Resource Capital Fund III LP v Commissioner of Taxation: Partners or the Partnership—Who Is the Relevant Entity Under the Avoidance of Double Taxation Convention Between the United States and Australia?

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I. OVERVIEW

Resource Capital Fund III LP (RCF) is a limited partnership set up under the laws of the Cayman Islands, with the majority of its limited partners residing in the United States.[1] Like many businesses in today's globalized market, RCF held shares of a foreign company.[2] The company, St. Barbara Mines Ltd. (SBM), is located and operates in Australia.[3] SBM engages in gold mining on tenements located throughout Australia.[4] RCF looked to divest itself of the 100 million shares of SBM stock it held, and in July 2007, RCF sold 52.5 million of the SBM shares.[5] In January 2008, RCF sold the remaining 47.5 million shares.[6] The total income of both transactions was around $58,250,000.[7] At no point during this time were RCF or any of its partners residents of Australia.[8] In 2010, the Australian Commissioner of Taxation

1. *Res. Capital Fund III LP v Comm'r of Taxation* [2013] FCA 363 ¶ 11 (Austl.).
2. *See id.* ¶¶ 1, 14.
3. *Id.* ¶ 14.
4. *Id.*
5. *Id.* ¶ 1.
6. *Id.* ¶ 2.
7. *Id.* ¶ 3.
8. *Id.* ¶ 13.

(Commissioner) issued RCF a notice of assessment for the 2008 tax year[9] and also assessed an administrative penalty of $13,106,250, which was 75% of the total tax liability of $17,475,000.[10] RCF objected to both the assessment and the penalty.[11] In response, the Commissioner reduced the penalty to $4,368,750 but sustained the assessment.[12] RCF appealed the Commissioner's decision.[13] The Federal Court of Australia *held* that (1) RCF was not considered a resident of the United States for tax purposes; (2) article 13 of the Convention Between the Government of the United States of American and the Government of Australia for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income (Avoidance of Double Taxation Convention) did not grant Australia the authority to tax the gain to RCF; and (3) under the Convention, RCF's general partners were considered to have derived the gain from the sale of shares. *Resource Capital Fund III LP v Commissioner of Taxation* [2013] FCA 363 (Austl.).

II. BACKGROUND

Both the United States and Australia, as all other countries, have their own domestic laws regarding how the income of individuals and businesses are taxed.[14] However, in an effort to promote international trade and to protect foreign economic interests, tax conventions were developed.[15] The main purpose of such conventions is to avoid the application of domestic tax laws by two countries to the income of a person or business with ties to both countries, which is referred to as double taxation.[16] These "avoidance of double taxation" conventions are written to reflect other existing domestic and international tax models.[17]

Often, difficulties arise when applying the provisions of these conventions.[18] Conflicts between domestic law and a convention and the problems inherent in interpreting international instruments combine to

9. *Id.* ¶ 4 (stating that the year of income is for the tax period ending on June 30, 2008, meaning that both sales transactions were completed within the same tax year).
10. *Id.* ¶ 5.
11. *Id.* ¶ 6.
12. *Id.* ¶¶ 7-8.
13. *Id.* ¶ 9.
14. *See* I.R.C. §§ 1-14 (2012); *Income Tax Assessment Act 1936* (Cth) pt III (Austl.); *Income Tax Assessment Act 1997* (Cth) (Austl.).
15. *See Res. Capital Fund III* [2013] FCA 363 ¶ 29.
16. *Id.*
17. *See id.* ¶ 30.
18. *Id.* ¶ 26.

create these difficulties.[19] Therefore, it is important to gain an understanding of the domestic tax laws of the countries involved and the language of the relevant convention, as well as how that language may be interpreted.

A. The Domestic Tax Laws of the United States and Australia

The U.S. domestic tax laws are found in the Internal Revenue Code (I.R.C.), under title 26 of the United States Code. Of particular relevance is I.R.C. § 7701(2), which defines a partnership as "a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on."[20] Section 7701(4) of the I.R.C. defines domestic corporations and partnerships as those which are created or organized in the United States, and § 7701(5) defines a corporation or partnership as foreign if it is not domestic.[21] The notion of fiscal transparency, found in § 701, states that the partners, not the partnership, are subject to and liable for U.S. income tax.[22] This means that for U.S. taxing purposes, the relevant entity is the partner.

The Australian domestic tax laws are found within two separate instruments that must be read in conjunction with each other: the Income Tax Assessment Act of 1936[23] (1936 Act) and the Income Tax Assessment Act of 1997[24] (1997 Act). The 1997 Act reflects modifications made to the 1936 Act, but there are provisions within the 1936 Act that remain relevant.[25] The 1997 Act, at section 995-1, defines a partnership as an association of persons doing business as partners or jointly receiving ordinary or statutory income.[26] Section 94T of the 1936 Act states that a partnership is an Australian resident if formed in, conducts business in, or has central management and control in Australia.[27] Section 94A of the 1936 Act allows for "limited partnerships to be treated as companies for tax purposes."[28] This means that for

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19. *See* Org. for Econ. Co-Operation & Dev. [OECD], *Commentary on Article 1: Concerning the Persons Covered by the Convention*, *in* MODEL TAX CONVENTION ON INCOME AND ON CAPITAL, at C(1)-1, paras. 2-3 (2010) [hereinafter *OECD Commentary*].
20. I.R.C. § 7701(2) (2012).
21. *Id.* § 7701(4)-(5).
22. *See id.* § 701.
23. *Income Tax Assessment Act 1936* (Cth) (Austl.).
24. *Income Tax Assessment Act 1997* (Cth) (Austl.)
25. *See id.* s 1-3.
26. *Id.* s 995-1.
27. *Income Tax Assessment Act 1936* s 94T (Cth) (Austl.) (as amended by *Act No. 227 of 1992* (Cth) (Austl.)).
28. *Id.* s 94A.

Australian taxing purposes, the relevant entity is the partnership. This notion conflicts with the fiscally transparent model followed in the United States and may present an issue for partners or partnerships with ties in both countries.[29]

B. The Avoidance of Double Taxation Convention Between the United States and Australia

In an effort to avoid double taxation on the income of their residents, in 1982, the United States and Australia entered into the Avoidance of Double Taxation Convention.[30] The provisions of the Convention germane to this Recent Development include articles 1, 3, 4, and 13.[31] Article 1 defines the scope of the Convention as applying only to residents of either the United States or Australia.[32] Article 3 allows partnerships to be regarded as "persons" for purposes of the Convention.[33] Article 4 defines U.S. residential status:

> (b) a person is a resident of the United States if the person is:
> (i) a United States corporation; or
> (ii) any other person (except a corporation or unincorporated entity treated as a corporation for United States tax purposes) resident in the United States for purposes of its tax, provided that, in relation to any income derived by a partnership, an estate of a deceased individual or a trust, such person shall not be treated as a resident of the United States except to the extent that the income is subject to United States tax as the income of a resident, either in its hands or in the hands of a partner or beneficiary, or, if that income is exempt from United States tax, is exempt other than because such person, partner or beneficiary is not a United States person according to United States law relating to United States tax.[34]

And article 13 allows the country where income was generated to tax the income although the income was derived by residents of the other country.[35] Article 13, paragraph 7 allows for domestic tax law to be applied to capital gains, except as provided in the earlier sections of

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29. *See OECD Commentary*, *supra* note 19, para. 6.2.
30. *See* Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austl., Aug. 6, 1982, 35 U.S.T. 1999 [hereinafter Avoidance of Double Taxation Convention].
31. *See Res. Capital Fund III LP v Comm'r of Taxation* [2013] FCA 363 ¶¶ 40-45 (Austl.).
32. Avoidance of Double Taxation Convention, *supra* note 30, art. 1(1).
33. *Id.* art. 3(1)(a).
34. *Id.* art. 4(1)(b).
35. *Id.* art. 13(1).

article 13.[36] The language of articles 1, 3, and 13 seems to convey an unambiguous meaning. They are simple to read and express their point clearly. Article 4(1)(b)(ii), on the other hand, is very convoluted and likely requires inquiry into what the crafters intended to interpret its meaning.

C. The Australian Method for Interpreting Avoidance of Double Taxation Conventions

The Australian method for interpreting "avoidance of double taxation" conventions was set out in *Virgin Holdings SA v Federal Commissioner of Taxation*.[37] *Virgin Holdings* dealt with the interpretation and application of a tax treaty between Australia and Switzerland as applied to a Swiss corporate holding company being taxed by Australia on income gained from selling shares in subsidiaries located in Australia.[38] The court established that the general principles for interpreting double tax treaties begins with the Vienna Convention on the Law of Treaties (Vienna Convention), specifically articles 31 and 32.[39] Article 31 of the Vienna Convention requires that "ordinary meaning . . . be given to [the] terms of the treaty in their context and in the light of its object and purpose."[40] Under the Vienna Convention, the text, preamble, annexes, agreements, and instruments created between the parties regarding the treaty; subsequent agreements and practices between the parties regarding interpretation and application of the treaty; and any relevant rules of international law shall be taken into account when interpreting a treaty.[41] Article 32 of the Vienna Convention states:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31:
>
> (a) leaves the meaning ambiguous or obscure; or

36. *See* Protocol Amending the Convention Between the Government of Australia and the Government of the United States of America for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austl., art. 9, Sept. 27, 2001, T.I.A.S. No. 13164 [hereinafter 2001 Protocol] (amending article 13 of the Avoidance of Double Taxation Convention to include paragraphs 5 through 7).

37. (2008) 214 FCR 278 ¶ 19 (Austl.).

38. *Id.* ¶ 5.

39. *See id.* ¶¶ 19-20 (citing Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]).

40. Vienna Convention, *supra* note 39, art. 31.

41. *See id.*

(b) leads to a result which is manifestly absurd or unreasonable.[42]

The court maintained the view, expressed through prior case law, that consideration of an international treaty's text, context, object, and purpose was required for interpretation since such instruments should be construed in a more general manner than domestic law.[43] Using this method of interpretation for "avoidance of double taxation" conventions can be helpful, and outside sources can be used to clarify ambiguities. But it can also be harmful because allowing so many different sources may produce several different interpretations, any of which could be correct or, more importantly, incorrect.

III. THE COURT'S DECISION

In the noted case, the Federal Court of Australia recognized that a conflict existed between its domestic tax law and the Avoidance of Double Taxation Convention as to which entity—the general partners or the partnership—was liable for tax on the income earned from RCF's sale of shares.[44] Considering three separate issues, the court held that RCF was not a resident of the United States for tax purposes, that article 13 of the Convention did not grant Australia the authority to tax the gain, and that under the Convention, RCF's general partners derived the gain from the sale of shares.[45] Accordingly, it resolved the conflict in favor of the Convention.[46]

The first issue addressed by the court was whether RCF was considered a resident of the United States under the Convention.[47] Article 4(1)(b)(ii) of the Convention is the relevant provision in determining U.S. residential status.[48] Unsurprisingly, the Commissioner and RCF had conflicting interpretations of the article.[49] The Commissioner argued that RCF was a resident of the United States because its general partners, who resided in the United States, received income from the partnership, which was subject to U.S. taxation.[50] It did not matter that RCF, as an entity, was not considered a U.S. partnership because its partners were subject to U.S. taxation .[51] The Commissioner

42. *Id.* art. 32.
43. *See Virgin Holdings* (2008) 214 FCR 278 ¶ 22.
44. *Res. Capital Fund III LP v Comm'r of Taxation* [2013] FCA 363 ¶ 77 (Austl.).
45. *Id.* ¶¶ 60, 76.
46. *Id.* ¶ 77.
47. *Id.* ¶ 54.
48. Avoidance of Double Taxation Convention, *supra* note 30, art. 4(b).
49. *Res. Capital Fund III* [2013] FCA 363 ¶¶ 56-57.
50. *Id.* ¶ 56.
51. *Id.*

insisted that the article should not be read as containing an additional requirement of the partnership being recognized as a U.S. resident.[52] The Commissioner reasoned that such an interpretation would defeat the possibility of extending the benefits of the Convention to partnerships under the notion that they were U.S. residents for treaty purposes only.[53] He further reasoned that this extension was needed because the I.R.C. only defined what was considered a domestic or foreign partnership and not what was required for a partnership to be considered a resident.[54]

RCF, on the other hand, argued that article 4(1)(b)(ii) of the Convention contained a dual requirement for U.S. residency.[55] It argued that a partnership first had to be considered a U.S. resident for tax purposes and then, if the U.S. partners received income from the partnership that was taxable, residency would be established.[56] Understanding that the I.R.C. does not define residency requirements for partnerships, RCF argued that the requirements given to corporations should also apply to partnerships.[57] Because the I.R.C. mentioned both partnerships and corporations when defining what was considered a domestic or foreign company, the residency requirements for a corporation should also apply to a partnership.[58] Following this logic, a partnership would only be considered a resident of the United States if it was established under U.S. law.[59] Applying this concept to article 4(1)(b)(ii) of the Convention, RCF would not be recognized as a U.S. resident for tax purposes because it was organized under the laws of the Cayman Islands.[60] Not meeting this primary requirement would completely disqualify RCF from U.S. residential status for purposes of the Convention.[61]

The court agreed with RCF.[62] It found the argument to apply the resident standard of corporations to partnerships convincing because it was consistent with the view expressed in a prior tax treaty between the United States and Australia.[63] Furthermore, it agreed with RCF's

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52. *Id.*
53. *Id.*
54. *Id.*; *see also* I.R.C. § 7701(4)-(5) (2012).
55. *Res. Capital Fund III* [2013] FCA 363 ¶ 57.
56. *Id.*
57. *Id.* ¶ 58.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* ¶ 60.
63. *Id.* ¶ 59.

interpretation of article 4(1)(b)(ii) that it contains a dual requirement.[64] Accordingly, the court held that RCF was not a U.S. resident for U.S. tax purposes and therefore was not a U.S. resident for purposes of the Convention as a whole.[65]

The next issue addressed by the court was whether article 13 of the Convention allowed Australia to tax RCF's gains from selling stock.[66] The Commissioner argued that article 13 was the only relevant provision to consider because it granted Australia unlimited taxing authority over capital gains.[67] The Commissioner relied on paragraph 7 of article 13, which states, "Except as provided in the preceding paragraphs of this Article, each Contracting State may tax capital gains in accordance with the provisions of its domestic law."[68] Such language, he argued, allowed Australia to use its domestic laws to tax the gains earned by RCF since they were earned in Australia.[69] The court disagreed.[70] It found that paragraph 7 was limited by the language of the rest of article 13.[71] It reasoned that because the authority to tax income gained from real property, which includes shares, was expressed in paragraph 1, it was not authorized under paragraph 7.[72] To authorize the tax under both provisions would make paragraph 1 unnecessary.[73] As such, paragraph 7 was not applicable because RCF's gains came from selling shares. Additionally, the court found that article 13 was not applicable because RCF was not a resident of either the United States or Australia.[74]

The final question addressed by the court was whether RCF's general partners or the partnership, as an entity, derived the gain for purposes of the Convention.[75] The court, relying on the method expressed in *Virgin Holdings*, looked to article 32 of the Vienna Convention, which allows the use of supplementary materials for interpreting tax treaties.[76] The court found the Organisation for Economic Co-Operation and Development (OECD) Commentary to be

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64. *Id.* ¶ 60.
65. *Id.*
66. *Id.*
67. *Id.* ¶¶ 55, 63.
68. *See* 2001 Protocol, *supra* note 36, art. 9; *Res. Capital Fund III* [2013] FCA 363 ¶ 63.
69. *Res. Capital Fund III* [2013] FCA 363 ¶ 63.
70. *Id.* ¶ 63.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* ¶ 64.

an appropriate source to reference for this purpose.[77] First, the court looked to paragraph 6.6 of the Commentary, which deals with how convention provisions should be interpreted when a partnership is considered fiscally transparent by one of the contracting countries.[78] As stated previously, fiscally transparent means that the partners are taxed as individuals in their home country on their share of income received by the partnership.[79] The OECD Commentary states that when dealing with a fiscally transparent partnership, the country that is the source of the gain should treat the gain as if it was directly earned by the partners themselves.[80] Therefore, under this notion, if RCF's general partners are the relevant entity to consider, article 13 of the Avoidance of Double Taxation Convention would be applicable since the partners are U.S. citizens who derived gains from the disposition of real property in Australia.[81] This is the desired result because the general partners, who are already subject to the U.S. tax and now liable for the Australian tax, can receive a tax credit to prevent double taxation.[82] The tax credit is not available to a partnership.[83] So, following paragraph 6.6 of the OECD Commentary allows the benefits of the Convention to extend to partnerships that are not considered residents of either of the contracting countries, as is the case here.[84] Using this information, the court reasoned that the debate over whether RCF was considered a U.S. resident under article 4(1)(b)(ii) of the Convention was null because under this notion, the partners were the relevant entity, and they were clearly U.S. residents.[85] The court also looked at paragraph 6.3 of the OECD Commentary, which put the burden on Australia, as the country where the gain was earned, to take into consideration how the U.S. partners were ultimately taxed within the United States.[86] Finally, the court looked to the expressed purpose of the United States and Australia in updating the Convention through the 2001 Protocol,[87] as stated in the

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77. *Id.*; *see also OECD Commentary*, *supra* note 19.

78. *Res. Capital Fund III* [2013] FCA 363 ¶ 65; *OECD Commentary*, *supra* note 19, para. 6.6.

79. *See* I.R.C. § 701 (2012).

80. *OECD Commentary*, *supra* note 19, para. 6.6.

81. *Res. Capital Fund III* [2013] FCA 363 ¶ 66.

82. *Id.* ¶ 69.

83. *See id.*

84. *Id.* ¶ 66.

85. *Id.* ¶ 68.

86. *Id.* ¶ 67.

87. 2001 Protocol, *supra* note 36. The 2001 Protocol amended the Avoidance of Double Taxation Convention including the addition of paragraphs 5 through 7 to article 13. *See id.*

Explanatory Memorandum to the Bill (Explanatory Memorandum), which was created in connection with the Protocol:[88]

> The key objective in updating Australia's tax treaty with the United States is to make a significant advance in providing a competitive tax treaty network for companies located in Australia by reducing the rate of DWT [dividend withholding tax] on US subsidiaries and branches of Australian companies. *An important secondary goal is to prevent double taxation of capital gains derived by US residents on the disposal of interests in Australian entities while retaining Australian taxing rights.*[89]

The court reasoned that making the partnership the relevant entity would violate this purpose because, as mentioned previously, the partners would be taxed in the United States while RCF was being taxed in Australia and the tax credit would not be available.[90]

IV. ANALYSIS

The Federal Court of Australia ultimately decided this case correctly. But there are some areas of concern within its decision. One example is the court's interpretation of article 4(1)(b)(ii) of the Avoidance of Double Taxation Convention. The court agreed with RCF's interpretation of the article, but neither the court nor RCF gave an explanation of how they arrived at such an interpretation.[91] To be fair, the Commissioner did not explain how he arrived at his interpretation either,[92] but upon reviewing the article, his interpretation seems to be correct. The language used and the structure of article 4 make it very convoluted, but when broken down and each piece considered, it seems to read: a person is a resident of the United States if it is a U.S. corporation or any other person resident in the United States for the purpose of its tax, *but* (when dealing with a situation where income is derived by a partnership,) a person resident in the United States for the purpose of its tax must not be considered a U.S. resident *unless* the derived income is subject to U.S. taxation as the income of a partner or a holding company that is a resident of the United States or if the derived income is exempt from U.S. taxation for reasons other than because the partner or holding company is not considered a U.S. person according to domestic tax law. When read in such a manner, the Commissioner's interpretation can be seen. RCF would be a resident because it has a

88. *Res. Capital Fund III* [2013] FCA 363 ¶ 69.
89. *Id.* (citation omitted).
90. *Id.*
91. *See id.* ¶¶ 57, 60.
92. *See id.* ¶ 56.

situation where, as a partnership, it derived income and it meets the requirements of the first exception listed after "unless" because it is fiscally transparent.

The only way to achieve RCF's interpretation of a dual requirement is by changing the words "provided that," interpreted as "but" above, to a conjunction that connects the preceding clause to the latter. In doing so, the article would read: a person is a resident of the United States if it is any other person considered a resident of the United States for tax purposes *and* (when dealing with a situation where income is derived by a partnership,) this resident of the United States for tax purposes must not be considered a U.S. resident *unless* it meets one of the exceptions.

It is unclear why RCF found it appropriate to substitute a connecting conjunction—such as "and"—when a contrasting conjunction—such as "but"—seems more fitting. It is possible that the court found both interpretations convincing but sided with RCF since its view was consistent with the view expressed in a prior tax treaty between the United States and Australia.[93] But courts must be careful of this practice. The document was updated for a reason, and higher regard should be given to the new views, if any, supporting the update. As mentioned, the debate over the correct interpretation is null because the residential status of RCF was not relevant. But it is important to consider the serious repercussions this decision, as precedent, could have had on partnerships if meeting the dual requirement was needed for the Convention to apply. Only the partnerships set up under U.S. or Australian law would be able to benefit from the protections of the Convention, thereby eliminating a large amount of partnerships with a similar set up to RCF.

Another area of concern regarding the court's decision is in how it interpreted the Convention. The prescribed Australian method for interpretation of double tax treaties was explained in *Virgin Holdings*.[94] The method essentially came down to applying articles 31 and 32 of the Vienna Convention.[95] There is a hierarchy presented by the use of these articles, such that the options existent under article 31 should be exhausted before the use of article 32's supplemental materials is allowed.[96] The article 31 tools available for interpretation of the Convention include its text, preamble, annexes, agreements, and instruments created between the United States and Australia regarding

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93. *See id.* ¶ 59.
94. *Virgin Holdings SA v Fed. Comm'r of Taxation* (2008) 214 FCR 278 ¶ 19 (Austl.).
95. *Id.* ¶¶ 19-20.
96. *Id.* ¶ 20.

the treaty; subsequent agreements and practices regarding interpretation and application; and any relevant rules of international law.[97] If using these items lead to an ambiguous or unreasonable interpretation, then article 32 is relevant and permits the use of supplemental materials for clarification.[98] In the noted case, the court did not follow this hierarchy. Or if it did, there is no explanation of why it seemed to surpass using the article 31 instruments and jumped right to using the OECD Commentary, which the court classified as an article 32 supplemental material.[99] There was mention of the Explanatory Memorandum, a related document that explained the key objectives behind updating the Convention.[100] This document was created by the parties in connection with the 2001 Protocol and thus would be classified as an article 31 material. But reference was made to it only after ample time was spent discussing the OECD Commentary.[101]

Coinciding with the issue of using the OECD Commentary to interpret the Convention is the issue of the weight of significance the court gave to the Commentary. In its decision, while discussing the method of interpretation, the court took time to rebut several claims made by the Commissioner regarding the method.[102] One such claim expressed doubt on how much reliance could be placed on article 32 supplemental materials, especially the OECD Commentary.[103] The court dismissed this claim by distinguishing between careful reliance on the OECD Commentary to support the language of a tax treaty and using the OECD Commentary to replace or override the language of a tax treaty.[104]

This distinction is a blurred line at best when dealing with interpretation. For example, when the court discussed the implications of paragraph 6.6 of the OECD Commentary on the noted case, it concluded that RCF's general partners, and not the partnership, were the relevant entities to consider.[105] It then transplanted this concept to the Convention and applied it to article 13. It could be argued that this transplant, which ultimately made the decision of the case, falls on the side of replacing the language of the Convention. This argument is aided by the fact that the proper method of interpretation was not followed and no other

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97. *Id.*
98. *Id.*
99. *Res. Capital Fund III LP v Comm'r of Taxation* [2013] FCA 363 ¶ 64 (Austl.).
100. *Id.* ¶ 69.
101. *See id.* ¶¶ 65-69.
102. *Id.* ¶ 48.
103. *Id.*
104. *Id.* ¶ 49.
105. *Id.* ¶¶ 65-66.

supplemental materials were used to confirm this concept. On the other hand, it could also be argued that the court did not override the language of the Convention, but instead used the concept from the OECD Commentary to develop an ambiguity within article 13. Finally, it could be argued that the court found the concept developed in the OECD Commentary to be a background principle upon which the Convention was founded.[106] This latter argument seems to be the route taken because the court reemphasized the Convention's purpose of avoiding double taxation while interpreting article 13 through the OECD Commentary and Explanatory Memorandum provisions.[107]

As previously stated, the court decided the case correctly. This decision is correct because it interpreted the Avoidance of Double Taxation Convention in a way that was consistent with the purpose of the Convention to avoid double taxation on the income of residents of the United States and Australia.[108] The court was not making a general rule that partners are the relevant entity under all conventions. This holding was specific and significant to the circumstances presented by this case—where a holding company is set up in country *A*, with partners in country *B* that recognizes fiscal transparency, conducting transactions in country *C*.

V. CONCLUSION

Many would agree that having these "avoidance of double taxation" conventions between countries has been beneficial to individuals, businesses, and economies. However, they also cause difficulties for the judiciary, which is burdened with the task of interpreting them. It is not realistic to believe that the crafters of the conventions will be able to imagine all the scenarios to which their instruments will be applied. Therefore, it makes sense to use general language within the instruments to make sure the provisions are broad enough to make its benefits attainable. But the use of such language can lead to ambiguity, which further leads to the courts sifting through the related documents and outside sources to find the true intention of the provisions. This is a dangerous practice when there are millions of dollars in tax penalties at risk. In the noted case, the potential tax liability was $17,475,000 and the penalty was initially set at $13,106,250.[109] This is a substantial amount of money for any company to pay out, especially unexpectedly.

106. *Id.*
107. *Id.* ¶ 69.
108. *Id.* ¶ 29.
109. *See id.* ¶¶ 1-5.

To ease the burden on the judiciary, crafters of "avoidance of double taxation" conventions should somehow incorporate their own commentary with their documents so that courts, individuals, and businesses will know the instruments' clear intentions and if the conventions will apply to their situation.

Of course, providing the commentary will not be the end to disputes, and judicial interpretation will still be required to some extent. To this end, courts should consider as many of the related documents as possible in determining the outcome. Relying primarily on a single outside source, as was done in the noted case, may not always produce the correct interpretation. Furthermore, it could be beneficial to take into consideration the consequences that will result from deciding one way or another while interpreting the document. Similar to the reasoning conducted by this court when it analyzed what would happen under the provisions of the Convention if partnerships were considered the relevant entity, all courts should go through this analysis. On the one hand, it may seem like an additional burden on the courts. But it is not uncommon for courts to conduct this type of reasoning because they want to be cautious in the precedent they set. Also, conducting this type of analysis creates a greater chance of deciding these cases in a manner consistent with the intentions of the conventions. Although "avoidance of double taxation" conventions have great potential to benefit companies and individuals with growing global interests, it is ultimately judicial interpretations that will grant or deny those benefits. Therefore, it is important to interpret them correctly.

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