Reprinted from
British Tax Review
Issue 4, 2020

Sweet & Maxwell
5 Canada Square
Canary Wharf
London
E14 5AQ
(Law Publishers)

To subscribe, please go to
http://www.sweetandmaxwell.co.uk/catalogue/productdetails.aspx?recordid=338&productid=6614.

Full text articles from the British Tax Review are also available via subscription to *www.westlaw.co.uk*, or *https://www.checkpointworld.com*.

SWEET & MAXWELL

Current Notes

Subsequent changes to the OECD Commentaries

In *Fowler v HMRC* (*Fowler*) the Supreme Court finally gave its sanction to reference being made to the OECD Commentaries that post-date a particular treaty (referred to here as "subsequent Commentaries").[1]

Paragraph 18 of the Supreme Court's judgment says:

> "The OECD Commentaries are updated from time to time, so that they may (and do in the present case) post-date a particular double taxation treaty. Nonetheless they are to be given such persuasive force as aids to interpretation as the cogency of their reasoning deserves: see *Revenue and Customs Comrs v Smallwood* (2010) 80 TC 536, para 26(5) per Patten LJ."[2]

Unlike, for example, the French Supreme Administrative Court, which has prohibited reference to subsequent Commentaries, the Supreme Court has in this one paragraph authorised it.[3] However, the Supreme Court has not, by sanctioning reference to subsequent Commentaries, resolved all issues that surround them.

In *Fowler* the treaty in question was the 2002 treaty between the UK and South Africa[4]; the paragraphs in the OECD Commentary on Article 15 of the OECD Model Tax Convention on Income and on Capital that were relied upon had been added in 2010,[5] supplementing existing material in the Commentary; the tax years in question were 2011–2012 and 2012–2013. Thus, the new paragraphs added to the Commentary had been adopted by the OECD before the tax years in question. There also appears to have been no argument over whether the new paragraphs were clarificatory of the prior Commentary or conflicted with it. South Africa has also participated in the tax work of the OECD since the late 2000s and has published its positions with regard to the OECD Model and Commentaries. The Supreme Court never had to consider, therefore, a number of issues relating to reference to subsequent Commentaries: for example, what if the changes do not clarify but appear to contradict the previous Commentary; what about subsequent Commentaries published in years after the tax years in question; what if the other country does not accept the changes?

The decision of the Supreme Court is, of course, in line with the approach taken by the OECD Committee on Fiscal Affairs itself, not that that should necessarily carry any particular weight. Referring to the OECD Commentary as support for reference to the OECD Commentary is

[1] *Fowler v HMRC* [2020] UKSC 22; [2020] STC 1476; (2020) 22 ITL Rep 679.
[2] *Fowler*, above fn.1, [2020] UKSC 22 at [18].
[3] On the position in France, see *SA Andritz* Conseil d'etat, 30 December 2003, case no.233894 (2004) 6 ITLR 604 and many subsequent cases.
[4] Double Taxation Relief (Taxes on Income) (South Africa) Order 2002 (SI 2002/3138).
[5] OECD, *Model Tax Convention on Income and on Capital 2010 (updated 2010)* (OECD Publishing, 2010), available at: *https://dx.doi.org/10.1787/9789264175181-en* [Accessed 25 August 2020].

something of a bootstrap argument. In the Introduction to the OECD Model of 2017, the following is said:

> "33. When drafting the 1977 Model Convention, the Committee on Fiscal Affairs examined the problems of conflicts of interpretation that might arise as a result of changes in the Articles and Commentaries of the 1963 Draft Convention. At that time, the Committee considered that existing conventions should, as far as possible, be interpreted in the spirit of the revised Commentaries, even though the provisions of these conventions did not yet include the more precise wording of the 1977 Model Convention.…
>
> 34. The Committee believes that the changes to the Articles of the Model Convention and the Commentaries that have been made since 1977 should be similarly interpreted."[6]

The issue of reference to subsequent Commentaries remains controversial, and there are further issues that need to be resolved, even after the decision of the Supreme Court.[7] There is a danger going forward that cases on tax treaty interpretation in the UK will become entangled with discussions about whether the subsequent amendments to the Commentaries are clarificatory, or effect changes, or simply add examples, etc. No doubt this will get rolled up into the question of how much weight is to be put on the Commentaries: there is a danger, of course, that a court will give weight to a Commentary if it supports a decision that the court otherwise wishes to reach; and will give no weight if the Commentary runs in the opposite direction. It may be that one will reach the position that the French Supreme Administrative Court was right all along to prohibit references to subsequent Commentaries.

Interestingly enough, the desire to use subsequent Commentaries to interpret existing treaties has also been manifested in UK treaty practice in the last few years. Six of the 12 most recent comprehensive treaties concluded by the UK have included explicit reference to the use of the Commentaries as an aid to interpretation. Generally this is found in a protocol to the Convention, an example being the 2016 protocol to the UK-Colombia Double Taxation Convention which provides as follows:

> "1. In relation to the whole Convention:
>
> It is understood that both Contracting States will interpret this Convention in the light of the Commentaries to the OECD Model Tax Convention *as they may read from time to time*, having regard to any observations or other positions that they have expressed thereon." (Emphasis added.)[8]

Substantially identical wording is to be found in the protocols to the double taxation agreements with the Isle of Man, Guernsey, Jersey and Gibraltar in 2018 and 2019. In some senses, the

[6] OECD, *Model Tax Convention on Income and on Capital 2017 (Full Version)* (Paris: OECD Publishing, 2019), available at: *https://doi.org/10.1787/g2g972ee-en* [Accessed 26 August 2020], paras 33–34.

[7] There is a whole body of literature on reference to the OECD Commentaries. One of the fullest discussions is in D. Ward (ed.), *The Interpretation of Income Tax Treaties with Particular Reference to the Commentaries on the OECD Model* (IBFD, 2005).

[8] UK/Colombia Double Taxation Convention, signed on 2 November 2016, entered into force on 13 December 2019, Protocol.

inclusion of this phrase in agreements with the Crown Dependencies and Overseas Territories is not too surprising, given that they are hardly negotiating as independent, sovereign states. On the other hand, it is not thought that officials from any of these territories have ever participated in the work of the OECD, nor have any of those territories ever expressed their positions on the OECD Commentaries. The negotiators appear to have accepted as an aid to interpretation wording over which they have little or no control.

By way of completeness, the protocol to the UK-Austria Double Taxation Convention of October 2018 has a more elaborate provision:

> "7. Interpretation of the Convention
>
> a) It is understood that provisions of the Convention which are drafted according to the corresponding provisions of the OECD Model Convention on Income and on Capital shall generally be expected to have the same meaning as expressed in the OECD Commentaries thereon as they may be revised from time to time. The understanding in the preceding sentence will not apply with respect to the following:
>
> (i) observations to the OECD Commentaries maintained by either Contracting State other than observations made after the signature of this Convention on Commentaries that existed before its signature;
>
> (ii) any contrary interpretations in this Protocol;
>
> (iii) any contrary interpretation in a published explanation by one of the Contracting States that has been provided to the competent authority of the other Contracting State before the signature of the Convention;
>
> (iv) any contrary interpretation agreed by the competent authorities after signature of the Convention.
>
> The OECD Commentaries — as they may be revised from time to time — constitute a means of interpretation in the sense of the Vienna Convention of 23 May 1969 on the Law of Treaties."[9]

The presence of these explicit references to interpretation by reference to the OECD Commentaries, including subsequent Commentaries, coming on top of the decision in *Fowler*, displays the UK Government's clear commitment to interpretation having regard to the subsequent Commentaries. It is worth pausing for a moment and asking: why should this be, and what implications may it entail?

The UK has always been an active participant in the OECD work on double taxation conventions, and has frequently held the chairmanship of Working Party 1, which oversees the updating of the OECD Model. There is an element of loyalty, therefore, in supporting the approach of the Committee on Fiscal Affairs in regard to the later Commentaries. However, there seems also to be something of a geopolitical advantage. The UK officials know that they may be able to exert influence over the development of the Commentaries to a degree that they are not able

[9] UK/Austria Double Taxation Agreement, signed on 23 October 2018, entered into force on 1 March 2019, Protocol, para.7.a).

to exert similar influence, for example, with regard to the United Nations or other international fora. If the UK cannot get its way with regard to the Commentaries, it always has the option of a reservation on the terms of the Model or an observation on the change to the Commentary. In a world where the UK has diminishing influence, the writer can understand the desire of officials from the UK, participating in the work of the OECD, to ensure that the results of their efforts have a clear effect on the interpretation even of existing treaties.

However, there is a constitutional issue here. If the changes to the Commentaries go beyond merely clarifying what is already there in the Model (and if it is already there, perhaps it needs no clarification) and actually alter in some way the meaning of the text, then unelected officials, acting without explicit mandate, through agreement with other officials at OECD meetings, can alter the meaning of international agreements entered into by the UK. That is the potential risk that is taken on by permitting reference to be made to Commentaries subsequent to the conclusion of a tax treaty. It is clearly a risk that the French Supreme Administrative Court did not wish to take on.

One logical corollary to the UK Government's apparent attachment to subsequent Commentaries is that there should be more Parliamentary scrutiny. Up to the present, changes to the OECD Commentaries are not presented to Parliament, and are not debated. Perhaps that should change. The scrutiny given by Parliamentary committees to double taxation conventions is not particularly profound and is sometimes rather laughable. However, at least there is some scrutiny, and a minister may have to explain—aided by officials who presumably know the answer—why particular treaty provisions have been adopted. Going forward, if weight is to be attached to subsequent Commentaries, then perhaps the appropriate minister should appear before a Parliamentary committee at least every time that the OECD Commentaries are updated to explain the position taken by the UK and to provide answers to questions. The scrutiny may not be very profound, but it might focus the minds of the officials responsible for discussion at the OECD.

Philip Baker*

Constitutional law; Double taxation treaties; OECD; Parliamentary scrutiny; Treaty interpretation

* Senior Visiting Research Fellow, Institute for Advanced Legal Studies, London University; Visiting Professor, University of Oxford.

See A. Nikolakakis, P. Blessing, G. Maisto, J. Hattingh and J. Avery Jones, "Fowler v HMRC (Supreme Court): neither fish nor Fowler: tax treaty implications of domestic deeming rules" [2020] BTR 537.

Extracts from OECD materials are republished with permission of the OECD: permission conveyed through Copyright Clearance Center Inc.