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INTERPRETING THE EXPRESSION "ARRANGEMENT OR TRANSACTION" IN THE PRINCIPAL PURPOSE TEST OF THE MLI

- –*Michael N. Kandev and John J. Lennard, Davies Ward Phillips & Vineberg LLP, Montreal*

INTRODUCTION

Like all other signatories to the Organisation for Economic Co-operation and Development's (**OECD**) Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (**"MLI"**), Canada has agreed to certain minimum standards on treaty abuse.[1] The key provision in the MLI to address treaty abuse is a broad anti-avoidance rule referred to as the principal purpose test (**"PPT"**).[2] The PPT is set out in Article 7(1) of the MLI and reads as follows:

> Notwithstanding the other provisions of this Convention, a benefit under this Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit

in these circumstances would be in accordance with the object and purpose of the relevant provisions of this Convention.[3]

The article focuses on how the expression “arrangement or transaction”, which is central to the application of the PPT, should be interpreted from a Canadian perspective, and in particular, whether the concept of “series of transactions”, as extended by subsection 248(10) of the *Income Tax Act* (Canada) (**“ITA”**), should apply in the context of the MLI.

As explained below, we are of the view that the context and purpose of the MLI require that the terms “arrangement or transaction” be given an autonomous meaning specific to the MLI that is as much as possible harmonized among signatory countries. Thus, the ITA concept of a “series of transactions” should not apply to the MLI.

PRINCIPLES OF INTERPRETATION OF THE MLI AND TAX TREATIES

In Canada’s leading treaty interpretation case, Crown Forest,[4] the Supreme Court of Canada (SCC) explained that “[i]n interpreting a treaty, the paramount goal is to find the meaning of the words in question. This process involves looking to the language used and the intentions of the parties”.[5] With respect to the intentions of the drafters, the SCC endorsed *Gladden Estate (J.N.). v. The Queen*, where Addy J. held that “a tax treaty or convention must be given a liberal interpretation with a view to implementing the true intentions of the parties”.[6]

These principles of treaty interpretation adopted by the SCC are consistent with Article 31(1) of the *Vienna Convention on the Law of Treaties, 1969*,[7] which provides 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 their context and in the light of its object and purpose.”

Finally, all of Canada’s treaties, including the MLI, contain interpretative provisions. In this regard, according to Article 2(2) of the MLI, any term not defined in the MLI shall, unless the context otherwise requires, have the meaning it has at that time under the relevant treaty in respect of which benefits are being sought. In turn, all of Canada’s treaties include a provision similar or identical to Article 3(2) of the OECD Model,[8] which provides that, unless the context otherwise requires, an undefined tax treaty term must be given the meaning it has under the domestic law of the state applying the treaty. Finally, section 3 of *Canada’s Income Tax Conventions Interpretation Act*,[9] substantially reiterates the rule in Article 3(2) of the OECD Model.

A UNIFIED AUTONOMOUS MEANING OF “ARRANGEMENT OR TRANSACTION”

The term “arrangement or transaction” is not defined in either the MLI or Canada’s tax treaties. In our view, the context of the MLI, which stresses the importance of a harmonized approach among participating jurisdictions to counter tax treaty abuse,[10] requires that this expression be given a unified and autonomous meaning that is not derived from the law of any particular state applying the MLI.

While Canada’s ITA uses the words “arrangement” and “transaction” individually, it does not combine them in the expression “arrangement or transaction” and it does not provide any exhaustive definitions for them other than to clarify for certain specific purposes that a transaction includes an arrangement or event.[11] Hence, the ITA does not provide a meaning of these words that could be expected to conflict with their ordinary meaning.

Accordingly, in interpreting the term “arrangement or transaction” in the MLI, a proper analysis should seek to determine the ordinary meaning of the expression and its component words in light of their context and the purpose of the PPT and the MLI in general.

Ordinary Meaning of “Arrangement or Transaction”

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Dictionary definitions are commonly used by Canadian courts in an attempt to establish the ordinary meaning of a word or phrase. In this regard, the term “arrangement” is defined in the *Oxford English Dictionary* to mean “disposition of measures for the accomplishment of a particular purpose”. The term “arrangement” is derived from the transitive verb “to arrange”, which has been defined as meaning “to draw up in ranks, or to put in order.”[12] Moreover, it might be assumed that an “arrangement” is not synonymous with a “transaction”,[13] but rather refers to something other than a transaction.[14] In this regard, Canadian cases[15] have frequently referred to the statement in Newton v. The Commissioners of Taxation that “the word ‘arrangement’ is apt to describe something less than a binding contract or agreement, something in the nature of an understanding between two or more persons—a plan arranged between them which may not be enforceable at law.”[16]

Regarding the term “transaction”, *Black’s Law Dictionary* defines it as: “1. The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract. 2. Something performed or carried out; a business agreement or exchange. 3. Any activity involving two or more persons.” While, this dictionary definition appears to contemplate a single act, instance, or activity as opposed to a “series of transactions”, which would imply multiple acts, instances, or activities, the word “transaction” has been interpreted to encompass the notion of “single composite transaction” as recognized by UK case law to mean “a pre-ordained series of transactions”.[17]

Accordingly, the ordinary meaning of “arrangement or transaction” would seem to refer to:

(i) a single act or instance of conducting business, or any activity involving two or more persons, or multiple acts, instances, or activities that are part of a pre-ordained series (i.e., a “transaction”); or
(ii) a disposition of measures planned, drawn up, or ordered to accomplish a particular purpose (i.e., an “arrangement”).

The OECD Commentaries on the Meaning of “Arrangement or Transaction”

In interpreting the expression “arrangement or transaction” in the PPT, a Canadian court is likely to refer to the relevant OECD commentaries. In this regard, while it is clear that the OECD Model and its commentaries have no force of law in Canada,[18] they may nonetheless be relevant in determining the intention of Canada and its treaty partners in interpreting Canada’s tax treaties. In this regard, in *Crown Forest*, the SCC stated that in ascertaining the intentions of the drafters of a tax treaty “a court may refer to extrinsic materials which form part of the legal context (these include accepted model conventions and official commentaries thereon) without the need first to find an ambiguity”.[19]

Regarding the intended scope of the expression “arrangement or transaction”, the OECD commentary reads as follows:

> The terms “arrangement or transaction” should be interpreted broadly and include <u>any agreement, understanding, scheme, transaction or series of transactions whether or not they are legally enforceable</u>. In particular they include the creation, assignment, acquisition or transfer of the income itself, or of the property or right in respect of which the income accrues. These terms also encompass arrangements concerning the establishment, acquisition or maintenance of a person who derives the income, including the qualification of that person as a resident of one of the Contracting States, and including steps that persons may take themselves in order to establish residence. <u>An example of an “arrangement” would be where steps are taken to ensure that meetings of the board of directors of a company are held in a different country in order to claim that the company has changed its residence. One transaction alone may result in a benefit, or it may operate in conjunction with a more elaborate series of transactions that together result in the benefit</u>. In both cases the provision of paragraph 9 may apply.[20] [Emphasis added.]

The above OECD commentary seems to support the following points:

(i) an “arrangement” seems to contemplate measures or steps that, while not legally enforceable and not “transactions” in a strict sense, are planned, drawn up, or ordered to lead to a particular result; and

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(ii) although the expression of “series of transactions” is not expressly used in the PPT, the overall meaning of “arrangement or transaction” should be read to include a series.

The Implicit Series Concept in “Arrangement or Transaction”

Regarding the concept of a series of transactions implicitly being included in the expression “arrangement or transaction”, we are of the view that a series should be interpreted as follows:

> A series of transactions comprises two or more related transactions planned by the taxpayer (or the mind directing the taxpayer) as one logical whole and completed in a predetermined sequence and without genuine interruption with the intention of achieving a particular common objective, purpose, or result. An initial transaction will form part of a series if, at the time that the transaction is carried out, it is contemplated that the subsequent transactions constituting the series will be implemented, and the subsequent transactions are eventually carried out. Such contemplation will be considered to exist, on the basis of objectively ascertainable facts, either (1) where the series has been precontracted or has been agreed upon in principle so that there is no practical likelihood that the series will not be completed, or (2) where the taxpayer's intention to complete any remaining transaction(s) is genuine and specific.[21]

While the notion of a “series of transactions” is likely implicit in the expression “arrangement or transaction” in the PPT, we see no textual, contextual, or purposive basis to import the Canadian domestic tax notion of a series as defined by subsection 248(10) and as interpreted by the SCC.

In Canada, the “series of transactions” test is a standard feature of anti-avoidance rules in the ITA, including the general anti-avoidance rule (**“GAAR”**). The word “series” is not defined in the ITA, but has been judicially considered to mean a number of transactions pre-ordained to produce a given result, with no practical likelihood that the pre-planned events would not take place in that order.[22]

For the purposes of the ITA, the common law definition of series of transactions has been considered by the SCC to be expanded by subsection 248(10),[23] which deems a series of transactions or events to include any related transactions or events completed in contemplation of the series. The SCC discussed the scope of subsection 248(10) in its seminal decision in *Copthorne*.[24] Relying on the FCA’s decision in OSFC, the SCC noted that subsection 248(10) provides that a series of transactions is deemed to include “any related transactions or events completed in contemplation of the series”. Notably, the SCC found that the phrase “in contemplation of” could apply both prospectively and retrospectively, and rejected the taxpayer’s argument that a subsequent transaction must be “contemplated by the parties” at the time of a prior transaction in order for the subsequent transaction to form part of the same series. Thus, the SCC confirmed its prior holding in Canada Trustco that it is sufficient for a later transaction to have been completed “because of” or “in relation to” an earlier transaction in order to be considered part of the same series, regardless of whether the later transaction was ever even contemplated at the time of the earlier transaction.

Accordingly, for the purposes of the ITA, the notion of “series of transactions”, as interpreted by the SCC, is unnaturally broad, and can include, beyond transactions that would form part of a pre-ordained “common law” series, related transactions completed before or after the common law series to the extent that those related transactions were completed “in contemplation” of the series. As stated above, in our view, this purely Canadian domestic notion of “series of transaction” should be irrelevant to the PPT. This is particularly so in light of the statement in *OSFC* that subsection 248(10) creates a “legal fiction” that “ imports into a term a meaning that the term would not otherwise convey.”[25] In light of the MLI’s stated harmonization purpose, it would be unreasonable, in our view, to read into the meaning of an “arrangement or transaction” for the PPT the extended domestic meaning of of a series of transactions that will likely be inconsistent with the meaning of that expression in other MLI participating jurisdictions. Doing so would mean that the MLI would be applied inconsistently across jurisdictions, which would defeat the very purpose of the MLI.

Practical Implications

Our interpretation of the term “arrangement or transaction” indicates that the scope of application of the PPT is limited only to clear instances of treaty abuse, whereby the allegedly abusive “arrangement or transaction” constitutes a series.

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On this basis, back-to-back royalty payments made pursuant to contracts established in an alleged treaty shopping scenario, such as the ones in *Velcro*,[26] would normally be seen to be part of a series that is within the scope of the PPT.[27] Conversely, if the holding structure for a Canadian oil and gas company, such as in the recent *Alta Energy* case,[28] is migrated to Luxembourg at a time when there is neither an agreement nor a specific genuine intention to sell the shares of the Canadian company, no series should exist for the purposes of the application of the PPT.[29] In such context, when it comes to the determination of the impugned series of arrangements or transactions, the scope of application of the GAAR[30] may very well be broader than that of the PPT.[31]

CONCLUSION

In our view, the expression "arrangement or transaction" in the PPT should mean one or more measures, acts, instances, or activities, whether legally enforceable or not, that form part of a series that is planned, drawn up, or ordered to accomplish a particular purpose. While the expression "arrangement or transaction" as used in the PPT is broad enough to include a series of transactions, for this purpose a "series" must be given its ordinary and natural meaning (i.e., pre-ordained or pre-ordered transactions that can be construed as a single composite transaction). Such an interpretation is consistent with the actual terms of the PPT, their context, and the MLI's overall goal to provide a consistent framework for combatting treaty abuse. The extended meaning of series under the ITA, as set out by the SCC on the basis of its interpretation of subsection 248(10), should not be relevant in determining whether benefits under a given tax treaty are denied pursuant to the PPT.

2019 BUDGET'S IMPACT ON CANADIAN WITHHOLDING TAX ON DIVIDEND COMPENSATION PAYMENTS IN CROSS-BORDER STOCK LOANS

- –Timothy Hughes and Roger Smith, Osler

The Canadian federal Budget (Budget 2019) tabled on March 19, 2019 proposed modifications to the securities lending rules and, specifically, to the way Canadian withholding tax applies to dividend equivalent payments under the *Income Tax Act* (Canada) (the ITA) and Canadian tax treaties.

SECURITIES LOANS AND REPURCHASE AGREEMENTS

A securities loan involves a lender transferring securities to a borrower for a period of time, with the borrower making payments to the lender in respect of any distributions paid on the securities during the term of the transaction. Where the securities are shares, these payments will be equivalent to any dividends paid on the securities. The borrower may deal freely in the securities but is obligated to return identical securities to the lender at the conclusion of the transaction. Generally, the borrower also provides the lender some form of collateral. The effect of such a transaction is that the lender no longer owns the securities, but is in a position to receive the economic equivalent of distributions paid on them while maintaining the opportunity for gain and risk of loss associated with holding the securities.

A repurchase transaction is similar but is structured as a sale and subsequent repurchase of the securities. As with a securities loan, the buyer compensates the seller for the amount of all distributions paid on the securities during the term of the transaction. In this type of transaction, there is a spread between the original price paid by the buyer and the higher price subsequently paid by the seller on repurchase representing time value of money on the cash proceeds received by the seller.

APPLICATION OF THE SECURITIES LENDING RULES TO DIVIDEND EQUIVALENT PAYMENTS

Where a Canadian resident borrows shares of corporate stock in Canada, and the lender is a non-resident of Canada, withholding tax on dividend equivalent payments can apply depending on the type and value of collateral posted by the borrower under the arrangement. In particular, where the borrower posts cash

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or government debt having a fair market value not less than 95% of the fair market value of the borrowed securities, and is entitled to enjoy directly or indirectly the benefits of all or substantially all income derived from the posted collateral (the "**95% collateralization test**"), dividend equivalent payments will be deemed to be dividends paid on shares of Canadian corporate stock. This result obtains whether or not the borrowed securities are in fact Canadian, such that dividend equivalent payments in respect of shares of non-resident corporations can effectively be treated as dividends paid on shares of a Canadian-resident corporation for withholding tax purposes.

Where dividend equivalent payments do not meet the 95% collateralization test, they are treated as interest for withholding tax purposes under Part XIII of the ITA.

PROPOSED CHANGES IN BUDGET 2019

Budget 2019 proposes to remedy the unusual result described above by excepting from Canadian withholding tax dividend equivalent payments on certain securities loans involving shares of non-resident corporations. The proposed exemption would apply where the borrowed security is a share of a class of the capital stock of a non-resident corporation, and the 95% collateralization test is satisfied. We understand that the Department of Finance has proposed relief only for securities loans that meet the 95% collateralization test out of concern that less robustly collateralized securities loans could be used a form of disguised financing. Where a Canadian borrower posts collateral sufficient to meet the 95% collateralization test, this risk is arguably mitigated, because cash and government bonds posted by a Canadian borrower as collateral could have been more easily used by the borrower directly to meet its financing needs.

This concern is largely historical. When the "securities lending arrangement" rules were introduced into the ITA in 1989, interest paid to a non-resident of Canada on a cash borrowing was subject to withholding tax unless the borrowing met certain exemption criteria. At that time, a securities loan involving a Canadian borrower and non-resident lender that met the 95% collateralization test was unlikely to have been structured to avoid this Canadian withholding tax regime. However, in 2008, the ITA was amended to eliminate withholding tax on arm's length plain vanilla cash borrowings and a protocol to the Canada–U.S. Tax Treaty was introduced to eliminate withholding tax on interest paid on such cash borrowings in both the arm's length and non-arm's length contexts. As Canadian withholding tax no longer applies to plain vanilla interest on arm's length cash loans, and similar non-arm's length cash loans made by certain treaty residents, any historical concern regarding securities loans and disguised financings should be more limited.

Draft proposals in Budget 2019 would also deem all dividend equivalent payments made by Canadian resident recipients of shares of Canadian corporate stock under "securities lending arrangements" and "specified securities lending arrangements," both as defined in the ITA, to be Canadian source dividends (as opposed to interest), regardless of whether the securities loan satisfies the 95% collateralization test.

Finally, Budget 2019 also proposes to change the way in which the dividend article of a tax treaty would apply to dividend equivalent payments made under certain securities loans and repurchase agreements. Where a non-resident transfers shares of a Canadian corporation to a Canadian resident under such transactions, the non-resident would be deemed for the purpose of applying the dividend article of the relevant treaty to remain the beneficial owner of the securities, and the "SLA compensation payment" (as defined in the ITA) made by the Canadian borrower to the lender would be deemed for purposes of the dividend article to be paid by the issuer of the securities. It is as yet unclear whether this treatment would apply only to the dividend article or to all tax treaty articles.

Notes de bas de page

[1] While the MLI has not yet been ratified by Canada, Canada's stated intention is to do so as soon as possible.

[2] For a detailed analysis of the PPT, see D. G. Duff, "Tax Treaty Abuse and the Principal Purpose Test – Part 2" (2018) 66:4 Can. Tax Journal. 947-1011.

[3] The PPT was also incorporated as Article 29(9) of the 2017 edition of the *OECD Model Convention on Income and on Capital* (the "**OECD Model**").

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[4] *Crown Forest Industries Ltd. v. Canada*, [1995] 2 S.C.R. 802 ["***"Crown Forest"***"]. Regarding tax treaty interpretation in Canada see generally David Ward et al., *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (Kingston, ON and Amsterdam: International Fiscal Association (Canadian branch) and International Bureau of Fiscal Documentation, 2005); Mark Meredith, "Treaty Interpretation and Assertions of Abuse," Report of Proceedings of Sixtieth Tax Conference, 2008 Tax Conference (Toronto: Canadian Tax Foundation, 2009), 20:1-12.
[5] *Ibid*., para. 29.
[6] [1985] 1 C.T.C. 163. See *Crown Forest*, para. 49.
[7] 37CTS 1980/37, 1155 UNTS 331, 63 AJIL 875, Article 2(1)(a) (**"Vienna Convention"**). It is widely accepted that the rules of interpretation contained in the Vienna Convention reflect generally accepted rules of international law and are to be applied to Canada's tax treaties: See, *inter alia, Hunter Douglas Ltd. v. The Queen*, 79 DTC 5340 (FCTD); *Beame v. The Queen*, 2004 DTC 6102 (FCA).
[8] See M. Kandev, "Tax Treaty Interpretation: Determining Domestic Meaning under Article 3(2) of the OECD Model", (2007) 55(1) *Canadian Tax Journal* 31-71.
[9] RSC 1985, c. I-4 (**ITCIA**).
[10] See OECD, Explanatory Statement to the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, which states: "[t]he overall purpose of the [MLI is] to implement tax treaty-related measures produced as part of the Final BEPS Package in a swift, co-ordinated and consistent manner across the network of existing tax treaties without the need to bilaterally renegotiate each such treaty." [emphasis added]
[11] See ITA subsections 233.1(1), 237.3(1), 245(1), 247(1).
[12] *Cormie (D.M.) v. Canada*, [1995] 1 CTC 2463, at 2469.
[13] This seem apparent given that the terms are juxtaposed in the text of the PPT.
[14] This is consistent with Canadian jurisprudence, which has recognized that "arrangement" and "transaction" are separate concepts: See, *inter alia, Blackburn Radio Inc. v. The Queen*, 2009 DTC 1099 (TCC), at para. 32. See also *The Queen v. Canadian Pacific Ltd.*, 2002 DTC 6742 (FCA), in which the Federal Court of Appeal (**FCA**) noted as follows at para. 24: "By the definition in subsection 245(2) a transaction includes an arrangement or event. Thus the definition of transaction is extended to include circumstances that would not strictly be considered to be a transaction within the normal meaning of that term."
[15] See *Mort v. The Queen*, 93 DTC 5058 (FC); *Davidson v. The Queen*, 99 DTC 933 (TCC).
[16] [1958], 2 All E.R. 759, at page 763.
[17] See, e.g., the comments of Lord Brightman in *Furniss v. Dawson* [1984] AC 474 (**Furniss**), in which he states, at 527: "First, there must be a pre-ordained series of transactions; or, if one likes, one single composite transaction.".
[18] See *The Queen v. GlaxoSmithKline Inc.*, 2012 DTC 5147 (SCC) at para. 20.
[19] *Supra* note 4, at para. 50.
[20] Paragraph 177 of the OECD Commentary to Article 29(9).
[21] Michael Kandev, Brian Bloom, and Olivier Fournier, "The Meaning of 'Series of Transactions' as Disclosed by a Unified Textual, Contextual, and Purposive Analysis", (2010) 58:1 *Canadian Tax Journal* 277-330 at 326.
[22] See, *inter alia, The Queen v. Canada Trustco Mortgage Company*, 2005 DTC 5523 (SCC) at page 5528 (***"Canada Trustco"***), affirming the decision in *OSFC Holdings Ltd. v. the Queen*, 2001 DTC 5471 (FCA) (***OSFC***), and drawing on the House of Lords decisions in *Craven v. White*, [1989] AC 398 (Craven) and *W. T. Ramsay Ltd. v. Inland Revenue Commissioners*, [1981] 1 All ER 865 (***"Ramsay"***). See also, in this regard, *Furniss*, supra note 17. *Ramsay*, *Furniss*, and *Craven* remain authorities on the concept of "series of transactions" in the United Kingdom and other Commonwealth jurisdictions: see, more recently, *Trustees of the Morrison 2002 Maintenance Trust & Others v Her Majesty's Revenue and Customs*, [2019] EWCA Civ 93.
[23] For a critique of the case law on this point see *supra* note 21 at 277 – 330.
[24] *Copthorne Holdings Ltd. v. The Queen*, 2012 DTC 5007 (SCC) (***"Copthorne"***).
[25] *Supra* note 22 at para. 33.
[26] *Velcro Canada v. The Queen*, 2012 DTC 1100 (TCC).

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[27] In this context Canada's back-to-back rules in subsection 212(3.1) would also apply.
[28] *Alta Energy Luxembourg S.A.R.L. v. The Queen*, 2018 DTC 1120 (TCC).
[29] This may explain why Canada has "unreserved" its position in respect of the 365-day holding rule for capital gains in Article 9 of the MLI (as well as the similar rule for dividends in Article 8).
[30] In *Alta Energy* the taxpayer conceded that there was an avoidance transaction for the purposes of the GAAR presumably on the basis that the restructuring into Luxembourg and the ultimate sale would be seen as forming part of the same series under the ITA.
[31] This would explain the Canadian government's stated intention to apply the PPT and the GAAR successively. See Neal Armstrong, Summaries of 14 May 2019 IFA Conference – Stephanie Smith on MLI – GAAR and PPT under Treaties – MLI, available at https://taxinterpretations.com/content/528917.

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