Litigating EU Tax Law in International, National and Non-EU National Courts

j Editors:
Daniel Sarmiento
Domingo J. Jimenez-Valladolid
de L'Hotellerie Fallois

i Table of Contents

Preface	xiii
Chapter 0: General Report Daniel Sarmiento and Domingo J. Jimenez-	1
Valladolid de L'Hotellerie-Fallois	
1	
Part One	
Litigating EU Tax Law before the Court of	
Justice of the European Union	
Chapter 1: Litigating EU Tax Law before the Court of Justice	
of the European Union: A European Commission	
Practitioner's Perspective	13
Wim Roels	
1.1. Introduction	13
1.2. The internal organization of the European Commission	15
in matters of taxation	13
1.3. Remedies and procedures	18
1.3.1. Comparison in terms of time and costs	19
1.3.2. Result-oriented comparison	22
1.4. European Commission tax policy and remedies and	
procedures	24
Part Two	
EU National Courts and the Application of EU Tax Law	
Chapter 2: Some Thoughts on the Judicial Application of EU Tax Law from an Italian Perspective	31
, Guglielmo Maisto	31
2.1. Introduction	31
2.2. Italian courts and judicial application of EU tax law	31
2.3. Assessment of the Italian judiciary in the application of	
EU tax law	34
2.4. Selected restraints to preliminary ruling requests	36
2.5. Cooperation between Italian courts and the ECJ	40
2.5.1. The case law on the concept of withholding tax	4.4
under article 5 of the Parent-Subsidiary Directive	41

2	2.5.2. An open decision: <i>P. Ferrero e C. and General</i>	i
	Beverage Europe BV (Joined Cases C-338/08 and	
	C-339/08)	45
2	2.5.3. Conclusive remarks on open decisions	47
Chapter 3	3: The English Courts and the Application of EU Tax	
	Law	49
	Paul Farmer	
3.1. U	JK courts and tribunals	49
3.2. T	The English courts and EU law .	51
3	2.1. Conforming interpretation	52
3.3. E	English courts and the preliminary ruling procedure	54
3	3.3.1. Framing preliminary questions	55
3	3.3.2. A dialogue between judges?	55
3.4. T	Two practical examples	56
3	3.4.1. Marks & Spencer	56
3	3.4.2'. The <i>Fll</i> litigation	58
3.5. (Concluding remarks	60
Chapter 4	4: EU National Courts and the Application of EU Tax	
_	Law – Finland	61
	Timo Viherkentta	
4.1.	General remarks	61
4.2.	The Finnish court system in tax matters	62
	The general approach to EU law in Finnish courts	63
4.4. \$	Some specific issues on court proceedings and EU law	65
4.5. I	Preliminary references	65
۷	4.5.1. General remarks	65
4	4.5.2. Split opinions on preliminary reference at the KHO	67
4	4.5.3. Annulling an earlier decision where a reference	
	was not made	69
4.6. I	Implementation of ECJ rulings	70
Chapter	5: Spanish Courts and the Application of EU Law	73
•	Guillermo Canalejo Lasarte and Ana Isabel Ron Elizal	de
5.1. 1	Introduction to the European and Spanish legal systems	73
	5.1.1. The autonomy of the EU legal system	73
	5.1.2. Cooperation between EU and national law	74
	5.1.3. Implementation of EU law by Spanish authorities	75

5.2.	Available remedies in taxation cases	//
	5.2.1. Introduction	77
	5.2.2. The Spanish tax courts and EU law	78
	5.2.3. Remedies	80
5.3.	Significant taxation cases with a link to EU law	81
	5.3.1. Introduction	81
	5.3.2. Decision of the Central Administrative Tax Court	
	(TEAC) of 28 September 2006	81
	5.3.3. Decision of the Regional Administrative Tax Court	
•	of Madrid of 29 November 2011	82
5.4.	Preliminary ruling proceduresj-	83
	5.4.1. General issues	83
	5.4.2. Preliminary ruling-procedures in Spain	85
	5.4.3. Right to submit requests for preliminary references	86
	5.4.4. Effects of the pre-judicial procedure	87
5.5.	Member State liability for breach of Community law	88
	5.5.1. Introduction	88
	5.5.2. Member State liability for acts or omissions of	
	national legislature	89
	5.5.3. Liability of the judiciary for breach of Community law	90
5.6.	Bibliography	91
	Part Three	
EU	U Tax Law in WTO and International Arbitration Litigation	
Chapter	6: Taxation Issues under the GATT in the WTO	
•	Appellate Body Jurisprudence	95
	Giorgio Sacerdoti	
	Introduction	95
	Tax discrimination	96
6.3.	Taxation and subsidies	104
Chanter	7: A Game of Snakes and Ladders – Tax Arbitration	
onaptti.		109
	David Ramos Muhoz	- 0,
7.1.	Introduction 1	109
	Tax arbitration's lack of pedigree: Sheer snobbery or	
	• •	I11
	-	112

Table of Contents

		7.2.1.1.	Tax issues	s in commercial and investment	ĺ
			arbitration	disputes	112
		7.2.1.2.	Tax issues	s in tax disputes	113
	7.2.2.	"Tax arb	oitration is	not arbitration"	116
7.3.	Conse	ent and ju	urisdiction		122
	7.3.1.	Jurisdic	tion/Arbitr	ability	122
					122
			7.3.1.1.1.	The state and its authorities.	
				Issues with sovereign immunity	
				and sub-state entities *	122
			7.3.1.1.2.	The private (non-)party as the	
				catch in the game	125
		7.3.1.2.	Jurisdictio	on <i>rationae materiae</i> , and	
			arbitrabili	ty	126
	7.3.2.	Nature of	of consent	and two-tier proceedings	130
				1 1	130
		7.3.2.2.		\mathcal{E}	132
			7.3.2.2.1.	Two-tier proceedings in	
				commercial and investment	
				arbitration	132
			7.3.2.2.2.	Two-tier proceedings in tax	
				arbitration, and the parties'	
				initiative to start proceedings	138
		7.3.2.3.		nce-competence in tax	
				n: The elephant in the room	140
7.4.				l its constraints	147
	7.4.1.	The arb	oitral tribur	nal: Appointment, challenge and	
		remova			147
	7.4.2.			cision-making (I). General and	
			aral constra		151
	7.4.3.	Constra	ints on de	cision-making (II). Substantive	
		constra			157
		7.4.3.1.		ces of the decision (I).	
				onal (tax) arbitration and	
			substantiv		157
		7.4.3.2.		ces of the decision (II).	
				onal (tax) arbitration and EU law	161
7.5.				aforcement	167
				facts, law and baseball	167
	7.5.2			e decision and parallel proceedings	170
		7.5.2.1.	_	proceedings, tax arbitration and	
			the backl	ash for middle-of-the-road solutions	170

(7.5.2.2. Parallel proceedings, procedural	
guarantees and tax arbitration	173
7.5.2.2.1. Limits on the reach of	
procedural guarantees in tax cases	173
7.5.2.2.2. Circumventing limits on	
(procedural) guarantees in tax	
cases through the (substantive)	
rules on the protection of property	177
j 7.5.2.2.3. Back to square one. Procedural	
•	180
_	184
	187
Part Four	
Non-EU National Courts and the Application of EU Tax Law	
Chapter 8: The Outreach of EU Law in Direct Tax Law –	
A Brief Introduction	207
Cecile Brokelind	
	207
C 1	208
8.3. Regional integration methodological issues	211
11	215
Billur Yalti	
0.1 Deletional of the Common Hairman d Traders	
9.1. Relations between the European Union and Turkey:	215
8 · · · ·	215
9.2. Legal sources: The AA	217
9.2.1. The status of the AA in Turkish law	217
F	218
	219
9.2.2.2. Indirect taxation: Non-discrimination and	221
	221
ı J	223
11 1	223
1	224
ε 1	224
,	225
9.4. The state of expertise of Turkish tax judges on EU law	227

Table of Contents

9.5. The discussion on the legal nature of Decision 1/95 of the	i
Council of Association	228
9.6. The decisions of the SAC on the AA	231
9.6.1. Timing issues	231
9.6.2. Issues arising from concurrent decisions of the	
Council of Ministers	232
9.6.3. Issues arising from formal conditions	233
Chapter 10: Two Different Stories on the Application of EU	
Tax Law: EU Courts Acting beyond the Scope of	
EU Tax Law and How Latin American Countries	
Have Received EU Tax Case Law	235
Adolfo Martin Jimenez	
10.1. Introduction	235
10.2. EU courts acting in fields not Covered by EU tax law	237
10.2.1. t Introduction: Defining the outer limits of	
the obligation of "consistent interpretation"/	
obligation to disapply national tax law and the	
doctrine of extension of effects of EU law	237
10.2.2. The <i>Canary Islands</i> case and the external	
limits of the doctrine on "extension of effects":	
The (non-)obligation to apply and interpret	
indirect tax legislation in the Canary Islands in	• • •
conformity with EU VAT directives	240
10.2.3. Situations external to EU tax law, the doctrine	
of "extension of effects of EU law to purely	
internal situations" and the obligation to	
dissapply domestic law or give "a consistent	2.42
interpretation" with EU law 10.3. Latin American countries and EU tax law	243 252
10.3.1. Introduction	252
10.3.2. Use of the ECJ case law in regional integration	232
processes	252
10.3.3. Application of EU tax Law in Latin American	232
countries	256
10.3.3.1. Introduction	256
10.3.3.2. Application of ECJ tax case law in	230
Argentina	256
10.3.3.3. Application of ECJ tax case law in	230
Colombia	259
10 3 3 4 Application of ECI tax case law in Peri	

	10.3.4.	Conclusions on the impact" of ECJ tax case law in Latin America	265	
Chapter	in Sy Dep	oducing an EU Compliant Patent Box Regime wiss Tax Law – A Note on the Swiss Finance artment Interim Report of 17 May 2013 ert Danon	269	
,11.1.	Introdu	ction	269	
1 11.2.	The sel	The selectivity of patent box regimes under EU State		
11.3.		pox regimes and Swiss constitutional law and	271	
		nization principles	277	
11.4.	Conclusions			
Chapter	Mut	lication of EU Law in National Courts in the ual Relations between the Netherlands and Netherlands' Associated Territories in the		
		d of Direct Taxation	283	
	Dan	iel S. Smit		
12.1.	Introdu		283	
12.2.		sition of the Member States' associated and		
	depend	ent territories under EU law in the field of direct	202	
		Classification of the Member States' associated	283	
	12.2.1.	and dependent territories under the TFEU	283	
	12.2.2.	The qualification of Member States' associated	_00	
		and dependent territories in the case law of		
		the ECJ: Third country or (part of) a Member		
		State? A case-by-case approach	290	
	12.2.3.	Competency of the local court of an associated		
		and dependent territory to ask preliminary	291	
123	The mu	questions itual relations between the Netherlands and the	291	
12.5.		ands' associated territories in the field of direct		
	taxation		293	
	12.3.1.	The perspective of the Netherlands' associated		
		territories	293	
	12.3.2.	The perspective of mainland Netherlands	294	
12.4.	Conclus	sion	299	

	Concluding Remarks	
Chapter	13: Throwing Back Some Curves – Some Comments	
	on the Presentations and the Proceedings of the	
	7th GREIT International Conference, Madrid,	
	13 September 2012	303
	Peter J. Wattel	
13.1.	Introduction	303
13.2.	Interaction between national courts and the ECJ	303
13.3.	EU law in WTO law and international arbitration	307
13.4.	Non-EU national courts and the application of EU tax law	310
13.5.	Closing of the closing lecture	311
List of Co	ontributors	313

Part Five