THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

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Suggested Solutions

PART A

Question 1

As ‘fiscal unity’ systems normally applies to shareholdings of around 95%-100% this normally relates to the freedom of establishment, as enshrined in Article 49 TFEU. In the Baars-ruling, the CJEU ruled that this freedom applies in relation to shareholdings that constitute a controlling influence in the company.

Concerning a cross-border fiscal unity, the CJEU in the X Holding case ruled, that this in itself is a discriminatory rule, but that it is justified because of the balanced allocation of taxation rights between Member States and the aim of combating situation of double loss relief. European law therefore cannot oblige Member States to establish a tax system that enables a cross-border fiscal unity.

A sharp distinction has to be made between the situation of a cross-border fiscal unity on the one hand, and a fiscal unity between domestic companies with an EU element, like a fiscal unity between a French grandparent, a French daughter company but in between an EU-parent company. The first situation is primarily aimed to obtain cross-border loss relief, the second to obtain domestic loss relief in a group structure.

Concerning the aforementioned French situation, the CJEU ruled in the famous Papillon-case, that France had to allow a fiscal unity between a French grandparent and a French daughter company. Not making such a fiscal possible, was a violation of the freedom of establishment. All grounds for justification in that respect were denied by the CJEU.

This rule was later confirmed and expanded by the CJEU in the cases X AG, X1 Holding GmbH, X2 Holding GmbH, X3 Holding GmbH D1 BV, D2 BV, D3 BV. In this ruling the CJEU also acknowledged that a fiscal unity should be possible between two domestic companies with an EU parent company. Als in this ruling, all grounds for justification in this respect were denied by the CJEU.

Question 2

In the Schumacker ruling, the CJEU has ruled that for the purpose of deductions in personal income tax related to personal and family circumstances, as a rule, residents and non-residents are not in the same position. Consequently, non-resident workers are not entitled to the same deductions as residents.

This is different, however, if non-resident workers earn their entire income or almost their entire income in the work state and if they do not earn enough income in their state of residence to benefit in their state of residence from deductions related to their personal and family circumstances. Under those circumstances, the work state is obliged to grant non-resident workers the same deductions as resident workers.

Under such circumstances, a different treatment of resident and non-resident workers would constitute an indirect discrimination of nationals of other EU Member States on grounds of their nationality, because generally residents of a Member State are nationals of that Member State whereas non-residents generally are not. This would constitute an infringement of the free movement of workers (art. 45 TFEU).

In the Renneberg case, the CJEU ruled that this also applies to the deduction of mortgage payments. If a work state grants its residents the possibility to deduct interest payments related to a mortgage, then this state is obliged to grant similar deductions to non-resident workers who meet the Schumacker-criteria. It is not relevant that, for domestic law purposes, mortgage payments are considered as payments related to a source of income instead of payments related to personal or family circumstances. Mortgage payments affect a taxpayers ability to pay income tax, and should therefore be taken into account.

In the case Commission/Estonia, the CJEU clarified that the Schumacker ruling does not stipulate a strict 90% criterion, as certain scholars assumed (the European Commission advised Member States to apply a 75% criterion). The case regarded a resident of Finland who received only 50% of her income from Estonia (pension payments). Despite of this, Estonia was obliged to grant her the same deductions for personal and family circumstances as it granted to residents, since the lady did not earn enough in Finland to make use of similar tax benefits in her state of residence.

PART B

Question 3

The first case in this respect is the Deutsche Shell case which concerned the Italian permanent establishment of a German company, that was converted into an Italian subsidiary. This resulted in a currency loss, and the question was whether this foreign currency loss was tax deductible in Germany. The CJEU rules in the affirmative.

Many scholars were of the opinion that currency losses were always tax deductible is they were not part of the taxable base of the source state. In this conviction this also meant that Member States who applied a straight participation exemption system in their corporate tax system, still had to make it possible that a currency loss of a foreign participation was tax deductible.

In the recent X AB-case that concerned the application of a system of participation exemption in Sweden, the tax payer wanted to deduct a foreign currency loss from its domestic tax base. The non-deductibility of the foreign currency loss was regarded by the CJEU as not being discriminatory, as the rule equally was applicable with regard to a shareholding in a domestic company with its registered in a foreign currency. So the CJEU concluded that there was no discrimination at stake.

Deductible currency losses of a foreign shareholding apparently only come into consideration when they are part of the final loss as established by the CJEU in the Marks & Spencer ruling and reaffirmed in various subsequent rulings.

Question 4

Since company L has shares in a Japanese company, the question rises whether the dividend taxation at issue infringes the free movement of capital. In principle taxation of dividends in the hands of the shareholder is subject to the free movement of capital (for example Verkooyen ruling). The free movement of capital is the only freedom that applies in relation to third countries (art. 63 TFEU).

Since company L owns 60% of the shares in the Japanese company, it has the majority in the shareholders meeting and consequently it has the power to determine the activities of the Japanese company. Therefore, the possession of the shares could also be considered as an act of establishment (for example Baars ruling).

The question rises which of the two freedom has priority. This is crucial, since the freedom of establishment does not apply in respect of third states. The tax regime at stake, taxation of foreign dividends, is a regime that as such can apply irrespective of the size of the shareholding: it can apply to both small and large participations. In FII-2 the CJEU has ruled that in such circumstances, the taxpayer involved can rely on the free movement of capital, despite of the fact that the it holds a majority participation.

The question is whether the regime at issue infringes the free movement of capital. In FII GLO (C-446/04), Haribo and Salinen (C-436/08 and 437/08) and Accor (C-310/09), the CJEU accepted that for inbound foreign intercompany dividends only indirect credit was extended, although internal company dividends were exempted. The CJEU views these two systems for avoiding of double taxation as ‘equivalent’. Consequently, the tax laws of Member State Ligertas do not infringe EU law and the tax claims of company L will most likely not be successful.

Even if the regime would infringe the free movement of capital, then this regime might be safeguarded under the standstill-provision of Article 64 TFEU, provided this regime already existed at 31-12-1993 and provided it has not been changed significantly since then. Owning 60% of the shares constitutes a ‘direct investment’ or ‘establishment’ for the purpose of Article 64 TFEU and constitutes a type of capital movement to which the standstill provision applies.

PART C

Question 5

The most-favoured-nation principle entails that a State A must extend the benefits, which it has agreed upon with another State B in a bilateral (tax) convention, to the residents of State C on grounds of a most-favoured-nation-agreement concluded in a treaty between States A and C.

In the D-case (C-376/03) (and later in the ACT Class IV case, C-C-374/04), the CJEU ruled that the EU fundamental freedoms do not oblige EU Member States to apply the most-favoured-nation principle.

Under the Dutch-Belgian tax convention, the Netherlands granted residents of Belgium a tax free base for Dutch wealth tax purposes. The CJEU ruled that, under the free movement of capital, The Netherlands was not obliged to grant a similar tax free base to residents of Germany. The CJEU ruled that residents of Belgium and residents of Germany are not in comparable situations, because they are subject to different bilateral tax conventions.

Question 6

Such an appeal will not be successful because the deadline to file an appeal has expired.

One of the underlying, unwritten principles of EU law is the principle of legal certainty. This principle brings about that, generally, the CJEU observes national deadlines for filing appeals against, among others, tax assessments (Kühne & Heitz).

The deadline for filing an appeal, however, shall not be shorter if the appeal is based on an alleged violation of EU law than for appeals based on an alleged violation of national law (principle of equivalence, see Rewe, C33/76). Furthermore, it is not allowed to render such appeals in any other ways 'practically impossible or excessively difficult' (principle of effectiveness, see Rewe, C33/76).

Only in one situation, the CJEU has ruled that tax administrations must receive an appeal that has been presented of the deadline (Kühne & Heitz). This regards the situations in which:

1. In earlier years, the taxpayer has appealed against a similar alleged violation of EU law and has litigated up to the national supreme court; and

2. The national supreme court has rejected the appeal without raising preliminary questions to the ECJ; and

3. The taxpayers has filed its appeal immediately after the CJEU has delivered a ruling which indicates that the present tax assessment has been imposed violating EU law; and

4. National law grants tax administrations the authority to review such tax assessments even where the deadline for filing an appeal has exhausted (Kühne & Heitz).

Question 7

The question regards Article 6 Merger Directive. This provision gives the right to transfer losses in case of a cross-border reorganization on a non-discriminatory basis. This brings about that if a transfer of losses from a transferring company to a receiving company is allowed under domestic law in case of domestic mergers, then a similar transfer of losses must also be allowed in case of cross-border mergers. There is no obligation for Member States to facilitate the transfer of losses if this is not possible in domestic reorganizations.

The rights of Article 6 are subject to the condition that a permanent establishment remains behind in the state of the transferring company. In fact, on a non-discriminatory basis, the losses of the transferring company may be transferred to the permanent establishment of the transferring company that remains behind in the state of the transferring company and is subject to tax there after the merger in the hands of the receiving company.

Article 6 does not grant the right to export losses to the state of the receiving company. The state of the receiving company is not obliged to grant the possibility to compensate the losses suffered in the state of the transferring company.

Transfer of losses is, however, not allowed, if one of the main purposes of the merger was the very transfer of such losses. If there are no commercial reasons for the merger then Member States may assume that the merger constitutes abuse (Article 15 Merger Directive). The transfer of losses itself constitutes a purely fiscal motive and cannot be characterized as a commercial motive (Leur-Bloem; Foggia). The mere fact that the merger results in the winding up of one or more companies with consequent reduction of administrative burdens, does, per se, not result in a sufficient commercial motive (Foggia).

In the A Oy case (C-123/11) the CJEU has ruled that if the transferring company is wound up and there is no remaining permanent establishment in the state of the transferring company, and the losses cannot be used anymore in the state of the transferring company (nor by the transferring company, nor by any other company) then such losses can be considered as final losses under the freedom of establishment. By analogy to the Marks & Spencer 2 case, and provided that loss transfer is possible in case of domestic mergers under the laws of the receiving company, the state of the receiving company must allow that the foreign losses are compensated with profits in the state of the receiving companies. In such situations, the rules for loss compensation may not be less favourable than the rules that apply to domestic mergers in the state of the receiving company.

Question 8

In 2015, an anti-abuse provision with regard to hybrid loans has been adopted in the Parent-Subsidiary Directive. Article 4(1)(a) provides that the Member State of the parent company shall ‘refrain from taxing such [distributed] profits to the extent that such profits are not deductible by the subsidiary, and tax such profits to the extent that such profits are deductible by the subsidiary’.

Consequently, the benefits in the state of the parent company do no longer apply if the payment is deductible in the state of the subsidiary company.

Furthermore, there is an obligation in the state of the parent company to tax the profit distributions received to the extent that these profit distributions have been tax deductible in the hands of the subsidiary company. This is a new aspect, since anti-abuse provisions were generally not mandatory: Member States were allowed to apply anti-abuse. Under the new provision, Member States are obliged to apply this anti-abuse provision.

Question 9

Taxation of cross-border inheritances are subject to the free movement of capital (Barbier; Van Hilten van der Heijden).

In the case Van Hilten van der Heijden, the CJEU has ruled that Member States are allowed to charge inheritance tax on the basis of the nationality of the deceased, being a national of that specific Member State. This is not considered as prohibited discrimination on the basis of nationality, but as legitimate taxation of a State's own nationals.