

A European Tax Tribunal – An Idea Whose Time Has Come?

Philip Baker

Has the time come for the creation of a European Tax Tribunal, as a separate judicial panel within the European Court of Justice?

At present, all tax cases – involving issues relating to VAT, Customs Duties, and very important direct tax cases – are heard by the European Court of Justice (“ECJ”). This court consists of 25 judges – one from each Member State – assisted by 8 Advocates General. The ECJ deals with the whole range of issues relation to Community Law: external relations, the four freedoms, state aid, competition etc. Cases involving tax issues represent a substantial part of the ECJ’s case load – perhaps as many as one quarter of the total case load in recent years.

An issue which has arisen for discussion in recent months is whether the tax cases should be separated off and heard by a separate European Tax Tribunal. In large part, this suggestion has been prompted by several of the Member States who have seen themselves losing cases before the ECJ with potentially massive budget implications for the states concerned. In one case which is presently pending before the ECJ – the Banco di Cremona case – the potential budgetary consequences for the Italian government is estimated to exceed €30 billion. Over lunch at the recent meeting of the Council of Ministers on Economic and Financial Affairs on 7th June, the Ministers had a discussion of “the budgetary impact of judgments delivered by the Court of Justice in the field of taxation.” While there is no doubt that some Member States might prefer if issues of direct taxation were removed from the scope of the

Treaties entirely, that would involve an amendment to the Treaties for which there might not be sufficient support. Possibly a more acceptable solution would be the establishment of a separate tribunal to hear tax cases.

There is at least some legal basis in the European Community Treaty for the establishment of such a Tribunal. Article 25a, which was added by the Treaty of Nice, provides for the establishment of “judicial panels to hear and determine at first instance certain classes of action or proceeding brought in specific areas.” The power to create these judicial panels is exercisable by the European Council, acting unanimously on a proposal from the Commission (after consulting the Parliament and the ECJ). So far, only one judicial panel has been established. In November 2004, the Council adopted a decision creating a “European Union Civil Service Tribunal”. This judicial panel is to hear cases involving disputes between the European Communities and their civil servants. The Civil Service Tribunal (which should begin functioning in 2005) consists of 7 judges and not necessarily a judge from each Member State) and no Advocates General.

The creation of a Civil Service Tribunal is relatively uncontroversial. The use of Article 225a to create a European Tax Tribunal would be far more controversial. Also, it is not entirely clear whether it could be done under that article: the article refers to judicial panels hearing and determining “at first instance” certain classes of cases. While some tax cases are brought at first instance by the Commission bringing infringement actions against Member States under Article 226, most tax cases presently arise under Article 234 on a reference for a preliminary ruling. It is doubtful whether that could be regarded as the hearing and determination of a case “at first instance”.

Assuming that the creation of a European Tax Tribunal was legally and politically feasible, what would be the advantages and disadvantages?

No doubt the Member States would hope, that if they appointed established tax experts to this Tribunal, they might start winning rather more tax cases. Certainly, established tax experts might display rather more respect for established principles of international taxation than the ECJ displays. This criticism has also been made on several occasions that neither the existing judges of the ECJ nor the Advocates General really understand the national tax rules they are dealing with. Some critics have pointed to specific misunderstandings of particular national provisions, hopefully, a panel of established tax experts would have a greater understanding of what is, for most countries an incredibly complex area of law on which some practitioners or academics focus with their entire working life.

A separate tribunal would also move away from the requirement of having a judge from each Member State which might lead to the appointment of some judges with little knowledge of community law let alone of taxation. A separate court will also have no Advocates General: one question which is being raised is whether the Advocates General really add value to the functions of the ECJ. A separate tribunal could also potentially speed up the hearing of tax cases which otherwise have to take their place in the ever lengthening queue of cases before the ECJ.

At the same time there may be disadvantages to the establishment of a tax tribunal. Dealing only with tax matters, the tribunal may begin to diverge from the general trend of Community Law (perhaps that is what some Member States are hoping for). Article 225a mentions the possibility of appeals from the judicial panels to the Court

of First Instance on questions of law: if provision were made for such appeals, then the establishment of the Tribunal might simply add another level in the hierarchy.

No doubt there are other advantages and disadvantages which readers might think of.

Overall, and assuming that the legal and political possibility is there, the advantages of an expert tribunal with a better understanding of tax law seemed to outweigh any possible disadvantages. The author certainly thinks that the creation of a European Tax Tribunal is an idea whose time has come.

At present discussion is taking place of the possible creation of a Community Patent Tribunal.