



# ***Court's Rulings, General EU Taxation Principles in the Area of Direct Taxation***

Brussels, 7 June 2006  
Dieter Kischel, TAXUD E3



## Overview

- Foundations: Supremacy and direct effects
- The Single Market: Abolition of obstacles
- Discrimination and Restriction
- Difference of treatment
- Justification?
  
- Annex: List of all ECJ-cases in the field of direct taxation  
[http://europa.eu.int/comm/taxation\\_customs/resources/documents/taxation/gen\\_info/tax\\_law/legal\\_proceedings/court\\_cases\\_direct\\_taxation\\_en.pdf](http://europa.eu.int/comm/taxation_customs/resources/documents/taxation/gen_info/tax_law/legal_proceedings/court_cases_direct_taxation_en.pdf)



## *The Supremacy of EU Law*

- Positive integration (harmonization)  
Negative integration (ECJ-jurisprudence)
- „...although direct taxation falls within their competence, Member States must none the less exercise that competence consistently with Community law ...“  
Case C-324/00 Lakhorst/Hohorst ECR 2002 I-11779 para 26  
Case C-446/03 Marks & Spencer, 13.12.2005, para. 29



## ***Direct Effect***

- „It must be stated firstly that Article [43] of the [EC] Treaty embodies one of the fundamental principles of the Community and has been directly applicable in the Member States since the end of the transitional period“

Case 270/83, Commission v France ECR 1986, 273 para. 13



## ***The Single Market (I)***

- Article 3.1(c) EC:  
„... an internal market characterised by the abolition, as between Member States, of obstacles to the free movements of goods, persons, services and capital“
- Article 14.2 EC:  
„The internal market shall comprise an area without internal frontiers in which free movements of goods, persons services and capital is ensured in accordance with the provisions of this Treaty“



## ***The Single Market (II)***

- Non discrimination and fundamental freedoms
  - Article 12 EC: Discrimination on grounds of nationality
  - Article 18 EC: Free movement of persons
  - Article 39 EC: Free movement of workers
  - Article 43 EC: Freedom of establishment
  - Article 49 EC: Freedom to provide services
  - Article 56 EC: Free movement of capital



## ***Court's reasoning***

1. EC law at stake?
2. Obstacle = discrimination or restriction?
3. Justification?



## ***Obstacle: Discrimination and Restriction***

- Discrimination = Question of equality
  - Different treatment notwithstanding comparable situations
  - Resident and non resident in comparable situations
- Restriction = Question of obstacles
  - Inbound: more burdensome for non residents (e.g. double book-keeping)
  - Outbound: different rules for foreign and domestic income of residents
- Both should lead to the same result in direct tax area





## ***Difference of Treatment (I - Individuals)***

Different treatment with regard to individuals:

- Refusal of personal relief to a non resident is not as a rule discriminatory because the situations of residents and non residents are not comparable (Case C-279/93, Schumacker, ECR 1995, I-225)
- But where the non resident receives almost all his income in the state of activity there is no objective difference



## ***Difference of Treatment (II - Company)***

- „... different treatment solely by reason of the fact that the registered office is situated in another Member State would deprive Article 43 EC of all meaning“

Case 270/83 Commission v France ECR 1986, 273

- One cannot treat EU subsidiaries differently depending upon the residence of their EU parents
- One cannot treat EU parents differently depending upon the residence of their EU subsidiaries.



## ***Difference of Treatment vs. Allocation of Taxing Rights***

- In the absence of unifying rules or a convention under Article 293 EC Member States are competent to determine the criteria for taxation of income with a view to eliminate double taxation by means of bilateral agreement

Case C-336/96 Gilly, ECR 1998, I-2823, para. 35

- But: The exercise of the taxing rights must be consistent with Community law

Case C-307/97 Saint Gobain, ECR 1999, I-6163



## ***Justification (I)***

- „It must ... be established whether a national measure ... pursues a legitimate aim which is compatible with the Treaty and is justified by pressing reasons of public interest.

In that event it must also be such to ensure achievement of the aim in question and not go beyond what is necessary for that purpose (see ... Futura ... Verkooijen).“

Case C-324/00 Lankhorst/Hohorst ECR 2002 I-11779 para 33

Case C-446/03 Marks & Spencer, 13.12.2005, para. 35



## ***Justification (II)***

No justifications:

- Lack of harmonisation (Com v France, para. 24, 25)
- Countervailing advantages (Com v. France, para. 26)
- Loss of tax revenue (Case C-436/00 X and Y ECR 2002, I-829, para. 50; C-264/96 ICI ECR 1998, I-4695, para. 26)



## ***Justification (III)***

Accepted justifications:

- Preserving cohesion of tax system
- Preventing tax avoidance/abuse of rights
- Ensuring fiscal supervision
- Territoriality

Proportionality



## ***Justification (IV – cohesion)***

- „... in Bachmann ..., a direct link existed, in the case of one and the same taxpayer, between the grant of a tax advantage and the offsetting of that advantage by a fiscal levy, both of which related to the same tax ...  
Case C-204/90, Bachmann, ECR 1992, I-249
- „Where there is no such direct link, because ... one is dealing with different tax payers, ... the coherence of the tax system cannot be relied upon ...“  
Case C-168/01 Bosal, ECR I-9401, para. 29 - 30



## ***Justification (V – Preventing tax avoidance)***

- „... according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends ...

Case C-255/02 Halifax, 21.02.2006, para. 68; Case C-446/03 Marks & Spencer, 13.12.2005, para.49

- But: „... the legislation at issue here does not have the purpose of preventing wholly artificial arrangements, but applies generally to any situation in which the parent company has its seat ... outside [Germany]

Case C-324/00 Lankhorst, ECR 2002, I-11779





## ***Justification (VI – Fiscal supervision)***

- „The Court has repeatedly held that the effectiveness of fiscal supervision constitutes an overriding requirement of general interest capable of justifying a restriction ...“  
Case 250/95 Futura, ECR 1997, I-2471, para. 31
- But: „Directive 77/799 concerning mutual assistance in the field of direct taxation provide adequate means ...“  
Case C-279/03 Schumacker, ECR 1995, I-225



## ***Justification (VII – Territoriality)***

- Principal of territoriality cannot be regarded as discrimination – only profits and losses arising from the activity in the territory can be taken into account for a permanent establishment (non resident)

Case C-250/95 Futura, ECR1997, I-2471, para. 18-22

- But not applicable in case of worldwide taxation (residents)

Case C-319/02 Manninen, ECR 2004, I-7477, para. 39



## ***Justification (VIII – Proportionality)***

- In Marks & Spencer the need not to go further than necessary meant:
- The non resident subsidiary must „exhaust the possibilities available in its state of residence for present and past periods and must have no possibility of future relief (para. 55)