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Memorandum for the applicant
Memorandum for the defendant

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Il presente lavoro nasce dalla partecipazione dell'Università Luiss Guido Carli alla European and International Tax Moot Court Competition organizzata dalla European Tax College Foundation di Lovanio.

Si tratta di una competizione che simula un processo, in cui le delegazioni di alcune università europee ed americane si affrontano su uno specifico tema di diritto tributario internazionale e/o comunitario. Simulando tanto la fase scritta quanto il contraddittorio orale dinanzi all'autorità giudiziaria di un ipotetico Stato, le differenti squadre hanno proceduto, in questa edizione, all'analisi di un caso avente ad oggetto la problematica della compatibilità tra lo scambio di informazioni ed il diritto alla *privacy* del contribuente, ponendo particolare attenzione al concetto di inutilizzabilità dei dati raccolti. In questo contesto è stato analizzato il rapporto tra l'art. 26 dell'OECD Model Tax Convention ed il tema della c.d. "*fishing expedition*".

I paragrafi da 5 a 8 della Sezione IV del *Memorandum for the applicant* sono stati redatti dal dott. Federico Franconi.
I paragrafi da 1 a 4 della Sezione IV del *Memorandum for the applicant* sono stati redatti dalla dott.ssa Giulia Trabattoni.
I paragrafi 1, 2.2, 3.1.1. e 3.1.3. della Sezione IV del *Memorandum for the defendant* sono stati redatti dal dott. Alessandro Siragusa.
I paragrafi 2.1., 3.1.2. e 3.2. della Sezione IV del *Memorandum for the defendant* sono stati redatti dalla dott.ssa Sabrina Tronci.

Il dott. Giuseppe Giangrande, il dott. Alessio Persiani ed il dott. Federico Rasi hanno assistito gli studenti nella preparazione dei lavori e nella successiva fase orale.
I lavori sono stati diretti dal Prof. Giuseppe Melis e dal Dott. Eugenio Ruggiero quali *team coach* della delegazione LUISS.

MEMORANDUM FOR THE APPLICANT

TABLE OF CONTENTS

Table of contents

I. LIST OF SOURCES..6
II. STATEMENT OF FACTS……………………………………………………………………………Errore. Il segnalibro non è definito.
III. ISSUES…………………………………………………………………………………………Errore. Il segnalibro non è definito.
IV. ARGUMENTS…………………………………………………………………………………..Errore. Il segnalibro non è definito.

1 EXECUTIVE SUMMARY... ERRORE. IL SEGNALIBRO NON È DEFINITO.
2 THE FRUIT OF THE POISONOUS TREE DOCTRINE ..... ERRORE. IL SEGNALIBRO NON È DEFINITO.
2.1 THE LOGIC REQUIREMENT: THE EOI AS A NECESSARY CONDITION OF THE ASSESSMENT ERRORE. IL SEGNALIBRO NON È DEFINITO.
2.2 WHY EVIDENCE GATHERED THROUGH AN UNLAWFUL EOI IS UNLAWFULLY GATHERED ERRORE. IL SEGNALIBRO NON È DEFINITO.
2.2.1 BREACH OF LEGALITY .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
2.2.2 BREACH OF THE FUNDAMENTAL RIGHT TO PRIVACY... ERRORE. IL SEGNALIBRO NON È DEFINITO.
2.3 CONCLUSIONS .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
3 LACK OF FORESEEABLY RELEVANCE OF THE INFORMATION REQUESTED THROUGH THE EOI SUBMISSION.. ERRORE. IL SEGNALIBRO NON È DEFINITO.
3.1 "FORESEEABLY RELEVANCE" 19
3.2 THE RATIONALE OF THE "FORESEEABLY RELEVANCE". THE RIGHT TO PRIVACY ERRORE. IL SEGNALIBRO NON È DEFINITO.
3.3 THE LACK OF FORESEEABLY RELEVANCE .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
3.4 EX-ANTE EVALUATION .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
4. THE EOI PROCEEDING WAS UNDERTAKEN FOR A TAXATION "CONTRARY TO THE CONVENTION"..E ERRORE. IL SEGNALIBRO NON È DEFINITO.
4.1 DUALIST APPROACH .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
4.2 THE NATURE OF THE TAX TREATY RULES ...... ERRORE. IL SEGNALIBRO NON È DEFINITO.
4.2.1. THE NATURE OF ART. 23-B .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
4.3 CONCLUSION .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
5. THE FAILURE OF NOTIFICATION TO LL .... ERRORE. IL SEGNALIBRO NON È DEFINITO.
5.1 NON–SEVERABILITY OF THE EOI PROCEEDING 29
5.2 FAILURE OF NOTIFICATION TO LL AND BREACH OF THE EXHAUSTION RULE ERRORE. IL SEGNALIBRO NON È DEFINITO.
6. BREACH OF ART. 8 ECHR: FREELAND'S LAW DOES NOT PROVIDE FOR ANY PREVIOUS COMMUNICATION TO TAXPAYERS BEFORE EXCHANGING DATA. ERRORE. IL SEGNALIBRO NON È DEFINITO.
7. BREACH OF THE STATUTE OF LIMITATION IN FREELAND'S LEGISLATION ERRORE. IL

SEGNALIBRO NON È DEFINITO.
7.1 PAR. 17 OF THE COMMENTARY .... **ERRORE. IL SEGNALIBRO NON È DEFINITO.**
8. PENALTIES WERE INFLICTED AGAINST ART. 6 ECHR. **ERRORE. IL SEGNALIBRO NON È DEFINITO.**
8.1 PENALTIES AND ART. 6 ECHR .... **ERRORE. IL SEGNALIBRO NON È DEFINITO.**
8.2 PENALTIES IN FIXED AMOUNT AND ART 6 ECHR **ERRORE. IL SEGNALIBRO NON È DEFINITO.**
8.3 RIGHT TO SILENCE AND TAX LAW ....**ERRORE. IL SEGNALIBRO NON È DEFINITO.**
V. LIST OF ABBREVIATIONS... **Errore. Il segnalibro non è definito.**

MEMORANDUM FOR THE DEFENDANT

TABLE OF CONTENTS

Table of contents

I. List of sources……………………………………………..…………………………………...40
II. Statement of facts……………………………………..………………………………….....43
III. issues………………………………………..……………………………………………..45
IV. ARGUMENTS………………………………..…………………………………………...47
1) Introduction……………………………………….………………………………………...47
2) Jayland's internal law…………………………..……………………………………………..47
2.1 THE REQUIREMENTS FOR THE OPENING OF A TAX INVESTIGATION…………………………...47
2.1.1. Subjective requirement…………………………………………………………………47
2.1.2. Objective requirement...48
2.1.3. Use of the newspaper's article 49
2.2. RIGHT OF THE TAXPAYER TO BE HEARD 50
2.2.1. Al Papone's uncooperative behavior..51
2.2.1.1. The legitimacy of the administrative penalty applied to Al Papone………………..51
3) INTERNATIONAL LAW..……………………………………………………………………53
3.1. THE INFORMATION WAS EXCHANGED ACCORDING TO ARTICLE 26..53
3.1.1. The foreseeable relevance standard..54
3.1.1.1. Literal interpretation……………………………………………………………..54
3.1.1.2. Interpretation according to the Commentary ………………………………………55
3.1.1.2.1. The role of the Commentary to the OECD model……………………………….55
3.1.1.2.2. The foreseeable relevance standard according to the Commentary……………...56
3.1.1.2.2.1. Rules of interpretation…………………………………………………………57
3.1.1.2.2.2. Rationale of the standard ……………………………………………………58
3.1.1.2.2.3. Conclusions…………………………………………………………………59
3.1.2. Other limits set up by article 26………………………………………………………...59
3.1.2.1. Secrecy rules……………………………………………………………………..60
3.1.2.2. Reciprocity rule……………………………………………………………………60
3.1.2.2.1. Statute of limitation rules………………………………………………………..61
3.1.2.3. the possibility to go beyond the limits……………………………………………...62
3.1.3. Consequences of eventual treaty violations 63
3.2. ISSUES RELATED TO ARTICLE 23B OF THE TREATY 64
3.2.1. Irrelevance of the credit related issues for the exchange of information procedure 64
3.2.2. Rightful determination of the amount of the assessment 65
V. List of Abbreviations……………………………………………………………………68

European Tax Moot Court Competition 2013/2014

MEMORANDUM FOR THE APPLICANT

Registration number: H/02

I. List of sources

Scholars

H. J. Ault, *The role of the OECD Commentaries in the interpretation of tax treaties*, in *Intertax*, 1994, p. 144

P. Baker, *Should Article 6 ECHR (civil) apply to tax proceedings?*, in *Intertax*, 2001, p. 205;

P. Baker, *Some Recent Decisions of the European Court of Human Rights*, in *European Taxation*, 2008, p. 315-316;

P. Baker, *Recent Tax Cases of the European Court of Human Rights*, in *European Taxation*, 2012, p. 584-586;

P. Baker, *Taxation and human rights*, in *GITC Review*, 2001, p. 1-13;

P. Baker, *Taxation and the European Convention on Human Rights*, in *European Taxation*, 2000, p. 298-374;

P. Baker, *The decision in Ferrazzini: Time to reconsider the application of the European Convention of Human Rights in Tax Matters*, in *Intertax*, 2001, p. 360-361;

P. Baker, *The "Determination of a Criminal Charge" and Tax Matters*, in *European Taxation*, 2008, p. 587-588

G. Bizioli, *The impact of the Right to a Fair Trial on Tax Evidence: An EU Analysis*, in G. Kofler, M. Poiares Maduro, P. Pistone (Eds.), *Human Rights and Taxation in Europe and the World*, Amsterdam, 2011, p. 489-504;

R. Bousta, *Who Said There is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union*, in *European Public Law* 2013, 481–488;

J. M. Calderon, *Taxpayer protection within the Exchange of Information Procedure between State Tax Administrations*, in *Intertax*, 2000, p. 462-475;

A. Contrino, *Italian Tax Treaties and Domestic Law: Some Remarks about the Relationship Between Provisions on Foreign Tax Credit,* in *Intertax,* 2007, p. 647-652;

C. Doccio, *Exchange of Information*, in *European Taxation*, 1999, p. 314;

S. Frommel, *The European Court of Human Rights and the right of the accused to remain silent: can it be invoked by taxpayers*, in *Intertax*, 1993, p. 520-549.

M. Greggi, *Due Procedure Clause (Derecho a Un Procedimiento Justo) Under European Tax Law*, 2009, available at SSRN: http://ssrn.com/abstract=1350969 or http://dx.doi.org/10.2139/ssrn.1350969;

M. Greggi, *The protection of human rights and the right to a fair tax trial in the light of the Jussila case*, in *Intertax*, 2007, p. 610-617.

P. Gyöngyi Vègh, *Towards a better exchange of information*, in *European taxation*, 2002, p. 394;

W. Kessler, R. Eicke, *Germany's fruit from Liechtenstein's poisonous tree,* in *Tax Notes International,* 2008, p. 871;

E. Kristoffersson, P. Pistone, *Policy issues, historical development, general legal framework*, in *Tax Secrecy and Tax Transparency. The relevance of confidentiality in Tax Law*, Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien, 2013, p. 1;

M. Lang, F. Brugger, *The role of the OECD Commentary in tax treaty interpretation*, in *Australian Tax Forum*, 2008, p. 95;

G. Maisto, *The impact on the European Convention on Human Rights on tax procedures and sanctions with special reference to tax treaties an the EU Arbitration convention*, in G. Kofler, M. Poiares Maduro, P. Pistone (Eds.), *Human Rights and Taxation in Europe and the World*, Amsterdam, 2011, p. 373-395

R. Matteotti, *Interpretation of tax treaties and Domestic General Anti-Avoidance Rules – A sceptical look at the 2003 Update to the OECD Commentary*, in *Intertax*, 2005, p. 339;

C. Öner, *Using Exchange of information in regard to assistance in tax collection*, in *European taxation*, 2011, Journals IBFD (accessed 26 Dec. 2013);

J. Owens, *Moving towards better transparency and exchange of information on tax matters*, in *Bull. Int. tax.,* 2009, p. 557-558;

P. Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, in *Bull. Int. Tax.*, 2013, Journals IBFD (accessed 26 Dec. 2013);

F.G. Prats, *Mutual assistance in collection of tax debts,* United Nations Ad Hoc Group of Experts on International Cooperation in Tax Matters, Geneva, 2001, pg. 35-36, available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan001659.pdf;

C. Sacchetto, *Exchange of information, tax crimes and legal protection*, in L. Salvini - G. Melis,

Financial crisis and single market, Rome, 2012, p. 61

S. Sachdeva, *Tax treaty overrides: a comparative study of the monist and the dualist approach,* in *Intertax*, 2013, p. 180;

T. Schenk-Geers, *International exchange of information and the protection of taxpayers*, Alphen aan den Rijn, 2009;

R. Seer, I. Gabert, *General report*, in *Mutual assistance and information exchange. Proceedings of the 2009 EATLP Congress* (Santiago de Compostela, 4-6 June, 2009), Amsterdam, 2010;

T.A. Van Kampen – L.J. De Rijke, *The Kredietbank Luxembourg and the Liechtenstein tax affairs: notes on the balance between the Exchange of information between States and the protection of fundamental rights,* in *EC Tax Review,* 2008, p. 228;

K. van Raad, *International Coordination of Tax Treaties Interpretation and Application*, in *Intertax*, 2009, p. 213;

K. Vogel, *On Double Taxation Conventions*, The Hague, London, Boston, 1997;

A. Wisselink, *International exchange of tax information between European and other countries*, in *EC Tax Review*, 1997, p. 109.

<u>European Commission and European Court of Human Rights jurisprudence</u>

ECnHR, no. 673/59, *AX and BX v. Germany*.

ECnHR, no. 945/60, *X v. Germany*.

ECnHR, no. 2145/64, *X v. Belgium.*

ECnHR, no. 1904/63, *ABC and D v. the Netherlands.*

ECtHR, no. 10873/84, *The Tracktörer AB v. Sweden*.

ECtHR, no. 11760/85, *Editions Periscope v. France*.

ECtHR, no. 12547/86, *Bendenoun v. France.*

ECtHR, no. 13120/87, *DC v. Italy*.

ECtHR, no. 18656/91, *Perrin v. France.*

ECtHR, no. 19958/92, *AP, MP and TP v. Switzerland.*

ECtHR, no. 20919/92, *EL, RL and JOL v. Switzerland.*

ECtHR, no. 21351/93, *JJ v. the Netherlands.*

ECtHR, nos. 10828/84, 12661/87 and 11471/85, *Funke, Miailhe and Crémieux v. France*.

ECnHR, n. 30128/96, *FS v. Germany*.

ECtHR, nos. 41601/98 and 41775/98, *Vidacar SA and Opergrup SL v. Spain.*

ECtHR, no. 44759/98, *Ferrazzini v. Italy*.

ECtHR, no.73053/01, *Jussila v. Finland*.

ECtHR, no. 18497/03, *Ravon v. France*.

ECtHR, no. 4837/06, *Segame SA v. France*.

ECtHR, no. 11663/04, *Chambaz v. Switzerland.*

European Court of Justice jurisprudence

C-80/94, *Wielockx.*

National jurisprudence

Australia

High Court of Australia, *Thiel v. Federal Commissioner of Taxation*, 1990, 171 CLR 338

Belgium

Rechtbank van Eerste Aanled te Brussel, sec. XXXIII, June 28, 2002, n. 02/23379

Correctionele Rechtbank van het arrondissement Hasselt, sec. XVIII, April 30, 2003, n. 78.97.1357/00

France

Cour d'Appel de Paris, Pôle 5 – Chambre 7, February 8, 2011.

Cour de Cassation, Chambre Commerciale, Financière et Économique, January 31, 2012, no. 141.

Luxembourg

Cour de Cassation, July 6, 1967, no. 14/67.

Administrative Court, May 24, 2012, no. 30251C.

Spain

Tribunal Constitucional de España, Sala Segunda, November 29, 1984, STC 114/1984.

Tribunal Constitucional de España, Sala Primera, December 11, 1995, no. 181.

Tribunal Constitucional de España, Sala Primera, March 26, 1996, n. 49.

Tribunal Constitucional de España, Sala Primera, March 26, 1996, n. 54.

Tribunal Constitucional de España, Sala Primera, July 9, 1996, no. 127.

Switzerland

Administrative Federal Court, January 21, 2010, no. A-7780/2009

II. STATEMENT OF FACTS

Al Papone is a taxpayer resident in Jayland and shareholder in the company Outfit Chicago, resident in Freeland and not listed on any stock exchange.

During the five calendar years 2008 through 2012 (included) Outfit distributed to AP dividends for the following amounts:

- € 14.000 in 2008;
- € 11.000 in 2009;
- € 1.750 in 2010;
- € 12.000 in 2011;
- € 17.000 in 2012.

Such amounts have not been reported by AP, and have therefore never been subjected to taxation in Jayland; they have been subject instead to a 15% rate withholding tax in Freeland.

Clark Kent, a journalist, revealed in a newspaper article that a politician, Luxus Luthor, resident in Jayland, was a shareholder in Outfit and that he had never reported the dividends perceived from such company. The newspaper article mentioned three other taxpayers resident in Jayland and shareholders of Outfit who had not reported the dividends perceived from such company. However, the newspaper did not mention their names.

The tax administration of Jayland requested Clark Kent the names and further information on the three unknown taxpayers, but the journalist refused to provide them.

On the basis of the newspaper information then, Jayland's tax authorities submitted a group request to Freeland, in order to obtain information about the full list of persons resident in Freeland and shareholders of Outfit and about the amount of dividends received by them in the last five calendar years. Such request contained:

- the name and the address of Luxus;
- the name and seat of Outfit Chicago;
- other information contained in the newspaper article about the three other possible shareholders, including the initials of their names and some of the amounts that some of them had allegedly received from Outfit, in the last five years.

Answering to the request, the tax administration of Freeland provided the following information:

- full names and addresses of all shareholders in Outfit who were also resident in Jayland;
- the amount of dividends distributed to them by Outfit during the last five calendar years.

Based on the information received, Jayland's tax authorities requested AP further information. He refused to provide it, whereupon the tax administration confronted AP with the information received from Freeland. AP still denied any wrongdoing, but the tax administration issued a notice of assessment of unreported dividends for all five previous years. On the other hand, the tax administration did not granted to AP the tax credit provided by article 23B of the Convention against double taxation signed by Jayland and Freeland and not implemented in Jayland's internal legislation.

Moreover, the tax administration applied an administrative penalty to AP, for having refused to provide the information requested by the tax administration.

On the 25th of January 2014 AP filed a protest against the notice of assessment.

III. ISSUES

This case involves many juridical questions and topics that can be summarised as follows:

PART A: THE FRUIT OF THE POISONOUS TREE DOCTRINE

1. The illegitimacy of the EoI proceeding makes not utilizable the information gathered through same EoI.
   1.1 The EoI proceeding is a necessary condition of the assessment
   1.2 The assessment is void because based on unlawfully gathered evidence

2. There is a breach of the principle of legality
   2.1 The EoI proceeding was not in compliance with international and internal law.
   2.2 Principle of legality is basement of the rule of law and is granted by Art. 41 of the Charter of Fundamental Rights of the European Union

3. There is a breach of the fundamental right to privacy
   3.1 ECtHR's *Funke* and *Ravon* jurisprudence: the privacy right must be respected during tax proceedings.

PART B: THE ILLEGITIMACY OF THE EOI PROCEEDING (UNDER INTERNATIONAL AND INTERNAL LAW)

4. The EoI request sought for not "*foreseeably relevant*" information.
   4.1 The rationale of the foreseeably relevance requirement is protecting the privacy right of the taxpayer.
   4.2 "Foreseeably relevance" means identification of the taxpayers involved.
   4.3 Foreseeably relevance must be evaluated *ex ante*.

5. The taxation for which the EoI request was submitted was not in compliance with the Treaty
   5.1 Jayland adopts a dualistic system.

5.1.1 The dualistic system does not allow treaty rules to produce effects without an implementing regulation

5.2 The tax credit rule is not self-executing

5.2.1 As tax credit rule need procedural internal rules to be implemented, lack thereof does not allow the treaty rule to produce effects

5.3 As the tax credit cannot be granted to AP, the taxation for which the EoI request was submitted is contrary to the Convention

6. The notification right was not granted to LL, in breach of both internal and international law.

   6.1 The EoI proceeding is indivisible

   6.2 LL's right to privacy was not respected: this affects also the Assessment served upon AP.

   6.3 There was not a previous recognition of information by LL, in breach of the "exhaustion rule" under art. 26 of the Tax Treaty.

7. Freeland national law does not provide for any notification right for taxpayers before forwarding information related to them,

   7.1 Breach of art. 8 ECHR: limitations to taxpayer's privacy rights requires a "fair hearing" to challenge such limitation

8. *In subsidiary order*: there was a breach of the statute of limitation provided by Freeland.

9. *In subsidiary order:* penalties are in breach of art. 6 ECHR.

   9.1 Art. 6 is applicable to tax proceedings involving "criminal" penalties

   9.2 Penalties are provided for a fixed amount: no discretion is granted to judge.

   9.3 Penalties are a consequence of the mere silence of the taxpayer: there is a breach of the right to silence.

IV. ARGUMENTS

1 *EXECUTIVE SUMMARY*

1. The Assessment must be considered null and void because the EoI, which was the basis of the Assessment, was in breach of international and internal law.
2. Indeed, we are going to show in the following pages that:
   - (i) the EoI proceeding is a necessary condition of the Assessment;
   - (ii) the EoI must be considered unlawful, and, as a result,
   - (iii) the related pieces of evidence are not utilizable in the tax proceeding toward AP; thus
   - (iv) as the evidence gathered through the EoI are a necessary basis of the Assessment, the latter must be considered null.
3. The arguments relevant in the case at stake are divided into two main parts.
4. Firstly, we are going to illustrate the reasons why the illegitimacy of the EoI proceeding affects the assessment based on same EoI proceeding (under the so-called *fruit of poisonous tree doctrine*).
5. Then, we will explain why the EoI procedure is not in compliance with the law, addressing the following arguments:
   - (i) the EoI proceeding was based on a request of information which was not "*foreseeably relevant*" under Art. 26 of the Treaty;
   - (ii) the EoI proceeding was undertaken for a taxation contrary to the Treaty;
   - (iii) the EoI proceeding was in breach of internal law as LL was not notified before requesting the information; the EoI request was sent even if the Tax Authorities of Jayland did not take all the measures available under Jayland law to obtain the information;
   - (iv) Freeland's law does not comply with Art. 8 ECHR because it does not grant taxpayer with any previous notification right before forwarding data related to them;
   - (v) the information was exchanged in breach of the statute of limitation provided by Freeland Tax Law;

(vi) penalty inflicted was not in compliance with Art. 6 ECHR.

2 THE FRUIT OF THE POISONOUS TREE DOCTRINE

6. Under the fruit of the poisonous tree doctrine, evidence gathered through illegally obtained information must be excluded from any administrative proceeding and/or trial[1]. Thus, in the case at stake, as the EoI proceeding was not legitimate, such illegitimacy shall extend its effects to the final Assessment, that must be declared null and void.

2.1 THE LOGIC REQUIREMENT: THE EOI AS A NECESSARY CONDITION OF THE ASSESSMENT

7. The EoI is a necessary condition of the Assessment, in the sense that if the pieces of evidence gathered through the EoI fail, the same Assessment fails. Therefore, the essential result of the illegality of the EoI, and the consequent invalidity as evidence of the information gathered through the EoI, is the nullity of the Assessment.

8. Indeed, the Assessment was based only on the information gathered through the EoI, as before there was no evidence of any breach of tax obligation by AP.

9. Thus, if (i) the EoI proceeding is proved to be unlawful, and, as a result (ii) the related pieces of evidence are not utilizable – both these conditions are met in the case at stake – the Assessment must be deemed null, as based exclusively on the illegal EoI proceeding and related evidence.

10. This thesis is supported by case-law developed by courts in different Countries, stating that the information gathered unlawfully by a tax administration cannot be used as evidence to base an assessment and, as a result, it must be considered null and void in the case the evidence unlawfully gathered is its necessary basis[2].

2.2 WHY EVIDENCE GATHERED THROUGH AN UNLAWFUL EOI IS UNLAWFULLY GATHERED

11. This paragraph aims at demonstrating that the illegitimacy of the EoI proceedings leads to the exclusion of related evidence by the tax proceeding.

[1] C. Sacchetto, *Exchange of information, tax crimes and legal protection*, in L. Salvini - G. Melis, *Financial crisis and single market*, Rome, 2012, p. 61. See also W. Kessler, R. Eicke, *Germany's fruit from Liechtenstein's poisonous tree,* in *Tax Notes International,* 2008, p. 871.

[2] As to Belgium, see Rechtbank van Eerste Aanled te Brussel, sec. XXXIII, June 28, 2002, n. 02/23379, Correctionele Rechtbank van het arrondissement Hasselt, sec. XVIII, April 30, 2003, n. 78.97.1357/00. See also T.A. Van Kampen – L.J. De Rijke, *The Kredietbank Luxembourg and the Liechtenstein tax affairs: notes on the balance between the Exchange of information between States and the protection of fundamental rights,* in *EC Tax Review,* 2008, p. 228. As to Luxembourg, see Cour de Cassation, July 6, 1967, no. 14/67. As to France, see Cour de Cassation, Chambre Commerciale, Financière et Économique, January 31, 2012, no. 141, Cour d'Appel de Paris, Pôle 5 – Chambre 7, February 8, 2011.

2.2.1 BREACH OF LEGALITY

12. Firstly, the tax administration cannot benefit from an unlawful act (*i.e.* the illegal acquisition of evidence): indeed, should the piece of evidence gathered be considered valid, all the procedural rules that regulated EoI would have been useless, since their respect by the tax administration would have had no consequence. The assessment proceeding is an instrument to bound the tax administration to the law in compliance with the principle of legality, a general principle of law recognized by the European Countries and the same basement of the rule of law.

13. In this regard, the EU Charter of Fundamental Rights provided for a "*right of good administration*"[3] under Art. 41, according to which "*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*". Even if both Jayland and Freeland are not member of the EU, it has to be highlighted that the Charter of Fundamental Rights is a modern codification of rights and freedoms that are generally recognized to people all over the world.

14. The principle stated in Art. 41 imposes the *fairness* of the administrative activity: as a consequence, the public administration shall act fairly, *i.e.* in compliance with the law; as tax administration is part of the whole public administration, it has to act in compliance with the law.

15. In this context, since EoI for tax purposes was highly empowered during last years - as a consequence of the London 2009 G-20 and following developments[4] – it is even more important that the manner in which it is carried out is strictly in compliance with the rules provided by the applicable law.

2.2.2 BREACH OF THE FUNDAMENTAL RIGHT TO PRIVACY

16. However, there is another reason that demonstrates that the evidence gathered through the EoI proceeding at stake cannot be used to base an assessment.

17. Indeed, the EoI proceeding was in breach of the fundamental right of privacy of the taxpayer, granted by Art. 8 ECHR.

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[3] Even if a scholar pointed out that no "right of good administration" seems to be granted under the above-mentioned Charter. See R. Bousta, *Who Said There is a 'Right to Good Administration'? A Critical Analysis of Article 41 of the Charter of Fundamental Rights of the European Union*, in *European Public Law* 2013, 481–488.

[4] See J. Owens, *Moving towards better transparency and exchange of information on tax matters*, in *Bull. Int. tax.,* 2009, p. 557-558.

18. In this connection, according to the case-law of the Spanish courts, the fruit of the poisonous tree doctrine applies when the action of the tax authorities is in breach of a constitutional right - such as the right to defense, the presumption of innocence, the protection of the premises and of the communications and correspondence[5].

19. The relevance of the ECHR in tax proceedings was already pointed out by ECtHR in several decisions[6]. Therefore, ECtHR stated important holdings as to the applicability of the right of privacy (granted by Art. 8) to tax proceedings. In 1993, in the leading case *Funke, Miailhe and Crémieux v. France*[7], ECtHR found that there had been an infringement of, *inter alia*, Art. 8 ECHR when French revenue officers searched premises without a prior judicial authorization; furthermore, in the more recent case *Ravon v. France*[8], ECtHR held that the procedures for judicial authorization of searches and seizures by French revenue authorities also contravene Art. 6 ECHR, because they lead to a breach of the fundamental right of privacy without any "fair proceeding" under Art. 6[9]. *Ravon* was a fundamental decision about the applicability of Art. 6 ECHR to tax proceedings, as the right of privacy of the taxpayer was involved in the case at stake[10]. In *Ravon*, ECtHR expressly stated that the relevance of the right to privacy is so material that such right must be guaranteed even during the course of the tax proceeding, through a "fair hearing" pursuant to Art. 6. Thus, we can reach the conclusion that privacy is a fundamental right to be protected under every tax procedure.

20. As to the specific case of the EoI, it is widely recognized that the utilization of EoI for tax purposes shall not compromise the safeguard of taxpayers' rights[11]. In this connection, several States provide for a previous communication to the taxpayer before they submit an EoI request[12], demonstrating an interest of the taxpayer to keep private information relating

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[5] See Tribunal Constitucional de España, Sala Segunda, November 29, 1984, STC 114/1984;Tribunal Constitucional de España, Sala Primera, December 11, 1995, no. 181; Tribunal Constitucional de España, Sala Primera, March 26, 1996, n. 49; Tribunal Constitucional de España, Sala Primera, March 26, 1996, n. 54; Tribunal Constitucional de España, Sala Primera, July 9, 1996, no. 127. See also M. Rodríguez-Bereijo León, *La prueba en derecho tributario*, Navarra, 2007, 276-279.

[6] See P. Baker, *Taxation and the European Convention on Human Rights*, in *European Taxation*, 2000, p. 298-374, Idem, *Taxation and human rights*, in *GITC Review*, 2001, p. 1-13.

[7] ECtHR, February 25, 1993, nos. 10828/84, 12661/87 and 11471/85, *Funke, Miailhe and Crémieux v. France*.

[8] ECtHR, February 2, 2008, no. 18497/03, *Ravon v. France*.

[9] See P. Baker, *Some Recent Decisions of the European Court of Human Rights*, in *European Taxation*, 2008, p. 315-316; M. Greggi, *Due Procedure Clause (Derecho a Un Procedimiento Justo) Under European Tax Law*, 2009, available at SSRN: http://ssrn.com/abstract=1350969 or http://dx.doi.org/10.2139/ssrn.1350969.

[10] Applicability of Art. 6 to tax proceeding will be further analyzed in par. 8.1.

[11] See, *inter alia*, F.G. Prats, *Mutual assistance in collection of tax debts,* United Nations Ad Hoc Group of Experts on International Cooperation in Tax Matters, Geneva, 2001, p. 35-36, available at http://unpan1.un.org/intradoc/groups/public/documents/un/unpan001659.pdf.

[12] See R. Seer, I. Gabert, *General report*, in *Mutual assistance and information exchange. Proceedings of the 2009*

(continued...)

to him. Such previous communications may be considered the way to respect the privacy rights (as stated in *Ravon*) under the EoI proceedings, in this context, it may be argued that a national law which does not provide for such a communication cannot be considered in compliance with ECHR. Therefore, such guarantees, that assist taxpayers in connection with the EoI, are the proof that the taxpayer has an actual interest in keeping reserved his data.

2.3 CONCLUSIONS

21. Thus, for above-mentioned reasons, it must be held that an EoI proceeding in breach of international and/or national law cannot generate evidence that can be used in a tax proceeding and/or trial; as a result, the tax assessment based on the information provided through the EoI shall be deemed null. As we will show below, there are several reason of illegitimacy of the EoI proceedings; hence, the information gathered by the means of same EoI are not utilizable and the Assessment is to be declared null.

3 LACK OF FORESEEABLY RELEVANCE OF THE INFORMATION REQUESTED THROUGH THE EOI SUBMISSION

22. The Assessment shall be declared void as the information required through the EoI request was not "foreseeably relevant".

23. In order to determine the meaning of the expression "foreseeably relevant", it is worth making reference to the Commentary. Indeed, it is generally recognized that the Commentary is an instrument for interpreting OECD-based DTCs[13].

3.1 "FORESEEABLY RELEVANCE"

24. The formula "foreseeably relevant" was introduced into Art. 26 of OECD Model Convention as of 2005, to identify a parameter of specificity of a request of EoI and in

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EATLP Congress (Santiago de Compostela, June 4-6, 2009), Amsterdam, 2010, p. 49; M. Calderon, *Taxpayer protection within the Exchange of Information Procedure between State Tax Administrations*, in *Intertax*, 2000, p. 462-475.

[13] As to case law, see, *inter alia*, High Court of Australia, *Thiel v. Federal Commissioner of Taxation*, 1990 171 CLR 338. See also, *inter alia*, H. J. Ault, *The role of the OECD Commentaries in the interpretation of tax treaties*, in *Intertax*, 1994, p. 144; M. Lang, F. Brugger, *The role of the OECD Commentary in tax treaty interpretation*, in *Australian Tax Forum*, 2008, p. 95. R. Matteotti, *Interpretation of tax treaties and Domestic General Anti-Avoidance Rules – A sceptical look at the 2003 Update to the OECD Commentary*, in *Intertax*, 2005, p. 339; K. van Raad, *International Coordination of Tax Treaties Interpretation and Application*, in *Intertax*, 2009, p. 213.

order to eliminate the previous term "necessary", unanimously considered too limiting and restrictive. The same formula is included in the OECD Model TIEA, in Art. 5[14].

25. Such modification arose from the enforcement of international EoI and, more generally, from the cooperation between States to fight international tax evasion and avoidance. Indeed, to adopt a more effective approach in fighting such phenomena, States decided to cut away the border between national tax administrations, increasing the possibility to exchange the information gathered through tax audits and inquiries and/or to request information about taxpayers to other tax administrations. Nonetheless, to prevent a tax administration to burden a foreign one with an exaggerated encumbrance, each EoI request shall regard information that is "*foreseeably relevant for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes*".

26. The formula "foreseeably relevant" is ambiguous[15], as it is based on the concept of "foreseeably", which is a really unclear and wide one: for instance, Art. 26 does not precise what are the parameters to determine the concept of relevance.

27. The Commentary on art. 26 notes that "*the standard of "foreseeable relevance" is intended to provide for exchange of information in tax matters to the widest possible extent and, at the same time, to clarify that Contracting States are not at liberty to engage in "fishing expeditions" or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer*"[16].

28. The meaning of the formula "fishing expedition" was clarified through the recent 2012 amendment to the Commentary, paired with the amendment to Art. 26. Such modification to the Commentary was (implicitly) ratified by Jayland and Freeland by entering in the 2012 Protocol.

29. The OECD Council deeply addressed the interpretation to be given to such formula, using explanations that are relevant in the case at hand.

3.2 THE RATIONALE OF THE "FORESEEABLY RELEVANCE". THE RIGHT TO PRIVACY

30. It is worth focusing on the rationale underlying to Art. 26.

[14] On this, see P. Gyöngyi Vègh, *Towards a better exchange of information*, in *European taxation*, 2002, p. 394, in particular p. 395.
[15] Most scholars hold this opinion. See, *inter alia*, P. Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, in *Bull. Int. Tax.*, 2013, Journals IBFD (accessed 26 Dec. 2013), nt. 1.
[16] See Commentary on art. 26, par. 5

31. Indeed, the Commentary, in explaining said Article, makes explicitly reference to the request of information that is unlikely to be relevant to the tax affairs of a given taxpayer. In this connection, that rule must be deemed provided not only to protect the foreign tax administration by too general requests of information, but also to protect the taxpayer from an indiscriminate disclosure of his information, in the case there is not a reasonable link of its information with a breach of tax law. In other words, the right of the taxpayer to keep confidential and secure its personal data (such as data at stake) shall be taken into account interpreting Art. 26.

32. Indeed, it has to be considered that the information exchange between an EoI "travels" through different Countries, and this fact significantly increases the possibility of indiscrete disclosure of data.

33. In this connection, both Jayland and Freeland adhere to ECHR, which Article 8 provides a right to respect for one's "*private and family life, his home and his correspondence*". Such Article shall be a parameter to interpret the formula "foreseeably relevant" stated by Art. 26, notwithstanding the hierarchy of ECHR with respect to the Treaty. Indeed, it must be held that the general principle of coherency of the law system imposes to interpret a certain single rule having regard to the entire set of rules applicable in same law system.

34. One might argue that tax treaties are not governed by the rule of coherency, but by the reciprocity one[17]. Actually, such argument is not valid: in the case at stake both the States ratified ECHR and shall respect the rules established therein.

35. We have already analyzed some of the case-law of ECtHR as to the applicability of art. 8 to tax proceedings. In this context, it is worth highlighting that, as noted by an eminent scholar[18], the right to privacy is generally compressed by Art. 8, par. 2, that admits limitation to such right if "*in accordance with the law and [...] necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country*". Based on such observation, ECnHR justifies a limitation of the right to privacy as to EoI for tax purposes: in the case *FS v. Germany*[19] the EoI was deemed to be taken in the interests of the economic well-being of the country and necessary in a democratic society[20].

[17] See ECJ, C-80/94, *Wielockx*, par. 24.
[18] P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 320-321.
[19] ECnHR, n.. 30128/96, *FS v. Germany*.
[20] On this, see P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 326

36. However, such decision confirms the needs for respecting of procedural law. Indeed, ECnHR noted that the EoI proceeding was in compliance with the relevant legal provisions and, consequently, the interference was in accordance with law, as requested by art 8(2) ECHR. However, in the case at stake, the EoI proceeding is not in compliance with the law; thus, it must be considered in breach of Art. 8, since it is not covered by the "safe harbor" of art. 8(2).

37. This way of thinking is confirmed by a Swiss Court's decision stating that, should the requirement to consent the EoI between States are not met, the taxpayer may demand to a Court to declare null the administrative act through which the tax authorities have exchanged information with the foreign tax administration[21].

38. Therefore, AP has a concrete and current interest to invoke the breach of Art. 26 as to the lack of the foreseeably relevance of the information, since his right to privacy is involved in the case at stake.

3.3 THE LACK OF FORESEEABLY RELEVANCE

39. In addition, the requirement of the foreseeably relevance was not met in the case at hand; thus, the Assessment must be deemed null and void.

40. Indeed, it is clear that the clarifications set forth in the Commentary as to the foreseeably relevance of the information to be exchanged do not allow the EoI in the case at stake. Par. 5.1 of the Commentary clarifies that "*in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer*". Thus, a fundamental requirement in order to considered the information requested as foreseeably relevant is the identification of the taxpayer for whom the request is made[22]. This is explicitly required by art. 5(5) of TIEA Model as well.

41. In the case at hand, the information provided in the EoI request were not sufficient to identify the taxpayer.

42. Indeed, the EoI request included:
    (i) the name and address of LL, with no explanation of the link between him and the other taxpayers involved in the request;

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[21] Administrative Federal Court of Switzerland, no. A-7780/2009, January 21, 2010.
[22] See P. Pistone, quoted, nt. 1; P. Gyöngyi Vègh, quoted, p. 325.

(ii) the name and seat of Outfit Chicago, that nothing says in connection with its shareholders;

(iii) some newspaper extracts, including the initials of the other shareholders' names and some of the amounts received from Outfit.

43. As to (iii), that is the only point concerning AP-related information, there is no doubt that such information is not sufficient to identify him. Indeed, the initials of a name, even paired with the fact that a certain person is a shareholder of a company, cannot allow anyone to understand who is that person, except the case of a special knowledge of the same. A research aiming at discovering the identity of such person requires the consultation of corporate books or, in case of bearer shares, the consultation of the specific document representative thereof. In other words, through the mere request, it is impossible to understand at whom the same request is aiming.

44. This latter reflection shows that the identification of the taxpayer was done after the submission of the EoI request. Logically, it must be held that such identification was not done by the EoI request: as a result, the lack of foreseeably relevance.

45. Therefore, an example included in same Commentary[23] clarifies that the foreseeably relevance was not met in the case at stake. The Commentary notes that, if a Contracting State requests the names of all shareholders in a company resident of the other Contracting State and information on all dividend payments made to such shareholders, even if the request states that it is well known that taxpayers often fail to disclose foreign source income or assets, the State requested may refuse the EoI.

46. In conclusion, including the name initials is not relevant, as this information is not sufficient to identify the related shareholder.

47. A decision of the Administrative Court of Luxembourg supports this interpretation. Indeed, based on the Commentary and on the OECD manual on exchange of information, the CAL ruled that an information request is foreseeably relevant if (i) it relates to one or several specific taxation cases or to given taxpayers and (ii) *it states the identity of the person under tax investigation*. Any request failing to satisfy these conditions is null[24].

[23] See par. 8.1, let. *b)* of the Commentary on art. 26

[24] CAL, May 24, 2012, no. 30251C.

3.4 EX-ANTE EVALUATION

48. The Commentary also explicitly provides for an *ex ante* evaluation of the foreseeably relevance, clarifying that "*the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial*".

49. Thus, in the case at hand, even if the information provided through the EoI was used to base an assessment, the request could not be considered valid, as there was no foreseeably relevance at the moment of the request.

50. Indeed, an opposite interpretation, under which the following discovery of the relevance of an information provided through an EoI "ratifies" the EoI request for not foreseeably relevant information, would lead to an implicit abrogation of the rule, because, adopting such an interpretation, States could breach it and there would be no consequence for the validity of EoI proceeding.

51. Furthermore, this consideration is another argument to hold that the illegitimacy of the EoI request brings to the nullity of the related assessment, otherwise there would be no need to clarify that the following discovery of the irrelevance of the information provides is immaterial.

4. THE EOI PROCEEDING WAS UNDERTAKEN FOR A TAXATION "*CONTRARY TO THE CONVENTION*"

52. The Assessment is null as it is based on EoI in order to enforce the domestic law bringing to a taxation that is contrary to the Convention, as Jayland domestic law does not grant the foreign tax credit provided by the Treaty[25].

53. In fact, the abrogation of the domestic rule granting the foreign tax credit does not consent to consider Jayland legislation in compliance with the Treaty. As a consequence, the taxation for which the EoI request was submitted was not in compliance with the Treaty, and the provision set forth in Art. 26 – stating that the EoI is allowed "*insofar as the taxation thereunder is not contrary to the Convention*" - is violated. Thus, the EoI proceeding shall be deemed illegitimate and the Assessment based thereon must be considered null and void.

[25] On this, see C. Doccio, *Exchange of Information*, in *European Taxation*, 1999, p. 314.

54. Indeed, AP cannot invoke the foreign tax credit granted by the Treaty because of (i) the dualist approach adopted by Jayland; and (ii) the nature of the foreign tax credit rule.

4.1 DUALIST APPROACH

55. Jayland does not recognize self-executing character to public international law treaties, so that their provisions need to be implemented *via* domestic provisions[26].

56. Indeed, Jayland embraces a dualistic approach with respect to the force of the tax treaties (also in general, for all sort of public international law treaties) it signs. The premise of such an approach consists in the sharp distinction between the domestic legal system and the international one. Such theory is anchored on the supremacy of the State and regards the domestic and the international legal orders as separate and distinct, as respectively exclusive, each of them being supreme within its own sphere.

57. As a consequence, international law rules are not able to naturally perform their effect in the domestic legal system: States embracing a dualist approach have to undertake a legislative process in order to give to international law rules the force of law, so that those can be enforced by the Courts of the State[27]. The lack of such a domestic legislation, treaties cannot create obligations or rights for private parties, as they can only generate obligations and rights in the international order.

58. As a result, the abrogation of the foreign tax credit in 2006 does not allow AP to invoke the above-mentioned foreign tax credit, because of the lack of a law executing the Tax Treaty rule into the Jayland's legal system.

4.2 THE NATURE OF THE TAX TREATY RULES

59. Therefore, the nature of Art. 23-B of the Treaty does not allow AP to invoke such rule in order to benefit from the foreign tax credit.

60. Indeed, DTCs are bilateral treaties signed under the force of public international law. Their main purpose is the allocation of taxing rights among the residence and the source state, as double taxation may occur regarding certain types of income and/or capital[28].

61. In this regard, one of the most relevant Article of a tax treaty is that providing for a relief from double taxation. In the OECD Model Convention, such function is performed by

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[26] M. Lang, *The procedural conditions for the Implementation of Tax Treaty Obligations under domestic law*, in *Intertax*, 2007, p. 147.
[27] S. Sachdeva, *Tax treaty overrides: a comparative study of the monist and the dualist approach,* in *Intertax*, 2013, p. 180.
[28] See K. Vogel, *On Double Taxation Conventions*, The Hague, London, Boston, 1997, p. 38.

Articles 23-A and 23-B, that establish the exemption and the credit method in order to avoid double taxation in case of taxation of a certain item of income both in the State of residence and in the State of source. Under the Tax Treaty between Jayland and Freeland, the method chosen was the tax credit (Art. 23-B).

62. Nevertheless, those Articles do not provide any directive regarding the manner in which States are meant to implement those provisions, as they have to apply their own domestic procedural law. Similar issues are also raised by articles 25, 26 and 27 of the OECD Model Convention[29].

63. Thus, it is understandable how material is distinguishing between substantive and procedural rules. Indeed, in a tax treaty, contracting States establish rules as to the allocation of taxing rights (substantive rules); on the other hand, same contracting State have the duty to provide the procedural conditions in order to make the tax treaty provisions function in practice (procedural rules).

64. As a result, even though Contracting States introduce an implementing legislation of the treaty provision *via* an ordinary legislative process, not every single treaty provision, with the force of the domestic law or statute, is deemed to be directly applicable in their legal system (self-executing). Some substantive rules included in tax treaties need to be implemented through procedural rules.

4.2.1. THE NATURE OF ART. 23-B

65. In this context, the nature of the provisions of foreign tax credit contained in the Tax Treaty must be evaluated[30].

66. The wording of the article at hand appears really flexible. It does not provide any definition of "income derived abroad"; nor any criterion has been included for calculating the foreign income and the worldwide taxable income, required for determining the general limit for the deduction of the foreign tax credit. In addition, nothing is said about the deduction of foreign taxes' possible dependency on the irreversibility of the payment of foreign taxes, nor on the liability with respect to the income arose in the State of residence. The Article only requires that the income at stake shall be liable to tax in the state of source. Moreover,

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[29] M. Lang, quoted, p. 146-147.

[30] Article 23-B reads: "*Where a resident of a Contracting State derives income […] which, in accordance with the provisions of this Convention, may be taxed in the other Contracting State, the first-mentioned State shall allow: a) as a deduction from the tax on the income of that resident, an amount equal to the income tax paid in that other State […].Such deduction in either case shall not, however, exceed that part of the income tax […], as computed before the deduction is given, which is attributable, as the case may be, to the income […] which may be taxed in that other State*".

the Article does not provide any rule about the excess of foreign tax compared to the maximum creditable amount and about timing and procedural aspect in order to grant the right to deduct[31].

67. By reason of such a wording flexibility and the low level of details of the treaty provision, a domestic provision that concretely allows to enforce the treaty provision is necessary in order to eliminate double taxation, as the international and the domestic rule have different purposes, even though they are placed at the same level in the hierarchy of the sources of law[32].

68. Thus, having regard to the above mentioned wording of article 23B of the Tax Treaty, we shall exclude its self-executing nature. It rather must be held that it has a mixed nature, providing for an element with an autonomous character and, at the same time, an implicit cross-reference to domestic legislation[33].

69. Indeed, as previously highlighted, this treaty provision states nothing more than a general principle to determine the foreign tax credit, establishing the maximum amount of the allowed deduction. Contracting States have the duty to enforce this provision *via* a domestic legislative process, for the purpose of completing the general principle in the treaty by stating substantial and procedural features that are required, so that the provision can function in practice in the domestic legal order. By allowing the actual applicability of the treaty rule, the domestic provision enforces the treaty provision in the matter of the foreign tax credit and thus pursues the treaty main purpose of eliminating double taxation.

70. Due to the lack of such a domestic rule in Jayland's legal order, as the same was abolished by a special law approved in 2006, AP has no possibility to invoke the treaty provision in the matter of foreign tax credit, in order to get relief from double taxation, as such relief is strictly dependant to the emanation of internal enforcement measures *via* legislative proceeding, which shall contain that minimum level of necessary elements of integration of the general principle stated in the treaty[34]. This represents the sole way AP can effectively benefit from the deduction of foreign taxes in Jayland.

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[31] A. Contrino, *Italian Tax Treaties and Domestic Law: Some Remarks about the Relationship Between Provisions on Foreign Tax Credit,* in *Intertax*, 2007, p. 647.

[32] A. Contrino, quoted, p. 647.

[33] A. Contrino, quoted, p. 648.

[34] See K. Vogel, quoted, p.1131.

71. In other words, the domestic rule in the matter of foreign tax credit is always implied by the treaty provision at stake[35]. If there is no domestic rule as to the foreign tax credit, no foreign tax credit can be granted only through Art. 23 of the Tax Treaty.

72. Also the Commentary confirms such mixed nature of the treaty provision at stake. Indeed, the Commentary states that "*Article 23B sets out the main rules of the credit method, but does not give detailed rules on the computation and operation of the credit. […] In many states, detailed rules on credit for foreign tax already exist in their domestic laws. […] where the credit method is not used in the domestic law of a Contracting State, this State should establish rules for the application of Article 23B, if necessary after consultation with the competent authority of the other contracting state*"[36]. Moreover, after pointing out that problems related to the application of the credit for foreign taxes depend largely on the domestic legislation and procedure, the Commentary states that "*the solution must, therefore, be left to each State*" [37].

4.3 CONCLUSION

73. To sum up:

- the dualistic approach, adopted by Jayland, clearly distinguishes between international treaties and national law and statutes.
- Jayland abrogated the foreign tax credit as to taxes paid in Freeland by its residents. As Jayland follows a dualistic approach, said abrogation impedes the treaty rule to enter into Jayland legal system.
- Thus, we must conclude that the foreign tax credit for taxes paid in Freeland cannot be considered recognized by Freeland's law. Indeed, as the self-executive nature of art. 23-B shall be excluded, a taxpayer cannot benefit from the foreign tax credit granted under the Tax Treaty.

74. This last step of our reasoning will make understandable the reason why the notice of assessment is null and void, as it is based on EoI in order to enforce the domestic law, with a taxation that is contrary to the Tax Treaty. The Tax Treaty granted a relief on double taxation through the foreign tax credit; however, because of a treaty override, such relief is not granted by Jayland. As avoidance of double taxation is the main purpose of DTCs, a

[35] A. Contrino, quoted, p. 649.
[36] See Commentary, *Article 23A and 23B,* par. 60.
[37] See Commentary, *Article 23A and 23B,* par. 66.

taxation, which does not respect rules aiming at avoiding double taxation, must be deemed contrary to the Convention. As a result, the breach of Art. 26, - that allows the EoI "*insofar as the taxation thereunder is not contrary to the Convention*" - and the illegitimacy of the entire Assessment, because of the fruit of the poisonous tree doctrine.

5. THE FAILURE OF NOTIFICATION TO LL

75. The Assessment is null and void also because it was issued even though Jayland's tax authorities had not notified LL before submitting the EoI request.

76. Indeed, Jayland's national law obliges tax authorities to notify a taxpayer, requiring from him information before starting to request information from third parties. Such rule may be considered as a guarantee for the taxpayer, assisting him during a tax proceeding, to avoid divulgating information related to him. Such kind of guarantees are particularly important during an EoI proceedings, when the taxpayer may be completely unaware about any tax investigation, and allows him to challenge or to avoid the EoI, by providing information or contesting the request, to protect his right to confidentiality[38].

77. In this context, it was held by an eminent scholar that the absence of any notification does not allow taxpayer to challenge the EoI; then, bearing in mind the decision in *Funke* and *Ravon* with respect to the importance of safeguards on infringements of the right of privacy, the absence of any opportunity to challenge an exchange of information might constitute a breach of Art. 8[39]. Thus, in the case at stake, as such notification right is granted by the law but it is not respected, *a fortiori* we must consider illegitimate the EoI proceeding, as in breach of both internal law and ECHR.

78. This breach of law extends its effects to the whole EoI proceeding and, as proved above, to the entire Assessment.

79. Therefore, the failure of notification is in breach of international law as well; in particular, in breach of the "exhaustion rule" as provided in the Commentary.

5.1 NON–SEVERABILITY OF THE EOI PROCEEDING

80. One might argue that only LL may be considered able to invoke such breach of law, because he was directly damaged.

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[38] See P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 326; J. M. Calderon, quoted, p. 462-475; E. Kristoffersson, P. Pistone, *Policy issues, historical development, general legal framework*, in *Tax Secrecy and Tax Transparency. The relevance of confidentiality in Tax Law*, Frankfurt am Main, Berlin, Bern, Bruxelles, New York, Oxford, Wien, 2013, p. 2.

[39] P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 326.

81. Nevertheless, we must notice that at the moment of EoI request submitting, the tax inquiry had LL as only taxpayer audited. In other words, at the time of the request, there was only one pending tax proceeding, and all the other proceedings, including the AP-related one, derived from that proceeding. Hence, we must consider that the source of the proceeding against AP was the same EoI request: when the latter was submitted, even if there were no proceeding against AP, the tax inquiry related to him started. However, as shown above, at that moment there was only one proceeding, that was in breach of law because of the lack of notification to LL.

82. Therefore, there is a breach of a fundamental right of a taxpayer, the privacy right of LL. It cannot be accepted that the information gathered through a proceeding in breach of a fundamental right of a taxpayer may be used against another taxpayer, as the tax administration cannot benefit from an unlawful action. In this context, the Spanish jurisprudence quoted above must be recalled.

83. Thus, adopting the fruit of the poisonous tree theory as described above, it is clear that the Assessment shall be deemed null.

5.2 FAILURE OF NOTIFICATION TO LL AND BREACH OF THE EXHAUSTION RULE

84. Therefore, the failure of notification leads to a breach of the exhaustion rule as provided in the Commentary.

85. Indeed, the Commentary, in the samples provided in par. 5.3[40] , requires that tax authorities of the requesting State have exhausted all domestic means of obtaining information on the taxpayer to validly submit the EoI request. From such two samples, it must be derived a principle under which the State may submit an EoI request only after exhausting all the internal means to obtain information on the taxpayer (exhaustion rule).

86. Such rule is explicitly stated in the EU Directive on EoI[41], and even if it is not expressly adopted in the Art. 26 of OECD Model, it can be derived by the Commentary[42].

87. Thus, it has to be noticed that Jayland's tax authorities did not exhaust all domestic means of obtaining information on the taxpayer, as no request of information about Outfit Chicago was made to LL, who could have known the identity of the other shareholder thereof. As a result, the Assessment shall be deemed null and void.

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[40] Lets. *f)* and *h)*.

[41] See art. 17, par. 1, Council Directive 2011/16/EU.

[42] A. Wisselink, *International exchange of tax information between European and other countries*, in *EC Tax Review*, 1997, p. 109.

6. BREACH OF ART. 8 ECHR: FREELAND'S LAW DOES NOT PROVIDE FOR ANY PREVIOUS COMMUNICATION TO TAXPAYERS BEFORE EXCHANGING DATA.

88. Freeland's law does not respect the fundamental AP's right to privacy, as it does not provide for any previous communication to AP before exchanging its data.

89. Indeed, it was clearly explained in par. 5 that decisions in *Funke* and *Ravon* with respect to the importance of safeguards on infringements of the right of privacy, the absence of any opportunity to challenge an exchange of information might constitute a breach of Art. 8[43].

90. Thus, Freeland's tax authority should have notified AP before exchanging data related to him, in order to give him the possibility to challenge the request and the related forward of information.

91. However, Freeland's law does not provide taxpayers with any right of previous communication. Thus, taxpayers are not granted with any right to challenge the request.

92. From the above, it must be derived that Freeland's law is not in compliance with the ECHR, as interpreted by the ECtHR.

7. BREACH OF THE STATUTE OF LIMITATION IN FREELAND'S LEGISLATION

93. Having precised the above, in the case this Court had not granted the protest as to the previous grounds of appeal, the Assessment must be partially annulled, since it was in violation of the statute of limitation provided by Freeland's legislation.

94. Indeed, Art. 26, par. 3 of the Treaty states that "*in no case shall the provisions of paragraphs 1 and 2* (regarding the EoI proceeding) *be construed so as to impose on a Contracting State the obligation […] to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State*". Instead, Freeland's tax administration provided Jayland with the information as to FYs from 2008 to 2012, even though, according to Jayland's national law, taxes may be claimed back during a period of three calendar years, that, in case of withholding taxes, has to be computed from the date when the tax should have been paid. As a result, the part of the Assessment related to FY 2008 and 2009 is null.

95. Indeed, such rule shall be interpreted as a guarantee in favour of the taxpayer, that can benefit from the most advantageous provision established by the law of both the State

[43] See P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 326; J. M. Calderon, quoted, p. 462-475.

requestor and the State requested. In this connection, we have already spent some words as to the relevance of the respect of proceeding law in the EoI proceeding, since such respect of procedural law is the means to implement the protection of taxpayer's right.

7.1 PAR. 17 OF THE COMMENTARY

96. Par. 17 of the Commentary seems to allow the requested State exchange information also in case of breach of domestic law[44]. Nonetheless, we have already pointed out that the Commentary is a mere source of interpretation principle of an OECD-based Tax Treaty; and such clarification seems to be not in compliance with the principle of strict legitimacy governing EoI for tax purposes. It is worth recalling the principle of legality as explained above. Thus, the provision of the Commentary shall not be considered correct in the case at hand, since the guarantees of taxpayer rights must be considered more pregnant to avoid abuses by States.

8. PENALTIES WERE INFLICTED AGAINST ART. 6 ECHR.

97. As to penalties, inflicted (i) for an amount fixed by the law, and (ii) on the basis of the mere silence of AP, they must be deemed in breach of art. 6 ECHR.

8.1 PENALTIES AND ART. 6 ECHR

98. Art. 6 applies only to "*the determination of [someone's] civil rights and obligations or of any criminal charge against him*". Based on such limitation, ECnHR dismissed several application arising from tax proceedings, arguing that they did not fall in the scope of application of art. 6[45]. Indeed, in ECnHR's reasoning, taxes are public obligations, while the term "civil" covers only private obligations. This reasoning was replied in several decision by ECtHR, such as the leading case *Ferrazzini v. Italy*[46], when ECtHR held that in case of fiscal matter, determination of civil rights and obligations or a criminal charge within Art. 6(1) ECHR were not involved. Indeed, ECtHR was of the opinion that this was not possible, since every tax is an obligation under public law to provide economic resources to the State. According to this qualification of tax, considered as public

[44] Such paragraph reads as follow: "*the requested State is at liberty to refuse to give information in the cases referred to in the paragraphs above. However if it does give the requested information, it remains within the framework of the agreement*"

[45] ECnHR, no. 673/59, *AX and BX v. Germany*; ECnHR, no. 945/60, *X v. Germany*; ECnHR, no. 2145/64, *X v. Belgium;* ECnHR, no. 1904/63, *ABC and D v. the Netherlands*; see also P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 306-307.

[46] ECtHR, no. 44759/98, *Ferrazzini v. Italy*.

obligation, it is self evident that it couldn't be a Civil obligation at the same time, within the meaning of Article 6, thus it had to fall outside the scope of the Convention[47].

99. Most eminent scholars clearly demonstrated that the basic assumption of the Court is ill-founded, as no distinction is possible between tax and civil obligations in the framework of the Convention, and that therefore Article 6 has to be applied to tax proceedings as well[48].

100. However, case-law of ECtHR ascertained that in certain cases Art. 6 may be considered applicable also to tax proceedings, even though such principle was expressed having regard to "special" tax proceedings, *i.e.* proceedings with certain particular features for which applicability of Art. 6 become necessary, because there was involvement of (i) determination of civil right[49], or (ii) criminal charges.

101. As to (ii), ECtHR considered applicable Art. 6 when a penalty which may be held "criminal" under ECHR is applicable in the context and/or as a consequence of a tax proceeding.

102. The ECtHR has developed an autonomous meaning for the term "criminal charge", providing for a series of tests for determining whether or not proceedings involve the determination of a criminal charge (so-called "Engel criteria"[50]). These test are:

(a) the classification of the proceedings in domestic law;

(b) the nature of the offence; and

(c) the severity of the penalty which may be imposed.

103. Thus, if the domestic legal system does not regard a penalty as criminal, it may nevertheless be regarded as a "criminal charge" for ECtHR purposes by looking at the nature of the offence – in particular, whether it is an offence applicable to the public in

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[47] See also ECtHR, nos. 41601/98 and 41775/98, *Vidacar SA and Opergrup SL v. Spain.*

[48] See P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 307-308; Idem, *Should Article 6 ECHR (civil) apply to tax proceedings?*, in *Intertax*, 2001, p. 205; Idem, *The decision in Ferrazzini: Time to reconsider the application of the European Convention of Human Rights in Tax Matters*, in *Intertax*, 2001, p. 360–361; G. Bizioli, *The impact of the Right to a Fair Trial on Tax Evidence: An EU Analysis*, in G. Kofler, M. Poiares Maduro, P. Pistone (Eds.), *Human Rights and Taxation in Europe and the World*, Amsterdam, 2011, p 489-504; G .Maisto, *The impact on the European Convention on Human Rights on tax procedures and sanctions with special reference to tax treaties an the EU Arbitration convention*, in G. Kofler, M. Poiares Maduro, P. Pistone (Eds.), quoted, p. 373-395; M. Greggi, *The protection of human rights and the right to a fair tax trial in the light of the Jussila case*, in *Intertax*, 2007, p. 612-613.

[49] See, *inter alia*, ECtHR, no. 10873/84, *The Tracktörer AB v. Sweden*; ECtHR, no. 11760/85, *Editions Periscope v. France*; ECtHR, no. 13120/87, *DC v. Italy*.

[50] From the leading case *Engel v. Netherlands* (ECtHR, Application nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72, p. 81).

general and whether involves, for example, dishonesty – or the severity of the punishment, or by looking at the nature of the offence and the severity of the punishment combined[51].

104. Based on above-mentioned considerations, ECtHR held that Art. 6 is applicable to tax proceedings not only if criminal liability (under national law) may rise from the same proceeding, but also if pecuniary penalties are involved, provided that the above-mentioned requirements are met. Thus, ECtHR considered applicable Art. 6 also when pecuniary penalties were of a quite high amount, since they seemed to be "criminal" under ECHR[52].

105. A recent decision by ECtHR seems to further extend the applicability of Art. 6.

106. In *Jussila*, ECtHR[53] concluded that if a penalty applied to all taxpayers and it was intended as a deterrent and to encourage future compliance, it involved the determination of a criminal charge, even though it was not of a substantial amount. According to ECtHR, when a pecuniary penalty aims at punishing a person and not at compensating damages, it must be considered "criminal" in the interpretation of Art. 6 ECHR[54].

107. Under tax law, surcharges are generally not intended as compensation for damage occurred to the State, but always as a punishment applied to the (negligent or unfair) taxpayer to prevent future offending. Therefore, when a surcharge is pursuing an aim other than of a compensative nature, it could be qualified as a punishment for a criminal offence.

108. Thus, it was held by a scholar that, following *Jussila*, almost all penalties computed as a percentage of the tax under-charged will be regarded as involving the determination of a criminal charge for the purposes of Art. 6 ECHR. The consequence is, therefore, that virtually every tax case in which a pecuniary penalty is assessed will engage the criminal guarantees in Art 6[55].

109. In the case at stake, penalty applies to the taxpayer to punish him and to prevent future offending. In particular, penalty aims at (i) punishing taxpayer for not give information to tax administrations during a tax assessment proceeding against him, and (ii) prevent him

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[51] P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 310.
[52] See ECtHR, no. 12547/86, *Bendenoun v. France*; ECtHR, no. 18656/91, *Perrin v. France*, ECtHR, no. 19958/92; *AP, MP and TP v. Switzerland*; ECtHR, no. 20919/92, *EL, RL and JOL v. Switzerland*; ECtHR, no. 21351/93, *JJ v. the Netherlands.*
[53] ECtHR, no.73053/01, *Jussila v. Finland*. On this, see P. Baker, *The "Determination of a Criminal Charge" and Tax Matters*, in *European Taxation*, 2008, p. 587-588; M. Greggi, *The protection of human rights and the right to a fair tax trial in the light of the Jussila case*, quoted, *passim.*
[54] See *Jussila*, p. 38.
[55] P. Baker, *The "Determination of a Criminal Charge" and Tax Matters*, quoted, p. 587.

from further violations of above-mentioned obligation to give information. Thus, the penalty seems to have a criminal nature as referred to in *Jussila*. As a result, principle held by Art. 6 shall be deemed applicable to penalty at stake.

8.2 PENALTIES IN FIXED AMOUNT AND ART 6 ECHR

110. Having precised the applicability of Art. 6 to tax proceeding, such Article was not respected by Jayland's law.

111. Firstly, penalties in fixed amount may not be considered in compliance with Art. 6. In the case the judge has no discretion to assess the amount of a pecuniary penalty, as it is fixed by law, the taxpayer has no right to a fair hearing under Art. 6 ECHR and then national law is in breach of such Article.

112. Indeed, in the light of *Jussila*, penalty applied in the case at stake must be considered "criminal" for the purpose of Art. 6. In case such penalties are fixed by the law, neither tax authorities nor judges cannot determine the amount of the penalties, on the basis of the concrete behaviour of the agent. Thus, no "fair hearing" under Art. 6 above is granted, in breach of that provision.

113. However, it must also be considered a recent decision by ECtHR, stating that penalties which amount is pre-determined by the law (with no discretion for the judge to modify the related amount) are in compliance with Art. 6, provided that the taxpayer has the chance to challenge the amount of the tax, and that the Courts could have determined that there was no tax due, in which case there would have been no penalty[56].

114. The principle stated in above-mentioned decision shall be rejected. Indeed, once liability to the tax was determined, the penalty is automatic, with no possibility of the court determining, for example, that the taxpayer lacked culpability or merited only a lower penalty. The answer by ECtHR is that the law itself fixed the penalty in proportion to the gravity of the offence by fixing a percentage of the tax unpaid. However, this reasoning is not correct, as in breach of the proportionality principle in criminal matters. Indeed, where tax is under-declared, there may be a wide range of possible culpability of the taxpayer concerned. A fixed percentage can hardly be said to be proportionate where different levels of culpability are involved[57].

[56] ECtHR, no. 4837/06, *Segame SA v. France*, p. 55.
[57] P. Baker, *Recent Tax Cases of the European Court of Human Rights*, in *European Taxation*, 2012, p. 585-586.

115. Thus, as it is clear that in the case at stake the judge has no discretion with regard to the penalty amount, fixed be the law, Jayland's law does not comply with Art. 6.

8.3 RIGHT TO SILENCE AND TAX LAW

116. We shall focus now on the relevance of the right to silence under art. 6 ECHR[58].

117. Indeed, even if Art. 6 ECHR does not expressly contain a right to silence in criminal proceedings, ECtHR have concluded that a right to silence and a right not to incriminate oneself are generally recognized international standards, which lie at the heart of the notion of a fair procedure guaranteed by Art. 6[59].

118. Since proceedings arising out of taxation matters may involve the determination of a criminal charge, the right to silence may arise in connection with those.

119. The leading case on this point is above-mentioned *Funke*, when ECtHR stated that if a law provision attempts compel the applicant himself to provide the evidence of offences he has allegedly committed, providing for criminal and pecuniary penalties for failing to do so, such provision is not in compliance with the right to remain silent and not to contribute to incriminating himself granted by Article 6(1)[60].

120. A recent decision of ECtHR upheld principles stated in *Funke*. In *Chambaz v. Switzerland*, ECtHR held that assessment of pecuniary penalty for failing to provide the Tax Administration with certain documents is in breach of the right to silence of the taxpayer[61].

121. The principles stated in above-mentioned decisions may be applicable in the case at stake.

122. Indeed, even if there is no notice of any "criminal" (in the sense of Art. 6 above) inquiry at this moment, it cannot be excluded that, in the future, the penalty for tax evasion will be assessed. As stated by ECtHR in *Chambaz*, it is necessary to examine globally all the tax proceedings against AP in order to determine whether or not there might be a criminal charge arising in those proceedings. In the case ultimately an issue of tax evasion is raised, Art. 6 was applicable even at the early stages. As noted by an eminent scholar, "*this is potentially a further step towards recognizing that article 6 will apply to most tax cases. It takes a realistic approach to the fact that a tax investigation might lead, whether in respect*

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[58] On this see S. Frommel, *The European Court of Human Rights and the right of the accused to remain silent: can it be invoked by taxpayers*?, in *Intertax*, 1993, p. 520-549; P. Baker, *Taxation and the European Convention on Human Rights*, quoted, p. 314-315.

[59] See ECtHR, no. 19187/91, *Saunders v. United Kingdom*.

[60] See *Funke*, p. 44.

[61] ECtHR, no. 11663/04, *Chambaz v. Switzerland*.

of the year in question or other years, to a criminal penalty and hence article 6 is engaged"[62].

123. At this stage, we do not have information about "criminal" penalties against AP. However, it cannot be excluded that in the future he will be charged with tax evasion, for instance because the amount of tax evaded trigger a certain threshold that the law may provide, and the overcome of said threshold is due to tax assessed in the case a stake.

124. As criminal charges against a certain taxpayer may not be predicted at the earliest stages of an inquiry, we believe that the right to silence must be respected in any tax proceeding, when law provides for criminal penalties that may apply and even the requirements provided by the law have not been met yet, but may be met in the future.

125. We are not aware of risk of criminal penalties for AP's conduct. However, in the case criminal penalties may be apply, the right to silence has been violated by the Jayland's rule we have discussed in this paragraph.

[62] See P. Baker, *Recent Tax Cases of the European Court of Human Rights*, in *European Taxation*, 2012, p. 584.

V. LIST OF ABBREVIATIONS

AP	Al Papone
Assessment	Notice of assessment served by the tax administration of Jayland upon Al Papone
Art.	Article
CAL	Administrative Court of Luxembourg
Commentary	OECD Commentary on the Model Convention
DTCs	Double Taxation Conventions
ECHR	European Convention on Human Rights
ECnHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
EoI	Exchange of information
EU	European Union
FY	Fiscal year
OECD-based Tax Treaty	Tax Treaty based on the OECD Model Convention
LL	Luxus Luthor
Treaty	Convention against Double Taxation in force between Jayland and Freeland
TIEA	Tax Information Exchange Agreement

European Tax Moot Court Competition 2013/2014

MEMORANDUM FOR THE DEFENDANT

Registration number: H/02

I. LIST OF SOURCES

Scholars

J. Avery Jones, *The interpretation of the tax treaties with particular reference to art. 3(2) of the OECD Model"*, in *Dir. Prat. Trib.,* 1984, p. 1625;

H. J. Ault, *The role of the OECD Commentaries in the interpretation of tax treaties*, in *Intertax*, 1994, p. 144;

P. Baker, *Should Article 6 ECHR (civil) apply to tax proceedings?*, in *Intertax*, 2001, p. 205;

P. Baker, *Some Recent Decisions of the European Court of Human Rights*, in *European Taxation*, 2008;

P. Baker, *Taxation and human rights*, in *GITC Review*, 2001, p. 1-13;

G. Bizioli, *The impact of the Right to a Fair Trial on Tax Evidence: An EU Analysis*, in G. Kofler;

J. M. Calderon, *Taxpayer protection within the Exchange of Information Procedure between State Tax Administrations*, 2000, Intertax Vol. 28, Issue 12;

M. Greggi, *Due Procedure Clause (*Derecho a un Procedimiento Justo) *under European Tax Law,* 2009;

P. Gyongyi Vegh, *Towards a better exchange of information*, European taxation, 2002, p. 394;

M. Lang, F. Brugger, *The role of the OECD Commentary in tax treaty interpretation*, in *Australian Tax Forum*, 2008;

R. Matteotti, *Interpretation of tax treaties and Domestic General Anti-Avoidance Rules – A sceptical look at the 2003 Update to the OECD Commentary*, Intertax, 2005, Vol. 33, Issue 8/9;

F. F. Murray and J. M. Erwin, *Exchange of Information and cross-border cooperation between tax authorities. USA Branch Report*, IFA Congress Copenhagen 2013;

A.W.Oguttu, "*A Critique on the Effectiveness of "Exchange of Information on Tax Matters" in Preventing Tax Avoidance and Evasion: A South African Perspective", Bulletin for International Taxation,* 2014 (Volume 68), No. 1;

C. Öner, *Using Exchange of information in regard to assistance in tax collection*, European taxation, vol. 5, 2011, n. 4;

J. Owens, *Moving towards better transparency and exchange of information on tax matters*, in *Bull.*

Int. tax., 2009;

H. Pijl, *Human Rights and Fundamental Freedoms for legal Entities*, in *European Taxation*, 2006;

M. Poiares Maduro, P. Pistone (Eds.), *Human Rights and Taxation in Europe and the World*, Amsterdam, 2011;

P. Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, 67 Bull. Intl. Taxn. 4/5 (2013), Journals IBFD (accessed 26 Dec. 2013);

C. van Raad, *Interpretation and application of tax treaties by tax courts*, in *European Taxation*, 1996;

T. Schenk, *"International Exchange of Information and the Protection of Taxpayers"*, Eucotax, 2011;

M. Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, *World Tax Journal*, 2012 (Volume 4), No. 2;

T.A. Van Kampen, L.J. De Rikje, *The Kredietbank Luxembourg and the Liechtenstein tax affairs: notes on the balance between the exchange of information between states and the protection of fundamental rights*, *EC Tax Review*, 2008, no. 5;

K. Vogel, *On Double Taxation Convention*, 1997;

D. A. Ward, *The role of the Commentaries on the OECD Model in the tax treaty interpretation process*, in *Bulletin*, IBFD, 2006;

P. J. Wattel and O. Marres, *The legal status of the OECD Commentary and Static and Ambulatory Interpretation of tax traties*, in *European Taxation*, 2003;

European Court of Human Rights jurisprudence

ECHR, February 24, 1994, no. 12547/86, *Bendenoun v. France.*

ECHR, March 4, 2004, no. 47650/99*, Silvester's Horeca Service v. Belgium.*

ECHR, February 2, 2008, no. 18497/03, *Ravon v. France*.

ECHR, June 7, 2012, no. 4837/06, *Segame SA v. France*.

National jurisprudence

France

Cour d'Appel de Paris, Pôle 5 – Chambre 7, February 8, 2011.

Cour de Cassation, Chambre Commerciale, Financière et Économique, January 31, 2012, no. 141.

Canada

Supreme Court of Canada, *The Queen v. Crown Forest Industries Ltd.*, n. 5389, 5396 and 5398, 1995.

Australia

Australia Supreme Court, *Thiel v. FCT*, n. 4717, 1990.

USA

United States Court of Appeal, Second Circuit*, United States v. A. L. Burbank & co., n.525 F 2d 9, 1975.*

UK

STC*, Sun life assurance of Canada v. Pearson, 1984, n. 461.*

Other documents

Council of Europe, *Convention on Mutual Administrative Assistance in Tax Matters.*

OECD, *Manual on the implementation of exchange of information provisions for tax purposes*, 2006.

II. STATEMENT OF FACTS

Mr. Al Papone is a taxpayer resident in Jayland and shareholder in the company Outfit Chicago, resident in Freeland and not listed on any stock exchange.

During the five calendar years 2008 through 2012 (included) Outfit Chicago distributed to Al Papone dividends for the following amounts:

- € 14,000 in 2008;
- € 11,000 in 2009;
- € 1,750 in 2010;
- € 12,000 in 2011;
- € 17,000 in 2012;

Such amounts have not been reported by Al Papone, and have therefore never been subjected to taxation in Jayland. On the other hand, they have been subject to a 15% rate withholding tax in Freeland.

Mr. Clark Kent, a journalist, revealed in a newspaper article that a politician, Luxus Luthor, resident in Jayland, was a shareholder in Outfit and that he had never reported the dividends perceived from such company. The newspaper article mentioned three other taxpayers resident in Jayland and shareholders of Outfit who had not reported the dividends perceived from such company. However, the newspaper did not mention their names.

Jayland's tax administration requested Clark Kent the names and any further information on the three unknown taxpayers, but the journalist refused to provide them.

On the basis of the newspaper information then, Jayland's tax authorities submitted a group request to Freeland, in order to obtain information about the full list of persons residents in Jayland and shareholders of Outfit and about the amount of dividends received by them in the last five calendar years. Such request contained:

- the name and the address of Luxus;
- the name and seat of Outfit Chicago;

- other information contained in the newspaper article about the three other possible shareholders, including the initials of their names and some of the amounts that some of them had allegedly received from Outfit, in the last five years.

Answering to the request, the tax administration of Freeland provided the following information:

- full names and addresses of all shareholders in Outfit who were also residents in Jayland;
- the amount of dividends distributed to them by Outfit during the last five calendar years.

Based on the information received, Jayland's tax authorities requested Al Papone further information. He refused to provide it, whereupon the tax administration confronted Al Papone with the information received from Freeland. Al Papone still denied any wrongdoing, but the tax administration issued a notice of assessment of unreported dividends for all five previous years. On the other hand, the tax administration did not grant to Al Papone the tax credit provided by article 23B of the convention against double taxation signed by Jayland and Freeland.

Moreover, the tax administration applied an administrative penalty to Al Papone, for having refused to provide the information requested him by the tax administration.

On the 25 of January 2014 Al Papone filed a protest against the notice of assessment, which is now pending before the tax tribunal.

III. ISSUES

The present case involves many juridical questions and topics that can be summarised as follows:

PART A: ISSUES RELATED TO JAYLAND'S INTERNAL LAW

1. The requirements for the opening of the tax investigation were met.
   - 1.1 The investigation targeted a *«specific taxpayer»*.
   - 1.2 The investigation was carried on for a *«specific assessment»*.
   - 1.3 The use of a newspaper article as a trigger for the opening of the investigation constituted legitimate use of the administrative discretion.

2. There was no breach of the right of the taxpayer to be heard as Al Papone's identity was unknown at the time of the request of information.
   - 2.1 Al Papone gave up his right to be heard by refusing to provide to the tax administration the information requested.
     - 2.1.1 The sanction applied to Al Papone for his non cooperative behavior does not violate the *nemo tenetur se detegere* principle.

PART B: ISSUES RELATED TO THE DOUBLE TAXATION CONVENTION

1. The assessment cannot be considered void with reference to the foreeseable relevance standard
   - 1.1 The information exchanged was foreseeably relevant under a literal interpretation of Article 26 of the Convention
   - 1.2 The information exchanged was foreseeably relevant under an interpretation of Article 26 of the Convention guided by the Commentary to the OECD Model as the request of information did not constitute a *fishing expedition.*
   - 1.3 Even if the information exchanged were not foreseeably relevant, the requested State is entitled to provide them anyway.

2. The assessment cannot be considered void with reference to the other limits set up by Article 26 of the Convention.
   - 2.1 The identity of the shareholders of a Company does not constitute a business secret

2.2 The reciprocity rule has been respected as the Freeland's statute limitation rule refers only to the power to claim back taxes

2.3 Article 26 does not prohibit to the requested State to provide information beyond the limits set up by its paragraph n. 3

3. Even if a violation of the provisions of Article 26 of the Convention could be spotted, that could not affect the legitimacy of the assessment notice in the lack of an express internal provision.

4. The lack, in Jayland's tax system, of a tax credit for the taxes paid abroad does not make the taxation of the dividends received from Freeland illegitimate, as the two provisions and related procedures are completely autonomous.

4.1 The amount of the tax assessment has been correctly determined, as the nature of Article 23B (non self-executing provision) and of Jayland's legislatory system (dualistic system) do not allow the tax administration to grant a tax credit in the absence of a specific internal provision.

IV. ARGUMENTS

1) INTRODUCTION

1. Being undisputed that during the tax periods from 2008 to 2012 Al Papone has received dividends from the company Outfit Chicago without reporting and taxing them, the notice of assessment served upon him by Jayland's tax administration is substantially correct and legitimate.

2. The aim of this memorandum, then, is to prove that such substantial fairness of the assessment is associated with an identical procedural fairness, granted by the complete respect of all the internal and international provisions and principles ruling the process of tax assessment relevant in the case at stake.

3. Such demonstration will be provided through an analysis of Jayland's tax administration behaviour in the light of Jayland's internal law, firstly, and, on the second hand, of the relevant international rules provided by the Convention against double taxation in force between Jayland and Freeland, based on the OECD Model Convention.

2) JAYLAND'S INTERNAL LAW

2.1 THE REQUIREMENTS FOR THE OPENING OF A TAX INVESTIGATION

4. According to Jayland's national law, the tax administration is entitled to open a tax investigation only if some specific conditions are met. In particular, the investigation has to target "*a specific taxpayer, or a group of identified taxpayers*" and it has to concern a *"specific assessment"*. Both the subjective and the objective requirements are met in the case at stake.

2.1.1 SUBJECTIVE REQUIREMENT

5. In order to verify the respect of the relevant subjective requirement, it is necessary to determine the correct interpretation attributable to the notion of *"specific taxpayer"*.

6. In particular, the provision should not be considered as a prohibition for the tax administration to start an investigatory action in every case in which the targeted taxpayer is not namely identified. Indeed, if so interpreted, the subjective requirement would deny to the tax administration the chance to investigate even if the existence of a violation is completely

certain, for the only reason that the identity of the taxpayers who breaks the law is unknown, where the acquisition of the knowledge of that name should be the precise aim of the investigation. Such interpretation would then lead to an unjustified and intolerable compression of the cardinal principle of effectiveness of the administrative action. Indeed, if so interpreted, the requirement would end up in favouring the offenders who have been capable of hiding their identity to the tax administration, which is evidently paradoxical.

7. In order to grant a more reasonable interpretation, it is necessary to read the requirement in coherence with its rationale. This requirement aims at prohibiting any form of *fishing expedition*, meaning that if the author of the violations is not namely identified the tax administration is not allowed to start an investigatory action simply pointing towards an indeterminate group of taxpayers and relying on the pure statistic possibility to identify the author of the violation.

8. On the other hand, the investigation has to be considered legitimate in each case in which it aims at finding out the identity of a detected and sufficiently specified target, as it happens in the case at stake. Indeed, Jayland started an investigation having a specific target, represented by four shareholders resident in Jayland of the Company Outfit. Furthermore, Jayland provided the initials of their names, thus additionally clarifying its target.

9. Conclusively, the investigatory action cannot be considered a *fishing expedition* for the lack of the subjective requirement.

2.1.2. Objective requirement

10. Symmetrically to the subjective requirement, Jayland's national law asks for the investigation to be carried out *"for a specific assessment"*.

11. The two requirements have the common goal of prohibiting any form of *fishing expedition*, as confirmed by their insertion in a single provision and by the use of the same adjective (*"specific")* to define their content. Consequently, the criterion used to interpret the two requirements has to be the same.

12. The analysis of the objective requirement furthermore proves the fairness of the interpretation given to the subjective requirement. Indeed, the results of a restrictive interpretation of the objective requirement would be even more paradoxical of the ones already indicated with reference to the subjective requirement. That is because interpreting in a restrictive way the notion of *"specific assessment"* would mean to allow the tax

administration to open an investigation only in the presence of a previous knowledge of the precise violations attributable to the investigated taxpayer.

13. If combined and interpreted restrictively, then, the two requirements would allow the opening of a tax investigation only if the tax administration already knew:

    a) the identity of the investigated taxpayer;

    b) the violations committed.

14. But that would mean that a tax investigation could be opened only in circumstances in which it would be completely unnecessary, as the tax administration would already know both the identity of the offender and the nature of the violation, so that an assessment notice could already be issued. It is then the ontological nature of an investigatory action, that imposes to allow its opening in circumstances of uncertainty on the identity of the transgressor or on the nature of the transgression. The investigation itself is, for its nature, aimed at clarifying those uncertainties.

15. In the light of the interpretation so far exposed, the condition requested by the provision under examination has undoubtedly been respected in the case at stake. More in detail, the investigation against Al Papone, since its beginning, had a well defined target, identified by its initials and by his belonging to a precisely identified group of taxpayers: the shareholders resident in Jayland of the not listed company Outfit Chicago. Furthermore the presence of a *fishing expedition* has to be excluded because of the complete identification of the violation allegedly committed, as the unreported flow of income had been completely identified by the tax administration in its nature, unreported dividends, date of rise, the tax periods from 2008 and 2012, and partially even in its precise amount.

16. It is therefore clear that the tax administration, far from starting a *fishing expedition*, had instead enacted a well founded investigation, directed at discovering the identity of the author of a specific and well defined violation.

2.1.3. USE OF THE NEWSPAPER'S ARTICLE

17. The investigation started by Jayland cannot be considered illegitimate only because it was triggered by a newspaper article. Indeed, according to Jayland internal law, it is completely legitimate to start an investigation even on the basis of the *"public knowledge of a suspicion of non fulfillment of a tax obligation"*. The will of Jayland's legislation, then, is that of granting to the tax administration an almost complete freedom of judgment (administrative

discretion) on the evaluation of the capability of the single factual circumstances to trigger a tax investigation.

2.2. RIGHT OF THE TAXPAYER TO BE HEARD

18. Jayland's domestic law has been fully respected also with reference to the right of the taxpayer to be heard.

19. According to Jayland's legislation, before starting to request information from third parties, *"the tax administration has the obligation to first request the information from the taxpayer himself"*. First of all, the provision represents a specification of the general right of the taxpayer to be heard, also granted by Article 6 of the ECHR[63], whose applicability to tax proceedings has recently been stated by the European Court of Human Rights in the recent case of *Ravon v. France*[64]. In addition, it specifies the proportionality principle, which imposes to the tax administration to use the less invasive of the available effective means.

20. Anyway, the application of such a provision is evidently subjected to a *condicio sine qua non*, represented by the acquired knowledge, by the tax administration, of the identity of the taxpayer investigated. On the other hand, the rule clearly does not apply if the identity of the taxpayer is unknown, as it was at the time of Jayland's request of information.

21. The rightness of this interpretation is also confirmed by its coherence with the previous mentioned principles founding the provision. First of all, the right to be heard cannot be granted to an unknown person. Moreover, the principle of proportionality is fully respected, as it would be paradoxical to consider an effective way of getting knowledge of the identity of a lawbreaker, that of asking his identity directly to him.

22. Furthermore, if otherwise interpreted, the requirement of the previous involvement of the taxpayer would completely preclude to the tax administration the chance to investigate by asking information, even to Jayland's residents, about the author of a certain violation. This conclusion appears clear, considering that the provision makes a general reference to information asked to *"third parties"*, and not exclusively to third States. Once again then, a

[63] In particular, the right to be heard represents one of the specifications of the right to a *"fair trial"* granted by article 6 of the ECHR. For more on this point see P. Baker, *Taxation and human rights*, in *GITC Review*, 2001; P. Baker, *Some Recent Decisions of the European Court of Human Rights*, in *European Taxation*, 2008, 48; P. Baker, *Should Article 6 ECHR (civil) apply to tax proceedings?*, in *Intertax*, 2001, p. 205; Hans Pijl, *Human Rights and Foundamental Freedoms for legal Entities*, in *European Taxation*, 2006; M. Greggi, *Due Procedure Clause (*Derecho a un Procedimiento Justo) *under European Tax Law*, 2009; G. Bizioli, *The impact of the Right to a Fair Trial on Tax Evidence: An EU Analysis*, in G. Kofler, M. Poiares Maduro, P. Pistone (Eds.), *Human Rights and Taxation in Europe and the World*, Amsterdam, 2011;

[64] ECHR, February 2, 2008, no. 18497/03, *Ravon v. France.*

restrictive interpretation would determine a complete sacrifice of the principle of effectiveness in order to grant the right to be heard to a not even namely identified taxpayer, while the two principle need, in order to coexist, to be balanced.

23. In addition, the interpretation so far provided is sustained by the words of the Commentary to the OECD Model, followed by the treaty signed by Jayland and Freeland.[65] In particular, according to the point 14.1 of the Commentary to the paragraph 3 of Article 26, the possible notification procedures included by the domestic laws of the contracting States[66] *"should not, however, be applied in a manner that, in the particular circumstances of the request, would frustrate the efforts of the requesting State. In other words, they should not prevent or unduly delay effective exchange of information"*.

2.2.1. AL PAPONE'S UNCOOPERATIVE BEHAVIOR

24. The right to be heard has to be granted upon the knowledge of the person, as it happened in the case at stake.

25. More in detail, after having received the information needed from Freeland, Jayland contacted Al Papone and asked him for a clarification with reference to the dividends that Outfit had distributed to him but that he did not report. Through this request, the tax administration fully and promptly granted to the taxpayer the previously mentioned right to be heard and to give the information needed to clarify the rightness of his behavior.

26. However, Al Papone did not provide neither the information nor the clarifications requested, thus implicitly denying that he had perceived any dividend income from Outfit and perpetuating his violation.

27. Moreover, Al Papone did not reply to Jayland even when confronted on the information received from Freeland, thus giving up the chance to contradict their content.

2.2.1.1. The legitimacy of the administrative penalty applied to Al Papone

28. The non cooperative behavior adopted by Al Papone exposed him to an administrative penalty set up by Jayland's domestic legislation for the case in which the taxpayer refuses to provide the information required by the tax administration. The application of this penalty is completely legitimate and it does not collide with the principle according to which *nemo tenetur se detegere*, which originates from article 6 of the ECHR.

[65] For more on the role of the Commentary and the international aspects in general see par. 2.
[66] Such as the one here under examination provided by Jayland's internal law.

29. In order to fully understand the reason of this compatibility it is necessary to retrace the proper meaning and rationale of this principle. In particular, the principle under examination represents a specification of everyone's right to defend himself if accused of the commission of crimes, or, more in general, of illegitimate behaviors capable of determining the application of a penalty. More precisely, the principle grants to everyone involved in such situations the right not to help the public authorities in charging him.

30. On the other hand, the mentioned principle has no link at all with the ordinary functioning of the tax system that requires the cooperation of the taxpayers not in order to charge them, but only to allow the calculation of their taxable income. In other words, Jayland's tax administration did not ask to Al Papone to contribute to his conviction, but simply to cooperate to the correct carrying out of a public function. Indeed, in the lack of any information coming from the taxpayer, the tax administration could make a wrong calculation of his taxable income not only by attributing him less income than that effectively perceived, but also by attributing him a superior amount of income. The supply to the tax administration of information on the taxable income, then, lacks of any form of that accusatory content that could justify any reference to the principle under examination.

31. In addition, and to further confirm what so far has been stated on this point, it has to be noticed that the discover of unreported income has not given raise to a criminal conviction, or even to a penalty, against Al Papone, but simply to the correction, through the issue of the assessment, of the taxation burden levied on the taxpayer. The information had been asked to the taxpayer only in order to reach this goal, and the provision of Jayland legislation to punish his uncooperative behavior is then completely legitimate.

32. Moreover the legislative predetermination of the amount of the penalty is completely in accordance with the ECHR, as confirmed by the European Court of Human Right's decision *Segame SA v. France,*[67] according to which in such circumstances the law itself fixes the penalty in proportion to the gravity of the offence. The Court affirms that a system of administrative fines, such as the tax penalties in the *Segame SA v. France* case, is not incompatible with Article 6 § 1 of the Convention so long as the taxpayer can bring any such decision affecting him before a Court that affords the safeguards of that provision[68]. In the case at stake the taxpayer is perfectly able to submit to the Administrative Court of Jayland

[67] ECHR, no. 4837/06, *Segame SA v. France*, p. 55.
[68] See *Bendenoun v. France*, 24 February 1994, § 46, Series A no. 284, and *Silvester's Horeca Servicev. Belgium*, no.47650/99, § 25, 4 March 2004.

all the factual and legal arguments which he considers helpful to appeal the tax assessment and the related penalties, in the full respect of Art. 6 of the ECHR.

3) INTERNATIONAL LAW

3.1. THE INFORMATION WAS EXCHANGED ACCORDING TO ARTICLE 26

33. As anticipated within the general remarks, once it is proved that Jayland's national law has been respected by the tax authorities, the latter's behavior needs to be examined from the perspective of the OECD Model. Indeed, such Model represents the basis of the Convention signed in 2005, which founded the here relevant exchange of information. In addition, Jayland and Freeland have signed a Protocol in 2012, reflecting the most recent changes in the text of Article 26 of the OECD Model.

34. As previously mentioned, the main foundation of the assessment issued by Jayland is represented by the information provided by Freeland and not contested by Al Papone, concerning the unreported dividends paid to the latter by the company Outift Chicago. This information has been communicated by Freeland after an explicit request coming from Jayland and finding its foundation and rules in Article 26 of the tax treaty Convention signed in 2005. The Convention's rules have been fully respected by the two States involved, who have exchanged the information in a completely legitimate way.

35. In order to verify such circumstance it is, first of all, necessary to point out that the aim of the provision set up by Article 26 is, as suggested by the preliminary remarks to the Commentary on the provisions of the Article, that of embodying the rules *"under which information may be exchanged* ***to the widest possible extent****"*[69] as *"in view of the increasing internationalization of economic relations, the Contracting States have a growing interest in the reciprocal supply of information on the basis of which domestic taxation laws have to be administered"*. It is then clear that the specific rules and conditions set up by Article 26 have to be interpreted in coherence with the goal pursued, that is the granting to *"the widest possible extent"* of the exchange of information.[70] That, in order to allow the contracting States to prevent the pathological processes of tax base erosion and profit shifting that the internationalization of economic relations has made, as a collateral effect, more significant[71].

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[69] K. Vogel, *On double tax Convention*, 1991, Kluwer affirms at page 1210 that Art. 26 "*serves the national interest of the Contracting States"*.
[70] J. Owens, *Moving towards better transparency and exchange of information on tax matters*, in *Bull. Int. tax.,* 2009, p. 557-558.
[71] A.W.Oguttu, "*A Critique on the Effectiveness of "Exchange of Information on Tax Matters" in Preventing Tax Avoidance and Evasion: A South African Perspective", Bulletin for International Taxation,* 2014 (Volume 68), No. 1,
(continued...)

36. In the light of the aim of the provision it is not arguable that the exchange of information between Jayland and Freeland has been processed, as it will soon be clarified, in the full respect of the specific rules set up by Article 26 of the Convention and with aims and effects completely coherent with the relevant provision.

3.1.1. THE FORESEEABLE RELEVANCE STANDARD

37. According to the first paragraph of Article 26 the contracting States shall exchange information under this provision *"as is **foreseeably relevant** ... to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States"*. In order to verify whether or not Jayland and Freeland exchanged information that was foreseeably relevant to the application of Jayland's domestic taxes, it is preliminary necessary to precisely define the meaning and aim of such notion.

3.1.1.1. Literal interpretation

38. Some authors[72] sustain that the information exchange should not be made unless there are serious reasons to believe that the tax has been evaded and that it can be collected in the requested state. However, such restrictive reading seems in contrast with a proper interpretation of the aims and content of the standard set up by Article 26 of the treaty.

39. We are considering the analysis of an international tax treaty, whose interpretation is also governed by the Vienna Convention on the Law of Treaties (hereinafter "Vienna Convention"). According to article 31 of the Vienna Convention, providing the *general rule of interpretation* of the treaties, the first criterion that has to be used in order to ensure the correct interpretation of a treaty provision is the literal one. More precisely *"a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty"*.

40. From a strictly literal approach to the text of the provision, foreseeable relevant means that the requested State should be able to determine from the content of the request received that the information asked is useful for the receiving State, in order to administrate and enforce its internal tax law. If examined according to this interpretation, the case at stake does not raise any kind of doubt. It is indeed immediately evident the benefit that Jayland obtains by

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par- 1.

[72] C. Öner, *Using Exchange of information in regard to assistance in tax collection*, European taxation, vol. 5, 2011, n. 4.

understanding if any of its residents receives revenue from abroad, that they may not report and have taxed in their State of residence.

41. Moreover, even in the lack of every hint of possible tax evasion, such information is undoubtedly relevant for the receiving State in order to verify whether or not the taxpayer who received the revenue has correctly reported them[73]. Such an activity of control is certainly ascribable to the notion of *"tax administration"* provided by Article 26 of the treaty and that, in the strictly literal approach of interpretation so far adopted, has a broad meaning.

3.1.1.2. Interpretation according to the Commentary

42. The Vienna Convention provides, next to the *literal criterion* so far exposed, other rules of interpretation in approaching a treaty provision. In particular the literal interpretation of the words of the treaties should be carried on *"in their context"* and "*in the light of the object and purpose of the treaty*".[74]

3.1.1.2.1. The role of the Commentary to the OECD model

43. With specific reference to the treaties following the OECD Model eminent literature suggests that, in order to grant an interpretation that is coherent with the rules provided by the Vienna Convention, it would be necessary to interpret the treaty provision in the light of the explanation of these rules provided by the Commentary to the OECD model[75]. More specifically, it has been sustained that "*if an individual convention provision follows the OECD Model Treaty, it must be assumed in good faith that that provision must be attached the meaning as determined by the OECD Commentary*"[76]. Furthermore it is quite common that international tax lawyers, courts[77] and tax authorities refer to the Commentary to establish the meaning of the words contained in a tax treaty.

44. Authoritative authors suggest that the Commentary can serve to determine the "object and purpose" of a tax treaty[78], contributing to international uniformity in interpretation and serving the purpose of the treaty, i.e. the avoidance of double taxation. In addition this could

[73] See the OECD, *Manual on the implementation of Eoi provisions for tax purposes*, 2006, p. 11.
[74] See article 31 of the Vienna Convention.
[75] K. Vogel, *On Double Taxation Convention*, 1997.
[76] See R. Matteotti, *Interpretation of tax treaties and Domestic General Anti-Avoidance Rules – A sceptical look at the 2003 Update to the OECD Commentary*, Intertax, 2005, Vol. 33, Issue 8/9, p. 339.
[77] Supreme Court of Canada, *The Queen v. Crown Forest Industries Ltd.*, 95 DTC 5389, at 5396 and 5398, in which the Court considered the OECD Commentary as part of the "legal context", pointing out that it has to be regarded of "high persuasive value"; Australia Supreme Court, *Thiel v. FCT*, 1990, ATC, n. 4717; *United States v. A. L. Burbank & co.*, 1975, 525 F 2d 9; *Sun life assurance of Canada v. Pearson*, 1984, STC, n. 461.
[78] C. van Raad, *Interpretation and application of tax treaties by tax court*, in *European Taxation*, 1996, p. 4.

be considered a reliable indicator of the intention of the contracting parties, which plays, according to the Vienna Convention, a central importance in the treaty interpretative process[79].

45. Since the Commentary, unlike the treaty, is not signed by the contracting State, its inclusion within the notion of *"context"* provided by the Vienna Convention has been questioned far in time[80]. Anyway, even if not relevant as *"context"*, the Commentary could still have a role in the interpretation of the treaty provisions, according to Article 32 of the Vienna Convention, as a "*supplementary mean of interpretation"*. If considered as such, the Commentary should be used in order to help the interpretation of notions which are *"ambiguous or obscure",* as it is considered that of foreseeable relevance.[81]

46. In addition, irrespective of the role attributable to the Commentary under the Vienna Convention, the OECD recommends to the contracting State "*when concluding new bilateral conventions or revising existing bilateral conventions, to conform to the Model Tax Convention, as interpreted by the Commentaries thereon*", and "*that their tax administrations follow the Commentaries on the Articles of the Model Tax Convention […] when applying and interpreting the provisions of their bilateral tax conventions that are based on these Articles*"[82].

3.1.1.2.2. The foreseeable relevance standard according to the Commentary

47. Anyway, independently from the debate on the role attributable to the Commentary[83], its reading provides additional clues confirming the conformity of the exchange of information enacted in the case at stake to the foreseeable relevance standard.

48. Such conclusion originates from both the reading of the rules of interpretation explicitly provided by the Commentary and the analysis of the rationale of the foreseeable relevance standard.

[79] D. A. Ward, *The role of the Commentaries on the OECD Model in the tax treaty interpretation process*, in *Bulletin*, 2006, IBFD.
[80] J. Avery Jones, *The interpretation of the tax traties with particular reference to art. 3(2) of the OECD Model"*, in *Dir. Prat. Trib.,* 1984, p. 1625.
[81] As sustained, *inter alia*, by P. Pistone, *Exchange of Information and Rubik Agreements: The Perspective of an EU Academic*, 2013, *Bull. Intl. Taxn.* 4/5, Journals IBFD (accessed 26 Dec. 2013), nt. 1.
[82] See OECD, *Model Tax Convention on Income and on Capital 2010* (updated 2010), 2012. The OECD adopts the Commentary as a "recommendation" to the member countries also in Art. 5(b) of the Convention that established the OECD (Convention on the Organization for Economic Cooperation and Development), as a mean of achieving the aims of the treaty.
[83] For more on this point see H. J. Ault, *The role of the OECD Commentaries in the interpretation of tax treaties*, in *Intertax*, 1994; M. Lang, F. Brugger, *The role of the OECD Commentary in tax treaty interpretation*, in *Australian Tax. Forum*, 2008; P. J. Wattel and O. Marres, *The legal status of the OECD Commentary and Static and Ambulatory Interpretation of tax traties*, in *European Taxation*, 2003, p. 222.

3.1.1.2.2.1. Rules of interpretation

49. First of all, the Commentary explicitly rules the precise situation occurred in the case at stake. More precisely, Art. 26, par. 1, point n. 6 of the Commentary introduces a series of examples helpful *"to clarify the principles dealt with in paragraphs 5, 5.1 and 5.2"*, which include the notion of foreseeable relevance.

50. For the matter here relevant it is particularly helpful to look at the example pictured in point n. 8.1, lett. b), that reads as follows: *"Company B is a company established in State B. State A requests the names of all the shareholders in Company B resident of State A and information on all dividend payments made to such shareholders".* Such example, that is extremely similar to the case at stake, is described by the Commentary as a situation *"where Contracting States* ***are not obligated*** *to provide information in response to a request for information, assuming no further information is provided"*, thus implying that:

- the Contracting States are obligated to provide information in response to a request for information in similar circumstances, if further information is provided;
- under these circumstances the Contracting States ***"are not obligated"*** to provide the information required, but the provision does not forbid them to provide them if they are willing to do that.

51. The decision to provide or not the information is then left to the discretion of the requested contracting party. It follows that a competent authority may decide to provide the information, even when there is no obligation to do so and if it does, it can be considered to act in the framework of the agreement[84].

These conclusions, if applied at the case at stake, prove the respect of Article 26 of the treaty because:

- Jayland provided further information, and, in particular, the initials of the name of the taxpayer investigated and some of the amounts that he had received from the company, so that Freeland was obligated to provide the information requested;
- Article 26 completely remits the choice not to transmit the information requested because of a lack of foreseeable relevance to the will of the requested State. Therefore, Freeland was free, in its full right as a sovereign State, to provide the information

[84] See the OECD Manual on the implementation of Eoi provisions for tax purposes, 2006, p. 13

requested, thus considering the request sufficiently detailed and not constituting a "fishing expedition".

52. Such conclusions are also confirmed by the reading of others extracts from the Commentary to paragraph 1 of Article 26, and, in particular, from the reading of point n. 5. According to this explanatory provision *"the standard of "foreseeable relevance" is intended to provide for exchange of information in tax* ***matters to the widest possible extent****. In the context of information exchange upon request, the standard requires that at the time a request is made there is* ***a reasonable possibility that the requested information will be relevant****"*.

53. Moreover, according to point n. 5.1 *"a request for information does not constitute a fishing expedition solely because it does not provide the name or address (or both) of the taxpayer under examination or investigation ... However in cases in which the requesting State does not provide the name or address (or both) of the taxpayer under examination or investigation, the requesting State must include other information sufficient to identify the taxpayer"*, as Jayland did in the case at stake.

3.1.1.2.2.2. Rationale of the standard

54. Two more observations confirm the conclusions drafted. First of all, the foreseeable relevance standard has replaced, since 2005, the previous stricter standard that allowed the contracting State to only exchange *"necessary"* information. Such evolution, implicitly approved by Jayland and Freeland by signing the treaty exactly in 2005, proves the willingness of the States involved in such treaties to grant a progressively wider space to the exchange of information.

55. On the second hand, the foreseeable relevant standard has the purpose of allowing the requested State not to be compelled to answering to any request, no matter how undetermined and vague, coming from the other contracting State. The aim of the standard then, as critically noticed by the literature on this matter[85], is not that of protecting the taxpayer, but that of containing the burden of the onus accepted by the contracting States. In this line of thought, some authors have observed that the "foreseeable relevance" standard

[85] T. Schenk *"International Exchange of Information and the Protection of Taxpayers"*, Eucotax, 2011, according to whom: *"When reading OECD law, it is striking that the position of the taxpayer is hardly ever dwelled on in either the text of the Convention or the Commentaries"*. Similarly: J. M. Calderon, *Taxpayer protection within the Exchange of Information Procedure between State Tax Administrations*, 2000, Intertax Vol. 28, Issue 12, p. 462.

serves the purpose of limiting request to a level acceptable and manageable for the requested state[86].

56. Moreover, the rightness of this reading is confirmed by the verbs used by the text of article 26, that rules the cases in which the contracting States *"**shall** exchange such information"*, and by the words, previously mentioned, of the Commentary, which make reference to cases in which the contracting States *"**are not obligated to** provide information in response to a request for information"*. It is clear from these two extracts that the standard under examination has the aim of setting up, if met, an obligation for the requested State to provide the information, while it is not intended to set up a prohibition to exchange the information, if the standard is not met.

57. In other words, the foreseeable relevance standard represents a criterion granted to the contracting States to circumscribe the onus accepted by signing the treaty, so that the choice of a contracting State of considering the requisite met cannot be questioned by a taxpayer.

3.1.1.2.2.3. Conclusions

58. Conclusively, not only the exchange of information concerned *"foreseeably relevant"* information, both under a literal reading of Article 26 and under an interpretation guided by the Commentary, but, furthermore, the requested State is completely free, if willing to, to answer to requests of information not fulfilling such condition.

3.1.2. OTHER LIMITS SET UP BY ARTICLE 26

59. Article 26 sets up, in its paragraph n. 3, additional standards to the exchange of information for tax purposes, all of which have been respected in the case at stake. In particular, such provision establishes that *"in no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation:*

a) to carry out administrative measures at variance with the laws and administrative practice of that or of the other Contracting State;

b) to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State;

c) to supply information which would disclose any trade, business, industrial, commercial or professional secret or trade process, or information the disclosure of which would be contrary to public policy (public order).

[86] P. Gyongyi Vegh, *Towards a better exchange of information*, European taxation, 2002, p. 394.

60. As it was with reference to the foreseeable relevance standard, these limits have to be interpreted restrictively, having in mind that the primary aim of Article 26 is that of allowing information to be exchanged "*to the widest possible extent*"[87].

3.1.2.1. Secrecy rules

61. Moving from the latter of the three provisions, the transmission of information concerning the identity of a company's shareholders, and the dividend payments made in their favour, does not breach any of the secrecy rules set up by Article 26.

62. In particular, such kind of information does not represent an example of business secret. Indeed, such notion only occurs, as precisely stated by paragraph n. 19.2 of the Commentary to paragraph n. 3 of Article 26, in case of *"facts and circumstances that are of considerable economic importance and that can be exploited practically and the unauthorized use of which may lead to serious damage (e.g. may lead to severe financial hardship)."* Such restrictive eventuality is not met in the case of the mere communication of the names of the shareholders of a company. Especially if the company is not even a listed one, as in the case at stake, so that the communication of information related to its ownership is not capable to affect in any way the financial markets.

63. Moreover, there is no reason to believe that the information exchanged did not serve their status of confidentiality after the exchange. The information supplied by the requested State continues to enjoy a similar level of protection in the requesting one: the information received was disclosed only to persons and authorities concerned with the assessment, collection and enforcement of taxes covered by the exchange.

3.1.2.2. Reciprocity rule

64. The first two provisions of paragraph n. 3 may be summarized in the notion of *"reciprocity rule"*. According to these provisions it is possible to exchange only the information whose gathering could take place under the laws and administrative practices of both the contracting States. The relevant exchange of information fully complies with this standard.

65. First of all, Freeland's tax authorities obtained the relevant information requested by asking them directly from the company Outfit Chicago. There is no doubt then that the means of investigation used by the requested State are completely compatible with the domestic laws

[87] F. F. Murray and J. M. Erwin, *Exchange of Information and cross-border cooperation between tax authorities. USA Branch Report*, IFA Congress Copenhagen 2013, according to whom the standard of foreseeable relevance is "considered a lower bar than some other standards", as the "necessary" one, mentioned above.

and administrative practices of Jayland. Indeed, it is explicitly stated in Jayland's law that the tax administration is allowed to ask information from third parties.

3.1.2.2.1. Statute of limitation rules

66. In addition, the rule under examination has been fully complied also with reference to the statute limitation rules of the two contracting States. More in detail in Jayland *"taxes may be claimed back during a period of five years before the year of assessment"*, meaning that, in the case at stake, having the assessment been issued in 2013, it cannot go further back in time than 2008, the exact time frame to which the assessment issued by Jayland's tax administration refers.

67. On the other hand, in Freeland *"taxes may be claimed back during a period of three calendar years before the year of assessment"*, which does not conflict with the fact that Freeland has provided information concerning the five years preceding the request. More in detail, in the first place, the term set up by Freeland's legislation makes reference only to the time frame with reference to which the State is allowed to *claim back taxes*. The term of three years, then, does not apply for what concerns the mere employment of the investigation means, as it happened in the case at stake.

68. In addition, even if the term set up by Freeland's legislation was also referred to the employment of the investigatory means (*quod non*) we must consider that Article 26 of the OECD Model was complemented by a fourth paragraph in 2005, which confirms the rightness of this provision. According to this recently added provision *"if information is requested by a Contracting State in accordance with this Article, the other Contracting State shall use its information gathering measures to obtain the requested information, even though that other State may not need such information for its own tax purposes.* ***The obligation contained in the preceding sentence is subject to the limitations of paragraph 3 but in no case shall such limitations be construed to permit a Contracting State to decline to supply information solely because it has no domestic interest in such information****"*. This provision is an expression of the previously mentioned political willingness to extend the intent of the application of the exchange of information system also for tax purposes.

69. And indeed such rule, if applied at the case at stake, states that the mere fact that Freeland has no interest in the information requested (because it can not use them for tax collection, having the term of three years expired with reference to the annuities 2008 and 2009) does not allow Freeland to decline Jayland's request for information.

70. Such conclusion is even more precisely confirmed by paragraph n. 19.7 of the Commentary to paragraph n. 4 of Article 26, where it is stated that *"According to paragraph 4,* ***Contracting States must use their information gathering measures****, even though invoked solely to provide information to the other Contracting State and* ***irrespective of whether the information could still be gathered or used for domestic tax purposes in the requested Contracting State****.* ***Thus, for instance, any restrictions on the ability of a requested Contracting State to obtain information from a person for domestic tax purposes at the time of a request (for example, because of the expiration of a statute of limitations under the requested State's domestic law*** *or the prior completion of an audit)* ***must not restrict its ability to use its information gathering measures for information exchange purposes****"*.

3.1.2.3. the possibility to go beyond the limits

71. Conclusively, as already remarked with reference to the foreseeable relevance standard, even if one of the limits provided by Article 26, paragraph 3 (*quod non*) emerged in the case at stake, the contracting States are allowed to ignore them, if they are willing to.

72. To further confirm this line of thought, previously widely illustrated, it may be noticed that the OECD, in its Manual on the implementation of exchange of information provisions for tax purposes, approved in 2006 by the OECD Committee of fiscal affairs, affirmed, at paragraph n. 13, that *"in the rare case in which the exceptions apply, the contracting parties* ***are not obligated to*** *provide information*".

73. The OECD, then, stressed that the decision to provide the information where the exceptions apply is left to the discretion of the requested contracting party. This means that if the requested State decides to provide the information beyond the limitations of paragraph 3 of article 26, it still acts within the framework of the agreement. So Freeland could have correctly provided the information even in the lack of any obligation to do so.

74. Furthermore, the picture drafted is confirmed by the increasing development of the so-called *spontaneous exchange of information*[88]. Such kind of exchange of information procedure, also promoted by the Council of Europe[89], allows a contracting State who believes to hold information useful for the tax administration and enforcement in the other contracting State, to transfer such information spontaneously to the latter State. Such procedure, indeed, further proves that in the actual international context, the only real limit to the exchange of

[88] M. Stewart, *Transnational Tax Information Exchange Networks: Steps towards a Globalized, Legitimate Tax Administration*, *World Tax Journal*, 2012 (Volume 4), No. 2, par. 4.1.
[89] Council of Europe, *Convention on Mutual Administrative Assistance in Tax Matters*, art. 7.

information procedure is represented by the will of the State holding the information not to transfer them, as protected, if a Convention following the OECD Model applies, by the foreseeable relevance standard and by the other limits set up by paragraph n. 3 of Article 26. Meaning that, if the State holding the information is willing to transfer them, as Freeland has showed to be in the case at stake, the exchange of information procedure has, in any case, to be considered allowed and legitimate.

3.1.3. Consequences of eventual treaty violations

75. As clarified in the previous paragraphs, the information provided by Freeland, and founding the assessment against Al Papone, where exchanged between the two States in compliance with the provisions of Article 26. Anyway, even if some violations could be spotted (*quod non*), the breaching of the procedural rules set up by Article 26 does not constitute proper foundation for a claim of nullity of the assessment issued against Al Papone.

76. First of all, for what concerns the proper use of the information gathering measures, the eventual illegitimacy of Freeland's behavior has to be pointed out by its residents who have been object of investigation, in order to achieve the information exchanged. With particular reference to the case at stake, it should have been the company Outfit to contest Freeland's behavior, being the direct subject of the investigation means used and, consequentially, also of any eventual violation. So that we cannot only argue that Al Papone is not entitled to contest Freeland's behavior, being not its direct subject, but also the fact that Outfit has not moved any objection to Freeland's way of proceeding proves the fairness of Freeland's behavior.

77. On the other hand, with reference to any other kind of possible violation, it is necessary to precise that Article 26 sets up rights and obligations directly referable to the contracting States, and not to the single taxpayer who may be subject to an exchange of information procedure. In the light of such remark the taxpayers are allowed to contest the way in which the information was exchanged only in the following two specific circumstances.

78. First of all, in the presence of a specific domestic law, absent in the case at stake, qualifying as void the assessment issued in the case of violations of the rules set up by Article 26.

79. On the second hand, if such exchange of information happened in an arbitrary way, completely not referable to the procedure set up by Article 26.

80. That is the case, for instance, of the case-law[90] formed in connection with the well-known "lists of bad taxpayers", which considered some notices of assessment void as they were founded on information obtained through a theft and a fraudulent agreement with unfaithful employees of banks[91]. In that circumstances, the information founding the assessment had been obtained through an illegitimate procedure, lacking any form of legal basis and certainly not ascribable to the procedure set up by Article 26: its use was, therefore, illegitimate.

81. Anyway, as previously expressed and widely proved, in the case at stake the rules set up by Article 26 of the treaty have been fully respected by the two contracting States.

3.2 ISSUES RELATED TO ARTICLE 23B OF THE TREATY

82. The tax treaty signed by Jayland and Freeland in 2005 contained an option expressed by the two States for the adoption of the so called *credit method*, provided by Article 23B of the OECD Aodel, as a mean of relief from economic double taxation.

    However, such treaty provision does not find any implementation in Jayland's national law, from which such credit has been repealed in 2004 by a special law.

83. Coherently with its national legislation then, Jayland's tax administration has not granted to Al Papone any form of tax credit for the withholding taxes levied in Freeland on the dividends distributed to him by Outfit Chicago.

3.2.1. IRRELEVANCE OF THE CREDIT RELATED ISSUES FOR THE EXCHANGE OF INFORMATION PROCEDURE

84. According to Article 26, paragraph n. 1, of the treaty *"the competent authorities of the Contracting States shall exchange such information ... to the administration or enforcement of the domestic laws concerning taxes ...* ***insofar as the taxation thereunder is not contrary to the Convention****"*. The taxation levied by the State of residence on the head of the percipient of the dividends distributed by a foreign company is surely coherent with the treaty signed by the contracting States. Such compatibility is clearly affirmed by Article 10 of the Convention, according to which "*Dividends paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other*

[90] Cour d'Appel de Paris, Pôle 5 – Chambre 7, February 8, 2011, decision confirmed by Cour de Cassation, Chambre Commerciale, Financière et Économique, January 31, 2012, no. 141.

[91] For more on this point see T.A. Van Kampen, L.J. De Rikje, *The Kredietbank Luxembourg and the Liechtenstein tax affairs: notes on the balance between the exchange of information between states and the protection of fundamental rights*, *EC Tax Review*, 2008, no. 5.

State". The relevant exchange of information concerned a taxation that is ***"not contrary to the Convention"***.

85. Such statement is not deniable on the ground that Jayland has not granted, in the case at stake, a tax credit to Al Papone for the withholding tax levied in Freeland on the dividends received from Outfit. That is because the taxation of the dividends in the State of residence and in the hand of the recipient is autonomous in respect of the granting of a tax credit for the taxes paid abroad. Despite the fact that the two mechanisms are meant to work together, in order to prevent the double taxation of the same income, it is not possible to say that any violation related to one mechanism is automatically capable of affecting the other.

86. More precisely, the granting of the credit is strictly related only to the levying of an income or capital tax in the State of source, as confirmed by Article 23B. Indeed, such provision states that the deduction *"in either case shall not, however, exceed that part of the income tax or capital tax, as computed before the deduction is given, which is attributable, as the case may be, to the income or the capital which may be taxed in that other State"*. On the other hand no reference is made to the taxation of dividends enacted by the State of residence, so that article 23B of the OECD Model would not preclude the granting of the credit even in a case in which the dividend income is not taxed at all in the State of residence. This is to say that there is not any direct link between the taxation of dividends in the State of residence and the granting of the tax credit for the withholding tax paid abroad by the taxpayer. The granting could be independent from an effective taxation of the dividend income in the State of residence, and the taxation of that income shall apply independently from the recognition of the tax credit.

87. The two provisions, and the related procedures, are then completely independent, so that the lack of the tax credit cannot be considered as capable of causing the contrariety to the Convention of the domestic provisions regarding the taxation of dividends in the State of residence. Instead, such taxation remains completely legitimate, as stated by the previously mentioned Article 10 of the Convention, which is only provision regulating the taxation of dividends, beyond the domestic rules of the Contracting States.

3.2.2. RIGHTFUL DETERMINATION OF THE AMOUNT OF THE ASSESSMENT

88. The assessment issued by Jayland correctly refers to the entire amount of the tax burden evaded by Al Papone, in the course of the five years in which he had not reported and have taxed the dividends perceived from Outfit. More in detail, the tax administration correctly

refused, as This Court should do, to grant to Al Papone the tax credit allegedly provided by Article 23B of the Convention between Jayland and Freeland.

89. Indeed, in the lack of an explicit domestic law granting the credit, neither the tax administration nor the judicial authority are entitled to stand in for the legislator and create a rule that is not present in the tax system, independently from its possible coherence with a treaty provision.

90. Indeed, Jayland embraces a dualistic approach in its legal system with respect to the role occupied by its signed tax treaties in its legal system (also, in general, for all sort of public international law treaties). The assumption of such an approach consists in the sharp distinction between the domestic legal system and the international legal system. Such theory is anchored on the supremacy of the State and regards the domestic and the international legal orders as separate and distinct, as respectively exclusive, each of them being supreme within its own sphere. In such view the intervention of the legislator is strictly necessary in order for a treaty provision to be invoked directly from a taxpayer, and the legislator's role can not be replaced by the administrative or judicial authority.

91. Moreover, the tax credit is a complex method, whose enactment in the tax system needs a body of legislation, concerning, for instance, the means of verification of the correspondence between the credit and the tax burden levied by the State of the source, or the rules applicable in case of an excess of foreign tax compared to the maximum creditable amount, that can not be created by a court of law in examining a specific case. Indeed, such approach would inevitably cause a nonconforming application of the method, and therefore a breach of the principle of equal treatment that has a fundamental value in the taxation field.

92. The conclusions drafted on this point are fully supported by the OECD Commentary to Article 23B, according to which "*Article 23B sets out the main rules of the credit method, but does not give detailed rules on the computation and operation of the credit. ... In many states, detailed rules on credit for foreign tax already exist* ***in their domestic laws****. ... where the credit method is not used in the domestic law of a Contracting State, this State should establish rules for the application of Article 23B, if necessary after consultation with the competent authority of the other Contracting State*". Moreover, after pointing out that the problems related to the application of the credit for foreign taxes depend largely on the domestic legislation and procedure, the Commentary states that "*the solution must, therefore, be left to each State*". The same line of thought is embraced by an eminent author, according to whom "*the details of both the exemption method and the credit method must be*

shaped by reference to domestic law, viz. in regard to the reference figures – what positive and what negative elements should be included in the "foreign items of income" and what in the "domestic" ones, etc. – and in regard to procedures. In this connection, the credit method is, however, by far the more complicated of the two, and that is why it is normally shaped and supplemented to a much greater extent by domestic law"[92].

93. In the lack of a domestic provision implementing the tax credit in Jayland's domestic law then, such method of relief from double taxation cannot be granted to the taxpayer. Therefore, the amount of the assessment has been correctly determined by Jayland's tax authority.

[92] K. Vogel, *On Double Taxation Conventions,* p.1131.

V. LIST OF ABBREVIATIONS

AP	Al Papone
Assessment	Notice of assessment served by the tax administration of Jayland upon Al Papone
Art.	Article
Commentary	OECD Commentary on the Model Convention
DTCs	Double Taxation Conventions
ECHR	European Convention on Human Rights
EoI	Exchange of information
EU	European Union
LL	Luxus Luthor
Tax Treaty	Convention against Double Taxation in force between Jayland and Freeland
Vienna Convention	Vienna Convention on the Law of Treaties