

## The Relevance of Tax Treaty History

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With the steady flow of new double tax treaties, amendments to existing treaties, the issue of reports and consultative papers by the OECD, and two-yearly updates to the OECD Model with, at the time of writing, the 2005 update due shortly, one could be forgiven for dismissing tax treaty history as irrelevant. There is more than enough to do keeping pace with current developments. However, there are at least two ways in which tax treaty history can be of assistance. First, in the context of treaty interpretation, there are terms and concepts which have been developed as part of the 'international tax language' and which can only be fully understood by appreciating their background and historical development. There is a kind of continuum: the term 'permanent establishment', to take an obvious example, can be better understood if one knows something of its development and that involves a study of history. There is a contrary argument that the question is, 'What did the negotiators intend the treaty provision to mean and how did they intend it to be applied?'. Be that as it may, if reference is being made to the Model Commentary to determine the intention then the history of the Model Commentary would seem to be relevant.

Secondly, in the context of analysis of current tax treaty issues it may be that a current problem is found to give rise to the same issues as an apparently dissimilar problem in the past. An example of this can be found in the discussion of the taxation of e-commerce. It is understood that the issues raised in discussions on the taxation of shipping in the 1920s were very similar to the issues raised in the recent discussions on the taxation of e-commerce. This is not

surprising because both have the particular feature of mobility, but a reference to the earlier discussions and the outcome (place of effective management) would almost certainly have informed and perhaps shortened the later discussions. Another example is the attribution of business profits, which has a long history going back to League of Nations days, which should be acknowledged in the development of the working hypothesis.

One is therefore very grateful for the attention drawn to the subject of tax treaty history by the Canadian branch of the International Fiscal Association which, in cooperation with the OECD Centre for Tax Policy and Administration, organized a seminar in Toronto in November 2004, on 'The history of tax treaty provisions (*and why it is important to know about it*)'. It is to be hoped that at least some of the papers presented will be published in due course as an encouragement to academics, if not also practitioners in cases they are dealing with, to pursue research in this field. This journal has itself encouraged interest in this field by publishing articles such as 'The History of Article 8 of the OECD Model Treaty on Taxation of Shipping and Air Transport' by Guglielmo Maisto<sup>1</sup> and 'The Evolution of Article 4(3) and its Impact on the Place of Effective Management Tie Breaker Rule' by Sarig Shalav.<sup>2</sup>

If history is to play its role then it is important that scholars and others researching in the field should be able to access the source materials and there is work to be done here in identifying the location of materials, and their preservation and arrangement in an accessible form, including, one hopes, the archives at OECD.

### Notes

<sup>1</sup> (2003) 31 Intertax 232.

<sup>2</sup> (2004) 32 Intertax 460.