6. Elimination of double taxation – Administrative Cooperation

13 November 2024

1. Elimination of double taxation - Article 23 A-B

- AIM of DTCs → to eliminate international JURIDICAL Double Taxation
- The **ONLY CASE** of international double ECONOMIC taxation that DTCs deal with → Article 9 (2) – Associated enterprises
- **Article 23 creates and obligation for the STATE OF RESIDENCE to eliminate double taxation**
- **Tax jurisdiction** (exclusive or concurrent)
  - In our State of Residence: we have full tax liability
  - In the Source State: we have **Limited** tax liability; only specific items of income are taxable there

1. Elimination of double taxation - Article 23 A-B

- **DTCs contain DISTRIBUTIVE rules → an agreed Division** of taxing rights between the two contracting states
  - **Where an Exclusive** right to tax is provided = we see the term "shall be taxable only" → no double taxation will arise
    - Usually this is reserved for the state of residence; however, in 1 cases in the Model this is reserved for the SOURCE STATE → See 19§§1a &2a.
  - **Where a Concurring** right to tax is provided = we see the term "may be taxed" → double taxation will arise; this double taxation will be relieved through the mechanism of Article 23

1. Elimination of double taxation - Article 23 A-B

- **Exemption method v. Credit method** – choice of the State
  - Exemption → look at the INCOME
  - Credit → look at the TAX
- **Exemption**
  - The State of Residence DOES NOT TAX the income, that ACCORDING TO THE TREATY, may be taxed in the other contracting state, thus granting
    - A' variation: FULL EXEMPTION
    - B' variation: EXEMPTION WITH PROGRESSION
- **Credit**
  - The State of Residence taxes the worldwide income, including the income that, ACCORDING TO THE TREATY, may be taxed in the other contracting state and grants:
    - A' variation: a FULL CREDIT
    - B' variation: **an ORDINARY CREDIT**
- **"Exemption" countries, "Credit" countries**
- **Greece is a "credit" country**

1. Elimination of double taxation - Article 23 A-B Examples

➢ Common Facts :

- **Worldwide income**: 100.000
  - residence: 80.000
  - source: 20.000
- **Income tax rate in R state**
  - For income of 100.000: 35%
  - For income of 80.000: 30%
- **Income tax rate in S state**
  - Case (i): **20%**
  - Case (ii): **40%**
- **Tax in SOURCE country** (on 20.000)
  - Case (i): 4.000
  - Case (ii): 8.000

1. Elimination of double taxation - Article 23 A-B «Exemption»

- Examples

a) Full exemption

State R imposes tax on 80,000 at the rate of tax applicable to 80,000, *i.e.* at 30 per cent.

	Case (*i*)	Case (*ii*)
Tax in State R, 30% of 80,000	24,000	24,000
Plus tax in State S	4,000	8,000
Total taxes	28,000	32,000
Relief has been given by State R in the amount of	11,000	11,000

b) Exemption with progression

State R imposes tax on 80,000 at the rate of tax applicable to total income wherever it arises (100,000), *i.e.* at 35 per cent.

	Case (*i*)	Case (*ii*)
Tax in State R, 35% of 80,000	28,000	28,000
Plus tax in State S	4,000	8,000
Total taxes	32,000	36,000
Relief has been given by State R in the amount of	7,000	7,000

1. Elimination of double taxation - Article 23 A-B «Credit»

- Examples

a) Full credit

State R computes tax on total income of 100,000 at the rate of 35 per cent and allows the deduction of the tax due in State S on the income from S.

	Case (*i*)	Case (*ii*)
Tax in State R, 35% of 100,000	35,000	35,000
less tax in State S	- 4,000	- 8,000
Tax due	31,000	27,000
Total taxes	35,000	35,000
Relief has been given by State R in the amount of	4,000	8,000

b) Ordinary credit

State R computes tax on total income of 100,000 at the rate of 35 per cent and allows the deduction of the tax due in State S on the income from S, but in no case it allows more than the portion of tax in State R attributable to the income from S (maximum deduction). The maximum deduction would be 35 per cent of 20,000 = 7,000.

	Case (*i*)	Case (*ii*)
Tax in State R, 35% of 100,000	35,000	35,000
less tax in State S	- 4,000	
less maximum tax		- 7,000
Tax due	31,000	28,000
Total taxes	35,000	36,000
Relief has been given by State R in the amount of	4,000	7,000

1. Elimination of double taxation - Article 23 A-B

Table 23-2 Amount of tax given up by the state of residence

	If tax in State S is	
	4,000 (case *(i)*)	8,000 (case *(ii)*)
No convention	0	0
Full exemption (20*a*)[1]	11,000	11,000
Exemption with progression (20*b*)	7,000	7,000
Full credit (23*a*)	4,000	8,000
Ordinary credit (23*b*)	4,000	7,000

1. Numbers in brackets refer to paragraphs in this Commentary.

- Effect on budget

Table 23-1 Total amount of tax in the different cases illustrated above

A. All income arising in State R	Total tax = 35,000	
B. Income arising in two States, *viz.* 80,000 in State R and 20,000 in State S	Total tax if tax in State S is	
	4,000 (case *(i)*)	8,000 (case *(ii)*)
No convention (19)[1]	39,000	43,000
Full exemption (20*a*)	28,000	32,000
Exemption with progression (20*b*)	32,000	36,000
Full credit (23*a*)	35,000	35,000
Ordinary credit (23*b*)	35,000	36,000

1. Numbers in brackets refer to paragraphs in this Commentary.

1. Elimination of double taxation - Article 23 A-B

- **Exemption method– Aricle 23A**
  - Foreign losses – not an issue
  - ALWAYS apply ordinary credit for dividends and interest →§2
  - Progressive rates in the sate of residence → §3
  - A provision to deal with un-intended double non-taxation → §4

- **Credit method– Article 23B**
  - For the calculation and application of the credit → domestic legislation applies
  - **"Cap"** → Article 23B § 1
  - What about foreign losses?
  - **«Tax sparing»** clauses (1998 OECD Report)
  - Η χώρα κατοικίας λαμβάνει υπόψη της και το εισόδημα που απαλλάσσεται στη χώρα κατοικίας προκειμένου να υπολογίσει τον οφειλόμενο φόρο → §2

1. Elimination of double taxation - Article 23 A-B

- **How the credit method applies** → see **ΣτΕ 652-653/2020** on the relationship between domestic provisions on the application of the credit method and DTCs provisions
- **In case there is no DTC** → different rules apply → see ΣτΕ 1527-1528/2018 (7μ)
- See E. 2089/2021

2. Administrative Cooperation

Mutual **A**greement **P**rocedure – MAP (Art. 25)

Exchange **o**f **I**nformation - EoI (Art. 26)

Assistance in the collection of taxes (Art. 27)

2.1Article 25 OECD MTC
Mutual Agreement Procedure - MAP

2.1. MAP Article 25(1)

1. Where **a person** considers that the **actions** of **one or both** of the Contracting States result or will result for him in **taxation not in accordance** with the provisions of this **Convention**, he may, **irrespective of the remedies provided by the domestic law of those States**, present his case *to the **competent authority** of **either*** Contracting State*. The case must be presented within **three years** from the **first notification** of the action resulting in taxation not in accordance with the provisions of the Convention.

***2014: "...to the competent authority of the Contracting State of which he is a resident or, if his case comes under paragraph 1 of Article 24, to that of the Contracting State of which he is a national".**

2.1. MAP Article 25(1)

- Φορολογία που δεν είναι σύμφωνη με τη ΣΑΔΦ
  - Διπλή νομική φορολογία
  - Διπλή οικονομική φορολογία άρθρου 9
  - ΚΆΘΕ άλλη περίπτωση, ακόμα και αν ΔΕΝ υφίσταται ή δεν καταλήγει σε διπλή φορολογία
- Ανεξάρτητα από τα μέσα που προβλέπονται στο εσωτερικό δίκαιο: δικαστικά και διοικητικά
- Αρμόδια αρχή
- Προθεσμία: τρία έτη από τη γνώση («first notification»)

2.1. MAP Article 25(2)

2. The competent authority **shall endeavour**, if the objection appears to it to be **justified** and if it is **not itself** able to arrive at a satisfactory solution, to resolve the case by **mutual agreement** with the competent authority of the other Contracting State, with a view to the avoidance of taxation which is not in accordance with the Convention. Any agreement reached shall be implemented **notwithstanding any time limits in the domestic law** of the Contracting States.

2.1. MAP Article 25(2)

- “**θα προσπαθήσουν**” (“shall endeavour”): η υποχρέωση που αναλαμβάνουν τα μέρη είναι υποχρέωση για συνεργασία, όχι υποχρέωση επίλυσης
- Δικαιολογημένο παράπονο → όταν ο φορολογούμενος υφίσταται φορολογία η οποία δεν είναι σύμφωνη με τη ΣΑΔΦ
- Δυο φάσεις: α) προσπάθεια εξεύρεσης λύσης μονομερώς και β) διαδικασία επικοινωνίας με την άλλη αρμόδια αρχή (διμερές επίπεδο)
- Ανεξάρτητα από τις προθεσμίες που προβλέπονται στο εσωτερικό δίκαιο των συμβαλλομένων κρατών

2.1. MAP Article 25(3)

3. The competent authorities of the Contracting States **shall endeavour** to resolve by mutual agreement any difficulties or doubts arising as to **the interpretation or application** of the Convention. They may also consult together for the elimination of double taxation in **cases not provided for in the Convention**.

2.1. MAP Article 25(3)

- Δυο τύποι διαδικασίας αμοιβαίου διακανονισμού
  - Ατομική υπόθεση (**Individual MAP**): κινείται από τον φορολογούμενο
  - Γενική υπόθεση (**general or interpretative or consultative MAP**): κινείται με πρωτοβουλία μιας εκ των δυο αρμοδίων αρχών
- Η διαδικασία της §3 μπορεί να αφορά και περιπτώσεις που δεν καλύπτονται από τη ΣΑΔΦ (π.χ. κάτοικος τρίτης χώρας ο οποίος έχει ΜΕ σε κάθε ένα από τα δυο συμβαλλόμενα κράτη)
- Άρθρο 25(3) → Νομική βάση για διμερείς APAs

2.1. MAP Article 25(4)

4. The competent authorities of the Contracting States may **communicate** with each other **directly**, including through a **joint commission** consisting of themselves or their representatives, for the purpose of reaching an agreement in the sense of the preceding paragraphs.

2.1. MAP Article 25(5)

5. Where,

a) under paragraph 1, a person **has presented a case** to the competent authority of a Contracting State on the basis that the actions of one or both of the Contracting States have resulted for that person in taxation not in accordance with the provisions of this Convention, and

b) the competent authorities are **unable to reach an agreement** to resolve that case pursuant to paragraph 2 within **two years** from the *date when all the information required by the competent authorities in order to address the case has been* ***provided to both*** *competent authorities**, any unresolved issues arising from the case shall be submitted to **arbitration** if the person so **requests, *in writing***.

***2014: "…presentation of the case to the competent authority of the other Contracting State".**

2.1. MAP Article 25(5)

- These unresolved issues **shall not**, however, be submitted to arbitration if a **decision** on these issues has **already been rendered by a court or administrative tribunal of either State**.
- **Unless** a person directly affected by the case does not accept the mutual agreement that implements the arbitration decision, that **decision** shall be **binding on both Contracting States** and shall be **implemented** notwithstanding any time limits **in the domestic laws** of these States. The competent authorities of the Contracting States shall by mutual agreement settle the **mode of application** of this paragraph.

Annex to Article 25 "Sample Mutual Agreement on Arbitration"

2.1. MAP - Enhancing effectiveness

- Διαδικασία μεταξύ φορολογικών αρχών: απαιτεί τη συνεργασία τους, ο φορολογούμενος δεν συμμετέχει (περιορισμένη συμμετοχή)
- Εμπόδια από την εσωτερική νομοθεσία (π.χ. Ιταλία)
- Χρονοβόρα χωρίς εγγύηση αποτελέσματος
- **BEPS Action 14**: επιμέρους βελτιώσεις με σκοπό την ενίσχυση της αποτελεσματικότητας και πρόβλεψη για υποχρεωτική δεσμευτική διαδικασία «διαιτησίας»
- **Στην ΕΕ:** Directive on Tax Dispute Resolution Mechanisms in the European Union (2017/1852) και EU Arbitration Convention (90/436/EC)

2.2. Article 26 OECD MTC Exchange of Information - EoI

2.2. Exchange of Information – Article 26(1)

1. The **competent authorities** of the Contracting States shall exchange such information as is **foreseeably relevant** for carrying out the provisions of this Convention or to the **administration or enforcement of the domestic laws** concerning **taxes of every kind and description** imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to the Convention. The exchange of information is **not restricted by Articles 1 and 2.**

2.2. Exchange of Information – Article 26(1)

- Συνεργασία φορολογικών αρχών
- Αλλαγές το 2005 → σκοπός των τροποποιήσεων δεν ήταν να αλλάξει η ουσία της διάταξης αλλά να διευκρινισθούν ζητήματα και να αρθούν αμφιβολίες ως προς την ορθή ερμηνεία (→συνεπώς, με βάση την δυναμική ερμηνεία οι τροποποιήσεις αυτές εφαρμόζονται και σε προγενέστερες ΣΑΔΦ).
- Περαιτέρω αλλαγές το 2012
- Όμοιες ρυθμίσεις: *"Model Agreement on exchange of information on tax matters" developed by the OECD Global Forum Working Group on Effective Exchange of Information and the OECD report "Improving Access to Bank Information for tax purposes"*
- Κανόνας: «εύλογη συνάφεια» (**"foreseeable relevance" -** no "fishing expeditions")

2.2. Exchange of Information – Article 26(1)

- **Παραδείγματα: Εφαρμογή της ΣΑΔΦ**
  - Για την εφαρμογή του Άρθρου 12: μπορεί να ζητηθούν (ή να σταλούν) πληροφορίες σχετικά με το ύψος των δικαιωμάτων που καταβλήθηκαν στον πραγματικό δικαιούχο ή σχετικά με το αν ο λήπτης των δικαιωμάτων είναι ο πραγματικός δικαιούχος
  - Για την εφαρμογή των άρθρων 7, 9 και 23Α-Β: μπορεί να ζητηθούν ή να σταλούν πληροφορίες σχετικές με την ορθή απόδοση κερδών στη μόνιμη εγκατάσταση ή σχετικά με τον προσδιορισμό των κερδών μεταξύ συνδεδεμένων επιχειρήσεων
  - Για την εφαρμογή της Διαδικασίας Αμοιβαίου Διακανονισμού του Άρθρου 25
  - Για την εφαρμογή του άρθρου 15 (εισόδημα από μισθωτή εργασία)

- **Παραδείγματα: Εφαρμογή εσωτερικής νομοθεσίας**
  - Πληροφορίες σχετική με την τιμή πώλησης
  - Επιβεβαίωση του κόστους υπηρεσιών για την επαλήθευση του επιστρεπτέου ΦΠΑ εισροών
  - Πληροφορίες σχετικά με αδήλωτους λογαριασμούς στο εξωτερικό η πιστωτικές κάρτες αλλοδαπής

2.2. Exchange of Information – Article 26(1)

- **Τρεις τρόποι** ανταλλαγής πληροφοριών:
  - On request (κατόπιν αιτήματος)
  - Automatically (αυτόματα)
  - Spontaneously (αυθόρμητα)

✓ They can be **combined**

✓ They can be **supplemented** with other techniques

Other techniques*:

1. Simultaneous examinations
2. Tax examination abroad
3. Industry-wide exchange of info

*As described in "*Tax information exchange between OECD Member Countries: A Survey of Current Practices*", OECD, 1994.

2.2. Exchange of Information – Article 26(2) **Confidentiality**

2. Any information received under paragraph 1 by a Contracting State shall be treated as secret in the same manner as information obtained under the domestic laws of that State and shall be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, the determination of appeals in relation to the taxes referred to in paragraph 1, or the oversight of the above… Such persons or authorities shall use the information only for such purposes. They may disclose the information in public court proceedings or in judicial decisions. Notwithstanding the foregoing, information received by a Contracting State may be used for other purposes when such information may be used for such other purposes under the laws of both States **and** the competent authority of the supplying State authorizes such use.

2.2. 2.2. Exchange of Information – Article 26(3) Limitations

3. 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 (*ordre public*)

2.2. 2.2. Exchange of Information – Article 26(4) Obligations

4. 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.

2.2. 2.2. Exchange of Information – Article 26(5) Obligation to exchange

5. In **no case** shall the provisions of paragraph 3 be construed to permit a Contracting State to decline to supply information solely because the information is held by a bank, other financial institution, nominee or person acting in an agency or a fiduciary capacity **or** because it relates to ownership interests in a person.

2.2. Exchange of Information – Case Law

1. **Chatfield & Co Ltd v Commissioner of Inland Revenue (2016)**

In 2014, the Commissioner of Inland Revenue (New Zealand) received a request from the Korean National Tax Service (NTS) for information relating to the accounting firm **Chatfield & Co Ltd**, who acted as tax agent in respect of 15 NZ subsidiaries of a Korean multinational.

The request was made under the DTC between New Zealand and Korea.

Chatfield & Co Ltd v Commissioner of Inland Revenue (2016)

The NZ tax authority requested relevant tax information from Chatfield, who resisted providing tax information and commenced proceedings for the judicial review of the notice for the provision for information. Chatfield asked for disclosure of communications exchanged between the two tax authorities. The Commissioner for Inland Revenue (NZ) refused to supply the documents exchanged, on the basis that they were not relevant to the issues in the proceedings and, in any event, related to matters of state (in terms of section 70 of the Evidence Act 2006).

Chatfield & Co Ltd v Commissioner of Inland Revenue (2016) – cont.

An interesting balancing act was undertaken by the NZ High Court between **the interests of public disclosure** (and fairness to taxpayers) on the one hand and the interests in the withholding of information (**secrecy and international confidentiality obligations**) on the other.

The Commissioner's refusal to supply the information to the taxpayer was rejected as being acceptable behaviour by the Court

Chatfield & Co Ltd v Commissioner of Inland Revenue (2016) – cont.

Her Honour, **Ellis J**, did not order that the information be immediately supplied to the taxpayer, however; rather, she set in train a course of action which would involve a two-stage process.

The first stage of that process involved ascertaining whether the Korean NTS had an objection to the disclosure of the information (i.e. would they refuse consent to it being passed to the taxpayer?).

The second stage, which would only occur in the event of such an objection and refusal, involved a further referral of the matter back to the High Court in order to **balance the interests of public disclosure against the benefits of confidentiality and public withholding.**

Chatfield & Co Ltd v Commissioner of Inland Revenue (2016) – cont.

OECD Commentary on art. 26 explicitly states that communications between revenue authorities can be disclosed to a taxpayer unless the State requesting the information mandates otherwise.

The Court requested that the Commissioner make an enquiry to Korea as to whether it consented to the disclosure.

Korea indicated that it claimed confidentiality in the information and opposed its release to Chatfield.

Ultimately, the Court ruled that the information was confidential and should not be disclosed.

AX and another v Federal Tax Administration and another – Swiss Federal Supreme Court (2015)

- Mr and Mrs X lived in Paris but in 2010 moved to Geneva. In 2013, the French tax authorities requested information from the Swiss tax authorities relating to the bank accounts maintained by the Xs and transactions through those accounts.
- The French authorities told the Swiss tax authorities that it was suspected that the Xs were still domiciled in France, were living there and carrying on their main professional activities there.
- The Swiss tax administration proposed to comply with the request from the French tax administration for bank information relating to two individuals what had been residents of France but had become resident in Switzerland.

AX and another v Federal Tax Administration and another – Swiss Federal Supreme Court (2015)

- The Xs had failed to reveal the accounts in question to the French tax authorities despite an obligation to do so. The Swiss tax authorities requested the information from the bank concerned, which duly provided it.
- The Swiss authorities gave the Xs the opportunity to make representations and then passed the information to the French authorities.
- The Xs challenged the decision to provide the information to the French authorities, arguing that the request failed to show:

- that the information requested was likely to be relevant as the taxpayers were Swiss residents;
- that the Swiss authorities were obliged carefully to examine the request and determine the question of relevance, and
- that Swiss domestic banking secrecy law prevented the Swiss authorities from transmitting the information

AX and another v Federal Tax Administration and another – Swiss Federal Supreme Court (2015)

- The tax authorities ruled that the information should be provided and the taxpayers appealed to the Administrative Court, which ruled largely in their favour.
- The Swiss tax authorities appealed to the Federal Supreme Court which reversed that decision and permitted the exchange of information.
- The **assessment of the likely relevance** of the information requested was in the first place up to the **requesting state**. The requesting state was required only to supply information **sufficient to show the likely** relevance of its request.
- The **requested State could not refuse to send information** unless it appeared **certain** that it was not relevant to the requesting state or appeared to be a **pretext for an indefinite search for evidence**.

AX and another v Federal Tax Administration and another – Swiss Federal Supreme Court (2015)

- A request for assistance by its very nature involved obscure matters that the information requested from the requested State was to clarify. Therefore, to ask the requesting State to submit a request without any discrepancies or contradictions **would be to disregard the meaning and the intention of the administrative assistance.**
- The Swiss Tax Authority had rightly granted administrative assistance to France on the subject of the Xs even though the latter were subject to unlimited tax liability in Switzerland.

AX and another v Federal Tax Administration and another – Swiss Federal Supreme Court (2015)

- The request fulfilled all the formal conditions imposed by Art. 28 of the Franco-Swiss DTA and by Ch XI of the Additional Protocol, and in particular the requirement of likely relevance.
- Switzerland could not refuse to communicate the information by reason of Swiss banking secrecy. The provision in art 28(5) of the Franco-Swiss double taxation agreement that domestic law could not be used to prevent the transmission of information was self-executing and directly applicable in domestic law.
- The content of the rule of Art. 28(5) was clear and provided a basis for decision and a definition of rights and obligations. The requested State had to be able to obtain and send the information even if it was not available under its own domestic law or administrative practice.

2.3 Article 27 OECD MTC
Assistance in the Collection of Taxes

Article 27(1) – The principle

1. The Contracting States shall lend assistance to each other in the collection of revenue claims. This assistance is not restricted by Articles 1 and 2. The competent authorities of the Contracting States may by mutual agreement settle the mode of application of this Article.

Article 27(2) – definition of “revenue claim”

2. The term **“revenue claim”** as used in this Article means an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities, insofar as the taxation thereunder is not contrary to this Convention or any other instrument to which the Contracting States are parties, as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

Article 27(3) – Conditions

3. When a revenue claim of a Contracting State is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of collection by the competent authority of the other Contracting State. That revenue claim shall be collected by that other State in accordance with the provisions of its laws applicable to the enforcement and collection of its own taxes as if the revenue claim were a revenue claim of that other State.

Article 27(4) – Measures of conservancy

4. When a revenue claim of a Contracting State is a claim in respect of which that State may, under its law, take **measures of conservancy with a view to ensure its collection**, that revenue claim shall, at the request of the competent authority of that State, be accepted for purposes of taking measures of conservancy by the competent authority of the other Contracting State. That other State shall take measures of conservancy in respect of that revenue claim in accordance with the provisions of its laws as if the revenue claim were a revenue claim of that other State even if, at the time when such measures are applied, the revenue claim is not enforceable in the first mentioned State or is owed by a person who has a right to prevent its collection.

Article 27(5) – Priority

5. Notwithstanding the provisions of paragraphs 3 and 4, a revenue claim accepted by a Contracting State for purposes of paragraph 3 or 4 shall not, in that State, be subject to the time limits or accorded any priority applicable to a revenue claim under the laws of that State by reason of its nature as such. In addition, a revenue claim accepted by a Contracting State for the purposes of paragraph 3 or 4 shall not, in that State, have any priority applicable to that revenue claim under the laws of the other Contracting State.

Article 27(6) – Challenge of a revenue claim

6. Proceedings with respect to the existence, validity or the amount of a revenue claim of a Contracting State shall not be brought before the courts or administrative bodies of the other Contracting State.

Article 27(7) – Suspension or withdrawal of the request

7. Where, at any time after a request has been made by a Contracting State under paragraph 3 or 4 and before the other Contracting State has collected and remitted the relevant revenue claim to the first-mentioned State, the relevant revenue claim ceases to be

a) in the case of a request under paragraph 3, a revenue claim of the first mentioned State that is enforceable under the laws of that State and is owed by a person who, at that time, cannot, under the laws of that State, prevent its collection, or

b) in the case of a request under paragraph 4, a revenue claim of the first mentioned State in respect of which that State may, under its laws, take measures of conservancy with a view to ensure its collection the competent authority of the first-mentioned State shall **promptly notify** the competent authority of the other State of that fact and, at the option of the other State, the first-mentioned State shall either **suspend or withdraw its request**.

Art. 27(8)

8. In no case shall the provisions of this Article 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 carry out measures which would be contrary to public policy (ordre public);
c) to provide assistance if the other Contracting State has not pursued all reasonable measures of collection or conservancy, as the case may be, available under its laws or administrative practice;
d) to provide assistance in those cases where the administrative burden for that State is clearly disproportionate to the benefit to be derived by the other Contracting State.

Assistance in the collection of taxes- Case law

Krok v Commissioner for the South African Revenue Services (2015)

The taxpayer was resident in South Africa until he emigrated to Australia in 2002 where he remained for six years before deciding to move to the United Kingdom in 2008.

Upon his emigration to Australia, Mr. Krok undertook a series of transactions to optimize his tax situation in South Africa after the move and to deal with South Africa's 'exchange of control rules' which tend to freeze assets of South African residents permanently leaving South Africa. Income derived from the assets may be remitted abroad to an unlimited extent, though.

Krok v Commissioner for the South African Revenue Services (2015)

In January 2012 the Australian Tax Office (ATO) asked for assistance from the South African Revenue Service (SARS) in the collection of taxes in an amount exceeding AS$25m that arose in the period of the taxpayer's residence in Australia from 2002 to 2008. The Australia-South Africa double tax treaty had been concluded in 1999, without a provision for assistance in the collection of taxes. On 31 March 2008 a protocol was signed inserting a new Art 25A providing for cross-border assistance, which entered into force in November 2008.

Krok v Commissioner for the South African Revenue Services (2015) – cont.

The taxpayer argued that the 2008 Protocol was not retroactive in effect and could not apply to taxes that arose in the period from 2002 to 2008 to which the common law revenue rule applied. On appeal it was held that the application of Art 25A to taxes arising before the double tax treaty came into force was not prevented by the revenue rule. The revenue rule could be abrogated by convention or treaty and had no relevance in the determination of the meaning and scope of the protocol to the treaty. Notably the Court held that the wording of Art 2 said nothing about time limitations, and the taxes to which Arts 25 and 25A of the treaty applied were not limited by time.

Krok v Commissioner for the South African Revenue Services (2015) – cont.

The Court observed that Mr. Krok was wrong to attribute legal expectations to the **'revenue rule' because it does not exist for the protection of taxpayers.** The rule has two likely sources. The first was **a state's autonomy**, and the second had to do with **a court's powers**, which affects the relations between foreign states, and these were not concerned with the rights of taxpayers. The Court reiterated the UK House of Lords decision in *Government of India v. Taylor (1955) on this point.*