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CFE's Tax Top 5

Key tax news of the week

Brussels, 19 February 2018

International Organisations meet at UN in New York to discuss taxation and Sustainable Development Goals

A 3-day event was organised by the Platform for Collaboration on Tax and hosted at the UN headquarters in New York last week with the aim of examining the role of tax in alleviating poverty, protecting the planet and ensuring prosperity for all.

Major international organisations including the IMF, OECD, UN and World Bank Group called on governments to make their tax systems stronger and more effective in order to generate the domestic resources necessary to reach the Sustainable Development Goals and be in a better position to promote inclusive economic growth.

The statement from the meeting highlighted the problems experienced by developing countries in maintaining tax systems, which are capable of funding the necessary public resources such as public infrastructure. It also highlighted the importance of tackling tax evasion and tax avoidance, and the need to pay more attention to the spill overs from tax policies in order to support stronger tax systems internationally.

OECD publishes consultation document on misuse of residence by investment schemes to circumvent the Common Reporting Standard (CRS)

The OECD has launched a consultation document on the misuse of schemes that offer "residence by investment" (RBI) or citizenship by investment (CBI). These schemes offer foreign individuals the opportunity to obtain citizenship or residence rights in return for investment in the local economy.

Whilst users of these schemes have many valid reasons to avail of them, the OECD has obtained information through the OECD's CRS public disclosure facility that people are misusing the schemes in order to circumvent the CRS.

As part of the OECD CRS loophole strategy, this consultation document will:

- Assess how these schemes are utilised to circumvent CRS
- Identify the nature of the schemes that present the most high risk for abuse
- Remind stakeholders of the importance of the correct application of CRS due diligence in order to prevent abuse and finally
- Explain the next steps to be taken by the OECD with the assistance of public input.

The Consultation Document is available on the OECD website and comments are invited before the 19 March 2018.

Amazon settles French tax dispute

Amazon has settled with the French tax authorities a long-running tax dispute over a 200 million Euro bill for a period of over five years. In a statement, Amazon has said that they have reached a comprehensive settlement with the French tax administration on past issues, remaining committed to providing the best experience to French customers. Amazon has opened 5,500 permanent jobs in France, and since 2015 operates in France via branch. A branch is considered a permanent establishment ("PE") under international tax law, therefore of sufficient taxable presence to book profits and sales related to their French operations. Back in November 2012, the French tax administration issued an assessment of 22 million of underreported back taxes to Amazon covering the period between 2011 and 2015.

Similarly, Google is involved in a tax dispute with France after the French government appealed a decision of a Paris court that declared that Google did not have a French permanent establishment. On that basis, the court annulled the tax assessment of the French authorities worth 1.1 billion of back taxes.

Opinion of the Advocate General Sanchez- Bordona in the Case C-650/16 *Bevola* (loss relief of non-resident PEs)

The Advocate General Sanchez- Bordona ("AG) issued an Opinion in the Case Bevola, Jens W. Trock ApS v Skatteministeriet (C-650/16). The case concerns the possibility to claim cross-border loss relief regarding losses incurred by non-resident permanent establishments ("PE"), ie. branches in other Member States. Bevola is an important case where the Court of Justice has another opportunity to revisit the *Marks & Spencer* final losses doctrine, twelve years after this case.

- **Summary**

The Advocate General confirms the comparability of the situation of final losses of non-resident and resident PEs, claiming that an obstruction to the Marks & Spencer exception is disproportionate and contrary to Article 49 TFEU, ie. the freedom of establishment. It transpires from AG's analysis that it would be in breach of EU law if a resident PE could claim cross-border loss relief, but a non-resident PE could not regarding final losses in a comparable situation.

- **Issues**

The case considers three important issues:

1. Whether the Marks and Spencer exception should be retained,
2. if the exception is retained, whether it should apply to subsidiaries only or equally to losses of (non-resident) PEs
3. whether the Danish legislation which enables resident companies to deduct losses of non-resident PEs is compatible with EU law.

- **Final losses of non-resident PEs**

Regarding the question whether the Marks & Spencer exception should be applicable to this situation on equal footing, the AG recalls that the freedom of establishment should not in principle be restricted by tax measures as per Article 49 TFEU. For tax purposes, where a PE is located in a host state, it may be treated as a separate entity in accordance with Articles 5 and 7 of the OECD Model. Following *Lidl Belgium*, losses of non-resident PEs may be deducted from the profits of the principal company as per *Marks & Spencer para 55*. However, after the *X-Holding* judgment, PEs and non-resident subsidiaries could be considered not to be in a comparable situation with regards to allocation of taxing powers. Similar approach was taken by the Court in *Nordea Bank*.

On basis of this case-law, the AG claims that there is a confusion as to the criteria to ascertain the comparability of the tax treatment of parent companies, subsidiaries and non-resident PEs. In light of the uncertainty created by this situation, the AG infers that as a rule, the tax treatment of non-resident PEs and foreign subsidiaries must be equal, as far as the deduction of final losses cannot be used in the PE's state of origin. Such a tax treatment shall also be in line with the approach taken by ATAD (Directive 2011/96/EU, recital 9).

Considering that the losses in question of *Bevola* were final losses of a non-resident PE upon winding-up and arising from the closure of business, these could not be transferred to the company to which the PE belongs (the state of origin), and could therefore not be deducted from the basis of assessment in the origin state of the PE. Such a situation concerning final losses of a non-resident PE, according to the AG, could be covered by the *Marks & Spencer* exception.

On this basis, considering that the Danish legislation includes the revenues of resident and non-resident PEs within its power to tax, Denmark is bound to apply the equal treatment principle to comparable situations, therefore awarding the same tax treatment to loss relief of resident and non-resident PEs.

The Advocate General concluded that the *Marks & Spencer* exception could indeed be applicable to the dispute in question. If the final losses of a non-resident PE in Denmark cannot be offset in the origin country of the PE, there must be a possibility to claim loss relief in the host state (Denmark), equating the situation of resident and non-resident PEs under such comparable circumstances.

- Opinion of Advocate General Sanchez- Bordona in the Case *Bevola*, Jens W. Trock ApS v Skatteministeriet (C-650/16) of 17 January 2018

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