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PRESS RELEASES

1.1
Taxation: 3 jurisdictions removed, 3 added to EU list of non-cooperative jurisdictions

On 13 March 2018, the EU Council informed that the EU's list of non-cooperative jurisdictions in taxation matters (prepared during 2017 in parallel with work within the OECD) has been adjusted in the light of commitments made by listed jurisdictions. On 13 March 2018, the Council removed *Bahrain*, the *Marshall Islands* and *Saint Lucia* from the list and added the *Bahamas, Saint Kitts* and *Nevis* and the *US Virgin Islands.*

Since the list was first published on 5 December 2017, *Bahrain,* the *Marshall Islands* and *Saint Lucia* have made commitments intended to promote good governance in taxation worldwide, maximizing efforts to prevent tax avoidance, tax fraud and tax evasion. 9 jurisdictions still remain on the EU list: *American Samoa, Bahamas, Guam, Namibia, Palau, Samoa, Saint Kitts* and *Nevis, Trinidad* and *Tobago* and the *US Virgin Islands.* Jurisdictions that remain on the list are strongly encouraged to make the changes requested of them.

On a wider perspective, the EU activity regarding non-cooperative jurisdictions is part of the activity carried out by the EU Group on the code of conduct group as set by the *ECOFIN* Council on 9 March 1998. According to the code, "*tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful and therefore covered by this code*".

On the issue, reference can also be made to:

- *2 March 2018 note on changes to the EU list of non-cooperative jurisdictions;*
- *8 March 2018 note on changes to the EU list of non-cooperative jurisdictions;*
- *December 2017 Council conclusions on the EU list of non-cooperative jurisdictions;*
- *December 2017 press release on the EU list of non-cooperative jurisdictions;*
- *January 2018 press release on changes to the EU list of non-cooperative jurisdictions.*

EU COURT OF JUSTICE

2.1

Reference for a preliminary ruling — Common system of value added tax (VAT) — Directive 2006/112/EC — Revocation of identification for VAT purposes — Obligation to pay VAT collected in the period during which the VAT identification number is revoked — Non-recognition of the right to deduct VAT relating to purchases made during that period. Judgement dated 7 March 2018. Case C-159/17, *Întreprinderea Individuală Dobre M. Marius* v *Ministerul Finanţelor Publice*

Articles 167 to 169 and 179, Articles 213(1) and 214(1), and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national legislation, such as that at issue in the main proceedings, which allows tax authorities to refuse a taxable person the right to deduct value added tax when it is established that, on account of the alleged infringements committed by that person, the tax authorities could not have access to the information necessary to establish that the substantive requirements giving rise to the right to deduct input value added tax paid by that taxable person have been satisfied or that that person acted fraudulently in order to enjoy that right, a matter which it is for the referring court to ascertain.

This request for a preliminary ruling concerns the interpretation of Articles 167 to 169 and 179, Article 213(1), Article 214(1)(a) and Article 273 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, as amended, as regards the rules on invoicing, by Council Directive 2010/45/EU of 13 July 2010. The request has been made in proceedings between the sole Romanian trader *Dobre* and the tax authorities concerning the right to deduct value added tax (VAT) relating to purchases made by Dobre during the period in which his identification for VAT purposes had been revoked (on the ground that he failed to submit VAT returns within the statutory time limit for a given period).

The Court of Justice clarified that, according to settled case-law, the fundamental principle of VAT neutrality requires deduction of input tax to be allowed if the substantive requirements are satisfied, even if the taxable person has failed to comply with some of the formal requirements (judgment *Astone,* paragraph 45). In particular, identification for VAT purposes and the obligation of the taxable person to state when his activity as a taxable person commences, changes or ceases are formal requirements for the purposes of control, and "*they cannot compromise, inter alia, the right to deduct VAT, in so far as*

the substantive conditions which give rise to that right have been satisfied" (see judgements *Salomie* and *Oltean*, paragraph 60). Accordingly, a person taxable for VAT purposes may not be prevented from exercising his right of deduction on the ground that he had not been identified as a taxable person for those purposes before using the goods purchased in the context of his taxed activity (judgment *Nidera Handelscompagnie*, paragraph 51).

Moreover, Judges clarified that failure to file a VAT return is liable to prevent the correct collection of the tax and, therefore, to compromise the proper functioning of the common system of VAT. Therefore, EU law does not prevent such infringements from being considered to amount to tax fraud and the right to deduct being refused in such a case (above-mentioned judgment *Astone*, paragraph 56).

2.2

Reference for a preliminary ruling — Direct taxation — Freedom of establishment — Mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States — Directive 90/434/EEC — Article 8 — Exchange of securities — Capital gains relating to that transaction — Deferred taxation — Capital losses upon the subsequent transfer of securities received — Tax competence of the State of residence — Difference in treatment — Justification — Preservation of the allocation of fiscal competence between Member States In Joined Cases C-327/16 and C-421. *Marc Jacob v Ministre des Finances et des Comptes publics (C-327/16) and Ministre des Finances et des Comptes publics* v *Marc Lassus* (C-421/16)

Article 8 of Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, as adjusted by Decision 95/1/EC, Euratom, ECSC of the Council of the European Union of 1 January 1995, must be interpreted as meaning that it does not preclude legislation of a Member State pursuant to which the capital gain resulting from an exchange of securities falling within the scope of that directive is established when the transaction occurs, but is taxed in the year in which the event putting an end to the deferred taxation occurs: in this case, the transfer of the securities received in exchange.

Article 8 of the Directive 90/434, as amended by the Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden, as

adjusted by Decision 95/1, must be interpreted as meaning that it does not preclude legislation of a Member State that provides for the taxation of the capital gain relating to an exchange of securities, in a case where taxation of the gain has been deferred, upon a subsequent transfer of the securities received in exchange, even though that transfer does not fall within the fiscal competence of that Member State.

Article 49 TFEU must be interpreted as meaning that it precludes legislation of a Member State which, in a situation where the subsequent transfer of securities received in exchange does not fall within the fiscal competence of that Member State, provides for taxation of the capital gain that is subject to tax deferral upon that transfer without taking into account any capital loss occurring at that time, whereas account is taken of such a capital loss when the taxpayer holding the securities is resident for tax purposes in that Member State on the date of the transfer. It is for the Member States, in compliance with EU law and, in the present case, the freedom of establishment in particular, to provide detailed rules for offsetting and calculating that capital loss.

The EU Court of Justice provided clarification on Directive 90/434/EEC on extraordinary operations at EU level (i.e. mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States)[1]. In detail, Case C-421/16 intervenes on the case where Mr. *Jacob,* a French individual, transferred the securities he owned in a company incorporated under French law to another such company, in exchange for securities in the latter. In accordance with the tax legislation applicable at the time of the facts, the taxation of the capital gain made upon the exchange of those securities was deferred. Casa C-421/1616 intervenes on the case where Mr. *Lassus*, United Kingdom tax resident, transferred securities he held in a French company to a Luxembourg company in exchange for securities in the latter. Upon that exchange, a capital gain was established, the taxation of which was deferred in accordance with the legislation in force at the time.

Observations were provided on the establishment of the capital gain resulting from the exchange of securities upon that transaction and the deferral of the taxation of that exchange to the date of the subsequent transfer of the securities received in exchange.

1 The first, fourth and eighth recitals of the Merger Directive state: "*mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States may be necessary in order to create within the Community conditions analogous to those of an internal market and in order thus to ensure the establishment and effective functioning of the common market; whereas such operations ought not to be hampered by restrictions, disadvantages or distortions arising in particular from the tax provisions of the Member States; whereas to that end it is necessary to introduce with respect to such operations tax rules which are neutral from the point of view of competition, in order to allow enterprises to adapt to the requirements of the common market, to increase their productivity and to improve their competitive strength at the international level*". With reference to relating to the exit taxation of capital gains, reference can be made to judgement *National Grid Indus,* and the case-law cited.

Such a measure ensures that the exchange of securities in itself does not give rise to any taxation of that capital gain. That measure therefore respects the principle of fiscal neutrality as set out by the Merger Directive. According to the judges, "*that conclusion cannot be called into question by the mere fact that the capital gain resulting from the exchange of securities is established when that transaction occurs. In that regard, it must be pointed out that such establishment is merely a technique allowing the Member State with fiscal competence in respect of the securities existing before the exchange, but which, under Article 8(1) of the Merger Directive, has been prevented from exercising that competence at that time, to preserve its fiscal competence and exercise it at a later date, namely on the date of the transfer of the securities received in exchange in accordance with the second subparagraph of Article 8(2) of that directive*".

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LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MARCH 2018.
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