The CJEU’s case law on WHT

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Division of competences

CJEU in *Saint-Gobain* (C-307/97) (para. 56):

'…in the absence of unifying or harmonising measures adopted in the Community, (…) the Member States remain competent to:

- **(1)** determine the criteria for taxation of income and wealth
- **(2)** determine the connecting factors for the purposes of allocating powers of taxation as between themselves.'
- 'As far as the exercise of the power of taxation so allocated is concerned, the Member States nevertheless **(3)** may not disregard Community rules. According to the settled case-law of the Court, although direct taxation is a matter for the Member States, they must nevertheless exercise their taxation powers consistently with Community law.'

WHT features

- Simple mechanism of withholding
- Applied by a private party for the benefit of the budget
- Domestic or cross-border payments
- Gross income tax base
- Both passive and active income streams
- Variable degree of affiliation between the payer and beneficiary

Categories of WHT cases

- Discriminatory source taxation - in general
  - Dividends
  - Interest
  - Artists
- Discriminatory tax base
- Discriminatory collection mechanism
- WHT neutralisation in the MS of the recipient
- Curiosities

Discriminatory source taxation

- **Dividends**
  - C-170/05 *Denkavit Internationaal BV*
  - C-379/05 *Amurta SGPS*
  - C-521/07 *Commission v NL*
  - C-540/07 *Commission v IT*
  - C-487/08 *Commission v ES*
  - C-284/09 *Commission v DE*
  - Joined cases C-10/14, C-14/14 and C-17/14 *J.B.G.T. Miljoen and others*

Discriminatory source taxation

- **Interest**
    - C-282/07 *Truck Center SA*
- **Artists**
    - C-290/04 *FKP Scorpio Konzertproduktionen GmbH*
    - C-345/04 *Centro Equestre da Lezíria Grande Lda*

Discriminatory tax base- interest

- **C-105/08 Commission v PT**
  - 20% at gross v 25% at net

Example presented by the European Commission	
Interests	10.000
Costs	9.000
Profit	1.000
Tax non-resident 20 % interest	2.000
Tax residents 25 % profit	250

Example presented by Portugal	
Interests	10.000
Costs	5.000
Profit	5.000
Tax non-resident 10 % interest	1.000
Tax residents 25 % profit	1.250

Discriminatory tax base- interest

- **C-105/08 Commission v PT**
  - *27 In the present case, in order to prove that the Portuguese legislation, which, it is not disputed, treats resident and non-resident legal entities differently with regard to IRC, results in higher taxation of non-resident legal entities, the Commission relies on an arithmetical example based on the assumption that the profit margin achieved by the entity in question in that example is 10%.*

    (…)
  - *30 It is, however, clear that, in the present case, the Commission failed to produce, either during the written procedure or the hearing, and not even after an express request by the Court, any conclusive evidence whatever which would have been capable of establishing that the figures which it puts forward in support of its argument are in fact borne out by the actual facts and that the arithmetical example on which it relies is not purely hypothetical.*

Discriminatory WHT liability - Interest

- **C-18/15 *Brisal - Auto Estradas do Litoral AS***
  - **3 categories of expenses**
    - Business expenses directly related to the income received
    - Financing costs
    - Fraction of general expenses (overheads)
  - *49 (...) the mere fact that that evidence is more difficult to provide cannot authorise a Member State to deny categorically to non-residents, as taxpayers with limited liability, a deduction which it grants to residents, as taxpayers with unlimited liability, given that it cannot a priori be ruled out that a non-resident is able to provide relevant documentary evidence enabling the tax authorities of the Member State of taxation to ascertain, clearly and precisely, the nature and genuineness of the business expenses in respect of which deduction is sought.*
  - *50 Nothing prevents the tax authorities concerned from requiring a non-resident to provide such proof as they may consider necessary in order to determine whether the conditions for deducting expenses provided for in the legislation at issue have been met and, consequently, whether to allow the deduction requested.*

Discriminatory WHT liability - interest

- **C-257/20 'Viva Telecom Bulgaria' EOOD**
  - *Article 63 TFEU (…) must be interpreted as* ***not precluding*** *national legislation which provides for*
    - *the taxation in the form of a withholding tax of notional interest that a resident subsidiary which has been granted* ***an interest-free loan*** *by its non-resident parent company would have had to pay to the latter had the loan been concluded under market conditions,*
    - *where that withholding tax applies* ***to the gross amount of that interest****, without it being possible to deduct, at that stage, expenses related to that loan since a subsequent application to that effect is necessary for the purpose of recalculating that tax and* ***making a possible refund****, in so far as,*
    - ***first****, the length of the procedure laid down for that purpose by that legislation is not excessive and,* ***second****, interest is owed on the amounts refunded.*

Discriminatory collection mechanism

- C-433/04 *Commission v BE*
- C-498/10 *X BV (football club X)*
- Joined Cases C-53/13 and C-80/13 *Strojírny Prostějov, a.s. and ACO Industries Tábor s.r.o.*
- C-553/16 *‘TTL’ EOOD*

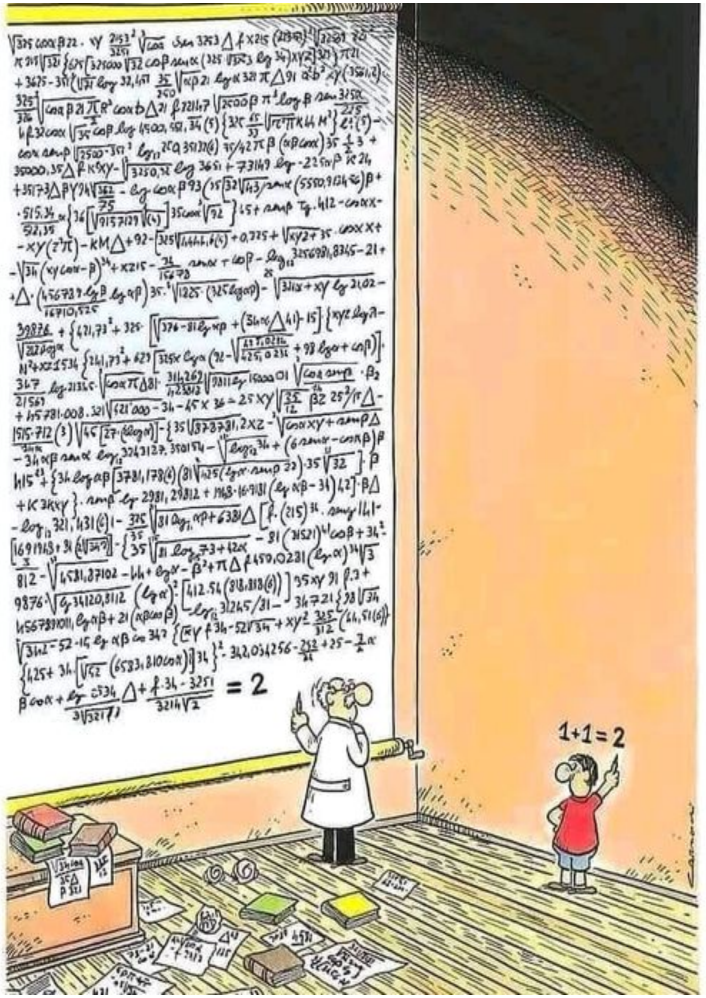
WHT neutralisation in the MS of the recipient

- C-513/04 *Mark Kerckhaert and Bernadette Morres*
  - C-128/08 *Jacques Damseaux*
  - C-194/15 *Véronique Baudinet and Others*
- C-157/10 *Banco Bilbao Vizcaya Argentaria SA*

Curiosities

- C-575/17 *Sofina SA and Others*
- C-601/23 *Credit Suisse Securities (Europe) Ltd*

To summarise…



Conclusion

- MS of source must ensure equal tax burden of domestic and foreign income recipients
- Deduction of costs at source may be due but subject to (perhaps onerous) proof
- WHT as a collection mechanism is justified if the beneficiary is not established in the source state (no PE)
- But it may be unjustified if
  - the income is not taxable in the source state or
  - the beneficiary has a taxable residence in the source state