European Commission published the opening decision in the case of potential state aid by Luxembourg to GDF Suez (Engie)

Continuing its inquiries into tax rulings practices by EU member states the European Commission opened on 19 September 2016 an investigation into the Luxembourg tax treatment of the GDF Suez group (now Engie). The opening decision was published on 5 January 2017. This particular case concerns discretionary double non-taxation of interest i.e. tax treatment of debt and equity in relation to zero-interest loans. The tax rulings that the Commission looks into allegedly treated two financial transactions as both debt and equity, which is inconsistent with the tax treatment of the said transactions. Such a treatment gave rise to double non-taxation, as the borrowers could significantly reduce their tax liability in Luxembourg by deducting deemed interest payments as expenses. Under the terms of convertible zero-interest coupon the borrower can record a provision for deemed interest payment without an interest payment actually taking place. Had the lender actually received interest payments it would have been subject to corporation tax, whilst the interest payments are tax deductible at the level of the borrower. This discretionary treatment of the deemed interest payments gave rise to double non-taxation, endorsed with tax rulings approved by the Luxembourg tax administration.

With this case, the European Commission addresses the cases of inconsistent application of national tax law that gives rise to discretionary double-non taxation.

In similar vein, the Commission is already looking into McDonald’s arrangements in Luxembourg, where the group’s income was exempt from taxation on basis of confirmatory ruling that accepts existence of permanent establishment in the US, where the profits would have been subject to tax, in spite of the fact that they were in fact not taxed in the US.

ECJ annulled General Court judgments in the cases Commission v World Duty Free and Commission v Banco Santander, and in Commission v Air Lingus, Ryanair

The week before Christmas saw European Commission winning two cases on appeal at the Court of Justice of the EU (CJEU). This line of case-law provides for important clarification concerning the criterion of selectivity in tax related State aid cases.

The case C-20/15 concerned a Spanish tax scheme where undertakings taxable in Spain that acquired a foreign shareholding could deduct the resulting goodwill through amortisation from its basis of assessment. European Commission investigation concluded that the scheme was selective, with General court later annulling two Commission decisions considering that the selectivity of the scheme had not been established.
Court of Justice annulled the General Court judgments establishing there was error in law in annulling Commission decisions on the ground that the Commission had not established a particular category of undertakings that was favoured by the Spanish tax scheme.

Consequently, the requirement of the General Court to identify *ex ante* an exclusive category of undertakings that benefit from the measure in order to establish its selectivity was dismissed by the CJEU. The judgment accepts an earlier Opinion of Advocate General Wathelet who recommended annulment of the General Court judgment.

In Commission v Ryanair, Air Lingus, the Court of Justice set aside part of the General Court judgment that had required from the Commission to examine whether and to what extent the State aid beneficiaries enjoyed an economic advantage arising from the application of lower rate of passenger air tax. Thus, CJEU dismissed actions brought by Ryanair and Air Lingus and confirmed Ireland’s obligation to recover 8 Euro per passenger from the airlines benefiting from state aid.

Judgment Joined Cases C-20/15P and C-21/15P Commission v World Duty Free Group and Banco Santander

European Commission published the decision regarding potential State aid by Ireland to Apple- Ireland its arguments

The long awaited decision related to the alleged State aid granted by Ireland to Apple was finally published by the European Commission in December. CFE published an extensive note summarising Commission’s main arguments of 130 pages long ruling, which we summarise in the points below:

**The European Commission decision** states that Ireland granted Apple illegal State aid by virtue of the terms of two Advanced Pricing Arrangements (APAs) with two Apple entities in 1991 and 2007. The APAs were granted in relation to two subsidiaries of Apple Inc., Apple Sales International (“ASI”) and Apple Operations Europe (“AOE”) which were not tax resident in Ireland but operated through a branch in Ireland. The Commission issued its preliminary decision on 30 August 2016 after a three-year long investigation into Apple’s tax arrangements in Ireland following comments made by Apple executives before a Senate Committee hearing in Washington in 2013. Ireland has appealed the decision and Apple has indicated its intention to appeal the decision. As a preemptive move Ireland published an outline of its appeal prior to the publication of the Commission decision. It is available here.

Profit allocation methods were challenged by the Commission. The Commission found that the Irish Revenue i.e. Ireland’s tax authorities granted Apple a “selective advantage” in contravention of EU State aid law because it did not employ appropriate profit allocation methods to calculate the Irish source income of the Irish branches. The Commission essentially disagrees with the methodologies employed by Apple and accepted by the Irish tax authorities, and in particular disagrees with: The use of a one sided functional analysis as opposed to a two-sided functional analysis assessing the resources of the head office in reality. Ireland should not have accepted the “unsubstantiated assumption” that the Apple IP licenses held by the relevant entities should be allocated outside of Ireland in circumstances where the reality of the situation is that there were no employees or personnel to conceivably carry out the functions assigned to the head offices based outside Ireland, and the Board minutes of the Head Office indicate the directors played an insufficient “active and critical role” in the control and management of the relevant Apple licenses. The use of operating expenses as the profit level indicator instead of sales in the case of ASI and total costs for AOE; the acceptance of a low rate of returns, as well as the comparables used in the analysis, were too challenged by the Commission.
Finally, the Commission is of an opinion that in accepting the one-sided profit allocation method endorsed by the tax rulings endorsed State aid for Apple in breach of Article 107 of Treaty on the Function of the EU.

Save the date- CFE’s Forum 2017, our International Tax Conference will take place on 30 March 2017 in Brussels

This year’s CFE Forum brings together prominent speakers revisiting the concept of permanent establishment post-BEPS, with specific focus on fixed establishment for VAT purposes.

Watch this space for more details. In the meantime, take a look at the tentative agenda.

Overview of the activities of CFE’s Fiscal Committee for 2016

Please follow the link below for overview of the main activities and publications of CFE’s Fiscal Committee for 2016.

CFE Fiscal Committee overview of activities and publications: LINK

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The selection of the remitted material has been prepared by Piergiorgio Valente / Filipa Correia / Aleksandar Ivanovski / Mary Mineen

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