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Editorial

Recovery of Income Taxes: ECJ Tends to Allow Member States more Leeway

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1 Setting the stage

Handing down a tax assessment is one thing, but getting it paid is another one. Especially in this era, where governments really need taxes to be paid in order to cover budgetary problems, the focus is more than ever on the recovery of taxes.[1] In transnational situations, tax administrations are restricted to collect taxes. In general, they are not allowed to collect taxes outside their own territory. As a result, it is not as easy to collect taxes from non-residents as it is from residents, especially when they do not hold any property in the state where they are taxed as non-residents. If they have, for example, immovable property or a permanent establishment in the source state available, a tax administration can, if necessary, attach of the non-resident's property in order to collect taxes. If a non-resident does not have any property in the source state available, that state may run an increasing risk that the taxes due will not be paid. Therefore, various mechanisms have been developed to guarantee that non-residents also pay the taxes they owe. Traditionally, a withholding tax may be considered a very useful instrument, but if it is only used in transnational situations, an EU law issue easily arises. However, if no withholding taxes are levied from non-residents, but if they are taxed by means of a tax assessment, a tax administration needs an extended arm of its tax collector in the residence state of its non-resident's taxpayer in order to put a hand on the money in case the non-resident does not pay. In this way, the non-resident cannot escape his obligations and will face a treatment equal to residents. Such an equal treatment is essential for establishing a level playing field, and is, therefore, also essential for the establishment of an internal market. This is not only true for the establishment of the internal market within the EU, but also for the internal market between two states who have concluded a double tax convention (DTC), although the level of integration of such an internal market is at much lower level than the EU internal market.[2] In any case, it is clear that both internal markets need rules in respect of the recovery of taxes in transnational situations, so that also in this respect these internal markets come close to what can be done in the domestic market of a state. The European Court of Justice (ECJ) has repeatedly argued that the internal market should function similar to a domestic market of a state.[3] Therefore, as benchmark can and will be taken that if in domestic situations a withholding tax is not levied, but is relied on rules concerning the recovery of taxes, rules on the assistance of recovery of taxes in transnational situations better fit to the concepts of an internal market than a system of withholding taxes.

Not only a system of withholding taxes ensures that taxes due will be paid. The same is true for requiring guarantees of residents who become non-resident taxpayers. However, also in this context, an EU law issue may easily arise, if such guarantees are not required for residents when they act purely domestically. The same benchmark can and will *mutatis mutandis* be applied to this context: rules on the assistance of recovery of taxes in transnational situations better fit to the concepts of an internal market than a system of requiring guarantees.

Against this background, the questions to be dealt with in this editorial are: What is the space that the ECJ gives to Member States to collect taxes and what should that space be?

2 Withholding taxes allowed on non-residents: no assistance to recover taxes is available

In the *Scorpio* case, the question arose whether Germany was allowed to levy a withholding tax in respect of a payment to a Dutch resident music group, whereas such

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1 Reading the newspapers, one can easily recall actions in Greece and Italy, but they are not the only states who desperately need the money.

2 See further on this comparison of markets, e.g., Eric C.C.M. Kemmeren, *Double Tax Conventions on Income and Capital and the EU: Past, Present and Future*, 3 EC Tax Review, 157–160 (2012).

3 See, e.g., ECJ, Feb. 9, 1982, Case 270/80 (*Polydor*) and ECJ, May 5, 1982, Case 15/81 (*Gaston Schul I*).

a withholding tax was not levied if the payment was made to a German resident music group.[4] Such resident individuals were taxed under the income tax rules by means of a tax assessment.

The obligation on Scorpio to withhold taxes on the payment and the fact that Scorpio might in certain cases incur liability constituted an obstacle to the freedom to provide services. However, this restriction was justified by the need to ensure the effective collection of income tax. The procedure of retention at source and the liability rules supporting it constituted a legitimate, appropriate and proportional means of ensuring the tax treatment of the income of a person established outside the state of taxation and ensuring that the income concerned did not escape taxation in the residence state and the state where the services were provided. In this context, the Court argued [italics added]:

> It should be recalled that at the material time, in 1993, *no Community directive* or *any other instrument* referred to in the case-file governed mutual administrative assistance concerning the recovery of tax debts between the Kingdom of the Netherlands and the Federal Republic of Germany.[5]

I believe that the message of this sentence was, or at least strongly suggested, that if any instrument concerning the recovery of taxes of a European law nature, such as the current directive on recovery of taxes (DRT),[6] or any other instrument, such as a bilateral DTC or a multilateral convention on administrative assistance in tax matters (MCAATM)[7] would be available, the withholding tax and the liability rules would not have been justified.[8] However, they were not available and, therefore, it was not possible to meet the benchmark either. Taking into account the necessity of establishing a level playing field within the internal market, the withholding tax could be justified because of the absence of rules on the assistance of recovery of taxes in transnational situations which better fit to the concept of the internal market than a system of withholding taxes.

3 Withholding tax allowed on non-residents: situation not comparable to that of residents and not per definition a disadvantage

The *Truck Center* case dealt with taxation of interest.[9] Truck Center paid interest, during 1994 to 1996, to Wickler Finances which was established in Luxembourg. Truck Center had to withhold a tax on the interest paid, while an interest payment to a recipient company resident in Belgium was exempted from withholding tax. The Belgian resident recipient company would be taxed on the interest by means of a tax assessment.

The Court held that, in relation to direct taxes, the situations of residents and non-residents were, as a rule, not comparable. Therefore, a difference in the treatment of resident and non-resident taxpayers could not in itself be categorized as discrimination. Furthermore, the Court argued that the different treatment of companies receiving income from capital consisting in the application of different taxation arrangements to companies established in Belgium and to those established in another Member State, related to situations which were not objectively comparable. In this context, it considered, *inter alia*, relevant the difference in the situations in which those companies found themselves with regard to recovery of the tax [italics added]:

> While resident recipient companies are *directly subject to the supervision of the Belgian tax authorities*, which can ensure *compulsory* recovery of taxes, that is not the case with regard to non-resident recipient companies inasmuch as, in their case, recovery of the tax requires the *assistance of the tax authorities of the other Member State*.[10]

Next to the fact that the situations were not objectively comparable, the different treatment did not necessarily procure an advantage for resident recipient companies.[11] The Court decided that, in those circumstances, the different treatment did neither constitute a restriction of

4 See ECJ Oct. 3, 2006, Case C-290/04 (*Scorpio*).

5 See, point 36.

6 See Council Directive 2010/24/EU of 16 March 2010 concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures. This directive is the successor of Council Directives 2008/55/EC of 26 May 2008 and 2001/44/EC of 15 June 15 2001 which amended Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. The 2001-DRT entered into force on 30 Jun. 2002. The 1976-DRT did not apply to income and capital taxes in general.

7 See, e.g, provisions similar to Art. 27 Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and Capital (2010) respectively Arts. 11–16 of the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (2010), the 2010-MCAATM is an amended version of the 1988-MCAATM. The 1959-DTC Germany-Netherlands did not contain any provision on the recovery of taxes. Germany signed the 1988-MCAATM only in 2008. See http://www.oecd.org/ctp/exchangeofinformation/Status_of_convention_26October2012.pdf.

8 Based on the different languages of the ruling, e.g., Dick Molenaar & Harald Grams, *Scorpio and the Netherlands: Major Changes in Artiste and Sportsman Taxation in the European Union*, 2 European Taxn. 66 (2007), were more reticent. They concluded that a new case was required to clarify the ECJ's position in respect of withholding taxes following the 2001-DRT.

9 See ECJ Dec. 22, 2008, Case C-282/07 (*Truck Center*).

10 See point 48.

11 In ECJ May 10, 2012, Cases C-338-347/11 (*Santander*), the French withholding tax was only levied on dividends paid to non-residents undertakings for collective investments in transferable securities (UCITS) and not from resident UCITS, while in the *Truck Center* Case both residents and non-resident creditors were taxed, but only by means of different procedures. Therefore, France could not rely the *Truck Center* ruling. See point 43. The different treatment could not be justified. The justification of the need to ensure the effective collection of income tax was not addressed in this case. Compare also, ECJ Nov. 8, 2012, Case C-342/10 (*EC v. Finland*), in respect of a withholding tax on non-resident pension funds, whereas dividends paid to resident pension funds were, in practice, (partially) tax exempt. See points 32 and 44.

the freedom of establishment nor of the free movement of capital.[12]

In this case, the Court did not refer explicitly to the absence of European law in respect of the recovery of tax, but since the case concerned interest payments during 1994 to 1996, the situation was comparable to the situation to the *Scorpio* case. Next to this, like the 1959-DTC Germany-Netherlands, the 1970-DTC Belgium-Luxembourg did not contain any provision on the recovery of taxes. Furthermore, the 1988-MCAATM did not apply either in those years.[13] However, Belgium might have relied on the Benelux Convention on Mutual Administrative Assistance in the Recovery of Tax Claims of 5 September 1952 (Benelux Convention).[14] However, the ECJ did not address the Benelux Convention at all, although it must have been known to it, because of the explicit discussion of it by Advocate General Kokott. It only referred with regard to non-resident recipient companies that in their case recovery of the tax required the assistance of the tax authorities of the other Member State and that was one of the elements to conclude that the situations of non-residents and residents were not comparable and that the freedoms were not restricted.[15] As a result, the ECJ gave in the *Truck Center* case more leeway to Member States than in the *Scorpio* case,[16] at least more than what it had suggested in that case. The ECJ moved away from the benchmark. The ECJ allowed the Belgian withholding tax, whereas by means of the Benelux Convention rules on the assistance of recovery of taxes in transnational situations which better fit to the concept of the internal market than a system of withholding taxes, were available.

4 Withholding taxes allowed on non-residents notwithstanding availability of assistance to recover taxes

In the *Feyenoord* case, the question was whether an obligation to withhold wage taxes on fees paid to the UK resident football clubs Tottenham (in August 2002) and Fulham (in August 2004) for friendly football matches was inconsistent with the freedom to provide services.[17] No part of these payments was paid out to the individual players. Feyenoord was a tax resident of the Netherlands and Tottenham Hotspur and Fulham were tax residents of the UK. Feyenoord failed to withhold wage taxes on these payments. After minor deductions of some expenses, the payments were taxed at a flat rate of 20%. The reassessments amounted up to euros (EUR) 26,050 and EUR 9,450, respectively. By contrast, in the case of a resident service provider, Feyenoord were not under such an obligation.

The ECJ held that, irrespective of the effects that the withholding tax may have on the tax situation of non-resident service providers, such an obligation to withhold tax, inasmuch as it entails an additional administrative burden as well as the related risks concerning liability, constituted a restriction of the freedom to provide services. Furthermore, with reference to the *Scorpio* case, it repeated that the need to ensure the effective collection of income tax can justify this restriction. In this respect, the Court noted that, in the case of service providers who provide occasional services in a Member State other than that in which they are established, and where they remain only a short period of time, a withholding tax at source constituted an appropriate means of ensuring the effective collection of the tax due. It should be recalled that the 2001-DRT was in force at the moment that the payments were made. However, the Court did not consider this decisive for its decision that the Dutch withholding tax was a proportional means.

As argued, I believe that the message in the *Scorpio* case was, or at least seemed to be, that if any instrument concerning the recovery of taxes would be available, the withholding tax and the liability rules would not have been justified. The 2001-DRT was implemented before

[12] See also ECJ Oct. 18, 2012, Case C-498/10 (*X NV/Feyenoord*), point 26. It should be noted that the name of the litigant was not officially disclosed. The same is true with respect to the names of the UK resident football clubs against which the litigant played the friendly matches. The names were disclosed by Dick Molenaar after he had done some individual research. See, e.g., *Dick Molenaar's note to Hoge Raad* Sept. 24, 2010, nos. 09/0296 and 09/00400, published in *NTFR* 2010/2207.

[13] In Belgium, the 1988-MCAATM entered into force only on 1 Dec. 2000. See http://www.oecd.org/ctp/exchangeofinformation/Status_of_convention_26October2012.pdf.

[14] See *Verdrag tussen Nederland, België en het Groothertogdom Luxemburg nopens wederkerige bijstand inzake de invordering van belastingschulden*, done in Brussels Sept. 5, 1952. See also, e.g., Advocate General Kokott Sept. 18, 2008, Case C-282/07 (*Truck Center*), points 42-47, but she concluded that it is by no means necessarily the case that collecting tax from a foreign parent company to which the interest is due in fact constitutes a less severe means than collection at source within the country from the subsidiary company. She held that this form of tax collection would probably give rise to substantially greater expense for the tax authorities, and for the group of companies, than taxation at source in the hands of the subsidiary company, which is liable to taxation within the country in any event. She argued that in a situation such as in *Truck Center* case, the legislature's margin of discretion is in any event not obviously exceeded if the Member State introduces a withholding tax, even though it could rely on bilateral arrangements for administrative assistance for the enforcement of taxes abroad. See critically, e.g., Luc De Broe & Niels Bammes, *Truck Center Belgian Withholding Tax on Interest Payments to Non-resident Companies Does Not Violate EC Law: A Critical Look at the ECJ's Judgment* 3 Truck Center, EC Tax Rev. 134 (2009).

[15] See also, e.g., Luc De Broe & Niels Bammes, *ibid.*, 135.

[16] It should be noted that the reasoning was remarkably different in both cases. Whereas, in the *Scorpio* case the German withholding tax was considered to constitute a restriction, but justified, the Belgian withholding tax did not even constitute a restriction. See also, e.g., Luc De Broe & Niels Bammes, *ibid.*, 132–135.

[17] See ECJ Oct. 18, 2012, Case C-498/10 (*X NV/Feyenoord*). The names of the UK resident football clubs. The names were disclosed by, e.g., Dick Molenaar after he had done some individual research. See, e.g., *Dick Molenaar's note to Hoge Raad* Sept. 24, 2010, Nos. 09/0296 and 09/00400, published in *NTFR* 2010/2207.

the friendly football matches were played. This means that the level of legal integration in the EU at that moment was different from the situation in 1993, the relevant year in the *Scorpio* case. In my view, the levy and collection of the Netherlands corporate income tax on the fees paid to Tottenham Hotspur and Fulham could sufficiently be ensured without obliging Feyenoord to withhold wage tax on these payments. The Netherlands should have included in the corporate income tax regulations on non-resident taxpayers a rule which made such fees subject to the Netherlands corporate income tax. Such a rule was included for non-resident individuals in Personal Income Tax Act (PITA) 2001.[18] This rule provides additional proof for the thesis that the withholding obligation went beyond what was necessary to attain its aim. Therefore, I believe that the withholding obligation was disproportional to its aim of ensuring the levy and collection of income tax on fees paid to foreign companies for sports services provided in the Netherlands based on a short-term contract.[19]

However, the Court decided otherwise. It held that the extension of the scope of 1976-DRT, in particular to claims relating to taxes on income, by the 2001-DRT, sought to safeguard the '*fiscal neutrality of the internal market*' and to protect the financial interests of Member States in view of the growth of tax fraud. Furthermore, it argued that [italics added]:

> [w]hile Directive 2001/44 carries out a degree of *approximation of national provisions* in the area of taxation inasmuch as it obliges all Member States to treat claims originating in other Member States as being national claims [. . .], *its aim* [. . .] was *not* to *replace the taxation at source as a method of collecting tax*.[20]

Although the Court noted that the renunciation of withholding tax at source and the recourse to the arrangements governing mutual assistance would allow the elimination of the restriction to the freedom to provide services caused to Feyenoord, such a renunciation would not necessarily eliminate all the formalities for which Feyenoord as service recipient is responsible. In this context, the Court takes surprisingly into account not only the interests of Feyenoord, but also the interests of the Dutch tax administration and the supplier of the services. The Court held that the withholding tax allowed the tax authorities to take note of the event giving rise to the tax for which the non-resident service provider is liable. In the absence of such a withholding tax, according to the Court, the tax authorities of the Member State concerned would be likely to be required to impose an obligation on Feyenoord as service recipient to declare the service carried out by the non-resident service provider. In addition, it argued that the renunciation of withholding tax would give rise to the need to collect the tax from the non-resident service provider, something which could lead to a serious burden on the foreign service provider in that he would have to submit a tax return in a foreign language and to familiarize himself with a tax system in a Member State other than that in which he is established. The Court believed that, as a result, the non-resident service provider could be deterred from providing a service in the Member State concerned and it might ultimately prove to be more difficult for the service recipient to obtain a service from a Member State other than that in which he is established. Furthermore, it held that such direct collection from the non-resident service provider would also give rise to a significant administrative burden for the tax authorities responsible for the service recipient in view of the large number of services provided on an ad hoc basis. In the light of all of those considerations, the Court decided that the collection of the tax directly from the non-resident service provider would not necessarily constitute a less severe means than deduction at source.[21]

In my view, the only conclusion that can be drawn is that in the *Feyenoord* case, the ECJ gave the Member States even more leeway than it did in the *Truck Center* and *Scorpio* cases. It moved further away from the benchmark and this does not match with one of the aims of the 2001-DRT as identified by the Court itself: safeguarding the '*fiscal neutrality of the internal market*'.[22] If in domestic situations a withholding tax is not levied, but is relied on rules concerning the recovery of taxes, only rules on the assistance of recovery of taxes in transnational situations establish, in my view, fiscal neutrality of the internal market and not a system of withholding taxes. Nevertheless, the ECJ allowed the Dutch withholding tax. This means that the Court's reasoning is not very consistent. Furthermore, it really missed an excellent opportunity to oblige Member States to better cooperate with each other to ensure that they can effectively exercise their taxing rights. Such a cooperation would have brought the realization of the internal market a step closer.

5 Bank guarantees and the like not allowed even in absence of assistance to recover taxes

Whereas a withholding tax can ensure the effective collection of income tax, guarantees can have a similar function, especially in respect of residents who become non-resident taxpayers. A bank guarantee was at issue in

[18] See Art. 7.3(3) *Wet inkomstenbelasting* 2001 (Personal Income Tax Act 2001; PITA 2001).

[19] See also, e.g., Eric C.C.M. Kemmeren, *The Netherlands: Pending Cases Filed by the Netherlands Courts: The* National Grid Indus *(C-371/10) and* Feyenoord *(C-498/10 (X)) Cases*, in Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer & Alfred Storck, *ECJ-Recent Developments in Direct Taxation 2010*, *Series on International Tax Law* vol. 67, 184 (Linde Verlag Wien 2011).

[20] See point 47.

[21] This reasoning comes close to the position taken by Advocate General Kokott in her opinion to the *Truck Center* case. See n. 14.

[22] See point 47.

the *Lasteyrie du Saillant* case.[23] De Lasteyrie left France in 1998 in order to settle in Belgium. As at that date, he held, or had held securities conferring entitlement to more than 25% of the profits of a company subject to corporation tax and established in France. The market value of those securities being then higher than their acquisition price, De Lasteyrie was taxed on the increase in value. However, it was possible to defer the payment of taxes, but not automatically and under strict conditions. One of the conditions was the setting up of guarantees, such as a bank guarantee.

The Court ruled [italics added]:

> Those *guarantees* in themselves constitute a *restrictive effect*, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee.[24]

The setting of guarantees constituted a restriction of the freedom of establishment. The Court did not accept as a justification the argument that the combined effect of taxation at the time of removal abroad and the requirement for guarantees to which deferral of payment was made subject, was necessary to ensure the coherence of the French tax system. It did neither accept the objective of preventing tax avoidance as justification. It must be emphasized that, in 1998, the DRT was not applicable either. Unlike in the *Scorpio* case, the Court did not refer at all to the absence of mutual administrative assistance concerning the recovery of tax debts in the *De Lasteyrie* case.[25]

In the *N.* case, the setting of guarantees in the context of a Dutch exit tax also was at issue.[26] In 1997, N transferred his residence from the Netherlands to the United Kingdom. At the time he left the Netherlands, he was the sole shareholder of three limited liability Netherlands companies, the management of which has since that same date been in Curaçao (Netherlands Antilles). Based on his transfer of residence, N. declared as taxable income a profit from a shareholding. He obtained, at his request, a deferral of payment. However, in accordance with Dutch legislation in force at the time of the facts, such deferment was made subject to the provision of security. Therefore, N. deposited by way of security his holdings in one of his companies. He challenged successfully, *inter alia*, the setting up of this guarantee.[27]

Like in the *De Lasteyrie* case, the Court ruled that [italics added]:

> Those *guarantees* in themselves constitute a *restrictive effect*, in that they deprive the taxpayer of the enjoyment of the assets given as a guarantee.[28]

The Court acknowledged that the obligation to provide guarantees without doubt facilitated the collection of tax from a non-resident, but that it went [italics added]:

> *beyond what is strictly necessary* in order to ensure the functioning and effectiveness of [. . .] a tax system based on the principle of fiscal territoriality.[29]

According to the Court, there were less restrictive instruments available. It referred, *inter alia*, to the 1976-DRT as amended by the 2001-DRT arguing, that it provided [italics added]:

> that a Member State may request the *assistance* of another Member State *in the recovery of debts relating to certain taxes*, including those on *income* and capital.[30]

However, it should be recalled that the 2001-DRT was *not* applicable to this case either, because the relevant transfer was in 1997, whereas the 2001-DRT became effective on 30 June 2002 in respect of income taxes. Thus, the Court was clearly on the wrong track in respect of the actual application of the DRT to this case, but that does not affect the general and clear message of the Court's decision: if an instrument of mutual administrative assistance concerning the recovery of tax debts is available, no securities may be required for the deferral of payment of taxes. This result might not come as a surprise, because, in *De Lasteyrie* case, the Court did not accept the requirement of setting up of guarantees either, even without taking into account whether there were instruments of mutual administrative assistance concerning the recovery of tax debts available. This meant that the *N.* ruling increasingly obliged Member States to cooperate with each other to ensure that they can effectively exercise their taxing rights.[31] This result fits to idea, as mentioned above, that the internal market should function similar to a domestic market of a state. The reasoning of the Court in the *N.* case and its result, make it even harder to understand the reasoning in and the result of the *Feynoord* case. Withholding tax systems and measures such as the provision of guarantees are both instruments to ensure that taxes due are paid. Therefore, it is hard to argue that the Court is reasoning consistently.

[23] See ECJ Mar. 11, 2004, Case C-9/02 (*Lasteyrie du Saillant*).

[24] See point 47.

[25] See also, e.g., Henk van Arendonk, Hughes de Lasteyrie du Saillant: crossing borders 192–193 (Henk van Arendonk, Frank Engelen & Sjaak Jansen eds., *A Tax Globalist*, Intl. Bureau Fiscal Documentation (2005).

[26] See ECJ June 7, 2006, Case 470/04 (*N.*).

[27] Following the *De Lasteyrie du Saillant* case, the tax collector told N., after 13 Apr. 2004, that the security he had provided could be regarded as released. However, the Court also ruled that the breach of EU law could not be waived with retroactive effect merely by releasing that guarantee.

[28] See point 36.

[29] See point 51.

[30] See point 53.

[31] See also, e.g., Bert Zuijdendorp, *The N case: the European Court of Justice sheds further light on the admissibility of exit taxes but still leaves some questions unanswered*, 1 EC Tax Review 12 (2007).

6 Bank guarantees and the like allowed despite the availability of assistance to recover taxes

The inconsistency only increases if we consider the *National Grid Indus* case.[32] In short, National Grid Indus BV (NGI), a company incorporated under Dutch law with its registered office in the Netherlands, transferred its place of effective management to the United Kingdom on 15 December 2000. On the occasion of this transfer, NGI was taxed on its unrealized capital gains. The Dutch tax rules did not include an option for a deferral of payment.

The absence of this option constituted a restriction of the freedom of establishment.[33] Notably, in respect of the option to defer the payment of the Dutch exit tax, the Court held [italics added]:

> However, account should also be taken of the *risk of non-recovery of the tax*, which increases with the passage of time. *That risk may be taken into account* by the Member State in question, in its national legislation applicable to deferred payments of tax debts, *by measures such as the provision of a bank guarantee*.[34]

This is a clear departure from the *N.* and the *Hughes de Lasteyrie* cases in which the requirement of a bank guarantee for deferred payments was considered to be a disproportional restriction of the freedom of establishment.[35] The Court did not explain why it deviated from its own case law. It justified the bank guarantee, because account should also be taken of the risk of non-recovery of the tax, which increases with the passage of time. However, this justification is hard to understand, taking into account that the Court subsequently held that the 2008-DRT provided for the recovery of taxes sufficient machinery for mutual assistance between the authorities of the Member States to enable the exit state to check the truthfulness of the returns made by taxpayers which have opted for deferred payment of the tax.[36] The Court held that the 2008-DRT enabled the exit state to obtain information from the competent authority of the host state on whether or not certain assets of a company have been realized, insofar as the information is necessary to enable the exit state to recover a tax debt which arose at the time of that transfer. The 2008-DRT, in particular Articles 5–9, provided the authorities of the exit state with a framework of cooperation and assistance, allowing them *actually* to recover the tax debt in the host state.[37]

In his opinion to Case C-38/10 (*EC v. Portugal*), Advocate General Megozzi also addressed the (in)consistency of the Court's line of reasoning in respect of bank guarantees and exit taxes in the context of Portuguese exit taxes.[38] He tried to reduce the leeway given to the Member States in the *National Grid Indus* case. He rightly noted that a bank guarantee can have an equally restrictive effect as its immediate payment, since it is likely to deprive the taxpayer of the enjoyment of the assets provided as a guarantee. He held that the *National Grid Indus* ruling cannot mean that the Court intended to give the Member States carte blanche, allowing them to introduce a measure (deferred payment together with a bank guarantee) the effects of which may be just as restrictive as the measure (immediate payment) which it considered to entail a disproportionate obstacle to freedom of establishment. In order to preserve both the internal coherence of the Court's reasoning in the judgment in *National Grid Indus* and its external coherence with the rulings in *Lasteyrie du Saillant* and *N.*, he suggested that a strict interpretation must be given to the requirement of the provision of a bank guarantee, possibly together with the option of the deferred recovery of the tax debt. Therefore, he joined the position taken by the Commission and the Danish Government to the effect that such a guarantee can be required only if there is a genuine and serious risk of non-recovery of the tax claim. Furthermore, he considered that the amount of the required bank guarantee cannot correspond to the amount of the tax claim the payment of which is deferred, otherwise a measure which is as restrictive as immediate payment of the tax will be reintroduced. That guarantee must nevertheless be sufficient having regard to the circumstances of each specific case.

Remarkably, the Court in its ruling of Case C-38/10 was absolutely silent on measures such as the provision of a bank guarantee. What does this mean? The case was

[32] ECJ Nov. 29, 2011, Case C-371/10 (*National Grid Indus*).

[33] See for more details e.g., Eric C.C.M. Kemmeren, *ibid.*, 157–185, Tom O'Shea, *Dutch Exit Tax Rules Challenged in National Grid Indus*, 65 Tax Notes Intl. 201–205 (2012), Eric C.C.M. Kemmeren, *The Netherlands: Infringement Procedure on Exit Taxes on Business (C-301/11)*, in Michael Lang, Pasquale Pistone, Josef Schuch, Claus Staringer & Alfred Storck, *ECJ-Recent Developments in Direct Taxation 2011, Series on International Tax Law* vol. 67, 183–212 (Linde Verlag Wien 2011), Daniel Gutmann, Liberté d'établissement et transfert de siège, A propos de CJUE, Nov. 29, 2011, *National Grid Indus*, Feuillet Rapide Francis Lefebvre 48/11, 9 and subsq., Peter J. Wattel, *Exit Taxation in the EU/EEA Before And After National Grid Indus*, 65 Tax Notes Intl. 371–379 (2012), Christiana HJI Panayi, *Exit Taxation following the National Grid Indus case*, 1 British Tax Rev. 41–49 (2012), Harm van den Broek & Gerard Meussen, *National Grid Indus Case: Re-Thinking Exit Taxation*, 4 European Taxn. 190–196 (2012), Reinout Kok, *Exit Taxes for Companies in the European Union after National Grid Indus*, 4 EC Tax Rev. 200–207 (2012), Katia Cejie, *Emigration Taxes – Several Questions, Few Answers: From Lasteyrie to National Grid Indus and beyond*, 6 Intertax 394–395 (2012).

[34] See point 74.

[35] See ECJ Mar. 11, 2004, Case C-9/02 (*De Lasteyrie du Saillant*), points 47, 49–51, 59–61, and 64–68, and ECJ Sept. 7, 2006, Case C-470/04 (*N.*), points. 36, 51–53, and 55.

[36] See point 78.

[37] See also, e.g., Eric C.C.M. Kemmeren, *ibid.*, 207, Peter J. Wattel, *ibid.*, 375 and 377, Harm van den Broek & Gerard Meussen, *ibid.*, 194–195, Reinout Kok, *ibid.*, 204, and Katia Cejie, *ibid.*, 395.

[38] See AG Mengozzi June 28, 2012, Case C-38/10 (*EC v. Portugal*), points 78–82.

on exit taxes concerning companies and permanent establishments. The judgment referred frequently to the *National Grid Indus* judgment, but it did not repeat or refer to point 74 of that case, although this would have been logical and consistent if we may take this point of the ruling seriously. Are measures such as the provision of a bank guarantee no longer allowed? Taking into account the benchmark, I would welcome such a development. However, this interpretation may amount to jumping to conclusions, because the Court did not explicitly depart from this point of the *National Grid Indus* ruling. Since the Court remained silent, it did not adopt the Advocate General's suggestion either. After the *National Grid Indus* ruling, this suggestion would be a step forward in meeting the benchmark. I would consider such a development as a second best solution. Relying on rules on the assistance of recovery of taxes in transnational situations would be the best solution.

7 Conclusion

The trend in the ECJ's case law seems to be that it gives Member States more leeway in respect of the recovery of income taxes. The Court's rulings are inconsistent. Initially, the Court only allowed withholding taxes on payments to non-residents, or at least it suggested so, in the absence of rules on the assistance of recovery of taxes in transnational situations, if in domestic situations a withholding tax was not levied, but was relied on rules concerning the recovery of taxes. Later on, the Court allowed withholding taxes levied only from non-residents despite the fact that rules on the assistance of recovery of taxes in transnational situations were available. A similar trend we found in respect of measures such as the provision of a bank guarantee. This trend is inconsistent with the benchmark: if in domestic situations a withholding tax is not levied or measures such as the provision of a bank guarantee are not required, but is relied on rules concerning the recovery of taxes, rules on the assistance of recovery of taxes in transnational situations better fit to the concept of an internal market than a system of withholding taxes or measures such as the provision of a bank guarantee. The Court really missed an excellent opportunity to oblige Member States to better cooperate with each other to ensure that they can effectively exercise their taxing rights. Such a cooperation would have brought the realization of the internal market a step closer. One may only guess what the Court's reasons are. Do the financial and economic crises and their impact on the Member States' budget play a role? Is the lack of cooperation between Member States implicitly accepted and is the taxpayer called to account for it?