Direct Taxation and the Court of Justice: the Virtues of Consistency*
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I. Introduction

Frits Bolkestein, European Commissioner for the Internal Market, Customs and Taxation said, following the decision of the European Court of Justice (“ECJ”) in Case C-168/01 Bosal Holding BV v Staatssecretaris van Financiën (judgment 18th September 2003), that:

"...it is clear that the court is becoming increasingly active in striking down member states’ tax rules that it considers contravene either the European treaty or other European legislation."

If this comment is simply a reflection of the fact that the ECJ is deciding more cases than ever before on the application of the fundamental freedoms to direct taxation, this statement is surely correct. From comments made by the Commissioner in Rome, in December 2003, it is clear that he intended his comments to be understood in this way. There are some commentators, however, who would not be unhappy if the Commissioner’s comments were to be understood as reflecting a view that the ECJ is becoming an activist court, straying outside its proper sphere of operation. Such a view would, nevertheless, be inaccurate. In the author’s view, what is remarkable in this field is the consistency of the approach of the ECJ in the area of direct taxation and the fundamental freedoms since the Commission first fought to have the fundamental freedoms applied to direct taxation in France v Commission. Many modern judgments have been drafted by the judges of the ECJ in reliance on the principles articulated in that case. The noteworthy development is not in the activity of the ECJ but in the activity and understanding of corporations and their tax advisers. They are now well aware of the implications of the fundamental freedoms of the internal market and are willing, if not obliged, to advance cases based upon them.

In this article I aim to identify a number of ways in which the consistency of the ECJ has been apparent in its application of the fundamental freedoms in the context of corporation tax. In doing so, however, I should make clear that I do not intend to convey the impression that litigation is the most desirable tool to use in ensuring that application. Legislation would, no doubt, be preferable for many reasons. But litigation is more practicable than legislation. The Commission has noted this and acknowledged that litigation, preferably which it initiates, may prove to be a

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1 Financial Times 22 October 2003 “Company tax law must not be made in court”.

valuable, and even essential, tool. In its Communication “Tax policy in the European Union - Priorities for the years ahead”\(^3\) for example, it has said:

“In short, the Commission now intends to adopt a more pro-active strategy generally in the field of tax infringements and be more ready to initiate action where it believes that Community law is being broken. It will also ensure the correct application of judgements of the ECJ. There is a particular imperative in the direct tax field: the current approach of leaving the development of case law in the area of direct taxation to chance by simply reacting to cases taken by taxpayers to the ECJ is not a proper basis for progress towards agreed Community objectives.”\(^4\)

It concluded that:

“...a more pro-active, well-focused and even-handed use of infringement proceedings in the tax field is now required;”\(^5\)

II. Four Areas of Consistency

I consider below four areas in which the ECJ has displayed consistency. (The fourth also demonstrates consistency on the part of the Member States as we shall see.) Firstly, the Court has consistently borne in mind the imperative of the Single Market and the obligation to abolish obstacles to the fundamental freedoms. Secondly, it has consistently asserted, against resistance which appears to continue in some quarters today, the supremacy of EC law over all forms of inconsistent national tax law and practice. Thirdly, it has consistently acknowledged the broad scope of the freedom of establishment contained in the EC Treaty. Fourthly and finally, it has consistently acknowledged the limited justifications available to Member States defending their tax regimes in opposition to the Member States’ equally consistent attempts to advance their interests at the expense of the Single Market.

Each of these four areas is considered further below at sections I to IV. Before examining them, however, one word of caution is appropriate. We should beware of thinking that direct tax is the only area in which the consistency of the ECJ and the behaviour of the Member States are opposed. Company regulation, as is shown by cases such as Kamer van Koophandel en Fabricken voor Amsterdam v Inspire Art Ltd,\(^6\) is just one of a number of areas in which this opposition is demonstrated.

1. The Consistent Imperative of the Single Market

a. The Single Market Is Fundamental to the EC

In any case concerning the fundamental freedoms and direct taxation it is important to remember, because the ECJ will undoubtedly bear it in mind, that for the EC the case touches upon fundamental principles. This has been acknowledged by the ECJ

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\(^1\) COM/2001/0260 final: OJ C284/6, 10.10.2001.
\(^2\) Section 4.2.
\(^3\) Section 5.
\(^4\) Case C-167/01, judgment of 30 September 2003 (not yet reported).