



LUND UNIVERSITY
School of Economics and Management

Applicability of domestic anti-avoidance legislation in relation to tax treaty commitments

A case study placing Swedish law in an international doctrinal framework

Author: Anna Sandin
27-05-2013
HARN 60 Master Thesis
Master of European and International Tax Law
Tutor: Maria Hilling
Academic year 2012-2013

TABLE OF CONTENTS

I. TABLE OF CONTENTS.....	2
II. LIST OF ABBREVIATIONS.....	3
1. INTRODUCTION.....	4
1.1 Background.....	4
1.2 Purpose.....	5
1.3 Method and Materials.....	5
1.4 Delimitation.....	6
1.5 Outline.....	7
2. BACKGROUND.....	9
2.1 Incorporation and application of DTTs in Sweden.....	9
2.2 The Sweden-Peru double tax treaty.....	10
2.3 The Swedish GAAR.....	11
2.4 Events leading up to HFD 2012 ref. 20.....	12
2.5 HFD 2012 ref. 20.....	13
2.5.1 Facts.....	13
2.5.2 The Court decision.....	14
2.6 The obiter dicta – an expression of the law as it stands today?.....	14
2.7 Points of interest and concern.....	15
3. INTERNATIONAL DOCTRINAL DEBATE.....	17
3.1 Application of domestic anti-avoidance rules without expressed authorization in treaties.....	17
3.1.1 A general international principle of anti-abuse for the purposes of treaty law?.....	17
3.1.2 Comments with regard to HFD 2012 ref. 20.....	20
3.2 When is a tax treaty being abused?.....	22
3.2.1 A one-state concern?.....	22
3.2.2 Comments with regard to HFD 2012 ref. 20.....	25
3.3 Compatibility with internationally established principles and customary international law.....	26
3.3.1 Conflicting rules.....	27
3.3.2 Pacta sunt servanda or treaty override?.....	28
3.3.3 Comments with regard to HFD 2012 ref. 20.....	32
4. SUMMARY AND CONCLUSIONS.....	34
LIST OF REFERENCES.....	36

LIST OF ABBREVIATIONS

Art.	Article
DTT	Double Tax Treaty
ECJ	The European Court of Justice
Edt.	Editor
GAAR	General Anti Avoidance Rule
HFD	The Swedish Supreme Administrative Court (Högsta Förvaltningsdomstolen)
ICJ	The International Court of Justice
IFA	International Fiscal Association
MTC	Model Tax Convention
OECD	Organization for Economic Co-operation and Development
P.	Page
Para.	Paragraph
Prop.	Proposition
Ref.	Reference
RÅ	Reports from the Supreme Administrative Court before 1/1-2013 (Regeringsrättens årsbok)
SEK	The Swedish currency (Svenska Kronor)
SFS	The Swedish Code of Statutes (Svensk Författningssamling)
SITA	The Swedish Income Tax Act
SkU	The Swedish Tax Committee
VCLT	The Vienna Convention on the Law of Treaties
Vol.	Volume

1. INTRODUCTION

1.1 Background

It is a fairly commonly held opinion that the act of disregarding or "overriding" treaties in favor of domestic law provisions run the risk of severely threatening internationally established networks of bilateral and multilateral agreements.¹ Pacta sunt servanda is a founding principle of international law, inherent in the Vienna Convention, and widely recognized as a reflection of customary international law.² Meanwhile, it is a well known fact that tax treaties run the risk of being abused by tax payers in order to circumvent legislation and thereby achieve tax advantages that were not intended by the legislator. Thus, a highly relevant and extensively discussed issue in contemporary international tax law is the relationship between domestic anti-avoidance legislation and tax treaty commitments, and particularly, whether domestic anti-avoidance legislation can be applied in order to deny treaty benefits.³ The referred discussion is signified by great controversy where scholars place their opinions in a widely stretched spectrum ranging from opposition to affirmation, supported by varying argumentation and points of concern.

At present day, Sweden is a contracting part in over 80 bilateral double tax treaties and is there by one of the countries that have entered into most tax treaty relations in the world.⁴ In March 2012 the Supreme Administrative Court of Sweden (HFD) delivered its judgment on the case HFD 2012 ref. 20,⁵ concerning the tax treatment of liquidation payment from a Peruvian company to a fully liable tax payer in Sweden. At the time for the relevant transactions, a tax treaty between Sweden and Peru provided for source taxation alongside full exemption for the other contracting state.⁶ The distribution payment at hand, being a result of several transactions and formations of companies during a short period of time, would according to the Swedish tax authorities be exempt from treaty benefits by means of the Swedish law on tax avoidance (the GAAR). The significance of the referred case was,

¹ Avi-Yonah, R.S., 'Tax treaty overrides: a qualified defence of U.S practice' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Amsterdam: IBFD, 2006, P.65. Wouters, J. & Vidal, M., 'The international perspective' in *Ibid.*, P.13-35. OECD Committee on Fiscal Affairs, *report on tax treaty overrides*, Paris, 1989.

²² Wouters, J. & Vidal, M., 'The international perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Amsterdam: IBFD, 2006, P.14.

³ Dahlberg, M., *Internationell beskattning*, Lund: Studentlitteratur, 2012, P. 251

⁴ Lodin, S.O, Lindencrona, G., Meltz, P., Silfverberg, C., Simon-Almendal T. *Inkomstskatt- En läro- och handbook / skatterätt*, Part 2, Lund: Studentlitteratur, 2011, P. 615

⁵ HFD 2012 ref. 20

⁶ SFS 1968:745

however, not the result and final judgment, which was reached through ordinary treaty interpretation resulting in that Sweden's right to tax was not restricted. More significant, though, was an introductory observation made by the Court, establishing that the treaty with Peru did not preclude the application of Swedish domestic anti-avoidance legislation. Additionally, the Court found no facts implying that the mutual expectations of the parties had been that domestic anti-avoidance rules should not be applicable to abusive applications of the treaty. Thus, the Court found there to be no principal hindrance of testing the current scenario against the Swedish law on tax avoidance.⁷ Yet, as the case was resolved before any application of domestic anti-avoidance rules came into question, the Court's statement merely holds the status of an *obiter dicta* (an observation not essential for the final result). Nevertheless, it has been stated that this particular observation hold a stronger legal value than what normally can be ascribed to an *obiter dicta*, predominantly due to the clear and articulate expression of the Court's standpoint on the matter.⁸

1.2 Purpose

With respect to extensive national and international doctrinal debate dedicated to the relationship between domestic anti-avoidance legislation and tax treaty obligations, commonly encompassing a good deal of criticism towards the act of disregarding treaties by reference to domestic law provisions, it is of interest not only to put the standpoint of the Swedish Supreme Administrative Court into a doctrinal framework but an international ditto. The interest in so doing would derive from a possibility of utilizing an even wider range of opinions and concerns, relevant not only in a Swedish context, but on an international level. The purpose and ambition of the present paper is therefore to put Swedish law, as expressed *obiter dictum* in HFD 2012 ref. 20, into an international perspective. This will be done by drawing internationally relevant conclusions on advantages and disadvantages in the Court's standpoint by reference to supportive as well as opposing pieces of argumentation derived from international doctrinal debate.

1.3 Method and Materials

The present study will initially apply a traditional legal method, utilizing case law and other legal material in order to clarify the present legal situation in Sweden regarding the

⁷ HFD 2012 ref. 20.

⁸ Hilling, M., 'HFDs Perudomar', *Skattenytt*, 2012, P. 591.

relationship between tax treaties and domestic anti-avoidance legislation.⁹ This will be necessary in order to subsequently put the present legal situation, envisaged by the observation made in HFD 2012 ref. 20, into an international perspective. Part of the initial task of the paper will, further, be to identify key aspects of the observation made obiter dictum in the referred judgment of HFD 2012 ref. 20. A selection of aspects will be made out of questions arising a propos the Court's observation with regard to doctrinal debate. These aspects will then form the basis onto which doctrinal opinions will be applied as templates for support and contradictions to appear. Thus, in drawing conclusions on advantages and disadvantages in the Court's standpoint, international doctrine will serve as important parameters.

The extensive range of material dedicated to the subject of domestic law in relation to tax treaties have the potential of providing a rich and multifaceted basis for analysis, yet, this will also create difficulties in terms of choice of material. The choice of material in terms of doctrinal opinions will take place with regard to both prominence in the field as well as their ability to deliver a diverse outlook on the relevant matter. In order to draw objective conclusions it will be of utter importance to keep a glance on several possible viewpoints at all times. Thus, the present paper does not make any attempts of providing the "truth" but solely to lift possible conclusions and perspectives on the standpoint taken by the Swedish Supreme Administrative Court regarding applicability of domestic anti-avoidance rules in relation to double tax treaties.

1.4 Delimitation

The observation subject to analysis in the present paper has habitually been analyzed in a context of previous settled Supreme Administrative Court judgments, especially regarding applicability of the Swedish CFC-rules in relation to double tax treaties.¹⁰ Additionally, the cases concerning CFC-rules¹¹ have on their own been subject to immense scrutiny.¹² The present paper will not aim at repeating conclusions drawn from such studies as the matter has already been extensively explored. However, it must be acknowledged that Court opinions

⁹ A discussion on the legal method is provided by for example: Peczenik, A., 'Juridikens allmänna läror', *Svensk Juristtidning*, 2005:3, P. 249 ff.

¹⁰ See for example Dahlberg, M. *Internationell beskattning*, Lund: Studentlitteratur, 2012, P. 246 ff.

¹¹ RÅ 2008 ref. 24 and RÅ 1996 ref. 84.

¹² See for example: Mutén, L. 'Treaty override I regeringsrätten', *Svensk Skattetidning*, 2008, P.353. Dahlberg, M., *Internationell beskattning*, Lund: Studentlitteratur, 2012, P.246. Grundström, K.J, 'Treaty override – nu även i Skatterättsnämnden', *Skattenytt* 2010, P.159-166.

and case law do not evolve in a vacuum alienated from previous judgments and observations. Further, it could be argued that the Supreme Administrative Court has provided important clarifications on the relationship between domestic legislation and tax treaty obligations in its judgment RÅ 2010 ref. 112. However, the Court's reasoning in this case concerned the relationship between domestic law and tax treaties in general, thus it did not refer to domestic anti-avoidance rules or the GAAR in particular. Further, it has been held that even though the Court, in RÅ 2010 ref. 112, clarified that treaties should prevail over domestic legislation they left ambiguities behind by providing for exceptions to that general rule.¹³ In addition, the Court stressed that, despite the general rule of treaties prevailing over domestic law, there exists no formal or constitutional hindrance in applying legislation in contradiction to tax treaty provisions.¹⁴ It can therefore be held that the legal situation was still rather unclear up until the time for settlement of HFD 2012 ref. 20. Thus, RÅ 2010 ref. 112 would merely help describing the context in which the observation in HFD 2012 ref 20 was made, which however, is not necessary for fulfilling the purpose of the present study. As HFD 2012 ref. 20 is the most accurate judgment available and concerns the relationship between the Swedish GAAR and tax treaties in particular, focus will rest solely on the observation made by the Court in that specific judgment. Doctrinal work and other material used to put this observation into perspective will concern anti-avoidance rules in general terms. This would, quite naturally, be due to the fact that the Swedish law on tax avoidance is of a general nature. Further, analyzed aspects of the observation made in HFD 2012 ref. 20 will be a result of subjective selection made by the author by inspiration of doctrinal discussions. There may very well be supplementary aspects of the case worthy of observance and assessment; however, these will fall outside of the scope of this study.

1.5 Outline

Chapter two of the paper will be dedicated to some introductory points, necessary for grasping the frames of reference in doctrinal debate and the forthcoming analysis. Also, the case of HFD 2012 ref. 20 will be presented. Points of interest and concern regarding the observation made by the Court will thereafter, in Chapter three, form the basis for analysis in comparison to international doctrinal debate. Here, each point of concern will be assessed by first reviewing doctrinal debate and subsequently drawing parallels to the observation made in

¹³ Dahlberg, M., *Internationell beskattning*, Lund: Studentlitteratur, 2012, P.248.

¹⁴ RÅ 2010 ref. 112

HFD 2012 ref. 20. Lastly, Chapter four will contain concluding remarks by reference to the purpose of the paper.

2. BACKGROUND

In order to fully grasp doctrinal reasoning as well as the method used by the Court in the case subject for the forthcoming analysis it is relevant to shortly comment on general conditions that come into play in the current context.

2.1 Incorporation and application of DTTs in Sweden

Over all, there are two general ways for countries to commit to international treaty law. Either by a monistic or dualistic approach. Monistic states perceive treaty law and domestic law as two parts of the same legal system. Dualistic states, on the other hand, view treaty law and domestic law as two separate systems with the effect of treaties having to be incorporated into the domestic legal system via adaption of specific incorporation laws.¹⁵ Sweden would ascribe to the latter approach which means that treaties come into effect only after laws of their incorporation are being passed by the government.¹⁶ It is then the law of incorporation that provides the treaty obligations rather than the actual treaty.¹⁷

The method when applying a treaty can further be described as taking place through a process of three steps. First, it needs to be established whether the income at hand would normally be subject to tax under domestic Swedish legislation. If taxing claims exist under domestic legislation it will be necessary to ascribe whether the relevant treaty contains provisions that restrict such taxing rights. Here it should be mentioned that, by means of the *golden rule*, a treaty can never extend a state's right to tax beyond what is established under domestic law.¹⁸ If it is established that a treaty restricts domestic taxing rights, the third step of the application process would consist of applying domestic taxation prospects with regard to the delimitations provided by the treaty.¹⁹ The main issue in terms of application of a double tax treaty, however, is perhaps more one of interpretation rather than application. In this sense, the Supreme Administrative Court has made some important observations regarding treaty

¹⁵ Dahlberg, M. *Internationell Beskattning*, Lund: Studentlitteratur, 2011, P. 235.

¹⁶ Lodin, S.O et al. *Inkomstskatt – en läro- och handbok i skatterätt*, Part 2, Lund: Studentlitteratur, 2011, P.656.

¹⁷ Hultqvist, A., 'Metodfrågor vid konflikt mellan lagar om dubbelbeskattningsavtal och andra skattebestämmelser – en argumentationsanalys', *Svensk skattetidning*, 2010, P. 520.

¹⁸ Pelin, L. *Internationell skatterätt i ett Svenskt perspektiv*, Lund: Studentlitteratur, 2011, p. 97. Lindencrona, G, *Dubbelbeskattningsavtalsrätt*, Stockholm: Juristförlaget, 1994, p. 24.

¹⁹ Hilling, M. 'HFDs Peru domar', *Skattenytt* 2012, P. 585.

interpretation and applicable methods.²⁰ First, it has been held that in terms of interpreting the mutual intentions of the parties, guidance should be derived from Art. 31-33 of the Vienna Convention on the Law of Treaties (VCLT)²¹ which provides general directions for treaty interpretation. Second, for treaties following the format of the OECD Model Tax Convention (MTC), the Court held that it is normally justified to interpret its provisions by reference to the Commentary to the Model. This would be due to the fact that the expectations and intentions of the parties then can be assumed to resemble the OECD recommendations. If the definition of a treaty provision should not be found by guidance of the commentary and not stand clear from the context or other circumstances, the interpretation article 3.2 of the MTC provides that recourse can be taken to the definition provided by domestic legislation.²² Most treaties that Sweden enters into are drafted with close respect to the OECD Model.²³ However, as will be further developed below, some elder treaties deviate from this standard.

2.2 The Sweden-Peru double tax treaty

The tax treaty relevant in the case of HFD 2012 ref. 20 was signed in 1966 and incorporated into Swedish law in 1969.²⁴ Contrary to modern day treaties that Sweden enters into, the 1969 Peru- treaty did not follow the OECD MTC and did not, in its preamble, refer to one of the purposes being prevention of fiscal evasion, which is more or less standard in more modern treaties.²⁵ Also, the treaty provided for reduction of double taxation by use of the exemption method which is now days very rarely used in Swedish treaties.²⁶ By cause of the exemption method, in a situation covered by the Sweden-Peru treaty where Peru would be ascribed the right to tax, Sweden would refrain from all taxing claims. The treaty with Peru was subsequently terminated in 2007 as a result of increased awareness on that it had been, and could be, used by tax payers in order to circumvent Swedish tax legislation.²⁷

²⁰ RÅ 1996 ref. 84 as lifted by Hilling, M. 'HFD:s Peru-domar' *Skattenytt*, 2012 P. 585.

²¹ The Vienna Convention on the Law of Treaties, Vienna: 23 May 1969, entered into force on 27 January 1980.

²² RÅ 1996 ref. 84.

²³ Hiort af Ornäs, L. *Skatterätt*, Egypt: Liber, 2011, P.189.

²⁴ SFS 1968:745.

²⁵ SFS 1968:745.

²⁶ SFS 1968:745, Art. 23A . Hilling, M., 'HFD:s Peru-domar', *Skattenytt*, 2012, P. 258.

²⁷ Skatteutskottets betänkande, 2005/06:SkU37.

2.3 The Swedish GAAR

The Swedish law on tax avoidance²⁸ was first adopted in 1980.²⁹ Before as well as after its appearance in Swedish legislation it has been surrounded by much controversy which even led to it being abolished for a period between 1993 and 1995.³⁰ The law is still subject of intense debate and condemned by many as inefficient, contrary to the rule of law or simply unnecessary.³¹ Yet, these are not conclusive or uniform standpoints. The GAAR would by its general provision, paragraph 2, provide that a legal act is to be disregarded if:

- 1.) The legal act, by itself or in conjunction with other legal acts, is part of proceedings which bring substantial benefits to the tax payer.³²
- 2.) The tax payer has directly or indirectly contributed to the undertaken proceedings.³³
- 3.) By respect to the context, the achieved tax advantage can be assumed to constitute the predominant motive behind the proceedings.³⁴
- 4.) Assessment on the basis of the proceedings would be contrary to the purpose of the legislation.³⁵

Requisite number four, providing that the transaction must be contrary to the purpose of the law, has proven to be the most difficult to interpret. The problematic area of assessing the intentions of the legislator is commonly referred to as an impediment to this provision.³⁶

Nevertheless, application of the GAAR has been in question in a number of court cases prior to the referred judgment of HFD 2012 ref. 20 as will be seen below.³⁷

²⁸ SFS 1995:575.

²⁹ Rosander, U., in IFA bransch report, Congress 56:2002: Oslo, *Form and substance in tax law*, Cahiers de Droit Fiscale, The Hague: Kluwer law international, 2002, P. 531.

³⁰ Rosander, U. 'Generalklausul mot skatteflykt', *JIBS Dissertation Series*, No. 040, P.93. Prop. 1992/93:127, 1992/93: SkU14.

³¹ Rosander, U., in IFA bransch report, Congress 56:2002: Oslo, *Form and substance in tax law*, Cahiers de Droit Fiscale, The Hague: Kluwer law international, 2002, P. 531.

³² The author's own translation of Lag 1995:575 om Skatteflykt, Para. 2 p. 1.

³³ Ibid. Para. 2, p.2.

³⁴ Ibid. Para. 2, p.3.

³⁵ Ibid. Para. 2, p.4.

³⁶ Rosander, U., in IFA bransch report, Congress 56:2002: Oslo, *Form and substance in tax law*, Cahiers de Droit Fiscale, The Hague: Kluwer law international, 2002, P.532.

³⁷ See for example RÅ 2004 not. 59. The Swedish Court of Appeal in Jönköping, Case no. 3855-09, 3856-09, 3857-09, 3858-09, 3863-09.

2.4 Events leading up to HFD 2012 ref. 20

Even though the observation made in HFD 2012 ref. 20 will be the sole subject for analysis in the present paper it is of interest to shortly comment on some landmarks constituting the background of the case. This would be due to the fact that the process and judgments delivered by the Courts of Appeal leading up to HFD 2012 ref. 20, have implications for conclusions to be drawn on the legal relevance of the observation made *obiter dictum*.

In 2004, the Swedish Supreme Administrative Court delivered a judgment concerning Peruvian liquidation payments to Swedish tax residents. The liquidated company had carried out all of its business activities in Peru. The Court interpreted the treaty with Peru as restricting Swedish taxing claims on the relevant income and did also establish that the *subject to tax rule* did not apply to the scenario.³⁸ Consequently, the income became subject to double exemption as Peru did not impose any tax.³⁹ The judgment became the inspiration and point of departure for a long series of cases concerning so called “Peru-schemes” where shares in closely held companies were transferred to Peru and became subject to very low, or no taxation by means of the Sweden-Peru DTT alongside Swedish tax law providing for tax exemption on capital gains on business related shares.⁴⁰ As a consequence, a large number of cases concerning the possibility of applying the Swedish GAAR to Peru-schemes have lain before the Swedish Administrative Courts and Courts of Appeal during the past few years.

In 2011, the Swedish Court of Appeal in Jönköping, concluded that the Swedish law on tax avoidance could be called upon in order to deny treaty benefits provided for by the Sweden-Peru treaty as all requisites of the GAAR were considered to be fulfilled.⁴¹ Meanwhile, in another range of cases, the Court of Appeal of Stockholm found the law on tax avoidance as not applicable.⁴² This conclusion was based on the opinion that taxation by reference to the Sweden-Peru treaty would not be contrary to the law otherwise applied and, additionally, it could not be established whether the mutual expectations of the parties provided for prevention of abusive applications of the treaty.⁴³ Thus, the legal situation was rather unclear after the verdicts of the Courts of Appeal of Jönköping and Stockholm had been delivered.

³⁸ RÅ 2004, not. 59.

³⁹ Hilling, M. 'HFD:s Peru-domar', *Skattenytt* 2012, P. 586.

⁴⁰ Chapter 24, para. 17, SITA.

⁴¹ Court of Appeal, Jönköping, Case no. 3855-09, 3856-09, 3857-09, 3858-09, 3863-09.

⁴² Court of Appeal, Stockholm, Case no. 3348-10 and 3349-10.

⁴³ *Ibid.* Case no. 3348-10 and 3349-10.

Two of the cases decided in Stockholm got leave to appeal to the Supreme Administrative Court, which became HFD 2012 ref. 20.

2.5 HFD 2012 ref. 20

2.5.1 Facts

The judgment, delivered by the Swedish Supreme Administrative Court on the 26th of March 2012, concerned two identical cases relating to the tax treatment of liquidation payment from a company registered in Peru to a tax payer holding full tax liability in Sweden. The tax payer (K.P) and his son owned half of the shares of a real estate company (*K. and M. P. Fastigheter AB*) deriving their profits from sale of real estate in Sweden. On the 4th of April 2006 K.P bought half of the shares in the Peruvian company Inversiones Kappa Holding SAC (*Kappa*) for a consideration of approximately 1 200 SEK. On the 14th of June 2006 he also bought half of the shares in the Swedish companies K. and MP Holding AB (*Holding*) and Goldcup D 1261 AB (*Management*). One day later, on the 15th of June 2006, K.P sold his shares in *Holding* to *Kappa* for 50 000 SEK and his shares in *Real Estate* to *Management* for 612 000 SEK. Later that month, *Management* sold these shares on to *Holding* for the exact same amount, 612 000 SEK. In connection to this, K.P. acquired half of the shares of another company, Goldcup J AB 1746 (*Consulting*). Further, on the 28th of June, *Consulting* bought all shares in *Holding* from *Kappa* for an amount of 40,5 million SEK, which was equal to the substantial value of *Holding*. In September 2006 *Kappa* was liquidated and K.P's share, amounting to half of *Kappa*'s security on the purchasing price, was distributed to him. What now became the issue, which is the real concern of the case, was whether the payment due to the liquidation of *Kappa* would result in any tax consequences for K.P in Sweden. It should here be mentioned that taxation in Peru would be imposed to a rate of 4 % as compared to 30-60 % under Swedish tax law.⁴⁴

The tax authorities' position on the matter was that Swedish taxing rights were indeed restricted by the Sweden-Peru treaty. Yet, they argued, the Swedish GAAR was applicable to the scenario. K.P opposed by arguing that domestic rules cannot apply to income already exempt from Swedish taxation by the provisions of a treaty.⁴⁵

⁴⁴ HFD 2012 ref. 20

⁴⁵ Ibid.

2.5.2 The Court decision

The Supreme Administrative Court initiated its reasoning by firmly proclaiming that the Swedish GAAR provide no exemption for actions covered by double tax treaties and, equally, nowhere in the Sweden-Peru DTT is there a provision that would prevent the application of domestic anti-avoidance rules. Further, the Court found nothing implying that the mutual expectations of the parties had been that domestic anti-avoidance legislation should not be applicable to transactions constituting abuse of the treaty. Accordingly, the Court concluded that the present case *could* for certain be tested against the provisions of the Swedish GAAR. However, application of the anti-avoidance law requires that assessment on the basis of the action would be in violation of the purpose of the legislation.⁴⁶ By legislation is meant both the part that has been applied and the part which has been circumvented, which was what became subject of assessment next.⁴⁷ It could be established that Swedish taxing claims existed through Chapter 44 of the Swedish Income Tax Act (SITA). As a second step, following ordinary treaty interpretation, it was established that the treaty's article X covered the income at hand. By its provisions, taxation should be ascribed to the jurisdiction where the relevant asset was located at the time for realization. Here, the Court evaluated a number of aspects and concluded that the factors tying the shares in *Kappa* to Sweden were primarily the Swedish citizenship of the tax payer along with the value of the shares, solely deriving from income earned in Sweden on Swedish real estate. Another decisive factor, which is the reason for the deviating results in the present case and the earlier case of RÅ 2004 not. 59, was that the Peruvian company in HFD 2012 ref. 20 did not carry out any business activity in Peru. Thus, to conclude, as the shares in the liquidated Peruvian company were attributable to Sweden, taxation was deemed to be imposed under Chapter 44, section 8 of the Swedish Income Tax Act. No further comments on the statement made obiter dictum were thereby made.⁴⁸

2.6 The obiter dicta – an expression of the law as it stands today?

Opinions on the legal relevance of observations made obiter dictum are, in general, not wholly unambiguous. Some commentators would hold them as unnecessary parts of

⁴⁶ SFS 1995:575, Para. 2:4 as translated by Rosander, U., in IFA bransch report, Congress 56:2002: Oslo, *Form and substance in tax law*, Cahiers de Droit Fiscale, The Hague: Kluwer law international, 2002, P.531.

⁴⁷ Rosander, U. in Ibid. P. 531.

⁴⁸ HFD 2012 ref. 20.

judgments as they are not legally binding and, thereby, generally tend to create more confusion than clarity.⁴⁹ However, it has been convincingly argued that circumstances in relation to the particular judgment of HFD 2012 ref. 20 result in a stronger legal value than what generally can be ascribed to an observation made obiter dictum.⁵⁰ Peter Meltz argues that the relevance of observations obiter dictum depend heavily on the specific context in which they are articulated.⁵¹ It should here be noted that the opinion of the Court regarding applicability of the Swedish GAAR is utterly clearly expressed. Secondly, on the very same day as the judgment in HFD 2012 ref. 20 was conveyed, the five above mentioned cases decided by the Court of Appeal of Jönköping were denied leave to appeal to the Supreme Administrative Court. In all of those cases the Court had denied treaty access by reference to the domestic GAAR. Scholars such as Maria Hilling see the firm expression of the Court's standpoint in combination with the denial of leave to appeal as a strong indication on that the Court conceive of the results reached by the Jönköping Court as representative for the law as it stands today.⁵² To that, Peter Meltz would add that observations made by the Supreme Courts must be seen as resembling a persistent perception of the law, even though made obiter dictum.⁵³ Thus, the observation made in HFD 2012 ref. 20 will hereinafter be treated as reflecting the current legal situation in Sweden.

2.7 Points of interest and concern

After taking part of the Court's observation in the above referred judgment, a few points of concern arise as possibly being of particular interest regarding their implications in an existing international doctrinal framework.

1. Domestic GAARs *are* applicable to DTCs

First, the Court clearly interprets the absence of indications opposing the use of domestic anti-avoidance rules as justification for applying such rules. However, the Court express little clarification on what grounds such justification derives. Should the Court's conclusion be understood as implying that treaties automatically are to be interpreted as restricting their

⁴⁹ See for example Gregow, 'Några synpunkter på frågan om prejudikats bindande verkan', *Festskrift till Gösta Walin*, Stockholm: Nordstedts Juridik, 2002, P. 105.

⁵⁰ Hilling, M., 'HFD:s Peru-domar', *Skattenytt*, 2012, P. 590.

⁵¹ Meltz, P., 'Obiter dicta i Regeringsrättens prejudikatsbildning – hjälpsamt eller förvirrande?', *Regeringsrätten 100 år*, Uppsala: Iustus Förlag, 2009, P. 346.

⁵² Hilling, M., 'HFD:s Peru-domar', *Skattenytt* 2012, p. 590.

⁵³ Meltz, P. 'Obiter dicta i Regeringsrättens prejudikatsbildning – hjälpsamt eller förvirrande?', *Regeringsrätten 100 år*, Uppsala: Iustus Förlag, 2009, P. 346.

abuse? Would application of domestic anti-avoidance rules, thereby, not have to be literally endorsed in treaties?

2. *When* are domestic anti-avoidance rules applicable to DTCs?

The Court concludes that Swedish domestic anti-avoidance rules should be applicable to scenarios constituting abuse of a treaty. Yet, no guiding provisions on the required contents and elements of treaty-abuse can be derived from the statement. Thus, no discussion on who is to decide on the contents of abuse are visible. Should identification of abusive practices be perceived as a unilateral concern?

3. What about internationally established general principles of treaty law?

The Vienna Convention on the Law of Treaties provides that treaty provisions *must* be observed. Further, treaty law is commonly perceived of as superior to domestic law.⁵⁴ However, the Swedish Supreme Administrative Court seems to suggest that the Swedish GAAR would prevail over treaty provisions in case of abuse, irrespective of international principles or standards. A question that arises hereinto is whether the completion of such approach would automatically be in breach of international customary law.

⁵⁴ See Vogel, K. 'The domestic law perspective', in Maisto, G. (Series Edt.) *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P.3.

3. INTERNATIONAL DOCTRINAL DEBATE

The queries terminating the previous chapter will now, one by one, form the point of departure when reviewing international doctrinal debate dedicated to their respective area of concern.

3.1 Application of domestic anti-avoidance rules without expressed authorization in treaties

3.1.1 A general international principle of anti-abuse for the purposes of treaty law?

The Swedish Supreme Administrative Court clearly express that the scenario in HFD 2012 ref. 20 meet no obstruction of being tested against domestic anti-avoidance legislation.⁵⁵ Less clear, however, is on what grounds such firmly expressed standpoint is derived. The Court holds the absence of any provisions or indications speaking for the contrary as sufficient justification for their conclusion. An adequate point of departure for analysis might therefore be the doctrinal discussion on the possible existence of a general, unwritten principle of international treaty law implying that treaties do, by means of their inherent purpose, not apply to abusive applications. If such general principle exists, many scholars draw the conclusion that there would be little need for expressed anti-avoidance provisions in tax treaties.⁵⁶ This would, thus, be in accordance with the HFD approach. However, as one might expect, great doctrinal controversy surrounds the appropriateness of such approach.

Before 2003, paragraph 7 of the commentary to Art. 1 of the OECD Model Tax Convention would recognize the risk of tax payers using tax treaties in order to exploit differences in Member States' diverging tax systems and thereby place themselves in more advantageous tax positions.⁵⁷ However, the commentary did quite clearly suggest that the right of countering undesirable use of tax treaties by means of domestic anti-avoidance rules must be literally preserved in treaties by Member States wishing to do so.⁵⁸ In 2003 the revised commentary, extensively re-worked as regards clarification on the relationship between domestic anti avoidance rules and tax treaties, provided that one of the purposes of tax treaties

⁵⁵ HFD 2012 ref. 20.

⁵⁶ See for example: West, P., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 20.

⁵⁷ Commentary to Art. 1 of the OECD Model Tax Convention, Paragraph 7 as it read 1977-2003, Paris: OECD.

⁵⁸ Ibid.

is to prevent tax avoidance.⁵⁹ Treaties should therefore not be interpreted as to prevent application of domestic anti avoidance rules but rather as to prevent treaty abuse.⁶⁰ The effect of these changes and clarifications has, according to some authors, “shifted the onus”⁶¹ of preserving rights in treaties. It would now be up to those member states not agreeing with the “new purpose” of tax treaties to enter observations on the matter and insert provisions into their treaties precluding use of domestic anti avoidance rules.⁶² Brian J. Arnold recognizes that a contracting state that has entered observations on the Commentary is not bound to interpret treaties as to prevent tax avoidance. Such state would be totally free to interpret their treaties as precluding application of *their own* domestic anti-avoidance legislation. However, if no provisions of preclusion are inserted in the treaty, the other contracting state would not be bound to interpret the treaty as prohibiting application of *their* anti-avoidance rules. Thus, due to the contents of the current commentary, which according to Arnold is to be seen as the majority standpoint, it would be legitimate to apply domestic anti-avoidance rules if no reservation to the contrary is made in the treaty.⁶³ Scholars such as Stef van Weeghel, on the other hand, would not subscribe to Arnold’s conclusion. According to him, it is utterly clear that if one country has filed an observation on the commentary, the shared expectations of the parties - which the treaty is supposed to reflect - cannot possibly be that each country is free to apply their respective anti-avoidance rules. This would be the case even if no reservation is made in the treaty. The only thing that can be concluded in such scenario is that the contracting states disagree. It would therefore contradict established principles of treaty interpretation to allow one of the states to apply their anti-avoidance rules.⁶⁴ The same thing, would, according to Mattias Dahlberg, be the case in circumstances encompassing non-OECD member states. These countries cannot be expected to share the opinions expressed in the commentary and, thus, it is not possible to know the shared intentions of the parties without clear provisions in the actual treaties. Therefore, if domestic anti-avoidance rules are to be applied, affirmation must be derived from clear provisions in the treaty text.⁶⁵ Van Weeghel would, further, on a general basis question the “new purpose” of tax treaties as provided by

⁵⁹ Commentary to Art. 1 of the OECD Model Tax Convention, Paragraph 7 as it read 2010, Paris: OECD.

⁶⁰ Arnold, B.J., ‘Tax treaties and tax avoidance: The 2003 revisions to the commentary to the OECD Model’, *Bulletin for International Fiscal Documentation*, no.6, 2004, P.245.

⁶¹ Arnold B.J ‘Tax treaties and tax avoidance: The 2003 revisions to the commentary to the OECD Model’, *Bulletin for international fiscal documentation*, no. 6, 2004, P. 245. Arnold, B.J., ‘The relationship between tax treaties and domestic anti-abuse measures’ in Maisto, G. (Series Edt.) *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P.100.

⁶² Ibid. P. 99

⁶³ Ibid. P. 100

⁶⁴ Van Weeghel, S., in Ibid. P. 100.

⁶⁵ Dahlberg, M., *Internationell beskattning*, Lund: Studentlitteratur, 2012, P. 256.

the 2003 revised Commentary to the OECD MTC. He even reaches as far as asking for a recession to the rhetoric of the pre- 2003 commentary, which provides that the purpose of tax treaties is, among others, “not to help tax avoidance”.⁶⁶ This would be due to the fact that in the absence of a tax treaty, domestic anti-avoidance rules would apply without hindrance in order to counter tax avoidance. That is, within the general limits of domestic law, international law and possibly EC law where relevant. Seen that way, the only potential effect of tax treaties is to restrict application of domestic anti-avoidance rules. It is therefore, according to Van Weeghel, certainly not obvious that the purpose of tax treaties is to prevent tax avoidance.⁶⁷ Michael Lang would also support the previous conclusion in terms of the need of incorporating direct provisions of delimitations of treaty access in the actual treaties instead of relying on general principles of abuse or referring to domestic rules. Lang primarily points towards the fact that treaties are not only contracts that operate on a governmental level but do also affect citizens and businesses. Denying treaty benefits on the basis of rules that are not incorporated into the treaty would not be fair to citizens who derive their rights and obligations directly from treaty provisions.⁶⁸

Yet, even in the absence of the 2003 commentary, it has been suggested that an internationally recognized, unwritten principle of abuse of rights may very well exist. Ian Brownlie has observed the fact that several systems of law recognize a doctrine of abuse of rights. However, he holds, such doctrine is not existent in terms of positive law but rather, serves as an agent in the development of the law.⁶⁹ Professor Philip West would hold it as unsettled whether a general rule of public international law confines treaty abuse. Even though the doctrine of abuse, as pointed out by Brownlie, is not part of positive law in a treaty context, West holds it as reasonable to interpret treaties in a manner that is consistent with their purpose.⁷⁰ Such purpose would, further, surely be to restrict double taxation but not to eliminate taxation or promote tax avoidance. The possibility of interpreting treaties as to prevent abuse must, thus, be possible even though no specific provision of anti-abuse exists

⁶⁶ Commentary to Art. 1 of the OECD Model Tax Convention, Paragraph 7 as it read 1977-2003, Paris: OECD.

⁶⁷ Van Weeghel, S., ‘The relationship between tax treaties and domestic anti-abuse measures’ in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol. 2, Amsterdam: IBFD, 2006, p. 90.

⁶⁸ Lang, M., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P.16-17.

⁶⁹ Brownlie, I., *Principles of Public International law*, Oxford University Press, 2008, P. 444-445.

⁷⁰ West, P., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 20.

“within the four corners of the treaty”.⁷¹ Therefore, it is the opinion of West, that public international law must recognize the existence of a general anti-abuse doctrine for treaty law purposes.⁷²

3.1.2 Comments with regard to HFD 2012 ref. 20

The Sweden-Peru double tax convention at issue in the referred case of HFD 2012 ref.20 is silent on the relationship between its provisions and domestic anti-avoidance legislation. Based on the above, scholars such as West would suggest that irrespective of the provisions of the 2003 commentary, treaties must be interpreted as to deny access to abusive applications. If the standpoint of Arnold is to be ascribed, the same result would derive from a shifted onus of inserting reservations of application of domestic anti-avoidance rules by cause of the 2003 commentary. Consequently, if no reservations are to be found it can, according to certain scholars, be assumed that domestic anti-avoidance rules are not precluded by treaties. An immediate reaction here is of course that Peru is not now, nor has ever been, a member of the OECD. Even though non OECD member states are allowed to enter observations on the commentary, Peru has not done so. According to one of Dahlberg’s main arguments, this would mean that it is impossible to know Peru’s expectations on the purpose of the treaty without outright provisions therein. Another concern evident in the present case is that the Sweden- Peru DTT was signed in 1966, almost 40 years prior to the launch of the 2003 commentary.⁷³ Additionally, provisions of the Sweden-Peru DTT deviated significantly from the OECD Model. It might therefore be legitimate to conclude that the OECD Model and its commentary lack legal relevance in the present scenario. This conclusion is, however, not only derived from the facts just mentioned. Even though the reasoning of the Swedish Supreme Administrative Court might imply recognition of a general principle of treaty law providing that domestic anti-avoidance rules are applicable to treaty provisions it is questionable whether the Court builds its opinion upon the commentary, nor any other general international principle of treaty law. Maria Hilling points to the fact that no references to the commentary or any other ground for justification are made in the judgment. As seen from earlier Supreme Administrative Court case law presented above, this is a pronounce deviation from usual practice. A deviation that might indicate that the Court base their opinion

⁷¹ West, P., in IFA Cahiers 2000, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 20.

⁷² Ibid. P. 20.

⁷³ SFS 1968:745.

elsewhere, or more particularly, in a general approach equating treaty law and domestic law.⁷⁴ Many countries with a dualistic system take the position that treaty law is an incorporated part of domestic law for which domestic anti-avoidance legislation applies to restrict treaty provisions just as for other domestic tax legislation. The only relevant issue for those countries is, therefore, whether provisions of the relevant tax treaty restrict application of domestic rules.⁷⁵ If this is the approach mediated by the Supreme Administrative Court, consequently, the existence or non existence of a general internationally recognized principle of prohibition of abuse for treaty law purposes is irrelevant. Equally irrelevant is whether Peru is a member of the OECD.

To conclude, the Court does undeniably proclaim that domestic anti-avoidance legislation is applicable to situations governed by tax treaties if no provisions or indications to the contrary are to be found. In so doing, they do not share the common, yet not conclusive, doctrinal standpoint that application of domestic anti-avoidance legislation should be anchored in articulate treaty provisions. Even though the Court's standpoint bears clear resemblance to the contents of the 2003 commentary to the OECD MTC, the standpoint is more probably an expression of an approach equating international law with domestic law. Thus, assessment of improper use of tax treaties will be carried out purely by reference to the domestic definition of tax avoidance. Accordingly, in the present scenario, it looks as if only Swedish requisites for abusive practices will be observed. A concern that arises hereinto is, consequently, whether the current scenario can be seen as a purely domestic matter. Hilling has suggested that taxation by reference to the Swedish GAAR would, even though only Swedish tax law is being circumvented, mean a denial of treaty protection. A relevant question is therefore, whether the present scenario and assessment of possible abuse can be said to be purely a Swedish domestic concern.⁷⁶ This will be assessed next.

⁷⁴ Hilling, M., 'HFDs Peru-domar', *Skattenytt*, 2012, P. 588.

⁷⁵ Arnold, B.J. & Van Weeghel, S., in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 85.

⁷⁶ Hilling, M., 'HFD:s Peru-domar', *Skattenytt*, 2012, P. 589.

3.2 When is a tax treaty being abused?

3.2.1 A one-state concern?

It can be worth replicating that the HFD conclusion in the referred case is that domestic anti-avoidance rules are applicable to *transactions constituting abuse of a treaty*.⁷⁷ However, the Court does not make clear on what grounds they see the current scenario as possibly abusive and, thus, what elements should be present for a transaction to be tested against the GAAR.

Attempts of characterizing abuse and drawing conclusions on common and general features of such practices have been frequently made by both scholars and courts.⁷⁸ With regard to these attempts, generally, it has been held that abusive practices can be identified by a combination of subjective assessment of the intentions of the tax payer and an objective analysis of the purpose of the relevant legislation.⁷⁹ A definition containing these cumulative elements can be found in Paragraph 9.5 of the Commentary to Art. 1 of the OECD MTC.⁸⁰ The paragraph suggests that domestic anti-avoidance rules should apply only if first, the main reason behind entering into a transaction or arrangement is to achieve a more favorable tax position, and second, obtaining this more favorable position is contrary to the object and purpose of the relevant provisions of the treaty.⁸¹ Jacques Sasseville and Brian J. Arnold point to the important function of Paragraph 9.5 which, according to them, serves as a balance between the need to prevent treaty abuse with the need to encourage countries to take serious on, and follow, treaty commitments.⁸² Arnold articulates the need for such effect by stating that “[a] country should not be able to avoid its treaty obligations taking the position that virtually all transactions are abusive and all of its domestic tax rules are anti-avoidance rules”.⁸³ To some authors, the elements provided by Paragraph 9.5 of the Commentary appear to correspond to a

⁷⁷ HFD 2012 ref. 20.

⁷⁸ Sasseville, J., ‘A tax treaty perspective’ in Maisto, G. (Series Edt.), *Tax treaties and domestic tax law*, Vol.2, Amsterdam: IBFD, 2006, P. 56-57. Van Weeghel, S., *The improper use of tax treaties*, Boston: Kluwer law international, 1998, P. 258. ECJ C-94/05 *Emsland-Stärke GmbH v Landwirtschaftskammer Hannover*. ECJ C-196/02 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*.

⁷⁹ Ibid.

⁸⁰ Para. 9.5 in the Commentary to Art. 1 of the OECD Model Tax Convention, Paris: OECD, 2010.

⁸¹ Ibid.

⁸² Sasseville, J., ‘A tax treaty perspective’ in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 56.

⁸³ Arnold, B.J., ‘Tax treaties and tax avoidance: the 2003 revisions to the commentary to the OECD Model’, *Bulletin for international fiscal documentation*, no. 6 2004, P. 250.

general international law doctrine of abuse of rights, thus relevant on a general international basis.⁸⁴ However, not all scholars would agree on such conclusion.

Van Weeghel finds it peculiar that the definition provided above only requires tax avoidance to constitute *one* of the purposes of a transaction. As tax planning is lawful behavior and taxpayers are not forced to arrange business in a way that attracts a maximum tax burden, Van Weeghel instead suggests that in identifying improper or abusive use of tax treaties, guidance should be found by evaluating whether tax avoidance is the *sole* reason for arrangements. A second proxy would then be whether the application of a treaty to such arrangement would defeat fundamental and enduring expectations and policy objectives shared by *both* contracting states.⁸⁵ Michael Lang, on the other hand, finds the act of defining abusive applications of double tax conventions being a very troublesome area altogether. Like Van Weeghel, Lang recognizes that enterprises all over the world face an enduring obligation of arranging affairs in an as cost effective manner as possible. As long as double tax treaties permit different rates of tax at source enterprises are in effect, according to Lang, more or less forced to set up companies in countries having the most favorable DTTs.⁸⁶ Therefore, Lang sees the motive of the tax payer as highly irrelevant in establishing the existence of abuse of treaty provisions. This is a view seemingly supported also by the 2008 UN report on improper use of tax treaties which in paragraph 27 states that abuse is to be assessed on the basis of objective fact finding and not the intention of the tax payer.⁸⁷ Lang would further state that the act of standardizing or defining abuse is dangerous and might even risk contradicting the rule of law. Instead, the guiding principle on whether a treaty is being abused or not should be derived from whether the purpose of the treaty has been met. If the purpose of the treaty is met, then there should be no way of denying its benefits to tax payers. The primary purpose of DTTs are further, according to Lang, elimination of double taxation. The question of applying domestic anti abuse rules would then never have to be actualized as treaties do, automatically, not apply to arrangements failing to meet their purpose.⁸⁸ Lalithkumar Rao would agree on the conclusion of Lang in respect of meeting the purpose of the treaty is the only relevant concern when assessing treaty abuse. In so doing, he suggests that guidance should be derived

⁸⁴ Sasseville, J., 'A tax treaty perspective' in Maisto, G., (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 56.

⁸⁵ Van Weeghel, S., *The improper use of tax treaties*, Boston: Kluwer law international, 1998, P. 258.

⁸⁶ Lang, M.in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 8.

⁸⁷ Paragraph 27, 2008 UN Report on improper use of tax treaties, Geneva: UN.

⁸⁸ Lang, M.in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 8-9.

from whether transactions carry any real economic substance.⁸⁹ This line of reasoning is representative for a view placing a clear separation line between domestic and international legislation. According to such approach, treaty benefits can be denied *only* by reference to the actual treaty and the shared expectations of the parties. This would be due to, as Lang puts it, if interpretation of the provisions of a treaty was carried out according to each contracting state's domestic anti-abuse rules, the result would be two different interpretations of the treaty as anti-abuse rules differ from country to country. Such result would be contrary to the purpose of tax treaties.⁹⁰

Similarly, Franz Wassermeyer holds that, in the absence of any clear provisions on what would constitute abuse of treaties, reliance can be put on different reservations of abuse from country to country and the delimitation of such reservation would thereby not be clear on a general or mutual basis.⁹¹ This result would be the consequence of, as also highlighted by Lang, member states defining abusive practices differently and might also target differing elements of such practices. These are difficulties that, according to Wassermeyer, easily can be limited if the shared perception of the contracting parties' view on the minimum content of abuse was put directly in treaties.⁹² Another of his considerations relates to the fact that, if abuse is to be conceived of as the circumvention of a certain tax treatment in a certain jurisdiction by use of a DTT, only one of the contracting states, namely the one whose tax law is being circumvented, would be the suffering part. Thereby, only one of the contracting states in most scenarios has reason to observe that arrangements might be abusive. Also here would express provisions regarding the minimum content of abuse be preferable.⁹³

It is an established fact that states define and assess abusive practices in widely differing manners.⁹⁴ Yet, it is not doctrinally settled whether the differing thresholds of abusive practices necessarily constitute an impediment to the possibility of interpreting tax treaties by reference to domestic anti-avoidance legislation. Philip West suggests that if domestic anti-avoidance rules were not accepted as tools of interpretation in a treaty law context, it would

⁸⁹ Rao, L. in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 9.

⁹⁰ Lang, M. *Introduction to the law on double taxation conventions*, (2010), E-book on IBFD Tax Research Platform, retrieved 30/3-2013, Chapter V, part 1 (no page no. visible).

⁹¹ Wassermeyer, F., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 19.

⁹² *Ibid.* P. 20.

⁹³ *Ibid.* P. 19.

⁹⁴ Zimmer, R. (Edt.) in IFA Congress 56: 2002: Oslo, *Form and substance in tax law*, Cahiers de Droit Fiscale, The Hague: Kluwer law international, 2002, P.61.

result in an unbearable situation where domestic law that is normally applicable when interpreting a statute imposing a tax is suddenly not applicable in a treaty governed context.⁹⁵ This is a view bearing clear resemblance to earlier expressed standpoints made by Stanley Katz, concluding that treaties do, by their very nature, operate through domestic law.⁹⁶ Therefore, it is necessary for domestic law to remain coherent, which includes that domestic anti-avoidance rules must be applicable also to treaty provisions.⁹⁷ Lang would, however, probably counter such argumentation by stating that the nature of tax treaties is to set out premises for when domestic rights to tax are restricted. Such function cannot be maintained when interpreting treaties in the light of domestic anti-abuse rules. Thus, irrespective of anti-avoidance legislation, treaty protection should still be present.⁹⁸

3.2.2 Comments with regard to HFD 2012 ref. 20

In essence, there seems to be mainly two approaches regarding the assessment of abuse of double tax treaties. The first one implying that treaty law and domestic law are two separate legal systems that should be kept apart. Therefore, abuse would *only* be assessable by reference to the purpose of the treaty itself and not as a consequence of interpretation through domestic law. The opposite standpoint would be advocating a view on treaty law as an inherent part of domestic legislation for which domestic anti avoidance rules can serve as canons of interpretation in the consideration of treaty abuse.

Once again, even though the commentary to the OECD MTC would have provided support for the conclusion of the Swedish Supreme Administrative Court, this time by Paragraph 9.5, no discussion takes place on either the commentary or the existence of a general principle of the substance and contents of abusive practices. Even though there is ground for arguing that the commentary is of small legal value in the current context it has, as seen above, been suggested that the provisions of Paragraph 9.5 represent a general and guiding principle on when treaties are being abused.⁹⁹ Since the Court dedicates no discussion on the contents and elements required for testing a scenario against the domestic law on tax avoidance it can

⁹⁵ West, P. in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P.11-12.

⁹⁶ Katz, S. in IFA Cahiers 1994, Vol. 19 C, *How domestic anti-avoidance rules affect double taxation conventions*, Toronto, Canada, 1994, P. 10.

⁹⁷ Ibid.

⁹⁸ Lang, M. *Introduction to the law on double taxation conventions*, (2010), E-book on IBFD Tax Research Platform, retrieved 30/3-2013, Chapter V, part 1 (no page no. visible).

⁹⁹ See Sasseville, J., 'A tax treaty perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol. 2, Amsterdam: IBFD, 2006, P. 56.

merely be concluded that not only testing, but also identifying possible treaty abuse is seen as a purely domestic concern and does not have to be justified by reference to international law. By applying domestic anti-avoidance rules in order to deny treaty benefits the existence of abuse is assessed through purely domestic proxies and it is, as many scholars point out, not certain that the other contracting state would share the same notion of abuse. That said, would the apprehension of Brian J. Arnold be justified? Could Sweden argue that just *any* transaction constitutes treaty abuse and claim *any* domestic law provision to be an anti-avoidance rule?

It should be noted that Wassermeyer holds only one of the contracting states as the suffering part in a situation of circumvention of domestic legislation. Regarding the argumentation of Lang, however, this might be only a partly correct observation. Application of domestic anti-avoidance rules may result in denial of treaty benefits on the basis of a notion of abuse not necessarily shared by the other contracting state. If the other contracting state doesn't perceive the situation as abusive, can the function and protection of the treaty still be considered as maintained? In other words, the handling of abuse might not just be a question of circumvention of one country's domestic law but also a question of ensuring treaty protection, which is presumably a question of interest for both contracting states. The referred HFD judgment does not reveal any consideration of such concern. What can be concluded so far is that the Court's observation in HFD 2012 ref. 20 has, directly and indirectly, answered questions of whether and when the Swedish GAAR is applicable to income governed by a tax treaty. A scenario *can* be tested against the law on tax avoidance in situations constituting abuse of the treaty. A treaty should further be considered to be abused *when* domestic requisites are fulfilled.

3.3 Compatibility with internationally established principles and customary international law

Even though the Court's position on the applicability of the Swedish GAAR to prevent treaty abuse is utterly clearly expressed in HFD 2012 ref.20, it must be remembered that the Court never went further than establishing a possibility. Albeit, as the GAAR was never applied it is not utterly clear whether domestic anti-avoidance rules *automatically* would prevail over treaty provisions as soon as the requisites of the law are fulfilled. Treaties are generally recognized as superior to domestic legislation and scholars commonly hold the principle of

pacta sunt servanda as constituting the essence of customary international law.¹⁰⁰ However, as has been concluded above, the Court does not seem to be explicitly concerned with international standards or principles in the particular case of HFD 2012 ref. 20. A question arising hereinto is, therefore, whether the completion of the Court's standpoint, as expressed obiter dictum, inevitably would lead to tax treaty override and, consequently, be in breach with customary international law. This is what will be discussed next.

3.3.1 Conflicting rules

A pre dominant, however not conclusive, view in international doctrine is that tax treaty law constitutes special legislation in relation to domestic law and should therefore prevail in a conflict situation due to the general legal principle of “lex specialis derogat legi generali” (special legislation overrides general legislation).¹⁰¹ Scholars often hold that the relevance of the principles of lex superior and lex specialis is clear already from the enunciation of treaty provisions as they regulate the taxing rights of a specific country in a specific situation on a specific income.¹⁰² Other authors express this same idea by stating that tax treaty provisions “modify domestic law of the contracting states”.¹⁰³ However, the relationship between tax treaties and domestic law cannot be summed up that easily; merely by stating that treaties prevail over domestic law. The status of international law as superior to domestic legislation will, according to some commentators, always depend on the legal order in the state dealing with conflicting provisions.¹⁰⁴ In 17 out of 43 European states, treaty law holds the status of lex superior by established provisions in the constitution and is an unwritten principle of law in at least five more states.¹⁰⁵

Unlike many other countries, Sweden is not constitutionally bound to prioritize treaties at the expense of domestic law. Yet, regarding treaty relations, there are international binding rules

¹⁰⁰ Lindencrona, G., *Dubbelbeskattningsavtalsrätt*, Stockholm: Juristförlaget, 1994, p. 24. Vogel, K. 'The domestic law perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 3-10. Dahlberg, M., *Internationell beskattning*, Lund: Studentlitteratur, 2012, P. 248.

¹⁰¹ Lindencrona, G., *Dubbelbeskattningsavtalsrätt*, Stockholm: Juristförlaget, 1994, P. 25-26. Vogel, K. 'A domestic law perspective' in Maisto, G. (Series Edt.) *Tax treaties and domestic law*, Vol. 2, Amsterdam: IBFD, 2006, P. 3.

¹⁰² Lindencrona, G., *Dubbelbeskattningsavtalsrätt*, Stockholm: Juristförlaget, 1994, P. 26.

¹⁰³ Vogel, K., 'The domestic law perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol. 2, Amsterdam: IBFD, 2006, P. 3.

¹⁰⁴ Schaus, A. in Corten, O., & Klein, P., *The Vienna Conventions on the Law of Treaties - A Commentary*, Oxford: Oxford University Press, 2011, P. 700. Sasseville, J., 'A tax treaty perspective' in Maisto, G., (Series Edt.) *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 37.

¹⁰⁵ Ibid.

to consider, predominantly in terms of Article 26 of the Vienna Convention on the Law of Treaties (VCLT).¹⁰⁶ By those rules countries are enforced to follow their treaties (*pacta sunt servanda*), and to do so in good faith. Further, by the provisions of Art. 27, states may not call upon domestic rules as justification for failing to perform a treaty.¹⁰⁷ However, according to scholars such as Anders Hultqvist, a state with a dualistic approach to the relationship between treaty law and domestic law may lawfully perceive of such provisions as normative rather than legally binding.¹⁰⁸ Thus, from a strict constitutional outlook, the government is free to legislate against provisions of tax treaties and neither government, parliament or any other authority may decide upon how the Court is to apply a certain piece of legislation or how the Court should rule in the individual case.¹⁰⁹ On the other hand, there might be strong normative incentives not to override treaties. The act of disobeying treaty provisions by reference to domestic law is commonly seen as a highly inappropriate behavior that risk resulting in termination of the treaty, liability for damages or at least; harmed credibility.¹¹⁰ Mattias Dahlberg has, in addition to what was just said, stressed that the act of applying domestic legislation in contradiction to tax treaty provisions does indeed meet severe obstruction in the form of customary international law and particularly the principle of *pacta sunt servanda*.¹¹¹ The relevance of such standpoint in the context of HFD 2012 ref. 20 will be discussed below.

3.3.2 *Pacta sunt servanda* or treaty override?

Connected to the issue of rule conflict and whether application of domestic rules can be precluded by conflicting tax treaty provisions is, ultimately, whether application of a domestic anti-avoidance rule would constitute treaty override and thereby contradict the general internationally recognized principle of *pacta sunt servanda*. As seen above, Sweden is not

¹⁰⁶ Art. 26-27 of the Vienna Convention on the Law of Treaties, Vienna, 1969.

¹⁰⁷ Art. 27 of the Vienna Convention on the Law of Treaties, Vienna, 1969.

¹⁰⁸ Hultqvist, A. 'Metodfrågor vid konflikt mellan lagar om dubbelbeskattningsavtal och andra skattebestämmelser – en argumentationsanalys', *Svensk skattetidning*, 2010, P. 523.

¹⁰⁹ Chapter 11, Para. 2. (RF).

¹¹⁰ Hultqvist, A. 'Metodfrågor vid konflikt mellan lagar om dubbelbeskattningsavtal och andra skattebestämmelser – en argumentationsanalys', *Svensk skattetidning*, 2010, P. 523. Wouters, J. and Vidal, M., 'The international law perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P.21-35.

¹¹¹ Dahlberg, M. *Internationell beskattning*, Lund: Studentlitteratur, P. 248.

constitutionally bound to prioritize treaty provisions in case of conflict with domestic rules.¹¹² However, Jan Wouters and Maarten Vidal would point out that even if treaty overrides are constitutionally justified in some states, such practices are most likely unlawful according to international law.¹¹³ Thus, in contradiction to what has been held by Hultqvist above, Wouters and Vidal hold municipal lawfulness as irrelevant in the context of implementation of treaty obligations. All countries, even those who are not constitutionally required to follow treaties, are bound to apply and interpret their treaties in good faith as provided by Art. 26 VCLT.¹¹⁴ Whether these requirements can be fulfilled when applying domestic anti-avoidance legislation in tax treaty relations, or whether such practice would constitute treaty override, is what will be examined next.

According to the OECD report on tax treaty overrides¹¹⁵, such term would be defined as “Domestic legislation intended by the legislature to have effects in clear contradiction to international treaty obligations”.¹¹⁶ International treaty obligations would further be defined by the Vienna Convention, predominantly in Article 26 as “[e]very treaty is binding upon the parties to it and must be performed by them in good faith”¹¹⁷ The ICJ has interpreted good faith as meaning that “it is the purpose of the treaty, and the intentions of the parties in concluding it, which should prevail over its literal application”.¹¹⁸ A similar definition can be found in Art. 31 VCLT.¹¹⁹ Thus, the principle of good faith compels the parties to apply the treaty in such way that the purpose of it can be realized.¹²⁰ However, by reference to the purpose of treaties, a number of commentators would hold the seriousness ascribed to treaty overrides as exaggerated.¹²¹ A defense for this standpoint is expressed by Reuven S. Avi-Yonah who states that, if used sparingly and correctly, treaty overrides is an indispensable tool in combating tax avoidance and abuse of treaties which, according to him, is coherent to the two fold purpose of treaties, encompassing *both* prevention of double taxation and double

¹¹² Hultqvist, A. ‘Metodfrågor vid konflikt mellan lagar om dubbelbeskattningsavtal och andra skattebestämmelser – en argumentationsanalys’, *Svensk skattetidning*, 2010, P. 523.

¹¹³ Wouters, J. and Vidal, M., ‘The international law perspective’ in Maisto, G., (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 25-36.

¹¹⁴ *Ibid.* P. 34-35.

¹¹⁵ OECD Committee on Fiscal Affairs “Report on Tax Treaty Overrides”, Paris, 1989

¹¹⁶ OECD Committee on Fiscal Affairs “Report on Tax Treaty Overrides”, Paris 1989, P. 28

¹¹⁷ Art. 26 of the Vienna convention on the Law of Treaties, Vienna, 1969.

¹¹⁸ ICJ *Gabikovo- Nagymaros Project (Hungary/Slovak Republic)*, para.142.

¹¹⁹ Art. 31, p. 1 of the Vienna Convention on the law of Treaties, Vienna, 1969.

¹²⁰ ICJ *Gabikovo- Nagymaros Project (Hungary/Slovak Republic)*, para.142.

¹²¹ See *Ibid.* McIntyre, M., ‘A defence of treaty overrides’, *Tax Notes Int’l*, December 1989, P. 611-614.

non-taxation.¹²² Other scholars similarly build their support for treaty overrides on the underlying purpose of tax treaties. Mike MacIntyre would recognize that overrides being in *substantial* breach with international law would undeniably be unjustifiable. However, he would not hold all overrides as necessarily constituting such substantial breach.¹²³ Both Avi-Yonah and McIntyre view the purpose of tax treaties as a dual one, prohibiting not only double taxation but also double non-taxation. Thus, treaty overrides resulting in prevention of both outcomes would be compatible with the requirements of international law.¹²⁴ Also, the mentioned OECD report on tax treaty overrides might advocate a similar approach to the purpose of DTTs, stating that “Tax treaties aim primarily at the avoidance of double taxation and the prevention of fiscal evasion but also have the objective of allocating tax revenues equitably between two contracting states. Thus, any interpretation achieving these objectives would be preferable to one leading to double taxation or to an inappropriate double non-taxation.”¹²⁵

However, the possibility for states to justify treaty overrides by reference to necessity of maintaining equitable allocation of tax revenues would, according to Wouters and Vidal, be limited to very restrictive circumstances such as massive tax fraud endangering the continuity of public services and other equally serious scenarios.¹²⁶ This opinion is built upon a statement made by the ICJ in *Gabikovo-Nagymaros*, where the Court holds that over rulings of treaties by reference to necessity can only be invoked on a very exceptional basis.¹²⁷ Wouters and Vidal would instead suggest other *lawful* means available for achieving an appropriate result with regard to the abuse of tax treaties. Such lawful means would consist of cooperative action and consultation with the other contracting party regarding possible amendments to the relevant treaty rather than unilateral action by means of application of domestic legislation.¹²⁸ Yet, it has been questioned whether amendments and renegotiations would be a reasonable measure to undertake every time a treaty is being abused. Avi-Yonah’s

¹²² Avi-Yonah, R.S., ‘Tax treaty overrides: a qualified defence of U.S practice’ in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 66.

¹²³ McIntyre, M. ‘A defense of treaty overrides’, *Tax Notes Int’l*, December 1989, P. 611-614.

¹²⁴ McIntyre, M. ‘A defense of treaty overrides’, *Tax Notes Int’l*, December 1989, P. 611-614. Avi-Yonah, R.S., ‘Tax treaty overrides: a qualified defense of U.S practice’ in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 67.

¹²⁵ OECD Committee on Fiscal Affairs “Report on Tax Treaty Overrides”, Paris, 1989, P. 30.

¹²⁶ Wouters, J. and Vidal, M. ‘The international perspective’ in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, 2 Vol., Amsterdam: IBFD, 2006, P. 26.

¹²⁷ ICJ *Gabikovo-Nagymaros Project (Hungary/Slovak Republic)* Para. 57.

¹²⁸ Wouters, J. and Vidal, M. ‘The international perspective’ in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, 2 Vol., Amsterdam: IBFD, 2006, P. 25-35.

opinion on the matter is that tax law and practice change too fast for treaties to be renegotiated every time an unintended loophole is discovered and used by taxpayers in order to circumvent legislation. Wouters and Vidal, obviously representing a more restrictive view, would respond that such argumentation cannot be accepted as changed circumstances do not call for unilateral and one sided action, but rather international cooperation in good faith.¹²⁹

It should here be stressed that commentaries to the VCLT provide that the *essence* of lawfulness in treaty relations, provided for by international law, remain limited to the principles of *pacta sunt servanda* and good faith.¹³⁰ Vaughan Lowe has, in this respect, pointed out that the principle of *pacta sunt servanda* is utterly irrelevant in terms of treaty interpretation. No one would oppose the fact that treaties are to be followed. The central provision of Art. 26 VCLT is instead *in what way* the treaty is to be followed, namely, in good faith. Similarly, other commentators hold the principle of good faith as constituting the very essence of *pacta sunt servanda*.¹³¹ International law does in this respect, as seen in both Art. 31 VCLT and ICJ case law, not call for literal interpretation of treaty provisions.¹³² In this spirit, Vaughan Lowe holds that interpretation of the purpose of a treaty does, in fact, require a more flexible and contextual approach. Along this line of reasoning he would continue to argue that the question of whether domestic anti-avoidance rules conflict with tax treaties cannot be established by reference to the Vienna Convention as such, but only with respect to the purpose of the particular treaty at hand.¹³³ Thus, domestic anti-avoidance rules cannot be seen as principally conflicting with Art. 26 VCLT since the article merely calls for interpretation of treaties in good faith. Similarly, Roland Gustafsson would add that an answer to what a state is allowed to do in terms of application of domestic anti-avoidance rules in treaty contexts will never derive from international provisions of the VCLT, the OECD MTC, its commentaries or any other international principles. The answer does, according to him, not exist in such provisions. Instead, the principle of good faith brings that settlement of applicability of domestic anti avoidance rules will ultimately have to take place between the

¹²⁹ Wouters, J. and Vidal, M. 'The international perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, 2 Vol., Amsterdam: IBFD, 2006, p. 25-35.

¹³⁰ Salmon, J. in Corten, O. and Klein, P., *The Vienna Convention on The Law of Treaties – A commentary*, Oxford: Oxford University Press, 2011p. 671.

¹³¹ Von Verdross, A., 'Règles generals du droit de la paix', *RCADI*, 1929-V, Vol.30, P. 427 and 443 Via Salmon, J. in Corten, O. and Klein, P., *The Vienna Convention on The Law of Treaties – A commentary*, Oxford: Oxford University Press, 2011, P. 671.

¹³² ICJ *Gabikovo-Nagymaros Project (Hungary/Slovak Republic)* Para. 142.

¹³³ Lowe, R., in IFA Cahiers 1994, Vol. 19 C, *How domestic anti-avoidance rules affect double taxation conventions*, Toronto, Canada, 1994, P.7

only actors who can actually settle such question, namely the competent authorities of the contracting states.¹³⁴

3.3.3 Comments with regard to HFD 2012 ref. 20

First, what can be reiterated is that the Supreme Administrative Court does not provide any directions on the legal status of Swedish domestic anti-avoidance law in relation to possibly conflicting treaty provisions. This might be due to the fact that the judgment was reached without such application being actualized. However, a question arising in this context is whether the Court perhaps also knowingly refrain from commenting on the relationship between domestic law and treaty law or whether this is a result of the Court simply not recognizing a possible conflict scenario. From a strict constitutional outlook, which in this context would mean that treaty law does not hold the status of *lex superior* by constitutional provisions, it might be so that domestic rules cannot be seen as standing in conflict with treaty law as, if needed, treaties can be overruled. However, even if the Court did not recognize a possible rule conflict, it might have been appropriate to articulate the reason for such standpoint in relation to its observation. In the absence of explanatory comments, it might be legitimate to wonder whether the Court's standpoint, in fact, is signaling *carte blanche* to treaty overrides.

It should first be drawn to mind that treaty overrides are generally seen as the application of domestic legislation having effects in *clear contradiction* to international treaty obligations.¹³⁵ The question is, thus, whether application of the GAAR would stand in clear contradiction to international obligations in terms of the provisions of the VCLT. Commentators generally seem to hold Art. 26 as constituting the essence of treaty relations and the principle of good faith as its main provision. The question of treaty override by application of the Swedish GAAR would, thus, ultimately boil down to whether its application would be contrary to the *purpose* of the relevant treaty, which is also supported by the definition of treaty overrides in the OECD report. According to scholars such as Avi-Yonah and McIntyre, application of domestic anti-avoidance rules cannot be said to be in substantial breach with a DTT if the two fold purpose of the treaty is observed. Whether this would be the case in the present scenario is difficult to answer. It should be noted that Wouters and Vidal hold treaty overrides as

¹³⁴ Gustafsson, R. in IFA Cahiers 1994, Vol. 19 C, *How domestic anti-avoidance rules affect double taxation conventions*, Toronto, Canada, 1994, P. 23-24.

¹³⁵ OECD Committee on Fiscal Affairs "Report on Tax Treaty Overrides", Paris, 1989, P. 30.

justified only in case of massive tax fraud. This, however, seem more of a normative product than derived from international law provisions. Further, the Vienna Convention provides only general guidance on treaty commitments, which according to the ICJ¹³⁶, confers the task of interpretation to the contracting parties. Consequently, the purpose of a treaty would ultimately be a reflection of the shared expectations of its contractors. Thus, standpoints such as those expressed by Lowe and Gustafsson seem fairly relevant in suggesting that application of domestic anti avoidance rules can never, as such, constitute a breach of international law as it would be a matter dependent on a treaty to treaty basis. If this is accurately understood it would, to some extent, justify the low profile kept by the Court regarding the relationship between domestic rules and treaty law. It might be reasonable for the Court not to advocate too firm of a standpoint on the correlation between domestic law and treaty law as such relationship can vary significantly. However, even if this is the Court's standpoint there is still little reason for not clarifying the matter in relation to the observations made.

¹³⁶ ICJ *Gabikovo- Nagymaros Project (Hungary/Slovak Republic)*, Para.142.

4. SUMMARY AND CONCLUSIONS

The ambition and purpose of this paper was to place the observation made by the Swedish Supreme Administrative Court in HFD 2012 ref. 20 into an international framework of doctrinal debate. This would be in order to draw internationally relevant conclusions on the advantages and disadvantages of the Court's standpoint regarding applicability of domestic general anti-avoidance rules in relation to tax treaty commitments. First, it might be justified to conclude that tax scholars do not agree on a coherent approach on the issue of abuse of tax treaties and the applicability of domestic anti-avoidance legislation. A review of the literature dedicated to the matter leads to a conclusion that the debate can be said to primarily center around two main and overall concerns. Namely, whether abuse of treaty law is primarily a domestic- or international concern. These questions seemingly constitute an umbrella to which all subsequent reasoning and argumentation is attached. Debate regarding abuse being a domestic concern leads on to whether and how domestic legislation applies in relation to double tax conventions. The issue of whether abuse is instead a concern of treaty law relates to the subsequent question of whether international law recognize a general and uniform concept of abuse or whether provisions of anti-abuse need to be explicitly inserted in treaties in order to apply.¹³⁷

Objections and criticism towards applying domestic anti-avoidance legislation in contexts governed by tax treaties seem to mainly center on concerns regarding the unilateralism arising in situations that should be governed by joint expectations. In applying domestic law provisions without expressed authorization from the relevant treaty, observance of the mutual expectations may not be guaranteed, as tax treaties cannot be seen as automatically and by means of an unwritten rule, serving to prevent tax avoidance. Further, definitions and assessment of abusive applications would be made solely by reference to only one state's requisites for abuse which wouldn't necessary correspond to the other contracting state's notion of the term. If a general and universal principle on the contents of abuse cannot be said to exist, consequently, the shared expectations on treaty protection may very well be breached. In essence, by standards of international law, the purpose of a treaty must be observed at all times. As tax avoidance is a matter without a clear common definition and if treaties cannot be said to automatically preclude tax avoidance, critics seem partly right in the

¹³⁷ See Essers, P. in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 3.

opinion that observance of the purpose of a treaty cannot be guaranteed when applying domestic anti-avoidance rules.

On the other hand, the purpose of a treaty is the result of mutual agreement, encompassing mutual expectations. Thus, it does not seem possible to determine the purpose of a treaty on a general basis. International law does only set out general premises for treaty application and interpretation. Yet, whether the purpose of a treaty is being observed or not should reasonably only be possible to decide with regard to the particular treaty at hand. In its observation, the Swedish Supreme Administrative Court does in fact refer to the mutual expectations of the parties. However, it is the absence of indications implying that expectations would oppose the application of domestic anti avoidance rules that serve as justification for the Court's conclusion. Even though such approach can be supported according to some scholars, by means of general unwritten understandings, it can definitely also be questioned whether the absence of provisions can be interpreted as affirmation. The Court could virtually apply *any* rule by means of such reasoning. Thus, in order to show concern for treaty protection and the expectations of the other contracting state it seems to have been appropriate for the Court to refer to internationally recognized standards, such as the commentary to the OECD MTC and the Vienna Convention. Even though the commentary lack legal relevance in the current scenario per se, it could have been argued that its' provisions represent a general international approach of treaty law.

Thus, with regard to international doctrine, the main problem of the Swedish Supreme Administrative Court's observation seems to be the inability of the Court to justify their approach in an internationally viable way as they choose to see the issue of tax avoidance and treaty abuse as a purely domestic concern. Such approach might risk leading to inadvertence of the other contracting party's expectations on the treaty and thereby also an inadvertence of the fundamental treaty protection which, unarguably, is the essential reason for entering into treaty relations in the first place. However, as every treaty is subject to interpretation by the contracting states, it cannot be established that a treaty would infallibly be breached by application of domestic anti-avoidance rules, just as it cannot be concluded that anti-avoidance rules would necessarily be in line with the purpose of treaties. Thus, an unequivocal and internationally valid answer to the question of applicability of domestic anti-avoidance rules to scenarios governed by tax treaties seems impossible to find, presumably because there is none.

LIST OF REFERENCES

Sources of law

The GAAR: SFS 1995:575, Lag mot skatteflykt, Para. 2.

SITA: SFS 1999:1229, Inkomstskattelag, Chapter 44, Section 8.

Constitutional law: 1974 års Regeringsform, Chapter 11, Para. 2.

Litterature

Arnold, B.J., 'Tax treaties and tax avoidance: The 2003 revisions to the commentary to the OECD Model', *Bulletin for International Fiscal Documentation*, no.6, 2004, P.244-260.

Arnold, B.J., 'The relationship between tax treaties and domestic anti-abuse measures' in Maisto, G. (Series Edt.) *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P.81-102.

Avi-Yonah, R.S., 'Tax treaty overrides: a qualified defence of U.S practice' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Amsterdam: IBFD, 2006, P.65-79.

Brownlie, I., *Principles of Public International law*, Oxford University Press, 2008, P. 444-445.

Dahlberg, M., *Internationell beskattning*, Lund: Studentlitteratur, 2012, P. 230-258.

Essers, P. in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 3.

Gregow, T. 'Några synpunkter på frågan om prejudikats bindande verkan', *Festskrift till Gösta Walin*, Stockholm: Nordstedts Juridik, 2002, P. 105.

Grundström, K.J. 'Treaty override – nu även i Skatterättsnämnden', *Skattenytt* 2010, P.159-166.

Gustafsson, R. in IFA Cahiers 1994 Toronto, Vol. 19 C, *How domestic anti-avoidance rules affect double taxation conventions*, The Hague: Kluwer Law International, 1994, P. 23.

Hilling, M., 'HFDs Perudomar', *Skattenytt*, 2012, P. 582-591.

Hiort af Ornäs, L. *Skatterätt*, Egypt: Liber, 2011, P.189.

Hultqvist, A. 'Metodfrågor vid konflikt mellan lagar om dubbelbeskattningsavtal och andra skattebestämmelser – en argumentationsanalys', *Svensk skattetidning*, 2010, P. 520-534.

- Katz, S. in IFA Cahiers 1994 Toronto, Vol. 19 C, *How domestic anti-avoidance rules affect double taxation conventions*, The Hague: Kluwer Law International, 1994, P. 9-10.
- Lang, M., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P.6-8, 16-17.
- Lindencrona, G, *Dubbelbeskattningsavtalsrätt*, Stockholm: Juristförlaget, 1994, P. 20-24.
- Lodin, S.O, Lindencrona, G., Meltz, P., Silfverberg, C., Simon-Almendal T. *Inkomstskatt- En läro- och handbook I skatterätt*, Part 2, Lund: Studentlitteratur, 2011, P. 615.
- Lowe, R., in IFA Cahiers 1994 Toronto, Vol. 19 C, *How domestic anti-avoidance rules affect double taxation conventions*, The Hague: Kluwer Law International, 1994, P.7.
- McIntyre, M., 'A defence of treaty overrides', *Tax Notes Int'l*, December 1989, P. 611-614.
- Meltz, P., 'Obiter dicta i Regeringsrättens prejudikatsbildning – hjälpsamt eller förvirrande?', *Regeringsrätten 100 år*, Uppsala: Iustus Förlag, 2009, P. 345-347.
- Mutén, L. 'Treaty override i Regeringsrätten', *Svensk Skattetidning*, 2008, P.353.
- Peczenik, A., 'Juridikens allmänna läror', *Svensk Juristtidning*, 2005:3, P. 249 ff.
- Pelin, L. *Internationell skatterätt i ett Svenskt perspektiv*, Lund: Studentlitteratur, 2011, p. 97.
- Rao, L. in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 9.
- Rosander, U., in IFA bransch report, Congress 56:2002: Oslo, *Form and substance in tax law*, Cahiers de Droit Fiscale, The Hague: Kluwer law international, 2002, P. 530-532.
- Rosander, U. 'Generalklausul mot skatteflykt', *JIBS Dissertation Series*, No. 040, P.90-94.
- Van Weeghel, S., 'The relationship between tax treaties and domestic anti-abuse measures' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol. 2, Amsterdam: IBFD, 2006, p. 90.
- Salmon, J. in Corten, O. and Klein, P., *The Vienna Convention on The Law of Treaties – A commentary*, Oxford: Oxford University Press, 2011 p. 671.
- Sasseville, J., 'A tax treaty perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic tax law*, Vol.2, Amsterdam: IBFD, 2006, P. 37-38, 55-60.
- Schaus, A. in Corten, O., & Klein, P., *The Vienna Conventions on the Law of Treaties - A Commentary*, Oxford: Oxford University Press, 2011, P. 700.
- Van Weeghel, S., *The improper use of tax treaties*, Boston: Kluwer law international, 1998, P. 258.

Vogel, K. 'The domestic law perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Vol.2, Amsterdam: IBFD, 2006, P. 3-11.

Von Verdross, A., 'Règles generals du droit de la paix', *RCADI*, 1929-V, Vol.30, P. 427 and 443 Via Salmon, J. in Corten, O. and Klein, P., *The Vienna Convention on The Law of Treaties – A commentary*, Oxford: Oxford University Press, 2011, P. 671.

Wassermeyer, F., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 19-20.

West, P., in IFA Cahiers 2000 Munich, Vol. 25 B, *Abusive application of international tax agreements*, The Hague: Kluwer law international, 2000, P. 5-6, 11-15, 20.

Wouters, J. & Vidal, M., 'The international perspective' in Maisto, G. (Series Edt.), *Tax treaties and domestic law*, Amsterdam: IBFD, 2006, P.13-35.

Zimmer, R. (Edt.) in IFA Cahiers 56: 2002: Oslo, *Form and substance in tax law*, The Hague: Kluwer law international, 2002, P.61.

E-books

Lang, M. General report, *Introduction to the law on double taxation conventions*, (2010), E-book on IBFD Tax Research Platform, retrieved 30/3-2013, Chapter V, part 1 (no page no. visible).

Treaties

General: The Vienna Convention on the Law of Treaties, Vienna: 23 May 1969. Art. 26-27, 31-33.

Sweden – Peru: SFS 1968:745.

UN

Report on improper use of tax treaties, 2008, Geneva: UN.

OECD

OECD Committee on Fiscal Affairs, *report on tax treaty overrides*, Paris, 1989.

Commentary to Art. 1 of the OECD Model Tax Convention on Income and on Capital, Condensed versions, 1997 and 2010, Paris: OECD.

Case law

The Swedish Supreme Administrative Court: HFD 2012 ref. 20.

The Swedish Supreme Administrative Court: RÅ 2010 ref. 112.

The Swedish Supreme Administrative Court: RÅ 2008 ref. 24.

The Swedish Supreme Administrative Court: RÅ 2004 not. 59.

The Swedish Supreme Administrative Court: RÅ 1996 ref. 84.

Court of Appeal, Stockholm: Case no. 3348-10 and 3349-10.

Court of Appeal, Jönköping: Case no. 3855-09, 3856-09, 3857-09, 3858-09, 3863-09.

The International Court of Justice: Judgment of 25 September 1997, *Gabikovo- Nagymaros Project (Hungary/Slovak Republic)*.

The European Court of Justice: ECJ, C-94/05 *Emsland-Stärke GmbH v Landwirtschaftskammer Hannover*.

The European Court of Justice: ECJ, C-196/02 *Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v Commissioners of Inland Revenue*.

Government bills

Prop. 1992/93:127.

Tax committee reports

Skatteutskottets betänkande, 2005/06: SkU37.

Skatteutskottets betänkande, 1992/93: SkU14.