

*Tax News Bulletin**8 September 2017*

European Court of Justice rules French anti abuse rule regarding exemption from DWT violates the freedom of establishment

On 7 September, 2017, the ECJ rendered its decision in the “Eqiom case” or “Holcim case”. In this case, not only did the Court rule that France’s anti-abuse clause that limits the benefits of the EU Parent-Subsidiary Directive (“EU PSD”) is a violation of the freedom of establishment, it also stated a number of interesting considerations.

1 Summary

Relevant legal framework

The EU PSD exempts, among other things, profit distributions from a subsidiary in one member state to a parent company in another member state from withholding tax in the subsidiary member state. However, the EU PSD shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse.

France has implemented the EU PSD in its domestic law. However, the relevant French legislation holds that when the parent company is controlled, directly or indirectly, by one or more persons who are not resident in an EU member state, the exemption from DWT shall not apply, unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of the exemption.

Relevant facts

Eqiom SAS (formerly Holcim), a company under French law and resident of France, is 100% owned by Enka, a company under Luxembourg law and resident of Luxembourg. Enka is owned more than 99% by Waverly Star Investments Ltd, a company under Cypriot law and resident of Cyprus, which in turn is owned 100% by Campsores Holding SA, a company under Swiss law and resident of Switzerland. In

2005 and 2006 Eqioun distributed dividends to Eqiom. Following an audit, the French tax administration imposed DWT on the distributions. Eqiom and Enka both requested to be exempt from the DWT. The French tax administration, and tax courts denied the request, based on the ground that Enka was controlled by a company that is not a resident of the EU, and that no (or insufficient) proof had been provided that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of the exemption. The French Conseil d'État referred the case to the ECJ for a preliminary ruling.

2 ECJ decision

The ECJ rules that France's anti-abuse measure violates the freedom of establishment. In order for national legislation to be regarded as seeking to prevent tax evasion and abuses, its *specific objective* must be to prevent conduct involving the creation of wholly artificial arrangements which do not reflect economic reality, the purpose of which is unduly to obtain a tax advantage. Consequently, a general presumption of fraud and abuse, without the tax authorities being required to provide even *prima facie* evidence of fraud and abuse, would go further than is necessary for preventing fraud and abuse and therefore cannot justify either a fiscal measure which compromises the objectives of a directive, or a fiscal measure which prejudices the enjoyment of a fundamental freedom guaranteed by the treaties.

3 Interesting considerations of the ECJ

When questions referred concern both the provisions of the EU PSD and those of the Treaty, according to settled case-law, any national measure in an area which has been the subject of exhaustive harmonization at the level of the European Union must be assessed in the light of the provisions of that harmonizing measure (in this case the EU PSD), and not in the light of the provisions of primary law (the EU treaty, more specifically the freedom of establishment. According to the ECJ, this area has not been exhaustively harmonized as the EU PSD "recognizes solely" the Member States' power to apply domestic or treaty-based anti-abuse provisions. Such provisions may therefore be assessed in the light of primary EU law.

In this respect, it is interesting to note that as of 1 January 2016, the EU PSD contains its own anti-abuse provision (principle purpose test), and no longer "solely recognizes" the power of member states to adopt their own anti-abuse measure. It is therefore likely that in future cases relating to 2016 or later years the ECJ would rule that this area is in fact subject of exhaustive harmonization and that therefore the national anti-abuse measures must be assessed in light only of the EU PSD.

A next question, however, is whether – under the amended EU PSD – it would really matter if a national anti-abuse measure should be assessed solely in light of the EU PSD or solely in light of primary EU law, as the Court goes on to note that the objective of combating fraud and tax evasion has the same scope, whether it is relied on under (national anti-abuse measures allowed by) the EU PSD or under primary law. The uncertainty lies in that we do not know whether the Court would rule the same under the amended EU PSD now that this has its own anti-abuse provision.

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