Cases C-115/16, C-116/16, C-117/16, C- 118/16, C-119/16 and C-299/16

AG Kokott issued her opinion on the interpretation of the Parent Subsidiary Directive and the Interest and Royalty Directive in the Danish conduit cases

Today, AG Kokott issued her opinion in cases C-115/16, C-116/16, C-117/16, C- 118/16, C-119/16 and C-299/16 on the interpretation of the Interest and Royalty Directive (Directive 2003/49/EC, hereafter the "IRD") and on the Parent Subsidiary Directive (Directive 2011/96/EU, hereafter the "PSD"). The most relevant aspects discussed by AG Kokott are summarized below.

On the beneficial ownership requirement

In the IRD cases, AG concluded that the term beneficial owner should receive an autonomous meaning under Art. 1(1) of the IRD. The decisive criterion to identify a beneficial owner within the meaning of the aforementioned provision is whether the recipient receives the payments for its own benefit rather than as a trustee. AG also pointed out that the OECD Model Tax Convention and the related Commentary cannot have a direct effect on the interpretation of an EU directive, even if the terms used are identical.

In the PSD cases, AG held that the beneficial ownership requirement is not relevant in the context of the PSD. AG pointed out that such conclusion is in line with the wording of the Directive and with its underlying aims. With regard to exemption at source, AG further affirmed that the benefit should be given insofar as both the subsidiary and the parent are subject to corporate tax in the respective States residence.

On the notion of abuse

In both IRD and PSD cases AG went through the case law on the prohibition of abuse of law. AG upheld that wholly artificial arrangements (that are those arrangements existing only on paper) shall be automatically recognized as abusive. In all other cases, AG concluded that an abuse can be found if it can be established that the taxpayer circumvented the purposes of tax laws in line with Art. 6 of the recently introduced Directive 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market.

In the cases at stake, AG clarified that an abuse can be found where the ultimate investors – resident in third countries – circumvented taxation at source in the State of the subsidiary. Accordingly, AG concluded that it should be assessed whether the ultimate investors avoided tax on their income and, in particular, whether they achieved this outcome through corporate structures that are

designed to create a loophole in the exchange of information between the State of residence of the investors and the EU State in which the income is sourced.

On the identification of the beneficial owner

AG held that, when a State wishes to deny the nature of beneficial owner of the payee of certain interest or dividend payments, it must in principle also state whom it considers to be the beneficial owner. According to AG, this identification is necessary in order to assess whether abuse exists.

On the transposition of anti-abuse provisions contained in the Directives

AG denied direct effect of anti-abuse provisions contained in the Directives. AG pointed out that based on settled case law a directive cannot itself impose obligations upon individuals. Therefore, application of aforementioned anti-abuse provisions is subject to the existence of national provisions or principles of national law (including principles established in case-law), as a result of which, for example, sham transactions are disregarded for tax purposes. AG clarified that the aforementioned conclusion does not conflict with VAT judgments delivered by the CJEU in *Italmoda* (C-131/13, C-163/13 and C-164/13) and *Cussens* (C-251/16), since the principles enshrined therein do not apply in the field of direct taxation.

On the restriction of fundamental freedoms

With regard to the restriction of fundamental freedoms, it is interesting to remark that in the IRD cases AG recalled the *Truck Center* case (C-282/07) to uphold that resident and non-resident recipients of interest are not in a comparable situation being subject to different taxation arrangements (levying of corporate tax vìs-à-vìs application of withholding tax). Surprisingly, AG seems to hold the same conclusion also in the PSD cases.

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