

4. Philip Baker

I've been asked to consider dispute resolution, and particularly to address the question whether the current court system in the European Union meets the requirements of a CCCTB. I have a very clear view that the current court system does not meet the requirements of the CCCTB, but I am also of the view that the current court system does not adequately meet the problems of cross-border tax disputes in any event. So we would be here discussing this issue in any event even if the CCCTB had never been invented.

I would like to look at three elements. First, what are the features of the current court system for tax disputes? Secondly, I would like to discuss briefly the types of dispute that may arise under CCCTB. Thirdly, what solutions may be available, and which is the optimal solution.

Taking first the current court system, there are I think four aspects we can identify.

First, it is dominated by the national courts where most tax disputes are resolved. I will say more about this in a moment.

As a second element, we have the sporadic intervention of the European Court of Justice, generally by preliminary rulings on references from national courts but also on infringement proceedings. If you look at the statistics in the last couple of years about a sixth to a quarter of all judgements from the ECJ deal with some form of tax matter (both direct and indirect). At the present moment, though, the Court of First Instance has virtually no role in tax cases.

The third element of the current scenario is the limited use of ad hoc arbitration panels under the Arbitration Convention, which is presently available only for transfer pricing disputes.

The fourth element that must not be forgotten is that most cross-border disputes are still resolved under MAP, that is under the mutual agreement procedure under bilateral double taxation conventions. At present, this involves the competent authorities in negotiations, but with the possibility in the future (particularly based on the recent work in the OECD) of more use of binding arbitration to resolve otherwise unresolved disputes under MAP.

If we take these four elements and focus on the national courts where most disputes arise, there is absolutely no harmonization in this area at all. There are different types of courts: in some countries tax disputes go before specialist tax tribunals, in others the administrative courts, and in others the general courts. There is a huge variation in the number of levels of appeal: one, two, three, and occasionally four level of appealing tax cases. There are no common procedures. In some countries it is a largely written procedure; in others – like my own – it is largely oral. There are no common rules on evidence or even on the burden of proof. On such a basic point as the issue whether the revenue authority or the taxpayer bears the burden of proof, we have examples at both ends of the spectrum. There are very different cultures in countries concerning tax litigation. In some countries going to court over a tax mat-

ter is very rare, in others it is far more common and it is a regular way of resolving differences between the tax payer and the tax authorities. There are also cultural differences on referring questions to the European Court of Justice. Some countries have never referred any tax issues to the European Court. There is also a huge variation in the time taken to resolve tax cases: but I think tax payers generally would agree on one point, and that is in Europe too long is taken in resolving tax disputes through the national courts.

Above all, national courts can only take account of one tax system. They cannot act particularly well with cross-border tax problems when more than one country is involved.

This brings me to the second element of my comments: the types of disputes that will arise under CCCTB. By definition, these are all issues where more than one state is concerned, and where the resolution of the dispute will impact on more than one jurisdiction.

There are likely to be a variety of different types of dispute. Disputes on the interpretation of the Directive or the Regulation that introduces the CCCTB are the first type of relatively simple dispute: they will have to go to the ECJ for a common interpretation. Far more common will be the second type of dispute: disputes involving purely factual questions or mixed questions of fact and law, involving perhaps issues of accountancy evidence. These will include disputes over: was a particular payment made? What is the value of a particular asset at a particular time? What is the correct accounting treatment of this particular item in a balance sheet?

There will also be issues that will arise during the conduct of an audit. For example, is the taxpayer required to supply particular information? Then issues will arise after the audit is completed. For example: when does the taxpayer have to pay the taxes? Are there penalties due? What if the taxpayer doesn't pay the taxes? You should not necessarily assume that all taxpayers who join the CCCTB system will be good taxpayers, and penalties will arise or non-payment will occur.

So what are the possible approaches that might be adopted? I think there are four of them, and I have a very clear preference for one of these options.

The least attractive option is the status quo. That is, disputes are referred to the national courts of each Member State. That could easily mean that a company that has elected for the CCCTB finds itself in litigation in more than one Member State. If that happens it would destroy much of the efficiency advantages that CCCTB would otherwise introduce. That would not be an optimal solution in any sense.

A second solution might arise from a one-stop shop approach, where the courts of the Member State that is the principal Member State for the group deal with all disputes. Personally, I think that is an unlikely solution. I follow Matthias Mors here, where I think audit procedures are likely to have to be carried out by the different revenue authorities of the country concerned, and to try to bring all disputes back to one country would be unworkable. Suppose that State A is the principal State but the revenue authorities of State B are carrying out an audit of the subsidiary or the branch in that State, and a dispute arises. Is the revenue authority of State B really to come to the courts of State A to try to resolve any disputes over the audit? I don't think that will be possible.

A third possibility is an extension of binding arbitration. However, it seems to me that the type of dispute we are considering are not ones that lend themselves to arbitration. They are disputes where a rapid, definitive, traditional form of determination is required.

That leads to the fourth solution, for which in my mind the arguments are overwhelming. We need a European Tax Court: a single venue for all disputes to be resolved, so a single jurisdiction can resolve all of the issues.

Let me add some brief comments on this. While the European Tax Court may be a single court, it should be able to sit in any Member States. If there are witnesses, or documentary evidence to be considered, it will be much more efficient for the court to sit in the Member State concerned.

Secondly, and perhaps as a consequence of this, it will require a panel of tax judges. Probably at least one from each Member State involved in the CCCTB, plus a panel of experts to sit with them.

Thirdly – and that is easier said than done – the European Tax Court will have to be extremely efficient. It needs to be capable of resolving issues rapidly. If it is slow, and the apportionment of profits between the Member States waits for it to resolve the issues, it will make the CCCTB unworkable. It will need to be adequately staffed, and be proactive to resolve issues within its jurisdiction rapidly. It is, without doubt, my preferred solution.