

# Editorial

## The Court of Justice of the European Communities and its impact on direct taxation

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On 13 May 1996 the Department of Tax Law at the University of Economics and Business Administration in Vienna held a seminar on the topic 'Double Taxation Conventions and EC Law'.<sup>1</sup> The impact of the non-discrimination principle on the bilateral Double Taxation Conventions appeared to be the main issue.

Due to the increasing importance of the non-discrimination principle and the influence of the decisions of the European Court of Justice (ECJ) the question of compatibility of Austrian tax provisions with EC law became the centre of attention. The discussion on the compatibility of single tax provisions with EC law is thoroughly comparable with the discussion observable in other Member States.

In 1986 the ECJ began to examine national tax provisions in light of the fundamental freedoms of the EC Treaty which the ECJ interprets as non-discrimination principles.<sup>2</sup> The development in the decisions can be described in such a way that the ECJ attempts to refine its view on the non-discrimination principle in tax matters. Nevertheless, some borderline cases still exist which have to be answered. So far, in the decisions the ECJ has handed down, the question whether tax treaty provisions are compatible with the Community law has not yet been dealt with explicitly. Nevertheless, principles may be derived from these judgments that are also significant for the application of the fundamental freedoms on the provisions of bilateral tax treaties. This step forward leads to a new dimension, the significance of which is relevant not only to Austria, but also to all other Member States. As a consequence, the examination pattern of the ECJ is applicable not only to cases of discrimination of non-resident taxpayers caused by national tax law, but also to discriminations caused by bilateral tax treaties.

Until now the ECJ has rejected (almost) all attempts to justify existing fiscal discriminations. The only justification for a discrimination which the ECJ held admissible is fiscal coherence. Although the ECJ mentioned the argument of fiscal coherence in its most recent decision in the *Asscher* case,<sup>3</sup> this argument still seems to be too weak to justify an infringement of the fundamental freedoms.<sup>4</sup> Regarding the arguments put forward attempting to justify a discrimination, the attempt mainly of the tax authorities to impede necessary changes by all means is

obvious. This approach includes considerations to restrict the competence of the ECJ.<sup>5</sup>

However, the ECJ cannot be reproached for not excluding discriminations caused by national tax law from examination as to whether the relevant rules are compatible with the non-discrimination principle. As the ECJ pointed out, the principle of equal treatment would be rendered ineffective if it could be undermined by discriminatory national provisions on income tax.<sup>6</sup> In tax matters the difficulties of a political agreement can be put down to the requirement that these decisions have to be made unanimously. However, the decisions of the ECJ take into consideration the fact that on the basis of the EC law in force in the form of the fundamental freedoms, a harmonization to a certain extent is requested. Consequently, it is inappropriate to describe this development as disadvantageous as it derives its foundation from the European idea. In the light of this background the active role of the ECJ in the harmonization process should be respected rather than mistrusted.

Although the application of the non-discrimination principle might create some new differences in treatment, one must not hide the fact that the fundamental freedoms consistently applied in tax matters breathe new life into attempts of fiscal harmonization including a multilateralization of the tax treaty network.

<sup>1</sup> See the contributions of Schuch, Toifl, Urtz and Jann, in this issue; see also the various contributions in Gassner, Lang and Lechner (eds.) *Doppelbesteuerungsabkommen und EU-Recht*, 1996.

<sup>2</sup> *Avoir fiscal*, C-270/83, 1986 ECR 273.

<sup>3</sup> *Asscher*, C-107/94.

<sup>4</sup> See Thömmes, 'European Court of Justice follows Advocate General in the *Wielockx* Case', *Intertax*, 1995, 602 et seq.

<sup>5</sup> See Vermeend, 'The Court of Justice of the European Communities and direct taxes: "Est-ce que la justice est de ce monde"?' *EC Tax Review*, 1996, p. 54.

<sup>6</sup> *Biehl*, C-175/88, 1991, ECR I-1779.