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OPTIMIZATION OF TAX SOVEREIGNTY AND FREE MOVEMENT

SJOERD DOUMA

OPTIMIZATION OF TAX SOVEREIGNTY AND FREE MOVEMENT

OPTIMALISERING VAN FISCALE SOEVEREINITEIT EN VRIJ VERKEER

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Preface

After having obtained my law degree at Leiden University in October 1998, I was approached by Tanja Bender and Kees van Raad, my former teachers in international tax law, to teach that subject in Leiden and to write a dissertation in that area. Since I had enjoyed both the topic of international tax law and the academic environment at Leiden University very much, I gladly accepted their offer. The topic of my research became the tax treatment of cross-border employment under the OECD Model Tax Convention and I published several articles on it. After some one and a half years I realized, however, that I wanted to broaden my legal horizon before really writing a book on the subject. In 2000 I was appointed as a legal clerk with the Dutch Supreme Court (*Hoge Raad*). I decided to put the taxation of cross-border workers on ice and to concentrate fully on my new tasks.

My academic interest was awakened again in 2002. In that year I was asked to write a preliminary report for the Dutch Association of Tax Research (*Vereniging voor Belastingwetenschap*) on the delimitation of the Dutch corporate income tax jurisdiction on the basis of the ‘nationality’ of the company. After having completed and defended this report¹, I considered the idea of using it for a PhD. thesis and to keep the taxation of cross-border workers on ice still. In 2004 this idea became concrete when I left the Dutch Supreme Court to teach again at Leiden University and to prepare a dissertation there. I also became a part-time tax advisor with PricewaterhouseCoopers, where I started working with PwC’s EU Direct Tax Group which focuses on the EU law aspects of direct taxation. Obviously, these aspects were also present in the provisional topic of my dissertation: the delimitation of a State’s tax jurisdiction on the basis of nationality. Would such a delimitation be in line with EU law? During the course of my initial research on the delimitation of a State’s direct tax jurisdiction and the compatibility thereof with EU law, I came across the copious literature which relates in one way or the other to this problem. Terms such as discrimination, dislocation, fragmentation, disparity and economic and juridical double taxation were frequently used, without their content having been clearly defined. Nevertheless, I noted that the ECJ was criticized heavily in various publications for not complying with alleged principles of (international) tax law or its own earlier case law.² I came to the conclusion that clarity in this discussion was needed first. This has resulted in the present research, aimed at developing a theoretical assessment model for reviewing direct tax cases which is independent of the case law and literature published so far. This model makes both a normative claim (how should the ECJ assess whether a certain tax measure is compliant with the EU free movement provisions?) and a descriptive claim (the model is able to explain why the ECJ arrives at certain conclusions in its case law and is able to structure the ECJ’s case law in a coherent manner).

¹ Douma 2002.

² See for a discussion Douma 2006.

It will be clear that the tax treatment of cross-border employment under the OECD Model Tax Convention will remain on ice. Fortunately, I can refer to the dissertation of Frank Pötgens for an excellent study on the taxation of income from international private employment.³

Many people have contributed to the completion of this dissertation. Some of them require special mention here. First, I would like to thank my supervisors Prof. Tanja Bender and Prof. Frank Engelen for their unconditional support and friendship. The many conversations and discussions we have had on the topic of my dissertation remain a great inspiration. My special thanks must also go to Prof. Axel Cordewener, Prof. Malcolm Gammie, Prof. Janneke Gerards and Prof. Peter Wattel for finding the time to read my manuscript as members of the PhD Committee. Their comments and suggestions for improvement have been invaluable for the completion of this dissertation. I also owe many thanks to Prof. Stefaan Van den Bogaert, Prof. Hans Gribnau, Prof. Kees van Raad and Prof. Frans Vanistendael for their membership of the Opposition Committee.

I would also like to thank my colleagues at the Institute of Tax Law and Economics at Leiden University. In particular, I would like to thank Prof. Allard Lubbers for being such a supportive friend during all these years. Special thanks must also go to Dr. Koos Boer. His humour and comradeship have been of great value to me.

I must also thank my colleagues at PwC in Rotterdam and Amsterdam for providing me with the opportunity to combine my work as a tax advisor with my academic work. Without their support this would not have been possible. In particular, I am grateful to Walter de Zeeuw, Diederik van Dommelen, Marc Diepstraten, Prof. Stef van Weeghel, Dr. Ruud Sommerhalder and Paul van Amersfoort. Special thanks should also go to my international colleagues in PwC's EU Direct Tax Group. The discussions during our bi-annual conferences have been a great inspiration. In particular, I would like to thank the members of the Technical Committee for our great and sometimes never-ending exchange of ideas on EU law: Edward Attard, Peter Cussons, Dr. Gitta Jorewitz, Prof. Jürgen Lüdicke, Bob van der Made, Dr. Emmanuel Raingard de la Blétière, Dr. Nana Sumrada, Jacques Taquet and Caroline Wunderlich. I would also like to thank Anna Gunn for always sharpening my thoughts on matters of EU law. The same is true for my former colleague Pieter van der Vegt, who has played an important role in the development of my thoughts on EU free movement and State aid in the context of direct business taxation.

My most special thanks go to my friends and family, in particular to my parents, my parents-in-law, Anjeleen and Reimer, Maarten and Sanne, and Freek and Suzanne, for all their love and understanding. Above all, I would like to thank my wife Lara for always being there for me and our children Wytse, Nynke and Jelle, despite her own challenging career. We have done this together.

Leiden, June 2011

Sjoerd Douma

³ Pötgens 2006.

List of abbreviations

ECJ	Court of Justice of the European Union (per 1 December 2009) or Court of Justice of the European Communities (before 1 December 2009)
EC	Reference to a provision of the EC Treaty in its numbering after 1 May 1999
ECHR	European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	European Court of Human Rights
EC Treaty	Treaty establishing the European Community If used as reference to a provision – e.g. Article 6 of the EC Treaty – it indicates the numbering before 1 May 1999
EEA	Agreement on the European Economic Area of 2 May 1992
EU	European Union If used as reference to a provision it indicates the numbering after 1 May 1999
FCC	German Federal Constitutional Court (Bundesverfassungsgericht)
ICCPR	International Covenant on Civil and Political Rights
OECD	Organisation for Economic Co-operation and Development
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
VCLT	Vienna Convention on the Law of Treaties (done at Vienna on 23 May 1969)

