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Skatteavtal och generalklausuler Ett komparativt perspektiv

Langhave Jeppesen, Inge

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Abstract: This section contains reviews of two Swedish books on international taxation. First, the book *Skatteavtal och generalklausuler, Ett komparativt perspektiv* (Tax Agreements and General Anti-Avoidance Regulations, A Comparative Perspective) is recommended for those who study and work with international tax law. The book analyses how tax treaties' function to limit contracting states' taxing powers relates to national GAARs. A comparative analysis is made between Sweden and Canada. In the second review, the doctoral dissertation *EU-domstolens restriktionsprövning i mal om de grundläggande friherterna och direkta skatter* (The EU Court of Justice's examination of the restriction requirement in its direct tax case law) is reviewed. The dissertation systemizes relevant CJEU's case law and analyzes the Courts reasoning in deciding whether or not certain tax regulation is in conflict with EU fundamental freedoms.

Skatteavtal och generalklausuler Ett komparativt perspektiv

(Tax Agreements and General Anti-Avoidance Regulations, A Comparative Perspective); Wolters Kluwer, 2016, 196 pages

Authors: Maria Hilling¹

Reviewer: Inge Langhave Jeppesen²

Introduction and Overview

The book was released in 2016. The relationship between double taxation agreements (DTAs) and general anti-

avoidance rules (GAARs) is the topic of the book. In a world with an increasing focus on international tax law, BEPS, and the inclusion of a GAAR in EU's Parent-Subsidiary Directive, the subject seems very relevant and well chosen. As a reader, one expects to learn more about how to maneuver in this area.

In Chapter 1, the author introduces the subject that is to be investigated. The starting point is a globalized world with an explosive increase in cross-border transactions. Having set that scene, the author raises the question whether a GAAR loses its effect if the income in question is covered by a DTA.

On the one hand, a state might be obliged to grant the taxpayer a relief, because the purpose of a DTA is to avoid double taxation and prevent tax avoidance. On the other hand, a state may also want to secure its taxing rights by introducing a GAAR. The intersection between these two aims raises the question posed by the author: How does a DTA deal with a national GAAR when this intersection is not dealt with in the DTA?

An illustration of the problem is shown as an example in Chapter 4, p. 80. Pursuant to national law in state H, an income deriving from state X is taxable in State H. But pursuant to the DTA with state X, state H must exempt the income from taxation. State X as the source state doesn't tax that income. The result is that the actual DTA prevents state H in taxing the income and a situation of double non-taxation has occurred. The question is whether a national GAAR in state H nonetheless will allow state H to tax the income.

This question is to be answered on grounds of an analysis of the influence of national GAARs on the interpretation and use of DTAs. The analysis includes a theoretical description of relevant parts of international tax law as well as some international law and constitutional law. In order to further elaborate on the theoretical description, a comparative analysis of Swedish and Canadian law is conducted. The comparative analysis serves as an example on the intersection between GAARs and DTAs. The analysis will be conducted by using the legal method.

Besides the introduction in Chapter 1, the book is divided into three parts. The first part (Chapters 2–6) is setting the theoretical platform for the comparative analysis, which is being conducted in the second part. In the second part (Chapters 7–10), a comparative analysis of the in-

Edited by Axel Hilling: Associate Professor of Tax Law, Lund University School of Economics and Management, Sweden

¹ Associate Professor of Tax Law, Department of Law, Lund University, Sweden

² Professor wsr, Department of Law, University of Southern Denmark



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fluence of GAARs on the interpretation and use of DTAs is conducted. The third part comprises only of Chapter 11, which includes some final remarks on the topic of the book.

Part 1

Part 1 includes five chapters: Chapter 2 on the characteristics of DTAs, Chapter 3 on DTAs as part of international law and constitutional law, Chapter 4 on national rules on tax avoidance, Chapter 5 on the role of Organization for Economic Co-operation and Development (OECD), and Chapter 6 on DTAs and GAARs.

Chapters 2–5 serve as building blocks needed for conducting the comparative analysis in Part 2. Therefore, each chapter is a presentation of the theoretical and juridical tools that are to be used in the analysis. The theory and the tools are known, but, nevertheless, the author manages to present them in a short and well-structured manner.

The DTAs form one building block, which is presented in Chapter 2. After a short survey on the purpose and use of DTAs and the role of OECD, the focus in Chapter 2 is on the abuse of double tax agreements—especially when the taxpayer obtains a situation of double nontaxation. Three juridical strategies for combating double nontaxation are described. One of these is the use of national rules, especially GAARs, to prevent tax avoidance. It is the consequences of this strategy that will be further elaborated in the book.

Another building block consists of questions regarding the intersection between international law and national law, especially with regard to interpretation in case of a conflict between the international and national law. The author states that the integration of DTAs into national law creates a relationship between national law and international law. This statement leads to the view that the international law—that is the understanding laid down in the DTA—has an indirect influence on the interpretation of national law.

The third building block is a central discussion in Chapter 4 of whether it is possible to avoid situations of double nontaxation by introducing national anti-avoidance rules. The discussion is continued in Chapter 5, in which the position of OECD on this question is described. This includes a discussion of whether a static or dynamic approach is to be used in the interpretation.

In a situation where nontaxation occurs, the author raises the question whether a DTA prevents the use of a national GAAR. When answering that question, the author describes three alternatives. The author rejects a narrow-

minded use of the alternatives, because the answer depends on the actual situation. The author concludes that the use of a GAAR is only excluded if the actual DTA specifically leaves out this possibility. Otherwise, room is left for the use of a GAAR when making up the national tax base.

Part 2

Part 2 includes four chapters: Chapter 7 is an introduction to the legal system in both Sweden and Canada, Chapter 8 describes the Swedish GAAR and the interplay with DTAs, whereas Chapter 9 does the same with regard to Canadian law. Finally, Chapter 10 contains the actual comparative analysis.

The comparative analysis leads to the conclusion that the Swedish and Canadian systems are quite similar when it comes to the question of whether a DTA prevents the use of a GAAR. The two states use different tools, but the result is quite similar—both states accept the use of GAARs. In Sweden, the acceptance is based on case law and on the fundamental condition that nothing in the DTA indicates the opposite. In Canada, the acceptance is laid down in national legislation. Therefore, in Canada, treaty override will be relevant, in case an actual DTA excludes the use of an anti-avoidance rule.

Part 3

Part 3 contains solely of Chapter 11. The overall conclusion is that the use of a GAAR doesn't result in a conflict with the actual DTA. The conclusion is based on the point of view that the use of a GAAR results in a recharacterization. The recharacterization is part of national law and the DTA is used on the recharacterized situation. Only if the limitations in the DTA aren't respected, the use of the anti-avoidance rule will result in treaty override.

Final remarks

The book deals with a very relevant problem. Part 1 gives a well-structured description of the relevant theory when the question is on interpretation of DTAs and its relationship to anti-avoidance rules in national law. The presentation is easy to read and leaves the reader with a solid overview. The use of sources is quite solid and leaves the reader with the possibility to further investigate the subject.

Part 2 has a more specific approach as it is a comparative analysis and thus dedicated to Swedish and Canadian law. But as mentioned in the introduction, the author wants the comparative analysis to serve as an example on the analysis that is to be conducted when answering the initial question. And as such it leaves the reader with an insight into how the building blocks introduced in Part 1 can be used when deciding whether a DTA offsets the effectiveness and purpose of a general tax avoidance rule.

The book and its analysis are recommendable for those who study and work with international taxation. The theoretical platform might also be useful when it comes to future questions on conflicting rules that might arise in the interaction between national GAARs, international GAARs, and DTAs.

EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter

(The EU Court of Justice's examination of the restriction requirement in its direct tax case law); Jure Förlag; 2016; 356 pages

Authors: Jesper Johansson³

Reviewer: Cécile Brokelind⁴

This book review is a short summary of a Swedish legal doctoral thesis that I had to assess as a member of the jury, as well as a critical review of the author's work.

The Thesis

Jesper Johansson defended his doctoral thesis on 18 March 2016 in Stockholm and published his work with Jure (Stockholm) under the title (my translation) "The EU Court of Justice's examination of the restriction requirement in its direct tax case law" (*EU-domstolens restriktionsprövning i mål om de grundläggande friheterna och direkta skatter*). This book of 355 pages intends to describe what factors may have a potential impact to determine whether or

not the prohibition of discrimination under articles 39-67 TFEU may apply. The author writes for an expert audience who is already acquainted with the case law of Court of Justice of the European Union (CJEU) on the direct tax cases and the fundamental EU freedoms on the basis of which a series of national tax rules were held in breach of EU law during the past 30 years. The main contribution of this thesis is to propose a systematic review of all these cases in the view of finding out which criteria the Court relies on in order to find a "discrimination/restriction." The prohibition of discriminatory tax treatment applies in three steps. First, the CJEU assesses whether any of the fundamental freedoms applies at all (*i.e.*, is there any cross-border aspect of an economic transaction, in which category?). Second, when the applicable freedom is clearly determined, the Court evaluates whether the disputed national tax rules constitute a restriction to the application of the freedoms. Finally, the Court checks whether any ground of justification sustained by national governments holds and allows the national rule. The focus of Jesper Johansson's thesis is on the second step, for the sake of which he found 60 cases relevant for his discussion out of the 300 cases rendered.

The author explains briefly in his introduction his purpose, which is to help understanding in which situations a domestic income tax law provision opens for challenge at court. The policy maker and legislator may also find this work useful in order to draft a domestic law in line with EU law, without needing to justify unforeseen restrictions arising from a newly introduced tax rule. The main focus lies on the comparative analysis necessary to apply the TFEU and the prohibition of discrimination.

The book breaks down the 60 cases analyzed in five "typical" problems. These relate to the limitation of tax jurisdiction, the linked taxations, cumulative burdens, disparities, and neutralization issues, as suggested by the late AG Geelhoed's opinions in C-374/04 Test ACT and C-513/04 Kerckhaert-Morres. The author focuses on situations that can be held comparable in order to assess whether one category of taxpayer is at disadvantage to the other. The cases are analyzed in respect of the comparison of the tax subjects (Chapter 3), taxable income (Chapter 4), the nature of the rules causing the problem (Chapter 5), and the taxpayers' situations (Chapter 6).

Noticing the doctrinal discussions on the difference between "discriminatory" and "restrictive" tax treatments in his Chapter 7, the author rather focuses on how the CJEU describes the problem to be cured. The right to deduct costs and expenses from a taxable income usually is refused to non-residents, which makes their situation worse in the host state. In the end (Chapter 8), the author refers to

³ Lecturer in Tax Law, Stockholm School of Economics, Sweden

⁴ Professor of Business Law, Lund University School of Economics and Management, Sweden

the doctrinal debates opposing the proponents of the one-state approach of comparison applied by the CJEU, to the proponents of the overall approach, and rejects the internal consistency test (originating from the United States) as a plausible explanation for the Court's approach.

In his analytical conclusion, the author classifies the case law in two categories, the mainstream cases and the other ones. According to the author, the CJEU's case law is mainly consistent and builds on the premises that resident and non-resident taxpayers' situation should be compared from one state's perspective only. The pattern remains identical most of the times: Resident taxpayers should be allowed to consider expenses incurred either on the domestic turf or abroad, and non-residents should be allowed to be treated for tax purposes identically to resident tax payers in respect of deductions when they are taxed similarly. The author considers that the CJEU does not apply any "overall approach" as some doctrinal comments suggest. The Court most of the time finds that discrimination can never be cured or neutralized by advantages available other member States. The Court lets very rarely the rules of one Member State affect the evaluation of another Member State's rules, which conforms to the "per-country approach" found in a number of doctrinal comments.

Some cases, however, are presented as side-track cases (for individual taxation, C-385/00 de Groot; C-168/11 Becker; C-303/12 Imfeld Gercet; C-375712 Bouanich II; for corporate taxation, C-141/99 Amid; C-431/01 Mertens, C-293/06 Deutsche Shell, C-157/07 Krankenheim). In these cases, where no justification ground was admitted to allow the restriction, the CJEU seems to have admitted that the other Member State's rule are important to determine the extent of the disadvantage. The C-279/93 Schumacker ruling appears to be the main source of problem.

The author suggests that the CJEU is slowly departing from these cases in its present case law and tries to stitch to the mainstream approach that only one Member State's rules need to be taken into account for assessing the existence of a different/worse treatment. The author finds, however, that even more recent cases, such as C-632/13 Hirvonen and C-265/04 Bouanich, depart from this mainstream line of cases, in as much as the existence of a restriction was made dependent on the taxpayer's circumstances and the interaction of two member States' rules. The author remains puzzled by the lack of consistency of these cases with previous case law and wonders why it was necessary to leave the ending open to the referring court.

This is in a nutshell the thesis's main contribution to the doctrinal comments on the CJEU's case law in the field of direct taxation.

Some Comments

Since the author stopped updating the material on 1 November 2015, no reference is unfortunately made to the Grand Chamber case C-388/14 Timac Agro of 17 December 2015, which yet seems to announce another method of reasoning for the CJEU. The Court, reversing its previous Lidl Belgium and Krankenheim case law, held that where Member States apply the exemption method on foreign PE income, taxpayers with a loss-making foreign PE are not in a situation, which is comparable with the situation of a taxpayer with only a domestic business. However, where Member States recognize losses of a foreign PE, a comparable situation exists, which in principle allows taxpayers to argue that losses cannot be utilized anymore and, therefore, a recapture of such losses is not in line with the freedom of establishment. It would have been interesting to see how the author places this case in the "logic" he uses for classifying the case law. Indeed, in this case, the CJEU explicitly states at §64 that "As regards comparability of the situations, ... a permanent establishment situated in another Member State is not, in principle, in a situation comparable to that of a resident permanent establishment in relation to measures laid down by a Member State in order to prevent or mitigate the double taxation of a resident company's profits."

In any circumstances, this thesis reports all relevant case law and contradictory results of this comparative approach skillfully and shows an in-depth reading of previous recent doctrinal debates relevant to the same issue (N. Bammens, D. Weber, R. Szudoczky, E. Kemmeren, J. Mon-sénégo. W. Haslehner, etc.). Classifying cases in terms of mainstream and side-track helps the reader approaching this wide material pedagogically. The author's contribution to the general EU tax law knowledge is to build bridges between the several trends in the CJEU's 30 years' case law and provide clear categories of classification.

A higher level of reflection on the value of the CJEU's case law is briefly but not extensively covered in the introduction (Chapter 2.5). The first issue that the reader will face when reading this thesis is to determine whether the field of direct taxation presents a specific incoherence, which has to be explained by this book. The author explains in p. 30 at 1.6 that the reasoning of the CJEU in other fields of law is not transposable to cases in direct tax law. However, there are numerous authoritative doctrinal opinions in the opposite direction that could have provided a more objective view of the author's critics of the CJEU's case law. The author could have looked, for instance, at Niamh Nic Shuibhne's contribution on the topic. In her book on "The Coherence of EU Free Movement Law, Constitu-

tional Responsibility and the Court of Justice” (Oxford University Press 2013), she explains that the underlying mission of the Court is to fit its judgments with the pattern of previous decisions, explaining mechanism why different treatment is not justifiable, under the theory of “coherence,” as only a coherent system treats legal subjects equally. In her review of the CJEU’s case law on the free movement, she points out to a series of tax and non-tax cases where the “comparators are mainly a simpler question of fact that demonstrates the existence of a differential treatment at a very basic empirical level” (p. 150), showing that the Court’s approach is not incoherent. The lack of constitutional powers on the CJEU explains why the case law remains at the level of one Member State’s provisions only, trying not to distinguish arbitrarily between market access hindrances and unequal treatment on a two-State comparison basis. Another landmark contribution on the reason why one should comment on the CJEU’s case law which is missing in this thesis is the paper of K. Lenaerts and J. Gutiérrez-Fons “To Say What the Law of the EU is: Methods of Interpretation and the European Court of Justice” (EUI Working Paper AEL 2013/9) explaining the gap-filling function of the CJEU, justifying the need to find comparators in the free-movement case law.

The second issue the reader may encounter is the absence of reference to a chronology in the presentation of the CJEU’s case law. The question to know what the value of the CJEU’s case law is, and how the apparent flaws in the logic of the court reconcile with the need for the Court to fill-in the gaps, and criticize domestic tax rules fragmenting the internal market are issues developed in theoretical EU law major contributions, such as T. Koopmans’ landmark article on “Stare Decisis in European Law” (1982, open access). It would have been interesting to read the author’s opinion on the reason why the CJEU changes its approach on the need for the comparators from one case to another and why the very specific nature of EU law reveals that the case law cannot build a block of precedents, hence making the comparison of cases delicate and probably impossible.

There are good reasons to think, therefore, that Jesper Johansson’s findings on the CJEU’s rather coherent approach on the one-state restrictions prohibition reconcile with the general EU law’s academic writings and suggested theories. Hoping the whole book will be translated into English, and for an updating of the on-going case law, I recommend in the meantime the reading of the English summary of the thesis (p. 319–330) providing for a fair summary.