

I. The problem of double taxation

1. Basics of international law

States can levy taxes by virtue of their sovereignty. Tax sovereignty, however, is not unlimited. Not all situations can be taxed. There must either be a **personal or an objective nexus**, or connection, **between the taxpayer and the state**. With respect to a personal connecting factor, it is sufficient that this exists with respect to the person concerned. Connecting factors for individuals frequently include domicile, residence or citizenship. For legal entities, the factors usually include the place of incorporation and the place of effective management. With regard to an objective connecting factor, it is sufficient that parts of the transaction or activity involve the taxing state or that the object of the action is somehow connected to the taxing state. 1

In international law practice, there are no significant limits on the tax sovereignty of states. In designing the domestic personal tax law, the national legislator can even tax situations when, for example, only a “**genuine link**” exists. It is only when neither the person nor the transaction has any connection with the taxing state that tax cannot be levied. 2

Example: According to the Indian legal tax system, tax is levied when a “genuine link” exists. Pursuant to Sec. 9(1)(i) of the Income Tax Act, tax is levied on all income earned outside India which accrues, whether directly or indirectly, through or from any business connection in India. This principle formed the basis for the opinion of the Indian Authority for Advance Rulings (AAR) that a commission paid to a non-resident agent may be taxable in India even if the services are rendered outside India. Those services consisted of pursuing and soliciting the participation of foreign concerns, undertakings and government departments in the International Food and Wine Show (IFOWS) in India. Although the activity of the agent was carried on abroad, the AAR observed that the agent’s right to receive commissions arose in India when the foreign concerns, undertakings and government departments participated in the IFOWS. Therefore, the AAR considered that the agent’s income accrued from a business connection in India (cf. IN, AAR 3 Jul. 2006, Rajiv Malhotra, AAR/671/2005). 3

2. Circumstances giving rise to double taxation

2.1 Taxation of worldwide income (full tax liability) in two states

Since international law places few limits on the tax sovereignty of states, the same event may be taxed in two or more states. Under many domestic tax law systems, if there exists a close personal connection between the taxable person and the state, the person’s worldwide income is taxed (**universality principle**). This is called full tax liability. However, if the connection is weak or consists 4

only of objective factors, only the income earned in that state is taxed (**principle of territoriality**). This is called limited tax liability.

5 A taxable person can have close personal connections with two or more states. Under the tax laws of various states, for example, the person's domicile is a connecting factor. In others, residence and citizenship are connecting factors. Depending on the applicable laws, each of these criteria can lead to full tax liability. Therefore, it is not rare in practice, for the same person to be **subject to full tax liability in two or more states**. This can lead to the levying of taxes on worldwide income in two or more states.

6 *Example: An individual who lives in Spain and whose centre of economic interests is in France is subject to full tax liability in both states. If there were no DTC between France and Spain, both countries would tax the person's entire worldwide income.*

2.2 Full tax liability and limited tax liability

7 More frequently, persons are subject to full tax liability on the basis of their residence, citizenship, or any other criterion of a similar nature, in just one state and receive income from another state. In that other state, they are subject to limited tax liability. This limited tax liability applies only to the income earned in that other state. When the state of residence levies tax on worldwide income, the **income from the other state is taxed twice**. Thus, full tax liability in a state and limited tax liability in another can lead to double taxation.

8 *Example: A person resident and domiciled in the United Kingdom and subject to full tax liability therein holds shares in a Swiss corporation. The person does not have a home or domicile in Switzerland. The person receives dividends from the Swiss shares. These dividends are taxed in the United Kingdom since the person is subject to tax there on his worldwide income. In Switzerland, limited tax liability exists. Consequently, the dividends are also taxed in Switzerland.*

2.3 Limited tax liability in two states

9 Double taxation will not usually arise when a person is subject to limited tax liability in two states. Limited tax liability is based on the principle of territoriality. The two states will only levy tax on income arising in their respective territories. However, since the scope of the limited tax liability may not be the same in both states, double taxation may even arise **on the basis of limited tax liability**.

10 *Example: A person lives in Italy and is subject to full tax liability therein. The person receives income from shares of a corporation that has its legal seat in Germany and its place of effective management in Belgium. The dividends received from these shares are subject to limited tax liability in Germany and in Belgium. The income would be taxed a third time in Italy on the basis of the person's full tax liability if the DTCs did not provide a remedy.*

2.4 Economic double taxation

Thus far, the discussion has focused on double taxation arising from the taxation of the same person with respect to the same income in two or more states (juridical double taxation). However, it is also possible for the same income to be **taxed in the hands of different persons**. This situation is known as economic double taxation. 11

Example: The parent company of an unlimited company incorporated in the United Kingdom was a US corporation. The income of the UK unlimited company was taxable in the United Kingdom in the hands of the UK unlimited company itself. For US federal income tax purposes, the UK unlimited company was classified as a disregarded entity because it had a single shareholder, unlimited liability and had not made a “check-the-box” election. The income earned by the UK unlimited company was therefore considered to belong to the US parent corporation even if this income had not been distributed by the UK unlimited company. Thus the income of the UK unlimited company was taxable in the United Kingdom and in the United States in the hands of the US parent corporation (cf. UK, SCITD 19 Nov. 2008, *Bayfine UK Products v. Revenue and Customs Commissioners*). 12

The problem of economic double taxation frequently arises in cases in which **affiliated or associated corporations** that have their legal seats in different states enter into transactions with each other. Each residence state determines the taxable base for corporate income tax under its domestic corporate tax law. If the two companies enter into transactions with each other, the tax authorities of the two states could assign different values to those transactions (for a detailed description of transfer pricing issues, cf. m.no. 460 et seq.). Economic double taxation may then arise. 13

Example: A multinational group of companies has subsidiaries in China and Brazil. The Chinese company sells products to the Brazilian company for CNY 100,000. The Chinese tax authorities consider that the CNY 100,000 price is appropriate, whereas the Brazilian tax authorities are of the opinion that the appropriate price would be CNY 80,000. Income in the amount of CNY 100,000 is taxed in China, while the deduction in Brazil is limited to CNY 80,000. 14

3. Elimination of double taxation

3.1 Double taxation conventions

Cross-border economic relations would be considerably threatened if two or more states subjected the same income to taxation. Many states therefore enter into **bilateral international tax conventions** in order to eliminate double taxation. These agreements are called double taxation conventions (DTCs). They determine the extent to which each state may levy tax. 15