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studio di consulenza tributaria e legale

EUROPEAN

NEWSLETTER / DECEMBER 2017

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EU LEGISLATION

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EU Council Directive 2017/1852 dated 10 October 2017. Tax dispute resolution mechanisms in the European Union

EU Council Directive 2017/1852 dated 10 October 2017 on tax dispute resolution mechanisms in the European Union was published on the Eu Official Gazette L 265/1 on 14 October 2017. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 30 June 2019 at the latest.

As it can be read, it is necessary that there are mechanisms in the Union that ensure the effective resolution of disputes concerning the interpretation and application of such bilateral tax treaties and the Union Arbitration Convention, in particular disputes leading to double taxation. The mechanisms currently provided for might not achieve the effective resolution of such disputes in all cases in a timely manner. It is crucial to introduce an effective and efficient framework for the resolution of tax disputes which ensures legal certainty and a business-friendly environment for investments in order to achieve fair and efficient tax systems in the Union.

As envisaged under Article 3 "*Complaint*" of the Directive, any affected person shall be entitled to submit a complaint[1] on a question in dispute to each of the competent authorities of each of the Member States concerned, requesting the resolution thereof. The complaint shall be submitted within 3 years from the receipt of the first notification of the action resulting in, or that will result in, the question in dispute, regardless of whether the affected person has recourse to the remedies available under the national law of any of the Member States concerned. The affected person shall simultaneously submit the complaint with the same information to each competent authority, and shall indicate in the complaint which other Member States are concerned.
Where the competent authorities of the Member States concerned accept a complaint, they shall endeavor to resolve the question in dispute by mutual agreement within 2 years, starting from the last notification of a decision of one of the Member States on the acceptance of the complaint. The period of 2 years may

1 The complaint shall only be accepted if the affected person making the complaint provides the competent authorities of each of the Member States concerned with a series of information, such as for example the details of the relevant facts and circumstances of the case (including details of structure of the transaction and of the relationship between the affected person and the other parties to the relevant transactions) and the question in dispute.

be extended by up to 1 year at the request of a competent authority of a Member State concerned to all of the other competent authorities of the Member States concerned, if the requesting competent authority provides written justification.

Once the competent authorities of the Member States have reached an agreement as to how to resolve the question in dispute, the competent authority of each of the Member States concerned shall, without delay, notify this agreement to the affected person, as a decision that is binding on the authority and enforceable by the affected person, subject to the affected person accepting the decision and renouncing the right to any other remedy, where applicable. Where proceedings regarding such other remedies have already commenced, the decision shall only become binding and enforceable once the affected person has provided evidence to the competent authorities of the Member States concerned that action has been taken to terminate those proceedings. Such evidence shall be provided not later than 60 days from the date on which such decision was notified to the affected person. The decision shall then be implemented without delay, irrespective of any time limits prescribed by the national law of the Member States concerned.

Article 16 of the Directive intervenes on the interaction with national proceedings and derogations[2] and the mutual agreement procedure. The fact that the action of a Member State that gave rise to a question in dispute has become "*final*" under national law shall not prevent the affected persons from having recourse to the procedures provided for in this Directive. In addition to that, the submission of the question in dispute to the mutual agreement procedure shall not prevent a Member State from initiating or continuing judicial proceedings or proceedings for administrative and criminal penalties in relation to the same matters.

2 Affected persons may have recourse to the remedies available to them under the national law of the Member States concerned (see paragraph 3, Article 16).

EU COURT OF JUSTICE

2.1

References for a preliminary ruling — Direct taxation — Freedom of establishment — Directive 90/435/EEC — Article 1(2) — Article 5 – Parent company — Holding company — Withholding tax on profits distributed to a non-resident parent holding company — Exemption — Fraud, tax evasion and abuse — Presumption. Judgment dated 20 December 2017. In Joined Cases C-504/16 and C-613/16. *Deister Holding AG*, formely *Traxx Investments NV* (C-504/16), *Juhler Holding A/S* (C-613/16)

Article 1(2) in conjunction with Article 5(1) of Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States, as amended by Council Directive 2006/98/EC of 20 November 2006 and Article 49 TFEU must be interpreted as precluding a Member State's tax legislation, such as that at issue in the main proceedings, which, where persons have holdings in a non-resident parent company who would not be entitled to the refund or exemption from withholding tax if they received the dividends from a resident subsidiary directly, denies, provided one of the conditions set by that legislation is satisfied, relief from tax on income from capital tax on distributions of profits to that parent company.

These requests for a preliminary ruling concern the interpretation of Article 49 TFEU and of Article 1(2) and Article 5 of Council Directive 90/435/EEC of 23 July 1990, as amended by Council Directive 2006/98/EC of 20 November 2006 (OJ 2006 L 363, p. 129) ('*the Parent-Subsidiary Directive*'). The requests have been made in proceedings between *Deister Holding AG*, formerly *Traxx Investments NV* ('*Traxx*')[3] , and *Juhler Holding A/S*[4] , on the one hand, and the *Bundeszentralamt für Steuern* (Federal Central Tax Office, Germany) on the other, concerning the latter's refusal[5] to exempt dividends received from those companies' German subsidiaries from withholding tax.

3 *Deister Holding* is the successor in title of *Traxx,* which had its registered office in the Netherlands. *Traxx* principally had holdings in several companies established in various States and financed those companies, *inter alia*, by making loans to the companies of the group in question.

4 *Juhler Holding* is a holding company with its registered office in Denmark. *Juhler Services Limited*, a company incorporated under Cypriot law, holds 100% of the capital in *Juhler Holding. Juhler Services Limited*'s sole shareholder is a natural person resident in Singapore.

5 Reference is made in the Judgement to Paragraph 50d(3) of the *EStG* (*Einkommensteuergesetz* - German Law on Income Tax) as amended by the *Jahressteuergesetz* 2007 (Annual Tax Law 2007) of 13 December 2006. According to such Article, the entitlement to exemption or a refund is precluded where: i) the non-resident parent company's shareholders would not have been entitled to the exemption or a refund if they had received those dividends directly, ii) one of the following three conditions is satisfied, namely, if there are no economic or other substantial reasons for the involvement of the non-resident parent company, the non-resident parent company does not earn more than 10% of its entire gross income for the financial year in question from its own economic activity or if the non-resident parent company does not take part in general economic commerce with a business establishment suitably equipped for its business purpose.

Judges, after referring to a difference between the various language versions of that directive, underlined that the Member States cannot unilaterally introduce restrictive measures and subject the right to exemption from withholding tax under Article 5(1) of that directive to various conditions (see, to that effect, judgments *Denkavit*, *Eqiom* and *Enka*). Moreover, the Court has stated that, 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. Therefore, a general presumption of fraud and abuse 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 (judgments *Eqiom* and *Enka*). In order to determine whether an operation pursues an objective of fraud and abuse, the competent national authorities may not confine themselves to applying predetermined general criteria, but must carry out an individual examination of the whole operation at issue. The imposition of a general tax measure automatically excluding certain categories of taxable person from the tax advantage, 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.
Based on such assumption, the Court has determined that:

- the fact that the economic activity of a non-resident parent company consists in the management of its subsidiaries' assets or that the income of that company results only from such management cannot per se indicate the existence of a wholly artificial arrangement which does not reflect economic reality;
- the fact that the management of assets is not considered to constitute an economic activity for the purposes of value-added tax is irrelevant, since the tax at issue in the main proceedings and value-added tax are governed by distinct legal regimes;
- the finding of such an arrangement requires that, on a case-by-case basis, an overall assessment of the relevant situation be conducted, based on factors including "*the organizational, economic or other substantial features of the group of companies to which the parent company in question belongs and the structures and strategies of that group*";
- any situation where "*persons*" who would not have been entitled to such an exemption if they received the dividends directly have holdings in a parent company does not in itself indicate the existence of

a wholly artificial arrangement which does not reflect economic reality and whose purpose is unduly to obtain a tax advantage.

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EUROPEAN TAX NEWSLETTER | DECEMBER 2017

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 DECEMBER 2017.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM