Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

CONTENTS

Preface page xv List of Abbreviations xvi

1

Introduction

Fundamentals and Sources of International Tax Law
 Tax Fundamentals
 9

- What Are Taxes and What Are the Different Types?9Income Tax and Payments as Building Blocks11Other Taxes and Ways of Classifying Taxes14
- 1.2 Sources of International Tax Law and Their Interrelationship 16
 - 1.2.1 Domestic Law 16 1.2.2 Tax Treaties 18 What Are They and Where Did They Come From? 18 How Tax Treaties Take Effect in Domestic Law? 23 What Taxes Do They Cover? 26 Can a Treaty Create or Increase Tax? 27 The Multilateral Instrument 29 1.2.3 EU Law 31 EU Treaties 31 Directives 32 1.2.4 Other Sources 33 GATT and GATS 33 Investment Treaties 35
- Investment Treaties35European Convention on Human Rights351.3 Approaches to Interpretation of Material36
 - 1.3.1Domestic Law361.3.2Treaty Interpretation37Vienna Convention39Treaty Definitions42

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

vi

CONTENTS

		CONTENTS			
	Which By Mu 1.3.3 Interp	nentaries 45 Commentary? 48 tual Agreement 50 retation of EU Law by the CJEU 51 buse Rules and Their Interaction 55			
2	2 The Jurisdiction to Tax 61				
	2.1 Forms of I	Economic Allegiance 62			
	2.1.1 The Pe	erson 63			
	2.1.1.1	Who Is a Person: The Tax Subject64Domestic Characterisation of Entities65Entities Organised under Domestic Law65Entities Organised under Foreign Law68Meaning of 'Person' in the OECD Model71			
	2.1.1.2	Residence as a Connecting Factor73Domestic Law73'Residence' under the OECD Model80			
		Primary Test 80 Tiebreakers 83			
	2.1.1.3	Beneficiaries of EU Law 87			
	2.1.2 The A				
	2.1.2.1	Characterising Income-Producing Activities 91 Domestic Characterisation 91 OECD Model Characterisation 94			
	2.1.2.2	Locating the Activity 95 Domestic Law 95			
		Earning Activities 96			
		Allocating Payments 99			
		Problems in Allocating Business Profits 102			
		Assignment of Taxing Rights under the OECD Model 105			
	2.1.2.3				
		FEU Treaty 106			
		Directives 111			
	2.2 Divided Allegiance: The Problems of Double Taxat				
	and Under	0			
	2.2.1 Princip	ples 114			
		Tripartite Relationship 114			
	2212	Economia Considerations 115			

- 2.2.1.2Economic Considerations1152.2.1.3Cross-border Restrictions119
 - OECD Model 120 EU Law 123

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

CONTENTS	vii
 2.2.1.4 Interstate Relationship 132 Internation Equity 132 Harmful Tax Competition and the BEPS Project 134 EU Law Considerations 138 2.2.2 Methods of Allocating Taxing Rights 142 Double Tax Relief 143 Interstate Relationship 145 	
3 Source Country Taxation 149	
 3.1 The Recipient/Schedular Approach 150 3.1.1 Other Income 152 3.1.2 Income from Immovable Property 154 Immovable Property 155 Income From 158 EU Law 161 3.1.3 Business Profits: Subsidiary versus Permanent Establishment 162 3.1.3.1 Enterprise of a Contracting State 163 3.1.3.2 Subsidiaries: Exclusive Taxation 167 3.1.3.3 Permanent Establishments: Shared Taxation 169 3.1.3.1 What Is a Permanent Establishment? 169 Physical Presence 170 General Test 171 Building Sites 176 Express Exclusions 178 Personal Presence 179 Agency Permanent Establishment 180 Independent Agent Exception 185 Services Permanent Establishment 187 Position of Associated Corporations 189 Artificial Avoidance of PE Status and Digitalisation of the Economy 190 	
EU Law 192 3.1.3.3.2 Attribution of Profits: Separate Enterprise Approach 194 Delineating Activities 196	

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

> Calculating Profits 200 Real Transactions 201 Intra-enterprise Dealings 205 3.1.3.4 Discrimination in Taxation of Business Profits 209 OECD Model 210 Permanent Establishments 210 Subsidiaries 213 EU Law 220 3.1.4 Dividends, Interest and Royalties 225 3.1.4.1 Dividends 226 OECD Model 226 Scope of Article 10 226 Limited Source Country Taxation 227 Portfolio Investors 227 Direct Investors 231 Dividends and PEs 232 EU Law 236 Parent-Subsidiary Directive 236 Fundamental Freedoms 239 3.1.4.2 Interest 246 OECD Model 246 Scope of Article 11 246 Limited Source Country Taxation 247 Interest and PEs 248 EU Law 250 3.1.4.3 Royalties 252 OECD Model 252 EU Law 254 3.1.5 Capital Gains 254 OECD Model 254 EU Law 260 3.1.6 Income from Employment and Independent Personal Services 261 3.1.6.1 Employment 262 OECD Model 262 Employment 263 Salaries Etc. 267 Exercised In 269 Non-resident Employers 269 EU Law 270 3.1.6.2 Independent Personal Services 271 OECD Model 271 EU Law 275

CONTENTS

viii

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

> CONTENTS 3.2 The Payer/Deductions and Base Eroding Payments 276 Domestic Law 277 OECD Model 279 EU Law 281 3.3 Quantification and Characterisation Issues 284 3.3.1 Quantification: Transfer Pricing between Associates 285 Identifying Associates 3.3.1.1 288 Generally under the OECD Model 288 Scope of Article 9(1) 289 Independent Enterprise Approach 3.3.1.2 295 Arm's Length Pricing 297 Traditional Transaction Methods 299 Transactional Profit Methods 302 Problem Areas: Services and Intellectual Property 305 Administrative Matters 308 Special PE Issues 310 3.3.1.3 Formulary Apportionment 311 3.3.1.4 EU Law 312 Fundamental Freedoms 312 Common Consolidated Corporate Tax Base 315 3.3.2 Characterisation: Focus on Dividends, Interest and Royalties 316 3.3.2.1 Defining the Boundaries 317 Dividends 317 Interest 319 Royalties 321 Generally 321 Distinguishing from Other Payments 322 3.3.2.2 Thin Capitalisation 325 Domestic Rules 326 OECD Model 329 EU Law 332 3.3.3 Dual Characterisation: Reconciliation Rules 332 OECD Model 332 EU Law 335 4 Residence Country Taxation 340

4.1 Foreign Tax Relief 341 4.1.1 Methods 341 ix

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

х

CONTENTS

		4.1.1.1	Domestic Law: Unilateral Relief 341	
			Deduction 342	
			Exemption 343	
		4110	Credit 346	
		4.1.1.2	OECD Model 353	
			Exemption 355 Credit 358	
		4.1.1.3	EU Law 360	
	112		s with Corporations 363	
	4.1.2	4.1.2.1	Economic Double Taxation 364	
			Domestic Law: Unilateral Relief 364	
			Portfolio Investors 365	
			Direct Investors 366	
			OECD Model 372	
			EU Law 373	
			Parent-Subsidiary Directive 373	
			Fundamental Freedoms 374	
		4.1.2.2	Controlled Foreign Corporations 380	
			Domestic Law 382	
			Defining a CFC 383	
			Exemptions and Thresholds 384	
			Defining CFC Income 386	
			Computing Income 387	
			Attributing Income 388	
			Relieving Double Taxation 389	
			PEs 391	
			OECD Model 392	
			EU Law 398	
4.2	2 Expenses/Losses 405			
	4.2.1	Allocati	on of Expenses between Foreign and Domestic	
		Income	406	
		Domesti	ic Law 406	
		OECD N		
		EU Law		
	4.2.2	•	Loss/Domestic Income 420	
		General		
		EU Law		
	4.2.3		Income/Domestic Loss 426	
		General	•	
		EU Law		
	4.2.4		Relief 435	
		General	-	
		LU LaW	436	

5

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

	CONTENTS				
The Limited Scope of Treaties 446					
5.1	Cou	ntries	Allocation of Payment450ResidenceCountry Sees Entity Source Country DoesNot451SourceCountry Sees Entity Residence Country DoesNot452		
		5.1.1.2	PEs as Hybrid Entities 455 Quantification of Payment 455 Two Scenarios Involving In-Kind Cross-border Payments 457 Economic Double Taxation and Corresponding		
		5.1.1.3	Adjustments459Timing of Payment462Mismatch of Depreciation Rates462Mismatch in Tax Year and Basis ofAccounting464		
		5.1.1.4			
	5.1.2 BEPS Response to Hybrid Mismatch Arrangements 472				
5.2	•	Mismate 5.2.1.1	Bilateral474ch of Source: PEs and Third Countries475Payments Received by PEs477Generally477EU Law482Payments Made by PEs483Generally483		
			EU Law 486 ch of Residence 487 Taxation of the Person 488 Generally 488 Double Taxation 488 Duplicate Losses 489 EU Law 490 Payments Made by the Person: Dual Source 493		

xi

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

xii

CONTENTS

- · · · · · · · · · · · · · · · · · · ·		
Generally 493		
Double Taxation 493		
Duplicate Deductions 494 EU Law 494		
5.2.3 Intermediaries: Re-sourcing and Other Re-		
characterisation 495		
5.2.3.1 Intermediary Country 496		
PE 497		
Subsidiary 498		
Access to Treaty Network: Treaty		
Shopping 498		
Access to Lower Corporate Tax 500		
5.2.3.2 Source Country Taxation 502 Treaty Shopping 502		
Treaty Shopping 502 Beneficial Owner 503		
Limitation of Benefits and Treaty GAAR 508		
EU Law 513		
Tax Treaties: Most-Favoured Nation and Limitation		
of Benefits 513		
Shopping Primary EU Law 518		
Offshore Indirect Transfers 521		
5.2.3.3 Residence Country Taxation 522		
Foreign Tax Relief 522 CFC Rules 525		
EU Law 526		
6 Changes of Source and Residence 531		
6.1 Changes of Source Jurisdiction 533		
6.1.1 Creation of Source 533		
Transfer of Assets to PE 534		
Transfer of Assets to Subsidiary 537		
6.1.2 Termination of Source 538 Transfer of Assets from a PE 538		
Transfer of Assets from a Subsidiary 540		
6.1.3 Transfer of Ownership of Source 542		
Transfer of a PE 542		
Transfer of a Subsidiary 544		
6.1.4 Variation of Form of Source 545		
6.1.4.1 Conversions 546		
PE into Subsidiary 546		
Subsidiary into PE 550		
6.1.4.2 Mergers 552		
Assets Mergers 553		
Corporate Mergers 556		

Cambridge University Press 978-1-108-47781-9 — International Commercial Tax Peter Harris Table of Contents <u>More Information</u>

CONTENTS	xiii			
6.1.4.3 Divisions 559 Assets Divisions 559 Corporate Divisions 561				
 6.2 Changes of Residence Jurisdiction 562 6.2.1 Commencing Residence 562 6.2.2 Cessation of Residence 564 				
7 Bilateral Administrative Issues 567				
 7.1 Exchange of Information 568 7.1.1 OECD Model 570 7.1.2 1988 Multilateral Convention 573 Automatic Exchange of Financial Account Information 573 Country-by-Country Reporting 574 Tax Inspectors without Borders 574 7.1.3 EU Law 574 				
 7.2 Dispute Resolution 576 7.2.1 OECD Mutual Agreement Procedure 576 7.2.2 EU Law 582 				
 7.3 Assistance in Collection of Tax 584 7.3.1 OECD Model 585 7.3.2 Assistance in Collection Agreements 586 7.3.3 EU Law 586 				
Conclusion 587				
References 590				