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Editorial

The Court of Justice of the European Communities and direct taxes: 'Est-ce que la justice est de ce monde'?

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When the EC was established in 1957, the Court of Justice of the European Communities (ECJ) was given the task, under art. 164 of the EC Treaty, of ensuring the observance of the law in the interpretation and application of the Treaty. It was not until 1986, however, that the ECJ first entered the arena of direct taxation.[1] The fact that the ECJ had never concerned itself with this area of the law before is not so surprising when it is recalled that the Treaty of Rome does not contain any provisions for the harmonization of direct taxes. Article 220 of the Treaty requires Member States - not the Community - to enter into negotiations with each other where necessary with a view to securing the abolition of double taxation within the Community. The formulation of the principle of subsidiarity in the Maastricht Treaty likewise emphasizes that direct taxes should be accorded a separate place within European law. Nevertheless, it seems that since 1986 the ECJ has lost its reluctance.[2]

Besides the interesting question whether this attitude of the ECJ is in accordance with the spirit of the EC Treaty, the question arises how to provide the ECJ with sufficient specialist knowledge to rule on matters relating to direct taxation. In several of its judgments, the ECJ appears to have been a long way off the fiscal and European mark. For this reason, Van Gerven and Wouter recently asked: 'Is the ECJ, in its judgments, behaving like a bull in the china shop of direct taxation?'.[3]

For instance, in the recent *Wielockx* judgment[4] the Court assumed that the contribution to the so-called old-age reserve fell under art. 18 (pensions) of the tax convention concluded between Belgium and The Netherlands, whereas they should in fact have been considered under art. 22 (other income).[5] As Wattel rightly observes,[6] this removes the foundation on which the ECJ's conclusion is based.[7] As it will probably be impossible to tax withdrawals from the old-age reserve in Belgium,[8] a tax leak is created,[9] while at national level the system created was both coherent and watertight. Non-residents find themselves in a more advantageous position than residents in this regard. One inequality is swapped, as it were, for another even bigger one. Is this justice according to the EC Treaty? All it will do, it seems to me, is to provide fuel for more legal proceedings. According to Avery Jones, the *Schumacker* and *Wielockx* judgments could even lead to an increase in discrimination, as taxpayers in a tax credit state, such as the United Kingdom, will never be in the same circumstances, objectively speaking, as residents of the source country.[10] Unfortunately, the problem extends a good deal further than these cases alone. Parts of other judgments too exhibit inconsistencies. For instance, prevailing Community law is sometimes accepted as justification,[11] and sometimes rejected.[12] In addition, it appears sometimes that the rights enshrined in art. 52 of the EC Treaty may be subordinated to the content

1 ECJ, C-270-83, 28 January 1986 (*Avoir Fiscal*).

2 Instead of issuing draft Directives on the basis of Article 100 of the Treaty of Rome, the EC Commission endeavours to promote harmonization among Member States by making recommendations. Recent rulings in the field of direct taxes appear to demonstrate that these recommendations affect the jurisdiction of the ECJ. See also Dirk H. Witteveen, 'Taxation of non-residents in the European Union: Tax Equality or Patchwork Quilt?', *EC Tax Review* 1995/3.

3 Walter van Gerven and Jan Wouter, 'De rechtspraak van het Hof van Justitie inzake directe belastingen: Een olifant in de porseleinkast?', Fiscofoon 1995, no. 131, pp. 1-5.

4 ECJ, G-80-94, 11 August 1995 (*Wielockx*).

5 In the advisory opinion given by Advocate General Léger, on 15 February 1996, in the *Asscher* case (C-107/94), art. 25, para. 3 of the convention between Belgium and The Netherlands is also interpreted incorrectly.

6 See Peter J. Wattel, 'The EC Court's attempts to reconcile the treaty fredoms with international tax law', 33 *Common Market Law Review* 1996, pp. 243-244.

7 The fact that the domestic court ('s-Hertogenbosch Court of Appeal) came to a judgment in this case after nine months seems to indicate that the domestic court also had some reservations about the ECJ's judgment.

8 See Kamphuis and Pötgens, 'Goodbye Mr Bachmann, welcome Mr Wielockx', *Bulletin for International Fiscal Documentation*, January 1996, no. 1, p. 6, and Van de Wetering, 'Bachmann gesneuveld, Lid-Staten gekneveld, Europa de overwinnaar?', *WFR*, 6182/1996, p. 102.

9 For an individual taxpayer this could mean a sum of over NLG 300,000 remaining untaxed.

10 See Avery Jones, 'Carry on discriminating', *European Taxation*, February 1996, p. 48.

11 Cf. CJEC, C-204/90, 28 January 1992 (*Bachmann*) c. 27, and CJEC 81/87, 27 September 1988 (*Daily Mail*), c. 25.

12 See inter alia *Avoir Fiscal* c. 24, *Schumacker* c. 41.

of an agreement with another Member State,[13] and sometimes they may not.[14]

Judging by the current case law, the chance of the ECJ accepting justification seems to be fairly slim, nor is it certain that the grounds for not doing so will be explained. For instance, in the *Avoir Fiscal* case the French Government, which had justified its actions on the grounds that there was a risk of tax evasion, had to content itself with this meagre explanation: 'Article 52 of the EC Treaty does not permit any divergence from the fundamental principle of freedom of establishment for reasons of this kind.' Nor did the ECJ accept the argument that the fiscal disadvantages were offset by fiscal benefits.[15]

Furthermore, the ECJ has repeatedly dismissed the justification advanced by states of the administrative difficulties involved in information-gathering,[16] each time with sole, mantra-like[17] reference, to the Mutual Assistance Directive (Directive 77/799), ignoring the restriction imposed by art. 8 of this Directive,[18] even though it has become apparent in practice that this provision undermines the Directive's effectiveness.[19] In addition, it is clear from the fact that the Commission submitted a proposal as long ago as 1989 to amend this art. 8, and the fact that consultations have been in progress in Brussels for some time about ways of improving the exchange of information in practice, that the Directive is not, to put it mildly, functioning as it should. It is not so much the fact that justification is rejected by the ECJ, but the way in which this happens, that provokes a response, i.e. the ECJ sometimes rejects the grounds for justification advanced by Member States, without arguing its case convincingly.[20] By doing so, the ECJ loses sight of the fact that it is dealing with delicate issues. However simple the cases brought before the Court may appear at first sight, it would be wrong to underestimate the complexity of national direct taxation, and the difficulty for non-fiscal experts of understanding it. The Court's decisions can sometimes be read as the 'Alice in the Wonderland' of fiscal legislation. The trend in the jurisprudence of the ECJ in the field of (national) direct taxation will activate Member States to bring the role of the ECJ in this area of law into question. In view of this, the ECJ will have to ensure that its judgments are fiscally sound. Moreover it is important that its decisions in the field of direct taxation improve in quality and conviction.[21] Member States will not go on accepting the Court overruling them with the flimsiest of arguments forever. A way must be found of guaranteeing that the judgments are of the highest possible quality.

In this connection, Avery Jones makes the interesting suggestion that the Organization for Economic Cooperation and Development (OECD) be invited, in every case concerning direct taxation, to submit an expert opinion to the ECJ.[22] Although OECD involvement would be an option, the Court could also consult tax experts from the EU Member States, since they possess the necessary expertise to survey both the national and the international taxation system within the European Union. It should be noted that the EC Treaty would not have to be amended for this proposal to be implemented, as art. 22 of the Statute of the ECJ already allows the Court to consult experts. The EC Treaty also provides scope for other solutions. For instance, under the EC Treaty Member States may appoint fiscal experts as judges or to the post of Advocate General. Furthermore, the ECJ could help improve the quality of its jurisprudence by setting up specialist divisions. Besides the proposals that have been submitted by the United Kingdom,[23] which would call for an amendment to the EC Treaty, these improvements should also be given serious consideration.

The Intergovernmental Conference recently opened in Turin. It is gratifying to read in the conclusions of the European Council meeting in Turin on 29 March 1996, that the conference must study the question of whether the role and the functioning of the ECJ and the Court of Auditors can be improved, and if so, how.

[13] *Bachmann* c. 26.

[14] *Avoir Fiscal* c. 26.

[15] Cf. ECJ 12 July 1993, C-330/91 (*Commerzbank*) c. 18 and 19 and *Avoir Fiscal* c. 21.

[16] Cf. *Bachmann* c. 18, *Halliburton* c. 22, *Schumacker* c. 45, *Wielockx* c. 26.

[17] In Hinduism and Buddhism, a sacred utterance (syllable, word or verse) considered to possess mystical or spiritual efficacy. Repetition of the mantra is said to evoke the very essence or presence of that which it represents: *Encyclopedia Britannica.*

[18] Pursuant to art. 8 of the Directive, a Member State cannot be required to comply with a request for information from another Member State if its legislation or administrative practice does not permit it to gather such information for its own purposes.

[19] See also Vanistendael, 'The consequences of *Schumacker* and *Wielockx*: two steps forward in the tax procession of Echternach', 33 *Common Market Law Review* 1996, pp. 266-269.

[20] Avery Jones remarks in this connection that the Member States are perhaps seen by the Court, rightly or wrongly, to be self-serving in their observations.

[21] The opinion of Advocate General Jacobs delivered on 2 May 1996 in the joined cases C-283/94, C-291/94 and C-292/94 provides a good example of a well balanced and fiscally convincing opinion, which enables the ECJ to give a sound judgment.

[22] See Avery Jones, 'Carry on discriminating', *European Taxation*, February 1996.

[23] The UK proposals include: strengthening the Court's ability to limit the retrospective application of its judgments; introducing the principle that a Member State should only be liable for damages in cases involving a serious and manifest breach of its obligations; and an internal appeals procedure. See 'The British approach to the European Union Intergovernmental Conference 1996', para. 37.