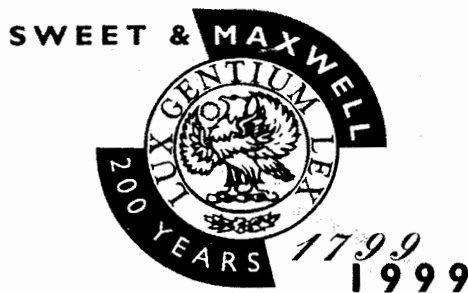


THE DEFINITION OF DIVIDEND IN THE DOUBLE TAXATION RELIEF ARTICLE

By

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The Definition of Dividend in the Double Taxation Relief Article[†]

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A TREATY interpretation issue was raised in the Court of Appeal decision of *Memec v. I.R.C.*¹ concerning the definition of dividend in the dividend article of the 1964 United Kingdom–Germany treaty applied to the interpretation of relief from underlying tax in the relief article. We had considered this question in a previous article² published before that case was decided and we now return to the same point in the light of the decision. Our conclusion was that the definition in the dividend article did not apply to underlying credit provisions and other similar provisions.

The OECD 1963 Draft

The treaty was based on the 1963 OECD Draft which was consistent in its use of defined expressions.³ In the 1963 Draft some expressions were defined in articles 3 (general definitions), 4 (resident of a Contracting State) and 5 (permanent establishment) for the purposes of the whole treaty, subject to the context otherwise requiring for all the article 3 definitions. Other expressions were defined in separate articles for the purpose of those articles. In the case of definitions in separate articles, either those expressions were not used in any other article (as in the case of dividends, interest and royalties, and professional services) or, if the expression was used elsewhere, a cross-reference was made to the definition (as in the case of immovable property in articles 13 and 22). The expression

† A version of this article appears in the *Bulletin for International Fiscal Documentation* (1999) Vol. 53 No. 3.

¹ [1998] S.T.C. 754. A case note on the decision in the High Court appeared at [1997] B.T.R. 188.

² "Credit and Exemption under Tax Treaties in Cases of Differing Income Characterisation" [1996] B.T.R. 212; 36 *European Taxation* 118.

³ The 1977 Model was slightly less consistent in its use of definitions than the 1963 Draft because it refers in the non-discrimination article in what is now art. 24(4) to interest and royalties, the definitions of both of which in arts 11(3) and 12(2) are "as used in this article". The current Model moves the definition of national from the non-discrimination article to the general definitions in article 3 but there are cases where the context requires that only the part relating to individuals is relevant in the dual residence provision and the government service article.

nationals⁴ defined in the non-discrimination article was an exception. The term national was also used in the dual residence provision⁵ relating to individuals, where only part of the definition is applicable, since the definition also includes legal persons, partnerships and associations. The existence of definitions in separate articles seemed to be for convenience rather than because these expressions were different in nature from the definitions in article 3.⁶ For example, it would have made no difference if immovable property had been defined in article 3, thus avoiding the need for cross-references.

In some cases of definitions in particular articles, the defined expression was stated to be "as used in this article" (dividends, interest and royalties), while in other cases that expression was not used (immovable property, professional services and nationals). Does this imply that a definition which includes the words "as used in this article"⁷ were intended to be limited to that article, while other definitions not containing this limitation are intended to apply more generally when used elsewhere in the treaty (as in the case of immovable property, where there is always a cross-reference to the definition, and nationals)? Professional services do not conform because the inclusive definition is not stated to be "as used in this article", and nor is the term used elsewhere. All one can conclude is that the terms defined by definitions "as used in this article" are not used elsewhere in the 1963 Draft, which might be the reason for the use of that expression; if so why is that expression not used in relation to professional services? One cannot judge whether the draftsman of the 1963 Draft intended that the defined expression should be limited to that article only, because it is not used elsewhere in the Model. This was the issue in *Memec* where the term dividend was used in another article of the treaty but defined in the dividend article including the words "as used in this article".

⁴ The definition became national (in the singular) when it was moved into the general definition section in 1992. Strictly therefore before this, the dual residence article and the Government service article did not use precisely the defined term, and nor did the cross-reference in the mutual agreement article (in art. 25(1)) to the non-discrimination article, although in the last case it was clear from the context that the definition was incorporated.

⁵ And a reference to "national laws" in art. 25(1) which clearly did not import the definition. In the 1977 Model national was also used in the Government service article, and in a cross-reference in art. 25(1) to the non-discrimination article.

⁶ The Brief Analysis of the Articles of the Draft Convention para. 10 said: "The proper interpretation of certain terms or expressions such as 'dividends', 'interest', 'royalties', 'immovable property', and 'professional services', is given in the special Articles dealing with these matters. (Para. 15 of the Presentation of the 1977 Model Convention, and para. 18 of the Introduction to the current Model are similar.) This does not suggest that the "proper interpretation" of the terms is limited to the separate articles. The first sentence of para. 10 refers to article 3 containing certain terms systematically employed in the Convention. It seems that the other terms are defined in particular articles because they are not systematically employed since they are not used anywhere else, although immovable property was used elsewhere. Art. 3 Comm para. 1 of the 1963 Draft said that: "This Article groups together a number of general provisions required for the interpretation of the terms used in the Convention. It should be observed, however, that the meaning of some important terms is explained elsewhere in the Convention. Thus, the terms 'resident' and 'permanent establishment' are defined in Articles 4 and 5 respectively, while the interpretation of certain terms appearing in the Articles on special categories of income ('immovable property', 'dividends', etc.) is clarified by provisions embodied in those Articles." (The provisions in the Commentary to the 1977 and current Models are similar.)

⁷ The official French version *employé dans le présent article* is less strong, as the taxpayer pointed out in *Memec*, being the equivalent to *used*, rather than *as used*, in this article. The same point could be made of the German language in the treaty concerned: *Der in diesen Artikel verwendete Ausdruck "Dividenden" bedentet...* The Italian version, *ai fini del presente articolo* is closer to "for the purposes of this article".

The United Kingdom–Germany Treaty

The United Kingdom–Germany treaty contained the following definition of dividends:

“The term ‘dividends’ as used in this Article means income from shares, jouissance shares or jouissance rights, mining shares, founders’ shares or other rights, not being debt-claims, participating in profits, as well as income from other corporate rights assimilated to income from shares by the taxation law of the territory of which the company making the distribution is a resident; . . . in the case of the Federal Republic the term includes income arising from participation in the capital and profits of a company resident in the Federal Republic, and the income derived by a sleeping partner from his participation as such.”⁸

The case is concerned with the last part of the definition, and the question is whether a distribution to a United Kingdom resident participant in a German silent partnership, which was agreed was the meaning of the term sleeping partner, was a dividend for purposes of the credit for underlying tax provision in paragraph (b) of the following double taxation relief article:

“1. Subject to the provisions of the law of the United Kingdom regarding the allowance as a credit against United Kingdom tax of tax payable in a territory outside the United Kingdom (which shall not affect the general principle hereof):

(a) Federal Republic tax payable under the laws of the Federal Republic and in accordance with this Convention, whether directly or by deduction, on profits, income or chargeable gains from sources within the Federal Republic (excluding in the case of a *dividend*, tax payable in respect of the profits out of which the *dividend* is paid) shall be allowed as a credit against any United Kingdom tax computed by reference to the same profits, income or chargeable gains by reference to which the Federal Republic tax is computed;

(b) in the case of a *dividend* paid by a company which is a resident of the Federal Republic to a company which is a resident of the United Kingdom and which controls directly or indirectly at least 25 per cent of the voting power in the Federal Republic company, the credit shall take into account (in addition to any Federal Republic tax creditable under the provisions of sub-paragraph (a) of this paragraph) the Federal Republic tax payable by the company in respect of the profits out of which such *dividend* is paid.”⁹

The first issue is whether the definition of dividends in art. VI(4) “as used in this article” limits the definition to that article. This cannot be answered in the 1963 Draft because it does not arise; the term dividend is not used elsewhere in the Draft.¹⁰ In the particular treaty, apart from the above quotation from the relief article applicable to the United Kingdom, there are several other references to dividends. They are as follows:

(1) “Paragraphs 1 and 2 of this Article [business profits] shall not be construed as

⁸ Art. VI(4).

⁹ Art. XVIII(1), italics added. Note that this is the only provision of the treaty using the term dividend in the singular, *cf.* national in note 4.

¹⁰ A similar question arises under the 1977 and current Models because the non-discrimination article refers to interest and royalties in but, as this comes immediately after a reference to articles 11(6) and 12(4), there is a strong context for using the defined expressions.

preventing one of the Contracting Parties from imposing pursuant to this Convention tax on *dividends* or income from immovable property derived from sources within its territory by a resident of the other territory even if such *dividends* or income are not attributable to a permanent establishment in the first-mentioned territory.”¹¹

(2) “Nothing in this Convention shall entitle an individual who is a resident of one of the territories and whose income from the other territory consists solely of *dividends*, interest or royalties (or solely of any combination thereof) to the personal allowances, reliefs and reductions of the kind referred to in this Article [personal allowances] for the purposes of taxation in that other territory.”¹²

(3) “[The previous convention shall cease to have effect] ... (b) In the Federal Republic:

(i) in respect of the Federal Republic tax withheld from *dividends* for the tax from *dividends* paid after the day of the entry into force of the present Convention, ...”¹³

(4) “Tax shall be determined in the case of a resident of the Federal Republic as follows:

(a) Unless the provisions of sub-paragraph (b) below apply, there shall be excluded from the basis upon which Federal Republic tax is imposed any item of income from sources within the United Kingdom and any item of capital situated within the United Kingdom which, according to this Convention, may be taxed in the United Kingdom ... The first sentence of this sub-paragraph shall in the case of income from *dividends* apply only to such *dividends* as are paid to a company limited by shares (*Kapitalgesellschaft*) being a resident of the Federal Republic by a company limited by shares being a resident of the United Kingdom at least 25 per cent of the voting shares of which are owned by the first-mentioned company. ...

(b) Subject to the provisions of German tax law regarding credit for foreign tax, there shall be allowed as a credit against Federal Republic tax on income payable in respect of the following items of income from sources within the United Kingdom:

(i) the United Kingdom tax payable under the laws of the United Kingdom and in accordance with this Convention on *dividends* not dealt with in sub-paragraph (a) above; ...”¹⁴

The first and third of these provisions clearly import the definition of dividends because they are dealing with withholding tax on dividends, the same subject matter as the dividend article. The second is less clear as it does not relate to withholding tax but presumably the definition is intended to apply as the provision deals with personal reliefs in the source state, and dividends are defined for the purposes of taxation in the source state. In the fourth provision, the relief article as it applies to Germany, both paragraphs refer to dividends. Paragraph (a) gives exemption in Germany for certain United Kingdom dividends, namely those paid by a company limited by shares to a company limited by shares owning at least 25 per cent of the voting shares. This is much narrower than the scope of the dividend article, particularly the limitation to dividends paid by a

¹¹ Art. III(5) italics added.

¹² Art. XVII(3), italics added, the reference to dividends being added by the 1970 Protocol at the same time as redrafting the definition of dividend and the relief article.

¹³ Art. XXIII(3) italics added.

¹⁴ Art. XVIII(2), italics added in relation to “dividends”, also redrafted in the 1970 Protocol.

company limited by shares. Only part of the definition of dividends in the dividend article can be incorporated in this provision because of this limitation, but otherwise the definition can be incorporated. There is a connection between the exemption provision and the dividend article which provides that the reduced rate of withholding tax applies if either the dividends are subject to tax in the other territory "or being dividends paid by a company which is resident in the United Kingdom, are exempt from Federal Republic tax under the provisions of [paragraph (a) above]".¹⁵ This strengthens the case for using the definition as far as is possible in the exemption provision. For all other dividends, credit is given in paragraph (b) for the withholding tax on dividends payable in accordance with the convention. The definition of dividends in the dividend article is necessarily incorporated into the credit provision as this deals with the same subject matter, withholding tax, particularly in view of the words "in accordance with this Convention" because the definition is part of the Convention regulating which dividends qualify for reduced withholding tax.

The draftsman must therefore have intended the definition of dividend to be used outside the dividend article at least in some cases. This suggests that the words "as used in this article" are not there to restrict the definition to that article. It is suggested that the question of interpretation should be approached by assuming that the definition in the dividend article may apply elsewhere in the treaty but by asking first whether the context requires that definition should not be used in interpreting the particular provision, here the underlying credit provision. If the answer is that the definition should not be used, it follows that the term dividend in the underlying credit provision is undefined¹⁶ and so article II(3), the equivalent to article 3(2) of the Model, applies. The internal law meaning of dividend in the United Kingdom, as the state applying the underlying credit provision, is therefore to be used to interpret it, unless the context otherwise requires. If the context does otherwise require, some other meaning has to be applied which is likely to be the definition in the dividend article, which brings us full circle back to the beginning of the analysis. One can therefore shorten the process by considering whether the context requires either the definition or internal law to be applied. The main aspect of the context is the connection between the dividend article and the underlying credit provision.

Starting with policy considerations, one would expect the reduced withholding tax on dividends on direct investment and exemption or credit for underlying tax to apply to the same circumstances. The policy reason is to remove any bias between taxpayers operating in a state through a subsidiary or a branch. There will be exemption or credit for the whole tax for a branch, which in some cases will be increased by a branch profits tax to make up for the lack of a withholding tax on dividends. Giving exemption or underlying tax credit for dividends on direct investment mirrors this treatment. Where a state reduces its withholding tax on dividends on direct investments it will expect that the other state will reciprocate by giving underlying tax credit or exemption.¹⁷ This approach favours the use of the definition.

There is also support for this approach from the wording of the treaty. Although one would expect there to be little connection between the dividend article dealing with

¹⁵ Art. VI(1).

¹⁶ In *Memec* it was agreed that "any term not otherwise defined" meant "any term not otherwise relevantly defined" see p. 767a.

¹⁷ In this case, because of the German split rate system, dividends on direct investments suffer a higher withholding tax.

withholding tax on dividends paid, and the underlying credit provision dealing with dividends received on holdings of at least 25 per cent, there is a separate paragraph in the dividend article dealing with dividends on direct investments in German companies owned by United Kingdom companies:

"2. Notwithstanding the provisions of paragraph 1 of this Article Federal Republic tax on dividends paid to a company resident in the United Kingdom by a company resident in the Federal Republic at least 25 per cent of the voting shares of which are owned directly or indirectly by the former company may be charged at a rate exceeding [the rates set out]."¹⁸

The subject matter of both this paragraph of the dividend article and the underlying credit provision is dividends paid on United Kingdom holdings in a German company carrying directly or indirectly at least 25 per cent of the votes but the qualification is different: ownership of voting shares in the dividend article, and control of voting power in the underlying credit provision, which corresponds to United Kingdom internal law.¹⁹ This provision is similar in nature to the Model's provision setting a 5 per cent rate of withholding tax on direct dividends (except that a higher than normal rate of withholding tax is permitted in the United Kingdom-Germany treaty on dividends on direct investments because of Germany's split rate system); however, the connection between the dividend article and the relief article is greater here as there is a separate paragraph of the dividend article dealing with direct dividends.²⁰ This point also suggests use of the definition.

Reverting to the relief provision applicable to the United Kingdom the words in brackets in paragraph (a) "(excluding in the case of a *dividend*, tax payable in respect of the profits out of which the *dividend* is paid)"²¹ create some link to the dividend article because paragraph (a) includes credit for the withholding tax on dividends,²² and hence there may also be a link from the dividend article to the underlying credit provision in paragraph (b). Alternatively, the term dividend might have a different meaning in each paragraph.²³

Another aspect of the wording of the treaty is that in the relief article, as applied by Germany, (the direct equivalent to the provision being interpreted) there is at least one reference to dividends which incorporates the definition. However, this does not extend to

¹⁸ Art. VI(2). The dividend article provision relating to direct investment is contained in the original (1964) treaty. There was less of a link in the original relief article before it was amended in 1970 because relief for underlying tax was originally restricted to dividends on ordinary shares and the participating part of dividends on participating preference shares. So long as the necessary votes are held the increased rate of withholding tax seems to have applied originally to all dividends.

¹⁹ I.C.T.A. 1988, ss.790(5), (6), 799, 800.

²⁰ In Australia where in the past there was no reduction in the withholding tax rate for dividends on direct investments there is no connection between the dividend and the underlying credit provisions, which favours the Australian meaning of dividend in the underlying credit provision.

²¹ Art. XVIII(1)(a), see text at note 9, italics added.

²² Note also the reference in the dividend article of the Model, but not this treaty, that "[art. 10(2)] shall not affect the taxation of the company in respect of the profits out of which the dividends are paid".

²³ If one excludes from paragraph (a) credit for underlying tax for the narrower meaning of dividend under internal law in order to give dividend the same meaning as in paragraph (b), the result could be that underlying credit was available under paragraph (a) for say a distribution from a silent partnership because the words in brackets excluding it would not apply. Accordingly, perhaps in paragraph (a) dividend has the dividend article meaning. Australia has ceased including these words in brackets in its treaties.

the German equivalent, exemption of dividends on direct holdings, because of the limitation to dividends paid by, and to, companies limited by shares. The consensus among German authors is that generally in treaties the dividend article definition should be used to interpret the whole relief article.²⁴ It should be noted that these views are expressed in the context of the relief article of the OECD Model as applicable to an exemption state which provides first for credit for tax on income within article 10, or, normally in modern German treaties, for credit in a case where both the type of income and the article number are given ("dividends within the meaning of article 10 which are not dealt with in [the exemption provision]"). Secondly, other income, including dividends on direct investments, qualifies for exemption. Naturally if there is a cross-reference in the relief article to the dividend article by number, the definition of dividend must be incorporated into the relief article.²⁵ A few modern German treaties refer in the relief article to dividends without any reference to an article number, as in this older treaty.²⁶ In such cases the context points to using the definition of dividend in the dividend article since the purpose of the credit provision in relation to dividends must be to give relief for the withholding tax provided for in the dividend article.

On the other hand, there are strong arguments for not using the definition. The dividend article definition is a matter concerning taxation by the source state and the underlying credit provision is a matter for the residence state. There is less connection with the dividend article and a closer connection with the residence state when the underlying credit provision follows internal law, particularly when the treaty relief provision is subject to the provisions of United Kingdom law.²⁷ The United Kingdom internal law underlying credit provision uses wording similar to the United Kingdom–Germany treaty, that the shareholder controls directly or indirectly at least 10 per cent of the voting power of the paying company.²⁸ The reason why the limit is 25 per cent in this treaty is that this was the limit applied at the time to non-Commonwealth countries.²⁹ The internal law limit was changed to 10 per cent in all cases in 1972. The internal law meaning of dividend is necessarily used in interpreting the internal law provision. This means that the narrower internal law meaning of dividend applies on holdings of between 10 and 25

²⁴ Debatin/Wassermeyer Doppelbesteuerung, Band I OECD-MA, March 1998, art. 10 MA annot. 91; Debatin/Wassermeyer/Beckmann, Doppelbesteuerung, Bank III, March 1988, art. XVIII annot. 11 (referring to the High Court decision in *Memec*); Vogel on Double Taxation Conventions (3rd ed.) art. 10 mn. 184 and art. 23 mn. 114.

²⁵ This does not guarantee that relief is available. In Belgium, where relief is given "in accordance with the rules of Belgian domestic laws", internal law requires that the income which the treaty categorises as a dividend in the source state should also be classified as a dividend under Belgian law before relief is given, see Official Belgian Commentary on Tax Treaties 23/124 and [1996] B.T.R. 212 at 219.

²⁶ Germany–Mexico (1993), Germany–Indonesia (1990).

²⁷ See text at note 9. A similar point can be made for other countries' equivalent provisions. An example is the following from the U.K.–Canada treaty (1978): "Subject to the existing provisions of the law of Canada regarding the determination of the exempt surplus of a foreign affiliate and to any subsequent modification of those provisions—which shall not affect the general principle hereof—for the purpose of computing Canadian tax, a company resident in Canada shall be allowed to deduct in computing its taxable income any *dividend* received by it out of the exempt surplus of a foreign affiliate resident in the U.K." There are deeming provisions in Canadian law treating a capital gain in some circumstances as a dividend. It is necessary to use the Canadian internal law meaning of dividend in such a provision to give full effect to it. This is strengthened by the express reference to the relief being subject to the provisions of Canadian law.

²⁸ See note 19.

²⁹ The 25 per cent limit is still found in U.K. treaties with Japan, Luxembourg and Thailand.

per cent. It might be thought to be a strange result if at 25 per cent one had to change the definition of dividend to that used in the treaty in relation to withholding tax. Using the same meaning throughout, which is the case if the internal law meaning of dividend is used, is obviously more sensible. Normally United Kingdom treaties provide for the reduced rate of withholding tax at 25 per cent in accordance with the Model and for credit for underlying tax at 10 per cent in accordance with internal law so that there is less connection between the two and it is easier to argue that the definition in the dividend article should not be used.

The Commentary appears to support limiting underlying credit or exemption provisions by excluding the use of the dividend article definition: "Moreover, States are free to fix the limits and methods of application of these provisions [exemption and underlying credit] (definition and minimum duration of holding of the shares, proportion of the dividends deemed to be taken up by administrative or financial expenses). . . ."³⁰ The reference to definition suggests that the definition of dividend is included, although it does not expressly mention it. Also, as we discussed in our previous article, there is support in other OECD documents for the use of the internal law meaning of dividend in connection with thin capitalisation. The OECD Thin Capitalisation Report contains the following³¹:

"If the text of the relevant Article [dealing with credit] simply gave relief in respect of 'dividends' without referring to Article 10, and if there was no generally applicable definition of dividends elsewhere in the relevant bilateral treaty, the meaning of 'dividends' for this purpose *would depend on the domestic law of the country of residence of the lender*,³² which would not necessarily accept any extended definition of 'dividends' provided by the thin capitalisation rules of the country of the paying company."

This is followed by three cases in which it is stated that relief might be given in certain cases of thin capitalisation by virtue of the context.³³ First, the treatment by the source state is in accordance with article 9, in which case the residence state is obliged to make a corresponding adjustment under article 9(2) which would include giving relief as a dividend, and the same for excessive interest treated as a dividend under article 11(6). Secondly, the residence state would have applied similar thin capitalisation provisions if it had been the source state. Thirdly, the residence state agrees that it is proper to treat the interest as a dividend.³⁴ The Report says that the circumstances are limited in which "the context otherwise requires" that the residence state's definition of dividends should not be used by virtue of article 3(2). In particular there is no suggestion that the residence state should generally respect the source state's characterisation. It is not clear whether the Report had in mind examples such as the relief provision as it applies in Germany, or the

³⁰ Art. 23 Comm. para. 54.

³¹ Thin Capitalisation, Issues in International Taxation No. 2, 1987, reproduced in the Model Tax Convention Vol. II, paras 65 and 86(b).

³² Our italics.

³³ Art. 23 Comm. para. 68.

³⁴ Thin capitalisation raises different issues because recharacterisation of interest as a dividend makes it more appropriate for all the same consequences of an actual dividend to be given, including therefore credit for underlying tax. This argument cannot be applied to the U.K. which does not recharacterise interest in thin capitalisation situations as a dividend but merely disallows the deduction of the interest. In addition the U.K. gives underlying credit based on the accounts profit of the subsidiary and so equivalence with dividends would be achieved only if the accounting treatment in the subsidiary's state showed the disallowed interest as a dividend, which seems unlikely.

underlying credit provision as it applies in the United Kingdom. It seems more likely that the latter was intended as such provisions referring to dividends without any cross-reference to the dividend article are more common; the credit part of the relief article used by exemption states normally follows the Model in cross-referring to article 10. There is also no discussion in the Report of the source state's taxation being in accordance with the Convention which would normally be found in cases such as the relief provision applying to Germany,³⁵ the inclusion of which would indicate that the residence state should accept the source state's characterisation. It therefore seems that the OECD regards the cases where the context otherwise requires as limited to the type of cases listed in the Report (which include all thin capitalisation cases where the recharacterisation is in accordance with article 9), so that in other cases the residence state applies its own meaning.³⁶

In conclusion we would on balance maintain the view that the definition should not be used in the underlying credit provision in this case and in interpreting similar articles in other states' treaties.³⁷

The decision of the Court of Appeal in *Memec*

So far we have considered our own approach to the issue. We turn now to how the majority in the Court of Appeal decided the question. The Court relied on the fact that the definition of dividend was in a separate article and pointed out that the 1970 Protocol changed the definition of dividend and substituted a new relief article so the connection between the two must have been in the draftsman's mind. The Court also noted the cross-references to the definition of immovable property in the other articles using that expression. The difference in meaning of the French text of the Model was noted but the Court said it was unimpressed by this over-subtle point. Perhaps the point would have had more force if it had been directed to the German text of the actual treaty.³⁸ The Court also referred to the other instances in which the definition of dividend was impliedly incorporated but said that it was far from obvious that the parties intended that the same should apply to the underlying credit provision.

The Court referred to a decision of the *Bundesfinanzhof*³⁹ in which a definition of dividend was applied to an article dealing with time limits for treaty refunds of withholding taxes on dividends, interest and royalties of the Germany–Switzerland treaty. It pointed out that the subject matter was withholding tax and so it was natural for the definition to be used. The second edition of Professor Vogel's book was referred to but the passage quoted dealt with keeping in line the definition of dividends on which withholding tax was charged and the credit for such withholding tax.⁴⁰ However, the subject matter of this case was different. The taxpayer might have relied on a better passage relating to exemption of dividends in Germany.⁴¹

The conclusion of the majority was against applying the definition on the ground of

³⁵ See note 14.

³⁶ Our previous article also referred to analogous discussions in the OECD Report on the 183 day rule and the OECD Model estate tax convention, see note 2.

³⁷ A list of such provisions is included in the article cited in note 2 at pp. 246–247 (B.T.R.); 137–138 (European Taxation).

³⁸ See note 7.

³⁹ *Bundesfinanzhof* (1982) BFH 22 HFR 301.

⁴⁰ Vogel on Double Taxation Conventions (2nd ed.), p. 1064. In the 3rd ed. see art. 23 mn 180 (p. 1243).

⁴¹ p. 1035 (art. 23 mn 114). In the 3rd ed. p. 1212.

symmetry as the judge in the court below had done: "In truth to achieve the symmetry which the judge sought requires treating a term defined in a distributive article for the purposes of that article as though it were a general definition in art. II. But that does not do justice to the coherent and careful drafting of the convention and the 1970 protocol, which to my mind indicates that the absence of a definition in art. XVIII [the underlying credit provision] and the consequent application of art. II(3) [the equivalent to art. 3(2) of the Model] were intended."⁴²

We would support the decision of the majority for the reasons given above, although it might be said that the approach was too semantic, just as the approach of the High Court Judge had been too purposive. It is perhaps odd that in adopting the semantic approach the majority of the judges did not mention the connection with the paragraph in the dividend article dealing with direct investment by United Kingdom companies in German companies.⁴³

The dissenting judge in the Court of Appeal, Staughton L.J., said that: "it seems to me very likely that continental courts generally, like the German court already mentioned, would reject the semantic restriction attributed to the words 'as used in this Article', and would hold that the definition could be relied on elsewhere in the Convention. In the interest of uniformity, I would do the same."⁴⁴ It is interesting that he seems to be willing to follow Continental courts without saying whether he agreed with them, although his dissent on this point made no difference to the final result of the case. It is clearly desirable that courts in both treaty states should come to the same result although he makes the point that this is less compelling than in the case of a multilateral treaty. He said that there was effectively a multilateral aspect since other treaties are based on the Model.⁴⁵ One might ask whether the point made concerning Continental courts is really true generally, or whether it is true only for dividends because of the express reference to dividends in the credit part of the relief article in exemption states. It is suggested that the German case to which he referred does not support the argument for the reason given by the majority, that it related to a treaty article dealing with withholding tax refunds and so the definition of dividend, on which withholding tax was charged, was obviously impliedly imported. If Continental writers favour applying the definition of dividend to the relief article, it is more likely to be because their treaties give credit rather than exemption for dividends; for credit purposes, dividends have the same meaning as in the dividend article. The Model deals with this unambiguously by referring to article 10 rather than to dividends ("items of income which, in accordance with the provisions of Articles 10 and 11, may be taxed in the other Contracting State...")⁴⁶ but the result is unlikely to be different if a treaty refers simply to dividends as do many German treaties. We do not know of any support for saying that Continental courts in general would use definitions in particular articles for the purposes of the whole treaty.

Conclusion

The conclusion is that a state should be more specific if it departs from what the court

⁴² p. 768c.

⁴³ See text at note 18.

⁴⁴ p. 771d.

⁴⁵ But it should be pointed out that the 1963 Draft did not use the expression dividends outside the dividend article and so the issue did not arise. The underlying credit provision is not in the Draft.

⁴⁶ Art. 23A(2).

rightly described as the “coherent and careful drafting” of the Model by using the term dividends elsewhere in the treaty with the intention that the term has its internal law meaning in the other provisions (as it is fairly clear the United Kingdom does in the underlying credit provision which is found in United Kingdom treaties generally). It is not sufficient to rely on the limitation in the dividend article definition, “as used in this article”, to restrict its effect to that article, particularly when the term is used elsewhere in the treaty in a context which imports the definition.⁴⁷ This is even more important in a case like *Memec* where the other state does intend that the definition should be used in another part of the relief article.

⁴⁷ See the examples in the text at notes 11, 12, 13 and 14.