Editors

Heike Jochum, Peter Essers, Michael Lang,
Norbert Winkeljohann and Bertil Wiman

Practical Problems in European and International Tax Law

Essays in honour of
Manfred Mössner

IBFD

Practical Problems in European and International Tax Law

Why this book?
This Festschrift celebrates the 75th birthday of Prof. Dr Jörg Manfred Mössner.
This book contains contributions from 35 renowned tax experts. The practical problems in European and international tax law discussed in this volume are of constantly growing significance in a globalizing world. The issue of tax avoidance by multinationals has become one of the main pillars in international politics and taxation, as can be seen when contemplating the current efforts on base erosion and profit shifting and the international advance on a thorough exchange of information.

Editors & Authors
Editors: Heike Jochum, Peter Essers, Michael Lang, Norbert Winkeljohann, Bertil Wiman
Contributors: Andrea Amatucci, Dieter Birk, Klaus-Dieter Drüen, Peter Essers, Jutta Förster, Theodoros P. Fortsakis, Gerrit Frotscher, Charles H. Gustafson, Alexander Hemmelrath, Heike Jochum, Eric C.C.M. Kemmeren, Georg Kofler, Michael Lang, Moris Lehner, Hans J. Lethaus, Hanna Litwińczuk, Jürgen Lüdicke, Jacques Malherbe, Gerard Meussen, Aage Michelsen, Włodzimierz Nykiel, Carlos Palao Taboada, Rainer Prokisch, Claudio Sacchetto, Wolfram Scheffler, Wolfgang Schön, Roman Seer, María Teresa Soler Roch, Karolina Tetłak, Thomas Töben, Frans Vanistendael, Elke Wilcox, Michał Wilk, Bertil Wiman, Frederik Zimmer

Title:	Practical Problems in European and International Tax Law
Subtitle:	Essays in Honour of Manfred Mössner
Editor(s):	Heike Jochum, Peter Essers, Michael Lang, Norbert Winkeljohann, Bertil Wiman
Date of publication:	October 2016
ISBN:	978-90-8722-383-0 (Print/Online), 978-90-8722-384-7 (eBook)
Type of publication:	Print book
Number of pages:	598
Terms:	Shipping fees apply. Shipping information is available on our website
Price (Print/Online):	EUR 105 / USD 120 (VAT excl.)
Price (eBook):	EUR 84 / USD 96 (VAT excl.)

Order information
To order the book, please visit www.ibfd.org/IBFD-Products/shop. You can purchase a copy of the book by means of your credit card, or on the basis of an invoice. Our books encompass a wide variety of topics, and are available in one or more of the following formats:

- IBFD Print books
- IBFD eBooks – downloadable on a variety of electronic devices
- IBFD Online books – accessible online through the IBFD Tax Research Platform

IBFD

IBFD, Your Portal to Cross-Border Tax Expertise

IBFD

Visitors' address:
Rietlandpark 301
1019 DW Amsterdam
The Netherlands

Postal address:
P.O. Box 20237
1000 HE Amsterdam
The Netherlands

Telephone: 31-20-554 0100
Fax: 31-20-622 8658
www.ibfd.org

© 2016 IBFD

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without the written prior permission of the publisher. Applications for permission to reproduce all or part of this publication should be directed to: permissions@ibfd.org.

Disclaimer

This publication has been carefully compiled by IBFD and/or its author, but no representation is made or warranty given (either express or implied) as to the completeness or accuracy of the information it contains. IBFD and/or the author are not liable for the information in this publication or any decision or consequence based on the use of it. IBFD and/or the author will not be liable for any direct or consequential damages arising from the use of the information contained in this publication. However, IBFD will be liable for damages that are the result of an intentional act (*opzet*) or gross negligence (*grove schuld*) on IBFD's part. In no event shall IBFD's total liability exceed the price of the ordered product. The information contained in this publication is not intended to be an advice on any particular matter. No subscriber or other reader should act on the basis of any matter contained in this publication without considering appropriate professional advice.

Where photocopying of parts of this publication is permitted under article 16B of the 1912 Copyright Act jo. the Decree of 20 June 1974, Stb. 351, as amended by the Decree of 23 August 1985, Stb. 471, and article 17 of the 1912 Copyright Act, legally due fees must be paid to Stichting Reprorecht (P.O. Box 882, 1180 AW Amstelveen). Where the use of parts of this publication for the purpose of anthologies, readers and other compilations (article 16 of the 1912 Copyright Act) is concerned, one should address the publisher.

ISBN 978-90-8722-383-0 (print)
ISBN 978-90-8722-384-7 (eBook)
NUR 826

Table of Contents

Preface xxvii

Chapter 1: Foundation of the Contemporary Ability-To-Pay Principle in Taxation in the Thought of Saint Thomas Aquinas 1
Andrea Amatucci

1.1. Introduction 1
1.2. The content of the con causes of taxation expounded by Saint Thomas Aquinas 4
1.2.1. The final cause: The common good 4
1.2.2. The formal cause: The proportion of tax/ability to pay/achievement of fiscal objectives 5
1.2.3. The efficient cause: The law 8
1.2.4. The material cause: The concrete quality of the taxable situation compared with other con causes 10
1.3. The cause of tax consists of the synthesis of the con causes 11
1.4. The interpretation of tax law 13

Chapter 2: Trade Taxation in Germany – Principles, Justification and Reform 17
Klaus-Dieter Drüen

2.1. Introduction 17
2.2. Foundations 17
2.2.1. Commercial enterprises – The trade tax’s subject 17
2.2.2. Additions and reductions: Defining the trade income 18
2.2.3. Standard rate and multiplier 18
2.2.4. Roots and development 19
2.3. The economic significance of trade taxation to the municipalities 19
2.3.1. Trade tax as the municipalities’ financial aorta 19
2.3.2. Volatility and apportionments 20
2.4. Trade tax and the Finance Constitution 21
2.4.1. Municipal self-government and financial independence 21
2.4.2. Legislative competence 21
2.4.3. Revenue distribution 22
2.5. Trade tax within the tax system and its effects on taxpayers 22

2.5.1. Character shift: From impersonal taxation to objectified income taxation 22
2.5.2. From “incidental cost” to major tax burden 23
2.6. Justification of the trade tax 24
2.6.1. Theoretical attempts at justification 24
2.6.2. Criticism 24
2.7. Constitutionality of the trade tax 26
2.7.1. Impersonal taxation and the ability to pay 26
2.7.2. Municipal needs for funding vs. the objective net principle 27
2.7.3. Judicial doubts and attacks on the trade tax’s constitutionality 28
2.7.4. The constitutional framework for trade taxation 29
2.8. Conformity of the trade tax to EU law 30
2.9. Perspectives and reform of the trade tax 30
2.9.1. State’s efforts to implement a reform 31
2.9.2. Academic reform proposals 32
2.9.3. Sobering reality: the ordinary trade tax’s revitalization 32
2.10. Conclusion 33

Chapter 3: Tax Risks: A Dynamic Interplay between Financial and Tax Accounts 35
Peter Essers

3.1. Introduction 35
3.2. Tax accounting and deferred tax assets and deferred tax liabilities 37
3.3. Tax accounting and uncertain tax positions 39
3.4. The influence of disclosure regimes 44
3.5. Influence of disclosed facts in the financial accounts on tax risks 46
3.6. Cooperative compliance/horizontal supervision 51
3.7. Conclusions 53

Chapter 4: Cross-Border Donations in Light of the Fundamental Freedoms and Tax Reality in Germany 55
Jutta Förster

4.1. Introduction 55
4.2. General requirements for the deduction of donations in accordance with Union law 55

4.3. Public-benefit status and free movement of capital 56
4.4. Stipulation of the public-benefit purpose by the national legislator 58
4.5. Procedural requirements for the deduction of cross-border donations 59
4.5.1. Fiscal supervision and fiscal control vs obligation of taxpayers to cooperate 59
4.5.2. Evidence falling within the ambit of a third party 60
4.5.3. Limitation by the Union law principle of effectiveness 60
4.5.4. International mutual administrative assistance and legal consequences of inadequate evidence 61
4.5.5. Relief through the procedure of determination of compliance pursuant to section 60a AO 61
4.6. Substantive requirements for the recognition of cross-border donations 63
4.6.1. Statutory arrangement of the pursuit of a public-benefit purpose 63
4.6.2. Statute-related management activity 64
4.6.3. Presentation of a donation receipt 65
4.6.3.1. Content of a donation receipt 65
4.6.3.2. Protection of legitimate expectations and liability 66
4.7. Conclusion 67

Chapter 5: Tax Control or Tax Morality for a Successful Tax System? 69
Theodoros P. Fortsakis

5.1. Introduction 69
5.2. One-sided focus of the Greek tax system 69
5.3. Extent of public revenue lost to tax evasion 70
5.4. Causes of tax evasion in Greece: The tax authorities 70
5.5. Causes of tax evasion in Greece: Taxpayers 72
5.6. Efforts to reduce tax evasion 72
5.7. Effect of policy measures to reduce tax evasion 74
5.8. Development of tax morality 75
5.9. Direct measures needed to foster tax awareness 76
5.10. Universality of the tax burden 77
5.11. A just tax system 78
5.12. Factors for a tax to be considered fair 79
5.13. Simplicity and stability of a tax system 79
5.14. Fostering trust and cultivating tax awareness 80
5.15. Delayed justice 80

5.16. Quality of taxation 81
5.17. The path forward 81
5.18. Conclusion 82

Chapter 6: Capital to be Allocated to a Permanent Establishment – A German Perspective 83
Gerrit Frotscher

6.1. Introduction 83
6.2. Attribution of capital as in the OECD Report 84
6.3. The German rules for the allocation of capital to a permanent establishment 87
6.3.1. The implementation of the AOA in German law 87
6.3.2. The allocation of capital 90
6.3.2.1. Principles of allocation 90
6.3.2.2. Calculation under the arm's length principle 91
6.3.2.3. Capital for German permanent establishments 92
6.3.2.4. Special rules for foreign permanent establishments 93
6.4. Comments on the German rules 94
6.5. Conclusion 96

Chapter 7: Anatomy of a Case: The US Supreme Court and the Foreign Tax Credit 99
Charles H. Gustafson

7.1. An introduction to the introduction 99
7.2. Introduction 100
7.3. The foreign tax credit under US law 100
7.4. The UK windfall tax 102
7.5. Issue is joined 105
7.6. The procedural pathway 106
7.7. Decision of the US Tax Court 106
7.8. Avenue of appeal 107
7.9. Conflicting decisions of appellate courts 108
7.10. The pathway to the US Supreme Court 109
7.11. Oral arguments to the Supreme Court 109
7.12. The Supreme Court's decision 110
7.13. The concurring opinion 111
7.14. The "missing" treaty analysis? 112
7.15. Implications of the Supreme Court decision 112
7.16. Conclusion 113

Chapter 8: AOA, BEPS, E-Commerce – “Permanent Establishment” in Flux 115
Alexander Hemmelrath and Elke Wilcox

8.1. Introduction 115
8.2. The concept of permanent establishment 116
8.3. The definition of permanent establishment 117
8.3.1. Fixed place of business 117
8.3.1.1. General understanding of article 5(1) and (2) of the OECD-MC 117
8.3.1.2. Service PE 117
8.3.2. Article 5(3) of the OECD-MC (2010) 119
8.3.3. Article 5(4) of the OECD-MC (2010) 119
8.3.4. Agency PE, article 5(5)-(6) of the OECD-MC 120
8.3.5. Tackling abuse of article 5(3)-(6) of the OECD-MC: BEPS action plan action point 7 121
8.3.5.1. Splitting-up of contracts, article 5(3) of the OECD-MC 121
8.3.5.2. Specific activity exemptions – Proposed changes to article 5(4) of the OECD-MC 122
8.3.5.3. Anti-fragmentation rule 122
8.3.5.4. Commissionaire arrangements – Proposed changes to article 5(5) and (6) OECD-MC 123
8.3.6. E-commerce and the digital economy 125
8.3.6.1. E-commerce business models 126
8.3.6.2. PE in the digital economy 127
8.3.6.3. Conclusion 131
8.4. Allocation of business profits to PEs 131
8.4.1. Basis for profit allocation and PE proviso, article 7(1) of the OECD-MC 131
8.4.2. Profit allocation, article 7(2)-(6) of the OECD-MC (pre-2010) 132
8.4.2.1. RBAA 132
8.4.2.2. FSEA 132
8.4.2.3. Application of article 7 of the OECD-MC 2010 and the AOA 137
8.4.3. The two-stage method of income and asset allocation under the AOA, article 7(2) of the OECD-MC 2010 137
8.4.3.1. Stage 1: Notion of PE as a stand-alone and independent company 138
8.4.3.2. Stage 2: Profit allocation in accordance with the arm’s length principle 143

8.4.4. E-commerce 143
8.4.4.1. POB 144
8.4.4.2. Personnel and functions 144
8.5. Outlook 144
References 146

Chapter 9: Fair Tax Law for Europe: On the Future of the Common Consolidated Corporate Tax Base (CCCTB) 151
Heike Jochum

9.1. Introduction 151
9.2. Fairness in tax competition between states 152
9.3. Multinational enterprises and the interstate apportionment of the taxation substratum 152
9.3.1. Substantive basic rules 152
9.3.1.1. The concept of permanent establishment 153
9.3.1.2. Determination of adequate transfer prices 153
9.3.1.3. The arm's length principle 155
9.3.1.4. Common consolidated corporate tax base 156
9.3.2. Procedural instruments 157
9.3.2.1. Binding assessments, rulings, and unilateral and bilateral advance pricing agreements 158
9.3.2.2. Exchanging information on an international level 160
9.4. Transparency as a condition for political decision making 160
Bibliography 161

Chapter 10: Legitimacy of Tax Claims of Developing Countries on Interest and Royalties of MNEs 163
Eric C.C.M. Kemmeren

10.1. Introduction 163
10.2. Benchmark for a legitimate tax claim on income and capital gains 165
10.2.1. International tax neutrality 167
10.2.2. Origin-based taxation 170
10.2.3. Interim conclusion 172
10.3. Legitimate allocation of tax jurisdiction on interest, royalties and related capital gains 172
10.3.1. Allocation of tax jurisdiction on interest and capital gains on debt claims 174

10.3.1.1. Origin-based approach 174
10.3.1.2. Origin-based approach versus BEPS approach 176
10.3.2. Allocation of tax jurisdiction as regards royalties and capital gains on underlying intangible property 177
10.3.2.1. Origin-based approach 177
10.3.2.2. Origin-based approach versus BEPS approach 183
10.4. Conclusion 183

Chapter 11: "Horizontal Discrimination" in European Tax Law 187
Georg Kofler

11.1. Introduction 187
11.2. Nationality-based "reverse" discrimination of cross-border activities 190
11.3. Free choice of secondary establishment 191
11.4. Tax treaties and "most favoured nation" treatment 197
11.5. Unilateral distortion between cross-border activities: The "snooker table" problem 203
11.6. Conclusions 213

Chapter 12: The Definition of International Traffic under Article 3(1)(e) of the OECD Model Convention 215
Michael Lang

12.1. Special provisions for ships and aircraft in international traffic 215
12.2. The taxation right for the operation of ships and aircraft in international traffic 217
12.3. Income from employment exercised aboard a ship or aircraft operated in international traffic 219
12.4. Assessment 223
References 224
Administrative Directives 225

Chapter 13: Application of the European Union's Fundamental Freedoms, the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights with Regard to Church Tax 227
Moris Lehner

13.1. Fundamental issues 227
13.1.1. A heterogeneous picture 227

13.1.2. A conceivable case 228
13.2. The criteria of a cross-border case 228
13.2.1. Statutory context 228
13.2.2. Protection of the general right to freedom of movement according to article 21(1) of the TFEU 229
13.2.3. Protection of freedom of establishment according to article 49 of the TFEU 231
13.2.4. The particular problem of indiscriminate restrictions 232
13.2.4.1. Special tax law characteristics of indiscriminate restrictions 232
13.2.4.2. Particular features of indiscriminate restrictions 233
13.2.4.3. The difference between church tax in Germany and France as mere disparity 234
13.3. Application of the Charter of Fundamental Rights of the European Union and the European Convention on Human Rights 235
13.3.1. Requirements of application of the CFR 235
13.3.1.1. The significance of the *Åkerberg Fransson* case 236
13.3.1.2. No applicability of the CFR in purely domestic cases 237
13.3.2. Requirements of application of the ECHR 238
13.4. Procedural consequences 239

Chapter 14: The Borderline between Corporate and Income Taxation for Non-Physical Persons under Modern Company Taxation: Paths to Europeanization of German SMEs 241
Hans J. Lethaus

14.1. Introduction 241
14.1.1. Europeanization of the private limited liability company (GmbH) 241
14.1.2. Economic significance of the GmbH & Co. KG 242
14.1.3. Europeanization of the GmbH & Co. KG 243
14.2. Mandatory coverage of corporate taxation 244
14.2.1. Taxation of non-physical persons 244
14.2.2. Tax liability of non-physical persons 244
14.2.3. Tax burden on non-physical persons 245
14.2.4. Principle of direct income attribution 248
14.2.5. Principles of income allocation 248
14.2.5.1. Personalistic profit distribution 249
14.2.5.2. Capitalistic profit distribution 249
14.2.5.3. Necessary regulatory framework 250

14.3. The GmbH & Co. KG as European Company 251
14.4. Modifications for the transparent taxation of the GmbH 253
14.4.1. Tax asset allocation and international tax conflicts 253
14.4.2. Limitations of tax asset allocations 255
14.4.3. Enterprise split for tax purposes 256
14.5. Proposals, effects, simplifications 257
14.5.1. Proposals 257
14.5.2. Effects 258
14.5.3. Simplifications 262
14.6. Technical configuration 264
14.7. Conclusion 264
14.7.1. Generally 264
14.7.2. Remarks 265
14.8. Annex: Proposal for a draft law 265

Chapter 15: Controversies around the Introduction of a General Anti-Avoidance Rule in Poland 269
Hanna Litwińczuk and Karolina Tetłak

15.1. Anti-avoidance measures and judicial doctrines in Poland 269
15.2. Introduction and repeal of a GAAR 271
15.3. Judicial doctrines revisited 273
15.4. Sham transactions 274
15.5. The proposal for a new GAAR 276
15.6. The new GAAR and evaluation of its future 281

Chapter 16: Subject-to-Tax Clauses in Tax Treaties – A German Experience 285
Jürgen Lüdicke

16.1. Introduction 285
16.2. Items of income or capital or elements thereof 288
16.2.1. No definition of the term “income” in tax treaties, the GNB or the circular 288
16.2.2. Income from different sources 289
16.2.3. Fragmentation (“atomization”) of income from a single source 290
16.2.3.1. The new approach by the German tax administration 290
16.2.3.2. The “atomization” of income in German case law and former administrative practice 292

16.2.3.3. The "atomization" of income from a policy perspective 293
16.3. No effective taxation in the state of source 295
16.3.1. Taxation 296
16.3.1.1. Allowances, loss set-offs and credits/deductions of foreign taxes 296
16.3.1.2. Privileged dividends 296
16.3.1.3. Differing rules on income calculation 298
16.3.2. Non-taxation 299
16.3.2.1. Domestic law does not provide for taxation 299
16.3.2.2. Other factors leading to non-taxation 300
16.3.3. Foreign losses 301
16.4. Evidence 302
16.5. Conclusion 303

Chapter 17: Cost Contribution Arrangements and Cost Sharing Agreements 305
Jacques Malherbe

17.1. Introduction 305
17.2. Definition and nature 306
17.2.1. Cost contribution arrangements 306
17.2.2. R&D 306
17.2.3. Sharing of services 307
17.2.4. CSAs and CCAs 307
17.2.5. Joint venture 308
17.3. Application of transfer pricing rules 308
17.3.1. Guidelines: Arm's length principle 308
17.3.2. Allocation key 309
17.3.3. Change of parties in the course of the agreement 309
17.3.4. Measurement of benefits 310
17.3.5. Relevant costs 311
17.3.6. Contents 311
17.3.7. Some remarks 312
17.4. Other tax issues 312
17.4.1. Withholding tax 312
17.4.2. Spreading of intellectual property 313
17.4.3. Legal definition 313
17.4.4. New US regulations 314

Chapter 18: Abuse of Tax Law in the European Union: Some Recent International and European Developments 317
Gerard Meussen

18.1. Introduction 317
18.2. Commission recommendation on aggressive tax planning 319
18.3. Tailored specific domestic anti-abuse provisions and EU law 320
18.4. New GAAR provision in the Parent-Subsidiary Directive 322
18.5. Different GAARs in various European directives 325
18.6. BEPS Initiative, Action 6: Preventing the granting of treaty benefits in inappropriate circumstances 327
18.7. Abuse of tax law by states 329
18.8. Some thoughts about the future of anti-abuse provisions 330
18.9. A personal note 331

Chapter 19: Action against International Tax Evasion and Avoidance by the Use of Tax Havens 333
Aage Michelsen

19.1. Introduction 333
19.2. The importance of the view on tax avoidance in the interpretation of the Danish law on income tax and indirect taxes 333
19.3. The legality principle 334
19.4. The relation between private law and tax law 335
19.5. The Inheritance and Gift Tax Act (AAL) section 5 c 335
19.6. The doctrine of reality in taxation 335
19.7. LL section 3 339
19.7.1. In general 339
19.7.2. The EU Parent-Subsidiary Directive 339
19.7.3. The general anti-avoidance provision 341
19.7.4. The relation between a general anti-avoidance provision and special anti-avoidance provisions 342
19.7.5. The relation to EU law 342
19.8. Other provisions in the tax haven package 344
19.8.1. New far-reaching provisions on trusts 344

19.8.2. Changes in the rules on binding answers as part of the efforts against the use of tax havens 345
19.9. Concluding remarks 346

Chapter 20: Functional Heterogeneity of Tax Law Language, the Problem of Multilingualism of Tax Treaties and the Protection of Taxpayers' Rights 349
Włodzimierz Nykiel and Michał Wilk

20.1. Introduction 349
20.2. Different functions of domestic and international tax law norms 350
20.3. Typology of international tax law terms 351
20.4. Consequences of multilingualism of tax treaties 354
20.5. Conclusions 356

Chapter 21: The Common Law Trust under Spanish Tax Law, with a Special Reference to the Club-Trustee Time-Sharing System 357
Carlos Palao Taboada

21.1. The trust and Spanish law 357
21.2. The trust and Spanish tax law 363
21.3. Special reference to the club-trustee time-sharing system 372
21.4. Conclusion 378

Chapter 22: Treatment of Internal Cross-Border Interest Payments in the Case of Partnerships 381
Rainer Prokisch

22.1. Introduction 381
22.2. Different opinions on treaty qualification 382
22.3. Priority of article 11 OECD MC over article 7 OECD MC 384
22.4. Deductibility of interest on internal loans 387
22.5. The civil law argument 390
22.6. The AOA 391
22.7. Section 50d(10) G-EStG 392
22.8. Conclusions 393

Chapter 23: The Fiscal-Virtual Environment and Telematic Tax Law: A New Perspective (and Frontier) for Digital Economy Taxation 395
Claudio Sacchetto

23.1. Introduction 395
23.2. Web environment control and digital evidences: Computer forensics and tax law 397
23.3. IT document and electronic signatures inside tax law: Their validity and fiscal digital effectiveness 398
23.4. Electronic documents in the fiscal and digital environment (e-commerce): E-invoicing analysis between Italy and Germany 401
23.5. Fiscal profiles of crypto currencies, with a focus on "Bitcoin" 405
23.6. Conclusions 407

Chapter 24: CCCTB: Influence on Extent and Complexity of Tax Planning 409
Wolfram Scheffler

24.1. Objectives and methodology 409
24.2. Interstate and intra-state income allocation under the CCCTB 410
24.3. The extent of tax planning within the CCCTB 414
24.3.1. Tax planning due to the limitation of the personal and objective scope of the CCCTB 414
24.3.2. Tax planning within the CCCTB 417
24.4. CCCTB: Complexity of tax planning 420
24.5. Increased relevance of tax planning 428

Chapter 25: Destination-Based Income Taxation and WTO Law: A Note 429
Wolfgang Schön

25.1. Introduction 429
25.2. Sales-only formulary apportionment 432
25.2.1. Fundamentals 432
25.2.2. Inbound cases: Article III(2) and (4) GATT (article XVII(1) GATS) 433
25.2.2.1. Direct taxation and article III GATT 434
25.2.2.2. Less favourable treatment 437

25.2.3. Outbound cases: Article16(1) GATT and the ASCM 438
25.2.4. Interim conclusion 441
25.3. Destination-based taxation with border tax adjustments 442
25.3.1. Introduction 442
25.3.2. Inbound case 444
25.3.2.1. Article III GATT 444
25.3.2.2. Article XVII(1) GATS 447
25.3.3. Outbound case: Article XVI GATT and the ASCM 449
25.4. Conclusion 451

Chapter 26: Exchange of Information between Tax Authorities: Structures and Recent Developments 453
Roman Seer

26.1. Introduction 453
26.2. Different legal bases of information exchange in tax matters 454
26.2.1. Exchange of information on bilateral legal bases 454
26.2.1.1. Information clauses modelled on article 26 of the OECD Model Tax Convention 454
26.2.1.2. Tax information exchange agreements (TIEAs) modelled on the OECD MTC 455
26.2.2. Information exchange based on EU law 457
26.2.2.1. From the EC Mutual Assistance Directive 77/799/EC to the EU Directive on Administrative Cooperation (Council Directive 2011/16/EU of 15 February 2011) (DAC 1) 457
26.2.2.2. From Council Directive 2003/48/EC of 3 June 2003 (the Savings Directive) to Council Directive 2014/107/EU of 9 December 2014 (DAC 2) 459
26.2.2.3. Council Directive 2015/2376/EU of 8 December 2015 (DAC 3) and Council Directive 2016/881/EU of 25 May 2016 (DAC 4) 462
26.2.3. Information exchange on a multilateral basis 463
26.2.4. Concurrences of the legal bases 464
26.3. Different types of information exchange instruments 465
26.3.1. Exchange of information on request 465
26.3.2. Spontaneous exchange of information 466
26.3.3. Automatic exchange of information 468
26.3.4. Concurrences of the different types of information exchange 469

26.4. Legal protection of taxpayers 469
26.4.1. Legal enterprise secrets 469
26.4.2. Personal data protection by EU law and the ECJ 470
26.4.3. Specific needs of data protection against automatic exchange of information 475
26.4.4. Effective procedural instruments of legal protection of taxpayers 478
26.5. Summary 480

Chapter 27: Exit Tax: A Fair Balance? 483
María Teresa Soler Roch

27.1. Introduction 483
27.2. Fair balance in respect of allocation rights 485
27.2.1. The right of the former state of residence based on the territoriality principle 485
27.2.2. Tax treaty issues 489
27.3. Fair balance in respect of the taxpayer’s position 494
27.3.1. The risk of an excessive taxation 494
27.3.2. The principle of proportionality 495

Chapter 28: Place of Management – An Analysis of German Case Law 499
Thomas Töben and Dieter Birk

28.1. Management – Place of management 499
28.1.1. General 499
28.1.2. Why the issues around management matter – Three cases 500
28.1.3. OECD Technical Advisory Group: Place of management remains the key 501
28.2. German tax law: Place of management and seat – Equally ranking 502
28.2.1. Corporations 502
28.2.2. Individuals/partnership 503
28.3. Why the place of management matters – Sanctions for non-compliance with place-of-management rules 503
28.3.1. Place-of-management-related tax consequences under German tax law 503
28.3.2. Consequences of non-compliance with place-of-management rules 504

28.4. Variety of terms 505
28.4.1. Centre of principal management 505
28.4.2. Place of (effective) management 506
28.4.3. Management and other permanent establishments (PEs) 507
28.5. One or multiple centres – Or absence of any management? 509
28.5.1. One single place of management ("centre") 510
28.5.2. "Multiple centres" of principal management? 510
28.5.3. Absence of any management? 512
28.6. Place of management under German case law 514
28.6.1. General definition 514
28.6.2. Controversial issues 516
28.7. Determination of the place of management 517
28.7.1. Even far-reaching shareholder rights are harmless for place-of-management determination 518
28.7.2. Fundamental management: Decision making 520
28.7.3. Personal attribution of management: The managers' responsibility 523
28.7.4. Relevant place 523
28.7.4.1. Fixed place: Office premises take precedence 524
28.7.4.2. The directors' homes 528
28.8. Cutting the Gordian knot – Weighing up the management activities 529
28.9. Side note: Statutory representative as agency PE 531
28.10. Premises of a subcontractor as management PE of the principal 532
28.11. De facto management by dominating shareholders or other persons? 534
28.11.1. Dominating shareholders, in legal terms 534
28.11.1.1. General 534
28.11.1.2. The *Laerstate BV* case 535
28.11.2. Dominating shareholders, in economic terms 537
28.11.3. De facto management by persons other than dominating shareholders? 538
28.12. Conclusion 540

Chapter 29: Can EU Tax Law Accommodate a Uniform Anti-Avoidance Concept? 543
Frans Vanistendael

29.1. Introduction 543

29.2. The concept of tax avoidance as justification for fiscal supervision 544
29.2.1. Fiscal supervision as a justification for restrictive measures 544
29.2.2. Tax avoidance as a justification under fiscal supervision 545
29.2.3. Initial rejection of tax avoidance as justification 545
29.2.4. The breakthrough with *Marks & Spencer* 546
29.3. Tax avoidance as abuse of law 547
29.3.1. Abuse of law in non-tax cases 547
29.3.2. Abuse of law in VAT: *Halifax* 548
29.3.3. Abuse of law in income tax: *Cadbury Schweppes* 550
29.4. Tax avoidance in existing EU tax directives 552
29.4.1. References in directives to national and agreement-based anti-avoidance rules 552
29.4.2. Specific anti-avoidance provisions in the directives 553
29.5. A quick succession of new SAARs and GAARs 554
29.5.1. New SAAR for hybrids in the Parent-Subsidiary Directive 554
29.5.2. New GAAR in the Parent-Subsidiary Directive 555
29.5.3. Commission recommendation for a GAAR encompassing EU and national tax law 556
29.6. Inconsistencies between GAAR and SAAR provisions of the directives and the common GAAR recommendation 560
29.7. Contradictions between GAARs and ECJ case law 561
29.8. Is it possible to have one size that fits all? 563
29.8.1. The competence of the European Union in national taxation 563
29.8.2. Differences in objectives 565

Chapter 30: The Impact of the European Union on (Swedish) Tax Law, Tax Research and Tax Teaching 567
Bertil Wiman

30.1. Introduction 567
30.2. Influence on legislation 568
30.3. Importance for research and research cooperation 571
30.3.1. Introduction 571
30.3.2. Research 572
30.3.3. Research cooperation 573

30.4. Importance for teaching 578
30.5. Concluding remarks 582

Chapter 31: Retroactive Tax Legislation in Norway – The Shipowner Case of 2010 583
Frederik Zimmer

31.1. Introduction 583
31.2. The point of departure: Section 97 of the Constitution of Norway 583
31.3. Early supreme court practice: Action taxes and income taxes 584
31.4. Some background remarks on the interpretation of section 97 in general 585
31.5. The VAT case of 2006 586
31.6. The shipowner case of 2010 588
31.6.1. The tonnage tax rules and the transitory rules 588
31.6.2. The type and degree of retroactivity 589
31.6.3. Expectations of the taxpayer 591
31.6.4. The "package" argument 592
31.6.5. Freedom of the parliament 592
31.6.6. Opinion of the parliament 593
31.6.7. Substantial quality of the arguments in favour of retroactivity 594
31.7. Concluding remarks 595

Sample Chapter

Exit Tax: A Fair Balance?

María Teresa Soler Roch

27.1. Introduction

Moving to another country, whether in the case of individuals, legal entities or permanent establishments (by means of the transfer of assets), should be regarded as a normal circumstance. In the case of individuals, it is not only a normal circumstance that may happen for different reasons throughout the course of a lifetime; it is, moreover, a right connected to the basic freedom of movement. However, when that circumstance implies a change of residence for tax purposes, at least two main concerns arise in respect of the taxing power of the former state of residence: first, there is the risk of losing this power in respect of the taxpayer's wealth generated in its territory; and second, there is the risk of tax avoidance if the main purpose of the taxpayer's emigration is precisely to circumvent the taxation of certain items of income in that state. In the first case, the risk will depend on the tax treatment of that wealth in a cross-border situation; in other words, it is a tax treaty issue if a convention applies. In the second case, the risk will depend on the purpose of the emigration, which should be checked according to the relevant anti-abuse provisions.

This is basically the core of the conflict that some tax legislation tries to solve by means of so-called exit taxes, according to which tax liability is connected to the mere fact of emigration (or, in other cases, to a further tax event related to the wealth generated in the former state of residence (so-called trailing taxes)). It must be noted that these types of taxes can be justified on the grounds of the two concerns mentioned above. Which concern prevails (i.e. the extent to which a tax is anti-abuse oriented) will depend on the content of the specific provision. In any case, the implementation of an exit tax should try to strike a fair balance on two different levels: on the one hand, the allocation rights of the tax jurisdictions involved; and on the other, the effects of those taxing powers on the taxpayer's position. Needless to say, if we are dealing with the idea of a fair balance, the principle of proportionality should play a decisive role.

The following contribution will explore this idea with reference to a recent Spanish provision (in force as from January 2015) that sets out a new exit tax on individuals (article 95 bis of the Income Tax Act (ITA)).[1]

According to this provision, any individual who has been resident in Spain at least 10 of the last 15 years and becomes tax resident in another country shall include in the income tax base related to the last fiscal year of residence in Spain the amount corresponding to the unrealized capital gain on shares and participations in any kind of entity having a fair market value of EUR 4 million, or EUR 1 million if the taxpayer holds a participation of more than 25% in the company. It must be noted that the reference to "any kind of entity" means that the scope of this provision is related to the taxation of the taxpayer's portfolio, irrespective of the type of entity (directly in a company, in another legal entity or in an investment fund),[2] but also irrespective of the tax residence *status* of the entity.

If the change of residence is due to employment, or in case of a temporary move to another state which has signed a tax treaty with Spain that includes a provision on exchange of information, the exit tax will apply, but the payment may be deferred upon request by the taxpayer. The exit tax will not apply if the taxpayer moves to another EU Member State or an EEA state; however, in this case, the provision will apply if the taxpayer: (a) sells the shares within the 10 subsequent years; (b) loses residence *status* in the European Union or European Economic Area; or (c) does not comply with the related formal obligations.[3] In other words, in this case, the tax can be explained as a kind of "sleeping tax", which will only wake up if the taxpayer does not comply with any of these conditions.

To summarize: article 95 bis of the ITA implements an exit tax in the case of a change of residence to outside the European Economic Area (with an option for deferred payment in some circumstances) and a trailing tax in the case of a change of residence within the European Economic Area.

According to the legal doctrine, this type of tax can be qualified either as a protective or an anti-avoidance measure, depending on the features of

[1] ES: *Ley* 26/2014, 27 Nov. For an in-depth analysis of this provision, *see* A. Ribes Ribes, *Un nuevo exit tax en el ordenamiento español: el artículo 95 bis LIRPF*, in *Crónica Tributaria*, nº 154 (2015).

[2] Art. 95 bis para. 3 ITA.

[3] Basically, communication to the Spanish Tax Administration of information about the shares, the realized capital gain and the current state of residence.

the relevant provision.[4] In the case of article 95 bis, its justification is not clearly expressed in the preamble to the ITA, although its wording refers to the taxation of "implicit capital gains of shares and participations in relevant entities in the case when the taxpayer changes his/her tax residence to another country before the sale of the shares". Taking this last sentence into account, the provision seems to be anti-abuse oriented, but if this is the case, its content is inconsistent with its intention, given that the tax event is connected to the mere fact of emigration or, in the case of moving to another EU Member State or an EEA state, to some subsequent circumstance, without any reference to other conditions such as a tax benefit for the taxpayer being the main purpose of the emigration. Moreover, a typical abusive behaviour connected to emigration, such as moving to a lower tax jurisdiction, should be considered beyond the scope of this new provision, taking into account that this situation is counteracted by article 8.2 of the ITA, according to which Spanish nationals resident in a tax haven (either a state or a territory) will be considered resident in Spain for income tax purposes in the fiscal year of the emigration and for the subsequent 4 years.

The following points will deal with different issues involved in article 95 bis of the ITA in the light of the idea of a fair balance at the two levels mentioned above.

27.2. Fair balance in respect of allocation rights

27.2.1. The right of the former state of residence based on the territoriality principle

As is well known, this right has been expressly recognized by the European Court of Justice (ECJ) as a valid justification for the restriction of EU treaty freedoms, especially free movement of capital, in cases related to exit taxes either on individuals or entities.

Although the decision was not based on this argument, a reference to allocation rights can be found in the *Lasteyrie du Saillant* case (judgment of 11 March 2004, C-9/02). Paragraph 68 of the judgment states that "the dispute does not concern either the allocation of the power to tax between

[4] *See* Ribes, *supra* n. 1, at p. 121; and L. de Broe, *Hard times for emigration taxes in the* EC, in *A Tax Globalist: Essays in honour of Maarten J. Ellis* (2005), Online Books IBFD.

Member States or the right of the French authorities to tax latent increases in value when wishing to react to artificial transfers of residence".

More clearly, in the *N* case (judgment of 7 September 2006, C-470/04), the court stated in paragraph 41 its position qualifying the right to tax based on the territoriality principle as an "objective in the public interest", considering that "the national provisions at issue in the main proceedings are designed, in particular, to allocate between Member States, on the basis of the territoriality principle, the power to tax increases of value in company holdings".

In the *National Grid Indus* case (judgment of 29 November 2011, C-371/10), a landmark case on this topic, the court justified a restriction of the freedom of establishment, considering the legislation at issue "appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States concerned" (paragraph 48) and, moreover, backed the position of the governments in the sense that "a Member State is entitled to tax the economic value generated by an unrealized capital gain in its territory even if the gain has not yet actually been realized" (paragraph 49).

The court has expressly invoked its doctrine in this respect in further decisions.

In *European Commission v. Kingdom of Spain* (judgment of 12 July 2012, C-269/09), the court invoked *N* and *National Grid Indus* (preserving the balanced allocation between the Member States of their powers of taxation as justified in terms of public interest and a legitimate objective), *National Grid Indus* (justification of rules intended to prevent behaviour capable of jeopardizing the right of a Member State to exercise the powers of taxation in relation to activities carried on in its territory) and, again, *N* and *National Grid Indus* (in accordance with the principle of fiscal territoriality linked to a temporal component, namely, the taxpayer's residence for tax purposes within national territory during the period in which the capital gains arise means a Member State is entitled to charge taxes on those gains at the time when the taxpayer leaves the country).

The same arguments based on the territoriality principle and the right to preserve the taxing powers of the former state of residence can be found in *European Commission v. Kingdom of Denmark* (judgment of 18 July 2013, C-261/11), *DMC* (judgment of 23 January 2014, C-164/12), *European Commission v. Germany* (judgment of 16 April 2015, C-591/13) and *Verden* (judgment of 21 May 2015, C-657/13).

This doctrine, as far as the taxing power of the former state of residence is concerned, is in the author’s view correct, because, beyond an EU law perspective, the right of the state of residence to tax taxpayers’ wealth generated in its territory throughout the time they have been residents has a solid grounding in the ability-to-pay principle and its connection with the residence *status.*

However, although this grounding may be clear in the case of shares of entities resident in the taxpayer’s former state of residence, it is not so justified, in the author’s view, in cases where the taxpayer holds shares in a non-resident entity, which would also fall under article 95 bis of the ITA, as previously mentioned (*see* section 27.1.). In this case, if we focus on the wealth generated by the increasing value of the shares (which, in fact, reflects the value of the company), this circumstance has no connection with Spain, according to the territoriality principle, unless this value is due to underlying assets or rights connected with that state. This would be the case, for instance, when there is ownership or there are rights of enjoyment of immovable property located in Spain, but it would also be the case when most of the assets of a non-resident holding company consist of shares or participations in Spanish entities. In this case, the scope of that provision on the unrealized gain obtained by a non-resident entity would have an effect similar to the taxation of indirect transfers.

But apart from these last-mentioned cases, in the author’s opinion, the levy of an exit/trailing tax on the capital gain of shares of or participations in a non-resident entity according to article 95 bis of the ITA does not have a solid justification and may go beyond what could be considered a fair balance of the allocation rights of the states involved in a cross-border situation.

Focusing on the case where the taxpayer holds shares or participations in an entity resident in Spain, the question, if we are dealing with an exit or trailing tax such as the one implemented by article 95 bis of the ITA – a tax on capital gains unrealized at the time of emigration – is why the taxing power of Spain should be preserved. Is there any risk of a definitive loss of this power in respect of that wealth because of the taxpayer’s emigration? The answer is: it depends.

It is well known that, as a general rule, the taxation of this type of wealth applies on realized gains, which means that the increase of wealth is submitted to a deferred taxation until the moment of the transfer (by any means) of the assets – and this is also the rule in Spanish income tax. Obviously, if this transfer takes place at a time when the taxpayer is no longer resident, the right of the former state of residence (now state of source if the assets are still connected to it) will depend on: (a) its domestic provisions regarding taxation of capital gains obtained by non-residents if no tax treaty applies; or (b) the allocation rights in respect of capital gains obtained by non-residents according to the tax treaty signed with the taxpayer's current state of residence at the moment of realization of the gain, together with its domestic provisions regarding non-residents in the case that the treaty allows the taxation of the capital gain in the state of source.

Nevertheless, it must be noted that, as a general rule, the taxing power of the state of source applies to the gain derived from the alienation of the shares of a company resident in that state, so unless expressly mentioned, it would not apply to the gain derived from the alienation of the shares of a non-resident company – a case which, under the reference to "any kind of entity", is included within the scope of article 95 bis of the ITA.

In a first hypothesis (no tax treaty) dealing with the case at hand, it is clear that Spain keeps its right to tax the capital gain at the moment of realization. According to article 13.1.i) of the Non-Residents Income Tax Act (NRITA),[5] Spain can tax the capital gains derived from the transfer of shares or participations issued by entities resident in Spain; moreover, it can also tax the capital gains derived directly or indirectly from the transfer of shares or participations of a resident entity whose assets consist mainly, directly or indirectly, of immovable property located in its territory, and also those derived from the transfer of shares or participations of a resident or a non-resident entity when those shares or participations include the right to enjoy immovable property located in the Spanish territory.

Certainly, it must be noted that, although the taxation power is kept by Spain, its exercise on the realized capital gain obtained by a non-resident taxpayer faces a risk in the absence of a tax treaty because of the lack of effective exchange of information; but this risk of evasion is not absolute, taking into account the residence *status* of the entity, as well as the cases in which a specific exchange of information agreement may apply. In any case, it can be clearly stated that Spain does not lose its power to tax the realized capital gain because of the mere fact of emigration, which means that applying (although at different times) both article 95 bis of the ITA to the unrealized capital gain and article 13.1.i) of the NIRTA to the realized capital gain on the same shares seems to be an unfair balance of allocation rights and a disproportionate exercise of the taxation power.

[5] ES: *Real Decreto Legislativo* 5/2004, 5 Mar.

The legislator was aware of this effect and therefore granted a step-up clause for the calculation of the realized capital gain, so according to article 24.4 of the NRTA,[6] the value at the moment of emigration will be considered as the acquisition value; therefore, that calculation will not overlap with the one applied to the unrealized capital gain. This provision restores a more adequate balance of the allocation rights, but only as far as the taxation power of Spain is concerned; obviously, it cannot provide that the calculation of the realized capital gain according to the domestic provisions of the state of residence at the moment of the transfer of the shares will not overlap with the calculation of the unrealized capital gain, nor can it determine the scope of the correction of double taxation according to the domestic provisions of that state. We will return to this issue in section 27.3.1.

The second hypothesis mentioned above (a tax treaty applies), which in practice will be quite common taking into account the Spanish tax treaty network,[7] raises more concerns in respect of the taxing power of Spain on the capital gains derived from shares realized after emigration, as well as specific issues that will be analysed in the following section.

27.2.2. Tax treaty issues

As is well known, allocation of income in the case of capital gains is ruled by article 13 of the various model conventions (MCs) in circulation, in particular the OECD MC, the UN MC and the US MC.

As a general rule, it can be said that, following the provisions of these MCs, capital gains obtained by a resident of a contracting state from the alienation of shares or participations in a company or entity resident in its territory will fall under the catch-all clause laid down in article 13(5) of the OECD MC,[8] which means that the state of residence at the time of the alienation has the exclusive right to tax the derived capital gain. In other words, in the case of Spain, if a tax treaty applies, Spain has no right to tax the capital gains obtained by its former residents if the transfer takes place at a time when the taxpayer is a resident of the other contracting state.[9]

[6] Expressly modified for this purpose by ES: *Ley* 26/2014.

[7] There are 85 bilateral tax treaties now in force, most of them on income and capital.

[8] "Gains from the alienation of any property, other than that referred to in paragraphs 1, 2, 3 and 4, shall be taxable only in the Contracting State of which the alienator is a resident". There is a similar rule in article 13(6) of the UN MC and in article 13(6) of the US MC.

[9] The tax treaty signed between Argentina and Spain (11 Mar. 2013, published 14 Jan. 2014) does not follow this rule, stating in article 13(7) that any capital gain not

As far as our topic is concerned, it could be said that an exit tax such as the one in article 95 bis of the ITA can restore a fair balance of the allocation rights in the sense that, according to the territoriality principle, it preserves the right of the former state of residence (Spain) to tax the wealth generated in its territory while the taxpayer has been a resident. Nevertheless, the compatibility of such an exit tax with a tax treaty may still be problematic.

On the other hand, it is also known that, in respect of capital gains arising from the transfer of shares, some relevant exceptions to the rule in article 13(5) of the OECD MC must be taken into account.

The first exception is the anti-abuse clause laid down in article 13(4) of the OECD MC,[10] according to which "[g]ains derived by a resident of a Contracting State from the alienation of shares deriving more than 50 per cent of their value directly or indirectly from immovable property situated in the other Contracting State may be taxed in that other State".[11] That is to say, if a majority of the underlying assets of the company consists in immovable property, the capital gain derived will follow the same rule as the one laid down in article 13(1), which means that the state of source (where the company is a resident) may tax that income.

Spain will be able to tax this type of capital gain in most cases, given that this rule has been included in a significant number of tax treaties signed with other states (although not in all cases).[12] Moreover, in the OECD MC (2010), Spain included a reservation extending the scope of the rule to the right of enjoyment of immovable property situated in its territory.[13] Such a rule is also included in several tax treaties signed with other tax jurisdictions.[14]

The second exception to the rule of exclusive taxation in the state of residence comes from the so-called substantial participation clause, an

included in the other paragraphs can be taxed in both contracting states, according to the relevant domestic provisions.

[10] There is a similar clause in article 13(4) of the UN MC and article 13(2) of the US MC.

[11] Included in 2003.

[12] The rule is not included in the tax treaties with Algeria, Austria, Bolivia, Brazil, Bulgaria, China, Cuba, Ecuador, Finland, Hungary, Iceland, Indonesia, Italy, Japan, Morocco, Romania, Slovakia, Switzerland and Thailand.

[13] Reservation 33: "Spain reserves its right to tax gains from the alienation of shares or other rights where the ownership of such shares entitles, directly or indirectly, to the enjoyment of immovable property situated in Spain".

[14] The tax treaties with Albania, Argentina, Barbados, Georgia, Iceland, Jamaica, Kazakhstan, Moldova, Panama, Saudi Arabia, Singapore, Slovenia and Uruguay.

anti-abuse provision not included in the OECD MC[15] but laid down in article 13(5) of the UN MC, according to which the state of source may tax the capital gains of shares (irrespective of the kind of the underlying assets) when the alienator has held a significant participation in the company prior to the transfer.[16] A rule of this kind is also included in several tax treaties signed between Spain and other tax jurisdictions,[17] with a 25% threshold being the most common (some of them include a time condition (12 months or more), but others do not).

Another exception, especially relevant for our topic, is included in a few tax treaties signed by Spain with certain jurisdictions (Canada, Germany, the Netherlands, Norway and Sweden). These contain specific provisions for the case of a change of residence by individuals; these provisions can be considered to constitute a kind of exit tax in themselves, deriving from the tax treaty.[18] The rule allows taxation of the gains derived from the transfer of shares of a company resident in a contracting state obtained by an individual resident in the other contracting state under certain conditions,[19] one of them being the alienation of the shares in the 5 years subsequent to emigration. (In respect of this rule, it is important to note that four of the five jurisdictions in which it applies are EU Member States or EEA states.)

In all cases where any one of these exceptions apply, it can be clearly stated that Spain, as the former state of residence and state of source at the time of the transfer of the shares, does not lose its right to tax the gain derived

[15] It must be noted that, until 2010, under reservation 45 to article 13 of the OECD MC, Spain reserved its right "to tax gains from the alienation of shares or other rights forming part of a substantial participation in a company which is a resident".

[16] "Gains, other than those to which paragraph 4 applies, derived by a resident of a Contracting State, may be taxed in that other State, if the alienator, at any time during the 12-month period preceding such alienation, held directly or indirectly at least___per cent (the percentage is to be established through bilateral negotiations) of the capital of the company".

[17] The tax treaties with Belgium (5 years), China, Egypt, France, Iceland, Ireland, Israel, Mexico, Norway, Portugal, Saudi Arabia, South Korea and Vietnam. In addition, Australia, India and Panama (10%). The tax treaties with Argentina, Chile and Lithuania extend the scope of the rule to any other gain derived from the alienation of shares representative of the capital of companies resident in the other contracting state.

[18] Provisions in the tax treaties with Canada (article 13(5)), Germany (article 13(7)), the Netherlands (article 14(5)), Norway (article 13(6)) and Sweden (article 13(5)).

[19] Conditions such as: (a) being a national of the former state (without being a national of the other state) (the tax treaties with Canada, the Netherlands and Sweden); (b) 5 years of prior residence in the former state (the tax treaties with Canada, the Netherlands, Norway and Sweden); or (c) a 7% participation (the tax treaty with the Netherlands) or decisive influence in the company (the tax treaty with Sweden). The current tax treaty with Germany does not require a specific threshold, but 5 years of prior residence and transfer in the 5 years subsequent to emigration.

from the alienation, which means that an exit tax such as the one laid down in article 95 bis of the ITA is not justified from the perspective of a fair balance of allocation rights between the contracting states. Moreover, the overlap of two different taxes on the same gain (the exit tax on the amount corresponding to the unrealized capital gain until emigration and the tax on the realized capital gain upon transfer) is obviously unfair and disproportionate from that perspective, and especially for the taxpayer's position in a potential situation of double/triple taxation. This situation is avoided by the Spanish legislation that, as mentioned, has provided for a step-up clause in the calculation of the tax on the realized capital gain, thus preventing the overlap.

The levy of two different taxes (on the unrealized and on the realized capital gain) makes sense when the tax events take place at different times (last year of residence/alienation of the shares after emigration), but it is, in the author's view, absolute nonsense when the levy of the tax is postponed on condition of the subsequent sale of the shares if, according to the tax treaty, the former state of residence, as state of source at this time, may tax the whole amount of the gain derived from the alienation of the shares (note that his will be the case when the taxpayer has moved to another EU Member State or an EEA state). In the author's opinion, if Spain may tax that gain according to the allocation rules in the relevant tax treaty with the current state of residence, article 95 bis of the ITA should not apply (which obviously means that the step-up clause in the calculation of the capital gain would not apply either). This interpretation, apart from being logical, is backed by the general rule that grants the priority of the convention, as laid down in article 5 of the Spanish ITA.

Apart from this case, there is still a concern about the compatibility between the exit tax laid down in article 95 bis of the ITA and the tax treaty and, more precisely, about whether this provision incurs a treaty override. In this respect, Ribes states that the provision implies a general extension of the substantial participation clause, even beyond its scope, implemented by a unilateral decision, which constitutes a violation of the tax treaty.[20]

One cannot deny that problems arise from this provision when a tax treaty applies, mainly related to double taxation not properly corrected and a disproportionate tax burden for the taxpayer, but, in the author's opinion, we are not here facing a case of treaty override, for two reasons:

[20] A. Ribes, *supra* n. 1, at pp. 134-135.

The first reason is connected to the different nature of the taxes referred to in the domestic provision and in the tax treaty. Article 13 of the OECD MC (and of the UN MC and the US MC) refers the concept of capital gain to the "gains derived … from the alienation". The tax event of an exit tax such as the one implemented in article 95 bis of the ITA is not connected to an alienation or any other type of transfer and, in the author's opinion, cannot be considered a deemed alienation either, because its tax event is connected to the mere fact of the change of the taxpayer's residence, based on the wealth generated by the increased value of the shares while the taxpayer has been a resident. The OECD MC Commentary on Article 13 clearly notes that the term "alienation of property" is used to cover the capital gains under that provision; "alienation of property" is connected to different kinds of events, but all of them are related to the concept of transfer, meaning change of property, either total or partial, and irrespective of its entitlement.[21] Certainly, the commentary also refers to some cases of deemed capital gains related to the increase of value of business assets that could be considered to fall under that provision if the domestic legislation of the contracting states levy tax on the book profits,[22] but, in the author's view, this example is not applicable to the case of the unrealized capital gains taxed under article 95 bis of the ITA.

The second reason why this provision cannot be considered a case of treaty override is due to the time to which the tax event of the exit tax is related. This time is out of the scope of the cross-border situation covered by the tax treaty, as far as the accrual of the tax is connected to the last year of residence in Spain; at that moment, there were not two players (the residence state and the source state), but only one player on the stage. As mentioned in section 27.2.1., the timing issue was expressly referred to by the ECJ in its arguments in the *National Grid Indus* case.

Obviously, it cannot be denied that the underlying goal of article 95 bis of the ITA is to retain the taxing power of Spain on the gains generated by the shares in order to counteract the negative effects of the catch-all clause in article 13(5) of the tax treaty in cases where the taxpayer moves to another contracting state before the realization of those gains, but the scenario above does not constitute, from a technical perspective, a case of treaty override. In other words, the levy of a tax on unrealized capital gains accrued in the last year of residence in Spain does not openly violate the allocation rules laid down in article 13 of the OECD MC.

[21] *See* OECD MC Commentary on Article 13, para. 5.
[22] *See* OECD MC Commentary on Article 13, paras. 8 and 9.

That being said, the combined effects of the domestic provision and the tax treaty still raise serious concerns from the perspective of a fair balance in respect of the taxpayer's position.

27.3. Fair balance in respect of the taxpayer's position

27.3.1. The risk of an excessive taxation

The implementation of article 95 bis of the ITA, in the cases of taxes levied both on unrealized (emigration) and realized (after emigration) capital gains can result in different situations for the taxpayer,[23] depending on the scope of the relevant provisions and the mechanisms for avoiding or correcting double taxation. The situations, excluding cases where, as argued, article 95 bis of the ITA should not apply, could be the following:

(a) There is no tax treaty between Spain and the current state of residence. Spain, as state of source and based on article 13.1.i) of the NRITA, may levy the tax on the gain derived from the alienation; Spain may also, as the former state of residence and based on article 95 bis ITA, levy the exit tax. As noted, these two taxes will not overlap, because of the step-up clause laid down in article 24.4 of the NRITA, and thus double taxation provoked by the Spanish provisions is avoided. But if the current state of residence, according to its domestic legislation, levies a tax on the realized gain, there will be double taxation, which may not be properly corrected unless this legislation grants either a step-up clause when calculating the realized gain, or an exemption or a foreign tax credit in respect of both taxes levied by Spain.

(b) There is a tax treaty in force between Spain and the current state of residence, according to which the catch-all clause applies. Spain, as the state of source, has no right to tax the gain derived from the alienation; but, as the former state of residence and according to article 95 bis of the ITA, Spain may levy the exit tax. If the current state of residence, according to the tax treaty and its domestic provisions, levies a tax on the realized gain, there will be double taxation, which may not be properly corrected unless those provisions grant an exemption or a foreign tax credit on the exit tax levied by Spain.

[23] *See also*, in this respect, A. Ribes, *supra* n. 1, at pp. 136-137.

(c) There is a tax treaty in force between Spain and the current state of residence, according to which Spain, as state of source, may tax the gains derived from the alienation; Spain may also, as the former state of residence and based on article 95 bis of the ITA, levy the exit tax. The overlap of these two taxes will not provoke double taxation, due to the step-up clause. But if the current state of residence, according to the tax treaty and its domestic provisions, levies a tax on the realized gain, there will be double taxation, which may not be properly corrected unless those provisions grant either a step-up clause when calculating the tax on the realized gain, or an exemption or a foreign tax credit on the exit tax levied by Spain.

Last but not least, in a different scenario, a triangular case may arise, such as the one in the following example: The taxpayer, resident in Spain, holds a substantial participation in a company resident in another state (A), a majority of the assets of this company consisting of immovable property situated in A. When the taxpayer changes his residence to another state (B), taking into account the value of the shares, Spain levies the exit tax according to article 95 bis of the ITA. At a later date, being resident in B, the taxpayer sells the shares, which according to the tax treaty between A and B means that both states (source and residence) may tax the gain derived from the alienation. In such a case, the double taxation levied by A and B on the realized gain can be corrected according to the provisions of that tax treaty (either an exemption or a foreign tax credit granted by B); but it is quite unclear how the triple taxation provoked by the overlap of these two taxes with the exit tax levied by Spain on the part of the gain accrued upon emigration can be corrected.

In any of these scenarios where double (or eventually triple) taxation may not be properly corrected, the result will be a disproportionate tax burden and therefore, in respect of the taxpayer's position, an unfair balance between his ability to pay and the taxing power of the states.

27.3.2. The principle of proportionality

The principle of proportionality has played an important role in the ECJ decisions related to exit taxes, to the extent that, in some of these cases, although the court justified the domestic provision based on the fair balance in the allocation of the taxing power to the former state of residence, it was considered that the content and scope of the provision at stake went beyond what was necessary to preserve that justified objective.

Proportionality was already mentioned in *Lasteyrie du Saillant*, when the court stated that a domestic provision cannot assume an intention of tax avoidance “without greatly exceeding what is necessary in order to achieve the aim which it pursues” (paragraph 52).

It should be noted, however, that in most of the cases in which the court has invoked the principle of proportionality, the idea has been linked to the payment of the exit tax. For instance, in *N,* the court considered that the obligation to provide guarantees for the granting of a deferral was contrary to that principle to the extent that it goes beyond what its necessary in order to ensure the effectiveness of such a tax based on the principle of fiscal territoriality (paragraph 51). Moreover, in the decisions in *National Grid Indus*, *European Commission v. Portugal*, *European Commission v. the Netherlands*, *European Commission v. Spain* and *DMC*, the immediate recovery of the exit tax was considered to be contrary to the principle of proportionality. Based on the same idea, there was a different result in *Verden*, in which the court considered valid and proportionate “the taxation of such capital gains and the staggered recovery of the tax relating to those gains over 10 annual installments”.

In other words, the ECJ has not analysed exit taxes from the perspective of the risk of a disproportionate tax burden provoked by the overall effect of taxation on unrealized and realized capital gains in cross-border situations; it has only focused on the domestic provisions implementing those taxes in the former state of residence, which the court considers to be justified based on the principle of fiscal territoriality, provided that their payment conditions are in accordance with the principle of proportionality.

In this respect, note that article 95 bis of the ITA provides for deferred payment upon request by the taxpayer, but only in the cases of change of residence due to employment or a temporary move to another state that has signed a tax treaty with Spain including a provision on exchange of information. In other circumstances, the taxpayer could request deferred or fractionalized payment according to article 65 of the General Tax Act (GTA),[24] although its concession falls under the discretionary power of the tax administration. That could also be the case when the taxpayer moves to another EU Member State or an EEA state and falls under any one of the conditions that, according to article 95 bis of the ITA, allows for levying the trailing tax; in this respect, it must be noted that an immediate recovery of the tax, even taking into account the application of article 65 of the GTA,

[24] ES: *Ley* 58/2003 *General Tributaria*, art. 65.

was expressly considered not compliant with the principle of proportionality in *European Commission v. Spain*.

The risk of a disproportionate taxation provoked by the exit tax in the different cross-border situations described above (*see* section 27.3.1.) should be analysed in the light of the fair balance doctrine set out by the European Court of Human Rights (ECHR), dealing with the protection of property according to the provisions laid down in article 1 of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.[25]

As is well known, the protection of property right is stated in paragraph 1 of that provision, but this protection is submitted to the so called "tax exception" laid down in paragraph 2, according to which that protection does not preclude enforcement of the laws necessary to secure the payment of taxes.

The doctrine set out by the ECHR is based on the idea of the need to preserve a fair balance between the protection of property and the general interest represented by tax legislation. The court has developed that idea by means of two conditions: first, the "quality of the law", in the sense that the tax should be enacted by a legal instrument, be published and be foreseeable in accordance with the principle of legal certainty; and second, the effects of the tax provision should not imply an excessive tax burden for the taxpayer.

Some ECHR decisions have dealt with this second condition with different results for the taxpayers.[26] However, the court has not been very precise in respect of the concept of an "excessive tax burden", nor has it connected this concept with specific tax principles (such as ability to pay or equality), but, in some cases, the principle of proportionality has been taken into

[25] Article 1, Protection of property:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

[26] *See*, for instance, ECHR: 16 Jan. 1995 (*Travers v. Italy*), 22 Jan. 2009 (*Bulves v. Bulgaria*) and 18 Mar. 2010 (*Support Centre v. Bulgaria*) (in favour); and 12 Feb. 2006 (*Burden and Burden v. United Kingdom*) (against).

account.[27] Therefore, and for the time being, whether a tax provision may provoke an excessive tax burden for the taxpayer should be ascertained on a case-by-case basis.

In the author's opinion, the potential effect of the application of article 95 bis of the ITA in cross-border situations (such as those described in section 27.3.1.) that involve a risk of disproportionate tax burden deserves attention from the perspective of the fair balance doctrine set out by the ECHR in respect of the protection of the property right vis-à-vis the tax legislation.

[27] *See also*, in this respect, ECHR: 9 Oct. 2009 (*Moon v. France*), 10 Dec. 2010 (*Jubert v. France*), 17 Apr. 2012 (*Steininger v. Austria*), 14 May 2013 (*N.K.M. v. Hungary*), 25 June 2013 (*Gáll v. Hungary*) and 2 July 2013 (*R.Sz. v. Hungary*).

Notes

Contact

IBFD Head Office
Rietlandpark 301
1019 DW Amsterdam
P.O. Box 20237
1000 HE Amsterdam, The Netherlands
Tel.: +31-20-554 0100 (GMT+1)
Email: info@ibfd.org
Web: www.ibfd.org

IBFD

IBFD, Your Portal to Cross-Border Tax Expertise