CFE's Tax Top 5

Key tax news of the week

19 September 2016

1. **Future EU “blacklist”: Commission presents selection of countries to be screened**

As a first step towards a common EU list of non-cooperative jurisdictions which the European Commission plans to publish by the end of 2017, the Commission presented, on 14 September 2016, its suggestion to the EU member states as to which countries should be screened first and should be involved in a dialogue on tax good governance issues. This screening and dialogue would be carried out by the Commission and, through the EU Council “Code of Conduct Group”, the member states.
As the Commission explains, its pre-assessment seeks to identify the countries which are economically relevant for the purpose of the list (taking into account the strength of economic ties with the EU, financial activity in relation to real economic activity, and stability), and countries that present a potential risk for facilitating tax avoidance (taking into account transparency and exchange of information, the existence of preferential tax regimes and the lack of corporate income taxation). 48 “least developed countries” have been excluded from the list and will be considered separately. The member states are not bound to the Commission´s selection when deciding, until the end of this year, which countries should be screened. It will thus be possible that even relevant countries with a high tax avoidance risk are spared from screening if member states cannot agree on including them. The screening criteria have not been agreed either. The Commission suggests that these be (1) tax transparency and exchange of information, (2) fair tax competition, (3) commitment to BEPS implementation and (4) the level of corporate taxation. The OECD is working on a blacklist (only) on tax transparency to be presented in summer 2017.

- Press release, 15 September 2016: EN (All EU languages)
- “Scoreboard of indicators”: EN
- Questions and answers: EN

2. **State aid: Commission opens in-depth investigation into Luxembourg's tax treatment of GDF Suez/Engie**

On 19 September 2016, the European Commission has opened an in-depth investigation into Luxembourg's tax treatment of the GDF Suez group (now Engie). The Commission has concerns that several tax rulings issued by Luxembourg may have given GDF Suez an unfair advantage over other companies, in breach of EU state aid rules. The Commission will assess in particular whether Luxembourg tax authorities selectively derogated from provisions of national tax law in tax rulings issued to the group. They appear to treat the same financial transaction between companies of GDF Suez in an inconsistent way, both as debt and as equity. After a preliminary assessment, the Commission considers that the treatment resulted in tax benefits in favour of GDF Suez which are not available to other companies subject to the same national taxation rules in Luxembourg.

The opening of an in-depth investigation gives interested third parties and the member states concerned an opportunity to submit comments. It does not prejudge the outcome of the investigation.

- Press release: EN (FR DE available)

3. **State aid: Commission opens in-depth investigation into Poland's tax on the retail sector**

On 19 September 2016, the European Commission has opened an in-depth investigation into a Polish tax on the retail sector. The Commission has concerns that the progressive rates based on turnover give companies with a low turnover a selective advantage over their competitors in breach of EU state aid rules. The Commission explains that the progressive rate structure has the effect that companies with low turnover either pay no retail tax or pay substantially lower average rates than companies with high turnover. The Commission will now investigate further to determine whether its initial concerns are confirmed. The opening of an in-depth investigation gives interested third parties the opportunity to comment on the measures under assessment. It does not prejudge the outcome of the investigation.
The Commission has also issued an injunction, requiring Poland to suspend the application of the tax until the Commission has concluded its assessment. In July 2016, the Commission had concluded that a progressive turnover-based retail tax in Hungary is in breach of EU state aid rules.

- Press release: EN (FR DE PL available)

4. **CJEU rules on exclusion of the right to input VAT deduction**

On 15 September 2016, the EU Court of Justice (CJEU) delivered its judgment in the German preliminary ruling case (C-400/15) on whether the district of Potsdam-Mittelmark could be refused the right to deduct VAT on machinery it had purchased and mainly used for non-taxable purposes.
A derogation from the VAT Directive authorised Germany to disallow input VAT deduction where goods and services are used more than 90% for the private purposes of the taxable person, or of his employees, or for non-business purposes in general. The CJEU decided that this derogation does not extend to goods or services used, to an extent greater than 90%, for non-economic activities which fall outside the scope of VAT.

- Judgment: EN (All EU languages)

5. **CJEU decides on retrospective effect of the correction of a VAT invoice**

On 15 September 2016, the CJEU decided in the German preliminary ruling case Senatex, C-518/14, that national legislation may not deny retrospective effect of the correction of a detail of an invoice, such as the VAT ID number, so that the deduction VAT on the basis of the corrected invoice would only be possible for the year in which it was corrected.

- Judgment: EN (All EU languages)
- Advocate-General opinion: EN (All EU languages)

6. **CJEU: Tax authorities that hold the relevant information may not refuse VAT deduction because supplies are not sufficiently described in the invoice**

In another decision relating to the right to VAT deduction taken on 15 September 2016, the CJEU ruled in case C-516/14, Barlis 06, that the description of supplies on a VAT invoice invoices mentioning only 'legal services rendered from [a date] until the present date', or 'legal services rendered until the present date' do not a priori comply with the EU VAT invoicing requirements. However, national tax authorities may not refuse VAT deduction solely because the services have not properly been described, if they have the necessary information for ascertaining whether the conditions for the right to VAT deduction are satisfied.

- Judgment: EN (All EU languages)
- Advocate-General opinion : FR (Available in most EU languages, not EN)

7. **OECD working paper on tax incentives for R&D and innovation**

On 13 September 2016, the OECD released a working paper titled "Fiscal incentives for R&D and innovation in a diverse world". The works looks at different incentives applied across countries and their unintended consequences such as favouring incumbent firms, encouraging small firms to undertake less efficient activities, or creating arbitrage and rent-seeking activity. The paper advocates the "nexus" approach, according to which a taxpayer should benefit from a preferential regime only to the extent that he has incurred the expenditures that have given rise to the income generated by the research and development investment.

- Working paper: EN (Executive summary available in French)

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

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