

INTRODUCTION IN THE JURISPRUDENCE OF EUROPEAN COURT OF JUSTICE IN FISCAL MATTER

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Abstract

The adherence of Romania to the European Union on January 1st 2007 assumes also the harmonization of Romanian law with the European one. In the fiscal domain, while in case of the value added tax and in case of the excise duties the harmonization is realized through the implementation to the national legislation of the European Directives, in case of the most direct taxes the absence of some harmonized regulations assesses the recourse to the decisions adopted by the European Court of Justice in the matter of the four fundamental freedoms which, through their effect, have incidence in the fiscal domain.

In these conditions the knowledge and profound study of the jurisprudence of the European Court of Justice is becoming a necessity.

Keywords: the activity of the European Court of Justice from Luxemburg, evolutions of jurisprudence, fiscality.

An important component of the institutional system of the European Union is represented by the European Court of Justice¹, with seat in Luxembourg – this way, according to the dispositions of article 220 of the CE Treaty, this assures: „the respect of the law in the interpretation and application of the present treaty”, being the guarantor of the application, interpretation and respect of the community law on the territory of the European Union.

The signing of the Single European Act in 1986 has introduced a modification in the judicial structure of the European Union, because, according to the wish to relief the Court, it was created the possibility to create the First Instance Court².

Through Treaty of Nice, modifying act for the Treaty of European Union, of the institutional documents of the European Communities and of some documents connected to these, there was foreseen the outlining of some premises to create a specialized jurisdictional district, that of the Tribunal of the Public Function³.

In terms of the institutional evolution of the European Court of Justice, we must notice that this action was marked by finalizing of the legislative project regarding to the institution of a preliminary urgent procedure which allows the quick and

¹European Court of Justice Luxembourg – ECJ;

²Decision of the Council 88/591/CECO, CEE, Euratom from 24 October 1988 instituting the First Instance Court of the European Union, published in the Official Journal No. L319 from 25 November 1988;

³Decision of the Council No. 2004/752/CE/Euratom from 2 November 2004 to create the Tribunal of the public service of the European Union, published in the Official Journal No. L333 from 9 November 2004;

appropriate examination of the preliminary questions referring to the freedom of space, security and justice (among the duties of the communitarian instances we mention the duty to judge direct actions and the duty to pronounce preliminary decisions – procedure which allows a consultation, a „dialogue” between the magistracy of the national instance noticed with a litigation where there are treated aspects regarding to communitarian law and European Court of Justice)⁴.

The jurisprudence of the European Court of Justice has a decisive role in the domain of direct fiscality, these appearing regularly in the national legislation and politics of taxation, accentuating the importance of the four freedoms: the freedom of traffic of goods, the free traffic of persons, the right or freedom of establishment, the free traffic of services and capitals.

ECJ judgments generally have effect *ex tunc*. The Court adjudicates on the application and interpretation of Community law from the very moment of its enforcement. The ECJ's judgments are, therefore, of a declaratory, but not of a constitutive character. The results of the ECJ's interpretation are also regularly applied to legal relationships that came into existence before the relevant judgment. In as far as tax assessments are based on national rules contrary to Community law and the relevant limitation period has not yet expired, the taxpayers concerned may in hindsight claim changes to their benefit.

In trying to catch the relevant aspects of the jurisprudence of the Court we are going to present step by step some pronounced decisions in the matter of taxation of physical persons as in the matter of judicial persons.

It can be observed that in the matter of taxation of particulars, some national measures were declared incompatible with the fundamental freedoms of the treaty, because these treated differently identical situations, without a valid fundament.

This way, in the decision from 25 January 2007, case C – 329/05 Finanzamt Dinslaken vs. Gerold Meindl (action opened by Bundesfinanzhof (Germany))⁵ (Freedom of establishment - – aspects concerning the interpretation of art. 43 of the EC Treaty - self-employed person - income tax - spouses who live apart on a non-permanent basis - refusal of joint assessment - spouses residing separately - wage compensation benefits for the non-resident spouse - income not subject to tax in the spouse's Member State of residence) – the Court declared that for a resident tax-payer can't be refused by the member state of residence, a common taxation with his/her consort, with whom he/she is not separated and who is living in an other member state,

⁴Art. 234 of the Treaty Establishing the European Community order that „the Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- the interpretation of this Treaty;
- the validity and interpretation of acts of the institutions of the Community and of the ECB;
- the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice”.

⁵Published in the Official Journal No. C 56 din 10 March 2007;

for the reason that this consort has obtained in that mentioned member state in the same time more than 10% from the incomes of the family, respectively more than the actual limit, with the hypothesis that the incomes obtained by the earlier mentioned consort in this other member state are not taxable. For these kind of tax-payers must be applied a different procedure, even if objectively, this tax-payer is apparently in the same situation of a resident tax-payer whose consort has the residence in the same member state, on the territory of which he/she obtains only non-taxable incomes. The Court has established that the resident state of these kind of tax-payers is the only one in measure to take into consideration the personal and familial situation of the mentioned tax-payer, because he/she not only lives in that state, but he/she obtains there the totality of the taxable incomes of the couple. This way, with no justification, the fact that this tax-payer cannot benefit no way, in the frame of the common taxation, of the taking into consideration of his/her familial situation, moreover she/he is categorized to the category of the single tax-payers, not taking into consideration his/her marital status, constitutes a discrimination forbidden by the principle of the freedom of establishment.

In an other decision from 30 January 2007, in case C – 150/04, Commission vs. Kingdom of Denmark⁶, the Court approved to an action to establish the non-fulfillment of the duties, declaring that this is not according to the dispositions of article 39, 43 and 49 of the CE Treaty - legislation permitting taxpayers to deduct or exclude from their taxable income contributions paid to pension schemes in so far as the pension contract was concluded with an institution established on national territory, while excluding any tax advantage for contracts entered into with pension institutions established in other Member States. The Court found that such legislation was liable to deter the freedom of pension institutions in other Member States to provide assurance services and also the freedom of establishment and freedom of movement of workers who originated from or who had worked in another Member State and had already entered into a contract in respect of a pension scheme there. The Court rejected the arguments relating to the need to maintain effective fiscal supervision and to prevent tax avoidance, holding that less restrictive means of achieving those two objectives existed. Nor was a justification relating to the cohesion of the tax system upheld, in the absence of proof of a direct link requiring preservation between a tax advantage and a corresponding disadvantage. The factor liable adversely to affect that cohesion was to be found in the transfer of the residence of the taxpayer between the time of payment of contributions and that of payment of the corresponding benefits, and less in the fact that the pension institution concerned was in another Member State.

In the matter of indirect taxation there can be considered more decisions, beginning with the example of those which were published in the matter of – clarifying the notion of inter-communitarian delivery: the decision of the European Court of Justice from 27 September 2007⁷, case C-409/04, Teleos PLC and others (Unique Distribution Ltd, Synectiv Ltd, New Communications Ltd, Quest Trading Company Ltd, Phones International Ltd, AGM Associates Ltd, DVD Components Ltd, Fonecomp Ltd, Bulk GSM Ltd, Libratech Ltd, Rapid Marketing Services Ltd,

⁶ Published in the Official Journal No. C 82 from 14 April 2007;

⁷ Published in the Official Journal No. C 297 from 8 December 2007;

Earthshine Ltd, Stardex (UK) Ltd) c. Commissioners of Customs & Excise; preliminary action created by the High Court of Justice of England and Wales, Queen's Bench Division (Administrative Court) (UK) (the reference for a preliminary ruling concerns the interpretation of the first subparagraph of art. 28 a (3) and the first subparagraph of art. 28 c (A) (a) of the Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment as amended by Council Directive 2000/65/EC of 17 October 2000 („the Sixth Directive”); The decision of the European Court of Justice from 6 April 2006⁸, case C-245/04, EMAG Handel Eder OHG vs. Finanzlandesdirektion für Kärnten, preliminary action formed by Verwaltungsgerichtshof (Austria) – (the reference for a preliminary ruling concerns the interpretation of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995 („the Sixth Directive”), and in particular art. 8 (1) thereof, relating to the place of supply of goods. The reference arose in the course of proceedings between EMAG Handel Eder OHG („EMAG”), established in Austria, and the Finanzlandesdirektion für Kärnten (the Carinthia Regional Tax Authority) concerning the deduction by EMAG of value added tax paid by way of input tax); in the matter of tax quota: the decision of the Court from 3 May 2001 case C – 481/98, Commission vs. France. The Commission asks the Court to declare that, by introducing and maintaining in force art. 281 g of the Code Général des Impôts (the General Tax Code), which provides for a rate of 2,1% for value added tax on reimbursable medicinal products, whereas other medicinal products are taxed at the rate of 5,5 %, the French Republic has failed to fulfill its obligations under art.12 of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonization of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment (hereinafter the „Sixth Directive”).

In Case C-73/06 Planzer Luxembourg⁹ (judgment of 28 June 2007), the Court considered the conditions and detailed rules for refund of VAT such as those laid down by the Eighth Directive 79/ 1072 and by Thirteenth Directive 86/560. This case arose from the refusal of the tax authorities of one Member State to refund to a taxable person having its registered office in another Member State the VAT paid by that person on goods acquired in the first Member State for its taxable transactions, on the ground that there were doubts concerning the actual place from which the business of the taxable person concerned was managed — in the Member State of its registered office or from the parent company established outside Community territory — even though the administration of the Member State of the taxable person's registered office had issued a certificate concerning that person's liability to VAT in that State. First of all, the Court confirmed that a certificate in accordance with the model in Annex B to the Eighth Directive does, as a rule, allow the presumption not only that the person concerned is subject to VAT in the Member State of issue, but also that he is established in that State in one way or another, which as a rule binds in fact and law the

⁸ Published in the Official Journal No. C 143 from 17 June 2006;

⁹ Court of Justice of the European Communities Annual Report 2007, Luxembourg, 2008, p. 35;

authorities of the Member State in which refund is sought. Nevertheless, where they have doubts as to the economic reality of the establishment whose address is given in the certificate issued, the authorities concerned may satisfy themselves of that reality by having recourse to the administrative measures made available for that purpose by Community legislation and, if necessary, refuse the refund applied for by the taxable person, without prejudice to any possible legal action by the latter. The Court then went on to state that a company's place of business for the purposes of art. 1 (1) of the Thirteenth Directive is the place where the essential decisions concerning its general management are taken and where the functions of its central administration are exercised. Determination of that place is based on a series of factors, foremost amongst which are its registered office, the place of its central administration, the place where its directors meet and the place, usually identical, where the general policy of that company is determined. Other factors, such as the place of residence of the main directors, the place where general meetings are held, the place where administrative and accounting documents are kept, and the place where the company's financial, and particularly banking, transactions mainly take place, may also need to be taken into account. So, a fictitious presence, such as that of a „letter- box” or „brass- plate” company, cannot be described as a place of business for the purposes of art. 1 (1) of the Thirteenth Directive.

Other important decisions of the European Court of Justice can be considered the followings too:

- decision from 14 February 1995, case C – 279/93, Finanzamt Koeln-Altstadt vs. Roland Schumacker; preliminary action formed by Bundesfinanzhof (Federal Finance Court) (Germany) - obligation of equal treatment - taxation of non-residents' income („resident” and „non-resident” the distinction is important in tax law because usually the two are not comparable. The resident is subject to world-wide taxation whereas the non-resident is subject to limited taxation;

- decision from 8 May 1990, case C – 175/88, Klaus Biehl vs. Administration des contributions du grand-duché de Luxembourg; Preliminary action introduced by Conseil d' État du Grand-duché de Luxembourg (the national court stayed the proceedings and referred the following question to the Court : „Does art. 7 of the EEC Treaty or any other provision of Community law, in particular Article 48 of the said Treaty guaranteeing freedom of movement for workers, preclude a Member State from providing in its tax legislation that sums deducted by way of tax from the salaries and wages of employed persons who are nationals of a Member State and resident taxpayers for only part of the year because they take up residence in the country or leave it during the course of the tax year are to remain the property of the Treasury and are not repayable?”

- decision from 28 January 1986, case 270/83, Commission vs. France („Avoir Fiscal”) (foreign insurance companies with branches in France not given the same tax credits as French companies. The discrimination appears even more clearly because French law uses one criterion to justify imposing tax liability and a different criterion to avoid granting an exemption).

As a conclusion, analyzing the actual situation, in the matter of the Romanian fiscal jurisprudence, we can observe a series of opportunities created by the

applicability of the communitarian law are remaining unused. This way it must exist an efficient way to inform those interested about the possibility of elimination of a not favorable treatment from the national legislation or administrative practice, through noticing these to the European Commission and about the possibility that the national instance transmits the case for interpretation for the European Court of Justice and to decide that the suffered prejudices as a sequel of breaking some fundamental rights guaranteed by the European Treaty, to be recovered.

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2. ***, Court of Justice of the European Communities, www.curia.europa.eu - jurisprudență;
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