

Non-Discrimination under TFEU and OECD MTC: Application to REITs

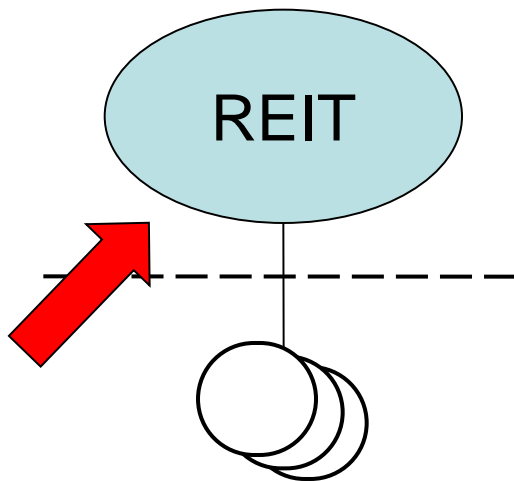
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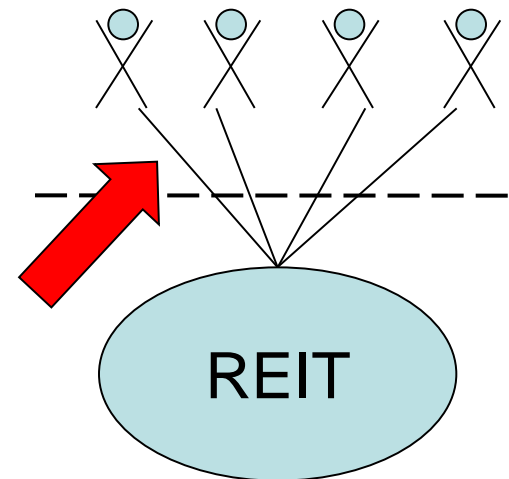

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Issues of cross-border taxation of REITs

scenario 1



scenario 2



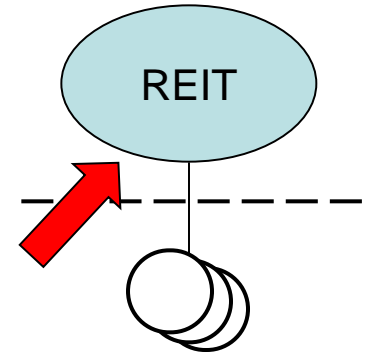
EU Non-Discrimination

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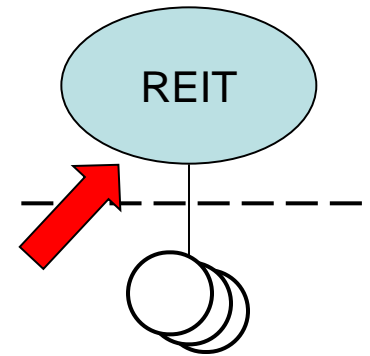
REIT taxation

...in the REIT residence state

- Investment in foreign real estate
- No distinction to be based on investment location within the EU
- In relation to third countries?



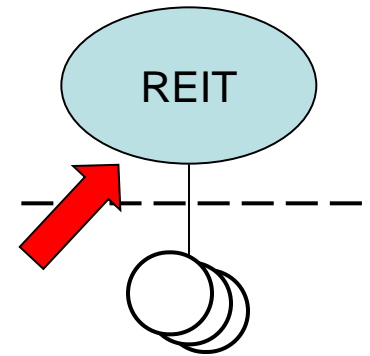
REIT taxation



...in the source state

- Treatment of foreign REITs
- Comparability to domestic REITs?
- Relevance of differences in...
 - ...Tax treatment
 - ...Legal form and personality
 - ...Regulation / activities
 - ...anything in light of a legitimate objective of the legislation?

REIT taxation



...in the source state (cont'd)

- Relevance of investor/shareholder taxation?
- Where a “direct link” exists in domestic law that underlies the special tax regime
- Limits?
- Relevant case law
 - *Aberdeen* (C-303/07), *Orange European Smallcap Fund* (C-194/06); *Santander* (C-338/11), *Commission v. Belgium* (C-387/11), *Emerging Markets* (C-190/12)

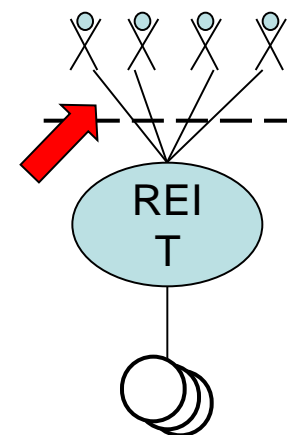
Investor taxation

...in the REIT residence state

- Compare resident and non-resident investors
- Equal treatment for taxable persons
- No higher withholding tax for non-residents

...in the investors' residence state

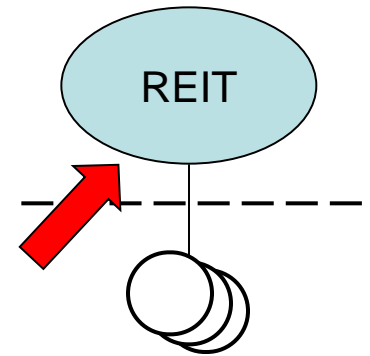
- Investment through foreign vs. domestic REIT
- No higher taxation of distributions from foreign funds
- No deemed distribution taxation for foreign funds?
- REITs in third countries?



DTC Non-Discrimination

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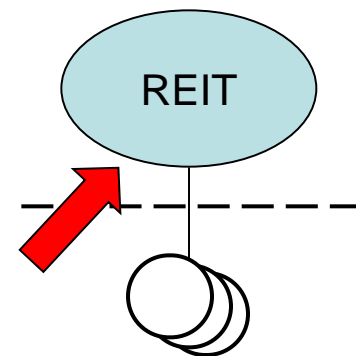
REIT taxation



...in the source state

- Taxing right following Article 6 OECD MTC
- Article 24(3) OECD MTC
 - if REIT is resident in other State
 - and has a PE
 - Comparability of foreign REIT to domestic REIT?
 - Exclusion of § 11 OECD Commentary?

REIT taxation



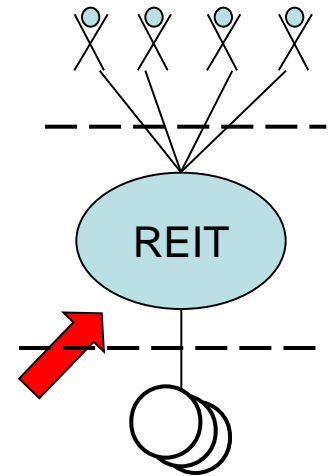
...in the source state

- Article 24(1) OECD MTC
- No residence or PE requirement
- Comparability:
 - Hypothesize nationality (domestic incorporation)
 - Generally no application of Art 24(1) if main difference is residence (priority of Art 24(3)!)
 - Inconclusive case law

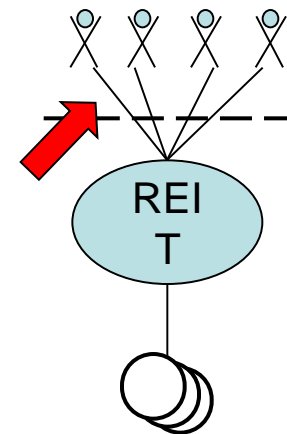
REIT taxation

...in the REIT residence state

- Article 24(5) OECD MTC
 - No disadvantageous taxation based on investors
- No credit entitlement if REIT is transparent
 - Quasi-entitlement of shareholders following Article 24(3) (if shareholders have a PE in the REIT)



Investor taxation



...in the REIT residence state

- Taxing right following Art 6 and Art 10 OECD
- US MTC: deviation from WHT limitation
- Discrimination of foreign investors?
 - Taxation of shareholders not covered by Article 24(5) OECD MTC
 - Application of Article 24(3) OECD MTC possible if REIT is both *transparent* and *actively managing*

Comments & Questions