LOYENS LOEFF

EDITION 196

EU Tax Alert

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- Dutch Supreme Court refers case on Dutch interest deduction limitation to CJ for potential breach of EU law

- CJ rules on whether VAT revision rules apply in situations where a deduction has not been exercised on time or not exercised correctly (*X*, C-194/21)

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In this publication, we look back at recent tax law developments within the European Union. We discuss, amongst other things, relevant case law of the Court of Justice of the European Union (CJ), Opinions of its Advocate Generals (AG) and case law of the national courts of the Member States. Furthermore, we set out plans and developments of the European Commission, the Council of the European Union and the OECD which are relevant for European Tax Law.

Highlights in this edition are:

- Joint statement by France, Germany, Italy, Spain and the Netherlands confirming the intention to implement a global minimum tax
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- CJ rules on whether VAT revision rules apply in situations where a deduction has not been exercised on time or not exercised correctly (*X,* C-194/21)
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Highlights in this edition

Joint statement by France, Germany, Italy, Spain and the Netherlands confirming the intention to implement a global minimum tax

On 9 September 2022, the French, German, Italian, Spanish and Dutch governments published a joint statement confirming their intention to implement a global minimum tax (Pillar 2) in 2023.

In this joint statement, the aforementioned governments reaffirm they have strengthened commitment to swiftly implement the global minimum effective corporate taxation. While they declare that their first goal remains to gather a consensus at the EU level, they note that if unanimity is not reached in the next weeks, they are fully determined to follow through on their commitment and to implement the global minimum effective taxation in 2023 by any possible legal means.

They further note that they are also fully committed to complete the work on the better reallocation of taxing rights from huge global multinationals' profits (Pillar 1) with the objective of signing a multilateral convention by mid-2023.

Dutch Supreme Court refers case on Dutch interest deduction limitation to the CJ for potential breach of EU law

On 2 September 2022, the Supreme Court of the Netherlands referred a case to the CJ regarding the Dutch interest deduction limitation rule and its potential breach of EU law. The case concerns the deductibility of intra-group interest payments that are at arm's length. The ruling of the CJ is expected to further clarify the Court's recent judgment in the Swedish *Lexel* case (*Lexel AB v Skatteverket*, C-484/19). For more information, please see the news item published by Loyens & Loeff on this matter.

CJ rules on whether VAT revision rules apply in situations where a deduction has not been exercised on time or not exercised correctly (*X*, C-194/21)

On 7 July 2022, the CJ delivered its judgment in the case X regarding the questions whether a VAT taxable person is entitled to a VAT refund when that VAT refund was erroneously not claimed upon being chargeable by the supplier (C-194/21).

X acquired ten plots of VAT taxed building land with the intention of constructing mobile homes on these plots. Initially, X did not reclaim the VAT charged by the supplier, even though X had the intention to use the plots for VAT taxed purposes. Ultimately, the business plan was not implemented due to economic circumstances. X sold two of the acquired plots back to the original seller in 2013. X did not report VAT due on this sale. The VAT inspector imposed a VAT assessment for VAT being due on this sale, which assessment was opposed by X who argued that he was still entitled to deduction of input VAT on his initial sale.

The CJ ruled that X was not entitled to reclaim in 2006, the VAT paid in 2013. The deduction must be claimed in the period in which it arose. If the deduction has not been exercised in the period in which it arose, the deduction may be granted if the national conditions set for this purpose are met.

The VAT revision rules are only applicable where VAT recovery has taken place by the taxable person and cannot give rise to VAT recovery in situations where the deduction has not been exercised on time or not exercised correctly. The right to reclaim VAT without any temporal limit would be contrary to the principle of legal certainty. This means that X had failed to reclaim the VAT in time and that this VAT recovery right has been permanently lost due to the expiration of the applicable limitation period.

Opinion of AG Szpunar on whether the freedom to provide services precludes obligations imposed on intermediary platforms to report, withhold and appoint a local tax representative (*Airbnb Ireland UC, Airbnb Payments UK Ltd v Agenzia delle Entrate*, C-83/21)

On 7 July 2022, AG Szpunar delivered his Opinion in the case *Airbnb Ireland UC, Airbnb Payments UK Ltd v Agenzia delle Entrate* (C-83/21). The main issue addressed in this case concerns whether Italian legislation obliging intermediaries such as Airbnb to report certain information, withhold a tax and appoint a local tax representative is precluded by the freedom to provide services set out in Article 565 TFEU and inferred from the E-Commerce Directive and the Services Directive.

Airbnb operates an online property intermediation platform on which lessors can advertise and rent their accommodation to customers. Under Italian law, qualifying intermediaries, including those operating through online platforms such as Airbnb, are *inter alia* required to: (i) collect and exchange information relating to the rental contracts concluded on the intermediary's platform with the tax authorities; (ii) withhold the tax due on the amounts paid by the lessee if the intermediary is involved in the payment of rent; and (iii) appoint a tax representative if the intermediary does not have a permanent establishment in Italy.

The first question referred to the Court for a preliminary ruling is whether the Directive 2015/1535 (which lays down a procedure for the provision of information in the field of technical regulations and of rules on information society services) must be interpreted as meaning that the Italian legislation constitutes a so-called 'technical regulation', 'rule on services' or a 'de facto technical regulation'. In this regard, Airbnb argued that if the Italian regime would qualify under these terms, it would have been adopted in breach of an obligation for Italy to notify the European Commission in advance of any draft technical regulation concerning services such as those provided by the platform. Addressing this first issue, the AG first stated that it is common ground that the services provided by Airbnb constitute information services within the meaning of Directive 2015/1535. However, according to the AG and his nuanced interpretation of the 'rule on services' definition, the aforementioned legislation does not constitute a technical regulation because the obligations included therein do not have the specific aim and object of regulating the taking-up or pursuit of property intermediation services via the internet. AG Szpunar also considered that such obligations are tax measures in the proper sense and do not qualify as 'de facto regulations' as that type of rules accompany fiscal measures which are intended to influence the consumption of certain goods or services, such as products which are less harmful to the environment or more energy-efficient and that is not the objective of the Italian tax regime at issue.

The second question referred for a preliminary ruling is whether the Directives 2000/31 (E-Commerce) and 2006/123 (Services in the Internal Market) and Article 56 TFEU must be interpreted as precluding the aforementioned national legislation. The AG stated that the aforementioned national legislation is excluded from the scope of these directives as all the obligations included therein fall within the 'field of taxation'. According to the AG, the judgment of the CJ in the Belgian case, *Airbnb Ireland* (C 640/20) is directly transposable to the present case and, therefore, Article 56 TFEU does not preclude the obligation to collect and transmit to the tax authorities information relating to rental contracts concluded as a result of the intermediary's activity. The AG further stated that the obligation to withhold taxes does not give rise to discrimination against non-resident operators but it is possible that such an obligation could be considered an obstacle to the freedom to provide services. However, the AG is of the opinion that such an obstacle can be justified with an appeal to the necessity of ensuring effective collection of tax on income and the prevention of tax evasion in the sector of short-term rental of immovable property. He further found that the obligation to withhold tax does not appear to be in any way disproportionate in the light of the legitimate objectives referred above. On such basis, he concluded that Article 56 TFEU does not preclude the obligation to withhold taxes such as that provided for by the tax regime at issue.

Concerning the obligation to appoint a tax representative if the intermediary does not have a permanent establishment in Italy, AG Szpunar took a different position and found it contrary to the freedom to provide services set out in Article 56 TFEU. To arrive at such conclusion he referred to the judgment of the Court in the case *Commission v Spain* (C 678/11) where an obligation to designate a tax representative imposed by the Spanish legislation on cross-border service providers for the purposes, specifically, of the transmission of information and the withholding of tax was found to constitute a disproportionate restriction on the freedom to provide services and therefore, to be contrary to Article 56 TFEU. Based on that precedent, the AG concluded that the obligation to appoint a tax representative under the Italian regime at issue is contrary to Article 56 TFEU.

Finally, AG Szpunar addressed a third question referred to the Court which asks whether Article 267 TFEU must be interpreted as meaning that, where a question concerning the interpretation of EU law is raised by one of the parties, a court or tribunal against whose decisions there is no judicial remedy under national law retains the power to rephrase independently the questions to be referred to the Court for a preliminary ruling or whether is it obliged to reproduce the questions as formulated by the party requesting the reference. The AG is of the opinion that Article 267 TFEU must be interpreted as meaning that, in the event of a question of interpretation of EU law raised by one of the parties, a national court or tribunal against whose decisions there is no judicial remedy under national law retains the power to rephrase independently the questions for a preliminary ruling.

Direct Taxation

Opinion of AG Rantos on whether differential treatment between national and cross-border transfers of assets under UK group transfer rules is compatible with the freedom of establishment (*Gallaher Limited v The Commissioners for Her Majesty's Revenue & Customs*, C-707/20)

On 8 September 2022, AG Rantos issued his Opinion in the case *Gallaher Limited v The Commissioners for Her Majesty's Revenue & Customs* (C-707/20). The case concerns the United Kingdom's (UK) group transfer rules and the main question addressed therein is whether the difference in treatment between national and cross-border transfers of assets for consideration within a group of companies is compatible the freedom of establishment (Article 49 TFEU). In his Opinion, AG Rantos concluded that the UK rules are indeed compatible with the freedom of establishment, in so far as the aforementioned difference in treatment may, in principle, be justified by the need to maintain a balanced allocation of taxing powers.

The case involves Gallaher Limited ('GL'), a company resident for tax purposes in the UK and member of the Japan Tobacco Inc. (JT) group of companies resident for tax purposes in Japan. At the head of the JT group for Europe is JTIH, a company resident in the Netherlands (the 'Netherlands company') which is GL's indirect parent company. In 2011 and 2014, GL made two transactions that involved the disposal of assets to other group companies not resident for tax purposes in the UK. These transactions consisted of: (i) a disposal of intellectual property rights relating to tobacco brands to a sister company of GL, resident for tax purposes in Switzerland ('the 2011 disposal'); and; (ii) a disposal of shares in a subsidiary of GL (a company incorporated on the Isle of Man) to its intermediate parent company, resident in the Netherlands (the '2014 disposal').

As a consequence of these transactions, the UK tax authorities adopted two decisions determining that the gains on the transferred assets were the subject of an immediate tax charge and denying a deferral of the payment of such charges. GL argued against these decisions. In essence, GL claimed that there is a difference in the tax treatment of these two transactions by comparison with transfers between members of a group of companies having their residence or their permanent establishment (PE) in the UK (exempted from corporation tax). The general question addressed by the AG, therefore, is whether these group transfer rules might constitute a restriction on the freedom of establishment.

The AG first analysed the freedom of establishment in the context of the 2011 disposal (namely a transfer of assets from a company chargeable to tax in the UK to a company having its tax residence outside the EU (in this instance, in Switzerland) which is not chargeable to tax in the UK) and solely from the viewpoint of the rights of the parent company (in this instance, the Netherlands company). In this regard, he found that the group transfer rules at issue in the main proceedings do not entail any difference in treatment according to the place of tax residence of the parent company, as they treat a UK-resident subsidiary of a parent company having its seat in another Member State in exactly the same way as they treat a UK-resident subsidiary of a parent company having its seat in the UK. In other words, AG Rantos considered that GL would have received the same tax treatment if the parent company had been resident not in the Netherlands but in the UK which, ultimately, does not entail any difference in treatment at parent-company level.

Under the understanding that the UK does not treat the subsidiary of a company resident in another Member State less favourably than a comparable subsidiary of a company resident in the UK, the AG concluded that Article 49 TFEU does not preclude the imposition of an immediate tax charge in the aforementioned circumstances.

Second, AG Rantos analysed the freedom of establishment in the context of the 2014 disposal. In this regard, he acknowledged that it is common ground between the parties to the proceedings that the UK group transfer rules give rise to a differential tax treatment and, therefore, that they may constitute a restriction on freedom of establishment. Sharing the referring court's assumption, the AG held that such a restriction may, in principle, be justified on overriding grounds of public interest, namely the need to preserve a balanced allocation of taxing powers. Citing the example of exit taxes as accepted justifications to the restriction on freedom of establishment, he considered that the UK should be authorized to tax the gains accrued before the assets are transferred to a company which is not chargeable to corporation tax in the UK. When assessing the proportionality of the restriction caused by the UK group transfer rules, the AG highlighted the differences between capital gain taxation in the context of the transfer of assets and exit taxes (i.e., no liquidity issue in the former case) and concluded that it is right that no possibility of deferring payment is afforded to the taxpayer. In the light of the foregoing considerations, Rantos concluded that Article 49 TFEU must be interpreted as meaning that a restriction on the right to freedom of establishment resulting from the difference in treatment arising in this case may, in principle, be justified by the need to preserve a balanced allocation of taxing powers, without there being any need to provide for the possibility of deferring payment of the charge in order to ensure the proportionate nature of that restriction, where the taxpayer concerned has realized proceeds by way of consideration for the disposal of the asset equal to the full market value of that asset.

OECD's public consultation on progress report on Amount A (Pillar One)

On 11 July 2022, the OECD Secretariat released a Progress Report on Amount A of Pillar One (the 'Report'), which is part of the OECD/G20 Inclusive Framework on BEPS in implementing the two-pillar solution to address the tax challenges arising from the digitalization of the economy. The Report includes a consolidated version of the operative provisions on Amount A, reflecting the technical work completed thus far. This Report does not yet include the rules on the administration of the new taxing right, including the tax certainty related provisions, which will be released in due course and before the Inclusive Framework meeting in October 2022.

This Progress Report is a consultation document released by the OECD Secretariat for the purposes of obtaining further input from stakeholders on the technical design of Amount A. When the period for submitting comments closed on 19 August 2022, more than 70 responses had been formally submitted (see public comments received). Following the submission deadline, a public consultation meeting to discuss this input was held on 12 September 2022, in a hybrid format. The objective of these consultation activities is to provide external stakeholders with an opportunity to give their input on the ongoing work, which will assist members of the Inclusive Framework in completing the work on the technical elements of Amount A.

Loyens & Loeff has been actively engaged in this consultation process and has submitted written comments and suggestions to the Report. To read our comments submitted to the OECD, please click here. In the document, we highlight that important conceptual links and justifications for the proposed system have been lost along the way and need to be reintroduced. Furthermore, we make specific suggestions to clarify and better explain the policy rationale behind Pillar One rules, while reducing their complexity.

Czech Presidency publishes its programme announcing the tax priorities of the Council of the European Union until December 2022

On 8 July 2022, the Czech Presidency of the Council of the European Union published the Programme of the Presidency, including priorities in the area of taxation.

As regards taxation, the Czech Presidency will generally strive to simplify the tax system, combat tax evasion and reduce the number of unjustified tax exemptions. In the case of indirect taxes, the Czech Presidency sees the intensive work on the amendment to the Directive on the taxation of energy products and electricity as key. In the area of direct taxes, the Czech Presidency intends to address the current legislative proposals, including those in relation to the global agreements resulting from the OECD/G20 in response to the challenges in the area of international taxation of multinational corporations related to the digitisation and globalisation of the economy or in the area of strengthening tax transparency. Updating the EU list of noncooperative jurisdictions will also be a priority. The Czech Presidency will also continue negotiating the Carbon Border Adjustment Mechanism (CBAM) where it will first endeavour to agree in the Council on the remaining open issues and then will lead negotiations in trilogues and reach a political agreement that reflects the emphasis on compatibility with rules of the World Trade Organization (WTO). The key task of the Czech Presidency will be to reach an agreement on the EU budget for 2023, and to negotiate an acceptable compromise between the Council and the European Parliament. The ECOFIN will also discuss the possibilities of introducing new EU own resources from 1 January 2023. The Czech Presidency will discuss both EC proposals for the revision of the Financial Regulation (the area of fines and the revised text of the whole Regulation) and the continued discussion on financial support to Ukraine. Furthermore, the Czech Presidency will pay attention to the protection of investments of investors from Member States on the EU market. In the customs area, a proposal for the reform of the Customs Union will be presented during the Czech Presidency in the form of a legislative package of changes based on the interim evaluation of the implementation of the Union Customs Code.

The Czech Republic holds the Programme of the Presidency of the Council of the European Union from 1 July 2022 to 31 December 2022.

European Commission publishes consultation on tackling the role of enablers

On 6 July 2022, the European Commission published a consultation on tackling the role of intermediaries (i.e. the 'enablers') in facilitating arrangements or schemes that lead to tax evasion and aggressive tax planning. Preventing enablers from setting up complex structures in non-EU countries, the objective of which is to erode the tax base of Member States through tax evasion and aggressive tax planning is another important and necessary step in the Commission's continued commitment to combatting these activities.

The consultation period runs from 6 July to 12 October 2022. It aims to collect views from stakeholders on the role of enablers that contribute to tax evasion and aggressive tax planning, the magnitude of the problem, the need for EU action, and the potential policy responses. Important to mention is that any chosen outcome is designed to sit alongside other initiatives that combat tax evasion and aggressive tax planning such as DAC 6 and the ATAD.

European Commission's Annual Report on Taxation 2022

On 28 June 2022, the European Commission published the Annual Report on Taxation 2022 Review of taxation policies in EU Member States. The report presents the state of play of taxation in the European Union, assesses recent trends in Member States tax systems and identifies how tax policy, implementation and compliance could be improved. In addition, it describes the most recent reforms and indicators of the European Commission. The Report focuses on developments related to the current digital and green transitions, with important consequences for VAT and other indirect taxes.

ECOFIN report to the European Council on tax issues

On 17 June 2022, the final scheduled meeting of the Economic and Financial Affairs Council of the EU (ECOFIN Council) under the French Presidency of the Council took place. The most predominant subject talked about was the agreement on the Minimum Tax Directive proposal. Because Hungary has changed its position and decided not to support the adoption of the Directive, the ECOFIN failed to reach unanimous agreement on this matter. For a more detailed description, reference is made to the EUTA 195.

The ECOFIN informed the European Council also on other pending initiatives which are expected to be taken forward during the second half of 2022. Such as the Unshell Directive, DEBRA, the revision of the mandate of the Code of Conduct Group and the update of the list of non-cooperative jurisdictions. Next to this, the ECOFIN has also included updates on various VAT items such as, its conclusion on the implementation of the VAT e-commerce package, the VAT definitive system, the VAT rates reform, the VAT committee and the VAT reverse charge mechanism extension. At last, the ECOFIN has touched upon the revision of the Energy Taxation Directive and the Financial Transaction Tax.

State Aid/WTO

Opinion of AG Szpunar on procedural aspects related to the status of intervener in State aid cases

On 14 July 2022, AG Szpunar rendered his Opinion in the joined cases C31/22 P(I), C32/22 P(I) and C74/22 P(I). The case concerns a procedural question on whether an intervener (admitted by the CJ during the appeal proceedings), continues to have this status following the referral of the case back to the General Court.

The underlying case concerns the Belgian excess profit tax rulings. The CJ had granted nine companies leave to intervene in support of the form or order sought by the applicant. In its judgment, the CJ set aside the judgment of the General Court (T131/16 and T263/16) and referred the case back to the General Court for a ruling on certain pleas in that case.

Several companies that were interveners before the CJ then submitted their observations to the General Court for the decision in the referred case. The General Court informed these companies that their observations did not constitute a document provided in the Rules of Procedure of the General Court, as they were not interveners in the referred case. The AG provided his Opinion on this dispute.

The AG first found that the Rules of Procedure did not resolve this dispute. The AG then considered that the right to intervene is based on the existence of a 'direct and present interest in the result of the case'. This does not change when a decision of the General Court is set aside by the CJ and referred back the General Court. Therefore, the AG opines that the parties that were admitted to intervene at the level of the CJ should, in principle, retain the capacity to intervene, in so far as the interest of the party in the case continues to be a present interest.

VAT

Opinion AG Kokott on invoice requirement when applying the simplified triangulation scheme (*Luxury Trust Automobil GmbH*)

On 14 July 2022, the Opinion of AG Kokott of the CJ was published in the case *Luxury Trust Automobil GmbH* concerning the simplified triangulation scheme for intracommunity chain transactions (C247/21).

The Austrian company Luxury Trust is engaged in the cross-border supply of vehicles. Luxury Trust purchased vehicles from a UK supplier and transferred these vehicles to a Czech customer. Luxury Trust applied the intracommunity triangulation scheme in relation to these supplies, as a result of which, Luxury Trust did not register for VAT in the Czech Republic. The invoices issued by Luxury Trust to the Czech customer mentioned 'VAT-exempt intra-community triangular transaction'. The Czech customer failed to declare VAT on the intracommunity acquisition in relation to the triangular transactions.

Luxury Trust provided its Austrian VAT number to the UK supplier. The Austrian tax authorities argued that the formal requirements to apply the triangulation scheme were not fulfilled, as a result of which a VAT assessment was imposed relating to the (deemed) intracommunity acquisition of the vehicles by Luxury Trust in Austria.

AG Kokott argued that the Czech customer should only be liable for VAT on the triangular transactions if the invoice issued by Luxury Trust states that the VAT has been reverse charged to the Czech customer. The mere statement 'intra-Community triangular transaction exempt from VAT' is not sufficient for that purpose, as a result of which, the VAT assessment was correctly imposed on Luxury Trust, according to the AG.

Get in contact

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