ISSUES OF COMPANY TAXATION IN THE EU

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FEE TAX DAY

MENU

- Migration to lower tax regimes
- Removing double taxation
- Keeping abuse in check
- Transfer pricing troubles
- Cross border losses
- Administrative burdens for SME’s

Migration to lower tax regimes

- When a taxpayer moves for employment from a low tax state to a high tax state, he must face the higher tax burden (C-336/96, Gilly, 12.05.1998)(nrs. 46-48 and 54)

- When a taxpayer moves from a high tax state to a low tax state, he must be able to benefit from the lower tax burden?

Migration to lower tax regimes

C-196/04, Cadbury Schweppes, 12.09.2006

- 49: “any advantage resulting from the low taxation to which a subsidiary established in a M.S. other than the one in which the parent was incorporated is subject cannot .. authorise that M.S. to offset that advantage by less favourable tax treatment of the parent”.

- I.e., but for abuse, a taxpayer who moves to a low tax country is entitled to the benefit of low taxation.

Migration to lower tax regimes

BUT C-298/05, Columbus Container, 06.12.2007

39:"Since partnerships such as CC. do not suffer any ..disadvantage in comparison with partnerships established in Germany, there is no discrimination.."

- I.e. there is no restriction when a taxpayer moves to a low tax country and is denied the benefit of the lower tax burden, because of a credit system, because his tax burden remains unchanged.

Migration to lower tax regimes

- ECJ: There is no violation of the freedoms, when a taxpayer moves abroad but remains subject to the same tax as before.
- This position = a non-discriminatory restriction, because the taxpayer is denied the normal tax benefit of his move.
- This position = discrimination, because the taxpayer is entitled to the benefit only when he moves internally to a low tax company, within the same jurisdiction, not when he moves to another jurisdiction.

Elimination of double taxation

C-436/08, Haribo-Riegel, 10.02.2011

170: “Since EU law ..**does not lay down any general criteria** for the attribution of areas of competence between M.S. in relation to the elimination of double taxation within the EU, the fact that both the M.S. in which the dividends are paid and the M.S. in which the shareholder is resident are liable to tax those dividends, does not mean that the M.S. of residence is obliged ..to prevent the disadvantages ..”

Elimination of double taxation

CRITERIA FOR ELIMINATING DOUBLE TAXATION

- **Double juridical taxation**: no taxation in the country of source: parent/subsidiary directive, interest/royalty directive, interest/savings directive.

- Is n't this a clear indication by the EU legislator how double juridical taxation should be resolved for companies?

Elimination of double taxation

CRITERIA FOR ELIMINATING DOUBLE TAXATION

- **Double economic taxation**: exemption and credit method are equally accepted in the parent/subsidiary directive.
- A M.S. may apply the exemption method to eliminate double taxation internally and the credit method for incoming dividends, provided that the credit is efficient and equivalent to exemption (C-446/04, FII group litigation, 12.12.2006, C-436/08, Haribo-Riegel 10.02.2011)

Elimination of double taxation

EQUIVALENCE OF CREDIT AND EXEMPTION

- « Exemption vaut impôt »: no further investigation of tax burden on upstream domestic profits.
- Credits require proof of effective taxation.
- WHT are not credited against CIT.
- Problems: losses, sub-subsidaries, prior tax years, burden of proof, quid when there is no evidence (Haribo)

ABUSE: (non-tax) Community law

- 33/74 van Binsbergen, 03.12.1974
- 115/78, Knoors, 07.12.1979 nr. 25: “ .. It is not possible to disregard the legitimate interest which a Member State may have in preventing certain of its nationals by means of facilities created under the Treaty, **from attempting wrongfully to evade the application of their national legislation** ..”

ABUSE: C-255/02 Halifax, 21.02.2006

Opinion Poiares Madouro, 07.04.2005

- 69: " .. This notion of abuse operates as **a principle governing the interpretation of Community law** .. "
- 75: "To the extent to which that principle is conceived as a general principle of interpretation **it does not require express legislative recognition** .. Even if there were a provision in the 6th. Directive expressly stating that principle, it could be regarded .. **as the mere** .. **codification of an existing general principle**."

ABUSE: Halifax - VAT

75: “ .. It must also be apparent from a number of objective factors that the **essential aim** of the transactions concerned is to obtain a tax advantage .. **the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other, than the mere attainment of tax advantages**.”

ABUSE: C-194/04, Cadbury- Schweppes

36: “ .. The fact that a Community national .. Sought to profit from a tax advantege in force in (another) Member State .. cannot in itself deprive him of the right to rely on the provision of the Treaty.”

51: “A national measure restricting the freedom of establishment may be justified where it specifically relates to **wholly artificial arrangements** aimed at cricumventing the application of the legislation of the Member State concerned”.

ABUSE: C-425 Part Service, 21.02.2008

45: « .. The Sixth Directive must be interpreted as meaning that there can be a finding of an abusive practice when the accrual of a tax advantage constitutes **the principal aim** of the transaction .. »

ABUSE: C-321/05,Kofoed, 05.07.2007

Definition of abuse in the merger directive

37: “ Under Article 11(1)(a) of Directive 90/434, by way of exception and in specific cases, Member States may refuse to apply all or any part .. of the provisions of that directive .. where the exchange of shares has tax evasion or tax avoidance as its principal objective or **as one of its principal objectives**.”

ABUSE: conclusions on EU case law

- There are two concepts of abuse in ECJ case law: one in which tax is the principal or one of the principal motives for the transaction or arrangement (Halifax, Part Service) and another in which tax is the only motive for the arrangement and the arrangement is not wholly artificial (Cadbury-Schweppes)

ABUSE: in directives

- The definition of abuse in the merger and interest royalty directives (Kofoed) is the third and widest concept of abuse and is very close to national tax concepts of abuse: **tax evasion or tax avoidance is the principal aim or one of the principal aims**.

ABUSE: when do various concepts apply

- Could it be that the **first** concept: essential or principal aim (Halifax, Part Service), applies to EU law in a domestic VAT context and that the **second** concept: exclusive aim and no wholly artificial arrangement (Cadbury Schweppes), applies when fundamental freedoms are at stake?
- The **third** concept: principal or one of its principal aims would only apply in purely domestic cases and when specifically stated in a directive (merger, interest-royalty).

Transfer pricing + losses

- Towering cost of transfer pricing documentation and growing complexity of profit allocation.
- Very restrictive rule on transfer of losses within the same group (C-446/03, Marks & Spencer).
- No transfer of losses from PE to HQ (C-414/06, Lidl Belgium)

Transfer pricing + losses

SOLUTIONS

- Common Consolidated Corporate Tax Base: if no unanimity -> enhanced cooperation or home taxation with common European base.

- Temporary piggy backing of losses with recapture in case of profit (ex. Austria).

Administrative burdens SME's

SOLUTIONS

- Home state taxation for SME's.
- Variant: no apportionment, but allocation of profits in accordance with uniform tax base.
- Uniform administrative VAT rules for cross border transactions & recovery of input tax.
- VAT on cross border B2B supplies at uniform minimum rate in M.S. of origin and deduction of input tax in M.S. of destination.