



INTERNATIONAL TAX CONFERENCE

RECENT TAX DEVELOPMENTS IN EUROPE

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SUMMARY

- Tax impact of EURO troubles
- EU legislative initiatives
- Case law of the European Court of Justice
- National legislative and case law developments



Impact of EURO troubles

- EURO group M.S. remain determined to defend the EURO.
- EURO group M.S. start to realise that a EURO fund of 750 billion EURO's will not save the EURO, but that under the circumstances the transfer of some sovereign fiscal and budgetary decision making power is inevitable in times of crisis.
- Germany is pushing for such reform, Ireland is resisting it. Except for rates impact of reform on material tax rules will be minimal.

EU Legislation

- Council Directive 2010/24/EU, 16.03.2010 concerning mutual assistance for the recovery of claims relating to taxes, to be implemented by 31.12.2011. This directive is a parallel with a proposal for a new directive on administrative cooperation in the field of taxation (COM2009 of 02.02.2009).
- Competent authority shall designate a central liaison office in charge of contacts with Commission and other M.S. (art. 4/2-3)



EU Legislation

- Council Directive 2010/24/EU, 16.03.2010:
- Foreign tax officials may be present in the tax offices during enquiry, and may, if national legislation provides so, interview individuals and examine records (art. 7).
- Information may be shared with third M.S., if M.S. of origin is not opposed. Information received may be used as evidence by all authorities in receiving M.S.



EU Legislation

- EU-Japan agreement of 24.06.2010 for the Mutual Recognition of Authorised Economic Operators with respect to customs inspection. Japanese security certified operators will receive same benefits as Authorised Economic Operators in the M.S. of the EU.

EU Proposed Legislation

- Proposal of Council Directive, COM 2009, 02.02.2009, on administrative cooperation in the field of taxation, to replace the existing Exchange of Information Directive, 77/799/EEC of 19.12.1977.
- Exchange of information on taxes of any kind, except VAT and excises, but including social security
- Liaison office for contacts with other M.S. and the Commission and liaison depts. (art.4)



EU Proposed Legislation

- Proposed Council Directive Administrative Cooperation (Com 2009, 02.02.2009)
- Simultaneous controls in two or more M.S. (art. 11).
- The directive shall not be construed as permitting a M.S. to decline to supply information if the information is held by a bank or financial institution (art. 17/2).
- When a M.S. provides a wider cooperation with a third country than the directive, it may not refuse such wider cooperation to another M.S.



EU Proposed Legislation

- EU Commission press release 07.10.2010:
- The Commission backs a worldwide (low) tax on financial transactions to finance global objectives. The tax must be global and uniform so as not to distort competition.
- Within the EU the Commission proposes a tax on financial activities to increase the over-all contribution of the financial sector. The tax would be based on profits and remuneration in the financial sector.
- No concrete proposal.



European Court of Justice

- Free movement of capital (art. 56 EC, art. 63 TFEU):
- All restrictions on the movement of capital, or on payments between M.S. and third countries shall be prohibited. Free movement of capital also applies to third countries.
- Limitations: (1) justification of tax avoidance and lack of exchange of information, (2) standstill clause, (3) non-application in parallel of other freedoms.



European Court of Justice

- C-510/08, Mattner, 27.04.2010:
- A provision whereby the amount of the basic exemption from gift tax on a gift between two non-residents of immovable property located in a M.S. is less than the basic exemption on a gift where one of the parties to the gift is a resident of a M.S., constitutes a violation of the free movement of capital under art. 56 EC treaty.



European Court of Justice

- C-440/08, Gielen, 18.03.2010:
- There is a violation of the freedom of establishment (art. 49 TFEU) when a deduction for self-employed persons is discriminatory to non-resident taxpayers, even when those non-resident taxpayers are entitled to opt for the tax regime of resident taxpayers (with taxation on worldwide income) in order to benefit from that tax advantage on the same footing as resident taxpayers.



European Court of Justice

- C-540/07, Commission v Italy, 19.09.2009:
- By making dividends distributed to non-resident companies subject to a less favourable tax regime (27% or 12,5 % WH tax), than the 95% exemption for dividends distributed to resident companies, Italy failed to fulfill its obligations under the free movement of capital (art. 56 (1) EC)



European Court of Justice

- C-562/07, Commission v. Spain, 06.10.2009:
- By taxing capital gains of non-resident taxpayers at 35%, while capital gains of resident taxpayers were taxed progressively, if realised within one year of acquisition and at 15% for the rest, Spain has failed to fulfill its obligations under the free movement of capital provisions (art.56 EC).



European Court of Justice

- C-72/09, Rimbaud, 28.10.2010:
- Art. 40 AEE (free movement of capital) does not preclude legislation, which exempts from the tax on market value, immovable property located in a M.S. belonging to a company having its seat in that M.S., but makes the exemption for a company having its seat in the EEA (Liechtenstein), conditional (1) on the existence of a DTA with clauses on administrative assistance, or (2) a clause of non-discrimination on grounds of nationality.



ECJ Pending Cases

- C-493/09, Commission v Portugal, 01.12.09:
- Dividends paid to domestic pension funds are wholly exempt from corporation tax, while dividends paid to non-resident pension funds are subject to WH tax. Is there a violation of the free movement of capital (art. 63 TFEU)?

ECJ Pending Cases

- C-342/10, Commission v Finland, 07.07.2010:
- Dividends received by Finnish pension funds are taxed at 26% on 75% (19,5%) of the amount received minus deduction of expenses and losses. Pension funds established in other M.S. are taxed at 19,5%, on gross-dividends, without any deduction of charges and losses: violation of free movement of capital (Art. 63 TFEU)?



ECJ Pending Cases

- C-383/10, Commission v Belgium, 30.07.2010:
- Interest not in excess of 1250 EURO's paid on savings accounts by financial companies established in Belgium is tax exempt. That exemption is not available on savings accounts paid by financial companies established in other M.S: violation of free movement of capital (art. 63 TFEU)?



ECJ Pending Cases

- C-157/10, Banco Bilbao Vizcaya, 02.04.2010:
- Are art. 63 and 65 TFEU precluding unilateral national or treaty rules, which in the context of the CIT or DTA's, prohibit the deduction of amounts of tax due in other M.S. on income subject to CIT and sourced in their territory, where those amounts, though due, are not paid by virtue of an exemption, a tax credit, or any other benefit?



ECJ Pending Cases

- C-384/09, Prunus, 29.09.2009:
- Is art. 56 EC precluding legislation which grants exemption from a tax to legal entities having their centre of management in France or another M.S., but makes that exemption for similar entities in a non-M.S. subject to the condition of the existence of a convention on administrative assistance with France, or a clause in the DTA prohibiting discrimination on grounds of nationality, which prohibits those legal entities from being taxed more heavily than resident entities?



National Legislation and Case Law

- **Interest Barrier Legislation:**
- Germany: as of 25.03.2007
- Interest expense (interest expense over interest income) is restricted to 30% of earnings before interest (income and expense), taxes and depreciation (EBITDA).
- Threshold of 3 million EURO
- Not applicable to non-group companies
- D/E ratio of company < D/E ratio of the group and interest paid to shares < 10% of total.



National Legislation and Case Law

- Interest barriers in Italy: as of 01.01.2008
- Special rule for financial companies: 96% of interest payable is deductible.
- Interest deduction is limited to 30% of EBITDA applies to all resident companies and PE's.
- Excess interest can be carried forward indefinitely and deducted in years where net interest expense < 30% of EBITDA.
- Group-relief: excess interest can be transferred among members of the group.



National Legislation and Case Law

- Interest barriers in the U.K: as of 01.01.2010
- Worldwide debt cap restricts deductible interest to the extent of (1) excess of financing expenses over financing income (threshold 0,5 mill. £) and (2) consolidated financial expenses of the group.
- Not applicable to SME's, qualifying financial companies and North Sea oil activities.
- Transfer of excess interest within group allowed.
- Gateway test: if UK net debt < 75% non UK gross debt, limitation does not apply.



United Kingdom

- Tax act 01.07.2010:
- CIT rate: 28->27% ->24%, SME 21->21%
- VAT: main rate 17,5 -> 20%, after 04.01.11
- Capital gains tax: 18 ->28%, lifetime exemption for entrepreneurs -> 5 mill. £, excess subject to 10%
- Trustees, representatives of deceased estates 28%
- Power to replace high income excess relief charge on pension contributions.



Germany

- New Circular 16.04.2010, on the application of DTA's to income from partnerships (Anwendung der Doppelbesteuerungsabkommen (DBA) auf Personengesellschaften.
- Solid case law that the special articles of a DTA prevail over the partnerships treated as transparent entities under domestic law, so that art. 7 OECD MC does not apply to fictitious commercial partnerships is put into question by this circular.

France

- Zimmer, Conseil d'Etat, 31.03.2010:
- Commission agent « commissionnaire » used by a non-resident company for its sales is not considered to be a PE, regardless the degree of dependency.
- Zimmer France was distributor for Zimmer Products a UK manufacturer. It sold inventories, assets and the balance of clients receivables to Zimmer U.K. to reduce risks. Under the commission agreement ZF was selling under its own name, but on the account and for the risk of ZGB.

Switzerland

- Switzerland has accepted the OECD standard on exchange of information under art. 26 of the MC.
- The amended exchange of information clauses will be effective as of 01.01.2011, except for the U.S. (23.09.2009)
- Tax « fraud and the like » is interpreted as only tax fraud meaning the use of forged and falsified documents (except U.S.)
- No fishing expeditions.
- Only taxes within the scope of the treaty (income and wealth).

- First court ruling, 16.04.2010 on beneficial ownership (SKM 2010, 268):
- In a quite complicated holding construction set up by foreign private equity funds the tax tribunal held that the set up was not a conduit and that the foreign holding company receiving the dividend was the beneficial owner and entitled to protection under the treaty and under the EU parent subsidiary directive.

Austria

- Austria lifts banking privilege : the Exchange of information implementation act, implements the EU directive on the mutual assistance of the recovery for claims of taxes and provides a legal basis to obtain bank account information for tax purposes in the course of cross-border exchange of information.
- Art. 29 of the Criminal Tax Act, provides for an amnesty in case of voluntary, full and timely disclosure of the amount of tax due.