ec TAX REVIEW 2009–3

Editorial

The European Court of Justice and National Courts

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Article 234 European Community (EC) provides for the preliminary reference. In addition, the Protocol of the Statute of the Court of Justice of the European Community (Article 23) and the Rules of Procedure, Title three, Chapter 9 (Articles 103-104 b, inclusive), contain a couple of provisions on the preliminary reference. But other than these, no other provisions deal with the relationship between the European Court of Justice (ECJ) and the national courts. It follows from the principle of Community loyalty that the national courts are bound to apply Community law. But because the EC Treaty contains quite a few open norms, it is often not clear how Community law should be interpreted in a specific case.

In the European legal system, it is the national court's task to arrive at a determination of the facts. The ECJ plays no role whatsoever in such a determination. In the proceedings before the ECJ, the parties have to clarify the legal framework: which legal provision is at stake, what is the substance of the provision, why it is (or is not) in conflict with Community law, and also whether a tax treaty is applicable. After the written statement of case has been submitted and the oral hearing has been held, the legal framework should be clear to the Advocate General and the Court. Nevertheless, this is not always the case, as can be seen when the Opinion of the Advocate General is published. In a couple of recent cases (among other cases, the *Cartesio* case), a reopening of the oral procedure was requested. Such a request may be made under Article 61 of the Rules of Procedure. However, the ECJ held that the case preparations had been sufficient and that the party was actually only seeking to react to the Advocate General's Opinion.

In proceedings before the ECJ, it is not possible for a party to react to the Advocate General's Opinion. A few years ago, The Netherlands did start allowing this. This may be an option in other Member States as well. By giving the parties the opportunity to respond to the Advocate General's Opinion, inaccuracies/unclear points with regard to the legal framework can be resolved in a timely fashion, which is important for the court giving the judgment. The quality of the ECJ's decisions would be improved if such a reaction were possible.

A clear example of this can be seen in the decision in the *Renneberg* case (see Eric Kemmeren's article on this case in *EC Tax Review* 1 (2009)). Because of the ECJ's mistaken interpretation of The Netherlands-Belgium tax treaty, one must question the correctness of the decision itself. Advocate General Wattel of The Netherlands Supreme Court has recently delivered a third Opinion in this case; this, as far as I know, is unprecedented. Now the problem is how The Netherlands Supreme Court should deal with the ECJ's decision. The best solution would be for the Supreme Court to make another preliminary reference to the ECJ on the basis of the correct interpretation of the applicable treaty provision.

The second-best solution would be for the Supreme Court, using the correct interpretation of the tax treaty, to try to decide what the ECJ's decision should have been. If this is possible on the grounds of existing case law, the national court itself would be able to apply Community law to the specific situation. In his Opinion, Wattel chose the second-best solution. In a similar case, the Supreme Court gave its judgment on the basis of the correct treaty interpretation (the *Wielockx* case).

In the *Renneberg* case, The Netherlands Supreme Court faces a very tough task resulting from a strange, if not to say incorrect, interpretation of a treaty provision by both the ECJ and its Advocate General. But even when this kind of mistaken interpretation is not at stake, the national court often faces a dilemma when it has to apply the ECJ's judgment to the case at hand.

The national court has to apply the national provision in light of the interpretation given by the ECJ. On the one hand, the taxpayer is entitled to effective legal protection under Community law, but, on the other hand, the national court has to do justice to the national tax principles, such as the principle of legality. Here, there is clearly an area of tension between fiscal sovereignty and Community law.

European cooperation has its own special characteristics, and this is creating new legal issues, such as the way the national courts function as Community courts, mentioned above. It is not always easy for national courts to fully apply Community law in the national tax context, in part because of the special characteristics of tax law itself.

The ECJ has indicated in its case law that the incompatibility of a national legal provision with Community law does not mean that the provision is void. The national court will have to determine under

its authority under national law how the individual's rights under Community law can best be guaranteed. The national court will have to determine – within the national constitutional framework – how the national provision can be repaired so that the citizen is afforded effective protection of his rights. In my opinion, the court does not have to go farther than is necessary to afford an effective legal protection, and this means that, with a view to the national interests at stake, the national provision may be allowed to remain intact. Hence, by means of interpretation, the national court will have to arrive at an acceptable solution within the existing legal framework; it may not, however, take on the role of the legislator and revise the legal provision. The legislator has to monitor this process carefully and, if necessary, should respond pro-actively by enacting legislation to close loopholes.

In practice, we see that the response of the national courts to the ECJ's case law is varied, depending on the subject matter involved in the case.

In cases where, for example, a non-resident taxpayer is taxed at a higher rate than a resident taxpayer, the national court will generally be able to fall back on the tax rate for resident taxpayers. Examples of this can be found in the *Asscher* case, the *Royal Bank of Scotland* case, and the *CLT-UFA* case, in which case, however, the national court in Germany still had to decide how to delineate the characteristics of a permanent establishment compared to a subsidiary.

On 4 July 2008, the UK High Court of Justice seems to have declared the British Controlled Foreign Corporation (CFC) legislation inoperative. If upheld on appeal, this decision will mean that, even in entirely artificial situations, the CFC legislation may no longer be applied (see S.C.W. Douma, 'Doorwerking van rechtspraak van het HvJ in de national rechtsorde' (Application of the ECJ's case law in the national legal system, WFR 6785 (2008)).

The ECJ's decision in the *N.* case has led to a great variety of reactions. The Court of Appeals of Arnhem, which made the preliminary reference, decided to declare void the conservatory assessment of the profits from a substantial interest made upon the emigration of the taxpayer. In line with the Opinion of Advocate General Wattel, the Supreme Court recently held that the assessment remains applicable as a ground for tax collection; if the taxpayer sells the shares for a lower amount than the amount assessed upon his emigration, the tax collector, under Community law, will have to take into account the lower amount in the assessment. According to the Supreme Court, the EC-incompatible security entails granting the taxpayer damages for the costs of providing the security. Unlike the Arnhem Court, the Supreme Court does offer the taxpayer the necessary protection under Community law, but on the other hand, it leaves the state's interest in tact as much as possible.

In a similar Swedish case, the Supreme Administrative Court gave an entirely different decision. The taxation of a shareholder upon emigration had to be postponed until the shares were alienated because of the incompatibility of such taxation with Community law, but the tax law provided no legal grounds for such a postponement (see Krista Stahl, 'National courts' treatment of tax rules that conflict with the EC Treaty', *Intertax* 12 (2008)).

The way in which national courts apply the ECJ's case law in the national legal order seems to be quite varied. This may be the result of the constitutional balance in a Member State or may have to do with the specific provision that has been ruled incompatible with Community law. Courts seem to be rather sensitive to the principle of legality and to the lack of adequate legal grounds for granting the taxpayer's claim in its entirety. Nevertheless, this is quite understandable, given the position of the courts in the trias politica. But we are dealing with a different trias politica when Community law is involved. I believe that at the time the European institutions were created, insufficient thought was given to how the ECJ's case law is to be applied in the national legal order. This issue needs to be discussed in Europe in the coming period; such a discussion, while taking into account the different cultures in the Member States, would clarify how the ECJ's case law is currently being applied in the national legal systems and how it can best be applied, taking into account Community and national interests.