
The EC Tax Journal

BOOK REVIEW

EC Tax Law by Paul Farmer and Richard Lyal
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This book is a worthy addition to the Oxford European Community Law Series (accepted for review in this *Journal* before one of the authors joined its Editorial Advisory Board). Certain aspects of EC tax matters have been referred to earlier in the series¹ but no previous book in the series has been devoted to EC tax (although there are, of course, other specialist works²).

The series aims to meet the needs of the student and the practitioner. As Advocate General Léger referred approvingly to the book in his opinion in *Wielockx*³, its utility to the practitioner ought to be clear. Postgraduate students too, whether of tax or EC law, will find plenty here to challenge them.

Between two introductory chapters and a short conclusion the book consists of two sections. The larger one on indirect taxation and VAT, and a substantially shorter one on direct taxation and company taxation. Within the first section two chapters of just over one hundred pages are devoted to discussing, first, Articles 95 to 99 of the EC Treaty and then the basic principles and scope of the common system of VAT. These are followed by shorter chapters on specific aspects of VAT, and finally one on excise duties and similar taxes. In the second part a short introduction to certain aspects of company taxation is followed by chapters on selected topics: the parent-subsidiary directive, the merger directive, proposals for further legislation and the Arbitration Convention. Finally, comes a chapter on the highly-charged subject of direct taxation and the fundamental freedoms.

¹ See chapters 2 and 4 of *The Law of Money and Financial Services in the European Community*, John A Usher 1994.

² See, e.g., *Taxation in the European Community* by Prof A J Easson, No 5 in the European Community Law Series of The Athlone Press, 1993.

³ *Wielockx v Inspecteur der directe belastingen* Case C-80/94 [1995] STC 876 paras 31 and 37.

So far as the first part of the book is concerned, chapter 3, on articles 95 to 99, is thorough and well-referenced. Chapter 4 is, perhaps, of more immediate interest to a UK tax practitioner and is a welcome and all too rare attempt to analyse the basic concepts of VAT such as supply of goods and services, taxable persons (containing brief but useful comments on holding companies and public authorities), consideration and the taxable amount.

One of the difficulties that has to be faced in embarking on discussions of the basic principles of VAT is that, whilst the pristine concepts are to be found in EC legislation, their practical expression takes place in a distinctly national context. In relation to consideration, for example, the English courts have needed reminding that consideration in the 6th Directive is not the same concept as consideration in English common law. However, as the authors rightly note, courts from other jurisdictions have not found the VAT concept of consideration at all easy to handle.

The gap between EC concepts and national or commercial reality is, however, a difficult one to span in a book devoted to EC matters. Some tax practitioners may prefer greater consideration of certain practical issues, such as, in the discussion of triangular transactions, the significance of low-tax jurisdictions and the competition between them. However, omissions such as this from a book of this nature do not detract from its value.

In fact the text is often rooted in practicalities. Helpful worked examples are provided, as in the discussion of domestic exemptions (chapter 6) and the rights of deduction (dealt with in chapter 7). There is a useful summary of accounting and reporting obligations in chapter 8 ("Payment of Tax, Rates and Administration") and chapter 9 concludes the consideration of VAT by looking at special schemes and derogating measures.

The final chapter in the first part of the book on excise duties and similar taxes provides a very useful overview of the developments concerning harmonisation of duty in respect of tobacco, alcohol and mineral oils. In the second edition it may be worth considering expanding this chapter. Since the text was written, Council Directives 92/12 and 92/108 in particular have featured in a number of high-profile cases in the English Courts⁴ and, in future, a fuller discussion of some issues surrounding excise duties is likely to prove valuable.

⁴ See, for example, *R v Commissioners of Customs and Excise ex parte Emu Tabac Sarl & Ors* Case C-296/95 (reference for a preliminary ruling) *The Times* 10th August 1995; *R v Cousins & Anr* 28th Nov 1994 (request for reference refused); and *R v HM Customs and Excise ex parte Eurotunnel Plc* 17th February 1995 [1995] CLC 392.

Turning to the second part of the book, the discussion of the Parent-Subsidiary Directive is particularly useful. It pays attention to the practical issues, such as the use of tax-havens and treaty shopping, whilst engaging in stimulating debate on some of the more difficult aspects of the Directive, such as which state is required to give the benefit of the Directive when a company has links with more than one member state. The position of Gibraltar and Madeiran companies in relation to the Directive has, of course, become a significant legal and political issue and perhaps we can look forward to seeing the authors' views on it in the future.

The explanation of the Merger Directive is again useful. Someone one day may wish to test the view suggested by the authors that Article 4(1) of the Directive requires the deferral of taxation of not only actual gains but also "tax gains", such as are taxed by balancing charges in respect of UK capital allowances.

Following the discussion of proposals for new legislation in the direct tax field and the Arbitration Convention, there is a detailed and balanced discussion of the impact of the fundamental freedoms in the sphere of direct taxation. On the one hand, the authors point out where the fundamental freedoms can be pushed further, such as in their criticism of *Bachmann* mentioned above and, perhaps, in relation to *Werner*. On the other hand, they do not expect the non-discrimination principle to apply whenever double-taxation is to be found. In their view: "...double-taxation arising from conflicts of tax jurisdiction must be resolved by convention or harmonisation."⁵ How much one can expect of the fundamental freedoms is, of course, something which is subject to development and, quite apart from other cases which are proceeding to the Court of Justice, those brought by *Hoechst* and *Pirelli* may result in some interesting developments in this area.

In reading the chapter on the fundamental freedoms one is struck by just how quickly the law in relation to direct taxation is developing. Since the publication of the book earlier this year the ECJ has decided *Schumacker*⁶, *Wielockx*⁷ and *Commission v Luxembourg*⁸ whilst the Commission and the Council have made statements⁹ on the transfer of small and medium-sized businesses¹⁰ and the

⁵ See p 315.

⁶ Case C-279/93 [1995] ECR I-225.

⁷ Case C-80/94 11th August 1995 [1995] STC 876.

⁸ Case C-151/94 26th October 1995.

⁹ See, most recently, the Council Communication on the Commission Recommendation of 7th December 1994 on the transfer of small and medium-sized enterprises, OJ 1994 No C 400/01 (31.12.94).

Arbitration Convention has entered into force. In addition to this, attention amongst writers in this area has increasingly been paid to the wider impact of the fundamental freedoms. Paul Farmer has himself written in this *Journal* on the impact of fundamental freedoms and double-taxation treaties. The fundamental freedoms are, of course, not the only features of the EC Treaty that impinge on direct taxation. Increasingly, state aid (which is briefly referred to in chapter 3) is seen as of practical significance in this context¹¹ and there are currently a number of investigations by the EC Commission into whether or not certain taxes constitute illegal state aid¹².

It is not just in relation to direct taxation that rapid development is occurring. There have been further decisions of the Court of Justice on Article 95 and on VAT. There has also been further legislation, for example, on VAT simplification¹³ and doubtless there will be much more.

So far as excise duty is concerned, we have already referred to *Emu Tabac* which has been referred to the Court of Justice for guidance on the meaning of Article 8 of Council Directive 92/12/EEC. So far as rates of excise duty on alcohol are concerned, these are being reviewed pursuant to Council Directive 92/84/EEC. The review is bound to attract significant interest and has already led to questions being tabled by MEPs.¹⁴ All this tends to indicate that a new and expanded edition of this book is likely to be required sooner rather than later.

One topic for which room is unlikely to be found in a new edition is customs duty - which has, of course, a quite distinct foundation in Community law. Yet there

¹⁰ This has raised the profile of taxes on gifts and inheritances within the EC. In this context it is interesting to note that the deemed residence rules in Dutch gift and inheritance tax have already faced a challenge in the Dutch Courts based on the freedom of capital movements: see Decision of the Lower Court of The Hague of 4th February 1991 published in *FED* 1991, No. 420 referred to by P J te Boekhorst 'Netherlands Inheritance and Gift Tax' Vol 34 *European Taxation* [1994] p 391 at p 393.

¹¹ See *Ayuntamiento de Valencia, Banco de Credito Industrial SA now Banco Exterior de Espana SA* Case C-387/92.

¹² See, for a recent example, the Commission's current investigation into the tax measures introduced by Ley Foral 12/1993 (Navarre), and Normas Forales 18/1993 (Alava), 5/1993 (Vizcaya) and 11/1993 (Guipuzcoa) referred to in an answer by Mr Van Miert to Written Question E-1897/95 put by Joaquin Siso Cruellas, OJ 1995 No C 277/34 (23.10.95).

¹³ Council Directive 95/7/EC of 10th April 1995, OJ 1995 No L102/18 (5th May 1995).

¹⁴ See, for example, Written Question P-2000/95 by Glyn Ford to the Commission, OJ 1995 No C 277/43 (23.10.95).

is no doubt that it is an area of increasing importance. UK lawyers are not as used as their continental counterparts to dealing with customs duty matters but now that the UK has a VAT and Duties Tribunal which can hear customs duty matters this is likely to change. Furthermore, the decisions of the Court of Justice on post-clearance demands, for example, have attracted more political than legal analysis. This is so notwithstanding that the issues with which they deal are of fundamental importance. For example, one of the questions in *R v Commissioners of Customs and Excise ex parte The Faroe Seafood Company Ltd*¹⁵ concerns which party bears the burden of proof of certain factual matters. At the time of writing, the judgment of the ECJ is awaited with considerable interest.

In their preface to the book the authors say that they "have sought to cater for the needs both of Community lawyers who need some knowledge of the specialised field of taxation, and of tax lawyers and accountants who need some knowledge of the Community dimension which is of increasing importance in their work." This is an easy objective to state but difficult to achieve. Both groups of specialists will be grateful to the authors for their efforts.

Timothy Lyons
Amanda Hardy

¹⁵ [1994] CMLR 65. Other cases are pending before the ECJ, e.g., *Cateringros Srl v Amministrazione delle finanze dello Stato* Case C-60/95 and *Pascoal & Filhos v Fazenda Publica* Case C-97/95.