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The background of the lower half of the page is a grayscale image. It shows a hand holding a pencil, pointing at a spreadsheet. The spreadsheet contains various numerical values, including '360,000', '86,200', and '360,500'. In the foreground, there are several Euro banknotes, with the numbers '10' and '50' clearly visible. The overall theme is financial and legal, consistent with the 'EU Tax' title.

EU Tax How we can help you

April 2008

National economies are becoming increasingly more integrated with the ever-increasing cross-border flow of trade, investment and capital. Multinational businesses long ago ceased to think purely in national terms and today undertake more cross-border transactions than ever. Conducting activities in other countries inevitably requires an understanding of the laws and practices of those countries including knowledge of complex tax regimes.

Cross border transactions within the EU (which currently has 27 Member States) can mean an additional level of complexity. One of the key aims of the EU has been the creation of a single market embodying the so-called four freedoms: the free movement of goods, services, people and capital within the EU's internal market. Although Iceland, Liechtenstein and Norway are not members of the EU these freedoms are also extended to them as members of the European Economic Area.

Although the EU has a harmonised system of VAT, it remains the case that each Member State is free to formulate its own direct tax laws. However, the decisions of the European Court of Justice (ECJ) have over a number of years made it clear that the direct tax laws of a Member State must nevertheless comply with the four freedoms embodied in the European Treaty. In addition, national tax law and practices may breach EU law if it amounts to state aid; that is to say it represents a targeted tax advantage provided to a single taxpayer, or more commonly, a particular group of taxpayers that is regarded as unfair.

CMS EU Tax Group

Businesses that operate in the EU need to take account of EU law and be aware that EU law developments can provide opportunities to reduce the burden of taxation. Over the years we have seen cases that challenge the legality of national tax law and practices in many of the fundamental areas of the taxation of cross border transactions including dividends, thin capitalisation, capital gains exit charges, group relief regimes and CFC rules. EU law in this area continues to evolve as the body of case law of the ECJ continues to expand.

The CMS EU Tax Group (the "Group"), coordinated by Dr. Carlo Romano, EU tax specialist at CMS Adonnino Ascoli & Cavasola Scamoni, is a global team composed of international tax lawyers from more than 14 countries within the EU who have a particular specialisation in EU tax law. The Group also includes international tax lawyers from non-EU member states such as Switzerland, which have entered into arrangements with the EU that extend parts of EU law to the non-member state (for example, Switzerland was granted limited access to the Parent-Subsidiary Directive and the Savings Directive). The Group also benefits from the valuable collaboration with CMS lawyers specialising in other areas including general EU law and litigation.

One of the strengths of the Group lies in the sharing of experience and practice and regular discussion to assess the impact of developments in EU law in particular countries. Lawyers within the Group are used to working together. The Group includes:

▮ Professor Melchior Wathelet, consultant to CMS Bureau Francis Lefebvre and formerly Home Affairs Minister in the Kingdom of Belgium and for ten years a judge at the ECJ in Luxembourg. During his tenure as a judge of the ECJ he was

rapporteur on a number of the key direct tax cases that came before the Court. As well as advising on EU litigation, Professor Wathelet is a respected commentator on ECJ cases and their development, and a regular speaker at international conferences.

▮ Bruno Gibert, partner with CMS Bureau Francis Lefebvre. In 2002 he was appointed by the European Commission as Chairman of the EU Transfer Pricing Forum on business taxation, which he continues to Chair. He is a well known and respected tax expert with considerable experience both in the French tax administration and in the private sector.

▮ Professor Pietro Adonnino, founding partner of CMS Adonnino Ascoli & Cavasola Scamoni, Professor of Tax Law, former IFA President and former member of the European Parliament. He has acted for several taxpayers on cases referred to the ECJ including the high profile Telecom Italia (C- 252/02) and Telecom Italia Mobile (C-250/02) cases where the Court held that the Italian "tax" on companies holding telecommunication licenses was incompatible with the Telecommunication Directive 97/13/EC of 10 April 1997. These cases had a significant impact on the 2007 Italian state budget.

▮ Anne Grousset and Ariane Beetschen, Partners with CMS Bureau Francis Lefebvre. They specialise on VAT matters that have an EU law dimension and together with Bernard Geneste, also of CMS Bureau Francis Lefebvre, have considerable experience of litigation before the ECJ and the European Court of Human Rights. They also lobby both the French tax authorities and the European Commission on behalf of clients. Anne Grousset has been nominated as a EU expert on electronic invoicing by the EU Commission.

Peter Mason, consultant to CMS Cameron McKenna and head of the specialised VAT consulting division in London. He has acted for a number of clients on contentious matters including the Abbey National case (C-169/04) where the ECJ found in favour of the taxpayer; a landmark case not only for the funds sector, but also for the future of the VAT treatment of financial services in the EU. He has also lobbied HM Treasury and the EU Commission on behalf of P&I Clubs regarding outsourced insurance operations.

CMS EU Tax Services

CMS has a broad European-wide network of EU tax specialists, co-ordinated through the Group that can assist both businesses and individuals to exercise their rights under EU law including:

- Advice on EU tax strategy, opportunities and risk management;
- Identification of opportunities for making claims based on EU law;
- Advice on procedure and filing of returns based on EU law;
- Acting for you in legal action against tax authorities before local courts and the ECJ;
- Lobbying tax authorities and the EU institutions;
- Advice on the application of Human Rights law to tax and acting in litigation before the European Court of Human Rights.

Why you should use the CMS EU Tax Group

Using the CMS EU Tax Group, you have access to tax experts recognised and respected in their own jurisdictions. You will benefit from their considerable specialist expertise in advising on EU related tax matters including the conduct of litigation both before the national courts and the ECJ as well as having a deep understanding of the workings of the European institutions.

The Group's in-depth knowledge and experience ensure that you get the best and most up-to-date advice on EU tax issues. You are offered a leading and practical service that is cost effective.

Why does EU law matter in direct taxation?

The taxpayer

There is nothing in the European Treaties about direct taxation and therefore, Community Law does not obviously provide a taxpayer with any help in challenging the legality of national taxation laws.

However, like any other national legislation the national tax systems can restrict the free movement of goods, persons, companies, services, capital and payments, all of which are guaranteed by European law.

Why should a European taxpayer pay more tax on the same type of income or capital or not be entitled to a tax advantage because:

- ▮ He is not resident in the Member State where he is working?
- ▮ The dividends or interest he receives come from abroad?
- ▮ A subsidiary or parent company is established in another Member State?
- ▮ He has signed an insurance contract with an insurance company established in another Member State?
- ▮ He transfers assets to a transferee established abroad?
- ▮ His capital is invested in or transferred to a non-resident company?

But of course a Member State will put forward good reasons that may justify restrictions to the free movement based on:

- ▮ The cohesion of a national tax system;
- ▮ The necessity to fight against tax evasion or fraud;

- ▮ The preservation of the balanced allocation of the taxing power between the Member States;
- ▮ The necessity to ensure the effectiveness of fiscal supervision.

The European Court of Justice

When facing these problems, the ECJ has ruled that, even though there are no specific direct taxation provisions in the EC Treaty and that direct taxation falls, in principle, within the competence of the Member States, Member States must nevertheless exercise that competence consistently with EU Law.

The Court has defined this obligation to exercise fiscal competency consistently with EU Law as prohibiting any discrimination or restriction on the free movement of goods, persons, companies, services or capital unless the discrimination or restriction can be justified by an overriding public interest.

Up to now, in most cases that have come before the Court, the Court has found that there has been a breach in that there has been discrimination or an obstacle: non-residents cannot be discriminated against and any restriction or obstacle to transnational operations is in principle inconsistent with the Treaty. The Court has also been rather reluctant to accept any justification for the discrimination or restriction put forward by the Member States although there are signs that the Court is becoming more receptive to such arguments.

The Court has given approximately 80 judgments relating to direct taxation (90 % of which have been in favour of the taxpayer) and a further 50 or so other cases are now pending.

Procedure

There are two ways for a taxpayer to bring such a case to the European Court of Justice:

- ▮ A complaint may be made to the Commission and the Commission may decide to bring infringement proceedings against a Member State. Up to now, less than 10 out of the 80 judgments of the Court have been made as a result of infringement proceedings. The Commission is never obliged to bring infringement proceedings before the Court. However, in appropriate cases this might be the preferable course of action as this option can be cheaper than a taxpayer engaging in litigation before the national court and may be more effective particularly where a Member State is reticent in referring cases to the ECJ.
- ▮ A taxpayer may instigate proceedings to test the consistency of national legislation with EU Law by bringing a case before the appropriate national court or tribunal, which must apply directly EU Law and the case law of the ECJ. If necessary, it must set aside a national law that is incompatible with the Treaty and order an appropriate remedy.

If the national court or tribunal has a doubt as to whether the national law breaches EU Law, it may (and it has to, if it is the final court of appeal) refer the case to the ECJ and in the meantime suspend the national proceedings pending the outcome of the reference to the ECJ, which will be binding. More than 70 out of the 80 judgments of the ECJ relating to direct taxation have been initiated in this way and around the same majority of the pending cases are also references from the national courts or tribunals.

European Court of Justice: composition and procedure

Composition

The ECJ is composed of 27 judges (one from each Member State) and 8 Advocates General. The Advocates General gives an independent opinion to the judges who may or may not follow this opinion. The judges and Advocates General are appointed for six years by a common agreement of the governments of the Member States.

Organisation

Exceptionally, the ECJ rules in plenary session (27 judges) but most (and from now on probably all) tax cases are attributed to chambers (of 13, 5 or 3 judges). The most difficult cases, all those raising new questions, will go to the Grand Chamber of 13 judges; cases where

there is already case law but which could be developed are allocated to 5 judges and those cases where it is sufficient to apply the existing case law are allocated to chambers of 3 judges.

Procedure

The average duration of a preliminary reference (in the field of direct taxation and, indeed, other fields) varies from 18 to 24 months. This is in addition to the time taken to complete the national part of the procedure.

The official language of the procedure is the language used by the national court or tribunal that refers the case to the Court.

Illustration of a tax case referred to the ECJ by a Dutch judge: the case "D" (C-376/03) – wealth tax – free movement of capital

ACTION	DATE
Formulation of the question by the Dutch Court	24 July 2003
Reference received by the Court	8 September 2003
End of the written procedure	2 January 2004
Final translation	4 March 2004
Report of the "judge rapporteur" to the General Assembly	28 May 2004
Hearing	14 September 2004
Opinion of the Advocate General	26 October 2004
End of the deliberations of the judges	13 May 2005
Judgment	5 July 2005

Comments



Except when the national court is a final court of appeal, in which case the court is obliged to refer the case to the European Court as soon as it has a doubt about the possible application of European Law, a national court or tribunal is never obliged to refer a case to the European Court.

In these cases, the taxpayer must take the necessary initiative. It is possible that the national court or tribunal will raise a point relating to the application of European Law and refer the case to the Court, but, usually, it is the taxpayer that will argue that there is a point of European Law at issue and persuade the national court or tribunal that the case should be referred to Luxembourg.

Whenever a taxpayer is in dispute with the national tax administration consideration should always be given to whether the national legislation is consistent with European law. As soon as a doubt arises, it should be part of the argument with the tax administration and ultimately part of the argument put before the court or tribunal with a view to convincing the court or tribunal either to directly apply the case law of the ECJ or to refer the case to the ECJ.



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CMS is the European legal and tax services provider which is the natural choice for businesses based in, or seeking to move into, Europe. CMS combines a deep understanding of the legal, tax and commercial issues in its home jurisdictions with the broader perspective and expertise which comes from an extensive European coverage, a common strategy and shared client service standards. CMS has 59 offices in 31 jurisdictions in Europe and beyond and is managed by a dedicated team based in Frankfurt.

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