pub/irs-pdf/f8802.pdf and at www.irs.gov/pub/irs-pdf/i8802.pdf.

8. As, for instance, appears to be the situation in Colombia. See Claudia Vargas, "Colombia: Treaty benefits – new rules introduced regarding tax residence and tax situation certificates", *IBFD Online Tax News Services*, 4 June 2009.

9. See the form to claim treaty benefits in Ireland for an example; available at www.revenue.ie/en/tax/it/forms/ic3.pdf.

10. For an example, see the form to claim treaty benefits in Finland, which makes reference to the date from which the taxpayer is a resident. The form is available at www.vero.fi/nc/doc/download.asp?id=2770;18836.

11. See, for example, the instructions for the form to be used by non-resident companies to claim exemption on dividends paid by Irish companies to companies resident either in the European Union or in a treaty state, where it is stated that the form is valid from the date of issue of the certificate to the 31 December of the fifth year following the year in which the certificate was issued. The form and the related instructions are available at www.revenue.ie/en/tax/dwt/forms/nonresv2a.pdf.

In this respect, state practices also differ. In some cases, requesting a refund of the excess tax levied by the source state is the only possibility for taxpayers. In other cases, this is the default option when, for instance, the withholding agent was not in possession of the documentation needed to claim the automatic application of the tax treaty, the required authorization from the tax authorities was not received before the payment was made or in any other instance where the procedural conditions set under domestic law are not met.

The OECD Model Tax Convention ("the OECD Model") emphasizes the need to agree on the procedural aspects of how relief will be granted in relation to dividends and interest by stating that:

> ... The competent authorities of the Contracting States shall by mutual agreement settle the mode of application of these limitations.[12]

The OECD Commentary on Arts. 10 and 11 of the OECD Model makes clear that the provision does not settle procedural questions and that, therefore, each state may use the procedures provided in its own domestic laws.[13] In other words, the source state can decide which method to apply and, therefore, either to limit its tax to the rates provided for in the tax treaty or to tax the income in full and then give a refund equal to the excess tax levied in the first place. The OECD Commentary on Art. 1 contains some general statements regarding the administration of tax treaties. The guidance contained in Para. 26.2 of the OECD Commentary on Art. 1 is generally along the same lines as that contained in the OECD Commentary on Arts. 10 and 11:

> ... A State can therefore automatically limit the tax that it levies in accordance with the relevant provisions of the Convention, subject to possible prior verification of treaty entitlement, or it can impose the tax provided for under its domestic law and subsequently refund the part of that tax that exceeds the amount that it can levy under the provisions of the Convention.
>
> As a general rule, in order to ensure expeditious implementation of taxpayers' benefits under a treaty, the first approach is the highly preferable method.
>
> If a refund system is needed, it should be based on observable difficulties in identifying entitlement to treaty benefits. Also, where the second approach is adopted, it is extremely important that the refund be made expeditiously, especially if no interest is paid on the amount of the refund, as any undue delay in making that refund is a direct cost to the taxpayer.

This guidance clearly indicates that contracting states are free to choose whether to apply the treaty provisions directly or through a refund procedure, although it also clearly indicates a preference for applying the treaty directly.[14] From a rough analysis of the practices of a number of states, it appears that most states allow the application of both methods. Provided that the conditions set under domestic law for direct reduction of the tax are met, the taxpayer is allowed to claim treaty benefits directly. If this is not the case, the full domestic tax must be paid and a refund must then be requested. Other states instead only provide for refund procedures on certain items of income, so that there is no possibility for the taxpayer to claim the benefits of the treaty directly with regard to such income. Finally, in other states, there is no official guidance and the taxpayer or withholding agent must make a choice on its own.

Whenever tax treaties are applied through the refund mechanism, a relevant question is whether or not the state pays interest on the refunded amounts, i.e. on amounts that the state should not have retained according to the applicable treaty, but has done so under its administrative procedures. In this respect, tax treaties are generally silent and leave it to the domestic law of the states concerned to regulate the matter. States' practices differ. In some situations, interest is paid but at a very low rate, in others it is paid at market rates, and in others it is paid, but it starts to be calculated after a certain time from the payment of the excess tax or from the request for the refund. Finally, there are states where no interest is paid on the refunded amount. This may be onerous in practice, as it directly affects the cash flow position of the taxpayer concerned.

## 3. Lack of Coordination at Cross-Border Level

As appears from the outline of the main issues arising in the application of tax treaties, this is an area where there are substantial differences between states. Aside from the current OECD work on possible improvements to procedures for tax relief for cross-border investors,[15] the 1998 IFA General Report and a few other contributions in the literature, no major effort has been made to streamline and standardize domestic administrative procedures, to make them more convergent or, at least, to highlight best practices that countries could follow when devising their administrative procedures to apply tax treaties.

If left unaddressed, issues arising from administrative procedures may prevent tax treaties from achieving their main purposes, which is obviously unsatisfactory.[16] There are a number of cases where double taxation arises and is not resolved simply because of lack of coordination between the states concerned. Consider the following case. An individual resident in State A is contracted to give a lecture in State B in 2009 (actually a lecture on tax treaties for the tax authorities of State B!). When the client in State B is about to transfer the agreed remuneration to the bank account of the individual, it asks for a certificate of residence to be issued by State A, stating that the individual is a resident of that state for purposes

12. See Art. 10(2) and also Art. 11(2) of the OECD Model.
13. See Para. 19 of the OECD Commentary on Art. 10 and Para. 12 of the OECD Commentary on Art. 11.
14. This is also consistent with the "best practice" recommendations of the ICG Report, which recommends use of the "relief at source" approach, but also improvements to refund procedures for those exceptional cases in which the use of the refund approach is necessary. See ICG Report, Paras. 127-128.
15. See the ICG Report. The OECD's Committee on Fiscal Affairs agreed in January 2009 to have a pilot group of government and business representatives pursue work on the ICG Report's "best practice" recommendations for improving the procedures in respect of claiming treaty benefits on cross-border portfolio investment income.
16. This conclusion is clearly consistent with the conclusion reached in the ICG Report.

of the A–B tax treaty. It should be noted that the client in State B knows very well that the individual is a resident of State A, because of the personal relations between the individual and some of the employees of the client. The individual sends an e-mail to the local office of the tax authorities of State A asking for a certificate of residence and is told that State A does not issue certificates of residence. The individual informs the client accordingly. The client replies that without a certificate of residence, it must levy a 30% withholding tax under the domestic law of State B. The individual gets really upset. He considers that he has been deprived of his own money and time. He wonders why the tax authorities of the two states do not simply communicate with each other based on Art. 26 of the A–B tax treaty. The individual wonders whether or not the case should be brought to court and on which basis.

## 4. Public International Law Principles

There are a number of international law principles that could be of relevance when dealing with the administrative aspects of tax treaties, such as the principles of effectiveness and of proportionality. The exact scope and effect of these principles is debated in the literature, but most would agree that they are an expression of the more general principle of good faith.[17] Specifically, Art. 26 of the Vienna Convention on the Law of Treaties states that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith". In addition, Art. 27 of the same Convention makes it clear that "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

One distinguished author has drawn a parallel between tax treaties and European Community (EC) law, based on the premise that, from a public international law perspective, both the EC Treaty and tax treaties are international treaties.[18] Considering that there is a wealth of case law from the European Court of Justice on the principles of effectiveness and proportionality, that author considers that this could contribute to the development of a common understanding of the way in which the principles have to be applied, also in relation to tax treaties. Specifically, that author stated that:

> ... if it were impossible to derive any principles from the EC Treaty and the tax treaties which have to be followed by States when they determine the procedural provisions, both the obligations under the EC Treaty and the obligations under bilateral treaties would be meaningless: if States were not limited at all in this respect, the application of EC Law or tax treaty law would ultimately be voluntary on the side of the States.

In other words, that author considers that the principles of proportionality and effectiveness should be taken into account as a limit imposed on states when devising domestic procedures for granting treaty benefits.

Where double taxation arises due to domestic law procedures, it appears to be legitimate to enquire whether or not either of the two contracting states has failed to perform the tax treaty in good faith. This is a question that is difficult to answer, particularly when double taxation is not the result of the procedures applicable under the law of one contracting state, but is, rather, due to a lack of coordination of the procedures set under the laws of both contracting states. In this case, it could, in fact, be argued that neither state is violating the tax treaty, as each is complying with the good faith requirement. Conversely, if the procedures set by one contracting state make claiming treaty benefits practically impossible, such procedures could be considered to be not in accordance with the good faith requirement.

Another interesting issue, which would be worth analysing in the future, is the effect on the application of these principles of provisions such as Arts. 26 and 27 of tax treaties based on the OECD Model. In fact, these provisions constitute the legal basis for cooperation between the two contracting states and it could be argued that they should be factored into the evaluation of the proportionality of measures taken by the contracting states. The author believes that a pragmatic approach must be taken. The practice and not the theory should be considered, and it should be ensured that these instruments are truly effective if they are to be taken into account when analysing the proportionality of states' administrative measures.

Finally, it should be noted that one distinguished author has stated that:

> If the DTC merely indicates that the rate of withholding tax be reduced, the wording as such of this indication means that technically, the withholding agent should from the outset withhold no more than the reduced amount of tax, and according to generally accepted principles, that rule, being *lex specialis*, would take precedence over domestic provisions governing the withholding procedure and related formalities.[19]

The author is not fully convinced that it is necessary to go that far. He believes the interests of all parties involved, i.e. the contracting states and the taxpayer, should necessarily be taken into account. There is a need for a balanced approach that, on the one hand, does not make obtaining treaty benefits impossible or extremely cumbersome and, on the other, ensures that treaty benefits are only granted where appropriate. Only with this balance in mind is it possible to devise a system that is at the same time effective and administrable. This also appears to be the view generally taken by courts when they are asked to deal with the issue.

## 5. Relevant Case Law

### 5.1. Introductory remarks

There does not appear to be much case law on the compatibility of domestic law procedures with the relevant tax treaty, but there have been some court decisions in

17. See F.A. Engelen, *Interpretation of Tax Treaties under International Law* (Amsterdam: IBFD, 2004), at pp. 179 et seq.
18. See Lang, supra note 1, p. 149.
19. Klaus Vogel, *Klaus Vogel on double taxation conventions: a commentary to the OECD, UN and US Model Conventions for the avoidance of double taxation on income and capital: with particular reference to German treaty practice* (3rd ed.) (London: Kluwer Law International, 1997), p. 572.

various countries. Some of the most representative cases are summarized in 5.2. to 5.7.

### 5.2. US Tax Court (28 July 1986)

The case involved the issue of whether or not a US withholding agent, Casanova Co., could be held liable for having applied the exemption applicable to interest under the United States–Netherlands Antilles tax treaty to interest payments it made to a Netherlands Antilles corporation in 1980, even though it did not obtain from the Antilles company the relevant US treaty relief claim forms which the Internal Revenue Service (IRS) had prescribed until 1984.[20] The IRS had issued regulations indicating that a self-certification form was required to establish entitlement to treaty relief and that such a form should be filed with the withholding agent "as soon as practicable". The IRS had also issued procedural guidelines indicating that both the self-certification form and a form from the Netherlands Antilles government certifying that the Antilles company was, in fact, organized in the Netherlands Antilles had to be filed with the withholding agent before the interest was paid. The Tax Court held against the IRS, finding that the requirements in the procedural guidelines went beyond:

> reasonable provisions to assure the orderly and efficient administration of the laws and the protection of the revenues [and had] the effect of extending the law, and limiting the substantive rights of taxpayers, beyond that which the treaty provisions and respondent's regulations require.

### 5.3. French Supreme Administrative Court (17 June 1987)

The case concerned royalties paid by a company resident in France to a company resident in the United States.[21] The royalties concerned were taxable at source under French domestic law, but were taxable only in the residence state under the applicable tax treaty. The French company made the payments to the US company free of tax and the French tax authorities assessed the company for failure to withhold tax. They claimed that, under the administrative requirements set out in Instruction 14-B-16-1972, the royalty payments could be made free of withholding tax only if a request for exemption, duly validated by the US tax authorities, had been sent to the French tax authorities. The case was brought before the French Administrative Supreme Court. Considering that nothing in the relevant tax treaty allowed the French tax authorities to subject the exemption at source to the submission of these documents, the Court accepted the taxpayer's position and stated that treaty benefits could not be denied in the case in question.

### 5.4. Netherlands Supreme Court (23 March 1994)

The case concerned a dividend payment made by a Netherlands resident company to its 100% parent company resident in the Netherlands Antilles.[22] Under the applicable domestic law at that time, a 25% withholding tax applied, whereas under Art. 11(3) of the Arrangement for the avoidance of double taxation between the various parts of the Kingdom of the Netherlands no tax could be levied at source. Based on an explicit authorization provided for in the Arrangement, the Netherlands tax authorities had issued regulations for the implementation of the provisions of the Arrangement. Under these regulations, in order to pay dividends without any withholding tax, payers were required to first obtain an authorization to that effect from the competent tax authorities. In the absence of such an authorization, withholding tax was due according to the full domestic rate, but afterwards the recipient of the dividend could request a refund of any undue tax paid. The Netherlands subsidiary had not applied for the authorization, but it had still paid dividends free of withholding tax. The Netherlands tax authorities audited the Netherlands subsidiary, which asked to be retroactively discharged from its withholding obligation. That request was denied by the Netherlands tax authorities who assessed the Netherlands subsidiary for failing to withhold tax. The case was brought before the Netherlands Supreme Court.

The Netherlands Supreme Court rejected the taxpayer's appeal. The Court considered the regulations to be duly authorized by the Arrangement. In particular, it recognized the requirement of prior authorization was justified by the necessity for the tax authority to determine whether or not the application of the provisions of the Arrangement would be appropriate. The Court also considered that, without a prior authorization being issued, the obligation to withhold under domestic law would remain unaffected, and the provisions of the Arrangement could be applied only through a refund of the excess tax to the recipient of the dividend.

### 5.5. Russian Supreme Arbitration Court (28 June 2005)

The case concerned the requirements to prove residence in another treaty state for the purposes of the application of tax treaties concluded by Russia.[23] A Russian resident company made various payments to residents of other treaty states. As the non-residents provided certificates of residence that were issued by relevant tax authorities, the Russian payer applied the provisions of relevant tax treaties. It appears that the applicable domestic law required that the residence certificate had to be confirmed by a competent authority. The tax authorities argued that the residence certificates were not in conformity with the Russian domestic law requirements, as they did not contain an apostil. They, therefore, imposed fines for not withholding the tax on the Russian payer. Consequently, the Court was asked to decide whether the term "competent authority" refers to competent authority within the meaning of the relevant tax treaty (normally, the authority issuing the certificate of resi-

20. *Casanova Co. v. Commissioner*, 87 T.C. 214 (1986).
21. *Conseil d'Etat*, No. 64549, 17 June 1987.
22. This summary is based on a summary prepared by Hans Mooij for the purposes of the LLM in International Tax Law of the Leiden International Tax Center.
23. See "Russia: Court decided residence certificates should contain apostil", *IBFD Online Tax News Service*, 10 August 2005.

dence) or to the state authorities approving documents with apostils. The Court held in favour of the tax authorities and agreed that the residence certificates should be confirmed with apostils.

### 5.6. Portuguese Tax Court (19 March 2007)

The case concerned whether or not service fees paid by a resident of Portugal to residents of other treaty states could be made free of tax in the absence of the required administrative formalities, provided that the payer could later prove that the payee is resident in the other contracting state.[24] A company resident in Portugal paid fees to several companies resident in the United States, Brazil and the United Kingdom for services rendered in 1999 and 2000. The payments were subject to a 15% withholding tax under Portuguese domestic law, whereas they were not taxable at source under the relevant tax treaties. The Portuguese tax authorities took the position that Portuguese payers had to withhold tax at source if they did not receive a certificate of residence issued by the tax authorities of the payee's state of residence before the payment was made. The Court considered that, based on the evidence submitted during the proceedings, the recipients were all residents of treaty states. It stated that the tax authorities' guidelines did not bind taxpayers or the Courts. It, therefore, decided in favour of the taxpayer and held the tax authorities' assessment to be unfounded.[25]

### 5.7. Canadian Federal Court (29 April 2009)

The case concerned a resident of Barbados that intended to sell shares in a Canadian company to a Canadian purchaser.[26] The capital gain realized on the sale was taxable under Canadian domestic law, but exempt under the relevant tax treaty. For the purposes of claiming the benefits of the tax treaty in respect of capital gains on unlisted shares, Canadian law provides that the seller must obtain a clearance certificate from the Canadian tax authorities. In the absence of the clearance certificate, the purchaser must remit 25% of the purchase price directly to the Canadian tax authorities. The taxpayer made a request for such a clearance certificate to the Canadian tax authorities, but no certificate was issued. The taxpayer brought the case to the Court, arguing that the gain was treaty exempt, as the shares were being sold by a resident of Barbados. Alternatively, the taxpayer argued that the Barbados resident had fulfilled all of the Canadian domestic law requirements and was, therefore, entitled to a clearance certificate under the tax treaty.

The Court based its decision on the fact that the relevant Canadian domestic law (which has meanwhile been amended) had been enacted before the conclusion of the relevant treaty and that the treaty did not deal with the issue. It stated that the tax treaty prevailed and that the taxpayer's treaty entitlement had to be based solely on the language of the treaty. As a result, the Court ordered the Canadian tax authorities to issue a clearance certificate stating that the capital gain was exempt under the tax treaty.

## 6. Conclusions

As this article has tried to demonstrate, because of procedural reasons, double taxation (or inappropriate taxation) may arise in a number of cases, even though the tax treaty and its substantive provisions should have avoided this. Greater coordination of procedures and forms is very much needed. If work is done in this area, it would be a typical win-win situation, for both tax authorities and taxpayers. Greater coordination would assist taxpayers obtaining the treaty benefits to which they are entitled. It could also permit the relevant tax authorities to obtain information that they would probably not obtain in most other cases, thereby creating an incentive to invest resources in streamlining the treaty application process.[27] Overall, it would, therefore, increase efficiency and ensure that tax treaties realize their objectives.

Key areas where progress could be made quickly are cross-border references to Tax Identification Numbers (TINs) by tax authorities and digitalizing the process by which information is exchanged between the relevant parties. Bona fide taxpayers would most likely cooperate with the relevant tax authorities to ensure that they obtained treaty benefits. They would not object to allowing their TIN to be provided to the tax authorities of the source state, so that those authorities could, ultimately, check (for example, through the exchange of information, effected electronically) if the person is resident in the other contracting state. In addition, bona fide taxpayers would not mind if the tax authorities of the residence state were informed by the tax authorities of the source state of the income the taxpayer received from abroad so as to ensure that this income was reported on the annual tax return. With adequate standardization of forms and transmission modes, all of this could be realized through simple electronic transmission.[28] Tax treaties do contain provisions

24. See Francisco de Sousa da Camara, "Treaty Overrides Administrative Rule, Portuguese Tax Court Says", *Tax Analysts' Worldwide Tax Daily*, 26 April 2007.
25. It should be noted that, from 2003, the administrative formalities to be respected to claim treaty benefits are now embodied in Portuguese domestic law. Some authors have heavily criticized this. See de Sousa da Camara, supra note 24.
26. For a comprehensive summary and comment on this case, see N. Boidman and M. Kandev, "Can a treaty override domestic backup withholding rules? The Canadian decision in RCI", *Tax Notes International* 54 (2009), No. 10, pp. 867-872.
27. It is interesting to note that the ICG Report, which had the full support of the business members of the Informal Consultative Group, recommended the imposition of significant information reporting obligations on financial intermediaries processing treaty relief claims on behalf of investors in the context of a set of recommendations which would also involve substantial streamlining of the treaty claims process and standardization of countries claims and reporting forms.
28. The ICG Report recommended increased use of automatic exchange of information, as well as electronic transmission of information by both the private sector and governments, as best practices. See ICG Report, Paras. 131-132 and 145.

that could be used to facilitate that, namely Art. 26 on exchange of information.

Encouraging cross-border references to TINs appears to have been one of the objectives of the 1997 OECD Council Recommendation on "the Use of Tax Identification Numbers in an International Context".[29] Amongst other things, that instrument recommended that Member countries encourage non-resident recipients of income to disclose their residence country TIN and consider making this disclosure mandatory. The OECD Council also recommended that, when it is mandatory for the recipient of income to disclose his residence state TIN to the payer of income, there should be a mandatory requirement for the payer to pass the TIN to the tax authorities of the source state. Conversely, the Recommendation states that, where the recipient of income discloses voluntarily his residence country TIN to the payer of income, states should either consider making it a mandatory requirement for the payer to pass the TIN to the tax authority of the source state or adopt alternative means of tax compliance – for example, withholding tax at a full rate, subject to reduction if the recipient of income provides the payer with relevant means of identification.[30]

The international tax community has spent years trying to ensure a uniform system of tax treaties to avoid double taxation and prevent tax avoidance and evasion. There are now around 3,000 tax treaties in place. Because of international efforts made in this area, they all conform to the same standard pattern. It does not appear to be reasonable that taxpayers should face double taxation (or other taxation inconsistent with the treaties) merely because a form is not drafted in the requested language or because of some purely administrative formality that is not essential to verifying treaty entitlement, especially in a world where many things can be done through a mouse click.

29. Recommendation C(97)29/FINAL of 13 March 1997. Available at www.oecd.org/LongAbstract/0,3425,en_2649_33767_2662192_1_1_1_1,00.html. The ICG Report likewise recommended increased use of TINs as part of the treaty claim process as one of its best practices. See ICG Report, Paras. 131-132.

30. In the same Recommendation, the OECD Council also instructed the Committee on Fiscal Affairs "to develop an OECD Standard Certificate of residence which will contribute to the standardization and increased transparency for the verification of fiscal status, and to monitor the Recommendation and to report back to the Council as appropriate".