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Could I Please Get a Fiat for the Price of my Frappuccino?

Raymond Luja (Maastricht University) · Wednesday, October 21st, 2015

Today the European Commission released its first set of decisions on corporate tax rulings, which it has investigated for over a year. Starbucks Manufacturing EMEA and Fiat Finance and Trade were the first test cases where final decisions have been issued.

At this point in time, only press releases are available. Formal decisions will be made public several weeks from now. But what we know is that the Commission estimates than in these two cases amounts of €20 to €30 mln. each need to be paid to the national governments, plus an interest charge. Most likely these will be treated as back taxes.

Tax rulings normally serve to provide advance legal certainty to businesses and investors when dealing with the many complexities in tax systems. In both cases the European Commission found that the tax authorities had agreed to a tax treatment that was more favorable than what should have been the result of a normal application of the Dutch and Luxembourg tax systems to the facts of the case at hand. It mainly questions the facts presented in Starbucks, such as the amount of royalties paid for know-how on coffee roasting and even the fact that such royalties had to be paid at all (other Starbucks group companies did not have to pay royalties at all), the payment of inflated prices for coffee bought from a Swiss associate (leading to tax deductible costs), and, for Fiat, its capital and the remuneration for such capital was found to be understated for tax purposes.

Now it is always hard to explain why the Member State involved in issuing allegedly incorrect rulings will receive its money back, which is still how the state aid regime operates today. From an EU point of view, neither the companies involved nor the Member States will be penalized, as the only intention is to take away any unlawfully granted benefits to restore free and fair competition in the EU's internal market.

So, what is next? Obviously these two cases are meant to be test cases, as will the Amazon and Apple cases that are expected to come to a close shortly, next to a case involving certain Belgian rulings. In one scenario, the Netherlands and Luxembourg could both decide not to appeal these decisions for political reasons. Luxembourg is still struggling with its former prime minister and current Commission chairman Junker being implicated in its ruling practices and the Netherlands is about to enter the office of EU Council president next January and it has bigger fish to fry in the area of taxation. (It attempts to avoid minimum taxes on interest & royalties and to save its innovation box as far as it allows special treatment of income out of non-patented research & development, an issue the OECD seems to be turning in to an EU state aid matter of its own should the Netherlands follow suit.) It is likely that both countries will announce their intentions shortly, and let us hope that the scenario above will be far from reality.

For the companies involved, a decision to appeal the Commission's findings will be as much of a public relations matter as it is a matter of law. It will be an executive decision whether or not to drag companies into a prolonged legal battle that may involve several European and national courts (final calculations of repayable amounts will be mainly a national matter). These cases will take at least 3 to 4 years to conclude and time and again the companies' names will come up in the context of tax avoidance practices. Even if a case would end successfully for them, PR will have suffered.

From an academic point of view, not contesting these decisions would be a rather unwelcome scenario. If the Commission should stick with much of its original reasoning provided when it decided to open formal investigations into these test cases in 2014, then there are a number of 'innovative' approaches that will have to be subjected to Court scrutiny. Otherwise, we may end up with uncontested decisions that the Commission will then use for guidance in future cases and which will live a life of their own as untested precedents.

Whatever happens, these tax ruling will lead to uncertainty for business and have an effect on the EU's investment climate as state aid control in the EU is a rather unique phenomenon. Let there be no doubt here, if rulings were provided that would be clearly providing unwarranted benefits to companies EU State Aid law is the right way to address them and the Commission is fully in its right to exercise its investigative powers to deal with this. But at the same time, Member States need to have some leverage to deal with the application of tax law to facts as to provide much needed certainty where national law does not provide us with clear-cut answers.

Admittedly, some companies do their best to make the facts suit their needs but dealing with this is something that calls for effective anti-tax-avoidance legislation. Even when legal constructs seem to be artificial, national law will need to allow to actually disregarding the facts as presented for tax purposes. And here I do agree with Commissioner Vestager who stated that proper transfer pricing – setting prices for transactions within a group of companies – need to reflect economic reality, at least as much as possible. So, again, the official decisions, once published, may show that the Commission – by means of a proper market comparison – may rightly have found that prices and capital remunerations may have been over- or understated to such a degree that national tax authorities should have ruled otherwise. On the other hand, what caught my eye in the press release is whether it is acceptable that tax authorities should question Starbuck's policy to charge royalties to some of its subsidiaries while it does not do so to others. Here the question is whether Dutch national law would allow the tax authorities to question this, something that is also relevant for state aid purposes.

In a related matter, it is a pity that the Commission will not be getting access to a tax ruling database that will be set up at the EU level in order to exchange information between tax authorities. Allowing it to monitor that database for state aid purposes would have been a very effective way to get an insight in what is going in all EU Member States also at sub-federal and regional level were applicable. Not that excluding the Commission from the database will be of any major consequence; it can still request relevant information from Member States but in order to do that it will need to have some indication first of what is out there. For this we still need to rely on the press, competitor complaints and national parliamentary enquiries for now, as it seems…

This blog was originally posted at Maastricht University at 11.45 AM.

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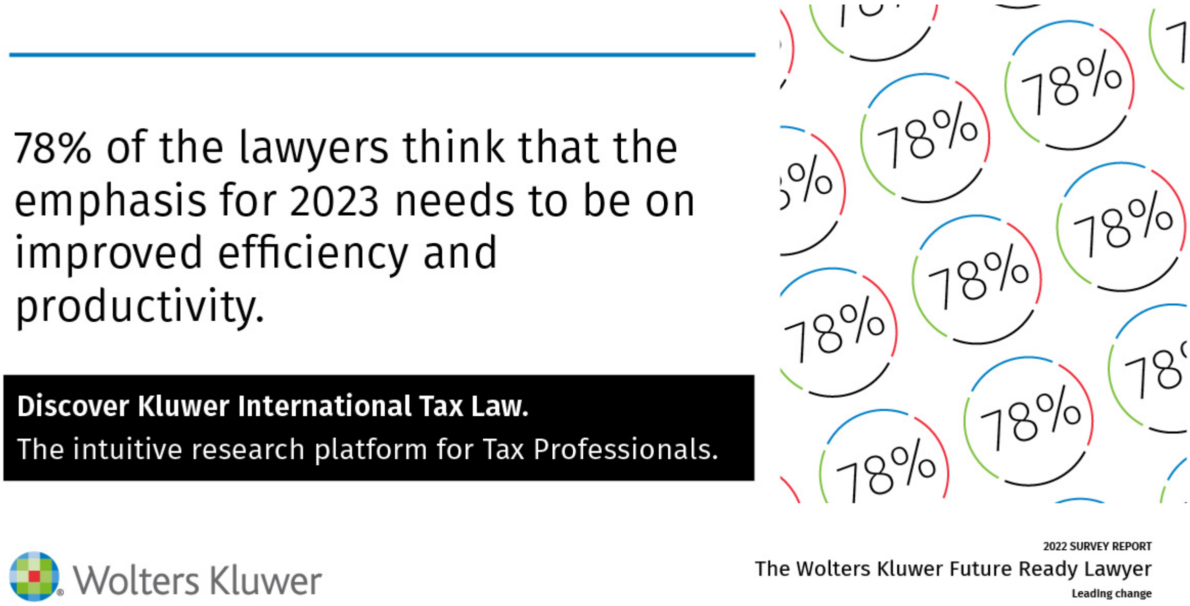

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