Finansdepartementet

The Norwegian case study - taxation of dividends from hybrid funds

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1. Is the fund a qualifying subject under the exemption method?

- In order to be a qualifying subject under the exemption method the fund must be equivalent to a Norwegian fund and resident for tax purposes in the UK. Under Norwegian law, a company established accordning to the company law of another Member State fulfills the condition to be considered a tax resident there.
- As seen, there is an exception if the fund is not an actual establishment which carries out genuine economic activity.
- What is the genuine economic activity of a fund?
  - The managment of the investments (UK)?
  - The decisions regarding the management made by the GP (Guernsey)?

Actual establishment and genuine economic activity

The fund ***was*** actually established in the UK.

- Does that mean that it will always be?
  - Does the move to Guernsey affect this assessment?
  - Which objective elements are relevant?
- The elements in the preparatory works to the legislation does not fit funds:
  - Actual establishment: Premises, staff and equipment
  - Genuine economic activity: income from its own business operations and represents an added value to the group.
  - Obviously based on establishment of companies as part of a group (freedom of establishment).

2. Can free movement of capital be invoked by the taxpayer?

- In a previous similar case, freedom of establishment have been used as a legal basis to argue that the fund is established outside the EEA.
  - I believe this argument to be erronous because 1) natioinal legislation applicable also to portfoilo investements fall within free movement of capital, and 2) TFEU art. 54 establishes what is a sufficient connection to the EU/EEA, not what is a sufficient connection to a non EU/EEA country.
- EEA: free movement of capital only applicable within the EEA.
- The capital movement occurs between Guernsey and Norway.
- Therefore, free movement of capital does not afford taxpayer protection in this case.

3. Would the ATAD Hybrid mismatch rules or the GAAR apply?

- ATAD article 9 (1) and (2) covers deduction without inclusion and double deductions.
  - No - the fund is not entitled to a deduction.
  - This situation concerns double non-taxation.
- AtAD article 9 a – reverse hybrid mismatches
  - Limited to situations of 50 % or more of voting rights, capital interests or rights to a share of profit.
- ATAD article 9 b covers tax residency mismatches
  - No – this rule concerns the same taxpayer resident in two countries, and does not affect the investor in this situation.

The ATAD GAAR (General anti-abuse rule)

1. For the purposes of calculating the corporate tax liability, a Member State shall ignore an arrangement or a series of arrangements which, having been put into place for the main purpose or one of the main purposes of obtaining a tax advantage that defeats the object or purpose of the applicable tax law, are not genuine having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part.

2. For the purposes of paragraph 1, an arrangement or a series thereof shall be regarded as non-genuine to the extent that they are not put into place for valid commercial reasons which reflect economic reality.

3. Where arrangements or a series thereof are ignored in accordance with paragraph 1, the tax liability shall be calculated in accordance with national law.

Would the ATAD GAAR apply?

- The managment of the fund in the UK is genuine (at least no indications that it is not).
- The question is rather whether this economic substance suffices to provide the necessary connection to the UK in terms of the conditions for being considered a qualifying subject under national law.
- Therfore, no element of artificiality.
- Not applicable?

Hybrid Mismatch Rules and EU Primary Law
An Analysis of Non-discrimination in Direct Taxation

Ingrid Birgitte Lund

Hybrid mismatch rules, as enacted in Articles 9, 9a, and 9b of the EU Anti-Tax Avoidance Directive (ATAD), obligate Member States to alter the tax treatment for cross-border transactions in order to prevent non-taxation or double non-taxation which may occur when a transaction is not only deductible for the payer but also deductible or not taxed as income for the payee. This book explores whether national hybrid mismatch rules adopted under the ATAD infringe on taxpayers' right to free movement under the fundamental freedoms and clarifies the extent of the protection these freedoms afford in direct tax cases.

The author's far-reaching analysis extends to such considerations as the following:

- why mismatches arise;
- scope of application of the hybrid mismatch rules and the conditions for them to apply;
- whether the EU has the legal competence to enact hybrid mismatch rules;
- assessment of the hybrid mismatch rules under the CJEU-developed discrimination test; and
- whether the general abuse of law principle serves as an exception to the taxpayer's reliance on fundamental freedoms.

Recognizing the tension in international tax law between competition and cooperation – including the extent to which a taxpayer covered by the hybrid mismatch rules, by invoking the fundamental freedoms, can claim the benefits that hybrid mismatch rules deprive them of – the answers and clarifications in this deeply informed book contribute to foreseeability and legal certainty for both corporations and governments. With it as a guide, both practitioners and policymakers will ensure appropriate application of hybrid mismatch rules, develop a keen awareness of how these rules affect taxpayers and their right to free movement and understand how the fundamental freedoms may be invoked as taxpayer protection.

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ESET 76

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