South Africa/United Kingdom

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Tax Treaty Interpretation after *Ben Nevis (Holdings) Ltd v. Her Majesty's Revenue and Customs* (2013)

In this article, the author examines the principles of tax treaty interpretation as set out by the UK Court of Appeal in *Ben Nevis (Holdings) Ltd v. Her Majesty's Revenue and Customs* (2013).

1. Introduction

The decision of the UK Court of Appeal *in Ben Nevis (Holdings) Ltd v. Her Majesty's Revenue and Customs* (2013)[1] is a landmark in tax treaty jurisprudence. It is the first reported case concerning the application of article 27 of the OECD Model (2010)[2] on mutual assistance in collection of taxes. The decision is also an important statement on the principles of tax treaty interpretation. UK law on treaty interpretation and application is largely developed by the Court of Appeal. In modern times, it is extremely rare for the Supreme Court to hear cases involving tax treaties. Only one tax treaty case has been decided by the House of Lords (the predecessor to the Supreme Court) in the 21st century.[3] That case did not canvas principles of treaty interpretation.

The basic facts of the case are relatively simple. The South African Revenue Service (SARS) sought both interim relief and collection of taxes owed to it for the 1998, 1999 and 2000 years of assessment, following the final determination of a tax appeal in October 2010. On 4 March 2011, a judgement was entered against Ben Nevis for the tax assessed in proceedings in South Africa.[4]

Two questions of international tax law arose in this case:
- the interpretation and application of the Protocol (2010)[5] to the United Kingdom-South Africa Income and Capital Tax Treaty (2002);[6] and
- the abrogation of the "Revenue Rule", i.e. the principle that the courts of one country will not enforce the revenue laws of another country.

Prior to the Protocol (2010), no provision had been made in any tax treaty between the two countries for mutual assistance in the collection of taxes.

2. Revenue Rule Not Abrogated

In the High Court,[7] Her Majesty's Revenue and Customs (HMRC) and SARS argued that the Revenue Rule had been abrogated by the treaty provisions. In consequence, it could no longer be said that there is a public policy that prevents SARS, as the South Africa competent authority, from collecting tax debts due to it and from taking enforcement action directly in the United Kingdom.[8] This argument was rejected by the High Court. The public policy objection to a foreign tax authority enforcing tax debts remains contrary to all concepts of independent sovereignties.[9] This question was not pursued on appeal. As a result, any enforcement action can only be undertaken within the confines of treaty provisions agreeing mutual assistance.

3. Treaty Interpretation

The difficult question the Court of Appeal had to address was the temporal application of article 25A inserted into the United Kingdom-South Africa Income and Capital Tax Treaty (2002) by the Protocol (2010). The tax treaty was signed on 4 July 2002 and entered into force on 17 December 2002. In its original form, it did not provide

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1. UK: CA, 23 May 2013, *Ben Nevis (Holdings) Ltd v. Her Majesty's Revenue and Customs*, [2013] EWCA Civ 578.
2. *OECD Model Tax Convention on Income and Capital* (22 July 2010), Models IBFD.
3. UK: HL, 23 May 2007, *Boake Allen Limited and others v. Her Majesty's Revenue and Customs*, [2007] UKHL 25, Tax Treaty Case Law IBFD.
4. *Ben Nevis (Holdings) (2013)*, at para. 1.
5. *Protocol between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa to Amend the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains, Signed at London on 4 July 2002* (8 Nov. 2010), Treaties IBFD.
6. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital Gains* (4 July 2002), Treaties IBFD.
7. UK: HC, 20 July 2012, *Commissioners for Her Majesty's Revenue and Customs and Commissioner for the South African Revenue Service v. Ben Nevis (Holdings) Limited et al.*, [2012] EWHC 1807 (Ch).
8. Id., at para. 51.
9. Id., at para. 53.

for mutual assistance in the collection of taxes. The Protocol (2010) was signed on 8 November 2010 and came into force on 13 October 2011. The Appellants' case was that the protocol did not authorize the collection of South African taxes due for the years 1998, 1999 and 2000 in the United Kingdom.

The article on entry into force of both the tax treaty and the Protocol (2010) followed article 30 of the OECD Model (2010). Article 27 of the tax treaty reads in part:

> This Convention shall enter into force on the date of receipt of the later of these notifications and shall thereupon have effect:
> (a) in South Africa:
> (i) with regard to taxes withheld at source, in respect of amounts paid or credited on or after 1st January next following the date upon which this Convention enters into force; and
> (ii) with regard to other taxes, in respect of taxable years beginning on or after 1st January next following the date upon which this Convention enters into force;
> (b) in the United Kingdom:
> (i) in respect of income tax and capital gains tax, for any year of assessment beginning on or after 6th April in the calendar year next following that in which this Convention enters into force;
> (ii) in respect of corporation tax, for any financial year beginning on or after 1st April in the calendar year next following that in which this Convention enters into force.

In a similar vein, article VI of the Protocol (2010) specifies:

> This Protocol shall enter into force on the date of the later of these notifications and shall thereupon have effect in both Contracting States:
> ...
> (c) in relation to revenue claims referred to in Article IV of this Protocol, in respect of requests for assistance made on or after the date of entry into force of this Protocol.

While the tax treaty generally applied to the taxes specified in article 2, article 25A, as inserted by the Protocol (2010), required assistance in collection of

> an amount owed in respect of taxes of every kind and description imposed on behalf of the Contracting States, or of their political subdivisions or local authorities,..., as well as interest, administrative penalties and costs of collection or conservancy related to such amount.

Two critical questions of interpretation arose:
- the temporal interaction between the new article 25A, inserted by the Protocol (2010), and article 27 (Entry into force) of the tax treaty;
- the effect of article 27 on the new article 25A in light of the fact that the new article 25A applied to taxes not expressly referred to in article 27.

At the heart of the problem was an anomaly between the scope of the United Kingdom-South Africa Income and Capital Tax Treaty (2002) generally and the new articles relating to international administrative cooperation inserted by the Protocol (2010). In common with the OECD Model (2010), the tax treaty is generally limited to the taxes identified in article 2. The provisions in article 27 of the tax treaty (patterned on article 30 of the OECD Model (2010)) addressing entry into force and the time when the treaty has effect are written by reference to the taxes identified in article 2. The later addition of the new article 25A requiring assistance in collection of taxes and its companion, the substitute article 25 setting out the newly adopted standard for exchange of information, are not restricted to the taxes identified in article 2. This anomaly is not unique to the United Kingdom-South Africa Income and Capital Tax Treaty (2002), but is found in the OECD Model (2010) itself. The same mismatch is found in article 24 (Non-discrimination) of the OECD Model (2010), which is likewise not limited to the taxes identified in article 2.

4. Principles of Treaty Interpretation

Somewhat surprisingly, HMRC and SARS contended that the rules of interpretation of treaties set out in articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") (1969) [10] did not apply to either the United Kingdom-South Africa Income and Capital Tax Treaty (2002) or the Protocol (2010) because South Africa is not a party to that Convention. Even more surprising was that the judge at first instance agreed.[11] The Court of Appeal emphatically rejected this contention, holding that the rules of interpretation set out in articles 31 and 32 of the Vienna Convention (1969) are rules of customary international law and, therefore, binding on all states regardless of whether or not they are parties to that Convention.[12] The trial judge preferred to rely on the "Commerzbank principles" set out by Mummery J in *IRC v. Commerzbank AG* (1990)[13] (a summary of the principles of treaty interpretation in the context of bilateral tax treaties). That summary has been adopted by the Court of Appeal in successive decisions on tax treaties and reads as follows:

> (1) "It is necessary to look first for a clear meaning of the words used in the relevant article of the convention, bearing in mind that consideration of the purpose of an enactment is always a legitimate part of the process of interpretation": per Lord Wilberforce (at p. 272) and Lord Scarman (at p. 294). A strictly literal approach to interpretation is not appropriate in construing legislation which gives effect to or incorporates an international treaty: per Lord Fraser (at p. 285) and Lord Scarman (at p. 290). A literal interpretation may be obviously inconsistent with the purposes of the particular article or of the treaty as a whole. If the provisions of a particular article are ambiguous, it may be possible to resolve that ambiguity by giving a purposive construction to the convention looking at it as a whole by reference to its language as set out in the relevant United Kingdom legislative instrument: per Lord Diplock (at p. 279).
>
> (2) The process of interpretation should take account of the fact that:
> The language of an international convention has not been chosen by an English parliamentary draftsman. It is neither couched in the conventional English legislative idiom nor designed to be construed exclusively by English judges. It is addressed to a much wider and more varied judicial audience than is an Act of Parliament which deals with purely domestic law. It should be interpreted, as Lord Wilberforce put it

10. *Vienna Convention of the Law of Treaties* (23 May 1969), Treaties IBFD.
11. *Ben Nevis (Holdings)* (2012), at para. 24.
12. *Ben Nevis (Holdings)* (2013), at para. 17. Despite this, the approach adopted by the judge was not entirely inconsistent with the principles in the Vienna Convention (1969). *See* id., at paras. 25 to 42.
13. UK: HC, 1990, *IR Commissioners v. Commerzbank AG*, [1990] STC 285 (ChD).

> in *James Buchanan & Co Ltd v. Babco Forwarding & Shipping (UK) Ltd* [1987] AC 141 at p. 152, 'unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptation': per Lord Diplock (at pp. 281–282) and Lord Scarman (at p. 293).
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> (3) Among those principles is the general principle of international law, now embodied in article 31(1) of the Vienna Convention on the Law of Treaties, that "a treaty should be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". A similar principle is expressed in slightly different terms in McNair's The Law of Treaties (1961) p 365, where it is stated that the task of applying or construing or interpreting a treaty is "the duty of giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances". It is also stated in that work (p. 366) that references to the primary necessity of giving effect to "the plain terms" of a treaty or construing words according to their "general and ordinary meaning" or their "natural signification" are to be a starting point or prima facie guide and "cannot be allowed to obstruct the essential quest in the application of treaties, namely the search for the real intention of the contracting parties in using the language employed by them".
>
> (4) If the adoption of this approach to the article leaves the meaning of the relevant provision unclear or ambiguous or leads to a result which is manifestly absurd or unreasonable, recourse may be had to "supplementary means of interpretation" including travaux préparatoires: per Lord Diplock (at p. 282) referring to article 32 of the Vienna Convention, which came into force after the conclusion of this double taxation convention, but codified an already existing principle of public international law. *See* also Lord Fraser (at p. 287) and Lord Scarman (at p. 294).
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> (5) Subsequent commentaries on a convention or treaty have persuasive value only, depending on the cogency of their reasoning. Similarly, decisions of foreign courts on the interpretation of a convention or treaty text depend for their authority on the reputation and status of the court in question: per Lord Diplock (at pp. 283–284) and per Lord Scarman (at p. 295).
>
> (6) Aids to the interpretation of a treaty such as *travaux préparatoires*, international case law and the writings of jurists are not a substitute for study of the terms of the convention. Their use is discretionary, not mandatory, depending, for example, on the relevance of such material and the weight to be attached to it: per Lord Scarman (at p. 294).[14]

In *Ben Nevis*, Lord Justice Lloyd Jones, giving the judgement of the Court of Appeal, observed that the summary was "particularly helpful" as it derived in part from the earlier decision of the House of Lords in *Fothergill v. Monarch Airlines Limited*,[15] which dealt with a multilateral treaty.[16] He further noted that the Commerzbank principles are largely derived from the Vienna Convention (1969). While there is no conflict between the two, the Commerzbank principles, being in the nature of a summary, does not deal with certain aspects addressed in articles 31 and 32 of the Vienna Convention (1969). Thus, although the Commerzbank principles remain the central statement on tax treaty interpretation in UK law, the Court of Appeal has mandated a more systematic analysis by reference to articles 31 and 32 of the Vienna Convention (1969) in *Ben Nevis*.

14. Id., at pp. 297-298.
15. UK: HL, 10 July, *Fothergill v. Monarch Airlines Limited* [1981] AC 251.
16. *Ben Nevis (Holdings)* (2013), at para. 17.

Both the High Court and the Court of Appeal started their analysis by examining the ordinary meaning of the Protocol (2010) in context in the light of its object and purpose as required by article 31(1) of the Vienna Convention (1969). The High Court judge noted that there was nothing in the Protocol (2010) itself that addressed its purpose expressly beyond the implication to be derived from the terms of article 25A itself. However, he adopted the purpose expressed in the implementing instrument, namely, to assist in international tax enforcement.[17] The Court of Appeal agreed, adding that the clear purpose of the Protocol (2010) is to amend the effect of the tax treaty as originally concluded. Thus, in interpreting the Protocol (2010) and the provisions it inserts into the tax treaty, it is necessary to consider them within the context of the tax treaty (as amended), which they form part of. No temporal limitation was expressed in the article and the purpose did not suggest any logical or policy reason for imposing, or an intention to impose, such a limitation.[18]

While it is correct that there is no temporal limitation expressed and the purpose did not suggest a reason for imposing such a limitation, in the author's view, the converse is also true. The fact that the purpose of the Protocol (2010) was to assist in international tax enforcement does not itself suggest a reason why its effect should extend beyond the period during which the protocol itself or, possibly, the tax treaty it amends, is in force.

5. Interpretative Material

5.1. Introductory remarks

The High Court and Court of Appeal were invited by the parties to consider several sources of support for their contentions on the interpretation and application of the United Kingdom-South Africa Income and Capital Tax Treaty (2002) and the Protocol (2010). The status and manner of use of the material was not comprehensively examined by reference to the rules in articles 31 and 32 of the Vienna Convention (1969). Nonetheless, helpful observations were made by the High Court and the role of these sources was carefully examined by the Court of Appeal.

5.2. Commentary on the OECD Model (2010)

Temporal issues relating to assistance in the collection of taxes are addressed in the Commentary on Article 27 of the OECD Model (2010), on which article 25A of the United Kingdom-South Africa Income and Capital Tax Treaty (2002) is based, including:[19]

> Nothing in the Convention prevents the application of the provisions of the Article to revenue claims that arise before the Convention enters into force, as long as assistance with respect to these claims is provided after the treaty has entered into force and the provisions of the Article have become effective. Contracting States may find it useful, however, to clarify the extent to which the provisions of the Article are applicable to such revenue claims,

17. *Ben Nevis (Holdings)* (2012), at para. 31.
18. *Ben Nevis (Holdings)* (2013), at paras. 19, 24 and 43(2).
19. *OECD Model Tax Convention on Income and Capital: Commentary on Article 27* para. 14 (22 July 2010), Models IBFD.

> in particular when the provisions concerning the entry into force of their Convention provide that the provisions of that Convention will have effect with respect to taxes arising or levied from a certain time. States wishing to restrict the application of the Article to claims arising after the Convention enters into force are also free to do so in the course of bilateral negotiations.

The High Court judge identified the Commentary as supplementary. He considered that the first sentence of this paragraph supported the conclusion that the article applied to tax claims arising prior to the entry into force of the United Kingdom-South Africa Income and Capital Tax Treaty (2002). He also considered that the recommendation in the Commentary that the matter may be clarified by the parties did not arise in this case.[20] The Court of Appeal, on the other hand, considered that the Commentary gave no indication either way. It simply recognized that the parties could agree to enforcement of claims arising prior to the entry into force of the tax treaty and that although a provision addressing this issue is helpful, it is not essential.[21]

5.3. Expert evidence

The Appellants sought to introduce expert evidence in relation to the interpretation of the provisions of the United Kingdom-South Africa Income and Capital Tax Treaty (2002) and the Protocol (2010) in the form of expert witness reports of Prof. Maria Grau Ruiz and Dr Avery Jones. This evidence was rejected as inadmissible by both the High Court and the Court of Appeal.[22] The meaning of a tax treaty is a matter of international law and, as such, the meaning of a tax treaty is a legal question for argument by the parties and one of construction for the court. It is not a matter of evidence.

5.4. Legal writing

Prof. Grau Ruiz's book "Mutual Assistance for the Recovery of Tax Claims"[23] was presented by the Appellants and accepted by the Court of Appeal as admissible, but the Court did not consider it assisted, particularly in light of the Court's conclusions on the Commentary on the OECD Model.[24] An article by Jacques Sasseville, Head of the OECD Tax Treaty Unit,[25] was also accepted by the Court of Appeal.[26]

5.5. Parallel treaty

By way of comparison, the Appellants pointed to temporal issues in the Convention on Mutual Administrative Assistance in Tax Matters (the "Mutual Assistance Convention") (1988),[27] which deals, inter alia, with cross-border collection of tax. Article 28(6) of the Mutual Assistance Convention (1988) specifies that its provisions, as amended by a protocol in 2010,[28] shall have effect for administrative assistance with prospective effect, i.e. in relation to taxable periods or tax liabilities after its entry into force. The Mutual Assistance Convention (1988) did not originally include such a rule. Article 30 of the Mutual Assistance Convention (1988) permits contracting states to reserve the right not to provide assistance for tax claims in existence on its date of entry into force. The Court of Appeal considered that this indicates that the Mutual Assistance Convention (1988) originally applied to pre-existing tax liabilities unless there was an applicable reservation. Article 28(6), introduced by the protocol in 2010, expressly allows any two or more parties to agree that the Convention shall apply to assistance relating to earlier taxable periods or charges to tax. The Court of Appeal considered that this comparison did not help the Appellants.[29]

5.6. Foreign judicial decisions

Both parties relied on the US Federal Court of Appeals decision in *Stuart v. United States* (1987).[30] The case concerned exchange of information under the United States-Canada Income Tax Treaty (1942) and the Canada-United States Income and Capital Tax Treaty (1980).[31] Article XXX of the Canada-United States Income and Capital Tax Treaty (1980) included provisions similar to article 27 of the United Kingdom-South Africa Income and Capital Tax Treaty (2002). The taxpayers argued in *Stuart* that, on the basis of those provisions, the Canada-United States Income and Capital Tax Treaty (1980) and not the United States-Canada Income Tax Treaty (1942) applied to a request for information. This was similar to the argument of the Appellants in *Ben Nevis*. The US Federal Court of Appeals agreed with the US government that the United States-Canada Income Tax Treaty (1942) applied because all the relevant acts of request preceded the coming into force of the Canada-United States Income and Capital Tax Treaty (1980). The US government also argued that article XXX determined the issue for the exchange of information rules. The US court decided that it did not need to rule on the second argument because it accepted the first one. The Court of Appeal in *Ben Nevis* did not consider the *Stuart* decision of assistance.[32]

20. *Ben Nevis (Holdings)* (2012), at paras. 24 and 38.
21. *Ben Nevis (Holdings)* (2013), at para. 33.
22. Id., at para. 34; *Ben Nevis (Holdings)* (2012), at para. 4.
23. M.A. Grau Ruiz, *Mutual Assistance for the Recovery of Tax Claims* (Kluwer L. Intl. 2003).
24. *Ben Nevis (Holdings)* (2013), at para. 35.
25. J. Sasseville, *Temporal Aspects of Tax Treaties*, in *Tax Polymath: A Life in International Taxation: Essays in Honour of John F. Avery Jones* (P. Baker & C. Bobbett eds., IBFD 2010), Online Books IBFD.
26. *Ben Nevis (Holdings)* (2013), at para. 36.
27. *Convention between the Member States of the Council of Europe and the Member Countries of the OECD on Mutual Administrative Assistance in Tax Matters* (25 Jan. 1988) (as amended through 2010), Treaties IBFD.
28. *Protocol Amending the Convention on Administrative Assistance in Tax Matters* (27 May 2010), Treaties IBFD.
29. *Ben Nevis (Holdings)* (2013), at para. 27.
30. US: CA 9th cir., *Stuart v. United States* 813 F.2d 243 (9th Cir. 1987), Tax Treaty Case Law IBFD.
31. *Convention between the United States of America and Canada Relating to the Avoidance of Double Taxation and Prevention of Fiscal Evasion in the Case of Income Taxes* (4 Mar. 1942) (as amended through 1966), Treaties IBFD; *Convention between Canada and the United States of America with Respect to Taxes on Income and on Capital* (26 Sep. 1980) (as amended through 2007), Treaties IBFD.
32. *Ben Nevis (Holdings)* (2013), at para. 38.

5.7. Memorandum of understanding between the United Kingdom and South Africa

Article 25A(1) of the Protocol (2010) provides that the United Kingdom and South African competent authorities may enter into memoranda of understanding to settle the mode of application of the United Kingdom-South Africa Income and Capital Tax Treaty (2002). The tax administrations introduced a memorandum of understanding concerning assistance in the collection of taxes under article 25A of the United Kingdom-South Africa Income and Capital Tax Treaty (2002), which was concluded between the representatives of the two competent authorities on 24 February 2011.[33] Witness evidence was introduced to the effect that it was negotiated and agreed during the course of negotiating the Protocol (2010).

The Appellants argued for exclusion of the memorandum of understanding as an aid to the interpretation of the Protocol (2010) or the tax treaty, in particular because it is not an agreement between the states but between their competent authorities (i.e. their tax authorities). The Court of Appeal ruled that it was admissible pursuant to article 31(2) and/or 31(3) of the Vienna Convention (1969), as an agreement relating to the tax treaty, which was made between all the parties in connection with the conclusion of the treaty (article 31(2)(a)) or a subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions (article 31(3)(a)) or subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (article 31(3)(b)).[34]

The Appellants also referred to the fact that in *Commerzbank* a joint statement of the UK and US tax authorities was not regarded as admissible. The Court of Appeal in *Ben Nevis* noted that the judge in *Commerzbank* was not addressing the status of the joint statement in the context of the Vienna Convention (1969).

In the memorandum of understanding the parties agree that requests for assistance are not restricted to claims that were finally determined after the entry into force of article 25A of the tax treaty. It also records a qualification on the assistance to be provided in relation to revenue claims that are more than five years old on the date of the request for assistance. Since the Appellants agreed that enforcement procedure can apply to tax liabilities which arose before the Protocol (2010) came into force, a measure of retrospectivity was accepted. However, the Court found that the memorandum of understanding did not assist on whether article 25A applied before the effective dates set out in article 27.

Both Lords Justices Lloyd Jones[35] and Jackson[36] expressed criticism (with which Lord Justice Floyd agreed) of the fact that the memorandum of understanding was unpublished and that the only way in which taxpayers could obtain a copy is by making a Freedom of Information Act request. In the interests of fairness to taxpayers, such memoranda of understanding may have an important bearing on the position of taxpayers and should be readily available to the public.

33. Id., at para. 39.
34. Id.
35. Id., at para. 41.
36. Id., at paras. 57 to 61.

5.8. Other relevant rules of international law

Although the decision in *Ben Nevis* reasserts the primacy of the Vienna Convention (1969) in interpreting tax treaties and provides a systematic application of those rules, this issue received less explicit attention. Article 31(3)(c) of the Vienna Convention (1969) requires any relevant rules of international law applicable in the relations between the parties to be taken into account. Three rules were relevant in this case.

Firstly, the revenue rule provided the context for the case. The Appellants argued in the High Court that article 25A of the Protocol (2010) should be construed narrowly as it involved a departure from the Revenue Rule.[37] The purpose of the protocol was to overcome the effect of the revenue rule.

Secondly, the Defendants sought to rely on the principle of non-retroactivity in article 28 of the Vienna Convention (1969):

> Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.

Somewhat surprisingly, the Appellants accepted that article 25A could apply to requests relating to tax liabilities arising before the entry into force of the Protocol (2010) and restricted only by article 27 of the United Kingdom-South Africa Income and Capital Tax Treaty (2002).[38] In the author's view, this made the principled argument on non-retroactivity more difficult. The Court of Appeal ruled that the principle of non-retroactivity is not a peremptory norm of international law and article 28 of the Vienna Convention (1969) makes clear that the parties may agree to the contrary. In that respect, the parties expressed their intention in article VI of the Protocol (2010) that article 25A should apply to all requests made on or after the date of entry into force of the Protocol (2010). Thus, the Court of Appeal considered that this was not a true case of retrospective application. By reference to the principles of domestic law, the Court of Appeal considered that there was no unfairness or objectionable retrospection in enforcing the claims and no legitimate expectation that the Revenue Rule would not be overcome by a tax treaty.[39]

In the author's view, the Court of Appeal glossed over the application of the principle of non-retroactivity in article 28 of the Vienna Convention (1969). While it is clearly open to contracting states to agree retroactive application of a treaty, this is only one part of the analysis. Indeed, the difficulty in this case was the lack of express intention,

37. *Ben Nevis (Holdings)* (2012), at para. 23.
38. *Ben Nevis (Holdings)* (2013), at para. 43(4).
39. Id., at paras. 43(1), (2) and (3).

leaving the matter as one of interpretation. The main principle expressed in article 28 is that treaties do not normally bind a party in relation to any act or fact which took place prior to their entry into force. The expression "unless a different intention appears" suggests that a compelling case is needed to establish that the presumed norm has been displaced. The observation that the principle of non-retroactivity is not a peremptory norm of international law misses the point. All that it indicates is that the parties may agree the contrary. It does not negate the presumption of non-retroactivity. A treaty reasonably susceptible of two constructions should be construed in favour of non-retroactivity.

This line of reasoning also suggests that the Court of Appeal focused on the wrong part of article 27 of the United Kingdom-South Africa Income and Capital Tax Treaty (2002) and article VI of the Protocol (2010). Article 28 of the Vienna Convention (1969) also affirms that the temporal division is at entry into force. The relevant wording in the Protocol (2010) is:

> Each of the Contracting States shall notify to the other, through the diplomatic channel, the completion of the procedures required by its law for the bringing into force of this Protocol. This Protocol shall enter into force on the date of the later of these notifications.

The language in article 27 of the tax treaty is similar in effect. Unlike the later parts of those articles, which direct the effect of the tax treaty on the taxes specified in article 2, this language is general and applies to the whole tax treaty. The real focus of the Court's attention should have been on what was the relevant "act or fact which took place or any situation which ceased to exist before the date of the entry into force". If these are the transactions that gave rise to the tax liabilities in question, they would have clearly arisen before entry into force of either the tax treaty or the Protocol (2010).

This addresses the anomaly identified by the Court of Appeal, namely, that if the assistance in tax collection applied to the operative dates for the various taxes mentioned in article 27 of the tax treaty, different temporal limitations would apply to the taxes mentioned in article 2.[40] The anomaly only exists by misapplication of article 28 of the Vienna Convention (1969) and reference to the wrong part of the provisions on entry into force of the tax treaty and Protocol (2010).

The third rule was found in the European Convention on Human Rights. In the High Court, the Appellants argued, as a separate ground, that retrospectivity in this case infringed article 1 of the First Protocol to the Human Rights Convention. The High Court rejected this argument and the point was not appealed.[41] Retroactivity, whether as a matter of domestic or international law, always gives rise to concerns about both legal certainty and prescriptive norms not being in existence at the time conduct is undertaken. These three rules taken together suggest that, as a matter of construction, retroactivity should only be found where it is express or by necessary implication. Although the contracting states did not take heed of the advice of paragraph 14 of the Commentary on Article 27 of the OECD Model (2010) to clarify the issue, such advice was apparently followed in concluding a protocol amending the United Kingdom-India Income and Capital Tax Treaty (1993)[42] on 30 October 2012 (some four months after the High Court decision in *Ben Nevis*).[43] Article 10(2) of that protocol makes the administrative assistance provisions expressly retroactive.

6. Conclusions

In placing the Vienna Convention (1969) at the centre of tax treaty interpretation, the Court of Appeal has firmly brought the interpretation of tax treaties more fully in line with treaty interpretation generally. International consistency will follow from the use of the Vienna Convention (1969) as the framework for interpretation, rather than national courts each offering their own formulations of the applicable principles. This emphasizes the need for a careful study of the Vienna Convention (1969) and the customary international law it reflects.

40. Id., at paras. 25 to 29.

41. *Ben Nevis (Holdings)* (2012), at paras. 46 and 47.

42. *Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains* (25 Jan. 1993), Treaties IBFD.

43. *Protocol amending the Convention between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains of 25 January 1993* (30 Oct. 2012), Treaties IBFD.