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Review of *International Commercial Tax* by Peter Harris and David Oliver

Colby Mangels*

INTRODUCTION

Commercial transactions increasingly span multiple jurisdictions, responding to the needs of multinational corporations operating in the globalized environment of the post–Cold War economic reality. In response, tax laws both within and among leading commercial jurisdictions have added layers of complexity in recent decades, while also attempting to deal with highly specialized commercial structures and transactions. The result is the body of current international tax law that is renowned for its complexity and intricacy, often serving as the longest statute in many jurisdictions’ commercial regulatory structures.¹ While tax law is an attempt at pragmatic solutions to the contemporary system of economic incentives, taxation statutes often represent the political, historical, and economic interests of the jurisdictions in which they operate. This amalgam of factors adds a further layer of miscomprehension to the current regime, where bilateral tax treaties, multinational model agreements, and supranational judicial structures (e.g. the European Court of Justice, or ECJ) all shape critical principles of how internationally active corporations and individuals navigate their transactional decisions.

Because tax laws ultimately serve the real world interests of private enterprises and individuals, it is necessary for tax practitioners, students, and individuals engaged in transnational business to understand the framework in which these rules operate. Given that over 2,500 double tax treaties are currently in effect worldwide, international taxation issues are often complicated as much by the interplay of rules between a jurisdiction’s agreements with other countries as the rules active within its own borders.² These tax treaties attempt to prevent double taxation of individuals and businesses that operate in multiple jurisdictions, often by either exempting or crediting taxes paid in the country where the income is derived (i.e. the source country) to taxes that are nominally

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1. PETER HARRIS & DAVID OLIVER, *INTERNATIONAL COMMERCIAL TAX 1* (2010).
2. *Id.* at 17.

due in the entity's home jurisdictions (i.e. the residence country).³ The Organisation for Economic Co-operation and Development's (OECD) Model Convention on Income and Capital (the OECD Model Tax Convention), which has been updated multiple times since it was first published in 1963, has served as the underlying framework for the majority of the existing tax treaties among developed countries.⁴ However, despite this underlying Model Tax Convention, bilateral tax treaties are far from uniform, with jurisdictions noting significant divergences on critical issues such as payment characterization, asset transfer pricing, and depreciation schedules.⁵ Furthermore, the rigidity of these bilateral treaties is viewed as restricting progress on international taxation principles, considering that many countries have upwards of fifty different treaties.⁶ Many bilateral treaties were conceived at the turn of the twentieth century and are based on outdated scheduler systems. In addition, the ECJ adds complexity to the twenty-eight jurisdictions that are European Union member states, as it retains authority to rule on EU member states' compliance with the four fundamental freedoms of the EU.⁷

Peter Harris and David Oliver's book *International Commercial Tax* provides a framework for understanding the origins of existing complexities in tax law and how they interact in practice.⁸ While the OECD Model Tax Convention has historically provided the main foundation for international treaties, the law of the European Union is increasingly important for tackling cross-border tax problems within EU member state jurisdictions. EU law also stands as a template for how supranational solutions to international taxation issues may one day be implemented. Within these competing spheres of jurisprudence, Harris and Oliver's book provides comparisons of the OECD Model Tax Convention with EU law as a method of instructing the reader on a variety of complex yet realistic scenarios in international commercial income tax.

For Harris and Oliver, the inspiration for the book arose from their jointly instructed postgraduate course series at the University of Cambridge, which they held over the past decade. Peter Harris is a Reader at the Faculty of Law at the University of Cambridge and is the author of numerous books and publications on commercial taxation. David Oliver was, until his recent retirement, an international tax partner at the London office of PricewaterhouseCoopers. With their combined backgrounds from academia and the professional tax services sector, the authors bring a considerable depth of knowledge and experience, which aids in boiling down many of the complexities of international taxation regimes. The authors' mixed perspective provides a rich analysis of

3. *Id.* at 18.

4. *Id.* at 17–18.

5. *Id.* at 19.

6. *Id.* at 18.

7. *Id.* at 26–27.

8. *Id.* at 2.

contemporary international taxation issues while remaining accessible to both students of law and practitioners who have little background in fiscal matters.

I.
SUMMARY

Harris and Oliver offer a simplified framework for processing the innate complexity of international commercial income tax rules. The authors first provide an introduction to the fundamentals of income tax, permitting students and practitioners who have minimal taxation background to approach the materials. The authors then introduce a *base case*, developing a sample case scenario to demonstrate many of the issues faced in international taxation when at least two different tax systems interact.⁹ The authors continue to revert back to this simplified prism throughout the course of the book to demonstrate issues arising from taxation in the source state (i.e. where the rents are created) and in the residence state (i.e. where the party receiving the payments resides).

In identifying the basic features of international tax law, the authors describe four characteristics of payments that make up parts of administration for any international taxation issue: *allocation*, *quantification*, *timing*, and *characterization*.¹⁰ Tax *characterization* is subject to additional complexity due to a split between traditional *schedular systems*, a structure followed by a majority of countries, where taxation rates are calculated separately for different types of assets, and a *global system*, where income is theoretically calculated under a unified method.¹¹ Finally, an important characterization is the difference between *personal* taxation, generally adjusted according to personal circumstances of the taxpayer, versus *in rem* taxation, where the focus for calculation of the tax is on a particular tangible item.¹²

The purposes and interplays between domestic and international tax laws illustrate some of the issues faced when engaging in international transactions. *Domestic laws* of jurisdictions provide the background over which other sources of international tax laws are built, acting as the default laws applicable to a transaction.¹³ *Tax treaties* attempt to coordinate the unilateral, and often rigid, exercise of sovereignty found in domestic laws by bilaterally reducing threats to double taxation of cross-border commerce.¹⁴ Understanding the role tax treaties play is important given that currently over 2,500 double tax treaties are in effect worldwide. Tax treaties' bilateral nature has often slowed progress on international tax reform efforts. Many states have over one hundred bilateral treaties, each of which would have to be realigned if the international tax laws

9. *Id.* at 4.

10. *Id.* at 11–12.

11. *Id.*

12. *Id.* at 13.

13. *Id.* at 15.

14. *Id.* at 16.

were changed.¹⁵ Finally, tax treaties are important given that the OECD Model Tax Convention is followed by the majority of developed countries, adding power to its ability to alter the international landscape.¹⁶ This is in contrast to the UN Model Double Taxation Convention, which was proposed as a counterweight by developing countries and remains less influential.¹⁷ When jurisdictions attempt to support their positions in international taxation litigation efforts, they will often look to OECD commentaries to support their positions, as OECD commentaries are persuasive and given the most weight. Yet despite its relative importance, the authors make a point to note that the UN Model Double Taxation Convention is not itself a treaty, meaning that domestic courts are likely to emphasize the importance of those provisions within the OECD Model Tax Convention or commentaries which support the existing tax code of the court's own jurisdiction.¹⁸

A. Residence

After laying this groundwork, the authors discuss which country will be found to have preference in taxing a certain transaction or entity. To determine which jurisdiction's tax regime will apply to either the *personal* or *in rem* entity under taxation, the relevant tax administrations will first look to whether an appropriate economic connection to the jurisdiction exists to justify taxation. Residence, the authors explain, is essentially a question of domestic law, with tests typically for personal residence including family and social ties, income-producing activities, bank accounts, citizenship, domicile, and physical presence in the country. These factors are often then weighed together to determine the residency of an individual.¹⁹ Conversely, two main tests are used for determining residency for artificial persons (i.e. corporations). The first test is based on the place of incorporation, registration, or the primary seat of the corporation. An alternate test for artificial persons looks to the place of management or the principal office of the business. The authors note that this second test essentially asks where high-level managerial decisions are made; this question has arguably been rendered out of date by electronic communications and the abilities of corporations to establish "special purpose vehicles" (i.e.,

15. *Id.* at 17–18.

16. The Organisation for Economic Co-operation and Development (OECD), Model Tax Convention on Income and Capital, 1977, <http://www.oecd.org/tax/treaties/oecdmtcavailableproducts.htm> [hereinafter OECD Model Tax Convention].

17. Following the OECD Model Tax Convention's development throughout the 1960's and 1970's, an international consensus developed in an attempt to conclude more tax treaties both between developing countries, and between developed and developing countries. The result of this movement was the UN Model Double Tax Convention of 1980. *See* United Nations Model Double Taxation Convention Between Developed and Developing Countries, UN Sales No. E.80.XVI.3 (1980) [hereinafter UN Model Double Taxation Convention]; HARRIS & OLIVER, *supra* note 1, at 17.

18. HARRIS & OLIVER, *supra* note 1, at 37.

19. *Id.* at 58.

Wood v. Holden).²⁰ Special purpose vehicles are corporate legal entities often used during acquisition or merger transactions to limit a parent corporation's asset or bankruptcy liability. Finally, the authors also note the additional problem facing persons with dual residencies. Under the OECD Model Tax Convention's tiebreaker rules of Article 4(2) and (3), the Model Tax Convention attempts to provide a method for solving residency under the tax treaty in question.²¹ The Article 4(2) test for persons is based on a series of sequential steps (i.e. asking about the location of the individual's vital interest, habitual abode, nationality, or any mutual agreement of the tax authorities).²² The Article 4(3) test for artificial persons is based on the "place of effective management," which may differ among jurisdictions, but the authors note that in the UK this means the location of the managing, finance, and sales directors, a definition providing domestic tax authorities with wide discretion.²³

Under the existing tests for taxation, a person may simultaneously be resident of more than one country.²⁴ A dual residence status gives rise to the problem of double taxation. The authors note that although the OECD Model Tax Convention contains non-discrimination provisions, which are charged with mitigating instances of double taxation, the OECD Model Tax Convention's provisions are particularly narrow and often open to a variety of interpretations.²⁵ Additionally, the authors note the stark contrast between the OECD Model Tax Convention's anti-discrimination provisions and EU law's requirements under the four fundamental freedoms of the Treaty on the Functioning of the European Union (FEU Treaty).²⁶ The ECJ is likely to find that a member state has violated the FEU Treaty if there is any discriminatory behavior between dual residents who are EU citizens.²⁷ However the ECJ has not provided a "cut and dry" policy, as it has permitted tax measures that violate one of the four freedoms to still be upheld if the ECJ finds they are justified, as per the court's holding in *Marks & Spencer*.²⁸ This difference in the amount of

20. *Id.* at 61. Here, the authors note that the establishment of a special purpose vehicle is very common in international transactions. In this case, the court noted that when dealing with a special purpose vehicle, the acts of central control and management matter very little compared with non-special purpose vehicle transactions. *Wood v. Holden*, [2006] EWCA (Civ) ¶ 27.

21. OECD Model Tax Convention, *supra* note 16, at articles 4(2) and (3).

22. HARRIS & OLIVER, *supra* note 1, at 66.

23. *Id.* at 66–67.

24. *Id.* at 86.

25. *Id.* at 92.

26. The FEU defines the four fundamental freedoms as (1) the Free Movement of Goods; (2) Freedom of Movement for Workers; (3) the Right of Establishment and Freedom to Provide Services; and (4) the Free Movement of Capital. Treaty on the Functioning of the European Union articles 26(2) and 101(1), Oct. 26, 2012, 2012 O.J. (C 326); *see* HARRIS AND OLIVER, *supra* note 1, at 96.

27. HARRIS AND OLIVER, *supra* note 1, at 97.

28. *Id.* at 100–101. In *Marks & Spencer*, the ECJ held that discrimination might be justifiable based on the following factors: (1) symmetry, profits and losses must be treated similarly in the same tax system (regarding jurisdiction) to protect a balanced allocation of taxing rights; (2) the possibility

discrimination tolerated distinguishes EU law from that of traditional OECD Model Tax Convention treaties. However, the approach debated above is not the only means of taxing foreigners' income under the OECD Model Tax Convention. A further option for governments is to tax foreigners based on the activities arising within a certain jurisdiction. The items subject to taxation would only include income derived or incurred in connection with the income-earning activity in the jurisdiction.²⁹

The complexity of these overlapping jurisdictional layers becomes apparent with the author's discussion of source country taxation. The amount of taxation payable in the jurisdiction where expenses and income are derived (i.e. the source country) is determined by the type of income generated and the jurisdiction's designated treatment of that type of income. The authors begin by analyzing the OECD Model Tax Convention's scheduler approach, which is similarly represented throughout the majority of the bilateral tax treaty network. Despite the fact that many jurisdictions adopt scheduler approaches, the definitions of schedules within each jurisdiction are often imprecise and can vary substantially, thereby rendering cross-jurisdiction comparisons hazardous.³⁰

B. Defining Income

Given the imprecision surrounding the interpretations of the OECD Model Tax Convention in the international context, the authors focus on the OECD Model Tax Convention's Article 21, which provides the default or residual definition of income.³¹ In practice, many treaties do not include an article that defines this catch-all phrase for "other income" when it is not specifically covered in the treaty. Hence, if taxpayers are not careful to fit their income into pre-defined categories, their income is often deemed to fall outside the scope of the bilateral tax treaty used by the source state to determine the taxpayer's burden.³²

Article 6 of the OECD Model Tax Convention grants full taxing rights to the source state for income from immovable property situated therein.³³ Whether property is "immovable" and what counts as the "income therefrom" are

of losses being taken into account twice; (3) the risk of tax avoidance. Whether or not a single one of these factors can independently justify discrimination determines whether the restrictive legislation has the specific objective of preventing "conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, with a view to escaping the tax normally due on the profits generated by activities carried out on national territory." Case C-446/03, Marks & Spencer v. Halsey, 2005 E.C.R. I-10837 (citing Case C-196/04, Cadbury Schweppes, 2006 E.C.R. I-7995 ¶ 55).

29. HARRIS & OLIVER, *supra* note 1, at 71.

30. *Id.* at 119–20.

31. *Id.* at 121–22.

32. *Id.* at 123.

33. See OECD Model Tax Convention, *supra* note 16, at article 6.

therefore essential questions for the taxpayer.³⁴ The OECD Model Tax Convention primarily allows “immovable property” to be defined by the domestic states in question. This approach raises a number of issues given that definitions among many countries differ widely, or alternatively, “immovable property” may not even exist as a scheduler category.³⁵ Domestic jurisdictions often expand the scope of property under other schedules, resulting in “immovable property” being taxed at the source. In addition to requiring domestic tax codes to define “immovable property,” Article 6 of the OECD Model Tax Convention requires that there be income from the property before taxation can take place.³⁶ Whether this “income” from immovable property includes capital gains is likely to depend, per Article 3(2) of the OECD Model Tax Convention, on the applicable law of the domestic jurisdiction or on Article 13 of the OECD Model Tax Convention, which refers to gains from the “alienation” of immovable property.³⁷ Any income from immovable property can then typically be taxed on a gross basis if the domestic law does not provide a right to be taxed on a net basis and the resulting gross taxation does not violate the non-discrimination rules under Article 24(1) of the OECD Model Tax Convention.³⁸

Turning to the issue of taxing business profits, the authors note that source country taxation becomes quite controversial insofar as it deals with business subsidiaries.³⁹ Assuming that all the activities of the subsidiary are conducted in the source country, that jurisdiction has the exclusive right to tax the business profits of the subsidiary under Article 7(1) of the OECD Model Tax Convention.⁴⁰ However, where a holding company remains active in the ownership and management of the subsidiary, application of the Article 24(5) non-discrimination rule under the OECD Model Tax Convention becomes possible. Additionally, given that the source country only has exclusive rights over the “profits” of the enterprise (under Article 7(1)), a residence country of the holding company may dispute the taxation at the source, and a debate as to the definition of “profit” will ensue between the states and, perhaps, the taxpayer.⁴¹

Taxation of business profits is similar to taxation for a “permanent establishment” (PE), defined under Article 5 of the OECD Model Tax Convention, where the source and residence country share rights to taxation of

34. *Id.*

35. HARRIS & OLIVER, *supra* note 1, at 124.

36. *Id.* at 126 (with authors referring to Article 6 of the OECD Model Tax Convention).

37. *Id.* at 127 (with authors referring to Articles 3(2) and 13 of the OECD Model Tax Convention).

38. *Id.* at 128.

39. *Id.* at 129.

40. *Id.* at 134 (referencing Article 7(1) of the OECD Model Convention).

41. *Id.* (referencing Articles 7(1) and 24(5) of the OECD Model Convention).

the PE's profits.⁴² Per Article 5, a PE is "a fixed place of business through which the business of an enterprise is wholly or partly carried on."⁴³ This definition raises the question of what threshold must be met for a business to be "permanent." The authors note that the OECD commentaries are not necessarily helpful as precise measures, but rather act as broad guidelines.⁴⁴ Their adaptation to domestic law is often found in the jurisprudence of domestic courts.⁴⁵ Under Article 5, a PE can also be created through a "personal presence," which does not require a fixed place of business, but rather a fiduciary relationship.⁴⁶ This relationship often falls under the domain of agency law, where the PE is defined as an agent who acts for the principal within the source country.⁴⁷ This conceptual application again poses a number of definitional issues given that an agency relationship can be recognized on the basis of a variety of principles which differ among jurisdictions, not to mention between common law versus civil law systems.⁴⁸

Due to the complexity surrounding its definition, the PE concept acts as both a *de minimis* and a *substantive* limitation on taxing business profits. Once identified as a PE, the most difficult calculation is the intra-enterprise provision of services, where the question revolves around whether the type of activity is one which would, by its nature, normally be provided to an independent third party. The approach under EU law differs from the OECD Model Tax Convention, given that within the EU a PE can be defined as the exercise of a right of establishment under Article 49 of the FEU Treaty.⁴⁹ This differs from the OECD Model Tax Convention, which defines PE as a class based on the foreign ownership or control.⁵⁰ The result is an approach in the EU that stresses parity of tax treatment of PEs operating in multiple member states.

C. Qualifying Income

Although definitions of taxation structures are important, quantifying the price of transactions often determines how associated parties can undermine the domestic tax authorities. Because group subsidiaries may be subject to divergent tax rates, the multinational groups that engage in transfers among jurisdictions may have incentives to over- and under-report income in different jurisdictions

42. OECD Model Tax Convention, *supra* note 16, at article 5.

43. HARRIS & OLIVER, *supra* note 1, at 137.

44. *Id.* at 138.

45. *Id.* at 139–43 (citing *R v. Dudley* [2000] F.C.J. No. 230 (FCA); *Knights of Columbus v. The Queen* [2008] T.C.C. 307 (T.C.)).

46. *Id.* at 144.

47. *Id.* at 144–48 (referencing the distinction between the traditional corporate law definitions of an "agent" and the definition within article 5(5) OECD Model Tax Convention of an agency permanent establishment).

48. *Id.* at 147.

49. *Id.* at 176; *see* FEU Treaty, *supra* note 26, at article 49.

50. HARRIS & OLIVER, *supra* note 1, at 176–77; *see* OECD Model Tax Convention, *supra* note 16, at article 24(3) and article 24(5).

so as to reduce their tax bases.⁵¹ Articles 7(2) and 9(1) of the OECD Model Tax Convention deal with transfer pricing issues.⁵² The OECD Model Tax Convention treats subunits of an economic group separately, presuming that they act independently of each other. Article 9(1) authorizes adjustment by attributing additional profits directly to the disallowance of expenses.⁵³ Whether pricing is arm's length, such as those transactions that would take place between independent parties at an arm's length distance, is determined through five comparability factors: (1) a cost-plus reference to sales of similar products made between unrelated persons in similar circumstances; (2) the resale price method looking at the difference between reported costs and profits; (3) the cost-plus method which uses an average manufacturing cost to gauge appropriate profits. The final two factors are considered last resorts: (4) the transaction net margin method compares the reported profits of a company with similar companies' profits, and (5) the profit split method allocates the worldwide profits of a multinational among its members in proportion to their contribution.⁵⁴

The focus on quantification leads to a discussion on one of the hottest topics in international corporate taxation: transfer pricing issues. These issues arise when competing quantification methods, such as the independent enterprise⁵⁵ versus arm's length pricing, are relied on for calculating cross-border payments.⁵⁶ Intellectual property (IP) issues are particularly difficult to value because of their unique nature.⁵⁷ The OECD Model Tax Convention looks to past profits generated in similar instances to determine pricing for IP assets in particular. Within EU law, the fundamental freedoms have played a major role where the ECJ ruled that divergent or punitive capitalization requirements across member states are in violation of the freedom of establishment.⁵⁸ In an attempt to facilitate trans-European business, the EU has proposed its own guidelines through the Joint Transfer Pricing Forum, a committee of EU appointees studying transfer pricing tax issues in order to better advise the EU in its policy approach.⁵⁹

51. HARRIS & OLIVER, *supra* note 1, at 228–29.

52. *Id.* at 232; *see* OECD Model Tax Convention, *supra* note 16, at article 7(2) and article 9(1).

53. HARRIS & OLIVER, *supra* note 1, at 232; *see* OECD Model Tax Convention, *supra* note 16, at article 9(1).

54. HARRIS & OLIVER, *supra* note 1, at 236–39.

55. *See id.* at 235 (citing R. Vann, *Tax Treaties: The Secret Agent's Secrets*, BRITISH TAX REVIEW 345–82 (2006) (“This approach attempts to apply a functional analysis to identify the functions undertaken by various entities in the relevant corporate group in light of the assets used and risks assumed by each of them. The pricing of transactions is subsequently undertaken based on this analysis. . . .”).

56. *Id.* at 239–42.

57. *Id.*

58. *Id.* at 243; *see* Case C-324/00 Lankhorst-Hohorst GmbH v. Finanzamt Steinfurt, 2002 E.C.R. I-11779.

59. HARRIS & OLIVER, *supra* note 1, at 243–46.

D. Characterizing Income

Linked to quantification of transfer pricing are issues of characterization of assets, which focuses on the fungible nature of income types.⁶⁰ The OECD Model Tax Convention highlights the differences between dividends, interest, and royalties, and the authors note that the OECD Model Tax Convention's definition of "dividends" is outdated under article 10(3).⁶¹ Similarly, the concept of "royalties," which are defined under article 12(2) as "payment of any kind received as a consideration for use of or right to use any copyright," renders it difficult to tell what is being paid for when a royalty is characterized as a payment.⁶² While the UN Model Double Taxation Convention takes a similar approach to defining royalties, it includes more items than under the OECD Model Tax Convention's definition. In particular, the UN Model Double Taxation Convention's definition contains wording to define types of rent payable for the use of tangible property.⁶³

A major element within characterization issues deals with thin capitalization rules. "Thin" capitalization is characterized by a subsidiary which is excessively debt financed by its parent corporation, even though the subsidiary might just as easily finance itself through equity financing, but is instead motivated by the lower tax treatment of parent-corporation financing.⁶⁴ Harris and Oliver point out that this treatment results in tax base erosion in the source country, as the debt can be deducted while payment of dividends would generally not be deductible were the company financed through equity markets.⁶⁵ To counter this trend, domestic tax codes of individual countries often adopt a safe haven approach where, if a company's debt to equity exceeds a certain ratio, the interest on the excessive debt is not deductible. Other approaches to counter this problem of "thin" capitalization include denying deductions for interest to the extent that it exceeds a certain percentage of income net of financing costs, or allowing deductions on debt interest only to the extent that it is paid on debt that could be borrowed from an independent party.⁶⁶ While the OECD Model Tax Convention allows individual states to use safe haven or earning-stripping approaches as measured against the arm's length standard, the thin capitalization rules must apply in both a domestic and international context to avoid violating the Model Convention's Article 24(4) anti-discrimination provision.⁶⁷

60. *Id.* at 246.

61. *Id.* at 247.

62. *Id.* at 250.

63. *Id.*

64. *Id.* at 253.

65. *Id.*

66. *Id.*

67. *Id.* at 256; see OECD Model Tax Convention, *supra* note 16, at article 24(4).

E. Residence Country Taxation

The counterpart to problems faced in source country taxation is residence country taxation. Given that most countries impose taxes based on residence, problems exist for residents of one country who carry out business in another jurisdiction, since they could be subjected to double taxation. Domestic law often provides unilateral solutions to the double-taxation issue.⁶⁸ For instance, deduction methods may be used where foreign taxes may not qualify for more comprehensive relief. While exemption methods (which simply exclude the foreign income from consideration) seem straightforward, the authors note that they are often subject to strict requirements and qualifications.⁶⁹ The authors also observe that credit methods are complex methods of foreign tax relief and are often subject to limitations that can differ between countries.⁷⁰

Under the OECD Model Tax Convention, Article 23 allows for foreign tax relief through international tax treaties, differing from the domestic methods described above.⁷¹ Article 23A(1) requires residence countries to provide exemptions where the source country has a taxing right under a bilateral treaty. Harris and Oliver note that, realistically, the residence country is obliged to provide relief if the source state has interpreted the provision according to any bilateral treaty and residually to its own domestic law.⁷² Article 23A(2) also provides for a credit provision, subject to article 23B, which allows domestic law to limit foreign tax credits.⁷³ The authors point out that corporations face special problems under double taxation given the difficulties of allocating different levels of corporate tax rates among the branches of a multinational corporation that enjoys both foreign and domestic income.⁷⁴

F. Challenges of the Current System

Because bilateral tax treaties are in effect for most jurisdictions, the limitations of these treaties can have serious implications for determining international taxation. A key problem refers to mismatches between source and residence countries where key definitions such as the word “income” can differ vastly from treaty and international law contexts.⁷⁵ Recognition of certain artificial entities treated by one country as a tax subject, but not by the other (i.e. hybrid entities), also results in different taxation.⁷⁶ Distortions are also caused

68. HARRIS & OLIVER, *supra* note 1, at 265.

69. *Id.* at 267–69.

70. *Id.* at 269–70.

71. *Id.* at 275; see OECD Model Tax Convention, *supra* note 16, at article 23.

72. HARRIS & OLIVER, *supra* note 1, at 277.

73. *Id.* at 279; see OECD Model Tax Convention, *supra* note 16, at article 23A(2) and article 23B.

74. HARRIS & OLIVER, *supra* note 1, at 283.

75. *Id.* at 343.

76. *Id.* at 347.

by differences in income from employment versus independent services, with this distinction emphasizing certain biases to calculating applicable taxation rates which are based on individual transactions, as well as allocating expenses between domestic and foreign income.⁷⁷

Beyond bilateral issues, the authors discuss how the rigid nature of international tax treaties stands in the way of progress. Bilateral tax treaties typically deal with obvious tax barriers across countries. Such treaties therefore shape international dialogue, pointing countries to these issues as a means of reform. But the major limitation of tax treaties is related to what they do not cover. For instance, by placing an intermediary holding company in the midst of a transaction, companies can change the location of an income's source and the residence of the entity deriving the income.⁷⁸ The authors note that the goal in establishing an intermediary is often to reduce source country taxation as well as to obtain taxation relief in the residence country for expenses and any foreign taxes imposed.⁷⁹

The authors conclude the book by reiterating the structural problems underlining the existing international tax treaty network.⁸⁰ They contrast this to the EU, where the multilateral basis of the treaty provides uniformity and consistency. However, the authors note, EU law remains undeveloped, with jurisprudence at the ECJ level lacking since cases are brought on an ad hoc basis to the ECJ and the ECJ is ultimately a political institution.⁸¹ The authors propose that one way forward might be non-binding international standards that states could tailor to their own legal systems, such as those the OECD already operates for the purposes of information exchange and budgetary transparency.⁸² But ultimately, the authors stress that the point of the book is to show how the international tax framework can be analyzed in a coherent manner in spite of its complexities.

II.

ANALYSIS

Harris and Oliver succeed in sketching out an overview of both the relevant concepts and complexities in the interconnections of international tax law. Through a thoughtful introduction, the authors provide unaccustomed readers with a review of basic concepts in both general income taxation as well as the more complicated concepts which are directly relevant to international commercial taxation issues. The richness of the book is enhanced through its comparative angle: by contrasting the OECD Model Tax Convention, EU law,

77. *Id.* at 343.

78. *Id.* at 388, 410.

79. *Id.* at 388–89.

80. *Id.* at 467–68.

81. *Id.* at 468.

82. *Id.* at 469.

and strategically relevant domestic legal systems (e.g. the United Kingdom, United States, or Singapore), the authors demonstrate both the synergies and gaps existing in international tax. This comparative analysis efficiently demonstrates both the shortcomings of the outdated OECD Model Tax Convention and the often under-developed regime in the EU. For example, the authors' discussion of asset pricing transfers demonstrates that the OECD's approach toward taxation based on the aggregate value of similar products is quite inefficient when compared to EU approaches, which allow for shared taxation between the source and residence countries, even when the approaches are predicated on the four fundamental freedoms of the FEU.⁸³ In addition to the comparative nature of the work, the authors provide great depth to their analysis of individual countries through discussions of the historical development of relevant case law. Their citation to relevant judicial decisions demonstrates not only the methods used by authorities in deducing international tax principles from treaties (thereby providing a roadmap toward possible future developments in the field) but also the origins of how and why international taxation systems remain divergent.⁸⁴ Ultimately, the authors use their repeated demonstration of divergences in taxation methods to show how international taxation systems can coexist with fundamental differences while still giving hope for convergence in important areas.

While the topic of international taxation may set off immediate alarm bells of complexity, the authors have strived to make their book accessible to non-experts (including graduate-level students) while still providing significant added value to the analysis of professionals working in the field of international taxation. Through the author's *base case* scenario, readers are introduced to the subject of international taxation with an approachable series of examples relating to the ways that simple office lease agreements can pose significant international taxation issues. While relying on such a simplified example may seem lacking in substance, the authors use it as a jumping-off point for discussing some of the most complex issues in international taxation. Given this approach, the book works well as a self-study, or as a teaching manual, providing constant aid for orientation. This framework is then mixed with the authors' collective knowledge of the subject, allowing for an analysis rich in both practical advice and knowledge behind some of the most important decisions for international taxation. While this framework proves ultimately to be highly effective at conveying the necessary information, practitioners with experience in the field might find the repeated examples and guidance heavy-handed. The authors' apparent intention was to divide between a practitioner's manual and an academic piece, but it appears that the result favors more the

83. See *id.* at 227 (discussing quantification and characterization issues); see also FEU Treaty, *supra* note 26 (explaining the relevance of the EU internal market to international taxation issues).

84. The authors make use of cases from Australia, Canada, France, India, Italy, South Africa, the United Kingdom, and the United States. In addition, the authors cite a significant number of cases from the ECJ, considering the legal ramifications it poses across the entirety of EU member states. See HARRIS & OLIVER, *supra* note 1, at xiv–xxii.

latter than the former. Of course, at the same time, the book is very well cited and organized, allowing practitioners to easily reference relevant sections.

The authors' discussion on the existing challenges within the current tax regime nicely summarizes many of the key points referenced earlier in the book, but it could further benefit from a broadened comparative scope. The continued reference to the EU, the United States, and the United Kingdom provides a limited context in which to view the way these challenges are playing out. While a comprehensive list of countries relevant to international taxation issues is undoubtedly beyond the scope of the work, the authors' analysis could focus on approaches taken in developing countries, or even rival proposals to the OECD's international framework. The existing definition leaves the reader feeling biased toward the "North" within the "North-South divide," potentially missing out on important topics within the changing geopolitical scene of international taxation.

In addition, the book could benefit from a further discussion of issues surrounding tax evasion and offshore jurisdictions. The OECD's Centre for Tax Policy and Administration has been a driving force in pushing countries to harmonize their information-sharing agreements on taxation issues. This in turn has forced countries with previously strict banking secrecy rules to embrace information-sharing agreements on non-resident account holders.⁸⁵ A description by the authors about how these developments are shaping taxation reform efforts on the international scene could provide more depth to their work.

While the authors' analysis of international taxation regimes is sound, some readers may have problems with the scope of the work. Given that the book likely recommends itself as a tool for instructors rather than practitioners, some may find it lacking in its discussion of proper policy directions in the future. In this sense, the book is perhaps best thought of as a self-contained manual, more geared toward large university courses attempting to explain the functioning of international tax law than to smaller seminars interested in the policy-driving and policy-solving aspects of international and comparative tax law. Yet striking a balance between the two is arguably impossible within a work of this size and subject.

85. A prime example is Luxembourg's 2013 agreement to begin sharing information with the European Union on accounts held by non-residents in its jurisdiction. See Nanette Byrnes, *Essential Reading, Luxembourg Backs Info Exchange in Fight Against Tax Evasion, and More*, THOMSON REUTERS (Apr. 10, 2013), available at <http://blogs.reuters.com/taxbreak/2013/04/10/essential-reading-luxembourg-backs-info-exchange-in-fight-against-tax-evasion-and-more/>.