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Interpretation of Double Taxation Conventions – The Judgement of the German Federal Fiscal Court (*Bundesfinanzhof*) in the Light Designer Case

1. The judgement of the German *Bundesfinanzhof* of 11 July 2018 (I R 44/16)

Włodzimierz Nykiel is one of those Polish tax law scholars who is very present on the international scene and is also one of the most recognisable faces of Polish tax law around the world. He himself was a pioneer in the field, and it is partly to his credit that many Polish tax law experts today are outstandingly well-connected with their colleagues on an international level. Moreover, he has established numerous contacts around the world on behalf of his own university. One of his fundamental beliefs is that the future lies in international cooperation, not in national isolation. Meanwhile, the two of us are bound by a decade-long, intensive friendly collaboration on several levels: the tax law institutes of our universities are members of the EUCOTAX group, and my colleagues and I have often travelled to Lodz for lectures and conferences. Vice versa, we frequently invite Włodzimierz to come and deliver lectures on topics of international tax law at the Vienna University of Economics and Business (WU). Furthermore, we have both been members of the Board of Trustees of the IBFD in Amsterdam for several years.

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We also share a great interest in issues of double taxation conventions. Therefore, I wish to use the occasion of the milestone birthday of my friend and colleague to address the principles of interpretation of double tax conventions. The Festschrift published in 2018 to celebrate the 100th anniversary of the German Supreme Tax Court (*Bundesfinanzhof*, formerly *Reichsfinanzhof*) gave me the opportunity to examine the development of German case law in the field of interpretation and application of double tax conventions.[2] After completing my contribution for the said paper, the judgement of the *Bundesfinanzhof* of 11 July 2018, I R 44/16 was published, introducing additional aspects to German case law on DTCs. I wish to present and analyse this judgement here, also in order to make it better known to the international tax law community. I do so in the firm belief that courts are by their very nature not bound to the judgements rendered in other states, but that they are well-advised to consider them in the reasoning of their decisions on similar legal issues, and to either follow their example or explain why they opt for a different approach. I share this belief with Włodzimierz Nykiel, whom I hold in high regard. I hope he will be pleased with my contribution.

The facts on which the decision of the *Bundesfinanzhof* were based are quickly told: The taxpayer is resident in Germany. He works as a light designer in different opera houses outside Germany (Belgium, Denmark, France, Italy, Spain, Sweden, Switzerland, and Japan). His employer statements from France, Sweden, and Switzerland show that the taxpayer receives income from employment there. The German Tax Office has classified the work of the light designer under German tax law as independent activities.[3] The question presented before the *Bundesfinanzhof* was how to qualify the income from these three states according to the three double taxation conventions.

2. No solution of qualification conflicts through Art. 23 A Para. 2 OECD MC for DTCs concluded before 2000

In view of the fact that the three aforementioned source states do classify the income as employment income, but that such income is considered income from independent activities under German tax law, the question

[2] M. Lang, *Auslegung und Anwendung von Doppelbesteuerungsabkommen*, [in:] K. Drüen, J. Hey, R. Mellinghoff (eds), *100 Jahre Steuerrechtsprechung in Deutschland: Festschrift für den Bundesfinanzhof*, Verlag Dr. Otto Schmidt, Köln 2018, pp. 983 et seq.

[3] About the preceding case in front of the Finanzgericht Berlin-Brandenburg, 16 July 2015, 15 K 1093/10: A. Cloer, N. Niedermeyer, *Die Qualifikation der Tätigkeit im Quellenstaat ist für deutsche Finanzbehörden bindend*, "Deutsches Steuerrecht kurzgefaßt" 2017, No. 11, pp. 176 et seq.

arose as to whether the qualification in the source state is relevant for the application of the DTC in the state of residence. Since 2000, the Commentary of the OECD Fiscal Committee on the OECD Model Convention takes the view that, according to Art. 23A Para. 1 OECD MC, the state of residence is bound to the assessment in the source state for tax convention purposes.[4]

The *Bundesfinanzhof* has – once again[5] – rejected this view:[6] "For the DTC with Sweden, which has remained unchanged despite the new version of the OECD Model Commentary, this conclusion already follows from the existing case-law. The Senate has already rejected the assumption of a commitment to the source state's qualification (*Qualifikationsverkettung*) for existing DTCs without a corresponding treaty-based order […] The fact that Art. 23A Para. 1 OECD MC requires the exemption in the state of residence of income which 'in accordance with the provisions of this Convention, may be taxed in the other Contracting State', does not result in the state of residence being bound to the qualification in the source state." In my opinion, this view is conclusive:[7] The quoted formulation in the convention hinges on whether, according to this convention, the income *may be taxed in the other Contracting State*. Art. 23A Para. 1 OECD MC does not require that *the tax authorities* of the other Contracting State hold the view that they may tax.[8]

The subsequent reasoning of the German *Bundesfinanzhof*, however, is not convincing:[9] "Instead, one should, also in the light of this Method Article, consider the question as to the 'ability to tax' in conformity with Art. 3 Para. 2 OECD Model Convention, and thus according to the (national) law of the taxpayer's state of residence – the so-called applying state […]." This is because Art. 3 Para. 2 OECD Model Convention primarily requires an

[4] OECD, *Model Tax Convention on Income and on Capital: Condensed Version 2017*, 18 December 2017, p. 317, Para. 34.

[5] Previous rulings: DE, Bundesfinanzhof, judgement, 29 August 1984, I R 68/81, Para. 1; DE, Bundesfinanzhof, judgement, 12 July 1989, I R 46/85, Para. 3; DE, Bundesfinanzhof, 29 October 1997, I R 35/96, II Para. 2; DE, Bundesfinanzhof, order, 4 April 2007, I R 110/05, Para. 13; DE, Bundesfinanzhof, judgment, 25 May 2011, I R 95/10, Para. 16; DE, Bundesfinanzhof, order, 13 November 2013, I R 67/12, Para. 16.

[6] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 16.

[7] Already M. Lang, *Die Bedeutung des innerstaatlichen Rechts für die DBA-Auslegung*, [in:] G. Burmeister, D. Endres (eds), *Aussensteuerrecht, Doppelbesteuerungsabkommen und EU-Recht im Spannungsverhältnis: Festschrift für Helmut Debatin zum 70. Geburstag*, C.H. Beck, München 1997, p. 287; M. Lang, *Auslegung*…, p. 996.

[8] Similarly also K. Schulz-Trieglaff, *Zulässigkeit einer Qualifikationsverkettung auch ohne entsprechende Anordnung in den Verteilungsnormen*, "Internationales Steuerrecht" 2018, No. 9, p. 344.

[9] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 16.

interpretation from the context of the convention.[10] The *Bundesfinanzhof* should have taken this approach, and I shall return to this point later.

On the other hand, the additional reasoning of the *Bundesfinanzhof* as to why it cannot follow the view held in the OECD Commentary since 2000 for previously concluded DTCs is conclusive:[11] "Moreover, it is contrary to the adjudication practice of the Senate to attach – for the sake of a dynamic convention interpretation – a dispute-settling significance to the later development or amendment of OECD statements for the understanding of already negotiated conventions for the avoidance of double taxation […]".

The *Bundesfinanzhof* extends this view also to those conventions that were concluded before 2000 and revised after 2000, but which remain unchanged as regards the provision modelled on Art. 23A Para. 1 OECD MC. One may per se take the stand that, as part of an amendment of the convention, the Contracting States could subsequently adopt the positions set out in the OECD Commentary also in other parts of the convention. This stand, however, would not be very compelling.[12] Therefore, one must agree with the following reasoning of the *Bundesfinanzhof*:[13] "In addition, a commitment to the source state's qualification (*Qualifikationsverkettung*) must also be dismissed with regard to the DTC with France and the DTC with Switzerland.
194 In particular, the Senate cannot subscribe to the view of the plaintiff that these conventions should be interpreted according to the new version of the OECD Model Commentary simply because – albeit without a positive order for a commitment to the source state's qualification (*Qualifikationsverkettung*) – they were promptly modified after the new version of the Commentary by the Law on the Complementary Convention of 20 December 2001 between the Government of the Federal Republic of Germany and the Government of the French Republic on the DTC with France (Federal Law Gazette II 2002, 2370, Federal Law Gazette I 2002, 891) and by the Law on the Revision Protocol of 12 March 2002 on the DTC with Switzerland (Federal Law Gazette II 2003, 67, Federal Law Gazette I 2003, 165) […]".

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[10] To that most recently M. Lang, *Tax Treaty Interpretation – A Response to John Avery Jones*, "Bulletin for International Taxation" 2020, No. 11, p. 660.

[11] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 16.

[12] M. Lang, *Die Bedeutung des Musterabkommens und des Kommentars des OECD-Steuerausschusses für die Auslegung von Doppelbesteuerungsabkommen*, [in:] W. Gassner, M. Lang, E. Lechner (eds), *Aktuelle Entwicklungen im Internationalen Steuerrecht*, Linde Verlag, Wien 1994, pp. 24 et seq.; *idem*, *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Österreichs*, [in:] M. Lang, J.M. Mössner, R. Waldburger (eds), *Die Auslegung von Doppelbesteuerungsabkommen in der Rechtsprechung der Höchstgerichte Deutschlands, der Schweiz und Österreichs*, Linde Verlag, Wien 1998, p. 123.

[13] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 17.

It is interesting that the *Bundesfinanzhof* also considers whether the later OECD Commentary can nevertheless – as an expression of "practice" – be used for the interpretation of previously concluded conventions. First, the *Bundesfinanzhof* describes the importance of practice in the interpretation of international law treaties:[14] "One must start out from Article 31 of the Vienna Convention on the Law of Treaties of 23 May 1969 – VCLT – […], where according to Paragraph 1 'a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose […]". Similarly, in addition to the systematic 'context' described in more detail in Art. 31 Para. 2 VCLT, according to Art. 3 Para. 3 VCLT any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (a) as well as any subsequent practice in the application of the treaty which establishes the consensus of the parties regarding its interpretation (b) must be equally taken into account. Correspondingly, a shared understanding of the convention and a common 'practice' of the participating tax administrations can be of significance for the interpretation of the convention […] Finally, according to Art. 31 Para. 4 VCLT, "special meaning shall be given to a term as interpretative guidance if it is established that the parties so intended." The *Bundesfinanzhof* thus takes the opportunity to relativise the meaning of "later practice" right from the outset. The fact that it once again argues – as it usually does in its case law on DTCs[15] – that its interpretation is limited by the meaning of the letters of the law is problematic: such an absolute limit to interpretation is not intrinsic to international law interpretation or to any other interpretation.[16]

The *Bundesfinanzhof* subsequently stresses that it had already ruled in the past that a view expressed in the OECD Commentary cannot justify a "subsequent practice" to be taken into consideration, but that it merely constitutes the opinion of the participating tax administrations, and that it can leave the question open at this point.[17] The *Bundesfinanzhof* hints that only the specific application of the convention is relevant in later practice, which in the dispute under consideration has led to a rejection by the Tax

[14] *Ibidem*, Para. 18.

[15] DE, Bundesfinanzhof, judgement, 20 August 2008, I R 39/07, Para. 18; DE, Bundesfinanzhof, judgement, 2 September 2009, I R 90/08, Para. 20; DE, Bundesfinanzhof, judgement, 2 September 2009, I R 111/08, Para. 16; DE, Bundesfinanzhof, judgement, 12 October 2011, I R 15/11, Para. 16; DE, Bundesfinanzhof, judgement, 13 June 2012, I R 41/11, Para. 16; DE, Bundesfinanzhof, judgement, 10 June 2015, I R 79/13, Para. 16; DE, Bundesfinanzhof, judgement, 30 May 2018, I R 62/16, Para. 23.

[16] For a detailed critique see: M. Lang, *Auslegung*…, p. 1007.

[17] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 20.

Office of Germany's obligation to comply with the foreign tax certificate.[18] The *Bundesfinanzhof* leaves these questions open, since "for the judiciary – especially in view of the principle of the separation of powers – only the text and context of the convention are relevant […], and any deviation can only apply if the (alleged) 'subsequent agreements of the Contracting States' or 'bilateral practices' find expression in an amended convention and a corresponding transformation law […]"[19].

The *Bundesfinanzhof* thus attaches importance only to the text and context of the convention. The "bilateral practices" – obviously referring to the "subsequent practice" of Art. 32 Para. 3 VCLT – as well as the "subsequent agreements between the Contracting States" must thus only be taken into account if they are reflected in an amended convention. As a result, however, the *Bundesfinanzhof* comes to the conclusion that subsequent practice and subsequent agreements are not at all relevant for the interpretation, since if the agreement itself was amended – and a corresponding transformation law was adopted – it is no longer about the interpretation of the previous agreement.

The *Bundesfinanzhof* already mentioned the "principle of the separation of powers" in the said passage, thus stressing the relevance of national constitutional law. It subsequently draws on further constitutional arguments for the following consideration:[20] "It follows from these constitutional principles that the agreement reached between the tax administrations – according to which a subsequent agreement of the Contracting States would be relevant for the interpretation of the convention (in the form of the OECD Model Commentary) – cannot result in an international law treaty assuming a different meaning than the one intended in the legal domestic act which approves the international treaty (*Zustimmungsgesetz*) […]".

The reasoning of the *Bundesfinanzhof*, rooted in German constitutional law, is not very convincing: The rules for the interpretation of international law expressed in the VCLT are derived from international law, and cannot be modified by the national constitutional law of a contracting state. When the *Bundesfinanzhof* stresses the meaning that "an international law treaty assumes for national law",[21] it obviously suggests that it considers it possible that the meaning of the agreement according to the international law treaty may differ from the one under the approval law (*Zustimmungsgesetz*), which belongs to German national law and which transforms the international law treaty into national law. This, too, is problematic: The validity of the

[18] *Ibidem*.
[19] *Ibidem*.
[20] *Ibidem*, Para. 22.
[21] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 22.

international law treaty may differ, or the latter may cease to be applicable at the national level. The meaning of the international law treaty, however, remains the same.[22] This is independent of the form of incorporation of international treaties in national law[23] and of whether the relationship between international law and national law is interpreted on the basis of monistic or dualistic theories.[24]

Ultimately, however, the *Bundesfinanzhof* is right: Interpretation is not a schematic or formalised process.[25] The objective is to determine the meaning of the provision. In international treaties, the importance of "subsequent practice" may vary. In the case of tax treaties, its importance is a priori limited. Considerations with regard to the separation of powers play a role here. The reason, however, does not lie in German constitutional law, but in the fact that numerous constitutional legal systems are founded on such principles, which are significant in many states, especially in legal areas like tax law.[26] Therefore, one should generally not expect from double taxation conventions to leave a lot of room for subsequent practice. The fact that these treaties do not only govern the legal relations between two states but also have an impact on third parties – i.e., the taxpayers – and their legal position must be predictable which further reduces the significance of subsequent practice.[27] Constant practice, however – as the *Bundesfinanzhof* itself suggests *en passant*[28] – is predominantly shaped by decisions of authorities and courts which specifically apply the DTC.[29] These do not include the representatives of the finance ministries, who regularly modify the Commentary to the OECD Model Convention within the framework of the OECD. Therefore, there is no reason to use a more recent Commentary of the OECD Fiscal Committee for the interpretation of previously concluded DTCs.[30]

[22] See: M. Lang, *Doppelbesteuerungsabkommen und innerstaatliches Recht*, Wirtschaftsverlag Dr. Anton Orac, Wien 1992, p. 22.

[23] *Ibidem*, p. 21.

[24] *Ibidem*, p. 21 et seq.; G. Frotscher, *Internationales Steuerrecht*, C.H. Beck, München 2020, Para. 239.

[25] M. Lang, *Die Bedeutung des Musterabkommens*…, p. 21.

[26] On this topic M. Lang, *Doppelbesteuerungsabkommen*…, p. 90; D. Gosch, *Über die Auslegung von Doppelbesteuerungsabkommen*, "Internationales Steuerrecht" 2013, p. 92; M. Lang, *Die Bedeutung des OECD-Kommentars und der Reservations, Observations und Positions für die DBA-Auslegung*, [in:] J. Lüdicke, R. Mellinghoff, T. Rödder (eds), *Nationale und internationale Unternehmensbesteuerung in der Rechtsordnung: Festschrift für Dietmar Gosch zum Ausscheiden aus dem Richteramt*, C.H. Beck, München 2016, p. 239.

[27] M. Lang, *Bedeutung des Musterabkommens*…, p. 28.

[28] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 23.

[29] In more detail M. Lang, *Die Bedeutung des Musterabkommens*…, pp. 26 et seq.

[30] Already *ibidem*, p. 39; M. Lang, *Seminar B, Teil 2: Das OECD-Musterabkommen – 2001 und darüber hinaus: Welche Bedeutung haben die nach Abschluss eines Doppelbesteuerungsabkommens erfolgten Änderungen des OECD-Kommentars?*, „Internationales Steuerrecht" 2001, No. 17,

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The judgement of the *Bundesfinanzhof* also includes statements on the significance of the version of the OECD Commentary that had already existed at the time of the conclusion of the treaty:[31] "Although the OECD Commentary can be significant for the interpretation of treaties concluded later, it is by no means on the same level with the international law rule subject to interpretation. Its importance is rather similar to that of legal materials used in interpreting national law, so it cannot be ruled out that the intentions of the 'commentators' are not reflected in the text of the law, or that they are supplanted by overriding systematic or teleological considerations."

These arguments are conclusive: One should not overestimate the importance of the OECD Commentary for the interpretation of treaties concluded at a later stage. At times, the relevant literature almost gives the impression that it is the OECD Commentary to be interpreted, and not the treaty itself. The parallel drawn with the law materials is to the point:[32] They are just one of several tools of interpretation, and they must often take a back seat to systematic and teleological arguments. Occasionally, individual passages in the law materials simply prove to be flawed. Equally, arguments in the OECD Commentary may suffer the same fate.

The *Bundesfinanzhof* emphasises that, even in the case of an amendment to a treaty after publication of a new version of the OECD Commentary, this version of the OECD Commentary is not relevant if the treaty provision itself has not changed:[33] "If the issue at hand is the interpretation of the treaty or the transformation law, it is crucial for the pending proceedings that the already existing method articles have not been amended – in the passages relevant for the dispute under consideration – by the Law on the Complementary Convention of 20 December 2001 between the Government of the Federal Republic of Germany and the Government of the French Republic on the DTC with France […] and by the Law on the Revision Protocol of 12 March 2002 on the DTC with Switzerland […]

p. 538; A. Schnitger, *Die Einbeziehung des OECD-Kommentars in der Rechtsprechung des BFH*, "Internationales Steuerrecht" 2002, No. 12, p. 408; R. Mellinghoff, *Heranziehung von OECD-Musterabkommen und -Musterkommentar*, [in:] C. Kaeser (ed.), *Doppelbesteuerung: Festgabe zum 75 Geburtstag von Franz Wassermeyer*, C.H. Beck, München 2015, p. 43; M. Lang, *Die Bedeutung des OECD-Kommentars*…, p. 240.

[31] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 24.

[32] Already M. Lang, *Die Bedeutung des Musterabkommens*…, p. 22.

[33] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 25.

Instead, the treaties were only modified elsewhere. Moreover, Switzerland had expressed a reservation to OECD Model Commentary No. 32 in OECD Model Commentary No. 81 on Article 23A OECD MC to the extent that the qualification conflict concerns the modification of national law after conclusion of the treaty. None of the two amendments contains any verifiable evidence that the Contracting States had intended a commitment to the source state's qualification (*Qualifikationsverkettung*)."

The additional argument put forward by the *Bundesfinanzhof* is also convincing:[34] When one of the two States issues an observation to a passage of the OECD Commentary, this points out to a disagreement over the meaning of the treaty provision already in 2000. For this reason, too, one cannot assume that, with the text of the treaty provision, the Contracting States also adopted the view held in the Commentary.

At the heart of this reasoning by the *Bundesfinanzhof*, however, is the consideration that the unchanged wording of a provision does not change its meaning through modified arguments in the OECD Commentary. This subsequently raises the question as to whether this conclusion changes in any way if a double taxation convention was newly concluded after 2000.[35] In this case, too, the provision of Art. 23A Para. 1 OECD MC has remained unchanged. Only the view held in the OECD Commentary on this provision has changed. When sufficiently strong arguments can be drawn in favour of a specific conclusion from the wording, the systematics, and the teleology of the unchanged rule, the new view held in the OECD Commentary will definitely take a back seat. It is questionable whether it can tip the scales in case of other conflicting arguments. Yet the *Bundesfinanzhof* did not have to address this question in the judgement under consideration.

The *Bundesfinanzhof* summarises its conclusion, also referring to the principle of harmonisation of decisions on an international level (*Entscheidungsharmonie*):[36] "On that basis, it cannot be questionable that the change of the OECD Model Commentary on issues of commitment to the source state's qualification (*Qualifikationsverkettung*) was not included in the treaties under consideration, and for the reasons outlined, it is thus also not suitable to bring about a meaning that is divergent from the previous, handed-down convention interpretation. The principle of harmonisation of decisions on an international level (*Entscheidungsharmonie*) cannot change

[34] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 25; in greater detail already M. Lang, *Die Bedeutung des Musterabkommens…*, p. 20.

[35] This is taken into consideration by J. Schönfeld, N. Häck, *Article 23A*, [in:] J. Schönfeld, X. Ditz (eds), *Doppelbesteuerungsabkommen*, Verlag Dr. Otto Schmidt, Köln 2019, Para. 9.

[36] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 26.

anything about that either. This principle does not in any way rule out that the treaty interpretation of the Contracting States will lead to qualification conflicts and that these will, if necessary, be settled or mitigated by way of a mutual agreement procedure […]". Here, too, the *Bundesfinanzhof* is right: This principle does not imply an obligation to subscribe to the view of the administrative authorities or courts on the convention provisions in the other Contracting States.[37] Rather, it suggests that one should examine the arguments that were used by courts of the Contracting States or even by those of other states.[38] The *Bundesfinanzhof* must be reproached, however, for not having considered such decisions at all.

4. The interpretation provision of Art. 3 Para. 2 OECD MC

The *Bundesfinanzhof* remanded the case to the lower court and instructed the latter to also examine the application of the convention provisions modelled on Art. 17 OECD MC:[39] "According to what is meanwhile well-established case law, […] the definition of entertainer in the DTC
200 provisions modelled on Article 17 OECD MC, which – subject to Article 12 Para. 2 of the DTC with France, which merely covers the self-employment of entertainers – include those of the treaties concluded with the states in which the plaintiff was employed […], must be independently interpreted on the basis of the treaty if the DTC concerned provides a basis for it. The definitions of entertainer under the national law of the applying state – such as, for instance, the definition of artistic activity in Section 18 (1)(1)(2) and in Section 50a (4)(1)(1) of the Income Tax Act – are, by contrast, not relevant. On that point, it follows from an overall reading of the exemplary theatre, motion picture, radio or television artists, and musicians listed in Article 17 Para. 1 OECD MC and from the equation with athletes that eligibility does not depend on a particular artistic level

[37] Also J. Schönfeld, N. Häck, *Article 23A*, Para. 9.

[38] On the principle of harmonisation of decisions on an international level: D. Gosch, *Über die Auslegung…*, p. 87; M. Lehner, *Abkommensauslegung zwischen Autonomie und Bindung an das innerstaatliche Recht*, [in:] C. Kaeser (ed.), *Doppelbesteuerung: Festgabe zum 75 Geburtstag von Franz Wassermeyer*, C.H. Beck, München 2015, pp. 16 et seq; in more detail: H. Hahn, *Zur Auslegung von Doppelbesteuerungsabkommen: Der Grundsatz der Entscheidungsharmonie im Crash-Test*, [in:] R. Gocke, D. Gosch, M. Lang (eds), *Körperschaftssteuer, Internationales Steuerrecht, Doppelbesteuerung: Festschrift für Franz Wassermeyer zum 65 Geburtstag*, C.H. Beck, München 2005, p. 631.

[39] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 28.

or a specific degree of original creativity. Instead, the relevant factor is whether it is a personal (e.g.) performing activity that primarily serves the audience's artistic enjoyment or merely its entertainment […] An artistic activity requires that the entertainer performs in public either directly or indirectly through media; accordingly, it is essential that the remunerated activities are directly linked to a performance before an audience […] Accordingly, Article 17 Para. 1 OECD MC does not cover remunerations for scene painters […] or directors and set designers […], who are engaged in a creative activity. The differentiation from an artistic activity within the meaning of Article 17 Para. 1 OECD MC must be made according to whether the main activity of the artist relates to the work itself or to the creation of the same before the audience […]". The *Bundesfinanzhof* thus not only stressed the independent interpretation of the definition of entertainer on the basis of the treaty – detached from the respective national law – but also demonstrated the approach to be taken.

It is all the more regrettable that the *Bundesfinanzhof* took a different approach in the interpretation of the definition of employment (Art. 15 OECD MC):[40] "Subject to Article 13 (1) DTC with France, Article 15 Para. 1 DTC with Sweden, and Article 15 Para. 1 DTC with Switzerland, salaries, wages and other similar remuneration derived by a resident of a Contracting State in respect of an employment shall be taxable only in that State unless the employment is exercised in the other Contracting State. The convention provisions do not define the terms "employed", "employment" or "remunerations". Therefore, the Senate […] assumed that according to Article 3 Para. 2 OECD MC, Article 2 Para. 2 DTC with France, Article 3 Para. 2(2) DTC with Sweden, and Article 3 Para. 2 DTC with Switzerland, from the point of view of Germany as the applying state, they must be interpreted through recourse to Section 19 Income Tax Act, and to Section 2 of the Implementing Decision concerning Wages Tax. The Senate had already previously ruled […] that the question as to whether income from independent activities or employment is involved was subject to German law (also) for the interpretation of a DTC, since the DTCs do not contain any rules on the differentiation between types of income. The same applies to the relevant convention provisions in the proceedings pending […]".

One must concede to the *Bundesfinanzhof* that the interpretation of the term "entertainer" from the context of the convention seems easier at first glance: Art. 17 Para. 1 OECD MC itself contains examples that already provide rough outlines of the term. The distinction between independent

[40] DE, Bundesfinanzhof, judgement, 11 July 2018, I R 44/16, Para. 13.

activities and employment, however, pervades the entire OECD MC, so that systematic arguments can be deduced here as well.[41] The more demanding interpretation required here should not prompt a court to give up prematurely. The price to pay for this are qualification conflicts, for whose solution the convention – as the *Bundesfinanzhof* itself rightly highlights – does not provide any basis.

Even so, the *Bundesfinanzhof* convincingly answered the question as to the tax law of which State should be subsidiarily relevant according to Art. 3 Para. 2 OECD MC: Unless the context otherwise requires, one must resort to the national law of the applying state. The *Bundesfinanzhof* did not follow the view held by John F. Avery Jones that according to Art. 3 Para. 2 OECD MC only the source state applies the convention.[42] From the German point of view, the applying state of the convention is Germany, as the state of residence.[43]

5. Concluding summary

202 In its judgement of 11 July 2018, I R 44/16, the *Bundesfinanzhof* confirmed that Art. 23A Para. 4 OECD MC does not provide a basis for the settlement of qualification conflicts: This provision does not oblige the state of residence to follow the assessment in the source state. Moreover, the *Bundesfinanzhof* made it clear that the OECD Commentary is of no significance at all for the interpretation of previously concluded DTCs, and that its relevance for DTCs concluded later is also limited: Similar to legal materials in national law, it is important whether the views held in the Commentary are reflected in the text of the treaty, how clear and consistent the view held in the Commentary is, and which arguments can be derived from the systematics and teleology of the convention provisions. Although some of the arguments put forward by the *Bundesfinanzhof* prove to be problematic, there are other arguments in favour of the position taken by the *Bundesfinanzhof*, so that it is conclusive as a whole.

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[41] For more details see: M. Lang, U. Zieseritsch, *Der Begriff der unselbstständigen Arbeit nach Art 15 OECD-MA*, [in:] W. Gassner, M. Lang, E. Lechner, J. Schuch, C. Staringer (eds), *Arbeitnehmer im Recht der Doppelbesteuerungsabkommen*, Linde Verlag, Wien 2003, pp. 44 et seq.; to some extent also – though not consistently – F. Wassermeyer, M. Schwenke, *Article 15*, [in:] F. Wassermeyer (ed.), *DBA*, C.H. Beck, München 2020, Para. 63.

[42] Most recently J.F. Avery Jones, *A Fresh Look at Article 3(2) of the OECD Model*, "Bulletin for International Taxation" 2020, No. 11, p. 659.

[43] To this effect also M. Lang, *Auslegung…*, p. 994.

Qualification conflicts can be best avoided through autonomous interpretation: The more the courts and other legal practitioners in the Contracting States focus their attention on interpreting the convention provisions from their context and leave aside their own national law in the process, the greater the odds are that they will reach concordant results across borders. The *Bundesfinanzhof* confirmed the principle of autonomous interpretation based on the example of Art. 17 OECD MC. It is unfortunate that the *Bundesfinanzhof* did not attempt in the same judgement to also establish the distinction between independent activities and employment from the convention itself, but hastily resorted to national law instead.[44]

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[44] See also: R. Ismer, S. Piotrowski, *Internationale Streitbeilegung in Steuersachen und innerstaatliches Verfassungsrecht: Auf zu gerichtsförmigen Verfahren!*, "Internationales Steuerrecht" 2019, No. 21, p. 849 who discuss this case and convincingly take the view that international arbitration boards would tend to prefer an autonomous interpretation.

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Abstract

In its judgement of 11 July 2018, I R 44/16, the German Bundesfinanzhof had to qualify income from a German resident arising from his activities as light designer in three different countries according to the respective DTCs. This gave the court the opportunity to consider the framework for solving qualification conflicts, in particular the view that Art. 23A Para. 1 OECD MC binds the state of residence to the assessment of the source state (*Qualifikationsverkettung*). This was, in conformity with its earlier jurisprudence, rejected by the court. However, this approach was included in the OECD Commentary in the year 2000. The court therefore also discussed the effect of the updated Commentary on treaties concluded before and after its adoption respectively. It held that this change to the Commentary has definitely no effect on treaties concluded before 2000. The court could leave it open whether the position articulated in the updated Commentary might have effects on the interpretation of new treaties. This contribution will examine this judgement in detail, providing an analysis of qualification conflicts and a critical appraisal of the court's solution.

Keywords: double taxation treaty (DTC), qualification conflicts, autonomous interpretation, commentary, *Qualifikationsverkettung*