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Recovery of fiscal state aid: always somewhere?

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An important question in the context of the recovery of fiscal state aid, is how the amount of the tax advantage to be recovered should be calculated.

Recently, the Dutch legislator released a draft legislative proposal on the recovery of state aid. The starting point taken in this draft proposal is that the taxpayer should be in the same financial and fiscal position in which he would have been without having received the aid. This means that not only the fiscal state aid is to be corrected. In line with EU case law (e.g. the *Unicredito Italiano* case), any other tax treatment which would have been applicable to the transaction made if the aid would not have been granted, be it more favorable or less favorable, must be taken into account when calculating the amount of tax to be recovered, provided that such treatment is compatible with EU law. In the explanatory memorandum to the draft proposal, this starting point is referred to as the “consequential fiscal effect”.

The question arises how far one can go when implementing this so-called consequential fiscal effect. For example, to what extent one can claim a credit for foreign taxes which initially could not be offset against the taxpayer’s tax liability, but which suddenly become available for offsetting due to the state aid correction and the consequent increased tax liability? And what about the use of specific tax schemes, such as the Dutch innovation box regime? Is it still possible, in the context of calculating the amount of fiscal state aid, to take such schemes into account? And finally, should one, by analogy to the EU cases such as the *Amurta* case, take into account the fact that the Dutch additional charge could for its part be credited in the other country on the basis of a tax treaty as a result of which the taxpayer’s overall financial and fiscal position before and after the state aid correction remains the same?

We can now add a question here. On August 30th this year, the European Commission released its final decision in the *Apple* case. According to the European Commission, the two Irish tax rulings that Apple concluded with the Irish tax administration resulted in a too low tax charge on Apple’s sales profit in Ireland. On the basis of the European arm’s length principle, which the Commission uses as a fiscal norm in this case, the profits that had to be allocated to Ireland should have been (much) higher. Apple should pay back as much as € 13 billion plus interest within four months. This amount may be reduced, however, if other countries – e.g. EU Member States or the United States – now would find that some part of the Irish profits actually belongs to them and consequently would decide to tax those profits. This means that the calculation of the amount of state aid to be recovered is being made dependent on the tax treatment in other countries. By doing so, the Commission takes a unprecedented and uncertain road, and factually disregards its self-

developed European arm's length standard. On balance, it does not seem to matter where Apple's profits will be taxed, as long as these profits are ultimately taxed once somewhere. Ireland is primarily responsible to ensure single taxation, but if the taxation eventually takes place in another country, then that is also fine. In my view, the Commission is thus introducing, in the context of state aid recovery, the so-called "always-somewhere" principle (this term is derived from P.J. Wattel 's Dutch case note to the Marks & Spencer judgment). Until now, we only saw this principle in the context of the EU Treaty freedoms, for example with respect to cross-border loss relief. In my view, however, EU state aid law does not provide a basis for introducing such a principle.

The final legislative proposal "recovery of state aid" is expected shortly. In my view, the Dutch legislator can not ignore the Commission's new approach. I am therefore eager to see how the Dutch legislator legislature will follow-up on this new development!

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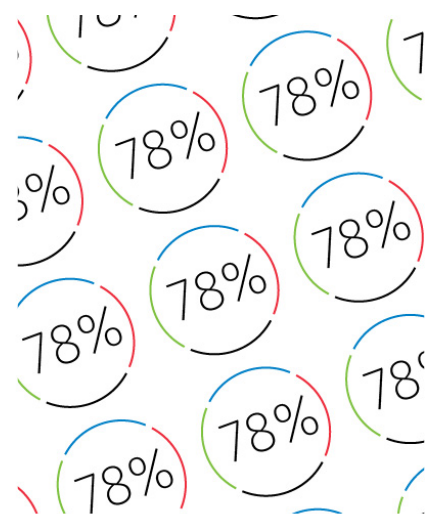
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