

# **Anti-avoidance: a judicial view**

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# Constitutional law

- **French *Conseil constitutionnel* 26 November 2010 « M »:**
  - ***Artistes* provision in French tax code justified by constitutional objective of fighting tax avoidance: no breach of equality**
  - **Fair allocation of tax burden among citizens**
  - **No punishment**

# Domestic law - General principles

- Equal treatment under the law
- Taxpayer's freedom to make legal and economic choices
- Tax administration has no right to interfere unless:
  - Violation of tax law
  - Abuse of law
- Tax planning not illegal *per se* (close to *Azadi Bachao 2003?*)

# **Domestic law**

## **Specific anti-avoidance statutes**

- **Broad anti-avoidance rules, with deeming provisions that allow various degrees of proof by taxpayer (*Artistes*, general CFC, Thin Cap, Payments to tax havens...)**
- **Some statutes are case-by-case, close to abuse of law (CFC for EU subsidiaries)**
- **No narrow interpretation as if criminal law**
- **Normal tax legislation, interpreted literally and according to purpose**

# Domestic law - Abuse of law

- **Defined by statute but mirrors case law**
- ***Conseil d'Etat* drafted concept as general principle of law, even without statute**
- **Covers fictitious acts (including simulation) + acts made for the sole motive of reducing the normal tax burden by applying the letter of the law against its purpose**
- **Applied in international situations**

# Tax treaties - Interpretation

- Interpretation of tax treaty according to anti-avoidance purpose or principle?
  - Use OECD Commentary Art. 1 §7: *it is also a purpose of tax conventions to prevent tax avoidance and evasion?*
  - Anti-avoidance purpose for treaty interpretation under VCLT Art. 31§1?
  - What is tax avoidance?
  - Wider than abuse?

# Tax treaties - Interpretation

- **Anti-avoidance interpretation to block tax schemes?**
  - ***Conseil d'Etat 24 May 2000 Crédit agricole Normand***: Italian tax credit literally granted by France-Italy DTT even if foreign tax technically paid without economically bearing tax burden in Italy (purchase of FTC)

# Tax treaties - Interpretation

- **Anti-avoidance interpretation to save domestic SAARs from conflict with tax treaty?**
  - ***Conseil d'Etat 28 June 2002 Schneider Electric (CFC):*** alleged anti-avoidance purpose in tax treaty, but no specific provision contradicting the clear terms of Art. 7
  - **Look for:**
    - **Specific treaty provision?**
    - **Purpose indicated by title, preamble? But overrules clear provisions on allocation of taxing rights?**
  - **How fine-tuned should the SAAR be to qualify as targeting avoidance?**



# Tax treaties - Interpretation

- **Implied beneficial ownership provision?**
  - **Royalties: recognized without specific treaty wording (interpretation of « paid to »): *Conseil d'Etat* 13 October 1999 *Diebold***
  - **Dividends: *Conseil d'Etat* 29 December 2006 *Bank of Scotland* : extension of treaty wording between paragraphs in Dividend article – subsequent OECD MC Commentary (2003) not referred to**

# **Tax treaties**

## **Domestic anti-avoidance fictions**

- **Domestic anti-avoidance fictions: recharacterizations of income, reattributions of income**
- **Treatment of domestic fictions for tax treaty purposes:**
  - **Outside the scope of tax treaties?**
  - **Apply tax treaty following domestic characterization and attribution of income?**
  - **Apply tax treaty following real effect of domestic provision?**

# Tax treaties

## Domestic anti-avoidance fictions

- **French case law: apply treaty following domestic legal fiction (consequence of subsidiarity principle: apply and interpret domestic law first)**
  - **Branch tax (*Conseil d'Etat* 31 January 2001 *Bank Polska*): deemed distribution (not extra taxation of PE profits); Dividend article applicable but does not cover deemed distributions; apply Other income article; taxpayer wins**

# Tax treaties

## Domestic anti-avoidance fictions

- **CFC (*Schneider*): French CFC (before 2005 amendment)**
  - **Domestic law: taxation of parent on the profits of subsidiary (« look-through »), not deemed distribution of dividends**
  - **Under Art 3(2) France-Switzerland treaty, the term « *business profits* » (Art. 7) has same meaning as under domestic law**
  - **CFC in violation of Art. 7 because taxation of Swiss profits in France although no PE in France (Art. 7 is clear and not limited to juridical double taxation)**

# Tax treaties

## Domestic anti-avoidance fictions

- **Artistes (*Conseil d'Etat* 28 March 2008 *Aznavour*):**

- Domestic law looks through a company receiving the income and attributes income directly to the artist
- Therefore Art. 17(1) OECD allows source State (France) to tax with no need for Art. 17(2) OECD

- **Risk: domestic fiction can be fine-tuned to choose treaty articles that might apply (French CFC amended in 2005 in favor of deemed distribution)**

# **Tax treaties**

## **Domestic anti-avoidance fictions**

- **If tax treaties should be applied according to real effect of domestic tax fictions, what of the distinction between « look-through » CFCs and « deemed dividend » CFCs ?**
- **Can Art. 3(2) save domestic fictions?**
  - **Distinction between domestic definitions and domestic tax regimes**

# Tax treaties

## Domestic anti-avoidance fictions

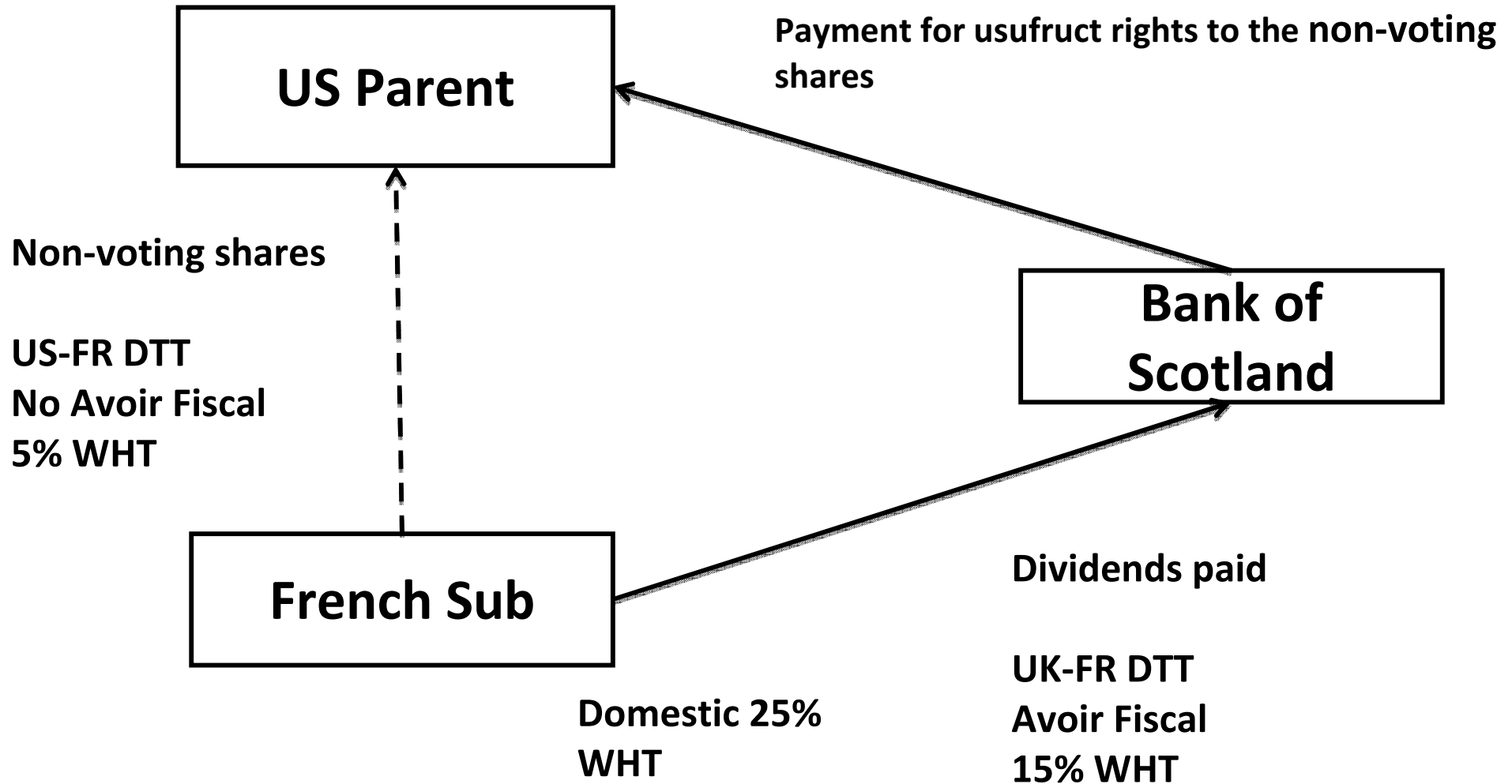
- « Deemed dividend » CFC: defines the terms « paid to » in Art. 10(1) OECD?
- Exit tax on shares: defines the term « alienation » in Art. 13(5) OECD?
- *Artistes* provision: defines the term « derived » in Art. 17(1) OECD?

# Abuse of tax treaties

- If no anti-abuse rule written in treaty, can domestic anti-abuse rule apply?
- *Conseil d'Etat* 29 December 2006 *Bank of Scotland*: abuse of law doctrine applied to abuse of tax treaty (usufruct agreement disguising a loan to take undue advantage of France-UK tax treaty)
- Although a tax treaty is an international agreement, it is part of domestic law and should be protected against abuse as any domestic law



# Bank of Scotland – Legal Structure



# Bank of Scotland – After Abuse of Law

