26 October 2015

1. **Commission: Dutch and Luxembourg tax rulings in Starbucks and Fiat cases were illegal state aid**

On 21 October 2015, the European Commission concluded that the tax rulings issued by the Dutch and Luxembourg tax administrations to Fiat Finance and Trade and Starbucks approved transfer prices not reflecting economic reality, endorsed artificial methods to establish the companies´ profits and thereby gave them a selective advantage over competitors, incompatible with the EU state aid rules. Most of the profits of Starbucks' coffee roasting company have been shifted abroad, where they are also not taxed, and Fiat's financing company only paid taxes on underestimated profits.

Fiat Finance and Trade, based in Luxembourg, provides financial services, such as intra-group loans, to other Fiat group companies. The Commission concluded that a tax ruling issued by the Luxembourg authorities in 2012 unduly reduced the company´s tax burden by €20 - €30 million since 2012. Given that Fiat Finance and Trade's activities are comparable to those of a bank, the Commission determined its taxable profits in a similar way as for a bank, as a calculation of return on capital deployed for its financing activities. The tax ruling endorses a methodology considered artificial and extremely complex, in two ways:

- Due to a number of economically unjustifiable assumptions and downward adjustments, the capital base approximated by the tax ruling is much lower than the company's actual capital. As a matter of principle, if the taxable profits are calculated based on capital, the level of capitalisation in the company has to be adequate compared to financial industry standards.
- The estimated remuneration applied to this already much lower capital for tax purposes is also much lower compared to market rates.

As a result, Fiat Finance and Trade has only paid taxes on a small portion of its actual accounting capital at a very low remuneration. According to market conditions, the taxable profits declared in Luxembourg would have been 20 times higher.

Starbucks Manufacturing EMEA BV ("Starbucks Manufacturing"), based in the Netherlands, is the only coffee roasting company in the Starbucks group in Europe. It sells and distributes roasted coffee and coffee-related products (e.g. cups, packaged food, pastries) to Starbucks outlets in Europe, the Middle East and Africa. The Commission concludes that a tax ruling issued by the Dutch authorities in 2008 unduly reduced Starbucks Manufacturing's tax burden since 2008 by €20 - €30 million, by artificially lowering taxes paid by Starbucks Manufacturing in two ways:

- Starbucks Manufacturing pays a very substantial royalty to a UK-based group company which is neither liable to pay corporate tax in the UK, nor in the Netherlands, for coffee-roasting know-how.
- It also pays an inflated price for green coffee beans to a Swiss group company.

The Commission explains that other products than coffee roasting represents most of the turnover of Starbucks Manufacturing, and that its profits from coffee roasting resulting from the arrangements are not high enough to pay the royalty to the UK group company that holds the know-how.

The Commission ordered Luxembourg and the Netherlands to end this tax treatment and claim back the advantage granted to the two companies.

In the two investigations, the Commission has for the first time used new information request tools, enabling it, if the information provided by a member state subject to the state aid investigation is not sufficient, to ask any other member state as well as companies (including the company benefitting from the aid measure or its competitors) to provide directly to the Commission all market information necessary to complete the state aid assessment.

The Commission is continuing its inquiry into tax rulings practices in all EU member states, announced in December 2014. There are pending in-depth state aid investigations concerning other tax rulings issued by Belgium ("excess profits tax"), Ireland (Apple) and Luxembourg (Amazon).

- Press release: EN
- Non-confidential versions of the decisions (to be made available later)
    - FIAT: SA.38375
    - Starbucks: SA.38374

2. CJEU: No VAT on exchange of currency into Bitcoins

On 22 October 2015, the EU Court of Justice (CJEU) decided in the Swedish preliminary ruling case C-264/14, Hedqvist, that no VAT is due on the exchange of a "traditional" currency into the digital currency (and vice versa). This means that Bitcoins get the same VAT treatment as traditional currencies.

- Judgment: EN (all EU languages available)
- Press release : ES CS DE EN FR IT NL PL PT SK SI FI

3. Commission asks Poland to stop discriminatory tax treatment of pensions contributions

On 22 October 2015, the European Commission has asked Poland to change its tax laws which grant tax deductibility of private pension contributions only if these are paid into "Individual Pension Insurance Accounts" (IKZE) opened in Polish financial institutions, but not into similar financial products and institutions established in other EU/EEA states. The Commission's request takes the form of a reasoned opinion. In the absence of a satisfactory response within two months, the Commission may refer Poland to the CJEU.

- October 2015 infringement package: EN (14 EU languages available)

4. CJEU rules on right to deduct VAT in case of missing supplier

On 22 October 2015, the CJEU rendered its judgment in case C-277/14, PPUH Stehcemp, referred to it by the Polish Supreme Administrative Court. The EU Court holds that national law may not refuse the deduction of the VAT due or paid in respect of goods delivered, on the grounds that the invoice was issued by a trader which is to be regarded as non-existent, and that it is impossible to determine the identity of the actual supplier of the goods. This does not apply where it is established on the basis of objective factors that that

taxable person knew, or should have known, that the transaction was connected with VAT fraud. When establishing this, the taxable person cannot be required to carry out checks which are not his responsibility.

- Judgment: EN (all EU languages)

5. CJEU rules on deduction of input VAT for public path leading to a place where taxable goods and services are sold

On 22 October 2015, the CJEU decided in the Lithuanian preliminary ruling case C-126/14, Sveda, that a taxable person has the right to deduct the input VAT paid for materials used for building a recreational path accessible for the public free of charge, if that person intends to attract these visitors to a place where he tries to sell them VAT-taxable goods and services, and this is directly and immediately related to his economic activity.

- Judgment: EN (all EU languages)
- Opinion of Advocate-General Kokott : EN

6. Ireland to introduce "knowledge development box"

On 13 October 2015, Ireland announced the planned introduction a reduced corporation tax rate of 6.25% on profits arising from research and development projects relating to certain patents and copyrighted software carried out by an Irish company. While details of the planned tax measure are not yet public, the Irish government aims at proposing an incentive fully compliant with the "modified nexus approach" supported by the EU and the OECD designed to prevent multinationals from shifting their intellectual property to those jurisdictions that give them the most favourable tax treatment, irrespective of any link between that jurisdiction and the generation of the IP rights and their value. Several tax firms that have commented on the measure expect that in most sectors, it will serve indigenous companies more than multinationals. The law is expected to apply to accounting periods beginning on or after 1 January 2016.

*****

The selection of the remitted material has been prepared by Piergiorgio Valente / Filipa Correia / Rudolf Reibel

Follow us on Linked in