

# The Impact of AG Geelhoed's Theories on Recent Case Law

HARM53

Christina Jonsson  
c.jonsson@hotmail.com  
0702519650

Tutor Cécile Brokelind  
Examinator Lars-Gunnar Svensson

## **Abstract**

This thesis begins in the view of AG Geelhoed about the right for the States to allocate the right to tax between them and that discrimination resulting from this does not fall within the scope of the free movement provisions of the Treaty. In an article by the CFE in 2006 a conclusion is drawn that the ECJ is starting to fall in line with Geelhoed's reasoning. The aim of this thesis is to see if the case law after 2006 supports this theory.

Geelhoed bases his reasoning on the idea that restriction can be of two types, so called quasi restriction that stem from the collision of two tax systems, or true restrictions that only originate in one tax system. True restrictions should be within the scope of art 43 EC, while according to Geelhoed quasi-restriction should not be.

One type of quasi-restriction Geelhoed approaches is disadvantages that stem from dislocation of tax base between states. He claims that any restriction that comes from two states, perhaps through a double tax treaty, dividing the right to tax between them should not be in breach of art 43 EC.

When looking at case law after 2006 there are cases such as SGI and Block that use similar argumentation to justify breaches of art 43 EC. Other cases indicate no interest of the court in Geelhoed's ideas.

Conclusions of this thesis are that the ECJ can be seen to not fully accept these ideas but at least work with similar lines of reasoning.

# Content

1	Introduction .....	1
1.1	Background.....	1
1.2	Problem.....	1
1.3	Method, material and limitations .....	2
2	The origin of a disadvantageous tax treatment .....	4
2.1	The Geelhoed approach.....	4
2.1.1	ACT Group Litigation .....	4
2.1.2	In what regard can restrictions originating from allocation of tax jurisdiction fall under art 43 EC? .....	4
2.1.3	The different meanings of the word "restriction".....	4
2.1.4	The nature of “quasi restrictions” .....	5
2.1.5	Division of the right to tax .....	6
2.1.6	Home State Obligations .....	7
2.1.7	Source State Obligations .....	8
2.1.8	The role of the double tax treaty .....	8
2.2	The Real Economic Environment .....	9
2.2.1	Kerckhaert Morres.....	9
2.2.2	Discrimination without negative economic results? .....	10
2.2.3	The obligation to relieve juridical double taxation.....	10
2.3	Different ideas, similar results? .....	11
2.3.1	The Scholarly Debate .....	11
2.3.2	Marks & Spencer .....	12
3	Have the ECJ adopted the Geelhoed line of thought?.....	15
4	Conclusions .....	23
5	Reference.....	25
5.1	Case law.....	25
5.2	Cases indirectly referred to.....	25
5.3	Literature .....	26

# 1 Introduction

## 1.1 Background

Are there situations where being treated different than someone else is simply a fact of living in a global world and not a discriminatory act design to deprive me of my rights? Different words like discrimination, disparities or restrictions naturally have different meaning, but where is the line between them? Can a restriction simply be a restriction without being discriminatory? Or is a disparity always a restriction?

The point of interest is that the ECJ do not always seem to know or think about these distinctions when judging cases, for example in regards to the prohibition of discrimination in the free movement provisions. While sometimes the ECJ does rule situations not to be discriminatory, in a majority of cases they do rule in favour of the tax payer, even if there are possibilities to justify discriminatory behaviour.

This thesis has its basis in an article or meeting summary of the Confederation Fiscale Europeenne (CFE) Forum in 2006 called "The ECJ and the New Path"<sup>1</sup>. The article describes the, at the time, recent development of the court in direct tax cases<sup>2</sup>. They focus on the allocation issues and the new approach by the ECJ to find in the favor of the Member States. The article mentions AG Geelhoed as having stated the opinion that explains this new line in most detail and I have therefore chosen to start my thesis by examining this point of view.

## 1.2 Problem

Since this article was written a few years ago I wanted to look into the following cases and try to conclude if this was indeed a new path that the ECJ is following or if it was simply more evidence of the ECJ's inconsistency and lack of predictability.

Arguments have been made that the complexity of the direct tax cases sometimes make it difficult for the Court to see the underlying situation and the whole economic reality in which the tax payer is operating. While the Treaty gives direct rights to individuals, it is not automatically assumed that all situations fall within the scope of the Treaty freedoms provisions. What is referred to as 'access to treaty freedoms' is the process where it is decided if a situation falls within the scope of the provision. This become problematic if the Court can not distinguish between disparities, when a tax payer simply is disadvantaged because of differences between the tax system, and real discrimination under Treaty articles. It is only after this has been decided that the analysis, if whether the situation is in breach of the article or not, commences.

If the Court have ruled that a national legislation is in breach of a free movement

---

<sup>1</sup> Dickinson, Fraser, (editor) *CFE News: CFE Forum 27 April 2006: Summary Report*, European Taxation, no. 7, volume 46, 2006.

<sup>2</sup> Cases discussed were for example Case C-446/03 Marks & Spencer, C-376/03 the D case and C-403/03 Schempp.

provision, the process of justification can arise. There are several grounds of justification; written, such as public health and public security. Other have been established through case law, as seen below. The problem arises from the Courts view that certain restrictions or discriminatory practices are justifiable under certain conditions. The court are frequently inconsistent in the judgment of these conditions which lead to even more issues of interpretation and a lack of legal certainty.

The goal of this thesis is to try to establish the current line of thinking in the ECJ on allocation of taxing rights and the line between disparity and discrimination. By doing this I hope to be able to answer the question; do the Member States have a new way of defending anti - abuse legislation?

Anti - abuse legislation in this case meaning national legislation having the aim of preventing tax payers minimizing their tax contribution in an unjust fashion. As seen in previous case law, the Court have formed the condition of "wholly artificial arrangement" as being the target of such legislation in order for it to be considered as justifiable. The Court have also heavily relied on the principle of proportionality. A legislation has only been ruled as a justified breach of Treaty freedoms if it is in proportion to the aim it seeks to attain.

The aim of this thesis is to establish if the current trend in the case law can support the theory that, when trying to justify the existence of a national legislation of an anti-abuse character, the Member States can find support and justification grounds in the reasoning of former AG Geelhoed.

### **1.3 Method, material and limitations**

In the material for this thesis I focused on case law of the ECJ, in order to establish the view of the Court. I chose the two opinions by AG Geelhoed with the clearest explanations of his theories. When looking through the recent case law by the Court, I tried to present the cases with the most relevant argumentation as far as justification grounds went, to highlight both cases in line with Geelhoed ideas and cases that went in other directions.

Articles and other literature have mainly been used to offer a wider perspective on certain issues in the cases or to illustrate the reactions the cases caused when presented. This thesis will not present the vast amount of literature available on the subject, in order to keep with the intent shown above, which is to focus on the view of the Court and the opinions of the Advocate General. Several renowned scholars such as Peter Wattel will not be extensively mentioned due to the fact that his ideas, while very interesting, so closely resemble those of AG Geelhoed which are presented in detail.

When researching this subject there was substantial material available, so in order to present as clear a picture as possible, I decided to limit the presentation of cases to those decided after 2006. For a more extensive analysis of cases before that I refer to the previously mentioned article by the CFE.

I focused, with a few exceptions, on cases regarding the freedom of establishment to

give a common thread and try to establish a cohesiveness. When presenting the cases I have chosen to structure them in a chronological order to illustrate the unpredictability in the development over time. While all cases have a value when trying to determine the overall reasoning of the Court, I have tried to present cases that indicate the indecisiveness and illogical manner in which cases have been judged.

While the EC Treaty have been amended and become the TFEU, and consequently the articles of the freedoms have been changed, this thesis will refer to for instance art 43 EC instead of art 48 TFEU. In similar fashion the Court of justice will be called the Court of simply the ECJ.

## **2 The origin of a disadvantageous tax treatment**

### **2.1 The Geelhoed approach**

#### **2.1.1 ACT Group Litigation**

The former Advocate General Geelhoed has written opinions on numerous cases and in this first chapter I will focus on ACT Group Litigation and Kerckhaert Morris. Particularly on allocation of taxing rights and the difference between discriminatory or restrictive behavior and discrepancies based on the coexistence of several taxing systems.

In Act Group Litigation<sup>3</sup> the Commissioner of Inland Revenue refused a group of companies a tax credit to non-resident companies in those groups for dividends paid to them by resident companies. The case was brought in light of Metallgesellschaft and Others. In that case the court ruled that national legislation that benefited residents companies by giving them the possibility to pay dividend to a parent company without having to pay advance corporation tax if the parent company was a resident in the same state was in breach of art 43.<sup>4</sup>

#### **2.1.2 In what regard can restrictions originating from allocation of tax jurisdiction fall under art 43 EC?**

To be considered under art 43 EC a disadvantageous tax treatment should come from one tax jurisdiction applying discriminatory treatment, not from differences between two states.

The AG states that because of the method that member states use to divide tax, namely home state and source state differentiate, the concept of discrimination will differ depending on the state acting as home state or source state. Basically a tax payer being subjected to a tax regime acting as source state will not be in a comparable situation to a tax payer in a resident state and vice versa. According to Geelhoed this means that the obligation that art 43 EC imposes depends on if the State acts as home or source state.<sup>5</sup>

#### **2.1.3 The different meanings of the word "restriction".**

In ACT Group Litigation Geelhoed claims that in the field of direct taxation there is no distinction between the terms *discrimination* and *restriction*, when looking at the case law by the ECJ. <sup>6</sup> The importance in his view is to distinguish between two

---

<sup>3</sup> Case C- 374/04 Test Claimants in Class IV of the ACT Group litigation (Pirelli, Essilor and Sony), 23 February 2006. (AG opinion).

<sup>4</sup> Id., pp. 22-23.

<sup>5</sup> Id., p. 55.

<sup>6</sup> Id., p. 36.

separate uses of the word restriction. The first being the type of effect that comes from the fact that within the EU there is no common regulation in the field of direct taxation. This will lead to economic effects on commercial transactions as the direct result of two different jurisdictions colliding. Geelhoed is of the opinion that this has their distinct effects and that none of them really in its right meaning should be called restrictions. He calls them quasi restrictions. *The effect is firstly the existence of cumulative administrative compliance burdens for companies' active cross-border; secondly the existence of disparities between national tax systems; and last the necessity to divide tax jurisdiction.*<sup>7</sup>

There is no question that these types of effects have economic consequences that in fact may hinder the common market and in that sense they do restrict tax payer's rights to the fundamental freedoms as granted by the treaty. Geelhoed points out while this may truly cost tax payers in an economic sense these are not actual restrictions set out by the states, they are simply effects of coexisting systems. While there are cases judged by the ECJ as restriction or discrimination one should take into consideration that in cases where these types of mismatches in the systems create favourable situations that stimulate the market, no one seems highly concerned with invoking EU law.

#### **2.1.4 The nature of "quasi restrictions"**

As mentioned above there are three types of quasi restriction according to the judgment in ACT Group Litigation. First he mentions the compliance burden. It is natural that a tax payer that chooses to establish himself or a company in several different jurisdictions will have to comply with the tax rules in both (or all) states. There is no argument that this will not increase both the administrative and economic burden on the tax payer, but nor should this be considered as discrimination.<sup>8</sup>

The second quasi restriction is the variations, differences or disparities in the system. Since there is no harmonization in the tax system in EU all the different member states have tailor-made their tax system to fit the particular needs of that country. Naturally this leads to large disparities not only in tax rates but also in administrative rules, the definitions on what is income, the rules regarding relief of double taxation etc. All this is due to the specific economic and political policies of the different member states, for example one state may choose to levy higher tax rates in order to offer better public service or in order to redistribute wealth to lower income levels in society. There is little argument that these factors do not have a distortive effect on investment, employment or establishment decisions. The ECJ have in Schempp, and AG Geelhoed concurred in his opinion, clearly stated that distortions between the tax systems do not fall within the scope of the freedom of movement article in the treaty. The ECJ clarifies that the treaty does not guarantee that a move between member states will be neutral in tax matters, only not discriminatory. It is AG Geelhoed's argument in ACT Group Litigation that the same criteria should be used for the freedom of establishment, thus leaving disparities resulting from two or more jurisdictions should fall outside of the scope of article 43 EC (now as amended art 48

---

<sup>7</sup> Id., p. 37.

<sup>8</sup> Id., p. 42.



TFEU). This however does not mean that these issues fall entirely outside the scope of the treaty. One could still argue under harmonisation issues art 94 EC and under art 96 and 97 EC to counteract distortions of competition.<sup>9</sup>

The quasi-restriction that Geelhoed focuses on is the division of tax jurisdiction.<sup>10</sup> He claims that it is necessary in cross border economic activity for states to divide the right to tax between them but that as with disparities this should not be confused with discrimination. This because they result from the parallel existence of two or more systems, not from the system in just one country. The key part is that one single jurisdiction is not to blame for the tax disadvantage. The difference between tax disadvantages resulting from disparities and disadvantages resulting from allocation of taxing right is that even if the EU would harmonies the tax system the latter disadvantage would still remain.

### 2.1.5 Division of the right to tax

The basis for this type of disadvantage is well established. In order for the states to decide who has the right to tax, they must choose criteria to base their tax claim on. The most common is "home state/resident taxation" or "source state/non-resident taxation". Due to this type of division, a tax payer conducting cross border activity may be taxed in both states, so called juridical double taxation. The norm in international law to day is "source country entitlement", meaning that the right to tax in the source country is primary. This would leave the responsibility to relieve double taxation to the home state. This state may choose if and how it wishes to do so. This is why division and classification of tax jurisdiction is elemental. In regards to EU law, this division of tax jurisdiction lies completely with the States. There have been several cases that have touched on this subject, providing case law stating that nationality is not a discriminatory way of dividing tax jurisdiction nor is it problematic for the states to base this division on the OECD model convention. There are also plenty of cases where the compatibility of home/source state taxation and EU law has been expressed. The ECJ could however not entirely follow through on this. They have also stated that treating tax payer differently due to resident or non resident statues alone is not always acceptable. In *Marks & Spencer* the Court come to the conclusion that, since it would otherwise render art 43 EC useless, "*.. in each specific situation, it is necessary to consider whether the fact that a tax advantage is available solely to resident taxpayers is based on relevant objective elements apt to justify the difference in treatment.*"<sup>11</sup>

The conclusion of this will be that disadvantageous treatment of tax payers that is not a natural consequence of the fact that different tax obligation can flow from cross border activities, will fall within the scope of art 43 EC.<sup>12</sup> Thus not entirely leaving the division of the jurisdiction to the states. So what does this mean for the states? Which obligations are imposed on a state acting as home state?

---

<sup>9</sup> Id., pp. 43-47.

<sup>10</sup> Id., pp. 50 and onwards.

<sup>11</sup> Case C-446/03 *Marks & Spencer*, pp. 37 and 38.

<sup>12</sup> See note 10, Id., p. 54.

## 2.1.6 Home State Obligations

Essentially the obligation is to treat domestic and foreign income consistently according to the division of tax base. If foreign income is taken into account, then the rules cannot be applied differently to domestic or foreign income. Examples derived from case law, regarding corporate income taxation, are;<sup>13</sup>

- Relief of economic double taxation on domestic dividend must apply to foreign dividend income, and then foreign corporation tax paid must be taken into account.
- If domestic losses can be off set against prior or future gains, this must include companies with foreign income.
- Group relief given to domestic subsidiaries distributing profits to domestic parents, must be given to domestic subsidiaries with foreign parents.

The court has, however, found that if a Member State does not have to give loss relief, if it doesn't exercise tax jurisdiction over a non-resident subsidiary of a resident parent company.<sup>14</sup> AG Geelhoed points out that the court did leave room for an exception. In extreme cases where there is no possibility for the subsidiary to off set its losses in their resident state, the home state of the parent company must take losses into account. By not leaving this possibility the Court claims that is would have been beyond what is necessary to achieve a balanced division on tax. In the opinion of the AG the Court has created a new disparity regarding allocation of tax base and thereby distorting the free movement on the common market.<sup>15</sup>

The AG is also critical as regards to the Bosal<sup>16</sup> case. In his opinion, not enough attention was paid to the division of tax jurisdiction. The division gave the full right to taxation to the resident state, so that the Netherlands exempted from taxation all incoming profit from non- domestic subsidiaries seem to be fully consistent with the balance of allocation. *"In sum, this would appear to be a classic example of a difference in treatment resulting directly from dislocation of tax base. ...the result of the court's judgment was to override the Member States' choice of division of tax jurisdiction and priority of taxation..."*<sup>17</sup>

It is clear from case law that it is the full responsibility of the home state to take into account the personal circumstances, when it comes to individual income tax. If residents investing domestically receive incentives, such incentives must also be given to cross-border investment.<sup>18</sup>

So if a lot of the responsibility according to art 43 EC falls on the home state or the resident state, which obligations falls on the source or non-resident state?

---

<sup>13</sup> Id., pp. 57-58.

<sup>14</sup> Id., p. 59. Marks & Spencer, p 46.

<sup>15</sup> Id., p. 64.

<sup>16</sup> Case C-168/01 Bosal. The Dutch rule stating that a Dutch- resident parent company could only deduct cost relating to a subsidiary if that subsidiary was taxable in the Netherlands was found to be in breach of art 43 EC. The court came to this conclusion in a three step test. First concluding that is was Ok with the Parent-Sub directive, but it might dissuade investors so it could fall under art 43 EC. Secondly they rejected the fiscal cohesion as justification due to the lack of a direct link between the rule and the objective. Thirdly they rejected the argument that due to worldwide taxation, resident and non residents were not in a comparable situation.

<sup>17</sup> See note 13. Id., p. 63.

<sup>18</sup> Id., p. 60.

## 2.1.7 Source State Obligations

Source state only have jurisdiction over income produced within their territory. Obligations applied to a source state can be:<sup>19</sup>

- If branches of non- resident companies are taxed in the same way as domestic counterparts, then the same tax benefits must be granted to both, even if they derive from double tax treaties.
- A branch of a non-resident company cannot be subjected to higher tax rates than domestic companies.
- Special schemes such as thin cap rules can not only be applied to non domestic branches or companies.
- Not impose a disproportional administrative or compliance burden.

In regards to individual income taxation, obligations lead to:

- In case of income related deductions (business expenses), states may not distinguish between residents and non-residents.
- Personal circumstances are in general the responsibility of the home state; therefore the source state may deny rights to non-residents that are granted to residents.

The Court has made an exception to the last rule, stating that in case where more than 90 % of a non residents income is in the source state, the source state must take on the responsibility of a home state and grant the non resident the same rights of deduction as a resident. The AG points out that the decisive factor should not simply be the amount of income in the source state but that the personal circumstance would otherwise be disregarded by both states, leaving the tax payer with a disadvantage.<sup>20</sup>

*"If a source state elects to relieve domestic economic double taxation for its residents, it must grant this relief to non-residents to the extent the same domestic double taxation results from the exercise of its tax jurisdiction over these non-residents."*<sup>21</sup>

## 2.1.8 The role of the double tax treaty

AG Geelhoed means that it is possible to fulfil these obligations under the Treaty by double tax treaties. When examining if the State is in compliance with its obligations under the free movement provisions the situation created by a tax treaty should therefore be taken into account. First, because it is up to the Member States to divide and priorities tax base. Second, without taking the effect of the double tax treaty into account, the real economic situation and incentives for the tax payers cannot be accurate. The combined effect of the allocation between the states would not be accurately accounted for and this will distort the balance between the states and infringe their exclusive competence in allocation of tax base. However, if one State fails to fulfil its obligations under the double tax treaty, it is up to the other state to

---

<sup>19</sup> Id., p. 67.

<sup>20</sup> Id., p. 68.

<sup>21</sup> Id., p. 69. E.g. taxation of dividend, where source State subjects company profits first to corporation tax and then to income tax upon distribution.

make sure they fulfil their obligations under the free movement provisions.<sup>22</sup>

The AG then concludes by pointing out that even if a rule would be not be considered a "quasi-restriction" but a "true restriction" or discrimination under the free movement provisions, there is still the possibility of justifying it according to certain grounds.<sup>23</sup> To further illustrate the development of Geelhoeds reasoning the following subsection will present his reasoning in Kerckhaert Morres. After will be a subsection presenting other points of view including two cases predating 2006, Marks & Spencer and Oy AA.

## 2.2 The Real Economic Environment

### 2.2.1 Kerckhaert Morres

In about the same time as ACT Group Litigation was rendered there was another case, Kerckhaert Morres<sup>24</sup>, regarding similar issues, where AG Geelhoed once again expressed his opinion that a disadvantageous tax treatment can only fall under the prohibitions in the free movement articles if it is not a "*direct and logical consequence of the fact that, in the present state of development of Community Law, different tax obligations for subjects can apply for cross-border situations than for purely internal situations*".<sup>25</sup> He goes on to clarify but stating that in order to fall under then article 43 or 56 EC, the discrimination has to be due to the rules in only one country, not the difference between two or more states. The latter would, as explained above, be a so called quasi restriction.

The disadvantageous tax treatment in the case was that Mr. and Mrs. Kerckhaert Morres received dividend income from France, where the dividend was subjected to withholding tax. This withholding tax was not taken into account when levying the tax in Belgium.

Kerckhaert Morres were at the time of the case residents in Belgium, meaning Belgium was subjecting them to home state taxation, or worldwide/resident taxation. A home state must treat foreign sourced income in accordance with the principle they've used when allocating the tax base. If it treats foreign income as taxable income, there can be no difference in the treatment of domestic and foreign income, or it becomes discriminatory.<sup>26</sup> The rules in Belgium were scheduler in nature, thereby subjecting domestic dividend first to corporate taxation and both domestic and foreign dividend was then taxed again as it were considered a different type of income. Clearly there is no direct discrimination, but do the rules go beyond the restriction that follows from two systems colliding and can they thus fall within the scope of covert discrimination?<sup>27</sup>

---

<sup>22</sup> Id., pp. 70-72.

<sup>23</sup> Id., p. 73.

<sup>24</sup> Case C- 513/04 Mark Kerckhaert Bernadette Morres v. Belgische Staat, 6 April 2006. (AG opinion)

<sup>25</sup> Id., p. 17.

<sup>26</sup> Id., p. 19.

<sup>27</sup> Id., p. 21.

## 2.2.2 Discrimination without negative economic results?

AG Geelhoed is clearly skeptical of the claim by the couple that the overall tax burden on French sourced income is higher than on Belgium sourced income. By looking at the economic reality of this particular case, he concludes that due to the French imputation tax credit offered through the double tax treaty they are in fact better off than purely domestic situations. Therefore there cannot be any discrimination under the free movement articles. He points out that this is the problem with looking at an individual situation of a tax payer and trying to establish if the tax legislation in one separate member state complies with the Treaty. “*Such an approach risks failing to capture the reality of the economic context in which that operator is acting, and (risk) the overall balance arrived at between home state and source state in dividing tax jurisdiction.*”<sup>28</sup>

## 2.2.3 The obligation to relieve juridical double taxation

He goes on to speculate on possible consequences had there not been an *avoir fiscal* in the double tax treaty, which lead to a similar debate on relief of juridical double taxation as seen previously in ACT Group Litigation. Such a disadvantage would not mean that Belgium was in breach of treaty provision, since there is no obligation in the Treaty for the home state to relieve juridical double taxation that is a result of the dislocation of tax base. While there is a goal in the treaty for states to enter into agreements to eliminate this problem, it is not an absolute obligation and the article has been found to lack direct effect. Therefore choosing not to eliminate juridical double taxation is not contrary to the free movement provisions. Whether or not Belgium was in breach of the double tax convention with France is a question purely for the national court and irrelevant in this question.<sup>29</sup>

In short, what Geelhoed concludes is that so called quasi restriction stems from the collision of two tax systems while true restrictions only originates in one tax system. True restrictions should be within the scope of art 43 EC, while quasi-restriction should not be.

One quasi-restriction is disadvantages that stem from dislocation of tax base between states. Restriction that comes from two states, perhaps through a double tax treaty, dividing the right to tax between them should not be in breach of art 43 EC.

---

<sup>28</sup> Id., pp. 25-26.

<sup>29</sup> Id., pp. 28-37.

## 2.3 Different ideas, similar results?

### 2.3.1 The Scholarly Debate

AG Geelhoed is not the only one to question the consistency of the rulings by the ECJ, nor is he the only one with ideas on solutions. While there are many voices on what the ECJ is doing wrong, one of the most concrete ideas for a solution is offered by **Ruth Mason** in an article in the Boston College Law review.<sup>30</sup> Mason urges the ECJ to adopt the so called Internal Consistency test<sup>31</sup>, is interesting from several aspects. In principle Mason seem to agree with Geelhoed<sup>32</sup> as regards to the difference between discrimination and disparities. However, Mason strongly rejects the notion that an economic net disadvantage has to occur in order for there to be discrimination. She argues that if no economic disadvantage has occurred, this fact could blind the court to certain types of discrimination. In such cases the discrimination used by one of the Member States is hidden by a positive tax treatment by another Member State, resulting in giving the tax payer a tax burden that is seemingly equal to that of a tax payer only tax liable in one state.

This would not only allow one state to discriminate but it would also move tax revenue from a EC compliant state to a non EC compliant state. In the long run this would distort tax competition and in doing so also severely damaging the common market. Mason argues that both the difficulty by the ECJ to separate between discrimination and distortion and the possibility for one state to hide discrimination behind the positive tax treatment of another state could be solved by the Consistency Test. This would in turn increase predictability in the judgements by the ECJ and thus increase legal security.

**Dennis Weber**<sup>33</sup> comes to conclusions which in certain ways agrees with Geelhoed but mainly illustrates why the case law of the ECJ is so difficult to interpret and predict. The main argument in his article is that the ECJ has stated on numerous occasions that the Member States retain full tax sovereignty in the field of direct taxation, but the ECJ still has not accepted that this fact comes with certain consequences. Even though the Court in general claim to allow disadvantages that stem from disparities, in case law there are disparities that have been considered as prohibited restrictions. Weber concludes that this is taking the freedom of movement too far and breaches the tax sovereignty of the Member States.

On the other hand, Weber concludes that the ECJ give the Member States too much power in regards to double tax treaties. Measures that make distinction on nationality

---

<sup>30</sup> Mason, Ruth; *Made in America for European Tax; the Internal Consistency Test*, The Boston College Law Review, volume 49 issue 5 number 5, 2008.

<sup>31</sup> The Internal Consistency Test was developed by the Supreme Court. In short, if the ECJ where to apply this test they would examine if intra-community commerce would bear a burden that domestic commerce would not, if all 27 states would implement this rule.

<sup>32</sup> And others, she explicitly mentions AG Peter Wattel by referring to a Dennis Weber article where the latter critic the former for expressing opinions that concur with those offered by AG Geelhoed.

<sup>33</sup> Weber, Dennis, In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC, Kluwer, 2006. p. 63.

is discrimination and should not be permitted.<sup>34</sup> Any measure that do not have the aim of allocating taxation rights should not be permitted, since they restrict the free movement.<sup>35</sup> One could infer from Webers article that the Court swings the balance too far, in both directions. This in itself would illustrate the problematic nature of the ECJ case law.

**Wolfgang Schön**<sup>36</sup> has written an interesting article trying to establish the somewhat confusing relationship between the concept of an anti-abuse doctrine and cases in direct tax. According to Schön the Court has made it clear that the application of an anti-abuse doctrine is firmly connected to the EU provision that has been circumvented. If a transaction can be called abusive or not depends on the aim and goal of the provision.<sup>37</sup> The focus of the article is on "choices". Which choices are acceptable and which are not? In regards to the Treaty freedoms, the tax payer cannot choose which rule of law should apply. "*The freedom to shift economic activity is undisputed and cannot be counteracted by relying on anti- abuse provisions or concepts.*"<sup>38</sup> This is the reason, according to Schön, why only "wholly artificial arrangements" can be regarded as abusive. They do not constitute economic activity and therefore fall outside the scope of the article.

### 2.3.2 Marks & Spencer

The first Marks & Spencer<sup>39</sup> (M&S) case was referred in a proceeding where the UK tax authorities refused to grant tax deduction to M&S for losses incurred by its subsidiaries established in Belgium, Germany and France. In UK at the time it was possible for companies within a group to offset losses amongst themselves.<sup>40</sup> In 2001 M&S started to either sell or close their continental retailers. They wanted to offset the losses, but the claim was rejected. The possibility to offset losses could only apply to losses occurred in the UK.<sup>41</sup> The question is if legislation such as this is a restriction of art 43 EC?

The Court claims that the aim and result of the group relief system is to take losses into account immediately. This gives the companies a cash advantage. Not providing this for subsidiaries established in other Member States is a restriction of art 43 EC since it makes establishing abroad less attractive than a domestic situation.<sup>42</sup>

Can such legislation be justified? Only if the aim is in line with the Treaty, justifiable by public interest and proportionate.<sup>43</sup> The Court states in paragraph 41 of the

---

<sup>34</sup> Id., pp. 63-64. Refers to cases Gilly and Van Hilten, where such measures were permitted.

<sup>35</sup> Id., p. 64. Refers to the D case, in which such measures were allowed.

<sup>36</sup> W. Schön, "Abuse of Rights and European Tax Law", in J. Jones, P. Harris, D. Oliver, eds., Comparative Perspectives on Revenue Law-Essays in Honour of John Tiley, Cambridge University Press (2008)

<sup>37</sup> Id., p. 79.

<sup>38</sup> Id., p. 98.

<sup>39</sup> Case C-446/03 Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes)13 December 2005. P. 2.

<sup>40</sup> Id., p. 12. Referring to Section 402 of the ICTA.

<sup>41</sup> Id., pp. 22-24.

<sup>42</sup> Id., pp. 32-33.

<sup>43</sup> Id., p. 35.

judgement that in order to establish if it is possible to justify the legislation, one must analyse what the consequences would be if the group relief system was granted without conditions.

The UK offers three grounds for justification<sup>44</sup>:

- 1 The balanced allocation of the power to impose taxes
- 2 If losses are taken into account in the Parent company home state, they may be taken into account twice.
- 3 There would be a risk of tax avoidance if the losses were not taken into account in the state of residence.

Loss of tax revenue can never be an overriding reason in the public interest, but in order to preserve the balance of allocation of power to impose taxes there might be necessary to follow economic terms and subject both profit and losses only to the tax system in which it is resident. The consequence would otherwise be that a company can choose which tax jurisdiction to count the losses in.<sup>45</sup> This is not the aim of the freedom of establishment.

The possibility that the loss is taken into account twice can surely be solved information between the Member States and therefore not a reason of overriding interest.<sup>46</sup>

The Court concludes that if losses from a non-resident company can be transferred to a resident company it is very likely that the losses will be transferred to a high tax jurisdiction where they are "worth more". Eliminating non-residents from the group relief system excludes that problem.<sup>47</sup> Taken together the ground for justification do hold for this kind of legislation. But is that a proportionate response?

M&S argued that the legislation could achieve the same aim but with less restrictive criteria. The Court came to the same conclusion stating that the UK legislation could be disproportionate because it did not allow losses to be taken into account even if<sup>48</sup>:

*- the non-resident subsidiary has exhausted the possibilities available in its State of residence of having the losses taken into account for the accounting period concerned by the claim for relief and also for previous accounting periods, if necessary by transferring those losses to a third party or by offsetting the losses against the profits made by the subsidiary in previous periods, and*

*- there is no possibility for the foreign subsidiary's losses to be taken into account in its State of residence for future periods either by the subsidiary itself or by a third party, in particular where the subsidiary has been sold to that third party.*

The Court ruled that the kind of legislation in question could be justified by the balanced allocation of the power to impose tax and tax avoidance and was not in breach as long as it passed the proportionality test.<sup>49</sup>

---

<sup>44</sup> Id., p. 43.

<sup>45</sup> Id., pp. 44-46.

<sup>46</sup> Id., p. 47.

<sup>47</sup> Id., pp. 49-51

<sup>48</sup> Id., p. 55.

<sup>49</sup> Id., operative part.



As will be seen in the later cases this line of reasoning has been relied upon. But does it exclude the reasoning of AG Geelhoed?

In the following chapter I intend to look at a number of recent cases to see if the ideas by Geelhoed have, in fact, lead the ECJ down a new path? I will look at how the Court or the AG has reasoned in specific cases, if they have used the Geelhoed line of reasoning and if that have had any effect on the judging. Can it be detected that the Court are instead following Marks and Spencer? Are these lines of thought really separate, or can they co-exist?

I will also use, to certain extent, articles and other material to illustrate different aspects of the cases. The chapter following that will contain conclusions on what the consequences of this new path will be and any impact it can have on the States possibilities to combat tax abuse.

### 3 Have the ECJ adopted the Geelhoed line of thought?

In the **Deutsche Shell**<sup>50</sup> case AG Sharpston uses the reasoning of Geelhoed to establish if there is discrimination or not. Sharpston reasons that since the rules make the exercise of freedom of establishment less attractive, they are restrictive. The AG relates to Geelhoed's opinion that quasi restrictions are not discriminatory as they stem from two systems colliding. However Sharpston thinks that the decisive factor is that a company is disadvantaged only when engaging in cross-border activities. The case at hand, where a currency loss that originated in Italy could not be accounted for in Germany, even though it was only detectable in the latter, can not, in the opinion of the AG, be considered to be a restriction that comes only from the coexisting of two different tax systems. The German government tries to rationalise the rule by stating that it only applies in cases where there is a direct link between the loss and non taxable revenues. This is rejected by the AG whom claims that the key issue at hand is that Germany and Italy have created a system where neither States allows for losses to be taken into account.<sup>51</sup> This would go beyond what is necessary to achieve a balance in the allocation of tax and be in breach of the obligations put on the Member States by the free movement provisions.

In the judgement<sup>52</sup> the Court came to a similar conclusion. The reasoning behind the conclusions is significantly less clear. The court starts by citing numerous case law to the fact that Member States retain the right to divide tax jurisdiction, as long as they comply with community law. They proceed to say that it is unreasonable to, in light of the present state of harmonisation, expect anything less than there being differences between tax systems and that there is no obligation for states to design their tax systems in order to conform to that of another state. They also claim that the freedom of establishment does not mean that the exercise of that right will always be tax neutral, nor does that freedom obligate one Member State to take losses into account simply because they cannot be taken into account in the other Member State.

Reading the judgement so far, I would conclude that they were in fact conforming to Geelhoed's line of thought; that the division of tax base lies with the State and that disparities resulting from the exercise of two systems should not be considered under the scope of art 43 EC. But that is not the case. Instead the court goes on reasoning that "*Although it is true that any Member State which has concluded a double taxation convention must implement it by applying its own tax law and thereby calculate the income attributable to a permanent establishment, it is unacceptable for a Member State to exclude from the basis of assessment of the principal establishment currency losses which, by their nature, can never be suffered by the permanent establishment.*"<sup>53</sup> Another line of reasoning by the Court was that the rule increased the risk of establishing in a country with a different currency, due to the possibility of

---

<sup>50</sup> Case C-293/06 Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg, 28 February 2008.

<sup>51</sup> Summary of AG opinion, IBFD Tax research platform.

<sup>52</sup> Case C-293/06, Deutsche Shell, pp. 41 -44.

<sup>53</sup> Id., p. 44.

an added tax burden.

In Tom O'Sheas<sup>54</sup> summary about the case he puts emphasis the similarities with Marks & Spencer, namely that in case of final or terminal losses the Court is likely to obligate the State to take the losses into account, even if that would not normally have been the case. He claims that this reasoning originates in the principle of proportionality.

If only regarding this case, I would draw the conclusion that while the ECJ may wish to comply with the idea that the division of tax jurisdiction lies solely within the competence of the Member State, other principles are likely to overrule this and the objectives of the Treaty will override the competence of the Member States.

In both **Amurta**<sup>55</sup> and **Eckelkamp**<sup>56</sup> the court came to the conclusion that the rules in question were in breach of the free movement provisions. They establish in Amurta and reaffirmed in Eckelkamp that the existence of a unilateral tax advantage in the other state is not a justification for failure to fulfill Treaty obligations on part of the first state. AG Geelhoed concurred with this in his opinion on Act Group Litigation.

Amurta came after ACT Litigation and in the judgment; the Court debated whether or not the disparity stemmed from the rules in one country, or from the division of taxation rights between two countries. They came to the conclusion that the disadvantage stemmed only from the Netherlands and therefore it would fall under the scope of the free movement provisions. This seems to be in line with the reasoning of AG Geelhoed.

Prof. Jaap Bellingwout<sup>57</sup> wrote an article on the Amurta case, claiming that it was a tribute to AG Geelhoed. His conclusions were that while the aspect in Geelhoed's lessons of the difference between quasi-restrictions and truly discriminatory situations might not be of much practical use in cases like Amurta, in his opinion the ECJ seem to have adopted, or at least taken a notice of, the difference in obligations regarding home state and source state and the role the double tax treaties play in that situation.

Margarete **Block**<sup>58</sup> is the sole heir of an inheritance from a relative. Both the deceased and Ms Block is residents in Germany. Most of the inheritance is sourced in Germany, except for some capital assets that are sourced in Spain. Ms Block pays the inheritance tax on the assets in Spain, but argues that this should be deducted from the amount of inheritance tax that she is due to pay in Germany, but is denied. Ms Block then claims that this is a restriction on the free movement of capital and that she is in a comparatively worse situation than a person where the whole inheritance was sourced in Germany and thus she is being discriminated against.

While the court did not mention anything about quasi restrictions they did state that

---

<sup>54</sup> O'Shea, Tom, German Currency Loss Rules Incompatible With EU Law, ECJ Says, Tax Analyst, Worldwide Tax Daily, 8 March 2008.

<sup>55</sup> Case C- 379/05 Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam. 8 November 2007

<sup>56</sup> Case C- 11/07 Hans Eckelkamp and Others v Belgische Staat. 11 September 2008.

<sup>57</sup> Bellingwout, Jaap, Amurta: A Tribute to (the Late) Advocate General Geelhoed, European Taxation, IBFD, March 2008, pp. 124- 132.

<sup>58</sup> Case C-67/08 Margarete Block v Finanzamt Kaufbeuren, 12 February 2009.

this disadvantage clearly originated in the parallel existence of two separate tax systems and that "the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order... to eliminate the double taxation"<sup>59</sup> The court relies solely on previous case law when stating that the fact that residency is the deciding factor in the division of tax base is not contrary to Community law. These cases are mainly Columbus Container Services<sup>60</sup> and Kerckhaert Morres.

In the **Aberdeen**<sup>61</sup> case, when establishing if there is a restriction of art 43 EC, the Court frequently references the Denkavit<sup>62</sup> line of thought namely that basing tax treatment on the registered seat (nationality) of a company makes it less attractive to invest in that tax regime and thus can be considered as a restriction on freedom of establishment.<sup>63</sup> They point out that while residents and non residents are not always in a comparable situation, when a state chooses, for example by bilateral tax treaties, to levy tax for both residents and non-residents, they come to be in a comparable situation. So consequently, if they are in comparable situations, relief granted to residents must be granted to non-residents.<sup>64</sup> The court finds that there is a restriction of freedom of establishment.

As a ground for justification of this breach, the Finnish government argues that the aim of the rules are to prevent tax avoidance and to protect **the balance of power in allocating taxes** between Finland and Luxembourg in their tax treaty.<sup>65</sup> The Court rejects the prevention of tax avoidance since it does not target wholly artificial situation.<sup>66</sup> In regards to the balance of power argument the Court admits that this can justify a breach of freedom of establishment, but goes on to conclude that "*where a Member State has chosen not to tax recipient companies established in its territory in respect of this kind of income, it cannot rely on the argument that there is a need to safeguard the balanced apportionment of the power to tax between the Member States in order to justify the taxation of recipient companies established in another Member State*"<sup>67</sup> They then state that the other grounds are not enough either and that Finland are in fact in breach of art 43 EC.

On January 21 2010 the court rendered their decision in the case Société de Gestion Industrielle SA (SGI)<sup>68</sup>. The Court starts their examination by deciding whether or not the law under dispute is possible to examine in the light of art 43, 48 and 56 EC. They refer to the case law line that started with Baars<sup>69</sup> in which it is clear that in order to

---

<sup>59</sup> Id., p. 31.

<sup>60</sup> Case C-298/05 Columbus Container Services, 6 December 2007

<sup>61</sup> Case C-303/07 Aberdeen Property Fininvest Alpha Oy, 18 June 2009

<sup>62</sup> Case C-170/05 *Denkavit Internationaal and Denkavit France*. One can note that a couple of years after Denkavit and Aberdeen, came Case C-247/08 *Gaz de France* that in effect reversed Denkavit and significantly decreased its value as precedent. Supposedly one could argue that this decreases the importance of the court reasoning in Aberdeen.

<sup>63</sup> See note 42. Aberdeen, p. 41.

<sup>64</sup> Id., pp. 43-44.

<sup>65</sup> Id., pp. 58-59.

<sup>66</sup> Id., pp. 63-65. The court references Case C-264/96 *ICI, Marks & Spencer, Cadbury Schweppes, Test Claimants in the Thin Cap Group Litigation*.

<sup>67</sup> Id., pp.66-67.

<sup>68</sup> Case C- 311/08 Société de Gestion Industrielle SA (SGI), January 2010.

<sup>69</sup> Case C- 251/98 Baars, followed by Cadbury Schweppes and Glaxo Wellcome.

determine if a law is within scope of the articles, one must take the aim of the legislation in mind. They rule that, on the bases of what the legislator have submitted, the legislation is capable of infringing on the free movement provisions and therefore are within scope of the articles. The problem in this case is that in Belgium, if a company grants a related party unusual or gratuitous advantages that is a Belgium resident, the grant is taxed as income for the receiving part, but if the grant is given to a party in another member state, the Belgium party will taxed for a fictitious interest based on standard rates. This without any regard to how it is taxed in the receiving state.

When examining if this could constitute a restriction, the court starts by stating that even though it does not expressly say, art 43 EC does not only aim to prevent the host state from treating foreign establishments worse than national, it also aims to prevent the state of origin from imposing obstacles for their nationals trying to leave the state. They refer to among others Aberdeen citing that simply accepting that Member States treat foreign establishments differently based on registered seat would deprive art 43 EC of all meaning.<sup>70</sup> According to the court there is no doubt that the rules could constitute a restriction and that they could cause double taxation.

When looking the balanced allocation between Member States of the power to tax, the court claim that this is an expectable justification, especially when the system is design to prevent behaviour that can put the taxing rights of a state at risk. Allowing residents in one state to move income through unusual or gratuitous advantages to another member state would indeed put this right at risk.<sup>71</sup> When it comes to the prevention of tax avoidance, the important point is usually that the legislation targets only wholly artificial arrangements but in this case the Court expands a bit on this. Referring to Oy AA they claim that a tax rule *"which is not specifically designed to exclude from the tax advantage it confers such purely artificial arrangements ... may nevertheless be regarded as justified by the objective of preventing tax avoidance, taken together with that of preserving the balanced allocation of the power to impose taxes between the Member States"*.<sup>72</sup>

In this case, the rules prevent the possibility that income transfers are established from Belgium to low or no tax States. Therefore the Court considers that the two grounds, *"taken together, it must be held that legislation such as that at issue in the main proceedings pursues legitimate objectives which are compatible with the Treaty and constitute overriding reasons in the public interest and that it is appropriate for ensuring the attainment of those objectives."*<sup>73</sup> The Court then compares if this legislation is proportionate, and finds that it is likely that it is, but that it is for the national courts do decide that in practice.<sup>74</sup>

When analyzing this case in light of the Geelhoed line of thinking, it gets somewhat mixed. The conclusion by the Court, that these rules were not prohibited, could lead to the belief that they were in fact agreeing with the former AG. However, they did

---

<sup>70</sup> Case C- 311/08, SGI, pp. 39-40. Referenced Case C- 264/96 ICI , Case C-446/03 Marks & Spencer, Case C-298/05 Columbus Container Services, Case C-418/07 Papillon.

<sup>71</sup> Id., pp. 60-64.

<sup>72</sup> Id., pp. 65-66.

<sup>73</sup> Id., pp. 67-69.

<sup>74</sup> Id., pp. 71-74.

not use his reasoning anywhere in the analysis, but they did consider the balance between the States and their right to allocate taxes as they deem appropriate. The difference is that they use it as a justification ground, after already establishing that the legislation could constitute a restriction. This seem to be the way they prefer to use it, but as previously presented, AG Geelhoed used the balance between the States as a reason to exclude the practice from the scope of art 43 EC.

A conclusion one could draw from this is that while the ECJ doesn't want to limit the scope of art 43 EC too much by excluding certain conduct from the scope of the article, they are willing to concede that there are reasonable grounds for justification, among them the balance of power and the object of combating tax abuse. When reading articles about the SGI case it is interesting to note that while Tom O'Shea<sup>75</sup> calls it one of the most important decisions in direct taxation to date, other call it "hardly exceptional"<sup>76</sup>. The latter goes on to state that the most noteworthy is that while the AG found it justified on the ground of balance of power alone, the Court paired it with tax avoidance, showing a consistent lack of willingness to let the latter ground stand on its own. Tom O'Shea based his opinion on, among other thing, the clarification on how "balance of power" and "combating tax avoidance" should be treated as justification grounds.

Following SGI the Court rendered judgment in **X Holding**<sup>77</sup> where the issue in question was the Netherlands Tax Authority's refusal to allow X Holding to form a single tax entity with a non-resident subsidiary. The court uses similar reasoning as seen in other cases, saying that this could constitute a restriction, but that restrictions can be justified and in this case the balance of power of allocation of tax jurisdiction is at risk since allowing this advantage to non resident subsidiaries would give the companies the option of choosing where to tax and thus where to take losses into account. They find that this legislation is proportionate to the aim it pursues.<sup>78</sup>

According to Marjaana Helminen<sup>79</sup>, it is clear that after X holding, the Court may consider to use balance of power of allocation as a single justification ground. In earlier cases such as SGI it was considered coupled with the need to prevent tax avoidance. She points out the fact that there is a close link between the risk for unbalance in the power balance of allocation in cross-border transactions and prevention of tax avoidance. A separate examination of those two grounds may not always be needed.

In the **CIBA**<sup>80</sup> case the AG uses Geelhoed in the argumentation. One of the peculiarities in this case is that the national court found the Hungarian levy to be outside the scope of the double tax treaty and as a consequence this levy was not

---

<sup>75</sup> O'Shea, Tom, ECJ Upholds Belgian Transfer Pricing Regime, Tax Analysts, Worldwide Tax Daily, January 29 2010.

<sup>76</sup> KPMG, Euro Tax Flash, Issue 123, January 26 2010.

<sup>77</sup> Case C-337/08 X Holding BV v Staatssecretaris van Financiën, 25 February 2010.

<sup>78</sup> Id., pp. 29-33.

<sup>79</sup> Helminen, Marjaana, EU Tax Law -Direct Taxation, online issue, section 2.3.4, 2010. She also mentions Oy AA as one of the first cases in which this justification ground was used. The judgement in OY AA refers in turn to Marks & Spencer.

<sup>80</sup> Case C- 96/08 CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Kereskedelmi kft v Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály, April 15 2010 ( Opinion AG December 17 2009).

eliminated like other type of direct taxation that lead to double taxation.<sup>81</sup> The AG summaries that the States are not under any obligation to eliminate double taxation, that the levy in itself is thus not in breach of Community law and that it doesn't automatically register as a restriction on the free movement provisions. According to case law, the Court points out that cumulative burdens resulting from two jurisdiction coexisting can restrict cross-border activity.

The AG points out that, in agreement with Geelhoed, there can be two types of restrictions. She demonstrates the Geelhoed line of thought, especially regarding the fact that Geelhoed claims that quasi-restrictions should fall outside the scope of art 43 EC<sup>82</sup>. She does however examine the 'other side' as well. In essence this line of thought originates in the idea that ALL restrictions are unacceptable, regardless of their origin and that in case of cumulative burdens that have the power to restrict the free movement provisions the Court should by analogy use their case law to find it to be in breach. According to the AG this line of thinking holds weight if the ultimate goal is to secure a true single market, but points out that since there is no community rules on how to divide the right to tax, it is sole up to the States. Her conclusion is that while Geelhoed's arguments hold merit in this case one can look at his definition of a "true restriction"<sup>83</sup> to understand that the problem at hand is not a quasi restriction. This case should therefore be tried according to art 43 EC.<sup>84</sup>

The court use the reasoning that *"It is settled case-law that all measures which prohibit, impede or render less attractive the exercise of that freedom must be regarded as constituting restrictions on the freedom of establishment"*.<sup>85</sup> They go on to debate whether there is double taxation at issue in this case. They form no firm conclusion on that issue, but they state that if this type of legislation would in fact be found to constitute double taxation, it would be the result of two coexisting tax system and therefore not fall under art 43 EC.<sup>86</sup> They cite both Kerckhaert Morres and Block on this issue.

The conclusion on the case was however that due to other issue than double taxation the legislation was still restrictive and to permitted under articles 43 and 48 EC.

Unlike the previously presented cases, **Zanotti**<sup>87</sup> deals with art 49 EC, the freedom to provide services. The Court find that the Italian rule which allows deduction of tuition fees for Italian residents attending national schools, but does not allow for full deduction for Italian residents attending schools in another Member State could constitute a restriction on the freedom to provide services since it renders it less attractive for Italian residents to attend school in a different Member State. The Court points out that this can be justified if there is objective considerations other than nationality and that the rules are proportionate to the legislative aim. In this case there

---

<sup>81</sup> Id., p. 24.

<sup>82</sup> Id., pp. 25-28.

<sup>83</sup> "That is to say, restrictions that go beyond those flowing inevitably from the co-existence of national tax system, which fall within the scope of Article 43 EC".

<sup>84</sup> See note 63. Id., pp.29-31.

<sup>85</sup> CIBA, see note 41,( Judgement of the court,) p. 19. They here reference Columbus Container Services and Case C-157/07 *Krankenheim Ruhesitz am Wannsee Seniorenheimstatt* .

<sup>86</sup> Id., pp. 25-29.

<sup>87</sup> Case C-56/09 *Emiliano Zanotti v Agenzia delle Entrate – Ufficio Roma 2*, 20 May 2010.

were no grounds for justification argued.<sup>88</sup> The interesting thing about this case is that while no grounds of justification is put forwards, the court in its reasoning if this is a breach of art 49 EC or not, touch upon the balance of power between the states, saying that as long as national legislation gives the same opportunity to deduct for tuition fees paid in Italy or any other Member State, it is up to the Member State to structure their tax system. They claim that since tuition fees are deductible to the same amount that a domestic student could deduct, there is no breach of art 49 EC.<sup>89</sup>

As seen earlier in *Block*, inheritance can fall within the scope of free movement of capital and the Court comes to this conclusion again in **Missionswerk Werner**<sup>90</sup> where Belgium gives a lower tax rate on inheritance given to non-profit bodies in a State where the deceased lived at the time of his death or had lived or worked. In the case, the non-profit body where denied this reduced tax rate since the deceased had neither lived nor worked in their state of residence. The Court agreed that this legislation could restrict free movement of capital since it reduced the value of the legacy and therefore made it less attractive to leave an inheritance to a non profit organisation in another state.<sup>91</sup>

In the judgement, there was no consideration of allocation of taxing rights or the distinction between quasi-restriction and discrimination as motioned earlier in Geelhoed's reasoning. If this is because it can be claimed to be an internal situation or simply because the State did not argue this is hard to tell. The reasoning of the Court was that this could not be justified by the States right to determine how they structure their relief system and the right to only grant relief if it can be argued to benefit the community at large. It also referred to earlier case law stating that if a charitable organisation is recognised in its state of residence as charitable it should be recognised in other Member States as well, regardless of their stipulations.<sup>92</sup> It can illustrate that the Court are unwilling to enter such discussions voluntarily. Unlike *Zanotti*, where different reasoning was approached even without particular arguing from the state.

There are cases that deal with the restriction/discrimination issue but do not touch on the division of tax jurisdiction. An example of such a case is **STEKO**<sup>93</sup>, in which there is ample discussion regarding justification grounds and their lack of weight in the case. The Court also refers back to *Deutsche Shell*, but in the capacity of illustrating the need for a direct link as regards to fiscal cohesion. Since these cases do not touch on jurisdiction issues, I'll only mention them in regards to illustrating that even if conclusions can be drawn that the Court is still inclined to judge in favour of the tax payer if it come to a point of justification of a restriction.

At present day, there are cases pending before the ECJ that could be very interesting and relevant for this issue. One of them is case **C-498/10**<sup>94</sup> that regards the freedom to

---

<sup>88</sup> Id., pp. 40-44.

<sup>89</sup> Id., pp. 51-62 and 65.

<sup>90</sup> Case C-25/10 *Missionswerk Werner Heukelbach eV v État belge*, 10 February 2011 .

<sup>91</sup> Id., pp. 21-26.

<sup>92</sup> Id., pp. 27-37.

<sup>93</sup> Case C-377/07 *Finanzamt Speyer-Germersheim v STEKO Industriemontage GmbH*, 22 January 2009.

<sup>94</sup> Case C-498/10 *X NV v Staatssecretaris van Financiën*, lodged on 14 October 2010.



provide services and withholding tax issues. One of the questions referred is if the court rules that the legislation is in breach of the freedom to provide services, can this be justified by the need to limit the risk of Belgium's right to tax? (I.e. allocation of taxing rights). Since there is neither judgement nor opinion at this time, any conclusion on potential rulings is naturally speculation.

So based on this case law, can we draw any conclusions about the intentions of the ECJ? Have they given credit to the Geelhoed approach? Or are they more inclined to fall inline with Marks & Spencer? Is there a wider use of the balance of power of allocation rights? Does this help the States protect their anti- abuse legislation, and if so, what are the consequences of that for the tax payer? In the following chapter I try to answer these questions as a conclusion to this thesis.

## 4 Conclusions

Drawing any conclusions based on a limited number of cases is always problematic, but looking at the cases at hand I would draw the conclusion that in the recent years, the trend that was seen by the CFE in 2006 seems to be continuing, but it is far from consistent. The Court seem more and more willing to find in favour of the State, using the reasoning that the existence of parallel tax system will lead to disadvantages that are in fact discriminatory under art 43 EC but justified by certain grounds. The common arguments in favour of the State seem to be the autonomy of States in the area of division of tax base and the lack of harmonisation in direct taxation. Prevention of tax abuse also seem to be a contributing factor. The most distinct trend to be seen is the balance of power in allocation of taxing rights. This supporting the theory that the Court is trying to stay in line with their reasoning in Marks & Spencer.

They seem to have at least in part adopted the reasoning on the difference in home state v source state obligations. While the issue of relevance in regards to tax treaties still remain somewhat sensitive, at least they have acknowledged the issue and seem more willing to take it into consideration when examining the economic situation the tax payer is operating in.

A possible outcome of this is that “balance of allocation of tax base” will become a new “fiscal cohesion”. The ground that states add as a last resort, but that rarely work, only resulting in irritating the Court.

However, there is still only a case to case basis and it is still hard to predict the actions of the ECJ. While it may or may not be the answer, I concur with Ruth Mason that a test, like the American Consistency test, would certainly increase predictability and legal security. If the test can also make it easier for the ECJ to really determine the true nature of a tax case, the possibility to determine in an early stage the real motive behind the case, then situations that have occurred in the past where cases that are basically extremely aggressive tax planning (not to say tax abuse) have been found to be "victims" of discriminatory rules and basically rewarded for their creative planning. One could argue that in such cases, where tax payers claim discrimination only in order to conceal aggressive tax planning, is an abuse of rights. But that is a topic for a thesis all on its own.

My conclusion is that the Court have certainly taken notice of Geelhoeds line of reasoning, but not warmed to it. While the idea of balance of power in allocation of tax rights is not fully in sync with Geelhoed’s ideas, it may accomplish similar results. In terms of possible justifications for legislation with the aim of preventing tax avoidance, I do agree with Marjaana Helminen that there is a very close relation between the risk for an imbalance in the allocation of taxing rights and the potential for tax avoidance in cross-border activities and that it might sometimes be unnecessary to separate these two justification grounds. There might even be arguments made that it is better to interpret them together.

I have hope that this line of reasoning will provide States with extra arguments when protecting their anti-abuse legislation, but it is too early to determine if the Court will

become consistent in their use of it.

## **5 Reference**

### **5.1 Case law**

C-168/01 Bosal Holding BV v Staatssecretaris van Financiën, 18 September 2003.

C-446/03 Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes), 13 December 2005.

C- 374/04 Test Claimants in Class IV of the ACT Group litigation (Pirelli, Essilor and Sony), 23 February 2006.

C- 513/04 Mark Kerckhaert Bernadette Morres v. Belgische Staat, 6 April 2006.

C- 379/05 Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam. 8 November 2007.

C-293/06 Deutsche Shell GmbH v Finanzamt für Großunternehmen in Hamburg, 28 February 2008.

C-11/07 Hans Eckelkamp and Others v Belgische Staat. 11 September 2008.

C-303/07 Aberdeen Property Fininvest Alpha Oy, 18 June 2009.

C-377/07 Finanzamt Speyer-Germersheim v STEKO Industriemontage GmbH, 22 January 2009.

C-67/08 Margarete Block v Finanzamt Kaufbeuren, 12 February 2009.

C- 311/08 Société de Gestion Industrielle SA (SGI), 21 January 2010.

C- 96/08 CIBA Speciality Chemicals Central and Eastern Europe Szolgáltató, Tanácsadó és Kereskedelmi kft v Adó- és Pénzügyi Ellenőrzési Hivatal (APEH) Hatósági Főosztály, April 15 2010.

C-337/08 X Holding BV v Staatssecretaris van Financiën, 25 February 2010.

C-56/09 Emiliano Zanotti v Agenzia delle Entrate – Ufficio Roma 2, 20 May 2010.

C-25/10 Missionswerk Werner Heukelbach eV v État belge, 10 February 2011.

C-498/10 X NV v Staatssecretaris van Financiën, lodged on 14 October 2010.

### **5.2 Cases indirectly referred to**

C-264/96 ICI

C- 251/98 Baars  
C-376/03 *D* case  
C-403/03 Schempp  
C-196/04 Cadbury Schweppes  
C-524/04 Test Claimants in the Thin Cap Group Litigation.  
C-298/05 Columbus Container Services  
C-170/05 Denkavit Internationaal and Denkavit France  
C-157/07 Krankenhaus Ruhesitz am Wannsee Seniorenheimstatt  
C-418/07 Papillon  
C-182/08 Glaxo Wellcome

### **5.3 Literature**

Bellingwout, Jaap, Amurta: A Tribute to (the Late) Advocate General Geelhoed, *European Taxation*, IBFD, March 2008, pp. 124- 132.

Dickinson, Fraser, (editor) *CFE News: CFE Forum 27 April 2006: Summary Report*, *European Taxation*, no. 7, volume 46, 2006.

Helminen, Marjaana, *EU Tax Law -Direct Taxation*, online issue, section 2.3.4, 2010

KPMG, *Euro Tax Flash*, Issue 123, 26 January 2010.

O'Shea, Tom, German Currency Loss Rules Incompatible With EU Law, ECJ Says, *Tax Analyst*, *Worldwide Tax Daily*, 8 March 2008.

O'Shea, Tom, ECJ Upholds Belgian Transfer Pricing Regime, *Tax Analysts*, *Worldwide Tax Daily*, 29 January 2010.

Schöen, Wolfgang, "Abuse of Rights and European Tax Law", in J. Jones, P. Harris, D. Oliver, eds., *Comparative Perspectives on Revenue Law-Essays in Honour of John Tiley*, Cambridge University Press, 2008.

Weber, Dennis, *In search of a (new) equilibrium between tax sovereignty and the freedom of movement within the EC*, Kluwer, 2006.