UPCOMING EVENTS & LIKELY DATES

March 2018
NEWSLETTER

2018

MARCH	Danish Beneficial Ownership cases	Opinion of the Advocate General
Q2	Prudential (Portfolio Dividends)	Supreme Court Judgment
	Fidelity Funds (WHT on dividends to non resident UCITS)	ECJ judgment
	FII (dividends from controlled interests)	Supreme Court permission to appeal
JUNE	Test Claimants in the CFC and Dividend GLO (Jurisdiction and time limits for Tax Claims)	High Court Hearing
JULY	BAT Industries (45% WHT on interest for EU claims)	Upper Tribunal Appeal

Danish Beneficial Ownership Cases – AG's Opinions Support the Taxpayers

Advocate General (AG) Kokott has issued her Opinions on the interpretation of the beneficial owner concept in two sets of circumstances: under the Interest and Royalties Directive (IRD) (Joined Cases C-115/16, C-118/16 and C-119/16 N Luxembourg 1, X Denmark and C Danmark I, and C-299/16 Z Denmark) and under the Parent-Subsidiary Directive (PSD) (Joined Cases C-116/16 and C-117/16 T Danmark and Y Denmark).

The IRD cases involved Danish companies being given loans from and paying interest to companies based in other EU member states and ultimately owned by entities resident in third countries. Under the IRD, withholding tax is not chargeable on interest payments arising in an EU member state, so long as the beneficial owner of the payment is based in another member state. The PSD cases involved the payment of dividends from a Danish company to a company in another member state which was ultimately owned by a third country-based entity. Under the PSD, dividends from subsidiaries to parent companies are not subject to withholding tax, and there is no beneficial ownership requirement as with the IRD. In all cases the Danish tax authorities refused to grant an exemption from Danish withholding tax on the interest and dividend payments to the non-Danish, EU parent company. The Danish tax authorities interpreted the IRD and the PSD as meaning that the non-Danish, EU company in receipt of the income was a conduit and not the beneficial owner of the payment.

In the IRD cases, the AG took the view that the non-Danish, EU company receiving the interest was, in principle, the beneficial owner, as it was the entity entitled in law to demand payment of the interest. However, that company would not the beneficial owner where it was not acting in its own name and on its own account, but instead as a trustee for a third party. The AG listed some relevant aspects for the national court to consider when determining the existence or otherwise of a trust relationship. A refinancing agreement with another party on similar terms as the present case was not of itself conclusive of a trust. By contrast, arrangements such as identical refinancing interest rates and received interest rates, or the absence of costs for the parent company could indicate the existence of a trust.

With regard to the PSD cases, AG Kokott confirmed that the exemption to withholding tax under this Directive was not subject to a condition of beneficial ownership. Consequently, the next question was whether there was an abuse under EU law, namely a wholly artificial arrangement to escape national tax normally due on profits. The AG's view was that a determination of abuse was a matter for the national court on the facts. In itself, the existence of a parent company in another member state so as to profit from that state's tax legislation was not abusive, but abuse may exist if that company did not have the structure to achieve its purposes and generate an income.

EU Council publishes proposal for draft Directive (DAC6) to prevent potentially aggressive cross-border tax planning

The new Directive aims to amend Directive 2011/16/EU, which concerns administrative cooperation in the field of taxation. The proposed legislation places an obligation on intermediaries to report on potentially aggressive tax planning arrangements.

While the existing tax instruments at EU level do not contain explicit provisions requiring Member States to exchange information in the case of tax avoidance and/or evasion schemes, DAC contains a general obligation for the national tax authorities to spontaneously communicate information to the other tax authorities within the EU.

The new reporting requirements have an effective date of 1 July 2020, with EU Member States obliged to exchange information every three months after that. The first exchange will take place by 31 October 2020.

C-533/16 – Volkswagen AG wins preliminary ruling on 'right to deduct VAT'

This judgment relates to the proceedings between Volkswagen AG and the Finance Directorate of the Slovak Republic. The dispute arose after a partial refusal by the Finance Directorate of the Slovak Republic of an application for a refund of value added tax ('VAT'), charged several years after the initial delivery of the supplied goods to Volkswagen AG.

The Slovak government argued that the 5 year limitation period (Law No 511/1992 on Tax Administration, 'The Tax Code'), starting from the date of delivery of the goods, had already expired when the application for deduction was made on 1 July 2011.

The legal context asks whether the fixing of the starting date of the five year limitation period is compatible with EU law on the common system of value added tax. While current EU law on the common system of value added tax holds that the 'right to deduct' (Article 167 of Directive 2006/112) is an integral part of the VAT scheme, the 'right to deduct' is also subject to substantive requirements or conditions (judgment of 19 October 2017, Paper Consult, C-101/16, paragraph 38).

The CJEU found that EU law must be interpreted to preclude national legislation of a Member State in circumstances, such as the main proceedings, when the exercise of the right to claim a refund expired before the VAT tax was charged and an application for a refund was submitted.

JHA BLOG

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