

MPI Studies in Tax Law and Public Finance 2



Isabelle Richelle  
Wolfgang Schön  
Edoardo Traversa *Editors*

# Allocating Taxing Powers within the European Union

 Springer

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# Max Planck Institute for Tax Law and Public Finance

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Volume 2

*Edited by*

Kai A. Konrad  
Wolfgang Schön

Isabelle Richelle • Wolfgang Schön  
Edoardo Traversa  
(Editors)

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## Preface

In May 2011, the Max Planck Institute for Tax Law and Public Finance, the Université Catholique de Louvain and the Tax Institute of the University of Liège convened a conference in the Palais des Académies in Brussels to discuss basic topics of European tax law. Starting from the fact that the judicature of the European Court of Justice regarding the impact of the fundamental freedoms on the tax systems of the Member States is largely built on a non-discrimination approach, renowned experts from all over Europe were invited to present their views on further reaching aspects of the Internal Market and its consequences for the validity of national tax provisions. The overarching goal was to flesh out to what extent a substantive “allocation of taxing powers” within the European Union is on its way to a convincing overall framework. We were happy that many high-level speakers and further participants joined us for two days, sharing their views and proposals for the future development of this area. This book contains enlarged and updated versions of the speeches delivered on that occasion.

One major field of research presented in this volume refers to the value attached to basic elements of the national and international tax order when European law meets domestic taxation. Traditional pillars of income taxation – ability-to-pay, source and residence, territoriality, abuse of law, arm’s length standard – are tested with respect to their place in the emerging European tax order. Moreover, substantial matters of co-existence between different tax systems which are not covered by the non-discrimination approach like mutual recognition, cross-border loss compensation or avoidance of double taxation are examined in more detail, proposing a more courageous handling of these obstacles to a fully-fledged Internal Market.

The editors of this book hope that the findings presented in this volume are well-received by an international audience, giving rise to further debate on the requirements of a European tax order which stretches “beyond discrimination”.

Liège, Louvain and Munich, September 2012

Isabelle Richelle

Wolfgang Schön

Edoardo Traversa





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# Revisiting “Schumacker”: Source, Residence and Citizenship in the ECJ Case Law on Direct Taxation

F. Alfredo García Prats<sup>1</sup>

## Abstract

*ECJ case law on direct taxation has been very important in the development of the international dimension of direct tax systems of EU Member States. Through the application of the non-discrimination principle and the requirements of the fundamental freedoms, some of the basic structures of the implementation of income tax systems have been revised to accommodate to the needs of the single market. However, the requirements of the EU single market are fundamentally incompatible with the assumptions that have served to build the criteria under which modern income tax systems have been developed (worldwide income taxation, residence vs source, unlimited vs limited tax liability, credit vs exemption, tax treaties).*

*The Court tried to reconcile the requirements of both systems (EU Law and income taxation) in the Schumacker case, which can be considered a landmark modern case, despite the fact that it simply implicitly introduced some of the latest developments of ECJ case law on direct taxation. Since then, the Court has been moving to a broader consideration of the fundamental freedoms and then reconsidered them under the need of a certain reequilibrium between the rights derived from EU Law and the recognition of the financial interest of EU Member States.*

*By doing so, the ECJ used the interpretation of EU Law to refine some of the basic trends of cross border income taxation, both referred to limited and unlimited tax liability requirements and to the measures devoted to alleviate the negative aspects derived from the interaction of the exercise of the tax jurisdiction by two or more EU Member States simultaneously.*

*EU Law was then seen as a mechanism to improve the deficiencies raised by the corresponding and subsequent rules and mechanisms formulated by international tax law to deal with problems generated to and by cross-border income situations.*

*But more recently the EU law seems to be more in favour of other criteria that serve to balance the position between EU Law rights granted to citizens and companies and financial interests of Member States, mainly with the recognition of the*

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<sup>1</sup> The author can be reached at [alfredo.garcia@uv.es](mailto:alfredo.garcia@uv.es). The present article is part of the Research Project MICINN DER 2009-13199, VI Plan nacional de Investigación Científica, Desarrollo e Innovación Tecnológica, granted by the Spanish Ministry of Education under the title ‘El control del ordenamiento tributario español desde la óptica constitucional y comunitaria: análisis y propuestas’.

*'balanced allocation of taxing rights' and 'avoidance of double tax advantages', or the need to prevent 'risks of tax avoidance' as justification criteria à la Schumacker. This landmark case reaffirms then its prominence again in the verification of which evolution has suffered the ECJ case law on direct taxation and whether this evolution may determine the predictability of new case law based on sound and consistent principles or on allocation criteria of taxing rights. The present article analyzes to what extent the ECJ has tried to evolved such a line of reasoning through the formulation of the symmetry criteria.*

*Based on the findings and considering the relevance of the outcome of the case in the Schumacker decision, the article proposes to analyze to which extent EU Law has to stick to traditional objectives and outcomes of international tax law – alleviation of international double taxation, allocation of taxing rights, prevention of cross-border tax evasion – when dealing with fundamental freedom's requirements or, on the contrary, has to look for criteria more consistent with the integration required by a single market and a further budgetary and fiscal consolidated situation. In that sense, the consideration of the requirements of the ability to pay principle will be analyzed to see whether they can serve to promote it as an EU Law principle that guides the formulation of consistent and coherent ECJ case law on direct tax matters.*

## **1. Schumacker: A Landmark Modern Case Revisited**

16 years after the formulation of the *Schumacker* case (hereinafter, *Schumacker*), and 25 years after the first case on direct taxation, the *Avoir Fiscal* case, it is possible to recognize the relevance and important implications of these landmark cases. *Schumacker*, together with *Avoir Fiscal*, represented an important step towards the recognition of the role of citizens and companies before domestic income tax provisions, and despite international tax treaty provisions and standards, in the consolidation of the single market. Despite unanimity requirements for further fiscal integration and lack of harmonization measures in direct taxation, these cases opened up the possibility to confront direct tax matters – taxing rules and provisions, schemes, structures and assumptions – with the requirements of EU Law, initially from the fundamental (economic) freedoms, but after its consolidation in the foundational treaties and the enlargement of the EU Law objectives, with the rights and principles recognized to EU citizens.

The *Schumacker* case also showed the existence of potential points of conflict between domestic and international income tax systems of the EU Member States (with their complexity) and the neutrality requirements of the single market, encouraging both taxpayers and the Commission to search for potential incompatibilities that were expanding since.

However, *Schumacker* is also a *modern* case, to the extent that the Court confronted the income tax rule in question with EU law requirements in a very balanced position, trying to accommodate and integrate EU law requirements, on the one hand, and direct requirements and tax treaty considerations on the other, generating