Big changes envisaged by the OECD, is this the end of tax optimization? No, this isn't. Especially not in the EU…

It is long time now that winds of change are blowing over the tax structuring schemes, accused to be instruments to tax evasion or even fraud.

On March 27 2014, an important Forum treating this subject took place in Brussels at the Confédération Fiscale Européenne (CFE).

Its significant output is that, though the high pressure of the OECD, there are EU Treaties and tax directives, not to mention several cases of European Court of Justice (ECJ) which must be complying with at a European Union level.

In other words, tax structuring mechanisms in the EU are mostly the mere application of treaties, directives existing since long time. The application of the international tax law goes through transparency and legality.

Such statements that are quite clear and, would say, obvious to the international tax practitioners sound more than relevant today, as they are released in an official context like the CFE and in the current troubled times for tax planning worldwide.

More in particular, in the framework of the CFE, Mr Tom O'Shea of the Centre for Commercial Law Studies at Queen Mary University of London stated "This doesn't get mentioned very often, but the ECJ has no problem whatsoever with tax planning generally […] taxpayers may choose to structure their business so as to limit their tax liability."

And this holds true if we consider plenty of cases discussed and judged by the ECJ. In the case C-277/09 of 2009 (also known as *RBS Deutchland*), for instance, the ECJ confirmed that "taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens."

For any avoidance of doubt, we must remind ECJ set certain limits to tax planning optimization. This means concepts like abuse of law, tax avoidance or evasion and treaty shopping have been part of the international tax law and jurisprudence since always.

Thus, tax planning in the EU is still well feasible to the extent that it is properly structured.

An important example is the Case C-364/01, known as *Barbier* case. In a nutshell, its object was an inheritance tax scheme contended by Belgium and Netherlands. In this situation ECJ confirmed the impossibility to deprive a community national "to rely on the provisions of the [EC] Treaty on the ground that is profiting from tax advantages which are legally provided by the rules in force in a Member state other than his State of residence".

Hence the choice of the most tax convenient strategy is a right that cannot be denied to a EU Member state resident within the EU. The ECJ though has always underlined a Member state might introduce anti-abuse provisions in its domestic legislation, only to the extent its aim is preventing "wholly artificial schemes" put in place solely on the purpose of circumventing said state's internal law of said.

In any case, as complying with the international GAAR (General Anti-Avoidance Rule), the ECJ provides the EU Member state taxpayer with the right to demonstrate the commercial/economic nature of its tax strategy has not been created with the sole purpose of avoiding/reducing the tax due.

The recent Italian case: a practical demonstration of the application of the GAAR

Italy is renowned among tax practitioners to be fairly strict when it comes to international tax planning and cross-border transactions impacting the Italian tax resident entities.

However, in a recent case (i.e. the judgement of the Supreme Court no. 4604 dated 26 February 2014) treating the Italian anti-avoidance legislation, the rules set up by the ECJ practices and jurisprudence proved to prevail and to side the Italian taxpayer.

The background

The Italian tax authorities challenged a transaction involving an Italian tax resident entity for such transaction appeared to be in breach to the anti-avoidance legislation in force in Italy.

More precisely, an Italian company (ItaCo) acquired a participation in a Greek company from a Luxembourg entity.

After short time-frame of their acquisition, ItaCo diluted the value of the Greek shares, in such a way that it had a capital loss – obtaining a tax saving.

Up to the second grade of court instances, the court judged the entire operation as a transaction aiming at solely gaining tax advantages and thus with no real economic interest to the company.

The final judgement

On the third and final grade of instance, the Supreme Court had to refer to the ECJ case Halifax, where it was stated "a taxpayer is not allowed to achieve a tax advantage to a

distorted use – albeit not in infringement of any specific rule – of licit instruments … to obtain a tax saving, if there are no well-grounded business reasons to justify that action."

Therefore, notwithstanding the fact anti-avoidance rules are based on article 37 of the Presidential Decree 600/1973, the Italian Supreme Court had to refer to the international GAAR which was at the base of the Halifax case and let ItaCo demonstrate the economic reasons behind the operation in object.

On these grounds, the Supreme Court assessed the reasons behind ItaCo's operations and recognized no abuse was envisaged, as the operation was part of a bigger group restructuring.

Conclusions

The output of CFE and, most importantly, the abovementioned recent judgement released by the Italian Supreme Court represent factual responses to those tax practitioners and investors/corporates, hesitating to take a move to international tax planning.

This holds true if we bear in mind the Italian tax administration's strict attitude before the international tax structuring. The judgement above creates a precedent to remember in the context of next claims against supposed anti-avoidance cases in Italy and abroad.

Indeed, the adopted approach follows the European concept of GAAR, thus valid all over the EU.

Such conclusions result in a positive stroke to the future of tax optimization planning.

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