Dear Colleagues:
Best wishes from the Tax Court of Canada for 2018! With the New Year, it is time to move forward in finalizing the planning for the IATJ 9th Assembly to be held in Ottawa, Canada on September 28 and 29, 2018.

The Program Committee, whose contributions are invaluable, have been operational for several months and are in the final throes of completing the program, including the selection of panelists and Chairpersons.

With respect to logistics, we have now finalized a number of items. These will be posted shortly on our website, but in the meantime, please mark the dates in your calendar! The Assembly will be held at the Lord Elgin Hotel, 100 Elgin Street, Ottawa, ON, conveniently located in the centre of downtown Ottawa, well within walking distance of various visitor sites and amenities. A block of rooms at preferred rates has been held for IATJ attendees, and we are also finalizing preferred rates at a variety of other nearby hotels. Those too will be available on our website shortly together with Assembly registration particulars and the draft program.

I attach for your information the speech kindly given by Prof. Marjaana Helminen at the Closing Dinner in Helsinki which I trust you will find of interest.

Please plan your schedule accordingly – we look forward to welcoming you to Ottawa!

Thank you for your continued support of the IATJ.

E.P. Rossiter, President

International Association of Tax Law Judges (IATJ)
General Assembly Closing Dinner, Helsinki, October 7, 2017

Prof. Marjaana Helminen

Recently, the international tax law world has gone through rapid changes. The international tax planning arena is now different from the crazy years of the early 2000s. Aggressive tax planning has become a swearword and the international tax planning structures from the early 2000s simply do not work anymore. We have now the BEPS, the EU Anti-Tax Avoidance Directive and various new or improved domestic law measures against cross-border tax avoidance. The tax climate and attitudes towards international tax planning have changed. Tax benefits are now denied from such arrangements that used to be acceptable.

This development has led to uncertainty regarding all actors; the taxpayers, the tax advisers and the tax administrations. And even you tax judges. It is not clear as to where the line between acceptable tax planning and unacceptable tax avoidance is. This situation unavoidably also means an increase in the number of tax disputes concerning tax avoidance. The tax courts, and especially the supreme courts, must clarify what is acceptable tax planning and what is prohibited tax avoidance under the tax law in force. You tax judges have a very interesting but at the same time demanding and responsible task in clarifying the mess.

It is not only pure domestic tax law that determines the line between acceptable tax planning and unacceptable tax avoidance. Increasingly also tax treaties and EU tax law have to be taken into account when dealing with cross-border tax arrangements. Tax benefits must not be denied in conflict with tax treaties or in conflict with EU law. It may, however, be difficult to determine the relevance of these different norm groups in an actual case. It may not be clear as to what the intervening threshold for the purposes of these different nom groups is. And obviously the threshold for the different purposes may be different.

EU tax law provides for a good example of the difficult questions that a tax judge must consider when deciding on a tax avoidance case. EU tax law specifically requires the Member States denying tax benefits from certain tax arrangements. We now have the EU Anti-Tax Avoidance Directive that requires taxation or denial of tax benefits in certain situations. At the same time EU law prohibits taxation in certain situations despite of a domestic law anti-avoidance provision. Despite of BEPS and the EU Anti- Avoidance Directive, the companies in EU still have the freedom to establish, the freedom to move capital and payments and the freedom to provide

services. The primary purpose of the EU founding treaties to abolish obstacles within the internal market must not be forgotten.

When determining whether a domestic law anti-avoidance provision of an EU Member Country can, should or is required to be applied, the tax judge must balance between the compelling anti-tax avoidance provisions of secondary EU law and the basic freedoms and the internal market principle of primary EU law. This puts a tax judge in a difficult position. It is not always clear as to when EU law requires denying tax benefits and when it requires respecting the basic freedoms.

It is not always even clear as to whether the applicability of a domestic law anti-tax avoidance measure must be assessed in the light of EU secondary law or in the light of EU primary law. For example, the EU Parent-Subsidiary Directive and the EU Merger Directive contain their own anti-avoidance provisions and now there is also the specific EU Anti-Tax Avoidance Directive. Somebody may think that because we have these compelling EU harmonisation measures, the scope of application of a domestic anti-avoidance measure must be evaluated only in the light of the directives. They may think, that the primary law freedoms are then irrelevant. This line of thinking, however, is wrong. Secondary EU law must not be applied in conflict with primary EU law.

The EU Court has confirmed, that only in an area which has been subject to exhaustive harmonisation, a national measure must be assessed only in the light of that harmonisation measure and not in the light of the primary law.1 The EU Court has confirmed that for example the anti-avoidance provisions of the Parent-Subsidiary Directive or the Merger Directive are not such exhaustive harmonisation measures.2

Obviously the EU Court has not yet ruled on this issue regarding the new Anti-Tax Avoidance Directive. There are however reasons to think that the same concerns the Anti-avoidance Directive. The Anti-avoidance Directive is not designed to achieve exhaustive harmonisation but it only sets a minimum standard. Despite of the Directive requirements, the application of the national anti-avoidance provisions must comply with the primary law freedoms.

It is also important to remember that the anti-avoidance provisions of secondary EU tax law must be interpreted strictly. After all, they mean a derogation from the tax rules established by the corporate tax directives.3 The objective of the corporate tax directives and the primary law basic freedoms is to remove obstacles from the EU internal market. Also the EU Anti-Avoidance

Directive means a derogation from the basic freedoms. The provisions of the Directive, thus, must be interpreted strictly.

Also the principle of proportionality must be followed when applying anti-avoidance provisions. A tax-avoidance norm and the way in which it is applied must be proportionate to the object of the provision. The norm must be suitable for its objective and it must not restrict the benefits based on EU law more than necessary. The application must not lead to a conflict with the basic freedoms. A cross-border situation must not be subject to a more burdensome tax treatment compared to a comparable domestic situation. Unless there is an acceptable justification that meets the proportionality test.

The EU Court has specifically stressed that the objective of combating fraud and tax evasion has the same scope under the anti-avoidance provisions of the corporate tax directives and as a justification for a conflict with the basic freedoms.4

Anti-avoidance norms that may lead to a restriction on the basic freedoms may be applied only in the case of wholly artificial arrangements lacking non-tax motives. The EU Court specifically reminded in the *Eqiom* and *Enka* case in this September, that in order for national legislation to be regarded as seeking to prevent tax evasion or abuses, its specific objective must be to prevent wholly artificial arrangements which do not reflect economic reality and having the purpose to obtain a tax benefit.5 A general presumption of fraud and abuse cannot justify denying directive benefits or the basic freedoms.6

The same was actually mention already in the *Cadburry Schweppes* case. It is, however, good that the EU Court reminded us. Despite of BEPS the EU corporate tax directive anti-avoidance provisions still apply only in the case of wholly artificial tax avoidance arrangements. And tax avoidance provides for a justification to restrict the basic freedoms only in the case of wholly artificial tax avoidance arrangements. For clarity reasons, there would be a need for the EU Court to confirm this also in regard to the new Anti-avoidance Directive. It is evident, however, that also the new Directive must be applied in line with the basic freedoms.

Finally, the EU Court has confirmed that a tax benefit based on the corporate tax directives or the basic freedoms cannot be subject to the condition that a company establishes that the principal purpose or one of the principal purposes of an arrangement is not to take advantage of a tax benefit.7 An anti-avoidance provision that is applied automatically to certain arrangements

without hearing the taxpayer is not in accordance with EU law.8 National tax authorities may not apply predetermined general criteria to determine whether the objective of an arrangement is tax avoidance. Instead, they must carry out an individual examination of the whole operation at issue. The EU Court has confirmed, that a general tax measure automatically excluding certain arrangements from a tax benefit, without the tax authorities being obliged to provide evidence of tax fraud and abuse, goes further than is necessary for preventing fraud or abuse.9

It will be interesting to see what the future will bring in regard to anti-tax avoidance. Will the Anti-avoidance Directive be actually amended, so that it will not exceed what is necessary in order to combat fraud or abuse? Or will it at least be interpreted very strictly in line with the existing EU Court case law on the basic freedoms and the corporate tax directive anti-avoidance provisions? And when will we have the first case dealing with the scope of the general anti-avoidance provision of the Anti-avoidance Directive?

In any case we are witnessing very interesting times regarding the international tax arena. The rapid changes keep us all busy. It is the task of you tax judges to make sure that the law and the important legal principles are followed even though there is a lot of movement on the surface. Such basic principles as the rule of law, protection of trust, no retroactivity and proportionality must be kept clear in our minds. Not to forget the in *dubio contra fiscum* principle.

Good luck working with all the tax avoidance cases piling up on your desks! Thank you and Have a nice evening!

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[1] C-14/16 Euro Park Service Case at Para. 19 and in the C-6/16 Eqiom and Enka Case at Para. 15
[2] C-6/16 Eqiom and Enka, Para. 17 and C-14/16 Euro Park Service, Paras. 21-25.
[3] C-6/16 Eqiom and Enka, Para. 26 and C-14/16 Euro Park Services, para.49.
[4] C-6/16 Eqiom and Enka, Para. 64 and C-14/16 Euro Park Service,
Para. 69. [5]C-6/16 Eqiom and Enka. Para 30 and C-196/04 Cadbury
Schweppes, Para 55. [6] C-6/16 Eqiom and Enka, Para. 31.
[7] C-6/16 Eqiom and Enka, Para. 31.
[8] C-28/95 Leur-Bloem.
[9] C-14/16 Euro Park Service, paras. 55 and 56 and C-6/16 Eqiom and Enka, Par 32