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This article examines the concept of causality, a somewhat underexposed aspect of categorizing income under the distributive rules of tax treaties. The author gives his views on causality under tax treaties, and suggests a method of approaching this concept.

1 INTRODUCTION

This article examines the aspect of causality that plays a role in the demarcation between the various distributive rules of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention (the OECD Model). When classifying income under the distributive rules of the OECD Model, i.e., the Articles 6–21, the nature or type of the income is relevant. In other words, income has to be categorized in accordance with the objective scope of the distributive rules. Determining the objective scope of these provisions is a matter of tax treaty interpretation. In the author’s opinion, the concept of causality plays an important role in categorizing income under the distributive rules of the OECD Model. This relatively underexposed concept is often not explicitly recognized in the tax treaty interpretation process. In this article, the author gives his views on causality under tax treaties, and proposes a method of approaching this concept.

The term causality refers to the required nexus between items of income that are taxed under a state’s domestic law, and the principal constituent elements of the various distributive rules of the OECD Model, by reference to the nature of the income. These principal elements are the various types of rights, property and activities underlying the income categories of the Articles 6–21 of the OECD Model.

First, because of the topic’s relation with tax treaty interpretation in general, the author’s views on tax treaty interpretation are summarized in section 2. The concept of causality is discussed in section 3, followed by a discussion of examples derived from case law in section 4. Finally, section 5 recapitulates the author’s conclusions.

2 TAX TREATY INTERPRETATION

2.1 Vienna Convention on the Law of Treaties (VCLT)

The general rules governing the interpretation of treaties are laid down in the Articles 31–33 of the VCLT. According to Article 31(1) of the VCLT, a treaty must be interpreted in good faith, 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 fundamental principle of international law is the principle of good faith, which is codified in Article 26 of the VCLT and in Article 31(1) of the VCLT, requiring that treaties should be interpreted and applied in good faith.

The ordinary meaning of undefined treaty terms should be established in their context, as defined in Article 31(2). Generally, the context comprises the entire text of a treaty, including the preamble and the annexes. In addition, the

Notes

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2 The scope of certain distributive rules is also determined by reference to the location of the source of the income, i.e., these distributive rules have a limited geographical scope (see, for example, Art. 10 of the OECD Model, which has a bilateral scope). The demarcation between distributive rules on the basis of their geographical scope is not further discussed in this article.

2 This article is based on parts of the author’s PhD thesis; R.A. Bosman, Other Income under Tax Treaties, Series on International Taxation no. 55, (Kluwer Law International 2015). This dissertation provides a comprehensive analysis of Art. 21 of the OECD Model.

3 This article does not elaborate on the concept of ‘temporal causality’, i.e., timing aspects of the application of distributive rules in tax treaties. On this issue, see, e.g., J. Sasseville, Temporal Aspects of Tax Treaties, in Tax Polytechnic: A Life in International Taxation, 53–55 (IBFD 2010); J. Wheeler, Time in Tax Treaties, in Global Tax Treaty Commentaries IBFD online, s. 3.3.
context includes any agreements relating to the treaty, to the extent that these were agreed upon by all contracting states and made in connection with the conclusion of the treaty, such as protocols, memoranda of understanding and letters exchanged during the signing of the treaty. Context also includes other instruments relating to the treaty made by one or more parties and accepted by the other parties, like declarations of policy and reservations made upon the signing of the treaty. Context for the purpose of Article 31(1) of the VCLT also includes the applicable domestic tax laws of the contracting states, although the significance of domestic tax laws will usually already follow directly from Article 3(2) of the OECD Model. Unilateral explanations, such as technical explanations to a particular tax treaty submitted to parliament, are not part of the context in the sense of Article 3(2) of the VCLT. A treaty may also have a ‘legal’ or ‘external’ context. This context in a wider sense may comprise other, similar treaties, as well as judicial decisions in other states.

2.2 Article 3(2) of the OECD Model

Article 3(2) of the OECD Model contains a specific clause for the interpretation of terms (i.e., words, coherent expressions or sentences) not defined in the treaty, which prescribes a rerum to the domestic tax law of the state applying the treaty, unless the context otherwise requires. Article 3(2) operates as a lex specialis in relation to the general rules of treaty interpretation included in Articles 31–33 of the VCLT.

Article 3(2) OECD Model prescribes that for the interpretation of undefined tax treaty terms, one should first look at the domestic tax law of the state applying the treaty. Only if the context otherwise requires should the domestic law meaning be abandoned in favour of another meaning. However, the primacy of Article 3(2) does not mean that the rules of the VCLT are irrelevant in interpreting tax treaty terms. Article 3(2) cannot be applied if the undefined treaty term under consideration does not have an equivalent in domestic tax law or if it does not have a legal meaning. Moreover, the Dutch Hoge Raad (Supreme Court) ruled that Article 3(2) cannot be applied to interpret a term that is not used in a similar context under the domestic law. In these cases, Article 3(2) is inapplicable and, therefore, Articles 31 and 32 of the VCLT govern the interpretation of the treaty term at issue. Furthermore, Article 3(2) itself must be interpreted in accordance with the rules of the VCLT. This means that a state’s obligation to carry out its treaties in good faith (pacta sunt servanda) and the requirement that treaties should be applied and interpreted in good faith (Articles 26 and 31(1) of the VCLT) limit the use of the domestic law meaning of a term in the interpretation process.

Only if the context otherwise requires, should the meaning under a state’s domestic law be abandoned in favour of another meaning. The context can only displace the domestic law meaning if the reasons to do so are sufficiently compelling. In the author’s view, the term context referred to in Article 3(2) should be interpreted broadly and may comprise any material that indicates that the domestic law meaning should not be used when interpreting a treaty term. The context for purposes of Article 3(2) includes both internal and external elements.

2.3 Significance of OECD Commentaries

The author adheres to the view that, based on principles of logic and good sense, it is appropriate to refer to the OECD Commentaries as they exist at the time a treaty based on the OECD Model is concluded for the purpose of establishing the meaning of particular tax treaty provisions. In any event, the OECD Commentaries are part of the context of Article 3(2) of tax treaties that are patterned on the OECD Model. As regards the VCLT, the OECD Commentaries existing at the time a treaty is concluded can be considered part of the ‘legal’ or ‘external’ context of a treaty, as opposed to the context as defined in Article 31(2) of the VCLT, and will be of high persuasive value in the interpretation process. From the perspective of the VCLT, it seems difficult to award later Commentaries a role in the interpretive process under Articles 31 and 32 of the VCLT. In the author’s opinion, to the extent that this does not contravene the Articles 31–33 of the VCLT, later Commentaries should be given the same weight as the views of, for instance, authoritative experts in the interpretation process. However, changes to the Commentaries often cannot be considered as mere clarifications. In the author’s view, contradictory and gap-filling changes should never be taken into account when interpreting pre-existing tax treaties.

3 Causality

3.1 General

The term ‘from’ that is used in various distributive rules of the OECD Model denotes the presence of a causal nexus.
between income that is recognized under a contracting state's domestic tax law and the basic element giving rise to each distributive rule of the OECD Model, i.e., the various types of rights, property and activities mentioned in Articles 6–20. The use of the word ‘from’ in Article 10(3), for instance, indicates the requirement of a causal relationship between shares, or other corporate rights, and the derived income. Certain distributive rules use equivalent expressions to indicate this presupposed causal relationship. For example, the phrase ‘profits of an enterprise’ in Article 7(1) of the OECD Model supposes a causal connection between the profits and the enterprise. Furthermore, Article 12(2) requires that a payment be made as a consideration for the use of, or right to use, any of the mentioned rights and properties. This terminology indicates the requirement of a causal relationship between the (right of) use of the right or property and the income that is derived from the right or property. The use of the terminology ‘in respect of an employment’ in Article 15 also indicates the requirement of a causal relationship between the employment and the income.

The classification of an item of income under the various distributive rules of the OECD Model implies causality between the income and the following principal elements:

- immovable property as defined in Article 6(2);
- an enterprise (Article 7);
- the operation of ships or aircraft in international traffic (Article 8);
- shares and other corporate rights as defined in Article 10(3);
- debt-claims of every kind within the meaning of Article 11(3);
- the use of, or the right to use, various types of rights or property listed in Article 12(2);
- the alienation of various types of property (Article 13);
- an employment (Article 15);
- a membership of the board of directors (Article 16);
- personal activities as an entertainer or sportsperson (Article 17);
- past employment (Article 18);
- services rendered to a state (Article 19); and
- maintenance, education or training of a student or business apprentice (Article 20).

If the required causal connection between an item of income and the elements mentioned above is absent, then the respective distributive rules do not apply. For example, Article 10 is inapplicable if the connection between a certain item of income and shares, or other corporate rights, is not close enough to consider the income to be derived from the shares. Consequently, the income at issue may fall within the scope of Article 21 of the OECD Model, provided that the income cannot be categorized under any of the other distributive rules of the OECD Model.

The causal nexus that is implied in the various distributive rules of the OECD Model can be approached in several ways. In the first place, establishing a causal relationship could be considered merely a factual issue, including the appreciation and interpretation of the relevant facts. This would entail an autonomous process of establishing causality for tax treaty purposes on the basis of the facts of the case. The author submits that there is often a factual component to the causal nexus required by the various distributive rules. However, establishing a causal link may also have a legal dimension. First, the required connection between an item of income and the relevant basic element underlying the distributive rules of the OECD Model could be given, or implied, under a contracting state's domestic law. For example, this connection could be established under a state's domestic tax law by employing a fiction. An alternative way of establishing the required causality may therefore take account of the interpretation clause of Article 3(2) of the OECD Model. From this perspective, the causal nexus could be determined by reference to the domestic law of the state applying the treaty, as long as the domestic law of this state provides a meaningful interpretation of this concept. This approach assumes that a causal connection can indeed be derived or distilled from the relevant domestic law. However, in cases where Article 3(2) cannot be applied, or where it does not lead to a useful result, the causal connection should, in the author's view, be established by employing the general treaty interpretation rules of the Articles 31 and 32 of the VCLT (see section 2 supra).

Second, in the author's view, the 'context' within the meaning of Article 3(2) of the OECD Model may under certain circumstances displace a causal relationship that is determined with the aid of the domestic law of the state applying the treaty. For example, when a causal connection is established by means of a domestic law fiction, the context of Article 3(2) may render the connection ineffective for purposes of a tax treaty. In this approach, the causal nexus could be considered to arise by

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8 Art. 21 (the ‘other income’ article) is not included in this enumeration, because this provision applies to items of income that are not dealt with in the preceding articles.

9 See, e.g., FPG. Pittgens, Income from International Private Employment 160, 262 (IBFD 2006).
implication from the tax treaty context. From that perspective, the required causality, which is reflected by the term 'from' or equivalent terms, can be considered an autonomous element that is part of the treaty context, which may limit the classification of an item of income by reference to a state's domestic law in cases where the causality is insufficient at the level of the tax treaty. This raises the issue of how a sufficient causal link should be established for purposes of tax treaty application. In some instances, the OECD Commentary indicates the causal nexus for purposes of the classification of specific items of income. The author takes the view that these parts of the OECD Commentary should be taken into account as relevant context when interpreting undefined treaty terms (see section 2 supra). These parts of the OECD Commentary may thus provide evidence of the causal connection that is embedded in the undefined terms of certain distributive rules. As regards the demarcation between Article 13 and Article 15, for example, the OECD Commentary on Article 15 adopts the approach that Article 15 applies to benefits derived from a stock option until the option has been exercised, sold or otherwise alienated. Gains on the acquired shares after the exercise or alienation of the option are governed by Article 13 (capital gains). Accordingly, the boundary between Article 15 and Article 13 is drawn at the moment on which the option is exercised and the employee becomes a shareholder. In this case, the OECD Commentary indicates that as of the moment of exercising the option, the causal relationship between the income and the employment is no longer sufficient to justify a classification of the income under Article 15. Another example is provided by paragraph 2.8 of the OECD Commentary on Article 15, which explains that punitive damages or damages awarded on grounds like discriminatory treatment or reputational injury are typically covered by Article 21. Moreover, paragraph 2.14 of the OECD Commentary on Article 15 explains that a payment made because the employee has legal grounds for claiming damages from his employer with regard to a work-related sickness or injury typically falls under Article 21. These passages can be regarded as examples of cases where the causal nexus between the respective items of income and an employment is insufficient to arrive at a categorization of the income under Article 15. However, the OECD Commentary does not contain comprehensive guidance on the question of when income can be considered to be derived in respect of an employment.

Third, the good faith principle may be relevant when establishing the causal nexus for purposes of the various distributive rules of the OECD Model. For example, a state may contravene the good faith principle of Article 3(1) of the VCLT by employing, or implying, under its domestic law a very broad notion of causality, which would result in a unilateral expansion of that state's taxation rights when this causality would be applied at the level of the tax treaty.

3.2 Proposed Approach

As regards the legal dimension of establishing a causal link, the author distinguishes an order of the various aspects of the concept of causality that is inferred from the author's approach as regards tax treaty interpretation (see section 2 supra). In the first place, the domestic law of the contracting state applying the treaty governs the establishment of a causal connection. This follows from Article 3(2) OECD Model, which requires that for the interpretation of undefined treaty terms, one should first look at the domestic tax law of the state applying the treaty. The causal element that is implicit in undefined tax treaty terms, such as 'income from shares' (Article 10(3) of the OECD Model) or 'salaries, wages and other similar remuneration in respect of an employment' (Article 15(1) of the OECD Model), should therefore be established with the help of the domestic law of the contracting state applying the treaty. However, the 'context' within the meaning of Article 3(2) may displace or restrict a causal link that is determined or implied under the domestic law of the state applying the treaty, provided that there are sufficiently compelling reasons to do so. Finally, there may be cases where Article 3(2) cannot be applied, or where it does not lead to a useful result. In these circumstances, the causal nexus should be established by employing the general treaty interpretation rules of the Articles 31 and 32 of the VCLT. In that respect, the good faith principle may provide a useful contribution.

3.3 Specific Provision for Immovable Property

With regard to income from immovable property, the author is of the view that the OECD Model contains a specific provision that establishes the required causal nexus. The word ‘from’ in Article 6(1) denotes the requirement of a causal relationship between a specific
The author takes the view that Article 6(3) Bundesfinanzhof

**Introduction**

Examples derived from case law

4.1 Introduction

The causality required by the various distributive rules of the OECD Model is, as far as the author is aware, often not explicitly recognized in case law. In certain court decisions, however, the issue of causality is either explicitly or implicitly addressed. The following discussion is not exhaustive, and is merely intended for illustration purposes. The selected judgments concern in particular the demarcation between Article 21 (the ‘other income’ article) and other provisions of the OECD Model.15

4.2 Third State Interest Included in Business Profits (Germany)

In a 2013 decision, the German Bundesfinanzhof (Federal Tax Court) dealt with the classification of interest paid by a resident of the UK to a resident of Thailand under the 1967 Germany-Thailand tax treaty.16 The Bundesfinanzhof interpreted Article 7 of the 1967 Germany-Thailand tax treaty with the aid of German domestic law by virtue of Article 3(2) of the treaty. As a result, the causal connection between interest arising in a third state and an enterprise carried on through a PE in Germany which was established in accordance with German domestic law was also deemed to exist for purposes of Article 7(1) of the treaty. The Bundesfinanzhof considered the interest to be taxable in Germany, inter alia, under Article 7 of the treaty (business profits), because the interest was attributable to a permanent establishment (PE) in Germany in accordance with German domestic law. Alternatively, the Bundesfinanzhof held that none of the distributive rules of

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12 Art. 6(3) provides that Art. 6(1) also applies to income derived from the direct use, letting or use in any other form of immovable property (the French version of the OECD Model uses the term 'exploitation'). According to the OECD Commentary on Art. 6, para. 3, 'this paragraph indicates that the general rule applies irrespective of the form of exploitation of the immovable property'. The Commentary points towards a broad application of Art. 6, as well as a broad meaning of the word 'use'.

14 For a detailed analysis and more examples, see Bosman, supra n. 2, Ch. 5.

15 For an extensive overview of examples on the demarcation between Art. 21 and the distributive rules of the OECD Model, reference is made to Bosman, supra n. 2, Chs 5–12.

the treaty prohibited Germany from taxing the income. Notably, since this treaty does not contain a provision similar to Article 21 of the OECD Model, the treaty did not prevent Germany from taxing the interest in accordance with its domestic law.17

4.3 Cash Compensation for Dividends (Finland)

A 2002 decision of the Finnish Korkein hallinto-oikeus (Supreme Administrative Court) offers an example where a lack of causality under Article 10 of OECD patterned tax treaties resulted in the classification of income under the 'other income' article.18 In this case, the Korkein hallinto-oikeus classified a cash compensation paid by a bank in respect of dividends under the 'other income' article instead of the dividend article of the applicable tax treaty. The compensation related to dividends paid on shares that were not owned by the recipient at the time of distribution. In the author's view, the income could not be considered as income from shares within the meaning of Article 10(3) because the causal link with the shares was not sufficient, even though the income was derived by a shareholder.19

4.4 Ex gratia Termination Payment (UK)

Another example is provided by a 2008 decision of the UK Special Commissioners of Income Tax of 27 August 2008, in which an ex gratia termination payment made upon an employee’s voluntary resignation was categorized under the 'other income' article of the 2001 UK-US tax treaty.20 Even though the income at issue was included in the UK’s domestic law concept of income from employment, this characterization was not maintained at tax treaty level. One of the Special Commissioner's main considerations was that the income at issue was not ‘similar’ to wages and salaries. This decision can be regarded as an example of a case where, despite the domestic qualification under the income from employment concept, the relation between the income and the employment was not considered sufficient to categorize the income under Article 15 at the tax treaty level.21

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17 This case involved a resident of Thailand who was a partner in a German limited partnership (‘Kommanditgesellschaft’ or KG) that manufactured products. A UK resident company in which the partner owned a shareholding distributed the KG’s products. The partner received interest on a loan which he had provided to the UK resident company. Under German domestic law, assets held by a partner in connection with the business of a partnership were considered to be special business property (‘Sonderbetriebsvermögen’) that was attributable to the partner’s share in the property of the partnership. This approach extended to the loan provided to the UK company. As a result, the interest income of the partner was subject to German income tax. The dispute revolved around the question, inter alia, of whether Germany was entitled to tax the interest income under the 1967 Germany-Thailand tax treaty. According to the Bundesfinanzhof, the interest was paid by a resident of a third state, i.e., the UK. Moreover, the UK company did not have a PE in any of the contracting states in connection with which the indebtedness was incurred. Therefore, the interest did not arise in any of the contracting states within the meaning of Art. 11(5) of the treaty (which is similar to Art. 11(5) of the OECD Model). As a result, Art. 11 of the treaty was inapplicable. The Bundesfinanzhof recognized that the income at issue would fall within the scope of Art. 21 of the OECD Model. However, the 1967 Germany-Thailand tax treaty did not contain a provision similar to Art. 21 of the OECD Model. Furthermore, according to the Bundesfinanzhof such a provision could not be incorporated in the treaty as part of the interpretation process. The Bundesfinanzhof then concluded that Germany was entitled to tax the income based on various alternative arguments, without expressly indicating a preference for either approach. In the first place, Art. 7 of the treaty (business profits), as interpreted with the aid of German domestic law by virtue of the interpretation clause of Art. 3(2) of the treaty, assigned the right to tax the income to Germany on the basis that the partner carried on business in Germany through a PE there. In this respect, the Bundesfinanzhof found that the partner had a PE in Germany as a result of his participation in the KG. The interest income of the partner could be attributed to this PE as a result of a causal connection between the income and the PE that was established in accordance with the relevant German legal doctrine. This connection was also deemed to exist for purposes of Art. 7(1) of the 1967 Germany-Thailand tax treaty, which did not require that the debt was 'effectively connected' with the PE, contrary to the PE provision of Art. 5(1) of the 1967 Germany-Thailand tax treaty (similar to Art. 11(4) of the OECD Model). Alternatively, the Bundesfinanzhof observed that there was no applicable provision in the treaty that prevented Germany from taxing the income under its domestic law.


19 This case concerned an individual residing in Canada who purchased shares in a Finnish listed company on the stock market. The Finnish custodian bank involved in the transaction did not timely register the purchase. As a result, the individual was not registered as owner of the shares and he did not receive the dividends distributed by the company. The bank paid the individual a cash compensation corresponding to the gross amount of the dividends the individual would have received if the transfer of ownership had been timely registered. According to the Finnish Central Tax Board, the payment could not be classified under Art. 10 of the former 1990 Finland-Canada tax treaty, but instead the payment was considered ‘other income’ under Art. 21 of the treaty. Under the ‘other income’ article in this treaty, the source state was entitled to tax the ‘other income’ derived by a resident of the other state in accordance with the laws of the source state. As a result, the Finnish bank had to withhold tax on the payment made to the individual under the applicable Finnish domestic law. This decision was upheld by the Korkein hallinto-oikeus. The 2006 Finland-Canada tax treaty contains a similar provision. The income in this case was a compensation received in consideration for dividends paid on shares that were not owned by the recipient at the time of distribution. In the author’s view, this is an example of a case where the causal connection between the income and the shares was not close enough to consider the income as being derived ‘from’ shares. The income could not be considered as income from shares because, although a shareholder derived it, it did not stem from his position as a shareholder.


21 This case concerned a US citizen who worked in the UK for a UK insurance company for a period of several years. Her employment contract did not provide for any entitlement to a termination payment. After filing her voluntary resignation, the company considered it appropriate to pay her an ex gratia payment, which was intended as a compensation for the benefits the employee was giving up by resigning. After her return to the US, thus becoming a US resident, the ex gratia payment was made. After concluding that the payment was taxable as a termination payment under the UK Income Tax (Earnings and Pensions) Act 2003 (ITEPA), the Special Commissioner had to decide on whether the UK was allowed to tax the termination payment under the 2001 UK-US tax treaty. The Special Commissioner observed that Art. 14 of the treaty (income from employment) followed the pattern of Art. 15 of the OECD Model. According to the Special Commissioner, the term ‘salaries, wages and other similar remuneration’ employed in Art. 14 of the 2001 US-UK tax treaty was not defined in the treaty. Therefore, the Special Commissioner referred to an interpretation of these terms on the basis of Art. 3(2) of the treaty. However, the ITEPA did not provide a useful definition of either term in this case. Based on their ordinary meaning, the Special Commissioner did not consider the ex gratia payment to be ‘salaries’ or ‘wages’, and found it difficult to consider it as ‘other similar remuneration’. The Special Commissioner found that the context of the ITEPA indicated that termination payments were not regarded as ordinary earnings (such as salaries, wages and other similar remuneration), even though they were taxed as employment income within the framework of the ITEPA. According to the Special Commissioner, it was not sufficient that a
4.5 **Disability Allowance (Netherlands)**

Dutch case law may provide some further examples of cases where the requisite causality was insufficient for the categorization of an item of income under Article 15 of OECD patterned tax treaties. For instance, the Dutch *Hoge Raad* decisions on the tax treaty categorization of Dutch disability allowances may be regarded as examples of cases where an item of income that was categorized under the ‘other income’ article rather than Article 15 of OECD patterned tax treaties because of an insufficient causal connection with an employment.\(^\text{22}\) Even though the disability allowance at issue was treated as income from employment under Dutch domestic law, the *Hoge Raad* categorized the allowance under Article 21 of tax treaties based on the OECD Model.\(^\text{23}\) The relevant tax treaties did not contain a specific provision dealing with social security allowances. The *Hoge Raad* may have based its conclusion on the implicit consideration that there was an insufficient causal link between the disability allowance and an employment. However, this argument was not mentioned in the relevant judgments. In the author’s view, if this was indeed the reasoning behind these decisions, the *Hoge Raad* should have at least mentioned that the connection between the income and an employment was insufficient to justify a classification of the income under Article 15. More generally, the author takes the view that the *Hoge Raad* should have explained why the context within the meaning of Article 3(2) required abandoning the domestic law meaning of the term ‘income from employment’ in favour of a different meaning in the case of disability allowances.

5 **Summary and conclusions**

The various distributive rules of the OECD Model require the presence of a causal nexus between income that is recognized under a contracting state’s domestic tax law and the basic element giving rise to the various distributive rules of the OECD Model, i.e., the various types of rights, property and activities mentioned in the Articles 6–20. In the author’s view, the requirement of a causal nexus can be approached in several ways. In the first place, establishing a causal relationship could be considered a merely factual issue, including the appreciation and interpretation of the relevant facts. With regard to the legal dimension of establishing a causal link, the author distinguishes a hierarchy of the various aspects of the concept of causality. As a starting point, the causal factor that is implicit in undefined tax treaty terms should be established with the help of the domestic law of the contracting state applying the treaty by virtue of Article 3(2) OECD Model. However, the ‘context’ within the meaning of Article 3(2) – which in principle includes the OECD Commentaries – may displace or restrict a causal link that is determined or implied under the domestic law of the state applying the treaty, provided that there are sufficiently compelling reasons to do so. Finally, in cases where Article 3(2) cannot be applied, or where it does not lead to a useful result, the causal nexus should be established by employing the general treaty interpretation rules of the Articles 31 and 32 of the VCLT, including the good faith principle.

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payment was similar or equivalent to remuneration. Rather, the payment had to be similar remuneration to salary and wages in order to be classified under Art. 14 of the treaty. The Special Commissioner found that the *ex gratia* payment was a gift, and not a payment in respect of any service rendered by the employee. Therefore, the remuneration did not fall within the ordinary meaning of ‘salaries, wages and other similar remuneration’, even in a broad interpretation of these expressions. According to the Special Commissioner, the *ex gratia* payment in question could not be considered as remuneration in any ordinary sense of the word. This was not only due to the voluntary nature of the payment, but also because the payment lacked the required nexus with services rendered that usually characterizes payments as salary, wages or other similar remuneration. The Special Commissioner concluded that the *ex gratia* payment did not fall within the scope of Art. 14 of the treaty. Consequently, the payment was categorized as ‘other income’ within the ambit of Art. 22(1) of the treaty.


\(^{23}\) It can be derived from BNB 2001/29 that according to the *Hoge Raad*, a disability allowance does not fall under Art. 15 for the following reasons: (i) the allowance stems directly from the social security system, and (ii) the allowance is not paid by the employer. The ‘other income’ article covers the allowance, because neither Art. 15, nor Art. 18, nor Art. 19 applies. The *Hoge Raad*’s judgments regarding WAO allowances have a fundamental character. In particular in BNB 2001/29, the *Hoge Raad* elaborated on the reasons for classifying a WAO allowance under the ‘other income’ article. The arguments employed by the *Hoge Raad* are, in the author’s view, not very distinctive. The domestic law qualification of disability allowances appears to be irrelevant (under Dutch domestic law, disability allowances are considered income from past employment). In the author’s view, tax treaty interpretation on the basis of Art. 3(2) in connection with Art. 10 of the 1964 Wage Tax Act should have resulted in the classification of disability allowances under Art. 15 of OECD patterned tax treaties as income from past employment. In the author’s view, the necessary level of causality arising from the term ‘in respect of’ can be considered part of the context within the meaning of Art. 3(2) of the OECD Model. Thus, an insufficient causal connection between a certain item of income and an employment may require an interpretation deviating from the domestic law meaning. The classification of a WAO allowance under Art. 21 may have been motivated by a perceived lack of causal connection between the income and an employment. However, the *Hoge Raad* does not address this issue at all.