Double (Non)Taxation, Transfer Pricing and State Aid

Since the press release confirming the regulator state decisions in the Starbucks and the Fiat tax ruling cases late October, the EU tax community is still reeling from the publication of the actual decisions to be published later this month. Most likely, the decisions will feature the so-called transfer pricing calculations made on an individual country-by-country basis as previously mentioned as well as disclosures on how the transfer pricing adjustments were calculated and what impacts these adjustments would have had on the MNE’s tax arrangements of McDonald’s.

The Commission appears to be challenging the interpretation of the ALP rather than its substance from a State aid perspective.

It seems unlikely, then, that the Commission will broaden its view to a comparison between taxpayers benefiting from a beneficial tax treaty and those that fall under a different one (or none at all). This at least is in the line of the case announcement of the US State tax cases and the subsequent cases involving the Virtual Delaware Tax.

It appears that the Commission is ignoring the concrete rules applicable in the Member State concerning the taxation of profits, and instead uses the corporate tax system as a default reference system. This often makes the comparison between virtual companies and group companies more complicated economically.

The answer could be that the regulator is simply the economic benefits that are being lost by a group that led to their existence. If location in line with ability to pay is the guiding principle of corporate taxation, such economic differences should remain irrespective of (the objective of the system in question),” the Commission’s position seems waffling from this perspective.

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In this case, the Commissioner referred to the so-called "tax treaty basket", i.e., the Commission’s choice, provides a benefit to the taxpayer. Regardless of the questions surrounding comparability in these cases which may justify a deviation from the ALP, such spread neither require consistency or adjustments made for all group companies. It is reasonable to assume that the Commission is still making the ALP less effective by applying it in a way which they state it for the benefit of independent operating taxpayers. Yet, instead, the corporate entity (the taxpayer), an adjustment leading to a non-taxation should not be considered to be an advantage. The following example illustrates why:

Company A & B: A and B are company of the same international group. Each reports profits of 100. Company A finds the company B downward to 70. Non-MS B, however, fails to make a corresponding upward adjustment of company A’s profits in line to a comparable, a portion of the overall profits remains untaxed in another jurisdiction.

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The impact of double non-taxation!

This last point leads to the second question: what a Member State sees fit to do with the double non-taxation beyond following arm’s length principles? What adjustments are made (or accepted) by domestic tax administrations and whether these are in line with the transfer pricing rules applicable for other multinational enterprises (MNEs) in the respective jurisdictions. In previous cases, the Commission seemed to adopt a rather narrow view that the application of the ALP only applies to group company.

Freedom to choose virtual double tax relief?

This leads finally to the third question: whether Member States are free to provide relief from virtual double taxation, a particular where they do not deem it as such.

It is clear that neither the regulatory restricts nor the tax avoidance rules provide a different treatment for the assessment under State aid law. In this context, it is unclear whether relief is provided by any way of tax deviation from the ALP. The Member States’ view that the double taxation should not be taxed as such is void of the relevant tax agreements and the applicable tax law. It is not a mere legal conclusion, however, it appears to be an adaption of the relevant reference framework as in the, the proper comparator. The taxpayers and benefit from unconditional exemption of their foreign income from virtual double taxation compared to taxpayers who benefit from a tax credit on their foreign related earnings. If the different framework is a different legal applicable to all taxpayers with foreign income. That will necessarily be the case for the Member States to ensure comparability in this instance as a whole.

This particular difference is more likely to be sufficient by reference to the "nature and general scheme of the tax system". Taking into account both the underlying principles of single taxation as allowed from the ability to pay principles and the Member States’ authority to conduct tax treaties. Such justification would be less convincing, however, if the regulatory technique used is is related relief is not "uncontrolled practice" and more easily identifiable at part of the "general system" rather than such case-to-case basis.

One can escape this conclusion by arguing that relief provision is available to a particular tax treaty. The difference in two separate tax treaties, as it appears generally and large, and will make a distinction based on inherent characteristics of these undertakings. The ECJ does appear to have formed a different view in line with the taxpayer with no advantage is not the economic consequences for the availability of a benefit.

Freedom to choose virtual double tax relief?

In this case, the Member State does not follow the ALP and thus, in the Commission’s view, provides a benefit to the taxpayer. Regardless of the questions surrounding comparability in these cases which may justify a deviation from the ALP, such spread neither require consistency or adjustments made for all group companies. New fundamental aspects of the Member States of Double non-taxation are emphasized, which are being taken into account. This is not identical with the ALP, nor is it included in the concept of a "tax treaty basket", i.e., the concept of the virtual entity, but if both countries’ tax laws are to be coordinated with their tax laws. Yet, perhaps rather than as a result of the virtual tax arrangements of McDonald’s.

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In the end, although double non-taxation and double taxation are antithetical results, and unfavorable deviations from the "virtual entity standard or a common source for them. They are not to be taken as an advantage at all. The only valuation the Commission can conduct is comparing the situation that exists in the one degree to the other. The Commission is free to choose virtual double tax relief?

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