

Series on International Tax Law
Univ.-Prof. Dr. Dr. h.c. Michael Lang (Editor)

Volume 83

ECJ – Recent Developments in Direct Taxation 2013

edited by

Michael Lang
Pasquale Pistone
Josef Schuch
Claus Staringer
Alfred Storck

Linde



Supported by PricewaterhouseCoopers and the City of Vienna

Bibliografische Information der Deutschen Nationalbibliothek

Die Deutsche Nationalbibliothek verzeichnet diese Publikation in der Deutschen Nationalbibliografie; detaillierte bibliografische Daten sind im Internet über <http://dnb.d-nb.de> abrufbar.

Das Werk ist urheberrechtlich geschützt. Alle Rechte, insbesondere die Rechte der Verbreitung, der Vervielfältigung, der Übersetzung, des Nachdrucks und der Wiedergabe auf fotomechanischem oder ähnlichem Wege, durch Fotokopie, Mikrofilm oder andere elektronische Verfahren sowie der Speicherung in Datenverarbeitungsanlagen, bleiben, auch bei nur auszugsweiser Verwertung, dem Verlag vorbehalten.

Es wird darauf verwiesen, dass alle Angaben in diesem Fachbuch trotz sorgfältiger Bearbeitung ohne Gewähr erfolgen und eine Haftung der Autoren oder des Verlages ausgeschlossen ist.

ISBN 978-3-7073-3055-7

© LINDE VERLAG Ges.m.b.H., Wien 2014
1210 Wien, Scheydgasse 24, Tel.: 01/24 630
www.lindeverlag.at

Druck: Hans Jentzsch u Co. Ges.m.b.H.
1210 Wien, Scheydgasse 31

1

Preface

The European Court of Justice (ECJ) has had to deal with more and more cases concerning direct taxation in the past years. This growing amount of case law is driven by the increased willingness of national courts to approach the ECJ through preliminary rulings as well as by the fact that the European Commission seems to be more and more willing to initiate infringement procedures against EU Member States. As all these cases are of great interest for academics as well as practitioners, they need to be analyzed carefully.

The conference, “Recent and Pending Cases at the ECJ on Direct Taxation” was held in Vienna on 21 to 23 November 2013. A large number of experts on European and international tax law accepted our invitation to attend the conference and took part in the discussions. At the conference, cases in the field of direct taxation now pending before or recently decided by the ECJ were presented by experts from the respective countries. These national reporters provided insights into the national as well as the European background of the cases. Their presentations were the basis for further lively discussions among the international participants. Possible consequences of the pending cases, future ECJ decisions and future trends in the ECJ’s case law were discussed and analyzed in detail. The results of the conference are published in this book.

The conference would not have been possible without the City of Vienna to whom we would like to express our thanks. In addition, we would like to warmly thank the authors who contributed to the conference by presenting cases from their countries and actively participating in the discussions. Furthermore, these individuals supported the entire project and the publication of this book by committing themselves to a strict time schedule. We are also grateful to the Linde publishing house for its cooperation and the quick realization of the book’s publication. Linde has generously agreed to include this book in its catalogue.

Our particular thanks go to Renée Pestuka for the smooth organization of the conference, to Eleanor Campbell, who edited and polished the texts of the authors, and to Eline Huisman and Alexander Zeiler, who supported us in deciding on the structure of the conference and in the preparation and publication of this book.

*Michael Lang
Pasquale Pistone
Josef Schuch
Claus Staringer
Alfred Storck*

Content

Preface	V
List of authors	VII
<i>Edoardo Traversa/Kim Van de Velden</i> Belgium: Commission vs. Belgium (2) and the Verest and Gerards cases	1
<i>Danuše Nerudová</i> The Czech Republic: Preliminary ruling referred by the Czech Supreme Administrative Court – joint cases: Aco Industries (C-80/13) and Strojírny Prostějov, a.s. (C-53/13)	25
<i>Søren Friis Hansen</i> Denmark: Recapture of Losses from a foreign PE transferred to a Company within the Group	35
<i>Guy Gest</i> French Rental Housing Investment Tax Incentives and Free Movement of Capital	45
<i>Erik Röder</i> Germany: The Wagner-Raith (C-560/13) and Grünewald (C-559/13) cases	63
<i>Daniel Deák</i> Special Industries Levies under Review from the Perspective of EU Law (C-385/12 Hervis Case)	83
<i>Jón Elvar Guðmundsson</i> The Icelandic Case: E-14/13	103
<i>Guglielmo Maisto</i> C-344/13, C-367/13, Blanco and Fabretti	117
<i>Daniël Smit</i> The 150km Requirement under the Dutch 30% Wage Tax Facility C-512/03 (Sopora)	131

<i>Eric Kemmeren</i>	
The Netherlands: Must a Fiscal Unity with a Company in Another Member State Be Allowed? (Cases C-39/13 [SCA Group], C-40/13 [X AG] and C-41/13 [MSA International])?	149
<i>Eivind Furuseth</i>	
Case E-3/13 and E-20/13 Fred. Olson	177
<i>Ana Paula Dourado/Ana Gabriela Rocha</i>	
Recent and Pending Cases at the ECJ on Direct Taxation: Portugal (Case C-343/13)	193
<i>Romana Schuster/Aurelian Opre</i>	
Case C-331/2013 Nicula pending before ECJ: Does the latest version of the Romanian pollution tax breach the principle of legal certainty?	201
<i>José Manuel Almudí Cid</i>	
Taxation of Non-Residents' Capital Gains on the Sale of a Permanent Residence	213
Schriftenreihe zum Internationalen Steuerrecht.....	223

List of authors

José Manuel Almudí Cid

José Manuel Almudí cid is professor of tax law at the Complutense University of Madrid. His main fields of research are European tax law in the area of direct taxation, international anti-avoidance rules, the harmonized system of VAT and taxpayers' guarantees in tax procedures. He is the author of several publications on tax law and he is regularly invited as a speaker at various tax conferences both in Spain and abroad. He is a member of the International Fiscal Association and of the Spanish Association of Tax Advisors.

Daniel Deák

Daniel Deák is employed as a full professor at the Corvinus University of Budapest. He teaches and undertakes research inside and outside Hungary in the subject of comparative and international business law and taxation. For more than two decades, he has been extensively publishing both in Hungarian and internationally recognized professional periodicals. He has been the president of the Hungarian national branch of the International Fiscal Association since 1998.

Ana Paula Dourado

Ana Paula Dourado is professor of tax law at the University of Lisbon, vice-president of IDEFF. She has been a visiting professor at several European Universities, University of Florida, and MOFTI, Taipei. She has acted as an expert in the legal department of the IMF, was a delegate for Portugal for EU direct taxes and at the OECD. A Founding member of GREIT, she has edited books on European and comparative tax law and has published several articles and book chapters on those legal areas; she is a correspondent for several national and international tax law journals. In addition, she is a member of the editorial board of Intertax, RFPDF of the Executive Board of the EATLP and of the EU Tax Good Governance Platform.

Eivind Furuseth

Eivind Furuseth, LL.M. holds degrees in law from the University of Oslo Norway (2002), and an advanced LL.M. from the International Tax Center (ITC) in Leiden, the Netherlands (2006). Currently, he is a PhD-candidate at the University of Oslo where he is writing about the relationship between domestic anti-avoidance rules and tax treaties. Prior to his PhD project, Eivind used to work for the Norwegian tax authorities and KPMG.

rangements, designed to circumvent Norwegian tax legislation, but apply generally to all situations in which assets are held, for whatever reason, by a trust. Thus, it is difficult to argue that the scope of the Norwegian wealth tax rules only covers “wholly artificial arrangements”.

Furthermore, as demonstrated above, the establishment of the Ptarmigan Trust was created for commercial reasons. Accordingly, the establishment has not led to any erosion of the Norwegian tax base and it is by no way a wholly artificial arrangement.

Based on this, the author is doubtful whether the EFTA Court will accept the risk of tax avoidance as a justification for the restrictive wealth tax rules.

However, to the extent that the EFTA Court may come to the conclusion that the wealth taxation of the beneficiaries is a restriction on the right of establishment or free movement of capital and that the restriction is justified; the third issue for the court to consider would be whether this restriction is proportionate.

As mentioned under section V.A.3. above, up until 2012 there was no tax treaty or other treaty between Norway and Liechtenstein containing an exchange of information provision.¹⁶ Although the Norway-Liechtenstein tax treaty entered into force on 31 March 2012, it has effect for taxable periods beginning on or after 1 January 2011, cf. Article 13 of the treaty. Thus, until the financial year 2011 it was not possible for the Norwegian tax authorities to ask the tax authorities in Liechtenstein for confirmation of the factual circumstances which the trust may have provided to the Norwegian tax authorities as evidence for the economic reality of the trust. Due to the fact that Case E-20/13 also covers financial years 2001-2003 and 2010-2011, the answer from the EFTA Court regarding financial year 2011 might be different from the other years under discussion.

In the author’s view, this may mean that the tax authorities are allowed to uphold the restrictive measure (i.e. wealth taxation) to avoid tax avoidance. Furthermore, due to the fact that the Norwegian tax authorities have not had the possibility of collecting information from the tax authorities in Liechtenstein to confirm the information provided by the beneficiaries, it might be that the EFTA Court comes to the conclusion that the restriction is proportionate. However, this might be different for financial year 2011, cf. above.

As far as situations arising after the exchange of information treaty entered into force are concerned, it might still be questionable whether that treaty has provided the tax authorities with the ability to obtain sufficient information, cf. above under section V.A.3.

¹⁶ The Agreement between the Kingdom of Norway and the Principality of Liechtenstein for the exchange of information relating to tax matters entered into force 31 March 2012.

Recent and Pending Cases at the ECJ on Direct Taxation: Portugal (Case C-343/13)

Ana Paula Dourado/Ana Gabriela Rocha

- I. Introduction
- II. The preliminary questions
- III. Analysis
- IV. Conclusions

I. Introduction

The Portuguese case concerns a decision sent to the ECJ on 24 June 2013 by the labour court of first instance of Leiria, Portugal, which according to Portuguese law is the last instance court in this case.¹

The main facts of the case are as follows: Modelo Continente Hipermercados, SA (hereinafter Modelo) is a public limited liability company (“sociedade anónima” in the Portuguese legislation) acting in the food retail business and has more than 150 stores in the country. On 15 February 2011, the company Good and Cheap – Comércio Retalhista, SA (hereinafter GC) was subjected to an inspection of one of its stores situated in Lisbon by the Portuguese Authority for Labour Conditions (“Autoridade para as Condições de Trabalho”, hereinafter ACT), and during this inspection the company was requested to produce certain documents.

On 31 March 2011, GC was wound up and merged through acquisition by Modelo, including the store that had been previously inspected. Its assets were globally transferred to Modelo.

After the registration of the merger, ACT served the wound up company GC with a report informing it of the application of an administrative penalty due to the violation of labour laws. Modelo informed ACT that the company had been wound up, but the latter decided to proceed with the enforcement holding that the liability for the offence had been transferred to the acquiring company.

Modelo requested that the process be suspended so that the ECJ could provide a preliminary ruling on the question of whether the transmission of the liability for an administrative offence from a company being acquired to the acquiring company is to be considered incompatible with Article 19 of Directive 2011/35/EU.²

1 The Authors would like to thank Dr. Duarte Abrunhosa e Sousa, for giving them access to the facts of the case, and Prof. Dr. Teresa Quintela de Brito, for the bibliographical elements. They would also like to thank Prof. Dr. José Almudi, for having kindly agreed to present and discuss the Portuguese case at the Conference.

2 Directive 2011/35/EU of the European Parliament and of the Council of 5 April 2011 concerning mergers of public limited liability companies (OJ L 110, 29.4.2011, p. 1). According to Article 19 of the Directive:

“1. A merger shall have the following consequences ipso jure and simultaneously:

(a) the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired;

(b) the shareholders of the company being acquired become shareholders of the acquiring company;

(c) the company being acquired ceases to exist.

2. No shares in the acquiring company shall be exchanged for shares in the company being acquired held either:

(a) by the acquiring company itself or through a person acting in his own name but on its behalf; or

(b) by the company being acquired itself or through a person acting in his own name but on its behalf.

The ECJ has never issued a decision on this Directive or on its predecessor, Directive 78/855/EEC, of 9 October 1978, known as the 3rd Directive.

This Directive is transposed into the Portuguese law through the Commercial Companies Code (art. 97 ff.) Article 19 of the Directive, in particular, was transposed as Article 112 of this Code, which is entitled “Effects of registration” and states that:

“On the registration of the merger with the competent legal institution: a) The merged companies are wound up or, in the case of the creation of a new company, all the merged companies are wound up. The rights and obligations of each merged company are transferred to the acquiring company or to the new company;

b) The shareholders of the wound up companies become shareholders of the acquiring or new company.” (our translation).

II. The preliminary questions

The Portuguese court has referred four preliminary questions to the ECJ. The first question asks whether “*In light of Community law and, in particular, Directive 2011/35/EU and Article 19 thereof, ... the merger of companies entail(s) a system of transfer of liability for administrative offences to the acquiring company for acts committed by the company being acquired before registration of the merger*”.

The second asks whether “*a penalty for administrative offences [can] be considered a debt owed to third parties (in the present case the State, for infringement of rules concerning administrative offences) for the purposes of the application of the Directive, with the consequence that the corresponding debt (fine) for an administrative offence, in respect of which the State is the creditor, is transferred to the acquiring company*”.

The third question asks whether “*an interpretation of Article 112 of the Portuguese Commercial Companies Code, according to which the merger does not imply termination of proceedings for an administrative offence committed before the merger, or of the corresponding fine to be imposed, conflicts with the abovementioned Community Directive, which sets out the consequences of a company merger, thereby constituting a broad interpretation of the provision contrary to the principles of Community law and, in particular, Article 19 of the Directive.*”

3. The foregoing shall not affect the laws of Member States which require the completion of special formalities for the transfer of certain assets, rights and obligations by the acquired company to be effective as against third parties. The acquiring company may carry out these formalities itself; however, the laws of the Member States may permit the company being acquired to continue to carry out these formalities for a limited period which cannot, save in exceptional cases, be fixed at more than 6 months from the date on which the merger takes effect.”

The last question asks whether that interpretation might “constitute a breach of the principle that there can be no administrative offence without strict (mitigated) liability or liability for fault on the part of the acquiring entity”.

III. Analysis

The 1st and 3rd questions are related to the 4th and last one, as they all point to the same issue: in the case of an administrative offence committed before the merger, is the transfer of the liability from the company being acquired to the acquiring company to be considered incompatible with article 19 of the Directive 2011/35/EU?

This directive aims, according to its recitals 4 and 5, to protect the creditors and members’ rights and interests during the process of a merger. The Directive applies to two different kinds of mergers between public limited liability companies: merger by the acquisition of one or more companies by another company (1) and by the formation of a new company (2).³

Article 19, in particular, states the three ipso jure and simultaneous effects that a merger should have in each Member State: “*the transfer, both as between the company being acquired and the acquiring company and as regards third parties, to the acquiring company of all the assets and liabilities of the company being acquired; the shareholders of the company being acquired become shareholders of the acquiring company; the company being acquired ceases to exist.*”

The questions asked to the Court focus on the meaning of the expression “*all the assets and liabilities*”. The problem lies in knowing whether these “*liabilities*” are intended to include liability for administrative offences, as the ACT argues in the present case, or if this kind of liability, being subjective or *ad personam*, cannot be transferred.

The question becomes more complex because the Portuguese rule which transposes Article 19 of the Directive, Article 112 of the Commercial Companies Code (“*Código das Sociedades Comerciais*”), as mentioned above, does not include the

3 Articles 2 and 3 of the Directive read as follows: “Art. 2: The Member States shall, as regards companies governed by their national laws, make provision for rules governing merger by the acquisition of one or more companies by another company and merger by the formation of a new company. Art. 3:1. For the purposes of this Directive, ‘merger by acquisition’ shall mean the operation whereby one or more companies are wound up without going into liquidation and transfer to another all their assets and liabilities in exchange for the issue to the shareholders of the company or companies being acquired of shares in the acquiring company and a cash payment, if any, not exceeding 10 % of the nominal value of the shares so issued or, where they have no nominal value, of their accounting par value. 2. A Member State’s laws may provide that merger by acquisition may also be effected where one or more of the companies being acquired is in liquidation, provided that this option is restricted to companies which have not yet begun to distribute their assets to their shareholders.”.

expression “*assets and liabilities*” but instead refers to “*rights and obligations*”. Therefore, we could be facing a wrongful transposition of article 19 by the Portuguese legislator.

In our opinion, according to the Portuguese legislation, the expression “*rights and obligations*” suggests a slightly different meaning than “*assets and liabilities*”, because the former is generally used when referring to the legal positive or negative obligations of the juridical person, while the expression in the European directive points to a more financial or accounting perspective. But even if the transposition is correct, the expression has to be interpreted in the sense of the Directive, as it is a concept contained in the European legislation that has to be interpreted autonomously from the national law.⁴

It is also important to determine if it is necessary that the administrative offence is already *res judicata* and, as such, final before the merger has taken place or if only the facts that raised the liability for the offence (and not the administrative process) need to have occurred before the registration of the merger. This is important because, as already mentioned, the administrative offence was only notified to the merged company after the merger, and at that time that company had already ceased to exist as it was incorporated into the acquiring company (as per article 19 (1) (c) of the Directive).

On the other hand, the second question is aimed at ascertaining whether a penalty resulting from an administrative offence can be considered as an obligation on third parties and if the State (in this case, the Portuguese State represented by the ACT) can be considered a creditor in terms of the Directive.

The need to define the concept of creditor, with regard to the Directive might lead the Court to apply the private creditor’s test, originally applied by the Court in State aid cases, which compares the position assumed by the State as a creditor with the one that a private person in a market economy would hold.⁵ In the case at hand, the position of the creditor defines if its interests are protected by the Directive, or if the Directive is only meant to protect private creditors *strictu sensu*.

The relationship between this case and tax cases, arises from the case law of the Court on the transmission of tax losses from an acquired company to the acquir-

4 This has been stated clearly by the Court in ECJ 18 January 1984, C-327/82, Ekro [1984] ECR 00107, para 11: “The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.”

5 See ECJ 24 January 2013, C-73/11 P, *Frucona Košice a.s. vs. European Commission*, para 23-28; ECJ 17 May 2011, T-1/08, *Buczek Automotive sp. z.o.o. vs. European Commission* [2011] ECR II-02107, para 59-61; ECJ 8 July 2004, T-198/01, *Technische Glaswerke Ilmenau GmbH, vs. European Commission* [2004] ECR II-02717, para 16.

ing company, in the context of Directive 2009/133/EC of 19 October 2009 on the taxation of mergers.⁶

According to the Portuguese regime, losses can be transferred if, among other conditions, there are commercial reasons for the merger operation.

In our view, it is questionable whether the arguments in the ECJ's case law on the transmission of fiscal losses can be transposed to the Modelo case, because the administrative offence is based on a subjective liability of the company. It requires unlawful and guilty behaviour for it to be applicable and, as said, it is an *ad personam* kind of liability.

In a Competition Law case, the ECJ has decided that the transfer of liability and penalties between associated companies for the infringement of competition rules may only occur if a company (for example a parent company) has a decisive influence on the market and on the infringement behaviour of the company (for example the subsidiary) that committed the offence.⁷ In other words, an associated company will only be liable if it (also) conspires in the offence. In that case, the ECJ also stated that the European Competition Law is based on a general principle of *ad personam* liability⁸ that could also be used by the Court in its decision in the present case.

On the other hand, deduction of losses is related to objective facts (assessment of the taxable base) and, in the case of the Portuguese legislation, to a substance versus form or anti-abuse analysis (whether there are commercial reasons underlying the operation).

6 ECJ 10 November 2011, C-126/11, *Foggia – SGPS* [2011] I-10923.

7 ECJ 20 January 2011, C-90/09 P, *General Química SA, Repsol Química, Repsol YPF SA v. European Commission* [2011] ECR I-00001 paras 15, 19, 37, 85-86; ECJ 10 September 2009, C-97/08 P, *Akzo Nobel NV v. European Commission* [2009] ECR I-08237, para 58; ECJ 14 July 1972, 48/69, *ICI v. European Commission* [1972] ECR 00619, para 132 and 133; ECJ 14 July 1972, 52/69, *Geigy v. European Commission* [1972] ECR 00787, para 44; ECJ 21 February 1973, 6/72, *Europemballage / Continental Can v. European Commission* [1975] ECR 00495, para 15. See Ana Perestrelo de Oliveira, "A imputação da responsabilidade individual na criminalidade da empresa: a aplicabilidade da figura da autoria mediata por "domínio da organização"" *RFDUL*, 2005, pp. 721-773; Anotações aos artigos 481.º-508.º, in António Menezes Cordeiro (Coord.), *Código das Sociedades Comerciais Anotado*, 2.ª edição, Coimbra, Almedina, 2011; Ana Perestrelo de Oliveira/Miguel Sousa Ferro, "The Sins of the son: parent company liability for competition law infringements", *Revista de Concorrência e Regulação*, Ano 1, n.º 3, Julho-Setembro 2010, pp. 53-92; Teresa Quintela de Brito, *Domínio da Organização para a Execução do facto: responsabilidade penal de entes colectivos, dos seus dirigentes e "actuação em lugar de outrem"*, Lisbon, 2012 (PhD thesis at the Faculty of Law, University of Lisbon), forthcoming, pp. 692-703.

8 See ECJ 20 January 2011, C-90/09P, *General Química SA, Repsol Química, Repsol YPF SA v. European Commission* [2011] ECR I-00001, para. 52.

IV. Conclusions

In this pending case, the ECJ has to decide on two main questions: first, whether in the case of an administrative offence committed before the merger, the transfer of liability for an offence from the company being acquired to the acquiring company is incompatible with article 19 of Directive 2011/35/EU, as transposed by article 112 of the Portuguese Commercial Companies Code. Secondly, whether a penalty resulting from an administrative offence can be considered as an obligation on a third party and if the State (in this case, the Portuguese State represented by the ACT) can be considered to be a creditor in terms of the Directive.

The ECJ's decision in this case will be useful to ascertain whether the Court considers it appropriate to apply the same rationale to the administrative offences of the acquired company as it has applied in a competition law case, above cited; and whether the arguments used in tax cases on the transfer of losses incurred by the acquired company to the acquiring company are applicable to cases regarding administrative offences and liability.