FACULTY OF LAW
University of Lund

Andreas Nyberg

Treaty shopping

Master thesis
20 points

Supervisor: Lars Pelin

International Tax Law

Fall 2001

Contents

SUMMARY 1

PREFACE 4

ABBREVIATIONS 5

1 INTRODUCTION 6

1.1 Purpose 6

1.2 Materials and Method 6

1.3 Limitations 7

1.4 Outline 7

2 TREATY SHOPPING, DEFINITIONS 9

3 DOUBLE TAXATION TREATIES 11

3.1 What is a double taxation treaty? 11

3.2 The basics of double taxation treaties 11

3.3 Why are double taxation treaties necessary? 12

3.3.1 Avoidance of double taxation 13

3.3.2 Double taxation treaties for distributive reasons 14

3.3.3 Double taxation treaties a way of fighting international tax evasion 15

4 HOW TREATY SHOPPING IS DONE 17

4.1 Direct conduit 17

4.2 Stepping stone conduit 18

4.3 Base company 20

4.4 Variations 21

5 SWEDENS ROLE WHEN TREATY SHOPPING 22

5.1 Sweden as the source state 22

5.2 Sweden as the base/conduit/holding company state 23

5.3 Sweden as the residence state 24

6 INTERNATIONAL TAX EVASION AND TAX AVOIDANCE 26

6.1 Definitions 26

6.2 Tax evasion 27

6.3 Tax avoidance 28

6.4 Corporate international tax planning and treaty shopping 28

7 HOW IS TREATY SHOPPING PREVENTED? 30

7.1 The OECD and its model convention 30

7.2 Treaty rules made to combat treaty shopping 32
7.2.1 Limitation on benefits provision 33
7.2.2 Associated enterprises article 34
7.2.3 Exclusion of tax-favoured entities from treaty benefits 34
7.2.4 Third country articles or the bona fide approach 35

7.3 Domestic law and treaty law 36
7.3.1 Abuse and substance over form 36
7.3.2 General anti-avoidance tax legislation 37

8 SHOULD TREATY SHOPPING BE PREVENTED? 40

9 STEPS TOWARDS A SOLUTION 43

BIBLIOGRAPHIES AND LISTS OF AUTHORITIES 45

Conventions 45

Jurisprudence 45

Books 45

Secondary material: Articles 46

Other materials 47

Summary

The expression treaty shopping is of American origin and it is closely related to the term forum shopping, a term used in U.S. civil procedure. Forum shopping describes a behaviour by which a party in a court case tries to “shop” into a jurisdiction or circuit where he expects a more favourable decision to be given.

When treaty shopping, one uses double taxation treaties (and/or domestic tax law) to gain advantages otherwise not applicable. A double taxation convention is a treaty of international law and can only limit – not extend – the right to tax according to the state´s domestic tax law. Treaties are binding for the parties and the obligations in the treaties should be fulfilled by the parties of the agreements in good faith. Double taxation conventions are a necessary way for states to deal with the avoidance of multiple taxation claims, since double taxation has harmful effects on the expansion of trade in goods and services and of movement of capital and persons. Double taxation treaties are also used to make a cohesive net of tax law and to fight international tax evasion.

When treaty shopping, at least three states are included: The residence state, the base/conduit/holding company state and the source state. Treaty shopping can be done i various ways, the most comon are through *direct conduit* and *stepping stone conduit*. The essential difference between the direct conduit method and the stepping stone method is that the direct conduit method makes use of an exemption from tax in the intermediary country, while the stepping stone method reduces a tax liability in that country by a counterbalancing expense. A stepping stone conduit could also mean that a second holding company is included. A third form of treaty shopping is conducted through a *base company* scheme, where the benefits appears in the residence state. The success of these kind of arrangements comes down to an effective and skilful use of a judicious combination of favourable provisions in tax treaties with favourable provisions in the domestic law of one or other of the countries involved.

One important part when doing treaty shopping is to see to that the “right” countries is at the right place in the scheme. Sweden is generally indifferent when it comes to being the source country when treaty shopping. In most cases the beneficial tax treatment is already applicable when investing and conducting business with or within Sweden. The holding company state should have a widely ramified network of double taxation treaties and low taxes. Tax havens are quite commonly used as holding company states.

Treaty shopping is a typical example of tax avoidance or tax planning, it is a way of structuring commercial transactions in a manner designed to minimize the tax burden. However, a tax planning technique, for example

treaty shopping, could be illegal anyway because the tax legislation in a country involved in the transaction does not allow the suggested transaction. Treaty shopping is sometimes seen as abusive. This is made quite clear through the numerous legislative and political ways of hindering treaty abuse. Limits may be reached where transactions are entered, in other states, solely for the purpose of enjoying the benefit of particular treaty rules existing between the state involved and a third state which otherwise would not be applicable, e.g. because the person claiming the benefit is not a resident of one of the contracting states.

The ways to hinder treaty shopping are many. It could be done through legislative or political matters. One way is to bring into conformity different countries double taxation conventions, thereby trying to plug the loopholes that arises when countries have different tax legislation. One purpose with the OECD Model Convention is to create unitary tax legislation.
Treaty shopping is prevented through treaty rules. The *limitation on benefits provision*, *the associated enterprises article*, *the exclusion of tax-favoured enteties* and the *bona fide approach* are some examples of treaty rules made to combat treaty shopping. Treaty shopping is also combated through domestic law, through general anti-tax avoidance or anti-abusive provisions. Domestic anti-avoidance rules may only be applied to double taxation conventions if justified by both domestic and international law. In Sweden, the general anti-avoidance legislation has never been tested against treaty shopping.

The question if treaty shopping should be prevented is a political question. It is not easy to answer, since there is a conflict of interest. The conflict is, at least, twofold. First we have the conflict between the company attempting to avoid tax through treaty shopping and the revenue losing country. Secondly, there is a conflict between states as well. There are winners and losers in a treaty shopping scheme. Generally the source country is the loser, since this is where the reduction or elimination of the taxes are executed.

The answer to the question in the end comes down to the advantages of treaty abuse compared to the disadvantages of it. In the end it is difficult to weigh up to everyone´s satisfaction the relative merits of various considerations. It may be desirable in some circumstances for tax treaties to be, where appropriate, more precise in the way they define those persons who are intended to be the beneficiaries of the treaties - or, perhaps even more important, those persons not intended to be beneficiaries of the treaty. The problem is to achieve this result without in fact penalizing taxpayers whose use of the relevant tax treaties are bona fide.
Whether anti-abusive provisions are necessary in any particular tax treaty in the end has to be decided on a case-by-case basis.

The conclusion is that it is not possible to say that anti-abusive provisions should be a standard feature of tax treaties. It is desirable that such

provisions should be incorporated in particular treaties to deal with particular situations.

Preface

I would like to thank my supervisor Lars Pelin for his guidance and valuable advices during my work with this thesis.
I would also like to thank Samuel Chan and Hock Leong Chia, my good friends from my time at Dalhousie University, for proofreading this thesis.

Andreas Nyberg

Abbreviations

AGL	Lag om arvsskatt och gåvoskatt (Inheritance and Gift Tax Law)
CFC	Controlled Foreign Company
EC	European Community
KL	Kommunalskattelagen (Municipal Tax Law)
LOB	Limitation on benefits
OECD	Organisation for European Economic Co-operation
RF	Regeringsformen (The Constitution Act)
SIL	Lag (1947:576) om statlig inkomstskatt (National Income Tax Law)

1 Introduction

1.1 Purpose

This thesis deals with the tax planning method called *treaty shopping*. The expression is of American origin. It is closely related to the term forum shopping, a term used in U.S. civil procedure. Forum shopping describes a behaviour by which a party in a court case tries to "shop" into a jurisdiction or circuit where he expects a more favourable decision to be given.[1]
The term treaty shopping is originated from the hearing on Offshore Tax Havens, which the U.S. Congress held in April 1971. Although this is supposedly the time when the expression was created, the tax planning method in itself dates even further back. Actually, as early as 1945 the tax treaty between the U.S. and the UK had an abuse clause trying to limit treaty abuse. The OECD has discussed the problem since 1961 and this has resulted in quite a few proposals of how treaty shopping should be limited.[2]
The purpose of this thesis is to explain how treaty shopping is done and how it is prevented. My goal is to take additional steps in the understanding of treaty shopping and ask the question why some forces, with the OECD and the U.S. in the forefront, wants to hinder treaty shopping. The following question is given, should treaty shopping be prevented?

1.2 Materials and Method

Treaty shopping is a very complex area of tax law, where domestic as well as international legislation comes into play. Although the term treaty shopping has existed in thirty years or so, literature that actually deals directly with the tax planning method are limited – especially in comparison with how frequently treaty shopping is used in international tax planning.
The materials I have used consists of domestic legislation (primary Swedish domestic legislation), international tax law in form of double taxation treaties and model conventions, jurisprudence, literature and articles that deals directly or indirectly with treaty shopping, and reports from the OECD. I have tried to chose as relevant and up to date material as possible.

As for the method, I have chosen to try and elucidate the "big picture". When explaining what treaty shopping is all about, I have selected to do it in a more theoretical way rather then from a practical standpoint. The reasons are the following. Laws are changed all the time, tax related laws even more

---

[1] Becker, H., Wurm. J.F., *Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries*, (Deventer, Kluwer Law and Taxation Publishers, 1988) at 2 [hereinafter *Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries*].
[2] *Ibid*.

so. This thesis would quite soon be “out of date” if a case study with for example three countries would have been done instead. I would not have been able to cover as much ground, because the work with identifying three different States double taxation treaties and their domestic tax law would have been immense.
I will, though, elaborate Sweden’s role somewhat more when it comes to what part different countries play when it comes to treaty shopping. Since tax havens are quite commonly used when treaty shopping, I will mention their purpose in the scheme of treaty shopping as well.

1.3 Limitations

Treaty shopping is basically international tax planning. When several jurisdictions are involved in tax planning, the number of tax rules, the number of alternative structures and the number of tax rates are immense. Techniques of international tax planning haven been developed over time, and include for example treaty shopping, tax havens and high tax countries.[3] The tax planning process does not rely on one technique, but should often use a mixture of two or more. This thesis deals only with treaty shopping. I will only mention tax havens in one short part of a chapter, the notion of tax havens could constitute a thesis of its own. Therefore anti-tax haven legislation, such as CFC-rules, has been excluded. The same goes for thin-capitalization rules.
As every country in the world with a double taxation treaty could be used when treaty shopping, the number of countries mentioned in this thesis are in that aspect extremly limited. The U.S. are a forefront country when it comes to anti-abusive clauses, therefore it is of interest to mention their model convention. Sweden will also be used since I have studied Swedish tax law and since the Swedish sources mention the Swedish interests explicit. The OECD model convention will serve as an example when it comes to legislative matters of how treaty shopping is limited through anti-abusive clauses, since the convention has had a great impact when countries set up their double taxation treaties. The EC will be excluded, although we can expect future legislative efforts from it when it comes to conforming member countries tax legislation.

1.4 Outline

The thesis begins with explaining the definitions of treaty shopping. Since a treaty shopping scheme uses double taxation conventions to “shop” favourable jurisdictions and tax rates, the thesis continues with describing what a double taxation is and why they are necessary. Therafter some

[3] Wenehed, L-E., *A guide to effective tax planning within a global group*, (Helsingborg, Comtax Publishing AB) at 15 [hereinafter *A guide to effective tax planning within a global group*].

examples of how treaty shopping is done is described, followed by what parts Sweden have (or could have) in a treaty shopping procedure.

Since treaty shopping is somewhat objectionable, this is made clear trough the ways different states tries to prevent it, a discussion of the differences between tax evasion and tax avoidance will follow.

A big part of the thesis deals with how treaty shopping is prevented, both through political means as well as legislative efforts. Both international preventions, as well as domestic law in comparison with treaty law, will be discussed.
The thesis ends with a somewhat hard question to answer; should treaty shopping be prevented?

2 Treaty shopping, definitions

Treaty shopping is a way of using another state's internal taxation system and/or their taxation treaties with a third state, in which an investment or business is to be made, in a way which leads to an advantageous taxation effect (compared with the effect not using the procedure).[4]

Double taxation conventions, as well as domestic tax legislation, are used for tax planning purposes. It is the legal opportunities deriving from tax treaties which are so used. Numerous transactions are aimed at obtaining the benefits of a treaty which otherwise would not be applicable to the taxpayer because he or she is not a resident of a contracting state. These arrangements have become known as treaty shopping.[5]

When treaty shopping, you always deal with at least three states.[6] I will limit the scope of this thesis somewhat by using three states and three states only when exemplifying about treaty shopping and how treaty shopping is done.[7]

With three countries involved we first have the *residence state*, this is where the subject of the law (like a physical person or a business) has its residence. The company in the residence state then starts another business or makes an investment in the second state. The second state is called the *base company state*, *conduit company state* or *holding company state*. Finally we have the *source state*. This is the third country in the scheme of treaty shopping and where the actual income or the appreciation of an investment derives from. Thus, the base/conduit/holding company state is a sort of intermediary. This is where the investment is derived from, an investment that takes place in the source state.[8]

In the OECD-written *International Avoidance and Evasion*, treaty shopping is defined as a procedure that leads to tax benefits in the source state. The tax benefits mainly consists of a reduction of the overall taxation effect achieved through a reduced tax rate regulated in the taxation treaties when it comes to payments of dividends, interests and royalties.[9] Sometimes however, the term treaty shopping is also used when the favorable taxation effect appears in the residence state. A favorable taxation effect in the

---

[4] Sundgren, P., ”Treaty shopping”, (1992) Skattenytt 370 at 370.

[5] Vogel, K., *Klaus Vogel on Double Taxation Conventions*, 3 ed., (London, Kluwer Law International Ltd., 1997) at 116 [hereinafter *Klaus Vogel on Double Taxation Conventions*].

[6] Pelin, L., *Internationell skatterätt ur ett svenskt perspektiv*, 2nd ed. (Lund, Studentlitteratur, 2000), at 114 [hereinafter *Internationell skatterätt ur ett svenskt perspektiv*].

[7] The exception to this is when the treaty shoppig form "stepping stone conduit" is explained. Sometimes two conduit States are used, making the total number of countries four.

[8] Sundgren, *supra* note 4 at 371.

[9] Issues in International Taxation, No 1, International Tax Avoidance and Evasion, Four Related Studies, 1987.

residence state is most often a result of exemption from taxes when it comes to receiving dividends.[10]

It is important to note that the advantageous taxation effect does not arise from the base/conduit/holding company country. As stated above, the conduit company state is merely a stepping stone, or a means to an end, for achieving the altogether advantageous taxation effect. The domestic tax law in the conduit company state and/or its taxation treaties with third countries are used for the said purpose.[11]
Sometimes the procedure of treaty shopping can actually lead to a realized taxation effect in the holding company state. But this taxation effect is supposedly less severe than the taxation benefit received in the other states.[12] If not, the given procedure is pointless since the reason for treaty shopping is to gain an overall tax advantage.

Thus, when treaty shopping, one uses double taxation treaties (and/or domestic tax law) to gain advantages otherwise not applicable. Before elaborating on the concept of treaty shopping further, it is therefore necessary to explain the basis and basics of double taxation conventions.
Governments dislike treaty shopping for various reasons

[10] Sundgren, *supra* note 4 at 371.
[11] *Ibid*.
[12] *Ibid*.

3 Double taxation treaties

3.1 What is a double taxation treaty?

A double taxation treaty is a treaty between two or more states, through which the States gives up some of their domestic taxation claims. A double taxation treaty is a treaty of international law. States have an undertaking through the treaties to do or not to do certain things. One of these obligations is to waive the right to tax objects otherwise taxable under the domestic law.[13] Double taxation treaties are, for obvious reasons, in written form.

Tax treaties are almost always bilateral. An example of a multinational treaty is the Nordic double taxation treaty, signed 1996 and in place from 1998.[14]

In Sweden, the Riksdag[15] is the only legislator in the area of taxation. This is made clear in the Swedish constitution.[16] Double taxation treaties therefore have to be accepted in accordance to domestic tax law, i.e. in Sweden by the Riksdag[17], as well as in accordance with international law. In short, double taxation treaties comes into being after negotiations between the given states and finally ratification by the States legislative assemblies.[18] Treaties are binding for the parties and the obligations in the treaties should be fulfilled by the parties of the agreements in good faith.[19]

3.2 The basics of double taxation treaties

Double taxation treaties have a complex nature of both international and domestic law.

One of the central questions when dealing with double taxation treaties is its dual relationship with both domestic and international law. An important principle, which is accepted by the majority of the states, is that a double taxation treaty can only limit – not extend – the right to tax according to the state's domestic tax law. This is the so called "golden rule". It is so called since it is a fundamental principle when dealing with double taxation treaties.[20]

---

[13] Lindencrona, G., *Dubbelbeskattningsavtalsrätt* (Stockholm: Juristförlaget, 1994) at 11 [hereinafter *Dubbelbeskattningsavtalsrätt*].

[14] Nordic double taxation treaty (1996).

[15] The Swedish equivalent of Great Britain's Parliament or the United States Congress, an assembly that makes the laws of a country.

[16] RF 1:4.

[17] RF 8:3 and RF 8:5.

[18] *Dubbelbeskattningsavtalsrätt*, *supra* note 13 at 12 ff.

[19] Vienna Convention on the Law of Treaties, Art. 26.

[20] *Dubbelbeskattningsavtalsrätt*, *supra* note 13 at 24.

An example of how the "golden rule" works: When deciding where to tax in an international relationship, you first have to examine if taxation is to take place according to Swedish domestic tax law. The answer could be yes or no. If the answer is no there is no need to go further, i.e. there is no need to check the double taxation treaty since no double taxation is taking place in this case. Sweden has no taxation claim in the given matter. But if the answer is yes, Sweden has a taxation claim, you have to check what the double taxation treaty states. If it states no taxation, that means the treaty has limited Sweden's right to tax in accordance with Swedish domestic tax law. Taxation can not take place in Sweden. The double taxation treaty can also state that taxation can take place in Sweden. Then the treaty has acknowledged and accepted Sweden's tax claim.[21]
The above stated mean that if a double taxation treaty is applicable, there is a need to examine the given legal act according to domestic law as well as in the context of the double taxation treaty. According to *Lindencrona* this is best described as follows: Double taxation treaties are a special legal body separated from the domestic law, but should be used in accordance and contemporaneous with the domestic law.[22] But at the same time we have to remember that, by the Riksdag, an incorporated double taxation treaty is a part of Swedish domestic tax law.[23]

3.3 Why are double taxation treaties necessary?

Why do States enter into bilateral/multilateral taxation treaties with one another? When implementing a double taxation treaty this mean that a state actually gives up some of its taxation claims. Moreover, countries have their own reasons for taxing persons and the domestic taxation policies are disturbed when countries have to interact with the outside world. But today, like it or not, we live in a globalized world when moving money can be done by a simple click on the computer. Countries have to adapt to this internationalized reality where people, property, money and companies are moving across borders. Double taxation conventions are a necessary way for states to deal with the avoidance of multiple taxation claims.

---

[21] *Ibid*.
[22] Lindencrona, G., *Skatter och kapitalflykt* (Stockholm, AB Egnellska Boktryckeriet, 1972, at 156.
[23] Dahlberg, M., *Svensk skatteavtalspolitik och utländska basbolag. En studie av svensk skatteavtalspolitik i förhållande till utländska basbolag mot bakgrund av svensk intern skatterätt*, (Uppsala, Iustus Förlag AB, 2000) at 61.

3.3.1 Avoidance of double taxation

One of the objectives of taxation treaties is to avoid double taxation. International double taxation is at hand when the same or similar tax hits the taxable subject in two or more states.[24]

It is easy to see that double taxation is very common in the international financial world. As with any legal rule, it must be determined who is subject to its application. The most common bases for imposing taxation are *citizenship* or *nationality*, *residence*, and the *source of income*.[25] Citizenship or nationality is used as a basis for taxation in a few countries, the most notable example is United States (which also uses residence). Residence is the primary basis for income taxation in Sweden and most other countries, since residence emphasizes an economic association with a country. Most countries also imposes income tax on the basis of the source of income of the taxpayer.[26] So for example if an US citizen works in Sweden, we immediately have a case of double taxation. The same is the case if a Danish resident works in Sweden, etc.

Double taxation arises in all sorts of situations. Three different enumerations can serve as examples of typical situations when double taxation is at hand:

1) A has its domicile in state X and receives income from operations in country Y, where he has its business. Country X taxes the income, since A has its residence there. Country Y taxes the same income, since the business is taken place there.
2) A is said to have its residence in state X, according to the domestic tax legislation in state X. According to country Y´s domestic tax law, A is considered as having its residence there. Thus, both countries taxes the given income.
3) The domestic tax law in country X states that a certain income is earned in that country. According to state Y´s domestic legislation the same income is considered earned in state Y. Thus, both countries taxes the income.[27]

It is, of course, important for the one who is liable to pay tax to have its tax burden eased. That is, eased compared to the otherwise executed doubly taxation. That an income is double taxed does not necessarily say anything about the cumulative tax effect. If the tax is very low in both states, this means that the double taxation is not a serious burden. The situation could also be the opposite, namely the person is taxed only in one of the states but

[24] Mattsson, N., *Svensk internationell beskattningsrätt*, 13th ed. (Stockholm, Norstedts Juridik AB, 2000) at 136 [hereinafter *Svensk internationell beskattningsrätt*].
[25] Lodin, S-O., Lindencrona, G., Melz, P., Silfverberg, C., *Inkomstskatt – en läro- och handbok i skatterätt*, 6th ed., (Lund, Studentlitteratur, 1997) at 473.
[26] Arnold, J. B., Edgar, T., Jinyan, L., Sandler, D., *Materials on Canadian Income Tax*, 11th ed., (Scarborough, Ont.: Carswell, 1996) at 153 ff [hereinafter *Materials on Canadian Income Tax*].
[27] *Svensk internationell beskattningsrätt, supra* note 24 at 17.

the tax rate is very high there. Double taxation treaties does not decide tax rates, only the distribution of the right to tax between the given countries.[28]

Not only individuals but also states have a desire to eliminate double taxation because it has harmful effects on the expansion of trade in goods and services and of movements of capital and of persons. Double taxation seriously hinders the widening of economic relations.[29] Since trade arguably is an important factor in the creation of wealth, obstacles that hinders trade has to be removed.[30]

3.3.2 Double taxation treaties for distributive reasons

One important reason for countries entering into double taxation treaties with one another is to accomplish a distribution of the tax claims between the given states.[31] When explaining the conflict of interests in this area it is of importance to discuss some of the objectives of taxation.

The primary goal and overriding aim with taxation is to provide the government with the funds required to meet their obligations. Therefore it is obvious that States when negotiating tax treaties wants to have an as extended right to tax as possible, because of pure financial reasons.
However, other goals apart from the raising of revenue is also recognized. In Western democratic societies these concerns are more or less the same, although they have different places in the hierarchy.

Most countries agree that the tax system should be neutral. That is neutral in the sense that it should be designed to bring about a minimum change in the allocation of resources within the private sector of the economy relative to the allocation that would take place in the absence of taxes.[32] But on the other hand, taxes are used by states to achieve desirable effects. The high Swedish taxes on tobacco, alcohol and gas are telling examples of when countries want to influence and ultimately decide consumer behavior.

Where there are imperfections in the market mechanism, as the result of uncertainty, immobility of factors of production, monopoly, etc., the tax system should be used to change the allocation of resources to compensate for these imperfections.[33] This is where double taxation treaties also play a role – to get rid of immobility that hinders the growth of economies. However, the use of non-neutral and compensatory tax provisions is not

---

[28] *Dubbelbeskattningsavtalsrätt*, supra note 13 at 35.
[29] *Taxation and international capital flows. A Symposium of OECD and non-OECD Countries* (Paris, The OECD, 1990) at 75.
[30] *Svensk internationell beskattningsrätt*, *supra* note 24 at 18.
[31] *Dubbelbeskattningsavtalsrätt*, *supra* note 13 at 30.
[32] *Materials on Canadian Income Tax*, *supra* note 26 at 16 ff.
[33] *Ibid*. at 18.

justified if other instruments could achieve the same results at a smaller total cost than could tax provisions.[34]

Other objectives of a system of taxation are the ability to pay principle and the principle of equity. Unless a tax system is generally accepted as fair, the fundamental purpose of taxation is lost. If fairness is not considered relevant there are simpler means for the government to secure command over goods and services.[35] Confiscation is one way.

Thus, it is quite clear that double taxation treaties have to deal with more than mere avoidance of double tax. It is a way for countries to make a cohesive net of tax laws, laws that hopefully works together with its taxation policies. The countries desire to defend their domestic taxation policies as far as possible in the international world. This could be achieved through double taxation treaties, although states more often than not have to make sacrifices at the negotiation table.

3.3.3 Double taxation treaties a way of fighting international tax evasion

The countries' struggle against international tax evasion has increased significally during the last decades.[36] The world is more globalized now and it is easier to move across borders, whether it is about moving money, people or businesses.
Double taxation treaties are of significant importance when it comes to trying to prevent tax evasion. For some states, US is one example, the wish to fight international tax evasion is the decisive reason for using and entering into double taxation conventions. The fight against international tax evasion is also one of the more important functions of Swedish double taxation conventions. This has been symbolized through the headline in newer double taxation treaties where it says: "Treaty for the prevention of international double taxation and tax evasion".[37]

The rules in the double taxation conventions with the purpose of stopping international tax evasion are of different kinds. Basically the rules can be divided into material and administrative rules. In the latter, it is more about the contracting parties establishing an exchange of information between the taxation authorities. When it comes to material rules the picture is more complex and the ways of approaching the issue of international tax evasion

---

[34] Economic effective laws is a way of maximising the cumulative wealth. A law could be economic effective if it contributes to an increase of the total income. When it comes to double taxation treaties, this mean that a double taxation convention is economic effective and comes into being if it increases the income of the States who ratifies it. See the Kaldor-Hicks criteria and Ståhl, I., *Anvisningar och kommentarer till kursen i rättsekonomi på juristlinjens sjunde termin*, oktober 1999, at 8.
[35] *Materials on Canadian Income Tax*, *supra* note 26 at 19 ff.
[36] *Dubbelbeskattningsavtalsrätt*, *supra* note 13 at 35 f.
[37] *Ibid*. at 37.

vary when comparing countries with one another.[38] One example of a material rule is one making it possible through the double taxation convention to use domestic international tax law directed to stop international tax evasion.[39]
The issue about international tax evasion is further elaborated later in the thesis. The purpose is to more specifically explain what is done to prevent treaty shopping.

[38] *Ibid*.
[39] See the Swedish domestic rule 7 § 8 mom SIL. Dividends from an abroad affiliated company, not taxed with an with Swedish companies comparable tax rate, can not be received tax free by a Swedish company. See for example the double taxation treaty between Sweden and the Netherlands article 24 d.

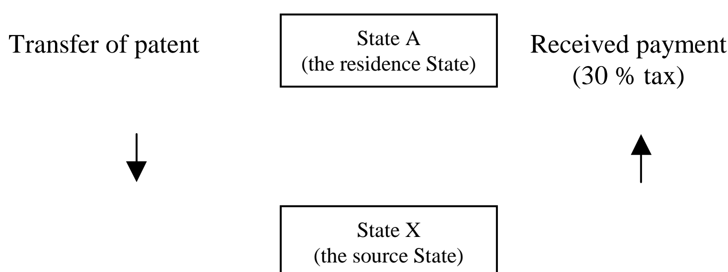
4 How treaty shopping is done

Treaty shopping can be done in various ways. The most typical structure for a multinational group includes an intermediate holding company, acting as a link between the parent company located in a given country and the controlled companies operating in other countries. Often, an intermediate holding company is the body through which treaty shopping is done and generally applicable in two forms, through *direct conduit* and *stepping stone conduit*.[40] A third form of treaty shopping is conducted through a *base company* scheme. Thus, when using the examples of companies, three different ways of treaty shopping have been identified. Direct conduit and stepping stone conduit gives tax benefits in the source state, while the tax benefits appears in the residence state when using base company treaty shopping.[41] The three forms are used in different situations, explained below.

4.1 Direct conduit

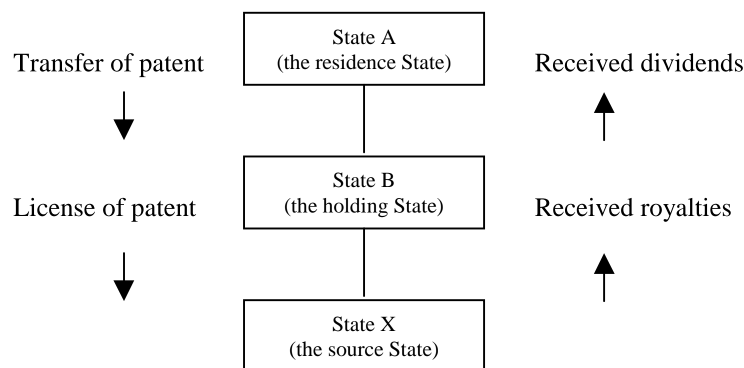
The direct conduit companies technique is used when two companies, in two different countries, intends to transfer income to each other, and there is an absence of a, for the purpose, "good" double taxation treaty between the states.[42]

An example of how a direct conduit scheme works: A company has its residence in state A (the residence state). The company has developed a patent and wants to license it to a separate company situated in state X (the source state). State A does not have a double taxation treaty with state X. When the company in state A receives payment for the royalty, a taxation effect occurs. Let us assume that the tax rate for received income on royalties are 30% - that is state X taxes the company in state A with a source tax of 30%.



[40] Scarlata, G.F., *Global Tax Planning and Offshore Opportunities*, (Helsingborg, Comtax Publishing AB, 1995) at 90 [hereinafter *Global Tax Planning and Offshore Opportunities*].
[41] Sundgren, *supra* note 4 at 371.
[42] *Global Tax Planning and Offshore Opportunities*, *supra* note 40 at 90.

To avoid this taxation at the source, the company in state A transfers the patent to a wholly-owned company in state B (the base/conduit/holding company state).[43] This company license the patent to the company situated in country X. Country B has a double taxation convention with country X, where it states that royalty payments to companies in state B are not taxed. The money can be transferred as dividends between state B and state A. It is of importance to see to that this procedure is tax free. Perhaps country A and B have a double taxation treaty dealing with dividends from a subsidiary to a parent company. It can also be regulated through domestic international tax legislation.
Through this direct conduit arrangement, money can be transferred almost tax-free to the company in state A, instead of an executed source tax of 30%. Although the source tax is zero, it is unusual that the income tax from a received royalty payment is zero. But it can be very low, especially if state B is a tax haven or merely a country with a low tax on received dividends from royalties.[44]



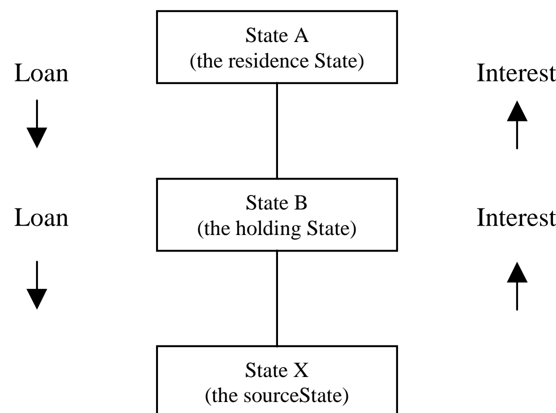
Treaty shopping through direct conduit has in this case resulted in an elimination of the 30% tax on royalty otherwise executed in the source state if the procedure was done directly from state A to state X.

4.2 Stepping stone conduit

In this situation state B (the base/conduit/holding company state) is a high tax country. The company in state A (the residence state) wants to give a loan to a company in state X (the source state). The source tax on interest to the lender situated in state A is 30% in country X. Therefore the loan is mediated to state B and from there lent to the company in state X. Why? Because state B and X has a double taxation treaty where it states that country X only taxes interests to a lender in country B with five percent. Another part of the equation is to see to that the loan between the company

[43] The company in State B can be set up for the purpose of treaty shopping in this specific situation.
[44] See further, Sundgren, *supra* note 4 at 371 ff.

in state A and B is exposed to minimal tax, as well as the interest paid from country B to the company in the residence state. For example, state B could through its domestic tax legislation not tax lenders with its domicile abroad.[45]



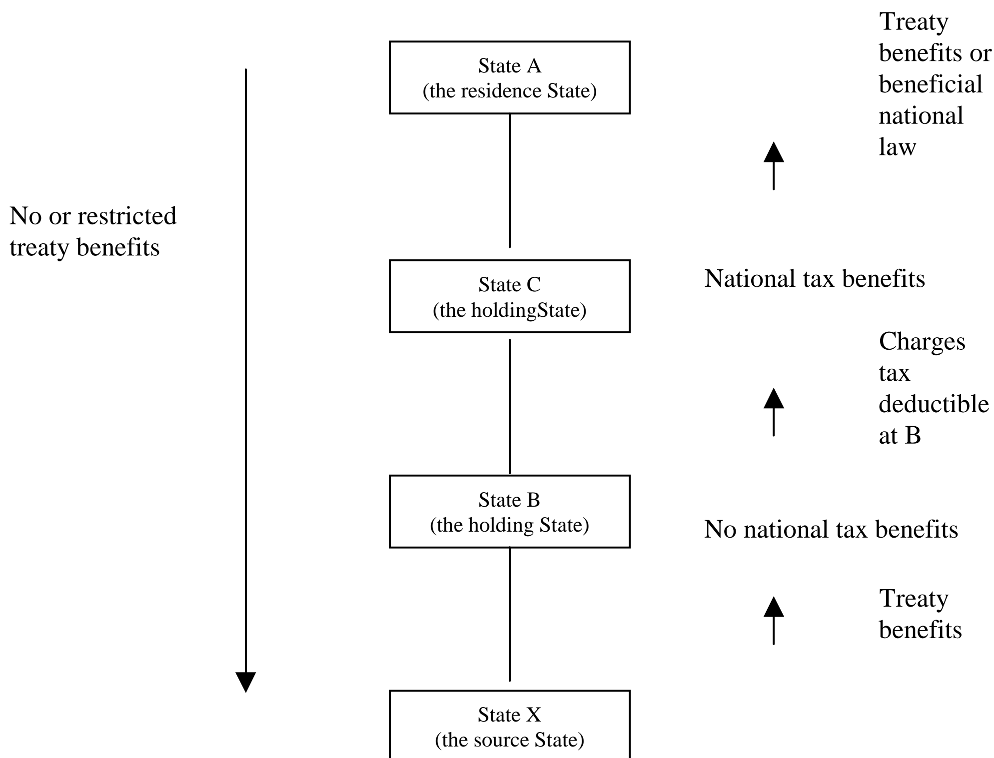
In this case the company in state A has been able to use the double taxation treaty between state B and X to reduce the tax on interests from 30% to five percent. The tax benefit has occurred in the source state through this stepping stone conduit.
This procedure is also an example of when treaty shopping actually leads to a realized taxation effect in the conduit company state, since state B is a high tax country and company tax has to be paid. But this taxation effect is supposedly less severe than the taxation benefit received in the source state. If not, the given procedure is pointless since the reason for treaty shopping is to gain an overall tax advantage.
The essential difference between the direct conduit method and the stepping stone method is that the direct conduit method makes use of an exemption from tax in the intermediary country, while the stepping stone method reduces a tax liability in that country by a counterbalancing expense.[46]

The above mentioned example is taken from Sundgren, P., ”Treaty shopping”, but in other literatue the stepping stone conduit has a somewhat other meaning. Basically a second holding company is included.
As in the previous situation, country A does not have a tax treaty with state X, or its treaty grants only limited benefits. State X has concluded a tax treaty with country C, or grants domestic tax benefits on income derived from that country. Country C applies a favourable tax regime to all companies or to a certain type of company. In country B charges from a

---

[45] Sweden is one example of a country that does not tax lenders with its domicile abroad. Sundgren, *supra* note 4 at 372.
[46] Department of International Economic and Social Affairs, *Contributions to international co-operation in tax matters* (New York, United Nations, 1988) at 4 [hereinafter *Contributions to international co-operation in tax matters*].

foreign company are tax deductible and income from country X is subject to treaty benefits. Given these circumstances the resident of country A sets up a company in country C, which derives most of its profits by providing services to its subsidiary in country B. The company in country B realises its income in country X where it is subject to beneficial treatment under the tax treaty. Thus the profits from country X are channelled to country C at almost no cost. Since the profits are subject to low or no taxation in country C, the income from country C finally arrives in country A at little or no tax cost.[47]

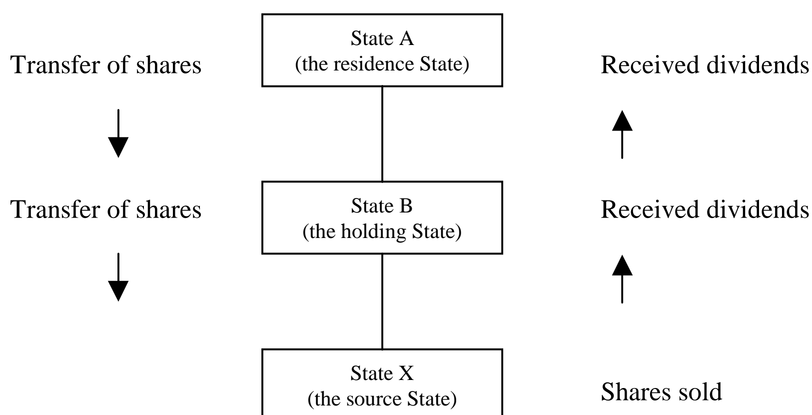


4.3 Base company

In this case the tax benefit arises in the residence state.
For example, a company in state A owns all shares in a company situated in country X. A disposition of the shares triggers a tax effect according to state A's domestic tax legislation and according to the double taxation treaty between state A and X. Therefore the company in state A transfers the shares to a wholly owned company in state B. This internal transaction does not render any tax in state A. The following structure looks like this:

---

[47] *Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries*, *supra* note 1at 4 f. and *Global Tax Planning and Offshore Opportunities*, *supra* note 40 at 90 f.



The company in state B then sells the shares of the company situated in country X and is not taxed since the domestic law render capital gains to be tax free. The tax free capital gain can then be transferred to the mother company in state A through dividends. It is assumed that the dividends are tax free through the double taxation treaty between state A and B. The company in state A have through this scheme completely avoided a tax on the capital gains when selling the shares of the company in country X. The tax benefit arises in the residence state.

4.4 Variations

These examples illustrate the basic types of treaty shop arrangement, but there is of course variations.
An intermediary company may not always be necessary. Sometimes a partnership, or one of a great variety of trusts or similar organizations, will serve equally well or perhaps better as a tax-free conduit for funds. It may also be possible, as indicated before, to use more than one tax treaty to provide such conduits and moving the funds tax free through several countries to the ultimate beneficiary. The income involved may also change its nature and character at different stages in the process, if it is deemed beneficial. Interest could be paid as dividens and received dividends may be transferred in the form of a loan, and so on. Another reason for chosing one route before another could be be the possibility of avoiding disclosure of the income or its ultimate source to the tax authorities of the country of residence.[48]
The success of these kind of arrangements comes down to an effective and skilful use of a judicious combination of favourable provisions in tax treaties with favourable provisions in the domestic law of one or other of the countries involved.

[48] *Contributions to international co-operation in tax matters*, *supra* note 46 at 4 f.

5 Swedens role when treaty shopping

As described before, a treaty shopping scheme always includes at least three states. They are:

i. The residence state
ii. The base/conduit/holding company state
iii. The source state.

I will now elaborate on the different roles that Sweden plays in the treaty shopping procedure.

5.1 Sweden as the source state

Double taxation treaties normally aim at eliminating double taxation. This means that the source country generally reduces or eliminates taxes on royalties, dividends and interests paid to the country of residence. This is regulated through double taxation treaties.
Sweden is very obliging when it comes to the reduction of double taxation. For example, with some countries, the source tax on dividends is reduced to five percent through taxation treaties. The situation is even more beneficial in other circumstances; with the source tax on dividends actually completely eliminated through double taxation treaties with France, the U.K, Germany, the Netherlands and our Nordic neighbours.[49]
When it comes to royalties, the picture is about the same. According to agreements, Sweden only claims a source tax on royalties in treaties with a few industrial states.[50]
Lastly, for interests paid according to domestic legislation, Sweden does not tax payments of interest to lenders situated abroad. Thus, it does not matter in this case if Sweden actually has a double taxation treaty with the given state of residence.[51]

The consequence of this is that Sweden is generally indifferent when it comes to being the source country in a scheme of treaty shopping. In most cases the beneficial tax treatment is already applicable when investing and conducting business with or within Sweden. This is at least true when the given company has its country of residence in a state which Sweden has a double taxation treaty with, and they are quite numerous.

[49] Sundgren, *supra* note 4 at 375.
[50] The source tax on royalties is ten percent in agreements with Japan, Australia and Spain. See, i*bid*.
[51] *Ibid*. at 376.

When it comes to companies resident in a state which Sweden does not have a double taxation treaty with, the situation is somewhat different. For instance, if a dividend was paid from Sweden to one of those states, Sweden is entitled to 30 percent tax on paid dividends and full income tax on royalties. The company could then use treaty shopping as an instrument to pass the money through a holding company state, situated in a country with whom Sweden has a, for the purpose, beneficial treaty. In this case Sweden loses tax revenue, and perhaps wants to reduce the possibilities of treaty shopping in those instances.

5.2 Sweden as the base/conduit/holding company state

Which countries are best suited as being the base/conduit/holding company state? This question is of interest for taxable individuals in the residence state.
Sweden is usually not regarded as a suitable holding company country when a company in the residence state wants to set up a treaty shopping scheme. Generally countries as the Netherlands, Switzerland, France, Luxembourg, etc. are in the forefront of the discussion. But it is wrong to exclude Sweden altogether, as it is equally wrong to rank one country before another as the perfect holding company state. A careful analysis has to be done, with the specific facts of every case in mind.

Some basics of what constitutes a "good" holding company state can be set up, though:

i. A widely ramified network of double taxation treaties with other countries.
ii. Low taxes (e.g. company tax and tax on capital).
iii. Low source taxes on dividends, royalties and interests (both received and paid to other countries).
iv. Deduction of taxes paid abroad.
v. Tax excluded units.
vi. A legal institution of advanced notice when it comes to taxation matters.
vii. Low restrictions to minimum share capital and company setup costs.
viii. Well educated lawyers/economists with language proficiencies.
ix. Good infrastructure.
x. Political stability.
xi. No exchange control.
xii. International integration and a stabile currency.
xiii. Free movement of capital, goods and services.[52]

[52] Sundgren, *supra* note 4 at 377 ff.

Sweden fulfills many of these requirements and thus could be regarded as a suitable host country for a holding company.
More commonly, though, is that tax havens are used to planning cross-border payments within a global group. The use of tax havens have, however, been limited due to the increasingly common CFC-legislation.[53] Anti-treaty shopping legislation also has hit tax havens hard, as discussed below under the headline, “How is treaty shopping prevented?”.

5.3 Sweden as the residence state

The treaty shopping arrangement is usually set up with the conditions of the company situated in the state of residence in mind. This is the starting point of treaty shopping. The company in the residence state looks for favourable methods of transferring or receiving money in the most tax efficient way as possible. Treaty shopping could be one way of achieving this goal.

The country of residence is generally the “winner” (together with the holding company state) when it comes to treaty shopping. If a company is situated in Sweden and conducts treaty shopping, this means that the company pays less tax in relation to what the company would pay if the procedure were not done. Ultimately it results in increased profits for the company, thus a larger base to tax for the Swedish tax authorities. In those cases, Sweden does not want to prevent treaty shopping. On the contrary, if a company has Sweden as its residence country, Sweden actually encourages treaty shopping. In some double taxation agreements, for example in the treaties with Switzerland, the Netherlands and Singapore, Sweden does encourage (or at least makes it easier) to treaty shop. A special “transferring-rule” has been included, which means that dividends that originate from a third country should be tax free in Sweden under the same circumstances as if the dividends would be paid directly from the third country to Sweden.[54]
For example:[55] Sweden has included this “transferring-rule” in a treaty with Singapore. Sweden is the residence state and Singapore the source state. The company in Singapore pays dividends to a holding company in Bermudas. These dividends can, since they arises from the company in Singapore, be paid tax free from the Bermudan holding company to the Swedish company through dividends. From a Swedish viewpoint, this is a way of upholding neutrality in the system, since the dividends would have been tax free if paid directly from Singapore to Sweden. But the Singaporean tax revenues may lose money if the source tax is less when transferring money to Bermuda in comparison with the hypothetical source tax if the money were directly transferred to Sweden. Thus, it has to be investigated by the resident company that the source tax, when paying dividends from the source country to a holding company, is actually less in comparison with if the dividends were paid directly from the source state to the residence country. Otherwise

---

[53] *A guide to effective tax planning within a global group*, *supra* note 3 at 35.
[54] Sundgren, *supra* note 4 at 378 f.
[55] This is a fictive, although likely, example.

it is pointless, at least from the viewpoint of treaty shopping, to include a holding company.[56]

There is another advantage, besides the reduction of the tax rate, though. Since the "transferring-rule" is a special rule in the treaty, it has a precedence over general anti-treaty shopping provisions.[57] Thus, general anti-treaty shopping provisions can not stop this kind of treaty shopping scheme. The factor of legal security has to be taken into account as well. If one knows for sure that a certain treaty shopping route is "secure" from anti-treaty shopping provisions, this is generally the route to choose.

The bottom line is; when Sweden is the country of residence, the Swedish policy does not mind treaty shopping. The same is true when Sweden is the holding company state. It is better that an investment is done in the country compared to an investment not taking place at all. Only when Sweden is the source state, there is an incentive of hindering treaty shopping. This inevitably leads to a contradiction when Sweden negotiates double taxation treaties. Sometimes Sweden wants to stop treaty shopping, other times not.

[56] Sundgren, *supra* note 4 at 379.

[57] More about this discussion under the headline "How is treaty shopping prevented?".

6 International tax evasion and tax avoidance

It is important, for the purpose of this thesis, to explain the differences between the terms *tax evasion* and *tax avoidance*. The terms need to be differentiated before elaborating what is done to prevent treaty shopping and if treaty shopping should be prevented.

6.1 Definitions

It is difficult to define international tax planning. It is essential for companies involved in international transactions to take into regard the tax provisions conducting business with or within foreign countries. They will have to comply with the prevailing rules, and when they do so, their actions may be labeled as tax planning. This is true regardless of the "real" nature behind the transactions – this could constitute normal tax compliance, making use of tax incentives, or through the abuse of loopholes.[58]
Taxpayers can go abroad, personally or with their investments, to seek advantages they could not gain in their country of residence. These transactions may involve tax haven countries, i.e. countries with extremely favorable tax rules, and these tax havens may not have any duty to cooperate with tax authorities in other countries on matters concerning tax law enforcement.[59] Under the Swedish tax law, a number of provisions may be interpreted as directed against this type of tax planning, or as guarding the Swedish revenue interest. Some examples are:

i. Sweden has a restrictive definition of who is no longer a resident.[60]
ii. A 10-year rule for former residents selling Swedish shares.[61]
iii. Inheritance and gift tax provisions keeping emigrants in the grasp of the Swedish tax authorities for a 10-year period from emigration.[62]

The Swedish income tax system is one of self-assessment. Thus, it depends on the basic honesty of taxpayers. It is recognized, however, that there will be attempts to evade or improperly avoid tax. The objectives of tax avoidance and tax evasion are the elimination or reduction of tax. The major distinction between the two terms can be illustrated by the different

[58] Mutén, Leif., *Tax Planning*, (Uppsala, Reprocentralen HSC, 1995) at 1 [hereinafter *Tax Planning*.
[59] I*bid*.
[60] 53 § anvp 1 KL.
[61] 6 § 1 mom a SIL.
[62] 4 § 1 st AGL.

consequences imposed in the event of an detection from authorities. In the case of tax evasion, the consequences are criminal in nature and lead to imposition of a fine or incarceration in addition to the civil consequences. The civil consequences include the payment of the tax that has been evaded, interest and penalties. An unsuccessful attempt at tax avoidance involves no criminal penalty in the nature of a fine or incarceration, but merely payment of the tax, interest and, perhaps, the imposition of civil penalties.[63] In short tax evasion has a criminal connotation while tax avoidance does not. Tax evasion is avoidance of tax by unlawful means.[64]

Internationally, the conceptual question of what is admissible by way of international tax planning is continually debated. This is due to the fact that there are fundamental differences in the taxation of citizens in each individual country. For example, the tax law could be based on domicile, nationality or the principle of territoriality.[65] And furthermore, there are numerous differences between the countries' domestic tax law when it comes to deciding what is abusive and not legally accepted .

Due to the reasons mentioned above, therefore it is difficult to define tax evasion and tax avoidance. And it is even harder to define the terms in an international environment, since the domestic laws are so different. But even if the definitional problem is solved, the technical problem of establishing the facts remains. It lies in the nature of measures aimed at evading or avoiding tax that they are not easily identified, since the persons evading or avoiding tax will attempt to hide what they are doing.[66] Some authors claim that the very essence of tax planning is to place assets and income streams outside the reach of the authorities.[67]

6.2 Tax evasion

Tax evasion is the willful attempt by a taxpayer to suppress or not disclose income where the law stipulates the obligation to report the income and pay the tax. Tax evasion involves an element of non-disclosure of some kind.[68] Ordinarily tax evasion involves the following:

i. Not filing an income tax return.
ii. Filing an income tax return but willfully omitting income.
iii. Willfully misrepresent the nature or amount of the income.
iv. Arranging so that the income does not come to the attention of the revenue authorities (e.g., paying for services "black").

---

[63] *Materials on Canadian Income Tax*, *supra* note 26 at 115.
[64] *A guide to effective tax planning within a global group*, supra note 3 at 9.
[65] *Tax Planning*, *supra* note 58 at 5.
[66] *Ibid*.
[67] *Ibid*. at 17 f.
[68] *Materials on Canadian Income Tax*, *supra* note 26 at 115.

v. Disguising the real object or benefit of the transaction (e.g., recording expenses not incurred in the income earning process).[69]

The heart of culpable tax evasion goes to the willful attempt by a taxpayer to suppress an accurate determination of the nature and amount of the liability for tax.[70] See for example the Swedish domestic tax legislation *Law (1971:69) against tax crimes*.[71]

6.3 Tax avoidance

Tax avoidance generally refers to arrangements by taxpayers to eliminate or minimize their tax, by taking advantage of the most beneficial provisions of the tax legislation or to rely on reasonable differences in interpretation.[72] See for example the Swedish *Law (1995:575) against tax evasion.*[73] The translation is somewhat confusing, but since there does not have to be an willful attempt by a taxpayer to suppress or not disclose income to be caught by the provision, this is rather an instrument to catch tax avoidance. The "only" sanction if getting caught by the provisions is a raised tax assessment, thus, no criminal penalty in the nature of a fine or incarceration.[74]

Treaty shopping is a typical example of tax avoidance or tax planning. Treaty shopping is a way of structuring commercial transactions in a manner designed to minimize the tax burden, in other words a scheme made to avoid tax. Thus, treaty shopping is generally not seen as tax evasion.[75]

6.4 Corporate international tax planning and treaty shopping

Where does treaty shopping fit in when it comes to international corporate tax planning? Is it tax evasion or tax avoidance? The question has in part already been answered – treaty shopping is basically tax avoidance (or in other words tax planning). However, a tax planning technique, for example treaty shopping, could be illegal anyway because the tax legislation in a country involved in the transaction does not allow the suggested transaction. If the transaction is neverless carried out, it could be characterized as tax evasion. But, if the jurisdiction accepts the transaction, and as a result the

---

[69] *Ibid*. at 115 f.
[70] *Ibid*. at 116.
[71] Skattebrottslag (1971:69).
[72] *Materials on Canadian Income Tax*, *supra* note 26 at 116.
[73] Lag (1995:575) mot skatteflykt.
[74] 3 § Lag (1995:575) mot skatteflykt.
[75] See for example Norell, K., "Skatteflykt – internationella kontrollfrågor", (1997) Skattenytt 673 at 675.

taxes payable decrease, the scheme could be characterized as tax planning.[76] Thus, a case to case approach has to be taken when determine if treaty shopping is tax evasion or tax avoidance.

There is an obvious and considerable difference between:

a. Companies making undisclosed foreign investments by knowingly omitting them in their tax returns or audits in an effort to evade tax authorities.
b. Corporations openly making use of the unilateral and treaty-based tax concessions to gain benefits from excessive tax relief elsewhere.[77]

The former is classified as tax evasion and to combat this form of abuse, investigative methods have to be taken into consideration, as well as the exchange of information between the tax authorities of different countries.[78] To restrict the latter type of tax planning, many remedies are available. Part of this thesis focuses on what is done internationally as well as domestically when it comes to preventing treaty shopping.
It comes as no surprise that treaty shopping is sometimes seen as abusive. This is made quite clear through the numerous legislative and political ways of hindering treaty abuse.

[76] *A guide to effective tax planning within a global group*, *supra* note 3 at 12.
[77] *Tax Planning*, *supra* note 58 at 9.
[78] *Tax Planning*, *supra* note 58 at 9.

7 How is treaty shopping prevented?

It is a well-established rule of conduct in tax law that taxpayers are free to arrange their economic affairs in the manner they deem to be the most beneficial for them. The fact a particular action has been taken for tax purposes cannot prevent the taxpayer in question of tax benefits to which they are otherwise entitled under the law. This rule applies, if not universally, at least within all Western constitutional democracies.[79] The rule is equally applicable with regard to treaty law compared with domestic tax law. This has also been established by case law.[80]

Tax planning on the domestic or the international level is by no means objectionable, though extensive tax planning is an indication of legislation being imperfect. Nevertheless, tax planning may reach a point beyond which it cannot be tolerated within a legal system intended to conform to principles of justice. Such limits may be reached where transactions are entered, or where entities are established, in other States, solely for the purpose of enjoying the benefit of particular treaty rules existing between the State involved and a third State which otherwise would not be applicable, e.g. because the person claiming the benefit is not a resident of one of the contracting states.[81]
The ways to hinder treaty shopping are many. It could be done through legislative or political matters. One way is to bring into conformity different countries double taxation conventions, thereby trying to plug the loopholes that arises when countries have different tax legislation. The OECD is one important forum where tax matters, such as harmful tax competition, are discussed.

7.1 The OECD and its model convention

The Organisation for European Economic Co-operation (OECD) is an international organisation consisting of 30 member states.[82]
The OECD is meant to be a setting where governments can discuss, develop, and perfect economic and social policy. Since its member states are numerous and represent very influential countries, politically as well as

[79] See for example *House of Lords, IRC v. Duke of Westminister*, 19 Tax Cases 490, 510 (United Kingdom) and *Perry Bass v. Commissioner*, 50 Tax Court 595 (1968) (USA).
[80] See *Aiken Industries v. Commissioner*, 56 Tax Court 925 (1971) on the United States´ DTC with Honduras.
[81] *Klaus Vogel on Double Taxation Conventions*, *supra* note 5 at 116-117.
[82] Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Island, Italy, Japan, Korea, Luxembourg, Mexico, The Netherlands, New Zealand, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, Switzerland, Turkey, United Kingdom and the United States.

economically, the organisation carries a lot of weight in the international community. The OECD provides a forum for co-operation by national tax authorities to prevent double taxation, but also works with stopping harmful tax competition. The co-operation includes a wish to include non-OECD countries to extend OECD norms and standards outside the OECD area.[83] States understand that they can not stand alone in the fight against treaty shopping and other forms of, which they regard as, harmful tax competition. OECD is a complement to countries internal legislative efforts to hinder treaty shopping.

In 1956 the OECD started to work on a model convention in the double taxation area. This resulted in a ready convention 1963, and later, in 1977 and 1992, two updated editions with minor differences were published. Presently the model convention is updated yearly, and in loose-leaf format.[84] It is not necessary for the purpose of this thesis to analyze the model convention in any greater depth. It is sufficient to say that the model convention is a recommendation of how countries could formulate their double taxation treaties. The importance lies in the understanding of why a model convention is of benefit to the international community.

The main purpose with the Model Convention is to create unitary tax legislation. Unitary tax legislation tends to plug unwanted loopholes, loopholes that one looks for when it comes to, for example, treaty shopping. The model convention is, as apparent from the name, non-binding; in other words it only constitutes a recommendation.[85] States seems to follow the model convention anyway when they are setting up their double taxation treaties, with minor differences compared to the model convention. This is so because the member countries of the OECD had their say when the model convention was drafted, thus the model convention actually represent the states view of how a double taxation treaty should be conformed. Secondly, countries understand the importance of uniformed tax legislation as well as the importance of uniformed tax policies.
Tax policies in one economy are now more likely to have an impact on other economies. Therefore countries cannot stand alone in their fight against tax evasion and double taxation. Unitary tax law reduces some of the uncertainty and complexity that inevitably arises when thousands of different double taxation conventions are in force.

---

[83] Svalborn, O., *The United States Fight Against Harmful Tax Competition*, (Master thesis, Faculty of Law, University of Lund, spring 2001) at 8.
[84] *Internationell skatterätt ur ett svenskt perspektiv*, *supra* note 6 at 159. The OECD model convention can be be read on internet, http://www.oecd.org
[85] *Internationell skatterätt ur ett svenskt perspektiv*, *supra* note 6 at 160.

7.2 Treaty rules made to combat treaty shopping

The problem with treaty shopping is aired already in article 1 of all double taxation treaties. The article deals with persons covered by the treaty. Article 1 in the OECD Model Tax Convention reads:

"*This Convention shall apply to persons who are residents of one or both of the Contracting States.*"[86]

This means that the benefits offered by the treaty cannot, without good reasons, be denied to persons with residence for tax purposes in the contracting states.

Treaty shopping is, as tax planning in general, permitted in principle. However, as with all types of tax planning, there are borders which when crossed lead to transactions that are no longer acceptable.[87] Governments dislike treaty shopping for various reasons, some of them listed below:

i. Double taxation treaties are normally designed to relieve double taxation that would otherwise be suffered by residents of the contracting states. They are not intended to be used by residents of a third country. More exact, the source tax country loses tax because its rate of withholding tax is limited by operation of this treaty with the third country. The result is not intended, since the double taxation treaty should be used by the contracting countries.
ii. Treaty shopping encourages the use of transactions that have little or no economic substance. This can diminish taxpayers respect for the tax system.
iii. The possibility of treaty shopping makes the source country "worse off" when negotiating for tax benefits for its own residents from a foreign country. If treaty shopping is already available, why not take that route instead? If treaty shopping is available, the other country may not be worried by high taxes imposed by the first country. Therefore, the principle of reciprocity is breached and the balance of sacrifices is altered.[88]

The expansion of the network of double taxation conventions creates, in itself, additional loopholes when it comes to treaty shopping. The extension makes it possible to gain tax benefits from double taxation treaties, through fictive jurisdictional maneuvers.[89] Special legal and treaty rules have been

---

[86] The OECD Model Tax Convention on Income and on Capital (As they read on 29 April 2000).
[87] *Klaus Vogel on Double Taxation Conventions*, *supra* note 5 at 119.
[88] *A guide to effective tax planning within a global group*, *supra* note 3 at 26.
[89] Sundgren, *supra* note 4 at 374.

developed to combat the avoidance of taxation through circumvention of treaties. To achieve that, numerous treaties today contain “subject-to-tax-clauses” or “activity” and “productivity clauses”. These clauses are intended to eliminate the incentive for abuse; they are applicable without the need to show that an abuse was intended in a particular case.[90]
Other regulations attempt to standardise the types of abuse; if the criteria of such a case are met, then the benefits of the treaty will be denied in that instance.[91]

7.2.1 Limitation on benefits provision

When it comes to ”anti-treaty shopping”, the U.S. is one of the leading countries. In treaties with U.S. a ”*limitation on benefits*” (LOB) provision is used in all new treaties, and old treaties are re-negotiated. This provision prevents an entity, which is not owned by a resident of any of the treaty countries, from being favored by treaty benefits.[92]
When a LOB article is in force, a resident of a contracting state does not automatically qualify for treaty protection. A resident must pass a LOB test every year, and treaty benefits can be excluded both from the other treaty country as well as from country of residence. This actually means that the U.S. can deny its own residents benefits, such as relief from double taxation.[93]

The LOB test means that a resident must meet one of a number of alternative conditions, otherwise the treaty benefits are not applicable to the entity. *The U.S. Model Income Tax Convention of 1996* can serve as an example:
Those who are directly qualified for benefits under the treaty are individuals, public entities, companies regularly traded on recognized stock exchanges, tax exempt organizations and pension funds.[94] A legal entity not qualified can try to meet an ownership and base erosion test. Under the ownership test, the legal entity must be owned – directly or indirectly – by persons who themselves are entitled to treaty benefits under article 22 (2), by at least 50 percent. The base erosion test is intended to make sure that the tax base is not eroded by requiring that less than 50 percent of the entity’s income is paid to non-residents as deductible payments. Both tests must be satisfied.[95]
Taxpayers that have not yet passed any of the tests may, if satisfying three requirements, receive treaty benefits with respect to certain income connected to active trade or business. These are: the resident must be engaged in an active trade or business, the income must be connected to that

[90] *Klaus Vogel on Double Taxation Conventions*, *supra* note 5 at 119.
[91] An example of such as measure is the “limitation on benefits clause”. See, *Klaus Vogel on Double Taxation Conventions*, *supra* note 5 at 119.
[92] *A guide to effective tax planning within a global group*, *supra* note 3 at 26 ff.
[93] Stitt, R. and Yu, A., “Has the Chase to End Treaty Abuse gone too Far?”, (2000) Tax Notes International 1057 at 1058.
[94] Article 22 (2) (a-e), United States Model Income Tax Convention (1996).
[95] Article 22 (2) (f), United States Model Income Tax Convention (1996).

trade or business and the trade or business must be substantial in relation to the activity in the other state generating income.[96]
If a corporation still do not qualify, there is a last option to apply for treaty benefits from the competent authority of the State where the benefits are applied for.[97]

This is one example of how a limitation of benefits article could be conformed. The U.S. LOB-article is very restrictive and has received critique in the doctrine. There is a risk that even legitimate U.S. companies will be left without double taxation relief, because non-residents own them. Perhaps this is a case when the prevention of treaty shopping has gone too far?[98]

Sweden has a LOB-article in its double taxation convention with Barbados, but it is less restrictive compared with the one in the U.S model convention.[99]

7.2.2 Associated enterprises article

The *associated enterprises article* constitutes a form of an arm-length´s test.
Associated enterprises articles normaly apply where the conditions made or imposed between associated enterprises in their commercial or financial relations differ from those which would apply between independent enterprises. The treaty provisions apply only to an amount corresponding to the circumstances which would apply between independent enterprises. The excess part of the payments remains taxable under the laws of each contracting State.[100] The associated enterprises article constitutes a form of an arm-length´s test.
Article 9 in OECD:s Model Tax Convention is one example of an associated enterprises article.[101]

7.2.3 Exclusion of tax-favoured entities from treaty benefits

Treaties could exclude particular tax-favoured entities in the treaty countries from either all treaty benefits or the benefits of certain articles. UK have, for example, excluded certain holding companies in Luxembourg and Barbados

[96] Article 22 (3), United States Model Income Tax Convention (1996).
[97] Article 22 (4), United States Model Income Tax Convention (1996).
[98] Stitt and Yu, *supra* note 93 at 1059.
[99] Article 24, Double Taxation Convention Sweden-Barbados (SFS:1742).
[100] *A guide to effective tax planning within a global group*, *supra* note 93 at 28.
[101] See Article 9, The OECD Model Tax Convention on Income and on Capital (As they read on 29 April 2000).

from treaty benefits in their double taxation conventions.[102] Sweden has used the same approach in, for example, the tax treaty with Barbados.[103]

The exclusion approach could be used against nations as well, but is then called *the abstinence approach*. Often treaty shopping involves interposition of companies in countries which enjoy a favourable tax regime. Countries have been reluctant to sign treaties with so called tax havens and therefore the abstinence approach simply means that a country will not include a treaty with states that are known for their low tax regime or as a place for conduit companies.[104]

7.2.4 Third country articles or the bona fide approach

As explained earlier in the thesis, when using treaty shopping a third jurisdiction is involved. The one and only reason to include this additional jurisdiction could be to decrease the tax. In the absence of a treaty the withholding tax rate may be substantial and by routing the payment through a treaty country the rate could be reduced. To prevent the abuse of the treaty in this way, some articles (particularly interest and royalty articles) include a paragraph stipulating that the article shall not apply if the payment was created or assigned mainly for the purpose of taking advantage of the treaty and not for *bona fide* commercial reasons.[105]
The OECD Model Convention uses the associated enterprises article to combat this kind of avoidance.[106] In the treaty between UK and Netherlands the bona fide approach is used:

The provision of this Article shall not apply if the debt-claim in respect of which the interest is paid was created or assigned mainly for the purpose of taking advantage of this Article and not for bona fide commercial reasons.[107]

The actual use of these articles in excluding the treaty rates could be questioned. A counter-argument to a challenge under these clauses could be that the debt-claim was created for bona fide commercial reasons even though the payment structure also resulted in the avoidance of, in this example, UK income tax. Arguably, though, the companies do not want to come into a long-standing argument with the British tax authorities. Other

---

[102] *A guide to effective tax planning within a global group*, *supra* note 3 at 30.
[103] Offshore companies entitled to tax benefits according to "Exempt Insurance Act", Cap. 308A, "Off-shore Banking Act", Cap. 325, International Business Companies Act", Cap. 77 or similar law are not entitled to benefits according to the treaty. See Article 24 (2), Double Taxation Convention Sweden-Barbados (SFS:1742).
[104] For that reason there are only a few tax treaties available with Liectenstein, the Channel Islands, Monaco or Panama. See, *Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries*, supra note 1at 6.
[105] *A guide to effective tax planning within a global group*, *supra* note 3 at 31.
[106] See Article 11.6 (Interest) and Article 12.4 (Royalties) The OECD Model Tax Convention on Income and on Capital (As they read on 29 April 2000).
[107] Article 11:6, The UK – Netherlands Double Taxation Agreement (As read 7 November 1980).

payment structures, using jurisdictions without these kind of bona fide articles, are rather applied.[108]

7.3 Domestic law and treaty law

If no specific provisions of this aforementioned type are included in a treaty, one can inquire about general rules: May the domestic regulations on "abuse" or "substance over form" be applied in cases involving double taxation treaties?[109] Generally, the courts have not hesitated to do so.
The question is if the use of domestic anti-avoidance regulations is in conflict with obligations committed through international law and double taxation conventions? In other words, could treaty shopping be prevented if it is concerned abusive through domestic legislation, or does this matter has to be dealt with through the double taxation treaty?

7.3.1 Abuse and substance over form

The main problem is whether or not general principles, such as *abuse* and *substance over form*, can be applied in any case or only to the extent they are expressly mentioned in international conventions.

Generally, with some exceptions, the national tax laws do not contain anti-abuse provisions specifically made to combat treaty shopping. Rather the countries apply their general anti-tax avoidance or anti-abuse provisions.
The Anglo-Saxon jurisdictions rely on their concept of substance over form. Under this approach the tax authorities have to determine, if the transaction is based on justifiable commercial reasons or if it is a sham merely set up in order to obtain treaty benefits. Most European countries combat treaty shopping under the *abuse* principle. There the question is, whether a certain set of transactions constitutes an abuse, a misuse or an improper use of a tax treaty.[110]

It is the view of the wide majority that such rules, and the underlying principles, do not have to be confirmed in the text of the convention to be applicable. There have been dissents on the issue, though. To give domestic rules precedence over treaty rules would, arguably by the dissents, gradually wear away the double taxation treaties and thus erode the protection of tax payers against double taxation.[111]
The majority's view is supported by case law. In the *Aiken case*, the Tax court expressly affirmed that the Honduran Corporation (a base company) had to be recognized. Nor did the court deny the Honduran Corporation

---

[108] *A guide to effective tax planning within a global group*, *supra* note 3 at 32.
[109] In Anglo-Saxon jurisprudence, the term "substance over form" is used. The term "abuse of law" is used in continental European jurisdictions. See Sundgren, *supra* note 4 at 383.
[110] *Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries*, *supra* note 1 at 7.
[111] Switzerland was (is?) of this dissenting view. See Sundgren, *supra* note 3 at 381.

entitlement to treaty protection. However, the Tax Court did find that according to the relevant provision of US domestic income tax law, the interest in question was not "received by" the base company, but rather its parent situated in Bahamas. Thus, the court in this case applied a rule of domestic law based on the substance of the transaction rather than on its form, instead of applying a rule in the double taxation convention.[112]
In the case of the boxing champion Ingemar Johansson the *Court of Appeals of the 5th Circuit* refused to apply the treaty between the *United States* and *Switzerland* for similar reasons.[113]

Most states consider it legally possible for domestic legislation to override international treaties. But this applies only to laws enacted after the conclusion of the given double taxation treaty, and general anti-avoidance legislation and/or case law will often be older than the convention. In short, domestic anti-avoidance rules may only be applied to double taxation conventions if justified by both domestic and international law.[114]

7.3.2 General anti-avoidance tax legislation

In certain countries a general anti-avoidance provision could be applied to combat treaty shopping. For example, the UK tax authority may seek to attack treaty shopping under general law by arguing that a conduit company does not have beneficial ownership of the payment made to it, and therefore is not entitled to the treaty benefits.[115]
In Japan, a scheme for treaty shopping which does not have economic substance would not be accepted by Japanese tax auditors, as they would determine the tax treatment based on the economic substance. Germany has a similar approach. A tax structure lacking any economic substance might be regarded as an abuse of legal forms.[116]
General anti-avoidance rules are made for domestic payments and could be difficult to apply to international payments, sometimes they are not even applicable in the international arena. And it is difficult to prove that a global structure is not set up for bona fide commercial reasons, but only for the use of treaty benefits. One could also argue that tax planning is a bona fide commercial reason.[117]

When dealing with the conflict between domestic law and international law, the first step is to decide that domestic law as well as international law is applicable in the given case. Whether a transaction arranged for tax planning purpose would be recognized in the field of international tax law is an issue,

[112] *Aiken Industries v. C.I.R.*, 56 Tax Court 925 (1971): DTC USA/Honduras.
[113] *Ingemar Johansson v. C.I.R.*, Court of appeals of the 5th circuit (336 F.2d. 809 (1964).
[114] *Klaus Vogel on Double Taxation Conventions*, *supra* note 5 at 122.
[115] *A guide to effective tax planning within a global group*, *supra* note 3 at 34.
[116] *Ibid*.
[117] *Klaus Vogel on Double Taxation Conventions*, *supra* note 5 at 122.

which cannot be decided by application of a uniform standard. Rather, a "differentiating" approach should be used. Four levels can be distinguished:

i. Facts. These facts are influenced by the requirements of the tax law in mind (e.g. an individual changing apartments and thereby altering the residence, or a business opening a fully furnished, fixed office, thereby creating a permanent establishment).
ii. Contractual relationships. Those may be shaped for tax purposes and usually stands in the foreground when dealing with tax planning (e.g., loan contracts may be concluded or a subsidiary may be established).
iii. Domestic tax law provisions.
iv. Treaty rules.[118]

The facts of a case must be determined according to the appropriate procedural rules; whether they are legally relevant will be decided on the three legal levels. If the tax planning affects a legal relation under contract law – and not merely a set of facts – it must first be determined whether the transaction is valid under such contract law. It may be that a transaction was concluded whose legal effect was not sincerely intended by the parties. According to the laws in most countries, such transactions are void. Instead of the sham, the parties' real intentions may be controlling. If the transaction is valid under contract law, one must then ask whether such transaction will be legally recognized by the domestic tax law of the concerned states and within the scope of a double taxation treaty.[119]
Thus, the question is whether the tax law will be applied to the legal form of the transaction as created or its substance and actual effect. Nothing prevents the use of the general domestic rules and case law of the state concerned regarding abuse and substance versus form in the tax context. But according to general principles of interpretation, special rules prevail over general rules. Particular treaty provisions may forbid the application of domestic anti-abuse provisions to certain transactions.[120]

This said, not every single transaction arranged for tax planning purpose, regardless of its artificial nature, has to be accepted when applying a double taxation convention. An artificial transaction created merely for tax avoidance purposes should be judged according to its substance rather than its form. This original domestic rule applies as a general legal principle recognized by civilized nations and is also applicable in the relationship between contracting states of a double taxation convention. There is no doubt, however, that application of double taxation conventions in

[118] *Ibid*.
[119] *Ibid*.
[120] *Ibid*. at 123.

accordance with its substance rather than in accordance with its form should continue to be an exception and that the lowest limit for allowing such application should be fixed at a high level rather than a low one.[121] Countries should carefully observe the specific obligations clearly evidenced in tax treaties, as long as there is no clear evidence that the treaties are being improperly used.[122]

Moreover, it is very unusual that states actually uses their domestic general anti-avoidance legislation to combat treaty shopping. In Sweden, the general anti-avoidance legislation (Lag (1995:575) mot skatteflykt) has, according to doctrine, never been tested against treaty shopping.[123]

---

[121] *Ibid*. at 125.
[122] Sundgren, *supra* note 4 at 382.
[123] *Ibid*. at 384.

8 Should treaty shopping be prevented?

Part of this thesis has dealt with how treaty shopping is prevented through legislative matters. There is also one political aspect of treaty shopping, the question if treaty shopping should be prevented? The question is not easy to answer, since there is a conflict of interest.

The conflict is, at least, twofold. First we have the conflict between the company attempting to avoid tax through treaty shopping and the revenue losing country.
Secondly, there is a conflict between states as well. There are winners and losers in a treaty shopping scheme. Generally the source country is the loser, since this is where the reduction or elimination of the taxes are executed. One aim with treaty shopping is to receive, income free of the source country´s tax (or to receive it at a comparatively reduced level of taxation) when source country tax would be suffered in the absence of such an arrangement.[124]
Consequently the winners are the holding company state together with the country of residence. The holding company country serves as a "stepping stone" or as a mean to an end to achieve an altogether favorable taxation situation in the global group of companies. Investments are made in this country, and sometimes even an incidental taxation effect occurs. The company in the country of residence pays less tax compared to if the treaty shopping arrangement was not conducted. Thus, the residence country in the end have a larger base to tax.
What makes the matters even more complicated is that every country can occur in any place of a treaty shopping procedure. This inevtiably leads to the same country wanting to prevent and encourage treaty shopping at the same time, which in the end consitutes an impossible equation.

It is clear that many countries sees treaty shopping as something abusive. Otherwise we would not have legislation, incorporated through double taxation treaties as well as evident in domestic laws, trying to prevent treaty shopping. The question if treaty shopping should be prevented in the end comes down to the advantages of treaty abuse compared to the disadvantages of it.

Avoidance of double taxation is arguably a good thing. The international financial markets continue to expand, when money, people and services can move without "penalties". This development facilitates global welfare-enhancing cross-border capital flow. The process has improved welfare and

[124] *Contributions to international co-operation in tax matters, supra* note 46 at 5.

living standards around the world by creating a more efficient allocation and utilisation of resources.
If one of the main general objects of the spread of tax treaties is to promote freer flows of international trade and investment, it may be generally arguable that it does not matter if the desirable result is achieved by the direct use of tax treaties or by their indirect use. Moreover, even if the transactions have been entered into with the express intention of taking advantage of the relevant treaties it does not necessarily follow that this is objectionable. It may be reasonably assumed in some circumstances that it was the actual intention of the treaty makers that interest passing from country A to B and from B to C should be exempted from tax and that the treaties were designed to encourage the underlying investment without regard to its ultimate source. Thus, countries sometimes may want to encourage treaty shopping and this encouragement should not, without very good reasons, be stopped through anti-abusive treaty shopping legislation.[125]

Globalisation has, however, also had some negative effects. New ways have been opened by which companies and individuals can minimise and avoid taxes. Countries can exploit these opportunities by developing tax policies aimed primarily at diverting financial and other mobile capital. These actions induce potential distortions in the patterns of trade and investment and could in itself reduce global welfare.[126] Treaty shopping erodes national tax bases of other countries and may therefore alter the structure of taxation (by shifting part of the tax burden from mobile to relatively immobile factors and from income to consumption) and may hamper the achievement of redistributive goals. In the end states might end up taxing immobile resources, suce as real estates, food and "poor people", in a higher grade then they want to.[127]

Another objection against treaty shopping regards the "artificial" use of facilities and companies. The persons conducting the treaty shopping arrangement would otherwise have used more direct routes for their capital and income flows. In this case they would have had to tolerate the consequent higher level of taxation. The treaties are presumably founded on the assumption of a particular perceived level and balance of actual and potential income and capital flows between the one country and the other. Treaty shopping distorts the level and balance of these flows.[128]

It could also be argued that the availability of benefits through treaty shopping reduces the demand for a certain double taxation treaty and makes it more difficult for those potential treaty partners to achieve the other

---

[125] *Ibid*. at 6.
[126] The OECD, *Harmful Tax Competition. An Emerging Global Issue*, (Paris, OECD, 1998) at 14.
[127] Eklund, K., *Jakten på den försvinnande skatten. Globalisering och rörliga kapital,* (Norstedts Boktryckeri, Stockholm, 1998) at 142 [hereinafter *Jakten på den försvinnande skatten*].
[128] *Contributions to international co-operation in tax matters*, *supra* note 46 at 7.

reciprocal advantages which might be achieved by a tax treaty between them.[129]

In the end it is difficult to weigh up to everyone´s satisfaction the relative merits of these various considerations. Generally, it seems undesirable that taxpayers should have to resort to indirect and devious methods of deriving advantages and that tax treaties and domestic laws should be side-stepped to provide them with unjustifiable advantages. At the same time should countries carefully observe the specific obligations evidenced in tax treaties, as long as there is no clear evidence that the treaties are being improperly used. It has to be remembered that treaty shopping basically is tax planning, where companies chose beneficial ways to structure the organisation internationally and ways to move money tax efficient.

[129] *Ibid*.

9 Steps towards a solution

It is something of a paradox that the expansion of the network of double taxation conventions in itself creates additional loopholes (or incentives if one like) to treaty shop. The OECD has tried to prevent this through its model convention. If the double taxation treaties are all alike the ways of treaty shopping are limited, in the same way as international tax planning would be non-existing if all countries had the same legislation and tax rates. But even those organisation (e.g. the OECD and the EC) has its limits. They work for the best of its member states and are prone to critisise countries outside the organisation.[130] It is not by chance that the OECD has put down a lot of work with combating tax havens, even though its efforts with the development of anti-abusive treaty shopping provisions has sometimes gone "hand-in-hand" with this objective.

Traty shopping are counteracted through political as well as legislative methods (arguably, they both are in the end inseparable). Both have, of course, room for improvement.

It may be desirable in some circumstances for tax treaties to be, where appropriate, more precise in the way they define those persons who are intended to be the beneficiaries of the treaties - or, perhaps even more important, those persons not intended to be beneficiaries of the treaty. The problem is to achieve this result without in fact penalizing taxpayers whose use of the relevant tax treaties are bona fide.

Whether anti-abusive provisions are necessary in any particular tax treaty has to be decided on a case-by-case basis. The outcome of this decision depends on a number of factors, such as: Does the contracting parties belive that a treaty is likely to be abused? If the treaty already exists, how far does their experience show that the treaty in fact is being abused? Does the abuse lead to a disadvantage? When considering the latter factor, it is important to take into consideration the economic benefits of the treaty even with the possibilities of abuse rather than tax loss or other considerations.

The domestic law of contracting parties, which often is equally important as the treaty in providing facilities for abuse, will similary wary. The same is true with the business practices of bona fide enterprises that it may be desired to exempt from the impact of the provisions.

The conclusion is that it is not possible to say that anti-abusive provisions should be a standard feature of tax treaties. It is more likely desirable that such provisions should be incorporated in particular treaties to deal with particular situations. The nature of abuse to be countered will vary from

[130] *Jakten på den försvinnande skatten*, *supra* note 127 at 107.

treaty to treaty, in the same way as the desire to counter treaty shopping will vary from state to state.

Bibliographies and Lists of Authorities

Conventions

Double Taxation Convention, Sweden-Barbados (SFS:1742).

Double Taxation Convention, The UK – Netherlands (As read 7 November 1980).

The Nordic Double taxation Convention (1996)

The OECD Model Tax Convention on Income and on Capital (As read on 29 April 2000).

United States Model Income Tax Convention (As read on 20 September 1996).

Vienna Convention on the Law of Treaties, SÖ 1975:1.

Jurisprudence

Aiken Industries v. Commissioner, 56 Tax Court 925 (1971) on the United States´ DTC with Honduras.

House of Lords, IRC v. Duke of Westminister, 19 Tax Cases 490, 510 (United Kingdom).

Ingemar Johansson v. C.I.R., Court of appeals of the 5th circuit (336 F.2d. 809 (1964).

Perry Bass v. Commissioner, 50 Tax Court 595 (1968) (USA).

Books

Arnold, J. B., Edgar, T., Li, J., Sandler, D., *Materials on Canadian Income Tax*, 11th ed. (Scarborough, Ont.: Carswell, 1996).

Becker, H., Wurm. J.F., *Treaty Shopping. An Emerging Tax Issue and its Present Status in Various Countries*, (Deventer, Kluwer Law and Taxation Publishers, 1988).

Dahlberg, M., *Svensk skatteavtalspolitik och utländska basbolag. En studie av svensk skatteavtalspolitik i förhållande till utländska basbolag mot bakgrund av svensk intern skatterätt*, (Uppsala, Iustus Förlag AB, 2000).

Eklund, K., *Jakten på den försvinnande skatten. Globalisering och rörliga kapital,* (Norstedts Boktryckeri, Stockholm, 1998) at 142.

Lindencrona, G., *Dubbelbeskattningsavtalsrätt*, (Stockholm, Juristförlaget JF AB, 1994).

Lindencrona, G., *Skatter och kapitalflykt*, (Stockholm, AB Egnellska Boktryckeriet, 1972).

Mattsson, N., *Svensk internationell beskattningsrätt*, 13th ed. (Stockholm, Norstedts Juridik AB, 2000).

Mutén, L., *Tax Planning*, (Uppsala, Reprocentralen HSC, 1995).

Pelin, L., *Internationell skatterätt ur ett svenskt perspektiv*, 2nd ed. (Lund, Studentlitteratur, 2000).

Scarlata, F.G., *Global Tax Planning and Offshore Opportunities*, (Helsingborg, Comtax Publishing AB, 1995).

The OECD, *Harmful Tax Competition. An Emerging Global Issue*, (Paris, OECD, 1998).

The OECD, *Taxation and international capital flows. A Symposium of OECD and non-OECD Countries*, (Paris, OECD, 1990).

Vogel, K., *Klaus Vogel on Double Taxation Conventions*, 3 ed., (London, Kluwer Law International Ltd., 1997).

Wenehed, L-E., *A guide to effective tax planning within a global group*, (Helsingborg, Comtax Publishing AB).

Secondary material: Articles

Department of International Economic and Social Affairs, *Contributions to international co-operation in tax matters* (New York, United Nations, 1988).

Norell, K., "Skatteflykt – internationella kontrollfrågor", (1997) Skattenytt 673.

Stitt, R and Yu, A., "Has the Chase to End Treaty Abuse gone too Far?", (2000) Tax Notes International 1057.

Sundgren, P., ”Treaty shopping”, (1992) Skattenytt 370.

Other materials

http://www.oecd.org

Issues in International Taxation, No 1, *International Tax Avoidance and Evasion*, Four Related Studies, 1987

Ståhl, I., *Anvisningar och kommentarer till kursen i rättsekonomi på juristlinjens sjunde termin*, (Lund, oktober 1999).

Svalborn, O., *The United States Fight Against Harmful Tax Competition*, (Master thesis, Faculty of Law, University of Lund, spring 2001).