

# Reader-Friendly Navigator for Global Tax Treaty Cases—Book Review of “A Global Analysis of Tax Treaty Disputes”

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## Abstract

This paper is a book review for the informative and thoughtful book “A Global Analysis of Tax Treaty Disputes”, edited by Prof. Eduardo Baistrocchi. As one of the first readers of this book, I firmly believe that it is a most fascinating pioneering work on global and comparative analysis of tax treaty disputes from empirical approach.

## Keywords

International Tax Law, Tax Treaty Disputes, Treaty Shopping, OECD Model Tax Convention

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The two-volume book “A Global Analysis of Tax Treaty Disputes” was published as part of Cambridge Tax Law Series by Cambridge University Press in August 2017. It was edited by Prof. Eduardo Baistrocchi at the London School of Economics and Political Science (LSE), and contributed by 42 established tax law scholars from major jurisdictions around the globe. This book can be categorized as comparative taxation law and international taxation law.

As one of the first readers of this book, it's my honor to write this book review for the informative and thoughtful book “A Global Analysis of Tax Treaty Disputes”. I firmly believe that it is a most fascinating pioneering work on global and comparative analysis of tax treaty disputes from empirical perspective.

As the late America Justice Oliver Wendell Holmes, Jr remarked, “The Life of the law has not been logic. It has been experience.” Following the same thinking of Holmes, the life of international taxation law also has been experience. To some extent, the history of international taxation law is the history of competition, bargaining and dispute and cooperation between the taxpayers and the tax

administrators. The tax treaty dispute cases have facilitated the growth of international taxation law to some extent.

The rich and authentic tax treaty disputes are the most valuable experience of international taxation law for three obvious reasons. We have good reason to celebrate the consensuses, progresses and achievements of modern international taxation law reflected in the form of rational and fair resolution of numerous dispute cases. We are offered ample opportunities to vigorously examine and reflect the legal risks and root causes of the loopholes hidden in the traditional and current international taxation regime, since many tax treaty dispute cases are created by the loopholes in the rules. More importantly, based on the functional and comparative analysis of tax treaty dispute cases, we are empowered to find the right path to the destination of tax justice of single tax principle, and work out better bilateral and multilateral solutions to prevent and eliminate both double taxation and double non-taxation in globalized market.

This book successfully presented and analyzed 445 assorted leading tax treaty dispute cases concisely and coherently. It did not repeat the ordinary writing style of compendium of loosely interconnected papers, as all the chapters in this book point to the common single theme of global analysis of tax treaty disputes. All the chapters are structured in such a coherent way that lack of any chapter or part would make this book incomplete. Even Volume 1 and 2 are interacting and supporting each other.

As tax treaty disputes are always created and resolved in the complicated international context, the authors briefed the framework of economic, political, legal and historical backgrounds of tax treaty in different countries, either in the body of the chapters, or in the appendix of questionnaires following the chapter. As the audience is eager to know the core controversial arguments of taxpayers and different tax administrators, most chapters of this book fairly present such conflicting arguments, and then proceed to introduce and examine the different results of treaty dispute cases. Most authors generously discuss the impact of key treaty disputes on the subsequent changes of tax treaties and/or domestic tax law. For instance, after the resolution of Xuzhou case between a Barbados company and Xuzhou State Taxation Bureau on the application of the rule of conduit company, China and Barbados entered a new protocol on capital gain. The micro framework of tax treaties and macro discussion of treaty disputes are very appealing to taxpayers, tax administrators, lawyers, and business people as well as the students of law schools and business schools, who want to understand the international tax treaties in practice within a short time.

The devil is in the detail. In addition to the detailed table of cases in 25 jurisdictions, the reader-friendly Golden Bridge provides the audience a clear picture of all the 445 leading tax treaty dispute cases as well as their links to the relevant articles of the OECD Model Tax Convention on Income and on Capital (OECD MTC). This format enables the readers to be easily aware of the controversial articles of OECD MTC by reference to the frequency of the occurrence of disputes

over the interpretation or application of certain articles or paragraphs in question. Consequently, both the taxpayers and the tax administrators could use the red flags to change and restructure their behaviors in the future.

To improve inclusive and just framework of global tax treaties, the 445 cases represent both developing and developed countries, both OECD and BRICS jurisdictions, and both the civil law and the common law jurisdictions. The comparative research on tax treaty dispute cases in different jurisdictions is extremely important in the era of post-BESP, as any resolution of tax treaty dispute cases could trigger responses from the multinational corporations and/or governments.

As a Chinese legal scholar, I'm more than pleased to realize that seven tax treaty dispute cases in China are covered. China has developed a set of sophisticated principles and institutional arrangements on international taxation based on its own legal tradition and the best international practices. Major domestic statutes on income tax are the Corporate Income Tax Law (CITL) of 2007 and the Law on the Administration of Tax Collection (LATC) of 2015. The Income Tax Law for Enterprises with Foreign Investment and Foreign Enterprises of 1991 was abolished to ensure equal treatment of domestic and multinational firms on January 1 of 2008, when CITL was set in motion. The administrative interpretations of the State Administration of Taxation (SAT) also play significant roles in clarifying the definitions of ambiguous legal language.

Compared with the domestic tax law, tax treaties are granted with priority in the application of law in tax treaty disputes. As Chinese traditional culture stress on the reputation of credibility, the bilateral treaties prevail over the domestic law as a general principle. For instance, Article 91 of the LATC of 2015 states that, "If the provisions of the relevant tax treaties or agreements concluded between the People's Republic of China and foreign countries are in conflict with the provisions of this Law, the relevant matters shall be handled in accordance with the treaties or agreements". Article 58 of the CITL declares that, "Where any provision in a tax treaty concluded between Chinese government and a foreign government is different from the provisions in the CITL, the provision in the treaty shall prevail".

Despite the controversial debate on the legal effect of the tax treaties, the SAT tends to argue that the tax treaties are not only legally binding on the governments of the contracting parties, but are also directly applicable to the taxpayers.<sup>1</sup> As China has signed 102 bilateral tax treaties with other jurisdictions by far,<sup>2</sup> the seven tax treaty dispute cases resolved between 2008 and 2011 in China deserve the attention from the audience.

Of course, more latest tax treaty dispute cases after 2011 could be included in the next edition of this book. For instance, in a frequently cited PE case, a parent corporation incorporated in Singapore, X corporation, established an equity

<sup>1</sup>SAT, *The Legal Status of the Tax Treaties and its Relationship with the Domestic Law*. the <http://www.chinatax.gov.cn/n810219/n810744/n1671176/n1705734/c1705580/content.html>.

<sup>2</sup><http://www.chinatax.gov.cn/2013/n2925/n2955/index.html>.

joint venture of auto making in China, Y corporation. X corporation sent several groups of employees to provide technological instructions and post-sale services for the projects of Y corporation in China. Beijing Tax Authority found that X corporation had 51 PEs by sending employees providing services for more than 183 days between January 2012 and December 2015 in China. Y corporation disagreed by arguing that the employees of X corporation stayed less than 183 days, and therefore no PE would be constituted, and that the employees' income were paid outside the territory of China, therefore the employees of X corporation not obligated to pay individual income tax in China.<sup>3</sup> According to the SAT official interpretation of the Tax Treaty and its Protocol between China and Singapore of July 26, 2010, the several projects characterized by commercial connection or continuity undertaken by the same company shall be considered as "the same or a connected project". Consequently, Beijing Tax Authority collected individual income tax and late payment fee of 42,169,500 RMB (more than 6 million USD).<sup>4</sup>

Based on the country-by-country analysis of the leading tax treaty disputes in 27 jurisdictions, this book drew four significant conclusions on the cutting edge issues of contemporary international tax law, ranging from global taxonomy of the patterns of tax treaty disputes, global evolutionary path of tax treaty dispute resolution, implications of triple non-taxation and BEPS, to global quantitative analysis of tax treaty disputes. This book has not only pointed out the key differences of resolution of tax treaty disputes in different countries, but also encouraged the readers to identify the commonalities of tax treaties, and the trend of convergence from the various jurisdictions, by comparative analysis of different cases and reference to the different responses to the uniform questionnaire applicable to the 27 jurisdictions.

I truly appreciate the professionalism and craftsmanship of the prominent authors. When I shop a book, the academic reputation and background of the authors are always equally important as the quality of the book itself. Prof. Eduardo Baistrocchi and other colleagues from different jurisdictions not only demonstrated their world-class expertise and teamwork, but also reflected their strong commitment of global responsibility towards the modernization of international taxation in the era of post-BEPS package.

No book is absolutely perfect. The book "A Global Analysis of Tax Treaty Disputes" is no exception. For instance, not all jurisdictions are covered in this book. For instance, although there are 35 member countries of OECD, only 16 countries are covered in this book. Therefore, the readers from other 19 OECD countries, including Scandinavian countries, are unable to check out the analysis of tax treaty disputes in their home countries. For another example, although both Mainland of China and Hong Kong Special Administrative Region have been covered by this book, and also hope Macau Special Administrative Region and Taiwan will be covered in the next edition of this book. Therefore, I advice

<sup>3</sup>[http://www.ctaxnews.net.cn/html/2016-10/21/nw.D340100zgswb\\_20161021\\_1-05.htm](http://www.ctaxnews.net.cn/html/2016-10/21/nw.D340100zgswb_20161021_1-05.htm).

<sup>4</sup>[http://www.ctaxnews.net.cn/html/2016-10/21/nw.D340100zgswb\\_20161021\\_1-05.htm](http://www.ctaxnews.net.cn/html/2016-10/21/nw.D340100zgswb_20161021_1-05.htm).

the authors to cover more jurisdictions as possible in the next edition of this book.

Last but not least, as I personally benefited a lot intellectually from the inspiring and thought-provoking ideas in this book, I'd like to recommend more readers to join the meaningful and enjoyable discourse of international tax law reform as global citizens.