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CJEU Developments

Belgium – CJEU rules Belgian secret commissions tax and administrative tolerance of it are incompatible with the free movement of services

On 24 February 2022, the CJEU decided that the secret commissions tax for missing fee forms and the administrative tolerance in relation to this tax are unjustified restrictions to the free movement of services (*Pharmacie populaire – La Sauvegarde SCRL & Pharma Santé – Réseau Solidaris SCRL v Belgian State*, C-52/21 and C-53/21).

Article 57 of the Belgian Income Tax Code (BITC) links the deductibility of certain expenses (such as fees, commissions) to the filing of fee forms and summary statements. If these formalities are not respected, the expense is not deductible and may be subject to distinct taxation of 50% or 100% (secret commissions tax). However, according to an administrative tolerance, taxpayers established in Belgium are exempted from these formalities when the beneficiaries are subject to the accounting obligations of companies foreseen by the Belgian Economic Law Code and are not exempt from issuing invoices for the services which they provide under the VAT Code. Nevertheless, this tolerance is not applicable in the case of non-resident service providers. On 4 December 2020, the Belgian Court of Appeal of Liège referred a question to the CJEU for a preliminary ruling in this regard.

The case concerns two Belgian companies, active in the trade of pharmaceutical products, which had concluded a contract with a Luxembourg company for the transport of medicines. The Belgian companies had not prepared any individual fee forms and summary statements for the expenses invoiced by the Luxembourg company between 2008 and 2012. The Belgian tax authorities therefore rejected the deduction of these expenses and applied the secret commissions tax of 50%.

In its judgment of 24 February 2022, the CJEU decided that the Belgian legislation combined with the administrative tolerance, requiring a reporting obligation with a penalty regime, is likely to make the services provided by a provider established in a member State other than Belgium less attractive to recipients of the services established in Belgium. The Court also considers that this restriction to the free movement of services cannot be justified by the need to ensure the effectiveness of tax audits, exchange of information and the fight against tax fraud. In this regard, according to the CJEU, the sanction is disproportionate to the aim pursued because it is applied even when the service provider has actually declared its Belgian source income in the State where it is established and even in absence of tax fraud.

We note that the Belgian legislator has already adapted Article 57 BITC in this direction and that this change is applicable to income attributed as from 1 January 2021. This decision is however still interesting for pending litigation.

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Bulgaria – CJEU rules that assessing withholding tax on notional interest in cases of interest-free loans does not infringe EU law

On 24 February 2022, the CJEU delivered its judgment on the *Viva Telecom Bulgaria* case (C-257/20). The case concerns a Bulgarian company which received an interest-free convertible loan with a 60-year maturity from its EU-based sole shareholder.

The CJEU decided that EU law does not preclude national legislation imposing withholding tax on notional market-based interest (mandated under national tax anti-avoidance rules) calculated with reference to interest-free loans. Such withholding tax cannot be exempt under the regimes of the IRD (EU Interest - Royalty Directive 2003/49/EC) and the PSD (EU Parent-Subsidiary Directive 2011/96/EU) as there have been no actual payments of interest.

The CJEU also ruled that the fact that the withholding tax is assessed on the gross amount of the notional interest and deduction of expenses related to the grant of the loan is available only under a separate subsequent application for recalculation of the withholding tax, does not infringe the freedom for movement of capital provided the length of the procedure for refund of the withholding tax after deduction of expenses (as regulated in the national legislation) is not excessive and interest is owed on the refunded amounts.

The facts of the tax dispute are broadly as follows, a Bulgarian company had received an interest-free convertible loan with a 60-year maturity from its EU-based sole shareholder. Under the loan arrangement, the Bulgarian borrower could waive the obligation to repay the loan if at any time after the date of financing the outstanding loan is converted into capital of the Bulgarian subsidiary. Following a tax audit, the Bulgarian tax authorities assessed 10% withholding tax on notional market-based interest that should have been payable to the shareholder. During the periods covered by the tax audit, the Bulgarian borrower had not settled the loan (or parts thereof) or converted the loan into capital as per the loan arrangement. Due to the above and considering the interest-free nature of the loan, the Bulgarian tax authorities challenged the transaction under the local tax general anti-avoidance rules. Under the Bulgarian tax rules interest-free loans and loans deviating from the relevant market conditions are considered tax avoidance by way of an irrebuttable presumption. Hence, the Bulgarian tax authorities assessed 10% withholding tax on a notional market interest on the loan in question. The tax dispute reached the Supreme Administrative Court in Bulgaria which initiated the CJEU proceedings in the current case.

Based on the CJEU decision, EU Member States may adopt measures for prevention and combating of tax evasion/tax avoidance (as far as these as proportionate and justifiable in terms of the objectives to be achieved) and respectively, impose tax liabilities in case of breaches of the national tax anti-avoidance measures (e.g., even on notional charges/interest). In this sense, interest-free loans / not market-based interest under loan arrangements (even if third party loans) may lead to tax complexities/uncertainties which may result in tax assessments and penalties in the case of tax audits.

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Germany – AG Opinion on requirements for withholding tax refund claimed by non-resident corporate taxpayers with a portfolio shareholding

On 20 January 2022, AG Anthony Collins opined in the CJEU case C-572/20 (*ACC Silicones*) that Germany's requirements for withholding tax claims filed by non-resident corporate taxpayers with seat or place of management in the EU or EEA are too strict in two respects.

In response to the CJEU decision in *Commission vs. Germany* (C-284/09), the German legislator in 2013 introduced a law according to which non-resident corporate income taxpayers whose shareholding in the distributing German company is too small to benefit from the Parent-Subsidiary Directive (i.e. below 10%) can claim a withholding tax reduction to 0% if the requirements of the new procedural rules are met.

Two conditions of the 2013 law are questionable in the case at hand, in which a UK company, owning 5.26% of the shares in a German company, received dividends in the years 2006-2008 from the latter company and now claims a withholding tax reduction from 15% (tax treaty level) to 0%.

First, as regards the requirement that the German withholding tax was neither credited against taxes levied by the residence state of the shareholder or its direct or indirect shareholder(s), nor deducted as expense by any of the said companies, AG Collins is of the view that it restricts the free movement of capital (Article 63 TFEU).

This is because in a purely domestic situation no such requirement existed. In 2006-2008, the dividend was tax exempt at the level of the German shareholder who, in addition, got a credit for the withholding tax. According to the AG, the restriction cannot be justified by the balanced allocation of taxing rights between Member States or the need to avoid that withholding tax be taken into account twice. Germany must refund the withholding tax unless the tax treaty ensures that it is fully credited in the residence state of the shareholder.

Secondly, non-resident taxpayers must provide a certificate issued by the authorities of their residence state which proves that no credit or deduction was granted at the level of any direct or indirect shareholder. AG Collins considers this requirement to be disproportionate because it can be "practically impossible" to meet.

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Spain – CJEU rules Spanish legislation governing the obligation on tax residents in Spain to declare assets or rights held abroad is contrary to EU Law

In its judgment dated 27 January 2022, (C-788/19), the CJEU ruled that the Spanish legislation governing the obligation to provide information concerning assets or rights held in other Member States of the EU or the EEA is contrary to the free movement of capital (Articles 63 TFEU and 40 EEA Agreement).

According to the Spanish legislation, the failure to file Tax Form 720 with the information in respect of foreign assets or rights, or the late or incorrect filing, will determine the regularization of the tax due on the undeclared value of those assets or rights as 'unjustified capital gains', even if the tax obligation was statutory barred. Additionally, such failure to comply, or partial or late compliance, will be subject to a tax penalty amounting to 150% of the tax regularization, which may be applied concurrently with flat-rate fines.

The CJEU has now ruled that, although the legislation at issue appears appropriate for ensuring the attainment of the objectives pursued, the restrictions on the free movement of capital are disproportionate with regards to the three issues raised in the European Commission's referral:

- The failure to comply with, or the partial or late compliance with, the obligation to provide information concerning assets and rights located abroad entails the taxation of undeclared income corresponding to the value of those assets as 'unjustified capital gains', with no possibility of benefiting from limitation;

- Allowing a proportional fine of 150% of the tax calculated on amounts corresponding to the value of those assets or those rights, which may be applied concurrently with flat-rate fines; and

- Allowing disproportionate flat-rate fines in comparison to the penalties imposed by similar infringements in a purely national context and the total amount of which is not capped.

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National Developments

Germany – Fiscal Court of Munich dismisses claim of Canadian pension fund after CJEU decision in C-641/17 - College Pension Plan of British Columbia

On 6 December 2021, the Fiscal Court of Munich rendered its decision in the case of the College Pension Plan of British Columbia which is a pension fund in the legal form of a trust under Canadian law. In 2007-2010, it received dividends from German companies which were subject to a final withholding tax of 15% (after application of the Germany-Canada tax treaty).

The College Pension Plan claimed to be discriminated against because in a comparable situation a German pension fund would have the possibility to deduct for tax purposes its technical provisions which it had to account for in respect of its future pension liabilities. Whilst it is true that a German pension fund also had to pay corporate income tax of 25% in 2007 and 15% as of 2008, the tax base was much lower due to the deduction of the technical provisions. Therefore, the College Pension Plan claimed a refund of the entire withholding tax paid.

Upon referral by the Fiscal Court of Munich, the CJEU held in its decision of 13 November 2019 (*College Pension Plan of British Columbia,* C-641/17), that Articles 63 and 65 TFEU preclude national legislation, such as the German rules in question, provided that the non-resident pension fund allocates dividends received to make provisions for pensions which it will have to pay in the future, this being a matter for the referring court to ascertain.

Having examined the financial statements of the claimant, the Fiscal Court of Munich found that no dividends were allocated by the fund to make provisions for future pension payments. Moreover, the pension commitments shown in the "notes to the financial statements" could not be considered as equivalent to provisions for pension payments because they were calculated without considering the dividend income received.

The court therefore dismissed the claim and disallowed the appeal against the judgment. The plaintiff has filed a complaint against the non-admission of appeal which is now pending with the Federal Fiscal Court (case no. I B 4/22).

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Italy – Italian Tax Court of First Instance rules Italian withholding tax levied on dividends distributed to a Luxembourg investment fund is incompatible with EU law

On 7 February 2022, the Pescara Tax Court of First Instance ruled that a Luxembourg SICAV is comparable to an Italian investment fund and, therefore, is entitled to the refund of the full withholding tax suffered on the dividends received from Italian companies.

The case originates from a refund claim submitted by a Luxembourg investment fund in the form of Société d'investissement à capital variable (SICAV) to the Italian Tax Authorities requesting the full refund of the dividend

withholding tax (equal to 20% until July 2014 and increased to 26% from 2015 onwards) suffered by the foreign investment fund with respect to the dividends received from Italian listed companies during the years 2014, 2015 and 2016. It should be noted that the investment fund did not have access to the reduced dividend withholding tax provided by the Double Tax Treaty between Italy and Luxembourg.

The request for refund was based on EU law, in particular on breaches of Articles 49, 54 and 63 TFEU by the Italian legislator to the extent it provided - during the years at issue - for the application of dividend withholding tax in the case of the non-resident investment fund whilst Italian investment funds were totally exempt on the same type of Italian-sourced dividends thus discriminating against the former to the advantage of the latter.

In the absence of a reply from the Italian Tax Authorities, the investment fund filed an appeal before the Tax Court against the "silent" rejection of the refund claim.

The Judges of the Pescara Tax Court of First Instance upheld the request for refund of the withholding tax suffered by the claimant. The Judges recognised that the claimant, being an investment fund in the form of a SICAV harmonised under Directive 2009/65/EC and subject to the supervision of the *Commission du Surveillance du Secteur Financier* (CSSF) was comparable to an Italian fund, both being subject to the supervision of the respective competent authorities.

In reference to relevant jurisprudence of the CJEU (i.a., *Santander*, C-338/11), the Judges confirmed that the application of the dividend withholding tax towards the non-resident SICAV was solely due to the fact that the foreign investment fund was not resident in Italy and therefore it constituted an infringement of Articles 63 and 49 of the TFEU.

Lastly, the Judges highlighted that the discriminatory treatment was also acknowledged by the Italian legislator itself which, starting from 2021, abolished the withholding tax toward EU qualified investment funds (but with effect only from 2021 onwards, see EU Tax News – Issue 2021 – nr. 1).

The Pescara Tax Court of First Instance judgment is of fundamental importance since it represents the first strong official confirmation by a Tax Court in Italy of the discriminatory tax treatment in Italy suffered by foreign investment funds on the dividends received. Notwithstanding the fact that the judgment refers to EU foreign investment funds and, in particular to an EU investment fund in the form of a corporation, the reasons put forward by the Judges in upholding the position of the claimant appear to be applicable also to non-EU foreign investment funds as well as to foreign investment funds in a contractual form. Although it remains to be seen if the case will be appealed, this judgment is of great interest for all non-resident investment funds. At present, the Italian Tax Authorities are not processing these types of refund claims. Therefore, foreign investment funds will need to consider what action is appropriate in respect of claims already filed as well as any new refund claims for the years not yet statute barred in order to safeguard their rights to any refunds.

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Spain – Procedure for the transposition of DAC7 into Spanish legislation has started

The Spanish Council of Ministers proposed a Bill to enhance administrative cooperation in tax and tax transparency for digital platforms (DAC7). With this transposition, contained in a preliminary draft law that now begins the consultative process, administrative cooperation with the EU is improved, since the mandate contemplated in the directive to facilitate the exchange of tax information on these digital operators will be fulfilled. The main outcomes from the draft bill are in line with DAC7.

Joint audits

This procedure provides that the competent authorities of EU Member States may initiate a joint audit in which officials of two or more EU Member States can participate. The tax audits will be governed by the regulations of the EU Member State where the inspection is being carried out and that the conclusions will be included in a final report in which the facts found and the tax situation of the inspected party may be agreed upon, informing the inspected party of the result. Spanish officials, when acting in another EU Member State will in no case have more prerogatives than those conferred under Spanish law.

Exchange of information by "platform operators"

The Spanish Ministry of Finance proposed the obligations of platform operators (as defined in DAC7) regarding the information which they are obliged to report to the Spanish Tax Administration.

Penalties

- The complete lack of registration in the EU in accordance with Council Directive 2011/16/EU of a "platform operator obliged to communicate information" constitutes a very serious tax offense, provided that this results in the lack of receipt by the Spanish tax administration of the information that should have been received within the deadline regarding "sellers subject to communication of information" residing in Spanish territory or real estate located in said territory. The sanction will be a pecuniary fine of three times the amount that would have corresponded for the lack of provision of said information.
- A fixed fine of EUR 200 per non-compliance with the rules and due diligence procedures by the "operators of platforms obliged to communicate information".
- A fixed fine of EUR 300 per failure to communicate within the deadline, or to communicate false, incomplete or inaccurate data, to the "platform operators obliged to communicate information" by the "sellers".
- When a "seller" does not provide the "reportable platform operator", having received two reminders regarding the operator's initial request and a period of 60 calendar days has elapased after the initial request, said operator will close the "seller's" account and will prevent it from re-registering on the platform or will withhold payment of the "consideration" until provided with the requested information.
- The Tax Administration will agree to the precautionary deregistration in the corresponding census of the "platform operator obliged to communicate information" when it does not comply with the obligation to inform after two requirements. The withdrawal will be made within a maximum period of 90 calendar days from the end of the reporting period, but never before 30 calendar days have elapsed since the second request.
- Information must be kept and be available to the Tax Administration during the 10 years following the end of the reference period to which the provision of information corresponds.

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EU Developments

EU – Council Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes

The ECOFIN Council approved Council Conclusions on the revised EU list of non-cooperative jurisdictions for tax purposes at its meeting on 24 February 2022. No jurisdictions were added to or removed from the EU's so-called blacklist (Annex I) and the Council agreed to add the Bahamas, Belize, Bermuda, British Virgin Islands, Israel, Monserrat, Russian Federation, Tunisia, Turks and Caicos Islands and Vietnam to the grey list.

See for the Council Conclusions: https://data.consilium.europa.eu/doc/document/ST-6437-2022-INIT/en/pdf

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EU – European Parliament's Economic and Monetary Affairs Committee adopts Report on fair and simpler taxation supporting the recovery strategy

The Report contains recommendations to the European Commission on fair and simple taxation supporting the recovery strategy (EP follow-up to the July 2021 European Commission Action Plan with its 25 initiatives in the area of VAT, business and individual taxation). The Economic and Monetary Affairs Committee (ECON) Report was authored by Ludek Niedermayer (EPP, CZ) and was adopted on 2 February 2022, with 43 votes in favour, 7 against and 9 abstentions. The ECON Report was scheduled for discussion and a plenary vote in the Plenary Sitting of 7 March 2022. See here for the consolidated version of the ECON Report.

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EU – Code of Conduct Group (Business Taxation) Work Program for first half of 2022 agreed

The Council published the work programme under the French Presidency as agreed in the Code of Conduct Group (Business Taxation) informal videoconference of 24 January 2022:
https://data.consilium.europa.eu/doc/document/ST-5625-2022-INIT/en/pdf

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EU – European Parliament Subcommittee on Tax Matters (FISC) re-elects Chair and Vice-Chairs

On 26 January 2022, the FISC Subcommittee met for the election of the Chair and Vice-Chairs for the second half of this legislature. The FISC Chair and Vice-Chairs were all formally reconfirmed:

MEP Paul Tang (S&D, NL): Chair
MEP Markus Ferber (EPP, DE): first Vice-Chair
MEP Martin Hlaváček (RE, CZ): second Vice-Chair
MEP Kira Marie Peter-Hansen (Greens/EFA, DK): third Vice-Chair
MEP Othmar Karas (EPP, AT): fourth Vice-Chair.

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ABOUT THE EUDTG

EUDTG is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up, but it is crucial that taxpayers with an EU/EEA presence understand the impact.

See for more info: www.pwc.com/eudtg or contact bob.vandermade@pwc.com