

Chapter 8

Tax Treaty Policy

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8.1 Introduction

Tax treaty policy is part of a State's domestic tax policy. However, States are not free to determine the contents of their tax treaties. First, they need the consent of the other Contracting State. Second, if they are EU Member States, they are bound by EC law. Third, in reality the OECD Model Convention plays an important role and it is difficult for States to deviate from the OECD Model Convention. For these reasons, most States do not have too much room to develop their own tax treaty policy.

On the other hand, tax treaties concluded by a State determine to a certain extent the rest of its domestic tax policy. As far as a State is in the position of a Residence State, tax treaties have relatively little impact on domestic tax policy. However, the taxation of non-residents is much more influenced by tax treaty provisions. This will be shown in more detail in this contribution.

8.2 Room for Tax Treaty Policy under EC Law

Obligation to avoid Double Taxation under Art 293 EC?

Art. 293 EC explicitly makes reference to double taxation: "Member States" shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals:

- the abolition of double taxation within the European Community.

Scholars have considered whether it might constitute an infringement of this EC Treaty provision if double taxation were still to exist in an intra-Community cross-border situation, due e.g. to the lack of a tax treaty. However, in the *Gilly* case the ECJ rejected this idea: "Article 220 [now Art. 293 EC] is not intended to lay down a legal rule directly applicable as such, but merely defines a number of matters on which the Member States are to enter into negotiations with each other 'so far as is necessary'. Its second indent merely indicates the abolition of double

taxation within the Community as an objective of any such negotiations. Although the abolition of double taxation within the Community is thus included among the objectives of the Treaty, it is clear from the wording of that provision that it cannot itself confer on individuals any rights on which they might be able to rely before their national courts”.

It should be emphasized that the ECJ recognized the abolition of double taxation as part of the objectives of the EC Treaty. Although Art. 293 EC does not confer any rights on individuals, the avoidance of double taxation is nevertheless not completely outside the scope of the EC Treaty. On the contrary, the ECJ seems to be of the opinion that other provisions of the EC Treaty should be interpreted in such a way that double taxation can be avoided. This may have some impact on the interpretation and application of the fundamental freedoms.

Furthermore, it is worth mentioning that the ECJ seems to distinguish between the conclusion of tax treaties and the objective of abolishing double taxation. According to the wording of Art. 293 EC, Member States should enter into negotiations with each other. However, the ECJ interprets this provision in a broader way by referring to the objective of abolishing double taxation as such, not necessarily by means of concluding a treaty. Therefore, the ECJ is obviously not of the opinion that avoiding double taxation is reserved to tax treaties.² While an obligation to abolish double taxation may not be derived from Art. 293 EC, the ECJ does not rule out that the abolition of double taxation may be required in certain circumstances under other provisions of the treaty.

Since Art. 293 EC emphasizes the role of the “Member States”, some authors have drawn the conclusion that taking measures to avoid double taxation is reserved to the Member States. However, the wording of Art. 293 EC does not support this opinion: Art. 293 EC mentions the obligations of Member States to “enter into negotiations”, but in no way prevents the EC from also taking measures to avoid double taxation.³ Furthermore, the ECJ has mentioned repeatedly that the Member States could take such measures “in the absence of Community measures”.⁴ It should not be forgotten that the Community has already taken action in this field: The Parent-Subsidiary Directive is a perfect example of a Community measure that intends to avoid double taxation. Nobody has ever argued that these directives infringe Art. 293 EC.

Obligation to avoid Double Taxation under the Freedoms?

The *Schumacker* case is a well-known ECJ decision for several reasons.⁵ One reason is closely related to the objective of avoiding double taxation: Mr. Schumacker was a resident of Belgium and was an employee in Germany, where he received all his income. The tax treaty between Germany and Belgium provided for the exemption method as far as employment income was concerned. Therefore, Belgium could not levy any taxes. It was thus not in a position to take into account Mr. Schumacker’s personal and family circumstances. In Germany, on the other hand, Mr. Schumacker was treated as a non-resident and therefore was treated differently compared to resident taxpayers: He and his wife did not qualify for the tax benefit of “splitting” that married couples who are residents usually enjoy and he was not entitled to