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Conflicts of Income Allocation in Tax Treaty Law: The Differing Opinions of the Austrian Federal Ministry of Finance and the OECD

In this article, the author considers the differing views of the Austrian Federal Ministry of Finance and the OECD regarding conflicts of income allocation in treaty law by way of a recent legal opinion given by the Ministry.

1. Question to and the Legal Opinion of the Austrian Federal Ministry of Finance

The following question was addressed to the Austrian Ministry of Finance (the "Ministry"):[1]

> Two individuals are subject to unlimited taxation exclusively in Germany and are therefore residents there. They are partners of a Hungarian limited partnership (*betéti társaság*) which is treated as taxable entity according to Hungarian tax law, but is comparable to a partnership according to the criteria of Austrian and German tax laws whose income is therefore allocated to the partners according to Austrian and German tax laws. By virtue of its activities, that Hungarian limited partnership is considered to manage assets in the case at hand according to the criteria of Austrian and German tax laws, so that it does not generate any business income, but only non-business income for its partners. The Hungarian limited partnership holds 100% in an Austrian corporation, the assets of which in turn consist entirely of immovable assets located in Austria.
>
> The Hungarian limited partnership now intends to sell its participation in the Austrian corporation. Alternatively, the Hungarian limited partnership's partners resident in Germany consider selling the two participations in the Hungarian limited partnership. (In this scenario, the participation which the Hungarian limited partnership holds in the Austrian corporation would be retained and not sold by the Hungarian limited partnership.)

In a letter of 25 September 2012, the Ministry issued the comments on the EAS procedure set out subsequently.[2] In this respect, the Ministry is willing to provide legal information in treaty situations. Although such legal information is not binding and cannot give rise to legitimate bona fide expectations, as the Ministry is not the competent authority in the tax procedure, these legal opinions are regularly acknowledged by subordinate agencies, even if the opinions are not instructions issued by a higher authority.[3]

> The sale by an asset-managing Hungarian limited partnership with two German partners of its shares in an Austrian real estate LLC [limited liability company] constitutes a sale of the domestic LLC share by the two German partners, because the Hungarian partnership is considered to be transparent for the purpose of taxing the income of domestic and foreign partnerships. Pursuant to Austrian national tax law (Section 98 (1) no 5 (c) Income Tax Act – *EStG*), that transaction is subject to limited taxation on income.
>
> Although Hungarian domestic tax law taxes the limited partnership like a corporation, Austria is not required to do so as well. Although Article 13 (3) DTC [double tax convention] Austria/Hungary grants Hungary the right to tax the gains from the sale of a domestic equity participation on the level of a person resident in Hungary and although these circumstances exist from the viewpoint of Hungarian national tax law, from the viewpoint of Austrian national tax law, however, the capital gains are not attributable to a person resident in Hungary, but rather to the partners resident in Germany. The allocation of income is not affected by tax treaty law (BFH 4 April 2007, IR 110/05), so that both states may rely on their national laws to solve that question. As a result, Austria will not be in breach of the DTC Austria/Hungary if it grants treaty benefits, if any, i.e. those from the DTC Austria/Germany, only to the two German partners (see also Section 8.8 OECD Commentary on Article 4 OECD-MC).
>
> Should the sale of the participation trigger a tax liability also in Hungary, Article 22 (1) DTC Austria/Hungary requires Hungary to grant a tax exemption in order to solve the conflict of income allocation. Since the tax treaty does not deprive Austria of its right to tax for the reasons described above, the requirement for an exemption from tax in Hungary is fulfilled, namely that "such income ... may be taxed in the other contracting state according to this convention"; it is Article 3 (2) of the tax treaty which allows taxation in Austria. On this solution under tax treaty law, please refer to numbers 32.1 et seq. of the OECD Commentary on Art. 23A OECD-MC.
>
> The DTC Austria/Germany does not deprive Austria of its right to tax the capital gains either, as these gains result from the sale of shares in a real estate company which holds land in Austria, which are consequently taxable in Austria pursuant to Article 13 (2) DTC Germany.
>
> That result would be the same even if [it] was not the Hungarian partnership that sold the domestic equity participation, but if the two German partners sold their shares in the Hungarian partnership. Based on the principle of transparency, in both cases the buyer would acquire the beneficial ownership to the domestic equity interest from the two German partners. In light of the principle of transparency, the fact that an interest in a Hungarian partnership rather than a domestic equity interest is transferred to the buyer under civil law in the second case does not create any tax consequences in derogation of the first case.

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1. Unless otherwise indicated, all English translations are the author's unofficial translations.
2. AT: 25 Sept. 2012, EAS 3300, BMF-010221/0588-IV/4/2012.
3. *See* M. Lang, *Die Bedeutung von EAS-Rechtsauskünften des BMF*, SWI, p. 460 et seq. (1998).

2. Application of Tax Treaties in the Source State

The Ministry's legal opinion first correctly assumes that the issue in question concerns the allocation of income. Austrian and German tax laws treat the Hungarian limited partnership as transparent. Capital gains are, therefore, allocated to the two individuals resident in Germany. Hungarian tax law treats the limited partnership as a taxable entity. This is why the capital gains are attributable to the Hungarian limited partnership, at least in the scenario in which it sells the Austrian equity interest. Such a situation gives rise to a conflict of income allocation. An examination of the effects of tax treaties on taxation in the source state must take into account which of the tax treaties that Austria has concluded apply and, therefore, that limit Austria's right to tax. In this context, the Ministry assumes that the application of the tax treaty depends on the allocation of income in the source state. Austrian tax law allocates the income to the two individuals resident in Germany, which is why only the Austria-Germany Income and Capital Tax Treaty (2000)[4] may apply. Nevertheless, this tax treaty does not apply, as the two partners are not resident in Hungary. However, even though the capital gains are attributable to the Hungarian limited partnership according to Hungarian tax law, the Austrian authorities do not have to apply the tax treaty.

The legal opinion refers to the Commentary on the OECD Model. This suggests that the Ministry's opinion is in line with the positions adopted by the OECD. However, a closer examination of paragraph 8.8. of the Commentary on Article 4 of the OECD Model (2010)[5] reveals a quite different picture. This paragraph reads as follows:

> [Partnerships] Where a state disregards a partnership for tax purposes and treats it as fiscally transparent, taxing the partners on their share of the partnership income, the partnership itself is not liable to tax and may not, therefore, be considered to be a resident of that State. In such a case, since the income of the partnership "flows through" to the partners under the domestic law of that State, the partners are the persons who are liable to tax on that income and are thus the appropriate persons to claim the benefits of the Conventions concluded by the States of which they are residents. This latter result will [be] obtain[ed] even if, under the domestic law of the State of source, the income is attributed to a partnership which is treated as a separate taxable entity. For States which could not agree with the interpretation of the Article, it would be possible to provide for this result in a special provision which would avoid the potential double taxation where the income is differently allocated by the two States.

The paragraph, therefore, considers the opposite case. That is, the partnership is treated as fiscally transparent in its state of establishment, in which case no treaty benefits apply. The OECD Commentary on Article 4 (2010) makes it very clear that this applies, regardless of the partnership's treatment as taxable entity in the source state. The legislation in the source state should, therefore, not affect the qualification for the purposes of treaty law. This could mean for the mirror scenario underlying the answer to the question only that the partnership's treatment as a taxable entity in the state of establishment is supposed to confer on it treaty protection and that the source state's qualification of the partnership may also well be irrelevant in this case. Consequently, the quoted statements of the OECD Commentary on Article 4 (2010) only suggest that a Hungarian partnership that is treated as a taxable entity in that state is entitled to the treaty benefits. The fact that Austria, as the source state, does not attribute the income to the partnership, but, rather, to the partners behind it, should specifically *not* oppose that.

However, Example 9 in The Application of the OECD Model Tax Convention to Partnerships (1999) (the "OECD Partnership Report")[6] considers a situation that is almost entirely comparable. The partnership is classified as a taxable entity in its state of establishment, while the income is allocated to the partners according to the tax law of the partners' residence state. The OECD Partnership Report concluded that both tax treaties, i.e. that between the source state and the partnership's state of establishment and that between the source state and the partners' residence state, apply in the source state and that the source state's qualification of the partnership is irrelevant. In the case in question, this can only mean that the Austrian tax authorities would have to apply not only the rules of the Austria-Germany Income and Capital Tax Treaty (2000), but also those of the Austria-Hungary Income and Capital Tax Treaty (1975).[7]

In summary, however, the Ministry's opinion is appropriate. The opinions in the OECD Commentary on Article 4 (2010) and the OECD Partnership Report are not binding. As the paragraphs quoted from the OECD Commentary on Article 4 (2010) and the OECD Partnership Report were issued long after the Austria-Hungary Income and Capital Tax Treaty (1975) had been concluded, they are entirely irrelevant for the interpretation of the rules of this tax treaty, as this issue has already been discussed in detail.[8] Legal scholars have repeatedly demonstrated that the OECD's position appears to be weak and that it is the allocation decision under the tax law of the source state that is relevant regarding the application of the tax treaty in the source state.[9] It appears that the Ministry is now expressly sharing this position.

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4. *Convention Between the Republic of Austria and the Federal Republic of Germany for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital and to Trade Tax and Land Tax* [unofficial translation] (24 Aug. 2000) (as amended through 2010), Treaties IBFD.
5. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 4* (22 July 2010), Models IBFD.
6. OECD, *The Application of the OECD Model Tax Convention to Partnerships*, Issues in International Taxation No. 6 (OECD 1999).
7. *Convention Between the Republic of Austria and the People's Republic of Hungary for the Avoidance of Double Taxation with respect to Taxes on Income and on Capital* [unofficial translation] (25 Feb. 1975), Treaties IBFD.
8. *See* M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen*, in *Aktuelle Entwicklungen im Internationalen Steuerrecht* pp. 14 et seq. and 24 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 1994).
9. *See also*, with further evidence M. Lang, *Qualifikationskonflikte bei Personengesellschaften*, IStR, p. 132 et seq. (2000); *Personengesellschaften im DBA-Recht*, SWI, p. 64 et seq. (2000); *Die Besteuerung von Einkünften bei unterschiedlichen Personen aus dem Blickwinkel des DBA-Rechts*, SWI, p. 529 et seq. (2000); *The Application of the OECD Model Tax Convention to Partnerships – A Critical Analysis of the Report*, the OECD Committee on Fiscal Affairs, p. 37 et seq. (2000); *Taxation of Income in the Hands of Different Taxpayers from the Viewpoint of Tax Treaty Law*, 55 Bull. Intl. Fiscal Documentation 12, sec. III. (2001), Journals IBFD; *Qualifika*

The case law of the Austrian Supreme Administrative Court (*Verwaltungsgerichtshof*, or VwGH) leaves room for any other choice, as is evident from its ruling of 18 October 2006, 2003/13/0052.[10] In this case, an association whose purpose it was to "enable visual artists to safeguard the copyrights to which they are entitled" asked the tax office to issue "residence certificates for Belgium, England [United Kingdom], France, Italy, Switzerland for the years 2001 and 2002". The tax office rejected that application on the grounds that:

> pursuant to the tax conventions with the states in question, only the beneficial creditor has the right to relief from taxation on royalties at source. Relief from taxation at source may not be relied upon by pure trustees or collecting companies.

The tax office continued that the association acted only as trustee in respect of the copyrights and could therefore not claim relief from taxation at source in respect of royalties payable by Belgian, French, Italian, Swiss or UK debtors.

The Independent Tax Tribunal (*Der Unabhängige Finanzsenat*, or UFS), a tax court of first instance, essentially followed this reasoning and rejected the appeal.

The Supreme Administrative Court reversed the Independent Tax Tribunal's decision, as the Tribunal had made the issuing of residence certificates "conditional upon requirements, which are not necessary under the international agreements quoted above". In this respect, the Supreme Administrative Court provided the following reasoning:

> Purpose of the quoted tax conventions is to avoid double taxation. However, the decision as to who is taxable in the relevant state, to whom income is attributable and who can therefore enjoy tax reliefs is generally assessed according to the domestic law of the state that has the right to tax or grant tax reliefs (see also Lang, *Die Besteuerung von Einkünften bei unterschiedlichen Personen aus dem Blickwinkel des DBA-Rechts*, in SWI 2000, at 527 et seq., especially 532, and Wassermeyer in Debatin/Wassermeyer, *Doppelbesteuerung I* (Commentary of OECD-MA), paragraph 26 on Art. 4 MC and paragraph 33 on Art. 12 MC).
>
> The questions whether the association is taxable in the other state on the royalties received or whether the individual artists are taxable or, on the other hand, whether a person liable to pay the royalties has retained or paid the resulting taxes for the association or for the individual artists in the relevant other state, and thus the question *whose* resident status is a fact to be proven in the eyes of the authorities of the relevant other state, are questions which must generally be answered by the authorities of the relevant other state [emphasis added].

The Supreme Administrative Court, therefore, regarded the issuing of residence certificates, something that, at first sight, appears to be rather unimportant, as an opportunity to express an opinion on a central and contentious issue of treaty law. The tax office had apparently followed the OECD's considerations and assumed that the entitlement to treaty benefits depended on the income allocation in the recipient state. Relying on Austrian tax law, the tax office refused to issue residence certificates on the grounds that the association had held the copyrights apparently as a trustee for the artistes. The tax office assumed that relief from taxation at source in Belgium, France, Italy, Switzerland and the United Kingdom could be assessed only after the recipient state, i.e. Austria, had decided on the income allocation.

The Supreme Administrative Court did not agree with the opinions of the tax office and the Independent Tax Tribunal that had confirmed the decision in the first instance. That Court considered the decision of income allocation in the *source state* to be relevant. The tax office could have refused to issue the residence certificates only if the investigative proceedings had demonstrated that taxation at source on royalties in the other state had not been imposed on the association according to the tax law of the other state. The fact that the Supreme Administrative Court quoted literature that related to conflicts of income allocation in general rather than simply limiting itself to the facts of the case in question demonstrates that the Court was aware of the implications of its opinion. As early as in 2006, the Supreme Administrative Court had, therefore, clearly indicated its disapproval of the opinion adopted in the OECD Partnership Report.[11]

3. Application of Tax Treaties in Recipient States

The Ministry assumed that article 13(2) of the Austria-Germany Income and Capital Tax Treaty (2000) applies in both scenarios. Under this provision, gains from the sale of stocks and other shares in a company, the assets of which consist predominantly of immovable assets in a contracting state, may be taxed in that state.[12] The application of this treaty rule is, however, not absolutely self-evident in both scenarios. If the Austrian company's interest is sold by the Hungarian limited partnership, only the transparent treatment of the Hungarian limited partnership provided for in German domestic tax law allocates the resulting gains to the partners resident in Germany. If the German partners sell their shares in the Hungarian limited partnership, they realize profits from the sale of the shares in the Austrian real estate company also only under the principle of transparency applying in German tax law. In neither case do the German partners directly sell the interest in the Austrian entity.

tions- und Zurechnungskonflikte im DBA-Recht, IStR, p. 115 et seq. (2010); *Steuerlich transparente Rechtsträger und Abkommensberechtigung*, IStR, p. 1 et seq. (2011) (F. Wassermeyer, *Duplik*, IStR, p. 8 et seq. (1999) adopts the same position);Art. 4 para. 26 *Doppelbesteuerung* (F. Wassermeyer, M. Lang & J. Schuch eds., Linde 2004); and *Die abkommensrechtliche Behandlung von Einkünften einer in einem Vertragsstaat ansässigen Personengesellschaft*, IStR, p. 90 (2011). G. Toifl, *Personengesellschaften mit Drittstaatseinkünften aus abkommensrechtlicher Sicht*, in *Personengesellschaften im Recht der Doppelbesteuerungsabkommen* p. 142 et seq. (W. Gassner, M. Lang & E. Lechner eds., Linde 2000) disagrees.

10. AT: VwGH, 18 Oct. 2006, 2003/13/0052, *Ansässigkeitsbescheinigung (Dba – Rechts)*, ÖStZ 2007, p. 192. *VwGH zum Anspruch auf Ausstellung einer österreichischen Ansässigkeitsbescheinigung*, RdW 2006, p. 790. For details, see R. Weninger, *Rechtsprechung zum internationalen Steuerrecht – VwGH zur Ansässigkeitsbescheinigung bei DBA-Entlastung für Lizenzen durch Verwertungsgesellschaften*, SWI, p. 243 et seq. (2007).

11. See M. Lang, *Tendenzen in der Rechtsprechung des österreichischen Verwaltungsgerichtshofs zu den Doppelbesteuerungsabkommen*, IFF Forum für Steuerrecht p. 29 (2012).

12. See H. Loukota, *Neues österreichisch-deutsches Doppelbesteuerungsabkommen in Sicht*, SWI, p. 257 (1998) and C. Staringer, *Veräußerungsgewinne nach dem neuen DBA Österreich-Deutschland*, in *Das neue Doppelbesteuerungsabkommen Österreich-Deutschland* p. 106 et seq. (W. Gassner, M. Lang & E. Lechner, eds., Linde 1999).

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Should the German tax authorities consider it appropriate to apply article 13(2) of the Austria-Germany Income and Capital Tax Treaty (2000), it must credit the Austrian tax. Still, it is, however, not impossible that the German tax authorities will refuse to do this. According to the OECD, Austria should apply the Austria-Hungary Income and Capital Tax Treaty (1975) and would, therefore, not have any right to tax at all. On the other hand, however, it could be argued that the position of the OECD cannot be traced back to the applicable treaty law and that the Austrian tax authorities, therefore, correctly did not apply the Austria-Hungary Income and Capital Tax Treaty (1975).

Although the Ministry does not comment on the treatment of income in Germany, it comments on the treaty interpretation in Hungary. In this regard, it is stated that the Hungarian tax authorities should apply the rules regarding the method of taxation rules set out in article 22 of the Austria-Hungary Income and Capital Tax Treaty (1975), which is predominantly modelled on article 23A of the OECD Model. The fact that Austria taxes the capital gains requires Hungary to exempt them. That is:

> Since the tax treaty does not deprive Austria of its right to tax for the reasons described above, the requirement for an exemption from tax is fulfilled in Hungary, namely that "such income ... may be taxed in the other contracting state according to this convention"; it is Article 3 (2) of the tax treaty which allows taxation in Austria.

The legal opinion also incorporates, by reference, the statements of the Commentary on Article 23A of the OECD Model (2010).

The question of how far article 23A of the OECD Model and the tax treaties modelled on it constitute a legal basis on which to resolve cases of double taxation and double non-taxation due to conflicts of qualification is a good opportunity for debate.[13] Specifically the wording of the method of taxation rules referred to in the Ministry's legal opinion simply suggests that an exemption shall apply if "that income ... may be taxed in the other contracting state pursuant to this convention", but does not suggest that an assessment according to existing legislation or even on the authority of the other state is relevant. As the residence state applies the method of taxation rules, it is likely that that state's perspective in connection with the application of the tax treaty determines whether or not the other contracting state has a right to tax under the tax treaty. This is, however, an already familiar dispute.

Surprisingly, however, the Ministry wants to rely on article 23A of the OECD Model to resolve not only conflicts of qualification, but also conflicts of income allocation. The relevant paragraphs of the Commentary on Article 23A of the OECD Model, where the legal opinion quoted does not support this view. These paragraphs are preceded by the heading "conflicts of qualification" and then specifically refer to "cases where the State of residence and the State of source classify the same item of income or capital differently for purposes of the provisions of the Convention".[14] These and other paragraphs clearly demonstrate that the authors of the OECD Commentary on Article 23A had in mind those cases in which the tax authorities of the two contracting states apply different provisions of the same tax treaty, which results in double taxation or double non-taxation. There is such a conflict of qualification if the tax authorities of the two contracting states apply the tax treaty, but apply different distributive rules. The case underlying the legal opinion, however, gives rise to double taxation, as Hungary applies the Austria-Hungary Income and Capital Tax Treaty (1975) and believes that it has the right to tax under that tax treaty, while the Austrian authorities do not consider the tax treaty to apply at all. This is due to a conflict of income allocation and not because of a conflict of qualification.

This is why the reference in the legal opinion to article 3(2) of the OECD Model is inappropriate. Article 3(2) governs the interpretation of terms not defined therein and the question of whether or not and under what circumstances such terms may be interpreted according to the domestic law of the state by which they are applied.[15] A conflict of income allocation does not, however, involve the interpretation of terms not defined in a tax treaty. Rather, the tax treaty grants benefits only to those residents to whom income can be allocated in that state. There is no further doubt in this context as to who qualifies as resident. As income is allocated differently in the two taxing jurisdictions, the relevant resident is regarded as a different taxable entity in each of the states.

It is, therefore, certainly not obvious at all that the Hungarian tax authorities believe that they are required under the tax treaty to exempt the capital gains. It is already doubtful in case of conflicts of qualification as to whether or not

13. For further evidence and on the status of discussions, *see* M. Lang, *The Application*, *supra* n. 9, at p. 41 et seq.; *Qualifikationskonflikte im Recht der Doppelbesteuerungsabkommen*, in *Staaten und Steuern*, commemorative publication for Vogel p. 907 et seq. (P. Kirchhof et al. eds., Müller 2000); *General Report Double Non-Taxation*, in International Fiscal Association, *Cashiers de droit fiscal international* vol. 89a, sec. 3.5. (Sdu Fiscale & Financiële Uitgevers 2004), Online Books IFD; *2008 OECD Model: Conflicts of Qualification and Double Non-Taxation*, 63 Bull Intl. Taxn. 5/6, sec. 3. (2009), Journals IBFD; and IStR (2010), *supra* n. 9, at p. 117 et seq.; D-A-CH-Steuerausschuß, *Joint Taxation Committee's opinion on the subject of classification conflicts*, SWI, p. 580 (1998); J. Schuch & J. Bauer, *Die Überlegungen des OECD-Steuerausschusses zur Lösung von Qualifikationskonflikten*, in Gassner, Lang & Lechner eds., *supra* n. 9, at p. 45; F. Wassermeyer, in F. Wassermeyer et al., *Doppelbesteuerung* Art. 3, para. 73 (2010); G. Kofler, H. Moshammer & M. Tumpel, *Zurechnungs- und Qualifikationskonflikte im DBA-Recht*, in *Einkünftezurechnung im Internationalen Steuerrecht* pp. 269 et seq. & 278 et seq. (M. Lang, J. Schuch & C. Staringer eds., 2012); J.F. Avery Jones et al., *Credit and Exemption under Tax Treaties in Cases of Differing Income Characterization*, 36 Eur. Taxn. 4, sec. V. (1996), Journals IBFD; J. Sasseville, *The Future of the OECD Model Tax Convention*, in *Die Zukunft des Internationalen Steuerrechts* p. 49 (W. Gassner et al. eds., Linde 1999); K. Vogel, *Probleme der Auslegung von Doppelbesteuerungsabkommen*, SWI, p. 111 et seq. (2000); A. Benecke & A. Schnitger, *Lösung von Qualifikationskonflikten im internationalen Steuerrecht – der "abgeleitete" Qualifikationskonflikt*, RIW, p. 143 et seq. (2002); and H. Loukota, *Der Einfluss des österreichischen Ertragsteuerrechtes auf die Auslegung von Doppelbesteuerungsabkommen*, in *Ertragsteuern in Wissenschaft und Praxis* p. 280 et seq. (R. Beiser et al. eds., LexisNexis 2007).

14. *See* K. Vogel, in *DBA*, 5th ed., Art. 23, para. 32.2. (K. Vogel & M. Lehner eds., Beck 2008) and para. 32.2 of the *OECD Model: Commentary on Article 23A and 23B* (2010).

15. For details and a summary of opinions, *see* M. Lang, *Art. 3 Abs. 2 OECD-MA und die Auslegung von Doppelbesteuerungsabkommen*, IWB, p. 281 et seq. (2011).

the opinion stated in the Commentary on Article 23 of the OECD Model (2000)[16] onwards is convincing based on the tax treaties modelled on the OECD Model. It is even less likely that the Hungarian tax authorities would transfer this theory, which was adopted in conflicts of qualification, to conflicts of income allocation and would, therefore, waive their right of taxation. This may be yet another reason why the Austrian tax authorities would find it difficult to insist on compliance with "OECD principles", as double taxation would not have arisen in the first place if the Austrian tax authorities had themselves followed the opinions that the OECD had adopted on conflicts of income allocation.

4. Conclusions, Summary and Outlook

The opinion that the OECD has developed on conflicts of income allocation and their effects on the application of tax treaties has produced different responses worldwide. Courts have recently had their own way of making decisions and are unimpressed by the OECD's positions, which are, in fact, based on rather shaky reasoning.[17] This legal opinion of the Ministry also reveals that tax authorities do not always follow the OECD guidelines, at least if this would give rise to a loss of the right to tax. In summary, the Ministry's opinion is quite convincing. However, it would have been desirable had the Ministry explicitly addressed the divergence with the OECD's opinions.

Specifically, in case of conflicts of income allocation within the framework of applicable treaty law, there is no alternative but to accept economic double taxation. Whoever believes that this is a problem for legitimate legal and political reasons would have to develop the treaty rules. The author, therefore, believes that, based on the currently existing tax treaties, the residence state has no obligation to relieve double taxation arising from conflicts of income allocation.

16. *OECD Model Tax Convention on Income and on Capital: Commentary on Article 23* (29 Apr. 2000), Models IBFD.
17. Lang, IStR (2011), *supra* n. 9, at p. 1 et seq.

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