Protection of Taxpayer's Rights

European, International and Domestic Tax Law Perspective

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Is There a Need for a European Court of Taxation?

1. CCCTB and legal protection of taxpayers

The discussion about a "Common Consolidated Corporate Tax Base" has inspired academics in Europe to deal intensively with the question of the extent to which tax systems will have to be harmonised if such a common tax base is introduced[2]. At first sight the proposed common tax base does not seem to require procedural harmonisation. However, procedural issues cannot be completely excluded: harmonised rules should be implemented similarly in all the Member States where they have to be enforced. A minimum standard of legal protection will have to ensure that these rules are interpreted consistently in all countries[3].

In the existing legal framework, the European Court of Justice (ECJ) would play an important role in this respect. The interpretation of EC law is within the competence of the ECJ. Since the rules on a CCCTB will be part of EC law, it will be up to the ECJ to interpret these rules. Although the ECJ cannot be approached directly by taxpayers, this framework provides sufficient legal protection. Every court or tribunal may request a preliminary ruling on the interpretation of an EC legal provision if such a question is raised before it. Courts of last instance are even obliged to

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[2] See the contributions in Lang, Pistone, Schuch, Staringer (eds.), *Common Consolidated Corporate Tax Base*, 2008.

[3] Marquez, Herrera, *Level of Coordination of Procedural Rules*, [in:] Lang, Pistone, Schuch, Staringer (eds.), *Common Consolidated Corporate Tax Base*, op. cit.,pp. 1047 et seq.

request a ruling from the ECJ in such cases. Although in some Member States courts refer questions of EC law to the ECJ more often than those in other Member States, one cannot ignore the fact that the number of tax cases pending before the ECJ has increased. If the Commission considers that a Member State has failed to fulfil an obligation under the EC Treaty, it will deliver a reasoned opinion on the matter. If that state does not comply with the opinion, the Commission may bring the matter before the ECJ. Thus, in Member States whose courts are reluctant to request preliminary rulings from the ECJ, the Commission may step in and start litigation against a Member State not meeting its European law obligations. The number of infringement procedures has increased recently.

However, some experts are convinced that the introduction of a CCCTB could require a fundamental change of the existing framework of legal protection. Philip Baker has called for establishing a "European Tax Court" that should be competent to hear all disputes to be resolved in the context of a CCCTB[4]. Ernst Czakert has raised similar arguments and saw as well a need for a specialized European tax court[5].

2. The ECJ as a tax court

Since the ECJ is competent to interpret EC law, it is competent to interpret EC law in the context of tax cases as well. The number of tax cases has grown rapidly in recent years. It is true that the ECJ does not have specialised chambers to decide on tax cases. The rules do not even require that the ECJ have tax specialists among its judges. The ECJ consists of one judge per Member State. According to Art. 223 EC, the judges must be chosen from persons whose independence is beyond doubt and who possess the qualifications required for appointment to the highest judicial offices in their respective countries or who are jurisconsults of recognised competence. Therefore, it is just by chance that judges have a background in tax law. Legally this is not required.

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[4] Baker, [in:] Schön, Schreiber, Spengel (eds.), *A Common Consolidated Tax Base for Europe – Eine einheitliche Körperschaftsteuerbemessungsgrundlage für Europa*, 2008, p. 183.

[5] Czakert, *Administrative Aspekte einer Gemeinsamen Konsolidierten Körperschaftsteuerbemessungsgrundlage in der EU*, [in:] Schön, Schreiber, Spengel (eds.), *A Common Consolidated Tax Base for Europe – Eine einheitliche Körperschaftsteuerbemessungsgrundlage für Europa*, op. cit.,p. 165.

In tax law, as well as in other areas, the ECJ is frequently criticised for its judgments. There are different reasons for this criticism. Governments of Member States often fear that the ECJ is too taxpayer-friendly and that their revenues are in danger. In former years most tax cases were "won" by taxpayers. However, this has changed in recent years. The first cases the ECJ had to decide were, at least seen from today's perspective, clear-cut cases where it was quite obvious that a domestic tax provision constituted an infringement of the freedoms or other provisions of the EC Treaty. In recent years, however, questions have been referred to the ECJ where the outcome was less obvious. In such borderline cases it is sometimes the taxpayer and sometimes the government whose positions are confirmed by the ECJ. However, the ECJ has also been criticised by some academics for arriving at too far-reaching results or for being inconsistent. The fundamental freedoms in particular have turned out to be most important in the case law of the ECJ. It cannot be denied that some ECJ judgments have shaped tax systems of some of the Member States dramatically. Nevertheless, the freedoms are to a certain extent similar to the equal treatment clauses that are part of the constitutions of many Member States and countries outside the EU. An analysis of the case law of domestic supreme courts under these equal treatment clauses shows that the interpretation of these clauses very often has developed in a direction that the drafters of the constitution had not originally anticipated[6]. Quite often one would not expect such detailed and far-reaching requirements imposed by the supreme courts after having read these clauses. In this respect the ECJ does not differ fundamentally from domestic supreme courts. As far as consistency is concerned, domestic courts are quite often criticised as well. Whenever a court hands down a judgment, there will be criticism. It is even a characteristic of a functioning legal culture that academics and other legal experts analyse judgments critically. This enables the court to reflect on its judgments and, if it considers it appropriate to do so, to react to well-founded criticism by using different arguments in the future. Although it is impossible to measure whether the level of inconsistency differs in the case law of the ECJ and in the case law of other courts, I do not have the impression that the case law of the ECJ is less consistent compared to other courts in the Member States[7]. Some judgments deserve criticism, as judgments of domestic courts do. Both in a domestic and

[6] For a comparison, see Meussen (ed.), *The Principle of Equality in European Taxation*, 1999.

[7] See Lang, *Die Rechtsprechung des EuGH zu den direkten Steuern*, 2007.

a European legal context, experts quite often do not necessarily agree as to which judgments lack consistency and a well-founded reasoning and which judgments are to be praised.

3. Disadvantages of a specialised tax court

Tax experts tend to favour specialised tax courts. One could expect that a specialised tax court is more willing to deal with the technical issues usually raised by tax experts. However, there are also disadvantages in having specialised tax courts. Specialised tax courts tend to focus exclusively on technical issues and sometimes ignore the remaining legal framework. There is always the danger that these courts view a legal issue in a rather narrow context. Sometimes they are not aware of tendencies in other areas of the law. Specialised tax courts have learned to live with the peculiar features of the tax system and which they tend not to challenge, even if these features have strange effects, seen from the point of view of an "outsider" who is more aware of the broader context and who follows developments in other areas of law more closely.

My view on this issue is very much influenced by experience in my home country: under the Austrian Constitution there are two supreme courts: The Supreme Constitutional Court, consisting of recognised and experienced generalists, is competent to interpret the Constitution, while the Supreme Administrative Court, which consists of specialised chambers some of which are specialised in different areas of tax law as well, decides on the interpretation of the plain law. One part of the Constitution is the principle of equality. The Supreme Constitutional Court has understood this provision as prohibiting interpretations of the domestic law which are "unthinkable". This position has enabled the Supreme Constitutional Court to decide on the interpretation of mere plain law provisions as well. Whenever the Court holds that the administrative authorities took a position which is "completely" wrong, it assumes that the principle of equality is infringed. This approach leads to *de facto* concurring competences of both courts to interpret tax law issues. Comparing the case law of both courts, one discovers that the Supreme Administrative Court mostly takes a rather conservative approach and reasons in a very technical way. It is reluctant to deviate from previous case law and usually does not challenge approaches that have been taken for years or decades.

However, the Supreme Constitutional Court is not afraid of challenging traditional positions. It sometimes decides to overturn case law that has existed for a long time. The judges of the Supreme Constitutional Court view developments in tax law from an outsider's position and require different interpretations if these developments do not fit into the general legal framework or developments in other areas of law. Therefore, the Supreme Constitutional Court is more open to new developments and more innovative than is the other supreme court. The interpretation of tax law provisions that are provided by generalists are more innovative than the positions usually taken by tax specialists.

A look at the case law of the ECJ supports this thesis: the ECJ has dared to challenge the traditional difference between residents and non-residents in many decisions[8]. According to its case law, taxpayers with permanent establishments in another country have to be entitled to the benefits provided by the tax treaty network of that other country[9]. The ECJ was not all impressed by the fact that it has been considered a fundamental principle of tax treaty law that only resident taxpayers could fall under the scope of a treaty. I have my serious doubts whether a court consisting of tax specialists would have been courageous enough to ignore all these well-established principles of tax treaty law. On the contrary, I would assume that a specialised court would not have dared to question these principles and would probably have taken the existing legal framework for granted.

4. Need for a reform?

It is true that after implementation of a CCCTB another set of rather technical provisions will become part of European law and the ECJ will be confronted with additional technical interpretation issues. However, this would not be unique for the Court. There are other areas of law where the degree of harmonisation is rather high and the Court has to rule on very specific interpretation issues. Direct taxation has actually been the exception so far, since there is still lack of harmonisation. However, in other areas of tax law, provisions have been widely harmonised, as is the case in

[8] See Lang, *Die Rechtsprechung des EuGH zu den direkten Steuern*, op. cit., ppp. 28 et seq.
[9] ECJ 21 September 1999, C-307/97, *Saint-Gobain*.

the area of VAT. The ECJ has had to give judgments on very technical VAT issues for years.

However, one could question whether it makes sense to have the ECJ competent to give judgment on both primary and secondary Community law. One might consider making the Court of First Instance competent to decide on all interpretation issues of secondary Community law and allowing the ECJ to focus exclusively on the interpretation of the EC Treaty. The ECJ would then become a mere "constitutional court". However, this question is far-reaching and would have an impact not only on tax cases. Therefore, it would have to be discussed in a broader context. A court that is competent for the interpretation of secondary Community law could be organised in specialised chambers. Specialisation in tax law could be considered as well, although in my view it would not be wise to have tax law experts sitting just among themselves. Tax law specialists and specialists in other areas of the law could join forces to decide on tax cases.

In any event, this discussion should not be held in the context of the CCCTB proposal. The introduction of a CCCTB would add additional rules to the existing large amount of secondary Community law. The necessity to consider a reform of the judicial system within the EU would grow. However, the introduction of a CCCTB would not have dramatic effects on the relation between secondary and primary Community law. There would be no immediate need for such institutional changes. They could and should be considered carefully without any time pressure. Linking the introduction of a CCCTB and institutional reforms closely to each other would endanger the whole CCCTB project. Achieving institutional reforms within the CCCTB is an even more difficult task than introducing a common tax base.