EU Taxation Law
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National (Equal) Treatment Principle and Regulatory Framework for Tax in the EU:
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Outline of this presentation

• Role of the CJ in direct tax matters
  • Introduction
  • National treatment in direct taxation: main concepts
  • CJ as a creator of income allocation rules?
Internal market & direct taxation

- One internal market, 28 different direct tax systems by which free competition can be distorted:
  - Disparities
  - Discrimination
  - State aid
CJ decision-making tree in direct tax cases

- Access to the TFEU freedoms?
  - TFEU freedoms may be overruled by state aid rules (*A-fonds, C-598/17*) and existence of exhaustive harmonization (*Euro Park Service, C-14/16*)
- Discrimination/restriction?
  - Less favourable tax treatment by one single MS?
- Justification?
  - e.g. combating abuse, preserving a balanced allocation of taxation rights between MSs
- Suitable?
- Proportionate?
- No grandfathering?
  - Only relevant vis-à-vis non-EU MSs
National treatment / non-discrimination requirement

- Discrimination can arise through:
  - The application of different rules to comparable situations
  - Or through the application of the same rule to different situations (e.g. Schumacker, C-279/93 and Garcia Avello, C-148/02)
    - Always requires a valid comparator ("tertium comparationis")
    - No de minimis
    - Fact that the discriminatory effects of a contested tax measure could have been avoided is immaterial (e.g. Gielen, C-440/08)
    - Less favourable treatment sometimes determined per country, sometimes overall (e.g. Amurta, C-379/05)
National treatment / non-discrimination requirement

• National treatment requirement covers both overt and covert tax discrimination based on nationality (e.g. Biehl, 175/88)
  • Taxation of residents vs non-residents (e.g. avoir fiscal, 270/83)
  • Taxation of domestic investments vs inward investments (e.g. Lankhorst Hohorst, C-324/00)
  • Taxation of domestic investment vs outward investments (e.g. Manninen, C-319/02)
  • Limits to the concept of covert discrimination (e.g. ANGED, C-233/16: tax liability based on >2.500 m2 premises)?
CJ as a creator of international income allocation rules?

• International tax system inherently discriminatory:
  • Residents taxed for their worldwide net income; ability to pay tax taken into account
  • Non-residents taxed only for sourced net or gross income; ability to pay tax typically not taken into account
Ability to pay tax: expenses allocation by the CJ

- **Schumacker-case, C-297/93**: Germany refuses deduction because of non-resident status → discrimination?
Ability to pay tax: expenses allocation by the CJ

- CJ: discrimination if non-resident:
  - Receives no significant income in its state of residence (Belgium)
  - And obtains the major part (>90%) of his taxable income from an activity performed in the state of source (Germany), with the result that Belgium is not in a position to grant him the benefits resulting from the taking into account of his ability to pay tax
Ability to pay tax: expenses allocation by the CJ

- **Renneberg-case, C-527/06:** Netherlands refuses deduction because of non-resident status → discrimination?

\[\begin{align*}
\text{BE} & \quad \text{Employment} \\
\text{NL} & \quad \text{Salary (100)} \\
& \quad \text{Mortgage Interest (10)}
\end{align*}\]
Ability to pay tax: expenses allocation by the CJ

- CJ: mortgage interest affects taxpayer’s ability to pay tax, hence Schumacker-doctrine applies → discrimination
Ability to pay tax: expenses allocation by the CJ

- X.-case, C-283/15: no deduction of mortgage interest in the Netherlands since salary (60) < 90% of worldwide income
Ability to pay tax: expenses allocation by the CJ

- CJ: discrimination
  - No income in Spain as a result of which Spain is not in a position to take the ability to pay tax into account
Ability to pay tax: expenses allocation by the CJ

- **De Groot-case, C-385/00:** Netherlands allocates personal expenses pro rata parte to source state \(\rightarrow\) discrimination?
Ability to pay tax: expenses allocation by the CJ

- CJ: discrimination, unless the ability to pay tax is already taken into account by the source state(s)
Ability to pay tax: expenses allocation by the CJ

• Is the CJ creating allocation rules?
  • Yes: ability to pay tax should always be taken into account somewhere, be it the residence EU state or source EU state
    • Interferes with existing international system
    • Interferes with fractional apportionment system
    • Due to the lack of internal consistency in MSs’ tax systems?
Business losses allocation by the CJ

- **Futura-case, C-250/95**: Luxembourg denies loss deduction because of non-resident status → discrimination?
Business losses allocation by the CJ

- CJ: no discrimination based on principle of territoriality → residents and non-residents not comparable
Business losses allocation by the CJ

- Philips Electronics-case, C-18/11: no loss offsetting in UK because loss is already taken into account in the residence state → discrimination
Business losses / expenses allocation by the CJ

• CJ: yes, fact that loss is offset in the Netherlands as well is immaterial
  • Overruled by NN A/S C-28/17?
Business losses allocation by the CJ

Profits (300) → UK

Investments

losses (300) → subsidiary

NL, BE, DE

UK

Parent

- **Marks & Spencer-case, C-446/03**: UK denies foreign loss deduction because of non-resident status of subsidiaries → discrimination?
Business losses allocation by the CJ

- No, except if the foreign losses must be considered as “final” (= no risk of double loss deduction)
  - *Holmen*, C-608/17: only in very exceptional cases
Business expenses allocation by the CJ

- Soc. Generale-case, C-17/14: Netherlands denies deduction because of non-resident state shareholder → discrimination?
Business expenses allocation by the CJ

• Yes, but only as far it concerns expenses which are directly linked to the actual payment of the dividends and the effective tax burden is higher
  • Overruled by Sofina, C-575/17 (=FR losses fully to be taken into account in NL?)
Business expenses allocation by the CJ

• *Bosal*-case, C-168/01: Netherlands denies deduction because non-instrumental to Dutch taxable profits → discrimination?

Investments

NL

Acquisition interest expenses (100)

Subsidiaries

Profits (100)

EU (9x)
Business expenses allocation by the CJ

- CJ: yes, territoriality no valid justifiction

NL

Investments

Acquisition interest expenses (100)

Profits (100)

Subsidiaries

EU (9x)
Business expenses allocation by the CJ

- Argenta-case, C-350/11: Belgium denies notional interest deduction on net equity of NL branch → discrimination?
Business expenses allocation by the CJ

- CJ: yes, balanced allocation of taxation rights not jeopardized
Business losses / expenses allocation by the CJ

- Is the CJ creating income allocation rules?
  - Yes: business losses / expenses should always be taken into account somewhere, be it the residence state or source state
    - Interfers with existing principle of territoriality
    - To what extent is the CJ creating its own allocation system?
    - Due to the lack of internal consistency in MSs’ tax systems?
Questions for further consideration

• To what extent are the anti-hybrid rules from Article 9, para. 1 and para. 2 of the anti-tax avoidance directive (ATAD) contrary to the TFEU freedoms?

• To what extent is a digital services tax contrary to the TFEU freedoms?
Thank you!

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