

- Moessner Rome 5. 12. 2003
- **Rôle of ECJ as a tax court**
- **Internal Market and principle of territoriality**
- **Discrimination and Restriction**
- **Solution ? – Reaction or action ?**
 - **European Code of Taxation**

- **ECJ as Tax Court**
- **Art. 220 ECT: interpretation and application of this treaty**
- **Not: of national tax law**
- **As community law stands at present direct taxation does not as such fall within the purview (domaine de la compétence) of the community (ECJ)**
- **Does this prevent the ECJ to decide matters of direct taxation ?**
- **Effect of national tax law on the basic economic freedoms = competence of EC**
- **Subsidiarity ?**

- **Internal Market and Territoriality**
- **World wide taxation = Residents vs. Non-Residents**
- C-279/93 (Schumacker):
- „does not preclude the application of rules under which a non-residents is taxed more heavily than a resident“
- C-250/95 (Futura):
- „fiscal principal of territoriality cannot be regarded as discrimination“ – only profits and losses arising from the activity in the territory are taken into account (p.e.)
- C-141/99 (AMID)
- no setting off domestic losses against profits exempted by treaty

- **Internal Market and Territoriality**
- Market = an area where goods and services can be traded without insurmountable physical, technical or legal obstacles (Vanistendael ECTR 2003, 141)
- within a market all participants act under same conditions
- Tax is a market's condition
- = **source taxation** (cf. Vogel BIFD 2002, 4; Strasser SWI 2003, 512)
- Principle of territoriality concerns the taxation of a single person (C-168/01 – Bosal)
- Paradox: one market – plurality of tax systems
- ECJ: per country or overall effects ?
- Influence of tax treaties

- **Discrimination and Restriction**
- **Discrimination** = Question of Equality
- Different treatment notwithstanding comparable situations
- Residents and Non-residents in comparable situations ?
- National (territorial) view – effects on national market
- **Restriction** = Question of obstacles
- Inbound restriction: no legally different treatment of residents and non-residents, but more burdensome for non-residents (Futura: double book-keeping for non-residents)
- Outbound restriction: different rules for foreign and domestic income of residents (internal discrimination)
- European view = effects on internal market

- **Discrimination and Restriction**
- **AMID**
- Profit in Luxembourg (p.e.), loss in Belgium
- Overall no loss and no profit – European view
- But: territoriality = tax on profit in Luxembourg, Luxembourg does not take into account loss in Belgium
- If Belgium takes into account Luxembourg profit and denies loss-carry forward in Belgium = double disadvantage
- **ECJ: setting off domestic losses against profits exempted by treaty establishes a differentiated tax treatment as between companies having establishments only on national territory and those having establishments in another member state. .. are likely to suffer a tax disadvantage which they would not suffer if all establishments were situated in the state of origin**

- **Discrimination and Restriction**
- **AMID**
- If all establishments are in the state of residence profits and losses are set off against each others = reduction of tax
- If establishments are in different states and double taxation is prevented by exemption or credit method
 - Profit in state of non-residence, loss in state of residence
 - Taxation of profit (territoriality)
 - No reduction of tax by losses in state of residence
 - No common tax base

- **Discrimination and Restriction**
- **Marks & Spencer**
- If losses are in state of non-residence and profits in state of residence
 - Principle of territoriality ?
 - Cross-border equalisation ?
 - Comparable situation between all establishments in state of residence and also establishment in other state ?
 - No discrimination but restriction
 - No disadvantage in state of foreign establishment
 - Draft directive on losses

- Solution ?
- Reaction
 - States enact tax legislation, ECJ declares incompatible with basic freedoms, states change tax law
 - No legal security
 - Danger that states eliminate discrimination by applying less favourite treatment of cross-border cases to domestic cases (cf. Lankhorst – thin capitalisation)
- Action
 - States check their tax law for compatibility with EU law and revise their statutes (bottom up)
 - EU issues directives (top down)

- Solution ?
- Necessary – clarification of the law and adaptation to the needs
- Preferable – bottom up approach
- Restatement of the law of tax rules being compatible with basic freedoms
- Who ? – scientific task – European Tax Institute
- European Code of Taxation