The Court of Justice of the European Union ("CJEU") ruled on (i) the immediate taxation of gains from the transfer of a foreign PE (Case C-292/16 *A Oy*) and (ii) the direct applicability of the general principle of prohibition of abuse to EU secondary tax legislation (Case C-251/16 *Cussens*)

Case C-292/16 *A Oy*

The CJEU decided today the *A Oy* case (C- 292/16), which concerned a Finnish resident company that transferred its Austrian permanent establishment ("PE") to an Austrian resident company in exchange of shares of such receiving company. The gain realized upon the transfer was subject to corporate tax in Finland in the fiscal year when the transfer took place. Under Article 10(2) of the Merger Directive, Finnish legislation granted the transferring company a notional tax credit for the corporate tax that Austria would have charged on the gain if the Merger Directive had not prevented Austria from doing so.

The CJEU held that the described Finnish rules were in breach of the EU freedom of establishment because, in a comparable domestic situation, the transfer of a PE to another Finnish resident company would not have been taxed (para. 27).

Relying on prior case law (particularly C-657/13, *Verder LabTec*), the CJEU confirmed that the restriction on freedom of establishment could be justified by the need to preserve the balanced allocation of taxing powers between Member States and by the principle of fiscal territoriality because, as a result of the transfer, any gains on the PE assets would become taxable only in Austria (paras. 31-33). However, the CJEU found that the immediate taxation of the gains arising from the transfer of the PE was not proportionate to the extent that the taxpayer was not given an option to defer payment of the tax (paras. 35-37). The CJEU also stated that granting the notional tax credit under Article 10(2) of the Merger Directive did not affect this conclusion as the rule on notional tax credit deals only with the determination of the tax due and not with the time of collection (para. 38). Therefore, granting the notional tax credit under Article 10(2) of the Merger Directive and deferring the exit tax as required by the freedom of establishment are not mutually exclusive. Conversely, they must be applied together and in parallel. This would also be the outcome under Italian tax law based on a co-ordinated interpretation of current tax provisions [Arts. 166(2-*quater*) and 179(5) of the Italian Income Tax Code].

Eventually, the CJEU examined the justification based on the need to ensure the effective collection of tax, which the Court accepted in other cases (particularly C 53/13 and C 80/13, Strojírny Prostějov and ACO *Industries Tábor*). The Court, however, dismissed this justification, noting that allowing a resident company to opt for deferring the payment of the tax would not affect the Member State's possibility to ask the company to provide the information necessary for collecting that tax. Nor would the deferral hinder the Member State in the effective collection of such tax (para. 39).

Case C-251/16 *Cussens*.

On 22 November 2017, the CJEU issued its decision in the *Cussens* case (C-251/16), which concerned an alleged abuse of the VAT Sixth Directive (and Irish VAT legislation) by some Irish individuals in connection with the sale of immovable property.

The Court held that, unlike the provisions of the VAT Sixth Directive (Directive 77/388/EEC), the principle that abusive practices are prohibited (as established in the *Halifax* case (C-255/02)) is not subject to a requirement of transposition in the Member States' domestic laws. According to this principle, (i) EU law cannot be relied on for abusive or fraudulent ends and (ii) the application of EU legislation cannot be extended to cover abusive practices by economic operators (para. 27). Because this is a general, overarching principle grounded in settled case law, it applies even if no national measure gives effect to it (para. 33). Moreover, the Court found that it is consistent with the principles of legal certainty and protection of legitimate expectations for such a principle to be applied to facts preceding its decision in the *Halifax* case (para. 44).

The CJEU also made an interesting reference to its previous decision in the *Kofoed* case (C-321/05), which concerned the abuse of the Merger Directive. According to the Court, the *Kofoed* case did not deal with the conditions for applying the principle that abusive practices are prohibited, but rather with the conditions for applying the specific anti-abuse provision contained in the Merger Directive. In particular, the *Kofoed* decision emphasized that national tax authorities could challenge transactions covered by the Merger Directive, on the basis of the specific anti-abuse provision contained in that Directive, only if they could rely on national anti-abuse rules capable of being interpreted in accordance with such a specific anti-abuse provision. In *Cussens*, however, the Court held that its decision in *Kofoed* does not apply to the general EU law principle prohibiting abusive practices (para. 38). This approach could potentially open the doors to the application of the general EU law principle forbidding abusive practices also to matters covered by direct tax directives, regardless of whether there are domestic provisions giving effect to such principle.

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