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WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international Financial Services industry

Dear Madam/Sir,

We hope you may find interesting the latest version of the WTS Global Financial Services Newsletter presenting taxation related news from six countries with a focus on the international Financial Services industry[1].

The following participants in the WTS Global network are contributing with a diverse range of FS tax topics, e.g. the CJEU GA Opinion in favor of Finnish pension institution regarding Sweden and WHT reclaims, the Supreme Administrative court request CJEU for a preliminary ruling on the application of VAT Directive on financial services in Finland and the delivery of the 2024 Spring Budget in the United Kingdom:

- China – WTS China
- Finland – Castrén & Snellman
- Germany – WTS Germany
- Italy – WTS R&A Studio Tributario
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Thank you very much for your interest.

Frankfurt, 12 April 2024

With best regards,

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For details on WTS Global Financial Services please click here.

1 The editors would very much like to thank their WTS colleague Sergi Meseguer for his valuable support.

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Hot Topic (i)

Germany – Landmark decision: Good news for foreign investment funds seeking to recover German WHT

The German Federal Fiscal Court's (BFH) recently published its ruling on the *"L-Fund case"* dated 11 October 2023, following the European Court of Justice judgement of 27 April 2023 (C 537/20).

The recent BFH decision has far-reaching implications for foreign investment funds who suffered German tax on their income from investments in Germany before 1 January 2018, especially regarding the "Fokus Bank" WHT reclaims filed by foreign securities investment funds[2].

Understanding the L-Fund case

The decision at issue revolves around the German taxation of a Luxembourg Real Estate Fund (FCP, non-UCITS) before 1 January 2018, specifically concerning income derived from German real estate. The court contends that subjecting such funds to German taxation is both discriminatory and unjustified, because comparable German funds were exempt from similar taxation.

Industry impact and implications

Beyond its application to real estate funds, the BFH decision at issue carries significant implications for numerous WHT reclaims filed by non-German securities funds, which were subject to German WHT on dividend income before 1 January 2018.

Notably, the BFH rejects the argument posed by the German Ministry of Finance that non-German funds could only benefit from the WHT exemption available to similar German funds if they levied German WHT on the distribution of German source real estate income to their investors. The BFH dismisses this argument in the case of non-German real estate funds, thereby signalling positive implications in favour of foreign securities funds seeking WHT reclaims, too.

On 13 March 2024, the oral hearing took place before the BFH in the case of two foreign securities funds seeking the reclaim of WHT they had suffered on German dividend income before 1 January 2018. The judges did not disclose the content of their upcoming decision. At length, however, the BFH asked about and discussed the topic of interest (potentially) owed on the WHT levied. The fact that this discussion on interest seemed to be of high relevance to the judges might indicate a future taxpayer-friendly BFH decision, which is expected within the next few months.

Conclusion

The arguments presented by the BFH indicate potential success for pending reclaim applications by non-German securities funds that suffered German WHT on their dividend income pre-2018. WTS suggests claimants prepare for further substantiation of filings, especially in the case of applications originally filed in minimal form.

WTS will gladly assist in enforcing German WHT refund applications, both before the German tax authority as well as before a German tax court, taking full advantage of the newly gained momentum from the above BFH decision.

2 Since the 4 year statute of limitations for the reclaim of WHT suffered before 1 January 2018 is expired by now, the BFH decision positively impacts pending applications only.

Latest development
On 4 April 2024, WTS received information on the outcome of the 13 March 2024 hearing before the BFH in the related – and important – cases of two foreign securities funds seeking the reclaim of WHT they had suffered on German dividend income before 1 January 2018.

The BFH now referred both proceedings back to the tax court of first instance due to unclear findings of fact. However, the reasons for this referral have not been published yet. There could be uncertainty regarding the facts underlying the classification of the foreign securities funds or regarding the question of allocation of dividend income to the plaintiffs or regarding details for the calculation of interest on the amount of a refund, as all of these items were discussed during the oral hearing on 13 March 2024.

Nevertheless, the request of the highest German tax court for further clarification of the facts seems to indicate that the legal arguments of the taxpayers are not without merit. The prognosis thus is that the main proceedings on the question of the justification of the foreign securities funds' claim for reimbursement of German dividend WHT will be won.

It is expected that the reasons of the BFH for the decisions will be available in July / August 2024.

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Hot Topic (ii)

Sweden and WHT reclaims: CJEU GA Opinion in favour of Finnish pension institution

On 21 March 2024, Attorney General (GA) Collins of the Court of Justice of the European Union (CJEU) issued his legal opinion in the CJEU case *"KEVA"* (Case C-39/23). The GA opines in favour of the applicants, three Finnish pension institutions.

The KEVA case pertains to the WHT reclaims of three Finnish pension institutions in Sweden on the basis of the fundamental freedom of the free movement of capital under Art. 63 TFEU, specifically concerning WHT levied on Swedish dividend income.

While the Attorney General's opinion is not binding for the CJEU, it is a positive signal for foreign pension institutions aiming to reclaim Swedish WHT. Further, the GA opinion is of significant interest to the investment industry as a whole, as it underlines the importance of material criteria in assessing the comparability of tax legal situations between domestic and foreign taxpayers.

Background
The case revolves around the differential tax treatment of dividends paid by Swedish corporations to foreign public pension institutions vis-à-vis those paid to Sweden's general pension funds ("GP funds"), which are governmental entities, exempt from

WHT on such dividends in Sweden. The claimants, two Finnish public pension institutions, who are part of the second pillar of the Finnish pension system (occupational pension) on the other hand are subject to Swedish WHT on dividends.

The Finnish pension institutions claimed before the Swedish national tax courts a refund of WH based on the argument that such unequal treatment violates the free movement of capital (Art. 63 TFEU). After receiving negative decisions in the first two instances, the Swedish Supreme Administrative Court decided to stay the proceedings and to refer the following questions to the CJEU for a preliminary ruling:

1. Does the before mentioned differential tax treatment of foreign and domestic pension institutions in Sweden constrain the free movement of capital as delineated in Article 63 TFEU?

2. If so, what criteria should be taken into account with regard to the objective comparability of foreign public pension institutions vis-à-vis Swedish GP funds?

3. May the potential restriction of the free movement of capital be justified for reasons of public interest in the case at hand?

Key aspects of the GA opinion

The Attorney General opines that the unfavourable tax treatment of the foreign pension institutions indeed constitutes a restriction of the free movement of capital, as it may dissuade investments from non-resident pension schemes in Sweden.

With regard to the comparability of the tax legal situation of the Swedish GP funds on the one hand and the Finnish pension institutions on the other hand, the GA emphasises that this question must be assessed on the basis of material aspects such as the purpose, function, regulatory framework and organizational structure of the pension scheme. Differences of purely technical nature, on the other hand, should not be decisive, so the opinion of the GA.

Based on these arguments, the GA opines that Finnish pension institutions and Swedish GP funds in the case at hand appear to serve analogous public interest objectives, thus potentially qualifying as comparable entities. In this context, the General Attorney deems the defendant's argument, suggesting that foreign public pension funds do not aim to promote the financial stability and durability of the Swedish social security system, and therefore cannot be compared with the GP funds, as unduly restrictive.

In assessing the potential justifications for the restriction of the free movement of capital in the case at hand, the GA finds that administrative efficiency or the prevention of state fiscal losses are inadequate justifications for constraining the free movement of capital in the case at hand.

Conclusion

The comparability of the tax legal situation of foreign and domestic taxpayers with regard to re-strictions of the free movement of capital under national WHT regimes is the central criterion, the application and interpretation of which is shown in two different trends in the case law of national courts:

1. A formal interpretation that is closer to the requirement of identity rather than comparability due to excessive formal or technical requirements, making it very difficult for foreign taxpayers to achieve a reduction of foreign WHT.

2. A material interpretation that focuses on similarity by comparing the essential characteristics in light of the purpose of the tax exemption, without regard to formal/technical differences.

AG Collins advocates for the second, materialistic approach to the question of comparability, giving less weight to formal/technical aspects. The opinion considers the pension institutions' purpose, function, regulatory framework, and organizational characteristics. The AG thus opposes the tendency apparent in the case law of some national courts, which essentially replaces the direct discrimination against foreign taxpayers with an indirect de facto discrimination through the application of all technical details of national tax regulations. Against the background of the "Effet Utile" provision pursuant to Art. 4 (3) TEU, which requires an EU law-friendly interpretation of national regulations in all cases and which is binding for national courts as well, the current AG opinion is welcomed.

The AG opinion is therefore good news, on the one hand, for the directly affected foreign public pension schemes seeking to recover Swedish WHT, as well as for the international investment industry as a whole.

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China

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Further encouragement QFLP's inbound investment and financing

Recently, Guangzhou Municipal People's Government issued several policy measures for promoting high-quality development of the biomedical industry in Guangzhou. The measures include the encouragement of QFLP to invest in biomedical projects. The government gives priority to QFLP who invest in biomedical enterprises. More detailed implementation rules are to be expected.

What is QFLP (Qualified Foreign Limited Partner)
Qualified Foreign Limited Partner, refers to foreign institutional investors who, after passing the qualification approval and supervision procedures of their foreign funds, invest in the domestic PE and VC markets. It is one of the most important channels for foreign investors to raise funds overseas (and/or domestically) and carry out domestic equity investments.

The policy of QFLP pilot was first launched in Shanghai in 2010, and then gradually expanded to Beijing, Chongqing, Tianjin, Guangzhou, Hainan, etc. Up to now, more than 20 regions in China have piloted QFLP policies. Each region has emphasized its special target of encouraging industries. Below table summarizes a general overview of the different targets in some advanced cities in China.

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Date	Region	Encouraging investment areas
Jun. 2023	Nanjing	Software and information services, smart grids, biopharmaceuticals, and integrated circuits.
Sep. 2023	Shanghai	Technology innovation fields or high-tech enterprises
Oct. 2023	Guangzhou	Science and technology enterprises.
Nov. 2023	Guangzhou	Innovative manufacturing enterprises.

Support measures such as convenient channels in foreign exchange settlement and taxation treatment are offered to QFLPs to encourage the inbound investment in China:

(i) Overall quota management. Once the QFLP investment quota is approved, the QFLP funds can set up one or several funds in China within the quota, and adjust the investment scale of different funds.

(ii) Exempt of re-investment registration. For foreign-invested enterprises conducting domestic equity reinvestment in pilot areas (not allowed to directly or indirectly invest in real estate), the invested enterprise or equity transferor does not need to register for domestic reinvestment. The fund transfer bank can directly transfer the relevant investment funds to the foreign exchange capital account of the invested enterprise or equity transferor.

(iii) Simplified the tax process of fund remittance. Such as using a tax commitment letter instead of providing a tax payment certificate for cross-border income and expenditure before QFLP fund liquidation.

However, in terms of the tax treatment on the QFLP, the domestic tax regulation has not offered an entirely clear definition. Questions such as whether QFLPs are entitled to a tax treaty beneficiary treatment, the taxation timing and income tax rules are yet to be clarified. Given the current situation in China, a case-by-case discussion with the tax bureau in China could be still necessary.

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The Supreme Administrative Court requests CJEU preliminary ruling on the application of VAT Directive on financial services

On 22 March 2024, the Supreme Administrative Court issued a ruling (KHO 2024:38) seeking a preliminary ruling from the CJEU regarding the VAT treatment of factoring financial arrangements.

According to the Finnish Value Added Tax Act, VAT is not levied on financial services. Such financial services include e.g. the provision of credit and other financial arrangements, as well as the management of credit by the lender.

The ruling concerned a company engaged in both invoice factoring and trade factoring. The company provided financing to its customers by granting credit against their outstanding invoices within a specified overall limit. Once the receivable was accepted within the scope of credit, the company disbursed the customer an amount corresponding to the agreed-upon credit ratio, minus the company's fee. The customer's outstanding invoices served as collateral for the financing provided by the company.

In trade factoring, the company committed to purchasing the customer's outstanding invoices. After the receivable is accepted under the agreement, the company makes payments to the customer based on the terms of the contract, either for the full nominal value of the invoice or a portion thereof. In the trade factoring, the ownership of the receivables was transferred to the company along with the credit risk associated with the debtors' potential insolvency.

In the earlier proceedings of the matter, the Central Tax Board ruled that the fees charged by the company to their customers for factoring are subject to VAT to the extent that they relate to receivables and serve as compensation for invoice management and collection services.

The Supreme Administrative Court stated that in both types of factoring, there is a component similar to interest. Based on this, trade factoring could be considered as consideration for financial services in the same manner as stated by the Central Tax Board. On the other hand, in trade factoring, it can be seen that the financial commission is not a fee charged from the customer for VAT purposes, but rather an adjustment item. This adjustment item is defined in such a way that the purchase price of the receivable corresponds to its discounted present value, i.e., its true economic value.

The Supreme Administrative Court stated that although invoice factoring is considered a compensated service falling within the scope of the VAT Directive (2006/112/EC, as amended), it is unclear how the provisions regarding VAT exemptions in the Directive should be interpreted in relation to the various fees charged for such services. The Supreme Administrative Court decided to postpone the matter and request a preliminary ruling from the CJEU regarding the application of the VAT Directive and its immediate legal effect. A particular ambiguity arises in determining whether a factoring company, that buys receivables from its customer is also considered to supply to the customer some of the services covered by the Directive.

The current legal scope in Finland appears uncertain, and the VAT treatment of financial services remains subject to interpretation. We are aware that several similar cases are currently pending in the Supreme Administrative Court, and we are closely monitoring the developments.

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Germany

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German Tax Law and Regulatory Implications on Crypto Investments via Investment Funds

The current uptake in crypto funds, i.e. collective investment schemes (CIV) holding cryptocurrency, causes the need to shed some light on the tax and regulatory law implications with regard to the various avenues available for direct or indirect investment in cryptocurrencies from a German tax point of view.

In a nutshell, for a German private investor the indirect investment in cryptocurrency via CIVs is less tax beneficial than a direct holding of this asset class.

German Tax Law Implications of Crypto Investments

Direct investment in cryptocurrency
In Germany, any gain from selling cryptocurrency held directly by the investor as a Blockchain asset in a respective "Crypto-Wallet" is in general taxable income that is subject to the individual taxpayer's progressive income tax rate. A sale for tax purposes is not only triggered by the exchange of crypto units into state currency, but also by exchanging crypto units into other crypto units or even for simply buying goods or services.

However, in the case of such "direct" investment in cryptocurrency, a holding period related tax exemption is available. The sale of cryptocurrency is tax-exempt in Germany if the private investor has held the crypto asset for more than one year.

Investment in cryptocurrency through Exchange Traded Notes (ETNs)
Exchange Traded Notes (ETNs) are unsecured debt securities that track an underlying index of securities and trade on a major exchange like a stock. ETNs are similar to bonds but do not have interest payments. Instead, the price of the ETN fluctuates with the underlying asset, in this case, Bitcoin or other cryptocurrencies.

While there is no official guidance yet on the German tax treatment of such Crypto ETNs (neither from the German tax authority nor the German tax courts), the highest German tax court (the "BFH") has issued a decision in a comparable case: exchange-traded gold bearer bonds where the note conveys a claim to delivery of the underlying asset. In the case of such gold bearer bonds, the BFH has ruled that the gain from the sale of the note is tax exempt after holding the note for more than one year (i.e., like a direct investment in gold).

The German tax authority may draw a parallel between the above decision and the case of Crypto ETNs and treat an investment via ETNs similar to a direct investment in Bitcoin (tax exempt after a one year holding period).

Investment in cryptocurrency through a Crypto Fund
Investing in cryptocurrency through a crypto investment fund can provide investors with exposure to the cryptocurrency market while potentially mitigating some of the risk associated with direct investments. Crypto funds pool together the resources of multiple investors to invest in a diversified portfolio of cryptocurrencies. Furthermore, In addition the investment through fund vehicles – like the investment through an ETN – does not require any additional, crypto-specific hard- or software (e.g. a crypto wallet).

The investment in cryptocurrency through an investment fund may, from a German tax law perspective, lead to very different tax effects. Any income received by a German private investor from a public investment fund, like e.g. a crypto ETF, is for the purpose of German tax law qualified as "investment income" which is subject to a special uniform tax rate of 26,375 %. This fund investor level taxation applies regardless of which specific kind of income from cryptocurrency is generated on the level of the fund.

German Regulatory Law Perspective on Crypto Funds

From a regulatory perspective, Germany has introduced regulation on crypto fund units that allows fund managers to issue fund units on an electronic instead of a physical basis. This new regulation came less than a year after the Fund Location Act ("Fondsstandortgesetz") allowed institutional investors to invest in crypto assets through special AIFs. Specifically, domestic special funds (Spezialfonds) in Germany are permitted to invest up to 20% of their portfolios into crypto assets like Bitcoin. Domestic mutual funds are allowed to hold a maximum of 10% of their portfolio in crypto assets.

Conclusion

While there is by now some official guidance on the tax treatment of crypto investments available in Germany, the fast evolving crypto market and its on-going novelties inevitably lead to legal uncertainty. While the German legislator is endeavoring to open up regulatory doors to the opportunities presented by the crypto market, Germany does not yet match the pace of the American legislator.

Germany intends to launch 200 bn Euro pension fund

It may be of interest to foreign asset managers and custodian banks that the German government recently presented a plan to stabilize the statutory pension system. The central component of the plan is the establishment of a capital-covered fund in the legal form of a foundation under public law with legal capacity called "Generationenkapital". The foundation is established by law.

The purpose of the Generationenkapital foundation is to generate income from the management of the foundation's assets by investing on the capital market, from which a long-term contribution is to be made to stabilizing the contribution rate to the general pension insurance.

The foundation is to start with assets of 15 billion Euro, which will grow to 200 billion Euro over a period of around 10 years. The legal regulations on the foundation's investment guidelines follow the rather conservative provisions for insurance companies.

The operational management of the future foundation is to be transferred to the Fund for the Financing of Nuclear Waste Management (KENFO), which has already existed since 2017 and currently manages assets of around 24 billion euros.

As far as the operational structure of the future Generationenkapital foundation is concerned, it is to be expected that its structure will generally correspond to that of existing KENFO:

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- External asset management companies have been mandated to manage KENFO's assets in order to utilize their resources and expertise.

- KENFO's own team controls the allocation of the individual sub-segments via strategic and tactical decisions and risk management.

- KENFO's assets are predominantly managed in a German special fund of a master asset management company ("Master-KVG").

With regards to taxation, the current draft of the Act on the Generationenkapital foundation does not state whether the foundation will be fully or partially tax-exempt and whether it will owe 15% WHT on German dividends. However, if the future foundation will be subject to the same tax regulations as the existing KENFO, the foundation is likely to be taxed as follows:

- KENFO is not subject to corporation tax or trade tax in Germany.

- No German WHT is to be deducted from KENFO's investment income. If WHT has nevertheless been levied, the party obliged to withhold tax must refund the WHT to KENFO.

- The payments and benefits distributed by KENFO are not subject to WHT.

- For the purpose of double taxation treaties, KENFO is deemed to be a resident of Germany and subject to German taxation.

It is not yet foreseeable whether and with what detail of regulation this initiative of the German government will actually be implemented.

Real Estate funds – significant tax law changes enacted

On 22 March 2024, the German parliament approved a bill that enacts significant changes applicable to German and non-German Real Estate funds. Some of the changes extend while others reduce the scope of tax exemption on the level of the German fund investor.

- In the future, capital gains from real estate holding vehicles in corporate legal form with a predominantly German property value will be included in the other domestic income subject to tax for investment funds. It does not matter whether the corporation has its registered office or management in Germany or abroad. The only decisive factor is that more than 50 percent of the share value is based on German real estate.

  This change leads to an increase of taxation, compared to the current situation.

- In the future, real estate and real estate companies will no longer be included in the (foreign) real estate fund quota if their taxation level is non-existent (or too low). The taxation level is deemed to be too low if more than 50 percent of the real estate income is exempt from taxation.

In the case of Chapter-2 funds, the non-qualifying taxation level means that the property and real estate companies concerned will no longer be taken into account for the – tax beneficial – (foreign) real estate fund ratio. In the case of Chapter-3 funds (special funds), the lack of qualifying taxation level means that the tax exemption for double tax treaty exempt income will not be applicable.

This change leads to an increase of taxation, compared to the current situation.

› The scope of the – tax beneficial – Chapter-3 fund (special fund) will be extended. The threshold for permitted active business income related to the generation and supply of renewable electricity or related to EV charging stations will increase from 10% to 20% of the income of the fund.

This change makes it easier for funds to retain the tax beneficial status of the Chapter-3 fund, compared to the current situation.

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The Italian Investment Management Exemption law: new implementing rules

In 2023 Italy amended the domestic permanent establishment ("PE") definition provided by Article 162 of Italian Income Tax Code by introducing the so-called *"Investment Management Exemption"* (hereinafter "IME"), which constitutes a PE "safe harbor" for asset managers of foreign investment vehicles.

The IME concerns both the agent PE and the fixed place PE hypothesis.

With regard to the agent PE hypothesis, under the IME individuals, whether or not resident in Italy, who, **in the name and/or on behalf of a non-resident investment vehicle** (or of entities directly or indirectly controlled by this latter) habitually conclude contracts related to the purchase and/or sale and/or negotiation, or in any event contribute to the purchase, sale or negotiation of financial instruments, are considered to be independent from the non-resident investment vehicle provided that certain conditions are met.

The "presupposed" independence of the agent, implies *ex lege* the absence of a PE in Italy, under the following conditions:

1. the foreign investment vehicle and its controlled entities are located in a "white list" country (i.e. allowing for an adequate exchange of information with the Italian authorities);

2. the foreign investment vehicle meets certain independence requirements (see below);

3. the asset/investment manager who performs activities in Italy (i) must not hold any directorship or managing office in the corporate bodies of the foreign invest-

ment vehicle and of its controlled companies, and (ii) must not be entitled (directly or indirectly) to more than 25% of the profits of the foreign investment vehicle overall;

4. the Italian tax resident asset/investment manager, or the PE of the non-Italian tax resident entity, has received a remuneration that is supported by adequate transfer pricing documentation.

Subject to the same requirements set forth for the agent PE exemption, the IME applies also in the fixed place PE hypothesis. So, a fixed place of business is not deemed to be at the disposal of the foreign investment vehicle merely because the activities of the resident enterprise performed in its Italian place of business are to the benefit of such investment vehicle.

The Decree of the Ministry of Economics and Finance dated February 22nd 2024 has provided the implementing rules as request by the law specifying:

› the **independence requirements of foreign investment vehicles.** In particular, the following foreign investment vehicles can be considered as "independent":

  - EU UCITS compliant with Directive 2009/65/EC (UCITS Directive) or whose manager is subject to supervision in the Country in which it is established on the basis of Directive 2011/61/EU (GEFIA Directive);

  - UCITS and other entities located in a State allowing for an adequate exchange of information, with assets collected from a plurality of investors on an autonomous basis and who are (or whose manager is) subject to prudential supervision mechanisms similar to Italy.

› the **independence requirements of asset/investment manager** (or the Italian PE of the foreign entity) operating in Italy. They can be considered as "independent" from the foreign entity when:

  - do not hold any office in any of the managing or controlling bodies of the foreign investment vehicle or of its non-Italian direct and indirect controlled entities;

  - are not entitled to a share of the profits of the foreign investment vehicle (and of its controlled entities) exceeding overall 25%.

The implementing rules recently approved complete the IME legislative background and must be welcome in the perspective of **increasing Italy's attractiveness to foreign financial intermediaries,** granting them the opportunity to locate asset managers, as well as their employees and/or collaborators, in Italy without the risk of creating a permanent establishment.

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The Luxembourg Administrative Court's Interpretation of Loan vs. Equity Characteristics

A transaction even if formally structured as a loan may receive a different tax treatment if its characteristics align more closely with equity. A recent court decision highlights the importance for asset managers to thoroughly evaluating the substance of financial transactions, in their specific context and regardless of their formal structure, to ensure consistent tax treatment.

On 23 November 2023, the Luxembourg Administrative Court overruled a decision rendered by the Administrative Tribunal on 23 September 2022.

In this case, a Luxembourg company (the '**Company**') had received an interest-free loan ('**IFL**') from its shareholder, which was itself financed by a profit-participating loan. Although the IFL did not involve interest payments, the Company deducted notional interest for tax purposes, in line with its transfer pricing documentation.

The tax authorities challenged this deduction, arguing that whether a financial instrument is classified as debt or equity should be assessed by application of the *'substance over form'* principle. On this basis, they considered that the IFL should be treated as equity since a capital increase would normally be the preferred financing method for genuine business reasons and since the decision to structure it as a loan appeared to be mainly motivated by tax advantages. The Tribunal sided with the tax authorities, ruling that the IFL bore more characteristics of equity than debt.

The Court's approach in assessing the nature of the loan focused on the economic characteristics of the transaction and examined how the loan integrates into the Company's overall operations.

Some factors such as the maturity date, the use of the borrowed funds, the existence of shareholders rights such as voting or profit participation, the presence of guarantees, and the level of subordination are notably deemed important by the Court for the qualification of the instrument as debt or equity and must be assessed in a global analysis within the context and market practices in which the transaction occurs. Beyond the characteristics of the instrument, the actual behavior of the parties involved remains also important and cannot be only assumed.

According to the Court:

- **Maturity Date:** a duration of 8–10 years is not particularly long and does not imply the lender's intention to invest
- **Debt-to-Equity Ratio:** the regulations existing at the time of the transaction allowed for a minimal equity requirement, thus the significant loan amount compared to equity does not by itself suggest disguised equity
- **Profit Participation or shareholder rights:** the lack of entitlement to income along with the absence of shareholder rights such as voting, does not indicate equity

- **Subordination:** the loan was subordinated to a bank debt of the company but subordination of intragroup loans to bank debt is a common practice and required by financial institutions

- **Limited recourse clause:** although it transfers investment risk to the borrower, limited recourse clauses are commonly used and do not eliminate the mandatory repayment obligation

- **Actual Repayment:** The IFL repayment by the Company, that occurred before the maturity date, further demonstrated the loan's nature as a debt

The Court concluded that most of the relevant characteristics of the IFL supported its classification as a debt instrument, thus affirming the Company's ability to deduct the notional interest.

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2024 UK Spring Budget

The UK's Chancellor of the Exchequer, Jeremy Hunt, delivered the Spring Budget on 6 March 2024 announcing a variety of measures impacting the financial services industry.

CARF and CRS Consultation

A consultation has been initiated on the adoption of new international standards on the exchange of information, encompassing revisions to the Common Reporting Standard (CRS) and the Crypto-Asset Reporting Framework (CARF), whilst also seeking feedback on domestic reporting. The consultation focusses on practical implications, such as the adoption of an equivalent domestic regime that involves reporting on UK resident taxpayers by UK service providers; as well as proposed revisions to the penalty framework, to transition to a 'per-account' penalty model akin to the Digital Platforms information implementation.

PISCES Consultation

A significant consultation concerning the development of the Private Intermittent Securities and Capital Exchange System (PISCES), a new platform creating liquidity windows for private companies to trade at pre-determined intervals. Its primary objective is to close the gap between private companies and the UK public markets, thereby supporting prospective UK IPOs with a bespoke regulatory regime, providing better protection to investors than unregulated bilateral trading arrangements.

RIF Consultation

The UK government's confirmation of the Reserved Investor Fund (RIF) – set to be established in the Spring 2024 Finance Bill – signals a pivotal step in meeting the needs of professional and institutional investors. The RIF is anticipated to serve as an effective platform for holding UK real estate, however, the government has stated that the fund will have the flexibility to venture into various asset classes beyond real estate, provided it adheres to one of three restricted regimes: 1.) a minimum of 75% of the RIF's asset

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value is tied to UK property; 2.) the RIF's sole investors are exempt from capital gains except by reason of residence (e.g., certain pension funds); and 3.) the RIF refrains from direct investment in any UK property.

Additionally, RIFs will have flexibility to invest in Qualifying Asset Holding Companies (QAHCs) and Real Estate Investment Trusts (REITs). The government has confirmed a Stamp Duty Land Tax (SDLT) seeding relief, however there is no proposed VAT exemption or zero rating for management of a RIF. Despite lacking specific VAT exemptions, RIFs aim to provide a cost-efficient, regulatory compliant investment avenue for professionals, enhancing the accessibility and efficiency of the UK investment landscape.

UK ISA

A new Individual Savings Account (ISA) has been proposed, introducing an extra £5,000 allowance for investment in UK listed equities, with the aim of including funds, bonds, and gilts alongside UK equities within the UK ISA framework. Additionally, emphasis is placed on the government's commitment to digitising the ISA reporting system, prompting ISA managers to explore the feasibility of promptly integrating the UK ISA alongside these technological advancements.

Abolishment of 'Non-Dom' regime

The UK government has announced the abolition of the Non-Domiciled (Non-Dom) tax regime, effective 6 April 2025. This change impacts individuals who have been able to favourable tax treatment on foreign income and gains. Under the new legislation, Non-Dom individuals will be subject to UK tax on worldwide income and gains once they have been a UK resident for seven of the past nine years.

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