Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

EUROPEAN

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LAW

1.1

***EU list of non-cooperative jurisdictions.* Note dated 25 May 2018**

On 25 May 2018, the EU Council removed the *Bahamas, Saint Kitts* and *Nevis* from the *EU's list of non-cooperative tax jurisdictions*. Indeed, these countries have made commitments at a high political level to remedy EU concerns as in implementation of the recommendations made by the Code of Conduct Group on the taxation of companies.

More in specific, the jurisdictions have undertaken sufficient commitments to reform their tax policies.

As at today, 7 jurisdictions remain on the list of non-cooperative jurisdictions: *American Samoa, Guam, Namibia, Palau, Samoa, Trinidad* and *Tobago* and *the US Virgin Islands.* Whereas the list is revised at least once a year, the code of conduct group can recommend an update at any time.

On the issue, reference can be made also to:

- *May 2018 note on changes to the EU list of non-cooperative jurisdictions;*
- *Council webpage on the code of conduct group;*
- *December 2017 Council conclusions on the EU list of non-cooperative jurisdictions.*

The Code of Conduct is not a legally binding instrument but is a political commitment by Member States to re-examine, amend or abolish their existing tax measures that constitute harmful tax competition (rollback process) and refrain from introducing new ones in the future (standstill process).

Whilst the original focus of the Code of Conduct was on EU Member States, Member States also committed to promote the adoption of its principles by third Countries and in territories to which EU treaties don't apply (see paragraph M of the Code).

EU COURT OF JUSTICE

2.1

Reference for a preliminary ruling — Value added tax (VAT) — Directive 2006/112 — Article 4(3) TEU — Principle of sincere cooperation — Article 325 TFEU — Protection of the financial interests of the Union — Convention on the protection of the European Communities' financial interests (PIF Convention) — National law providing for criminal penalties relating to failure to pay withholding tax and VAT by the legal deadline — Higher financial threshold applicable to VAT related offences — National law providing for the extinction of criminal liability if VAT is paid — Member States' obligation to establish effective, proportionate and dissuasive penalties — Charter of Fundamental Rights of the European Union — Article 49(1) of the Charter — Principle of legality — Retroactive application of the more lenient penalty — Legal certainty. Judgement dated 2 May 2018, Case C-574/15, *Mauro Scialdone*

This request for a preliminary ruling concerns the interpretation of Article 4(3) TEU, Article 325(1) and (2) TFEU, Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax (the VAT Directive) and the Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, signed in Brussels on 26 July 1995. More in specific, the request has been made in criminal proceedings brought against the Sole Director of an Italian joint-stock company for failing, in his capacity as sole director, to pay, within the time limit prescribed by law, the value added tax (VAT) resulting from the company's annual Return for the tax year 2012.

The Court intervened on the principle of effectiveness and on the principle of equivalence. It is herein specified that the principle of equivalence does not preclude a difference such as that between the thresholds laid down, respectively, in Article 10 *bis* and Article 10 *ter* of Legislative Decree No 74/2000, as amended by Legislative Decree No 158/2015. Consequently, "*Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, read in conjunction with Article 4(3) TEU, and Article 325(1) TFEU must be interpreted as not precluding national legislation which provides that failure to pay, within the time limit prescribed by law, the value added tax (VAT) resulting from the annual tax return for a given financial year constitutes a criminal offence punishable by a custodial sentence only when the amount of unpaid VAT exceeds a criminalization threshold of EUR 250.000, whereas a criminalization threshold of EUR 150.000 is laid down for the offence of failing to pay withholding income tax*".

It is specified that, where two categories of offences can be distinguished by various circumstances concerning both the constituent elements of the offence and the degree of ease with which it can be detected, those differences mean, in particular, that the Member State concerned is not required to have an identical system of rules for the two categories of offences (see judgment "*Drexl*").

2.2

Reference for a preliminary ruling — Freedom of establishment — Corporation tax — Legislation of a Member State — Calculation of the taxable revenue of companies — Advantage granted gratuitously by a resident company to a non-resident company to which is it linked by a relationship of interdependence — Correction of the taxable income of the resident company — No correction of taxable income in the event of an identical advantage granted by a resident company to another resident company to which it is linked by such a relationship — Restriction on the freedom of establishment — Justification.
Judgement dated 31 May 2018, Case C-382/16, *Hornbach-Baumarkt AG*

This request for a preliminary ruling concerns the interpretation of Article 43 EC (now Article 49 *TFEU*), in conjunction with Article 48 EC (now Article *54 TFEU*). More in specific, the request has been in made in proceedings between *Hornbach-Baumarkt AG* and the *Finanzamt Landau* (Tax Office, *Landau,* Germany) ('the Tax Office'), relating to the calculation by the latter of the corporation tax and the basis of calculation for that company's business tax for the year 2003.

According to the settled case-law of the Court, the judges, by making direct reference to the freedom of establishment, stated that:

- national legislation intended to apply only to those shareholdings which enable the holder to exert a definite influence on a company's decisions and to determine its activities fall within the scope of freedom of establishment (see judgements *Test Claimants, Hervis Sport-és Divatkereskedelmi*);
- the provisions of the Treaty concerning freedom of establishment prohibit the Member State of origin from hindering the establishment in another Member State of a company incorporated under its legislation, in particular through a subsidiary. Freedom of establishment is hindered if, under a Member State's tax system, a resident company having a subsidiary in another Member State suffers a disadvantageous difference in treatment for tax purposes compared with a resident company having a subsidiary in the first Member State (see judgement *Masco Denmark et Damixa*);
- a tax measure which is liable to hinder the freedom of establishment is permissible only if it relates to situations which are not objectively comparable or if it can be justified by overriding reasons in the public interest recognized by EU law.

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According to the judgment, it must therefore be held that national legislation such as that at issue in the main proceedings, which seeks to prevent profits generated in the Member State concerned from being transferred outside the tax jurisdiction of that Member State via transactions that are not in accordance with market conditions, without being taxed, is appropriate for ensuring the preservation of the allocation of powers of taxation between the Member States.

The following principle is stated: "*Article 43 EC (now Article 49 TFEU), in conjunction with Article 48 EC (now Article 54 TFEU), must be interpreted as, in principle, not precluding national legislation, such as that at issue in the main proceedings, pursuant to which the income of a company resident in a Member State which granted to a company established in another Member State with which it has a relationship of interdependence advantages under terms that depart from those that would have been agreed on by unrelated third parties under the same or similar circumstances, must be calculated as it would have been if the terms which would have been agreed with unrelated third parties had been applicable, and be corrected, despite the fact that such a correction is not made in respect of taxable income when the same advantages are granted by a resident company to another resident company with which it has a relationship of interdependence. However, it is for the national court to determine whether the legislation at issue in the main proceedings affords the resident taxpayer the opportunity to prove that the terms were agreed on for commercial reasons resulting from its status as a shareholder of the non-resident company*".

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EUROPEAN TAX NEWSLETTER | MAY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 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