

THE ADVANCED DIPLOMA IN INTERNATIONAL TAXATION

June 2019

MODULE 3.01 – EU DIRECT TAX OPTION

SUGGESTED SOLUTIONS

PART A

Question 1

Part 1

Free movement of capital ; compare Directive 1988/361 or for example CJEU *Verkooijen* .

Part 2

Yes . Refund only granted to resident investment funds. Disadvantage for non-resident funds . Compare for example CJEU *Fidelity Funds* or *Amurta* .

Part 3

Art. 65 TFEU: distinction based on residence, unless arbitrary discrimination. Not allowed. Cohesion of the tax system , see CJEU *Fidelity Funds* or *Amurta*.

Direct link between refund of dividend withholding tax and levy of dividend withholding tax in case of distribution by same fund. However, not proportionate because less burdensome measures are available (voluntary taxation in *Belia*, see *Fidelity Funds* .

Question 2

Part 1

Assume that companies qualify (subject, EU resident, on Annex).

Loan between associated companies, 25% link.

Possible discussion whether Yoyan Europe is beneficial owner.

So Directive may apply but:

- 15% loan seems not at arms length – Directive partially inapplicable, Art. 4, par. 2.
- Profit participating loan qualifies (Art. 2 Dir), but states may exclude them (art. 4).

Part 2

Art. 4 IR Dir allows anti-avoidance rules.

Abuse examined case by case basis, based on all circumstances: economic activities, employees, obligation to pay interest immediately to India, office space, etc (CJEU T Denmark).

Objective element and a subjective element.

No abuse only because ultimate shareholder is resident of third state (CJEU Enquiom en Enka).

Yoyan Europe runs business with 25 employees: no artificial letter box company.

Conclusion: no abuse

CJEU T Denmark obliges member states to combat tax avoidance.

PART B

Question 3

Part 1

Division of taxing power on basis of nationality in treaties is allowed see CJEU Gilly;

Part 2

Making use of freedoms may have tax consequences. This is a disparity.

No infringement upon treaty freedoms. See CJEU C-496/15 Eschenbrenner).

Question 4

Free movement of capital art. 63 TFEU applies to shares (Verkooijen).

Also related to third countries.

Majority shareholding is act of establishment, see Baars.

Dividend taxation targets small and large shareholdings. EU company with majority shareholding in third state can rely on freedom of capital, see FII 2.

Switch over clause that exempts domestic dividend and taxes foreign dividends with credit are 'equivalent': no infringement.

Further cases: at least if credit results in same tax burden; see FII GLO (C-446/04), Haribo and Salinen (C-436/08 and 437/08) and Accor (C-310/09).

PART C

Question 5

Part 1

No movement of workers, but right to move and reside, art. 21 TFEU, see Pusa.

Part 2

Calculate case-by-case: if disadvantageous, then restriction, see Gerards, Asscher.

Part 3

State should refund tax, to the extent that more was paid than residents do.

Question 6

Part 1

LOB clauses restrict benefits treaty based on nationality or residence.

Part 2

As such this amounts to restriction of establishment/capital.

Part 3

Cannot be justified in order to combat abuse, see T Denmark.

Question 7

Part 1

See A Oy C-123/11: merger can result in 'final losses'.

Part 2

Provided no PE remains behind and no possibility to transfer them or sell company.

Part 3

MS Scandic is obliged to allow deduction of final losses in Scandic *as if domestic merger in Scandic*.

Question 8

Part 1

EU applies principle of legal certainty.

Part 2

Therefore, without timely appeal, you cannot rely on EU law, see Kühne & Heitz.

Part 3

Unless you proceeded before up to Supreme Court without success and without preliminary questions being asked Kühne & Heitz.

Question 9

Part 1

Discuss requirements of State Aid, art. 107 TFEU, they seem to be met.

However, exception art. 107, par. 3 sub c TFEU possible for cultural expressions such as museum.

Exception does however not apply to gift shop or restaurant.

Part 2

Museums should pay additional tax plus interest.