ADIT

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Excellence in Taxation

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PAPER 3.01 – EU DIRECT TAX OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Standstill is exception to free movement of capital.

Means that discriminating and restricting rules can continue to be applied.

Only applies in relation to third countries.

Only applies to certain types of capital movement, the categories as mentioned in art. 64. A.o: direct investments: aimed at establishing lasting and direct links between shareholder and company, C-194/06 Orange Smallcap.

Only applies to rules already existing at ultimo 1993 (certain states: ultimo 1999).

Rules that were changed after 1993 are considered 'already existing' if they they are substantially identical or if the discrimination/restriction has been limited. See cases such as C-446/04 (Test Claimants FII GLO) or C-302/97 (Konle).

Question 2

This restriction involves both the freedom of establishment (Baars: majority shareholding) and the free movement of capital (a loan).

The tax law of Carixia discourages companies to take a loan from foreign majority shareholders. This constitutes a restriction a the free market. The case is similar to Lankhorst-Hohorst, C-324/00 and to Lasertec C-492/04 (and Thin Cap GLO). The ECJ ruled that a difference on interest deduction based on the place of residence of the parent company infringes the freedom of establishment.

The freedom of establishment, does, however, not apply to a parent company established in Switzerland. Therefore, in this case the rule does not infringe the freedom of establishment.
To the extent that it also affect the free movement of capital: this is only an unavoidable consequence of the exercise of the freedom of establishment. Therefore, the free movement of capital is only secondary. Furthermore, the interest limitation targets majority shareholdings, therefore to situations of establishment (for that reason, the present case differs from Itelcar, C-282/12 and FII GLO). Therefore, the rule cannot be examined under the free movement of capital.

Finally, the Interest & Royalty Directive does not apply to a Swiss company, and it does not regard interest deduction (Scheuten Solar).

Conclusion: Automotive Engineering cannot successfully rely on EU law.

PART B

Question 3

The cohesion of the tax system of a Member State can justify a restriction if a tax disadvantage is directly connected with a tax advantage which is based on the objective pursued by the legislation. Often this justification is not accepted by the Court.

Examples from case law are the deductibility of pension or social security premiums on condition that future pensions/payments can be taxed by the same state (Bachmann, C-204/90; Commission/Belgium, C-319/02; Danner case).

Another example is the recapture of PE losses that were temporarily deductible in a situation that PE profits would be tax exempt (Krankenheim)

The justification only applies if the advantage and disadvantage regard:

- The same taxpayer (Bosal Holding);
- The same type of tax

Furthermore there must be a direct link between advantage and disadvantage (Welte, C-181/12; Deutsche Shell).

It is not possible to rely on this justification if the cohesion was already given up under a treaty (Wielockx, C-80/94)

Question 4

Before 2009, EU nationals could only rely on the treaty freedoms is respect of cross-border economic activities. In non-economic cases, any tax obstacles were simply allowed under EU law (Werner case).

The citizenship rights extended the rights to non-economic activities, such as the right to travel and reside within the EU (example: Pusa case).

Also the non-discrimination provision has been extended to discriminaton on other grounds than nationality.

And also the EU Charter of Human rights grants rights to taxpayers.

PART C

Question 5

This rules hampers the acquisition of subsidiary companies in other Member States: it is less attractive than establishing domestic subsidiary companies.

The rules restricts the freedom of establishment (art. 49 TFEU; Baars criterion: majority shares).

This rule cannot be justified.

Identical to the Bosal Holding case or Keller Holding C-471/04.

Certain students examined whether the case involved State Aid in favor of national groups. The question is whether companies receive any advantage. Deduction of costs (interest) as such is not an advantage: it is in line with the general rule that costs are in principle deductible.
Furthermore it could be argued that it selective, because it favors domestic groups. For a proper analyses of the State Aid criteria, also points were given.

Question 6

Julia emigrated within the EU. It remains unclear for what reason (as employee?), but in any case she has (at least) access to the right to move and reside within the EU, art. 21 TFEU.

This right is restricted because of the fact that she didn't live all year in Wisperia. The restriction regards purely procedural grounds: the fact that she had not lived on year in Wisperia. It is not clear what kind of deductions it regards (related to source of income or to personal/family circumstances).

In Biehl (C-175/88), the ECJ has ruled that such procedural restrictions infringe the effectiveness of EU law.

Alternative answer

Applicable freedom: see above.

Most students assume that the case regards the deductions for costs regarding her personal or family circumstances, and they discuss the Schumacker-doctrine. In that situation, Wisperia should grant her t he personal/family benefits if she earned almost all her income in that State and not sufficient in her new home state to use such deductions.

This must be examined on a full-years-basis, so on the basis of her income during the entire calender year (Kieback).

Question 7

This regards the implementation of Directives. As such Directives do not have direct effect. However, if they have not been implemented within the existing deadline, taxpayers may rely directly on the Directive to the extent that its provisions are sufficiently clear and grant rights to taxpayers.

This does not apply to the Tax Administration (the State): it can only rely on the national laws implementing the Directive; it cannot directly invoke a Directive which has not been implemented in time against taxpayers.

Question 8

Donations are subject to the free movement of capital.

The tax laws discourage to make donations to foreign charities and restrict as such this freedom. There is no justification applicable.

The ECJ has ruled so in cases like Persche.

However, each state is allowed to formulate its own rules regarding deductions of donations and its criteria in order to be recognized as qualifying charity.

Question 9

In principle, if there are no valid commercial reasons except saving real estate transfer tax, than the assumption of tax avoidance may apply.

However, in Zwijnenburg, C-352/08, the ECJ has ruled that the anti-avoidance rule of art. 15 Merger Directive does not apply in case of the avoidance of real estate transfer tax.

In general, the anti-avoidance provision does not apply to taxes for which the Directive does not grant any relief.