

Answer-to-Question-_1_

1)

The refusal of exemption of the dividends from tax is not compatible with EU law. The refusal is not in line with the Parent-Subsidiary Directive.

The Parent-Subsidiary Directive is applicable to this scenario. It aims to eliminate double taxation arising within a group of companies from cross-border distributions (like this scenario) in order to avoid double taxation. Company ABC and its subsidiary RED the qualification criteria of the Parent-Subsidiary Directive (under Article 3(a) a parent, Article 2(b) permanent establishment and Article 3 holding period)

Article 3:

Company ABC qualifies to be regarded as a parent. A parent is defined as a company holding (wholly or partially through a PE) at least 10% stake in the capital of a company in another member state (MS). Company ABC's 90% is higher than 10% threshold.

Article 2(b)

RED qualifies to be permanent establishment as defined; being a fixed place of business through which the business of ABC is carried out. Red is taxed in Redland, so it is a material PE as defined in Art 5(1) of OECD DTC (requiring profits of the PE to be subject to tax in the member states where the PE is located).

Article 3

ABC meets the minimum holding requirement of 10% (ABC holds a higher 90%). ABC acquired the 90% holding 18 months ago, which is below the minimum holding period of 2 years per Article 3. But the 2 years is an optional requirement; it does not bar the entities from utilising the Parent-Subsidiary benefits.

2)

The refusal is not consistent with EU law. The CJEU case of X Holding BV finds application here. Fiscal consolidation is aimed at intra-group relief. A subsidiary based in Homeland would be allowed to benefit from fiscal consolidation yet Blue, being a foreign subsidiary can not. Like in X Holding, there is comparability of a fiscal unity with a domestic

subsidiary versus a fiscal unity with a foreign subsidiary. Yet they are treated differently. The restriction of fiscal unity to Homeland based group entities to the exclusion of subsidiaries in other member states to unfair discrimination. Unless there is valid justification (as in X Holding where they stated that they were safeguarding the balanced allocation of the power to impose taxes), then this refusal is not compatible with EU law.

3)

I contend that Homeland is incorrect. It violates the freedom of establishment because this arrangement does not appear to be artificial and therefore an abuse. Principles of the Cadbury Schweppes case are applicable. The CJEU applied a 2 step criteria to determine if the arrangement was abusive, being (i) an objective test requiring the purposes and object of the EU rule (freedom of establishment) have not been achieved in light of the circumstances and (ii) a subjective test requiring a taxpayer to create a wholly artificial conditions in order to obtain an advantage.

In terms of the freedom of establishment, it would be incorrect for Homeland to refuse the utilisation of Pink's losses when ABC is carrying out genuine business operation through a PE in Pinkland and not creating a wholly artificially conditions aimed at utilising Pink's losses.

4)

Yes, Homeland can apply CFC legislation. The Anti Tax Avoidance Directive (ATAD) was introduced in 2016. One of its requirements is that member states must introduce CFC provisions into their domestic legislation. As long as such CFC legislation is in line with Article 7 of ATAD, then it is compatible with EU law.

The requirements of Article 7 ATAD on CFC legislation control of 50%, low taxation (less than 50% of the effective tax rate of the parent), passive income of the subsidiary that is taxed at the level of the parent company and that taxes paid by subsidiary must be creditable.

Company ABC holds 80% of Black's capital, which meets the CFC

legislative requirements. Black's 12% tax is low which again is in line with the Article 7 of ATAD and dividends from Black to ABC are passive income, which also meets Article 7 of ATAD requirements.

Therefore Homeland can apply its CFC legislation and it is compatible with EU law.

Answer-to-Question-_2_

1)

No. The use of nationality in the DTA as a connecting factor for the division of taxing powers between Member States A and B is not compatible with movement of persons. Article 45 of the TFEU (freedom of movement of workers) proscribes discrimination based on nationality between workers of Member States as regards employment, remuneration and other conditions of employment. In terms of this freedom; for direct taxation purposes, the home and host country must not treat a worker worse off because they are performing work in a member state other than their nationality. Using Mrs X's nationality as a connecting factor for the division of taxing powers to her detriment is therefore not compatible with Article 45 provisions.

2)

Article 45(2) of the TFEU provides that a foreign worker in another member states cannot be treated worse off than a national of the host EU Member state.

The ordinary credit method would credit the tax paid in another jurisdiction versus the home country of the worker. In that case, the employer is not left worse off than a comparable employer based in their home country. That is compatible with the free movement of person.

3)

This is a case of discrimination.

Discrimination consists of dissimilar treatment or comparable situations, meaning disadvantages for the person treated differently. On the other hand, disparity refers to a difference in tax treatment that arises from the coexistence of non-harmonised tax systems within the EU. Each member retains the right to its tax regime, leading to inconsistencies/mismatches in tax liabilities for cross border tax payers.

4)

Yes, there is an obligation on the EU to eliminate economical double taxation. The Parent-Subsidiary Directive as well as the Interest-Royalty Directive serve to eliminate economical double taxation.

But the EU has no obligation to eliminate juridical double taxation.

It must be noted that juridical double taxation is not within EU competence. It is a consequence of the parallel exercise of tax competence by different member states.

5)

Generally, EU law takes precedence over DTAs and if there is a conflict, EU law prevails.

Treaty powers of member states are constrained by the application of EU law (Directives and case law).

But the CJEU has sometimes deferred to DTAs, which suggests that the CJEU is trying to protect members' allocation of taxing powers. For example, in some of its decisions, the CJEU respected international tax law captured by the treaty allocations of the OECD Model Convention. Examples are the *Damseaux* case (one of the strong endorsements of tax treaties where the CJEU respected the attribution powers under the tax treaty), *Banco Bilbao* case and *Commission v Italy* (tax treaties were considered in assessing whether the difference in treatment generated by Italian dividend tax rules was compensated under tax treaties).

Answer-to-Question-_3_

State is incompatible with the common EU market. Article 107(1) of TFEU prohibits State Aid if 4 cumulative conditions are fulfilled. And a transaction is assessed under these 4 conditions to determine if it is proscribed State Aid.

These are the 4 conditions:

- (i) Aid in any form which confers an economic advantage to undertakings
- (ii) the advantage is granted directly/indirectly by the state or through state resources
- (iii) the advantage conferred is selective in that it favours certain undertakings or the production of certain goods
Selectivity is met where the tax authority exercise discretionary powers to give preferential treatment only to certain enterprises which increases their competitive advantage.
- (iv) the advantage distorts competition or trade between member states

If all the 4 conditions are met and there is no acceptance justification, then it is proscribed State Aid.

Assessment of the the Argonia's law under the 4 conditions:

Firstly the multinationals concerned are undertakings for purposes of Art 107.

(i) Excluding "excess" profits is a economic advantage to the multinationals because it reduces their exposure, which in turn improves their position. Their tax liabilities is reduced, which is a advantage compared to those entities that do not get this "excess profit" exclusion. This condition is met.

(ii) This Argonian law is passed by state organs, which meets the condition of the advantage being granted directly by the state.

(iii) The advantage targets multinational groups and not all Argonian entities. This is a clear the tax authority exercise discretionary powers to give preferential treatment only to certain enterprises which increases their competitive advantage.

Since this is a new law, it implies that there is normal tax law system that it deviates from to give an exclusive advantage to these entities. This is derogation (exemption from or relaxation of the tax law which

targets Argonian multinationals). It is a deviation from Argonian normal tax law. And it does not appear that this derogation results from the guiding principles of Argonian tax law. Therefore this measure is within State Aid prohibition. Condition is met.

(i) the exclusion of excess profits distorts the competition or trade in because it puts multinationals at a better position than other entities that do not have access to this advantage.

Is there justification?

The Belgian Excess Profits case finds application here. Similar to this scenario, Belgian tax rulings granted tax base reduction by allowing a few Belgian multinationals to make unilateral adjustments to their "excess profits".

In the Belgium case, the CJEU held that the Commission was correct to conclude that the Belgian tax rulings represent proscribed State Aid.

Conclusion:

This is proscribed State Aid.

Answer-to-Question-_8_

The beneficial ownership doctrine is part of the EU anti-abuse provisions that underscore that a company must have full control and discretion over the income to qualify as a beneficial owner. Intermediary entities used solely to reduce tax obligations may not be recognized as beneficial owners.

Beneficial ownership finds application in anti-abuse provisions of the Parent-Subsidiary Directive and the Interest-Royalty Directive.

The Interest-Royalty Directive defines beneficial ownership. It includes authentic beneficial owners and excludes mere conduits designed for avoiding tax.

It must be noted that the Parent-Subsidiary Directive does not have a

beneficial ownership provision. In this regard, the Danish conduit cases helped to develop the criteria for the beneficial ownership test.

The Danish beneficial ownership cases provided landmark guidance, emphasising substance over form and the prevention of tax avoidance. Companies receiving dividends or interest from Danish companies must ensure that they are true beneficial owners to benefit from tax treaties and UE directives. Intermediary arrangements designed solely for tax reductions may be disregarded by Danish authorities.

The Danish conduit cases set a precedent for future cases and demonstrate the importance of compliance with EU anti-abuse provisions.

In its Danish conduit case ruling, the CJEU confirmed the general prohibition of abuse in EU law.

The beneficial ownership criteria developed by the CJEU in the Danish conduit cases include the following:

- * the legal criteria relating to the autonomy of the recipient to decide how to use the sums are received

- *the substance criteria looking at the capacity of a company to carry out an activity other than functioning as a mere conduit between the payor and the ultimate beneficiary and the rationale of its interposition as well as

- *an economic criteria considering when, whether and to what extent the sums received are passed on.

Answer-to-Question-_6_

The TFEU provides that the home state must not hinder outbound cross-border activities while the host state must not discriminate once these activities are carried out in its territory.

Neutralisation is encountered in the restriction stage of analysing whether a measure breaches EU fundamental freedoms.

Applying the decision of *Commission v Spain*, "neutralisation of

restrictions by double tax conventions" means compensation of differences in treatment resulting from the application of national legislation by applying provisions of double tax conventions.

In *Columbus Container*, the CJEU held that it has no jurisdiction to provide an interpretation of double tax conventions; meaning that double tax conventions fall outside the scrutiny of the CJEU. In the *Gilly* case, the CJEU held that member states are free to allocate taxing rights as they deem fit. At the same time, in *Verest and Gerard*, the CJEU decided that member states are not obligated to eliminate juridical double taxation arising from parallel exercise of their fiscal sovereignty. This implies that EU would not not interfere where member states use the provisions of their signed double tax conventions to neutralise restrictions. But that neutralisation via double tax conventions must not breach EU law.

On the other hand, the CJEU (in *St Gobain and Riskin & Timmermans*) held that the matter of allocation of taxing rights falls outside the scrutiny of fundamental freedoms. This suggests that "neutralisation of restrictions by double tax conventions" is allowed under EU law.

In *Bouanich*, the CJEU decided a double tax convention is not completely irrelevant but forms part of the legal background and has to be considered in interpreting fundamental freedoms. This suggests that "neutralisation of restrictions by double tax conventions" is allowed under EU law.