What does the decision in *Russell*'s case mean for the argument that the CFC provisions override Australia's double tax agreements?

Russell's case dealt with the "personal services income" anti-avoidance provisions of the 1997 Act, which attributed the income of a non-resident company to the Australian resident individual who performed the work on behalf of the company.

The "controlled foreign company" provisions of the 1936 Act attribute certain income of a controlled foreign company to its Australian resident controllers.

Until at least 1997 the argument that a DTA might prevent either form of attribution, as Australia would be taxing the "business profits" of a non-resident company which did not have a "permanent establishment" in Australia, contrary to the "business profits" article of the relevant treaty, was a live argument. The arguments in relation to CFCs were set out in detail in a paper by the author entitled "Attempted CFC override of Double Taxation Treaties" (29 September 1996). See : http://robertgordontax.com/documents/articles/CFC Treaty Override.pdf

Curiously, the decisions in *Russell*'s case do not refer to the English Court of Appeal decision in *Bricom Holdings v IRC* [1997] EWCA Civ 2193, which dealt a serious blow to the argument in the context of the CFC provisions, and would have been unhelpful to Mr Russell in the PSI context.

However, the ATO Decision Impact Statement (issued 2 July 2012) confines their comments on *Russell*'s case to the PSI context, so the significance of the case in the wider CFC context would not be apparent to the casual reader, and the ATO comments that it is "not expected a factual scenario of like kind will often arise" downplay the significance of the case (for the CFC context).

After the issue of the DIS, the Canadian Federal Court of Appeal in *The Queen v Sommerer* 2012 FCA 207, upheld the decision of the Tax Court of Canada 2011 TCC 212, that the Canada – Austria DTA prevented the application of s75(2), the Canadian equivalent of s102 ITAA 1936 (revocable trust). Unless the decision is reversed on any appeal to the Supreme Court of Canada, the decision in *Russell* in the author's view, cannot be reconciled with *Sommerer*.

DIS Précis

Outlines the ATO's response to this case that concerns, first, whether an overseas registered company is a 'personal services entity' and if payments to it are the taxpayer's assessable income. Secondly, whether a partnership carried on enterprises and is entitled to input tax credits.

Brief Summary of Facts

Income Tax - Individual taxpayer

1. The taxpayer applied for a position as an office manager with an Australian company.

2. A contract for the taxpayer's full time services was entered into between the Australian company and a New Zealand company, whose sole shareholder was the taxpayer's wife.

3. The Australian company made all payments for the taxpayer's services (less an amount for GST) to the New Zealand company.

4. The taxpayer claims not to have received salary or wages from the New Zealand company and only returned partnership distributions as income (amounts equal to the GST).

5. The taxpayer was assessed for personal services income (PSI) for the monies paid by the Australian company.

6. The Full Court found that these amounts constituted the taxpayer's PSI.

…

Issues decided by the Full Federal Court

1. Court unanimously dismissed the individual's appeal. The ITAA 1997 does not purport to tax profits of a New Zealand company but taxes part of its income as the personal services income of the individual. Pursuant to the ITAA 1997 the taxpayer's personal services income would be excluded from the New Zealand company's assessable income and therefore, its taxable income, as it was not part of its profits and therefore not taxation of the profits of the New Zealand company's enterprise.

…

ATO view of Decision

The ITAA 1997 does not bring to tax the profits of a New Zealand company but taxes, as statutory income, the personal services income of the individual. The facts of this case were unusual and it is not expected a factual scenario of like kind will often arise.

…

Mr Russell was unrepresented until he made a special leave application to the High Court.

Russell v FC of T [2012] HCATrans 21 (10 February 2012)

MR PARISI: I am going to the income tax matter and I raise the very large question of whether deeming the income of foreign enterprise to be that of a resident and taxing the resident on that amount is the taxing of the profits of a non-resident enterprise for the purpose of the business profits article of the OECD model tax treaty. The large dimensions of the questions are illustrated by the conflicting views which have been expressed on this question of the international tax jurisprudence. We have different countries coming to different conclusions, as the written submissions have been indicating and remembering international tax laws are a kind of ecosystem where influences in one area inevitably come into others and here we have an opportunity to ensure that there is not a pollution of Australian law, let us say.

Also the dimensions of the question, the large dimensions of the questions are emphasised by what we see as a resolution below by the Full Federal Court which seems to be at war with what was said on the concept of profits in a substantially analogous or identical situation - - -

...

FRENCH CJ: Now, this case boils down, does it not, to an accountant in Australia who controls a company in New Zealand, the company in New Zealand makes an agreement with an Australian client company for the provision of the applicant's services to the client company and then the Australian client company pays for those services to the New Zealand company and the New Zealand company makes payments from time to time to the applicant - to Mr Russell.

…

KIEFEL J: Was not the principal issue in the courts below whether or not there was some inconsistency between the *Income Tax Assessment Act* provisions and the Article 7.1 of the New Zealand agreement, which is Schedule 4 to the Tax Agreements Act 1953?

MR PARISI: Precisely. The question was the interplay between those various items of legislation - - -

FRENCH CJ: The question really is whether the personal services income provisions of the *Income Tax Assessment Act* have, as it were, disposed of the application of the double taxation agreement because they have the threshold effect, if you like, that the personal services income is attributed to the accountant rather than to the company which he set up in New Zealand.

…

FRENCH CJ: Thank you, Mr Parisi. Mr Sullivan, we will not need to trouble you.

This application for special leave raises two questions relating to assessments of the applicant's liability to tax on his income for the years ended 2001 to 2004. The applicant was, at the relevant times, a member of a partnership with his former wife. In that capacity they received income from a New Zealand company which had charged another company for the applicant's services. The Commissioner assessed the applicant on the basis that the moneys he received were "personal services income" pursuant to Part 2-42 of the *Income Tax Assessment Act* 1997 (Cth).

The essential question in the courts below was whether the anti-avoidance provisions of the 1997 Act were inconsistent with what was referred to as the "New Zealand Agreement" contained in a schedule to the *International Tax Agreements Act* 1953. The 1997 Act is also incorporated into the Tax Agreements Act. There might be inconsistency if the moneys received by the applicant formed part of the New Zealand company's taxable income. The primary judge in the Federal Court and a Full Court of the Federal Court held that this was not the case.

Russell v Commissioner of Taxation [2011] FCAFC 10; 2011 ATC 20-240 (2011) 79 ATR 315 (4 February 2011)

DOWSETT J (does not note that the whole Refugee Convention is not enacted into the Migration Act, unlike the International Agreements Act, which is enacted into the Income Tax Assessment Acts and the treaties given primacy by s4(2)). In the author's view, surprisingly, EDMONDS & GORDON JJ AGREED WITH DOWSETT J without qualification, even on the *Thiel* point.

Interpretation of international conventions

25. The primary Judge observed that the NZ Agreement generally followed the OECD model and that:

> It is settled that, in construing such an agreement, a court may have regard to, inter alia, the OECD commentary on its model agreement ... .

26. The decision in *Thiel* is quoted as authority for this proposition. Reference is also made to the decision of the Full Court in *McDermott Industries (Aust) Pty Ltd v Commissioner of Taxation* (2005) 142 FCR 134 at [42]. It is certainly true that in both cases, reference was made to such commentary. However both of those cases were decided prior to the decisions of the High Court in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 and *NBGM v Minister for Immigration and Multicultural Affairs* (2006) 221 CLR 52. In both cases the Court emphasized the primary position of the words used in Australian legislation and the Australian rules of statutory interpretation in construing legislation which gives effect to international obligations, including treaties. Thus, in *QAAH* at [34], Gummow ACJ, Callinan, Heydon and Crennan JJ said, after discussing various aids to interpretation of such legislation:

> The relevant law of Australia is found in the Act and in the Regulations under it. It is Australian principles of statutory interpretation which must be applied to the Act and the Regulations.

27. After referring to the approach taken to legislation and regulations giving effect to international conventions their Honours continued:

> But despite these respects in which the Convention may be used in construing the Act, it is the words of the Act which govern.

30. Whilst I remain bound by the actual decision in *Thiel*, the approach adopted in *QAAH* and *NBGM* appears to require care in referring to material concerning international instruments. I see no reason for applying a different approach to model agreements. The approach is of some importance in the present case. Mr Russell's primary criticism of the decision is that his Honour relied upon "OECD rulings or pronouncements". ..

33. Mr Russell's argument is that art 7(1) confers Australian tax immunity upon Ancath's profits and that such immunity extends to moneys received by him from the partnership, which moneys were, in turn, derived from Ancath's profits. The 1997 Act does not purport to tax Ancath's profits. Rather, it treats part of Ancath's income as being, for Australian tax purposes, that of Mr Russell and taxes it in his hands. Pursuant to s 4(2) of the Tax Agreements Act, its provisions, including the NZ Agreement, take effect notwithstanding inconsistent provisions in the 1997 Act. Whether there is any relevant inconsistency for present purposes depends upon the construction of art 7(1). That question must be resolved in the context of the Tax Agreements Act as a whole, including the NZ Agreement.

34. The purpose of the inquiry is to determine whether the 1997 Act imposes a tax on Ancath's profits. The starting point is the meaning of the term "profits of an enterprise" in art 7(1). Such meaning will define the ambit of the protection given by that article. The only apparent guide to the meaning is s 3(2). There is little doubt that the words "profits of an activity or business" are intended to refer to an enterprise of the kind identified in art 7(1). Article 7 is headed "Business profits". For the purposes of the Tax Agreements Act and the 1997 Act (which are to be read together), the profits of an enterprise are taken to be its taxable income. That provision is subject to two conditions:

- that it applies only "in relation to" Australian tax; and
- that the context so permits.

35. I am presently seeking to determine the extent to which Ancath's profits are protected from liability to taxation pursuant to Australian law. I conclude that the relevant question is "in relation to Australian tax". The first condition is satisfied. As to the second, there is no immediately obvious basis for concluding that the context does not permit such an approach. Section 3(2) is not limited in its operation to Australian enterprises. Prima facie, it applies to New Zealand enterprises. ..

37. Pursuant to s 86-30 of the 1997 Act, Mr Russell's personal services income would be excluded from Ancath's assessable income and, therefore, from its taxable income. It follows that it was not part of its profits. Thus the taxation of Mr Russell's personal services income is

> not taxation of the profits of Ancath's enterprise. There is nothing surprising about such an outcome. Part 2-42 is plainly an anti-avoidance measure. Ancath's so-called profits were effectively attributable to Mr Russell's exertions. There is no reason to believe that Parliament intended, in enacting the Tax Agreements Act, that an Australian resident, earning personal services income in Australia, should be able to avoid the operation of Pt 2-42 simply by using a New Zealand company. Although it does not appear clearly from the Commissioner's submissions, this line of reasoning underlies the assertions made in paras 4, 5 and 21 of his written submissions. In those circumstances, it is not necessary to consider the OECD material, overseas cases and academic commentary. His Honour's conclusion was correct. (underlining added)

The decision of the Full Court in *Russell* caused considerable concern in the Australian Treasury, as it implied that in drafting statutes, it would become necessary to recite all that was said in the commentary to the model treaty, or at least in the EM, in order that a court would have regard to it, thereby increasing the volume of the statute, or the EM, to an unsustainable level. Fortunately, the suggestion was fixed quite quickly in a subsequent Full Court decision.

Commissioner of Taxation v SNF (Australia) Pty Ltd [2011] FCAFC 74 (1 June 2011)

RYAN, JESSUP & PERRAM JJ

> 119…. it is crucial to observe that the whole text of each treaty has been given domestic effect. In cases where the exact text of a whole treaty has been given effect by domestic legislation it would be surprising if it were interpreted without keeping that fact in mind. It should be noted that these taxation treaties stand in a very different position to, for example, the Refugee Conventions whose text is not given the force of law. Where Parliament implements a treaty using its expressions and its provisions then naturally enough one must begin with the words Parliament has used. But where Parliament expressly decides to incorporate the whole text of a treaty in domestic law and makes it plain, as here, that it is doing so, then it is appropriate to construe the provisions in accordance with the ordinary principles governing the interpretation of treaties. This is because the Parliament's use of the treaty shows its intention to fulfil its international obligations. This has been accepted by the High Court in respect of the double taxation treaties: *Thiel v Federal Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338.
>
> 120. This conclusion is unsurprising. The double taxation treaties are designed to ensure that the taxing regimes of two jurisdictions do not result in double taxation. If they were to be interpreted in a manner which would permit or foster conflicting outcomes between the two States in question their whole point would be frustrated. It is true, as Dowsett J has observed in *Russell* (at 455-456 [26]-[29]), that the High Court has indicated in the context of the Refugee Conventions that domestic courts must recall that their task is to interpret the *Migration Act 1958* (Cth) and not the Conventions. But, unlike the present legislation, that Act does not adopt and apply the whole text of a treaty. When a State decides to implement, as it has in this case, a Model Law, it would be quite inappropriate to disregard that fact when construing the resultant statute. (underlining added)

However, importantly, the Court did not allow use of the OECD Transfer Pricing Guidelines (even though they were referred to in the commentary on Article 9: see [114]), as the Commissioner did not adduce evidence that the ATO and treaty partners had relied on them as part of State practice, and hence admissible under cl 31(3) of the Vienna Convention: see [117]. This strikes the author as very strange, as the ATO refers to the Guidelines in its taxation rulings on transfer pricing.

Russell v Commissioner of Taxation of the Commonwealth of Australia [2009] FCA 1224 (30 October 2009)

LOGAN J (who goes into the international material, but doesn't refer to Bricom Holdings)

113. At a general level of abstraction and from an *economic* point of view, it is not difficult to have sympathy with Mr Russell's double taxation submission…

115.He then submitted that the effect of the requirement flowing from s 4 of the *International Tax Agreements Act 1953* (Cth) (International Tax Agreements Act) to read that Act with the ITAA 1997 meant that Part 2-42 could have no application so as to deem what was Ancath's income to be his when that income formed part of Ancath's assessable income in New Zealand because that would amount to taxing the profits of Ancath, which was an enterprise of New Zealand, in Australia rather than, as art 7 of the Double Taxation Agreement required, in New Zealand only.

118. The NZ Double Taxation Agreement generally follows the OECD Model Double Taxation Agreement (OECD Model). It is settled that, in construing such an agreement, a court may have regard to, inter alia, the OECD Commentary on its model agreement: *Thiel v Commissioner of Taxation* [1990] HCA 37; (1990) 171 CLR 338 at 344, 356-357.

119. On the basis of the evidentiary findings I have made, Part 2-42 of the ITAA 1997 will apply so as to subject Mr Russell, not Ancath, to taxation in Australia. It is true that art 7, cl 1 uses the language, "the profits of the enterprise". Read in isolation, and affording primacy to the NZ Double Taxation Agreement as incorporated by the International Taxation Agreements Act, that might be thought to support the notion that any measure which would subject those *profits* to taxation, even if the means of so doing was to deem the same to form part of the assessable income of an individual, rather than the enterprise which derived them, was inconsistent with the NZ Double Taxation Agreement. The foundation for such an approach to interpretation would be "juridical" in the sense that it would be textual.

120. The difficulty with that approach is that, read in the context not only of the balance of art 7 but the NZ Double Taxation Agreement as a whole, the focus of the clause is on the prevention of the double taxation of an "enterprise", not of profits as an abstract, economic concept.

121. There is no prior Australian authority directly touching upon the intersection between Part 2-42 of the ITAA 1997 and either the NZ Double Taxation Agreement or any other of the OECD Models to which Australia is a party.

122. The industry of counsel for the Commissioner did result in my being taken in supplementary written submissions to a number of foreign authorities in which national courts have had to grapple with the conundrums presented by the reconciliation of an attribution regime in their national revenue law with their country's adoption of a double taxation agreement on the OECD Model which would, under their national law, prevail to the extent of any inconsistency with the attribution regime.

123. Of these, the case from which I have derived particular assistance is a decision of Finland's Supreme Administrative Court in relation to whether an inconsistency existed between the attribution rules in that country's controlled foreign company (CFC) regime in its domestic revenue law and art 7 of its double taxation agreement with Belgium, which was in conformity with the OECD Model: *Re A Oyi Abp* (2002) 4 ITLR 1009 (Re A Oyi Apb). In that case, the Supreme Administrative Court observed (at 1064):

> Tax treaties are therefore concerned with judicial double taxation which means that the same taxable person is taxed on the same income in two different countries. Tax treaties do not generally concern economic double taxation, that is, where the same income is taxed in the hands of several taxable persons. Unless otherwise provided

> in a tax treaty, the removal of economic double taxation is a task which remains the responsibility of the national legislation. The tax treaty between Finland and Belgium does not contain provisions on the removal of economic double taxation.

124. There are passages in a decision of the French Conseil d'État in *Re Société Schneider Electric* (2002) 4 ITLR 1077 which, read in isolation, might be thought to support an opposite conclusion in relation to the immateriality of economic consequences when considering whether a national CFC regime was in conflict with Article 7 of an OECD model treaty with Switzerland. For example, in referring to Article 7 of the Franco-Swiss double taxation agreement, the Conseil d'État opined (at 1108):

> In the absence of any factor requiring a different interpretation, the 'profits' to which art 7 of the convention refers are those determined according to the rules established by the [French General Tax Code]. It follows that the court below did not make any error in deciding that there is an identity in nature between the business profits (bénéfices) of the Paramer company, the taxation of which is attributed to Switzerland by art 7(1) of the Franco-Swiss tax treaty, and the profitable results (résultats beneficiaries) of the Paramer company which are taxed in France in the name of the Schneider company on the basis of the [CFC regime in the French General Tax Code].

125. The actual decision in that case was that that the French CFC regime was in conflict with and was overridden by the relevant tax treaty. However, on closer analysis, the tax treaty concerned contained, apart from an OECD Model art 7 provision, another provision (art 25(A)(1)), which expressly exempted from the relevant French tax "income ... where such income is liable to taxation in Switzerland". Against that background, where the treaty itself authorised a focus on income per se, rather than enterprise, the seeming incongruence of result with that in *Re A Oyi Abp* is explicable.

126. There is no equivalent of art 25(A)(1) of the Franco-Swiss Double Taxation Agreement in the NZ Double Taxation Agreement.

128. <u>In the introduction to the OECD Commentary (para 1) the following statement is made:</u>

> <u>International juridical double taxation can generally be defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods</u>.

130. … The understanding of the meaning of art 7 reflected in the commentary is that the intended approach to the construction of art 7 of the OECD Model is *juridical*, not economic. Hence the reference in the commentary to "enterprise". Accepting this, Part 2-42 violates neither the letter nor the spirit of the intent of the Double Taxation Agreement in that it does not effect *juridical* double taxation.

131. Regard to academic literature in relation to double taxation does not support a construction of art 7(1) of the NZ Double Taxation Agreement based on a conception that its design is to eliminate economic, as opposed to juridical taxation.

132. In his seminal work, *Klaus Vogel on Double Taxation Conventions* (3rd ed, Kluwer Law International, 1997), the late Professor Dr Klaus Vogel of the University of Munich, a leading academic commentator on international double taxation, deliberately contrasts (at pp 9-10) international juridical taxation with economic double taxation.

136.It would be inconsistent with Professor Vogel's conception of the role of art 7 in the OECD Model to construe art 7 of the NZ Double Taxation Agreement as being directed to the subject of the elimination of the double taxation of profits irrespective of identity of enterprise in the contracting States or of the location of that enterprise's "permanent establishment".

138. <u>Insofar as Part 2-42 may effect *economic* double taxation, given the subjection of Ancath to New Zealand income taxation on the income it derived under the Tradecorp Agreement, the rectification of any resultant hardship or injustice would require either</u>

renegotiation of the NZ Double Taxation Agreement or unilateral Australian or New Zealand legislative action.

139. In principle therefore, the NZ Double Taxation Agreement does not prevent a conclusion that Mr Russell is in fact and law liable to assessment in respect of his personal services income by virtue of the operation of Part 2-42 of the ITAA 1997…(underlining added)

BRICOM HOLDINGS LTD v. COMMISSIONERS OF INLAND REVENUE [1997] EWCA Civ 2193

MILLETT LJ, WITH WHOM OTTON & BELDAM LJJ AGREED (make no mention of the OECD materials or any international literature)

This is an appeal by Bricom Holdings Limited ("the taxpayer") from a decision of the Special Commissioners given on 3rd. April 1996 dismissing the taxpayer's appeal against assessments to tax made in accordance with Section 747(4)(a) of the Income and Corporation Taxes Act 1988 ("the Act"). The appeal is brought directly to this Court by special leave granted pursuant to RSC Order 59 Rule 25.

The case raises fundamental questions concerning the relationship between (i) the provisions of a Double Taxation Agreement and (ii) the statutory provisions relating to controlled foreign companies. The Agreement in question is the Double Taxation Convention entered into between the United Kingdom and the Netherlands on 7th. November 1980 and scheduled to the Double Taxation Relief (Taxes on Income)(Netherlands) Order 1980 SI 1980 No.1961. The statutory provisions relating to controlled foreign companies are contained in Chapter IV of Part XVII of the Act. Part XVII of the Act is the Part which deals with tax avoidance. Chapter !V contains provisions originally introduced by the Finance Act 1984.

Given the fundamental nature of the issues and the fact that the relevant provisions have been in force for more than 12 years, it is perhaps surprising that they have not been the subject of dispute before now. The taxpayer says that this is because the Double Taxation Agreement with the Netherlands is in an unusual form, and that most Agreements would not allow the taxpayer's arguments in the present case to succeed. The Revenue says that it is because its understanding of the effect of the controlled foreign company provisions is so obviously correct that no one has considered it worthwhile to challenge it before.

The facts.

The facts are extremely simple. The taxpayer is incorporated and resident in the United Kingdom and is an indirect wholly owned subsidiary of The Bricom Group Limited ("BGL"). It has a wholly owned direct subsidiary Spinneys International BV ("Spinneys") which is incorporated and resident in the Netherlands. Spinneys is an investment holding company which formerly carried on business through a branch in Singapore. After selling that branch it had surplus funds which it lent at interest to BGL. BGL duly paid interest to Spinneys, which was taxable on such interest in the Netherlands. The Revenue alleges that Spinneys is a controlled foreign company within the meaning of Chapter IV of Part XVII of the Act, which allows income of such a company to be attributed to its United Kingdom resident shareholders, and has raised assessments on the taxpayer by reference to the United Kingdom source interest received by Spinneys from BGL.

The taxpayer does not dispute that Spinneys is a controlled foreign company and that but for the provisions of the Double Taxation Agreement with the Netherlands it would be unable to challenge the assessments. But it claims that the terms of the Agreement exempt it from liability. For its part the Revenue accepts that the effect of the Agreement is to exempt the interest itself from United Kingdom corporation tax and not merely the resident of the Netherlands who receives it. The benefit of the exemption, therefore, is capable of enuring to the taxpayer. But the Revenue claims that the assessments are not precluded by the terms of the Agreement because they are not assessments to corporation tax on the exempted interest.

<u>The Double Taxation Agreement with the Netherlands.</u>

The dispute thus turns on the effect of the controlled foreign company provisions rather than the scope of the Double Taxation Agreement. This can be shortly summarised as follows.

The Agreement applies to persons who are residents of the United Kingdom or the Netherlands or both (Article 1). The taxes which are the subject of the Agreement include United Kingdom income tax and corporation tax (Article 2(1)); but the Agreement also applies to any “identical or substantially similar taxes which are imposed by either State after the date of signature of this Convention in addition to, or in place of, the existing taxes”.

Article 11 deals specifically with interest. Article 11(1) provides that “interest arising in one of the States which is derived and beneficially owned by a resident of the other State shall be taxable only in that other State”.

It is common ground that this prevents the interest paid by BGL to Spinneys from being chargeable to corporation tax in the United Kingdom.

Article 1(5) prevents the interest from being treated as a distribution made by the company paying such interest or from being disallowed as a deduction in computing the taxable profits of the company paying the interest.

Provisions to similar effect apply to business profits (Article 7) dividends and distributions (Article 10) and “other income” (Article 21), but it is not necessary to consider these further.

<u>The difficulty with this submission is that "the chargeable profits" as defined by Section 747(6)(a) are a purely notional sum. They do not represent any profits of Spinneys on which United Kingdom corporation tax is chargeable, for there are no such profits. Nor do they represent any actual payments or receipts of Spinneys, whether of interest or anything else. They are merely the product of a mathematical calculation made on a hypothetical basis and making counterfactual assumptions.</u> The "chargeable profits" which are defined by Section 747(6)(a) exist only as a measure of imputation. What is apportioned to the taxpayer and subjected to tax is not Spinneys' actual profits but a notional sum which is the product of an artificial calculation…

<u>The correct analysis is that the interest received by Spinneys is not included in the sum apportioned to the taxpayer on which tax is chargeable. It merely provides a measure by which an element in a conventional or notional sum is calculated, and it is that conventional or notional sum which is apportioned to the taxpayer and on which tax is charged</u>. (underlining added)

<u>Comment on *Bricom Holdings*</u>

Daniel Sandler in a commentary on the Court of Appeal decision [1998] British Tax Review 52, suggested that the result might be different in Australia as Australia attributes on an “item of income” basis, whereas the UK attributed on an “entity” basis.

Bricom Holdings did not refer to the then applicable OECD commentary on Art 1 of the Model Treaty relating to CFC provisions (1992 version) that there was a “dissenting view” that CFC provisions are subject to the general provisions of tax treaties against double taxation. That provision was rewritten in 2003 and now says that the CFC provisions only conflict with tax treaties where the attributed income has been subject to comparable taxation on the CFC, to that in the country of the attributable taxpayer, see [26]. However, as observed in the decision of Logan J in *Russell* at [118], the Full Court in *McDermott Industries* has cautioned against the use of OECD commentary published after ratification of a tax treaty.

THE QUEEN v SOMMERER 2012 FCA 207 (13 JULY 2012)

[66] The OECD model conventions, including the Canada-Austria Income Tax Convention, generally have two purposes – the avoidance of double taxation and the prevention of fiscal evasion. Article XIII (5) of the Canada-Austria Income Tax Convention speaks only to the avoidance of double taxation. "Double taxation" may mean either juridical double taxation (for example, imposing on a person Canadian and foreign tax on the same income) or economic double taxation (for example, imposing Canadian tax on a Canadian taxpayer for the attributed income of a foreign taxpayer, where the economic burden of foreign tax on that income is also borne indirectly by the Canadian taxpayer). By definition, an attribution rule may be expected to result only in economic double taxation.

[67] The Crown's argument requires the interpretation of a specific income tax convention to be approached on the basis of a premise that excludes, from the outset, the notion that the convention is not intended to avoid economic double taxation. That approach was rejected by Justice Miller, correctly in my view. There is considerable merit in the opinion of Klaus Vogel, who says that the meaning of "double taxation" in a particular income tax convention is a matter that must be determined on the basis of an interpretation of that convention (Klaus Vogel on Double Taxation Conventions: A Commentary to the OECD –, UN –, and US Model Conventions for the Avoidance of Double Taxation on Income and Capital, 3rd ed. (The Hague: Kluweer Law International, 1997)).

[68] I see no error of law or principle in the conclusion of Justice Miller that Article XIII (5) applies to preclude Canada from taxing Peter Sommerer on the capital gains realized by the Sommerer Private Foundation.(underlining added)

Comment on *Sommerer*

It is interesting that the Canadian Federal Court of Appeal reached a different conclusion as to what Klaus Vogel had to say on economic double taxation, to that of Logan J in *Russell* at first instance.

The express treaty override for Canada's CFC equivalent in 56 of 88 of Canada's treaties, including in the Canada – Austria DTA, allowed the court to conclude that had it been intended to override s75(2), it should have been expressly provided for.

It is also interesting that neither *Bricom Holdings*, nor the French and Finnish cases were referred to in the *Sommerer* case in the Federal Court of Appeal or at first instance.

CONCLUSION

In the author's 1996 paper, it was suggested that the proper approach to the CFC override of treaties was for that exception to be noted in the International Agreements Act, in s4(2) together with Part IVA, (and now perhaps the PSI provisions as well). It is noted that the 2005 override for funds management was at least made in the International Agreements Act (s3AA(2)), rather than the Income Tax Assessment Acts. The *Sommerer* case at first instance in Canada specified that 56 of 88 Canadian treaties expressly preserve Canada's CFC provision [116], and there seemed no doubt that where they do, the treaty will be overridden. Where the relevant treaty does not expressly override Canada's CFC provision, the position in Canada after *Sommerer*, is clearly open.

No Australian treaty since the 1996 paper has done anything about the CFC override issue, presumably relying on *Bricom Holdings* (and after 2003, on the revised OECD commentary), which makes it all the more peculiar that the Commissioner's counsel apparently did not refer the court to *Bricom Holdings* in the *Russell* case, as it would have made the Commissioner's job so much easier.

As the High Court special leave application makes clear, it will be hard work to get an Australian court to embrace the CFC override issue following *Russell,* especially in relation to any treaty ratified after the 2003 amendment to the OECD commentary. However, if a court can be convinced to look at foreign judgments in relation to a pre 2003 treaty, they will need to contrast *Bricom Holdings* with *Sommerer* (if not reversed in the Supreme Court of Canada), and the position is evenly balanced.

DISCLAIMER

This paper does not constitute advice. It should not be relied on as such.

24.07.12