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FEE Tax Day

Simple, fair, coordinated – tax Utopia in the EU?

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Standing for trust and integrity

Tax Coordination based on ECJ Case Law ?

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ECJ's Function

- In a preliminary ruling, the Court interprets Community law to the extent it may affect the specific legal provision at stake in a particular proceedings.
- *« Negative harmonization »* = influenced by individual situations, and not always predictable; but no direct link between number of cases referred to the ECJ & legislative changes made by Member States (*abbrev.:* MS) to adapt their legislation (*The Impact of the Rulings of the ECJ in the Area of Direct Taxation*, PE 404.888, 2008; Prof. J. Malherbe & others)

Legal environment of the ECJ's preliminary rulings

- The EC Treaty has not as purpose to combat double taxation. MS are at liberty in the framework of Double Taxation Conventions (*abbrev.:* DTCs), to determine the connecting factors for powers of taxation to be allocated *(St-Gobain).*
- A DTC is no justification for restricting EC Treaty freedoms: MS, alone or two by two, may not disregard Community rules.
- Have recent judgements of the ECJ contributed to a more similar treatment of taxpayers across the borders of the several MS ?

A DTC with third countries may help to protect freedom of establishment

- Case C-141/99, 21 September 1999: *Saint-Gobain*

« The balance and the reciprocity of treaties concluded by Germany with Switzerland and the US would not be compromised by a unilateral extension (to the permanent establishment *(abbrev. :PE)* of a French company) by Germany of the category of recipients of the tax advantages (corporation tax relief for corporate groups) provided by those treaties »

Judgments with a « broader picture » or « two-country-approach »

- Case C-170/05, 14 December 2006: *Denkavit Internationaal BV & Denkavit France SARL*

↳Imposing a liability to tax on dividends paid to a non-resident parent company (in the NL) and allowing resident parent companies (in F) almost full exemption from such tax =discriminatory restriction on freedom of establishment.

↳The combined application of the France-Netherlands DTC and the relevant Dutch legislation does not serve to overcome the effects of this restriction.

Judgments with a « broader picture » or « two-country-approach »

Case C-379/05, 8 November 2007: *Amurta*

- Treating dividends paid to companies established in another MS (in P) less favourably than dividends paid to companies established in the Netherlands is liable to deter companies established in another MS from investing in the Netherlands = restriction on the free movement of capital. A MS may not rely on the existence of a full tax credit granted unilaterally by another MS to a recipient company established in the latter MS in order to escape the obligation to prevent economic double taxation of dividends.

Judgments with a « broader picture » or « two-country-approach »

« Where a MS relies on a convention for the avoidance of double taxation concluded with another MS, it is for the national court to establish whether account should be taken of that convention, and, if so, to determine whether it enables the effects of the restriction on the free movement of capital to be neutralised » = the legal assessment is based not only on the situation in one State, but also by taking into account the effects in another MS *(Malherbe & o., p. 65): "*a restriction in one MS of a freedom may be admitted if its effects are neutralized by a DTC which produces compensating effects in the other MS".

Is a tendency toward coordination therefore observable ?

- Previous judgments were characterized by a multilateral approach and opened somehow the way towards coordination of tax systems, provided sufficient goodwill were devoted to that aim from the part of the several MS,

But…

Judgments with a more unilateral approach

- Case C-374/04, 12 December 2006: *Test Claimants in Class IV of the ACT Group Litigation:*
  - A company resident in the UK which received dividends from another resident company was entitled to a *tax credit*, whereas a non-resident company receiving same dividends was not, unless granted by a DTC, concluded by the UK with the MS in which it is resident.
  - No requirement from the MS (UK) in which the company making the distribution is resident to ensure that profits distributed to a non-resident shareholder are not liable to economic double taxation: this would mean that that State would be obliged to abandon its right to tax a

Judgments with a more unilateral approach

- Profit generated through an economic activity undertaken on its territory. *Cfr. outbound >< inbound dividends.*

↳A MS is not obliged to extend the entitlement to a tax credit provided for in a DTC (concluded with another MS for companies resident in the second State which receive dividends from a company resident in the first State) to companies resident in a third MS (with which it has concluded a double taxation convention which does not provide for such an entitlement for companies resident in that third State) (reference to « D », C-376/03: EC freedoms have not the same effects as a *most-favoured nation clause*).

Judgments with a more unilateral approach

- The UK Court asked whether it was permissible for a MS to apply a provision of a DTC known as *« limitation of benefits »* provision: no credit granted to a Cy of the other MS which is controlled by a Cy in a third State.

- The grant of a tax credit to non-resident companies receiving dividends from a resident company, as provided for in DTCs, cannot be regarded as a benefit separable from the remainder of those DTCs, but is integral part of them, and contributes to their overall balance.

Judgments with a more unilateral approach

- Case C-524/04, 13 March 2007: *Test Claimants in the Thin Cap Group Litigation*

↳Where a MS treats all or part of the interest paid by a resident company (in the UK) to a non-resident company belonging to the same group of companies as a distribution, after having determined that a purely artificial arrangement, designed to circumvent its tax legislation, is involved, that MS cannot be obliged to ensure in such a case that the State in which the latter company is resident does everything necessary to avoid the payment which is treated as a dividend being taxed twice *(= no consideration for symmetrical treatment, submitted by the Commission).*

Judgments with a more unilateral approach

- Case C-298/05,6 December 2007: *Columbus Container Services*

↳MS aren't obliged to adapt their own tax systems to the different systems of other MS so that a given company or partnership is taxed at national level in the same way as a company or partnership that has chosen to establish itself in another MS.

↳«The Court (ECJ) has no jurisdiction to rule on possible infringement of the provisions of DTCs by a contracting MS. It may not examine the relationship between a national measure, and the provisions of a DTC, since that question doesn't fall within the scope of EC law. »

Judgments with a more unilateral approach

Same reasoning as in Case C-513/04, 14 November 2006: *Kerkhaert-Morres* (and in Case *C-282/07*, 22 December 2008: *Truck Center)*

- Case C-414/06, 15 May 2008: *Lidl Belgium GmbH & Co KG*

↳Losses incurred by a PE situated abroad may not be deducted in Germany: the tax situation of a company which has its registered office in Germany and has a PE in another MS is less favourable than it would be if the latter were to be established in Germany.

↳A justification of the restriction on the freedom of establishment is the danger that losses may be taken into account twice.

Judgments with a more unilateral approach

- That no deduction of losses of PEs situated in another MS from the tax base of the company to whom the PE belongs is legitimated « by preserving right to exercise powers of taxation vested in MS »: « the income of that PE is taxed in the MS of situation where the losses can be taken into account in the taxation of said income in future accounting periods ». But: a rule of reintegration of the foreign losses might also have been applied in the residence State of the company (see Case C-157/07, 23 October 2008: Krankenheim Ruhesitz am Wannsee)

Judgments with a more unilateral approach

- Case C-128/08, 16 July 2009: *Damseaux*

↳The fact that both the MS in which the dividends are paid and the MS in which the shareholder resides are liable to tax those dividends does not mean that the MS of residence is obliged, under Community law, to prevent the disadvantages which could arise from the exercise of competence thus attributed by the two MS.

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