Answer-to-Question-_1_

Facts involved

- WOW distributes to Z from Q
- Q requires a 15% withholding tax ("WHT") on outbound dividends in line with the Double Tax Agreement ("DTA") between Z and Q
- Q domestic law has an exemption from WHT for funds such as WOW for domestic entites but not for foreign dividends

Part (i) - is this compatible with EU Law?

A primary concern for the EU is the elimination of double taxation across member states. The above scenario, however, focuses on a Member state with a non-member state on the issue of dividends. At prima facie this would appear to be outside of the remit of the EU, as this would initially appear to be a domestic direct taxation matter.

The EU does not have competency for imposing laws, or interpreting the writing or application of domestic legislation **unless** these matters infringe on a Fundamental Freedom.

The fundamental freedoms

- Freedom of persons
- Freedom of establishment
- Freedom of the movement of capital ("FMoC")

Given the nature of the above transaction the

FMoC

This freedom, outlined in Article 63 TFEU, essentially says that there should not be laws which prevent capital from crossing borders and that equal treatment to capital moving between states should be provided to both residents and non-residents for intra-EU transactions.

This Freedom is unique among the Fundaemntal Freedoms of the EU as it applies to non-member states, being "Third States".

It is clear from the facts that a WHT being applied to investment into the single market would by a Third State would clearly dissuade foreign investment into the EU.

Third states

Third States can be entitiled to FmoC with certain key exemptions.

Article 65 of the Treaty on the Functioning of the European Union allows for the different treatment for Third States. The Article effectively says that a restriction would be allowed in the event that the situations of the two countries are not directly comparable.

This ties with case law in question, such as Rimbaud C-72/09 which effectively states that Third States can operate in a different legal context.

Parent-Subsidiary Directive

Given the presence of a non-member state there is no opportunity for WOW to make use of the PSD to reduce it's WHT to zero on this transaction.

Has a restriction taken place?

Given the analysis above it is clear that a restriction on FMoC has taken place.

When are restrictions allowed?

Restrictions may be permissible in the following cases, those being:

- To prevent double taxation
- It being in the public interest to do so. Gerhard C- places four tests on whether the public interest argument may be used, namely:

(i) Must be non-discriminatory (applied equally regardless of residence/nationality)
(ii) Must be justified
(iii) Must be suitable for achieving the goals of
(iv) Must not be excessive to achieve the goals

- To maintain a Govenmrments right to taxation

Justifications

Restrictions may be justified in the event that they do one of the following:

- Encourage fiscal cohesion - a freedom may be infringed upon in the event that that
- Fiscal administration - in the event that the administration of identical treatmetn across jurisdictions is too onerous, a

freedom may be infringed upon
- Balanced allocation of taxing rights - allowing Member States to still legislate with regards to taxes is a key element of the EU.
- The prevention of tax avoidance and/or abuse - this is a commonly used justification as it can be applied to many scenarios (ie is tracking the tax loss asset too challenging, or is recognising where a gain is generated and when a tax planning opportunity?)

Conclusion

Given the WHT goes against the overriding principle of improving the functioning of the single market, as well as the impact on the FMoC it is clear that a restriction has taken place.

As such, country Q would be required to amend it's domestic legislation to enable investment from Third States as a means of accessing the beenficial investment fund exemption described.

Part (ii)- Would this be different if tax applied only when dividends are paid?

In the event that the dividends were being taxed in State Z (which would be highly unusual) then there would be a clear matter of double taxation, as both the source state and the host state would be levying tax fistly on the distribution of dividends and upon the dividend income in the second state.

EU and double taxation

A driving principle of the EU is the elimination of double taxation. In the event that an EU country werve levying tax on a dividend which was not subject to some form of exemption from tax in state Z this would not be justifiable under EU law.

Kerckhaert & Morres C-513/04 argued that suffering taxation abroad without any subsequent relief domestically was an infringement before the ECJ. In the event that WOW suffered tax both abroad and domestically on this transaction it would be clear that a disproportionate impact was being felt by WOW in the issue of dividends.

As discussed in Gilly C333/96 a primary goal of the EU is the elimination of double taxation - and such action is frequently used as a defence against double tax.

However - countries within the EU are not required to unconditionally tackle the matter of double taxation as shown in Damseaux C-128/08. The court specifically stated in the presence of a DTC that states are not "unconditionally obliged to prevent the resulting juridicial double taxation".

Conclusion

Ultimately the notion of dividends suffering a 15% WHT and then being taxed on receipt at likely a similar rate is inconceivable for the functioning of modern economy. Whilst there may be a legal argument to support both forms of taxation, not providing a credit in one country against the expense in the other would be most irregular.

Part (iii)- Would this be different with no DTA?

Consideration must be given to DTAs when considering freedoms being infringed upon. DTAs may be used to "patch" gaps in domestic law which initially appear to infringe upon. In this case, the DTA doesn't actually amend for the restriction suffered.

Without a DTA there would be less clarity over which state had the right to tax, as this is often laid out in the initial articles of the treaty.

However, the absence of a DTA does allow for a more aggressive approach with regards to the elimiantion of double tax. As aforementioned, the elimination of double tax is a primary focus for the EU, except where there is a DTA in place (Damseaux C-128/08).

Conclusion

As such - the analsys to Part 1 may not be inherently incorrect as there is no mention of the taxing status in State Z. In the event that taxatin is levied on dividend income then there would be a much stronger case to take before the ECJ on the infringement of FmoC.

Answer-to-Question-_2_

Facts

- Mr X lives in State A
- Offer to work in State B, for Company Y
- X wants to live in State A but commute across the border every day
- Concerned he will lose allowances present in State A but not State B

Report on the applicability of allowances for cross border staff

Introduction

The aim of this report is to consider the impact of EU law on the circumstances of Mr X.

Mr X is a resident of Country A with his family, and has been offered new employment in Country B by a new firm. Country A offers considerable tax benefits in the form of allowances based on his residency which he fears will be lost should all of his income arise as a result of employment in Country B.

The EU

The EU was established with fundamental freedoms for it's member states, and citizens.

They are :

- Free movement of Persons ("FMoP")

- Freedom of Establishment
- Free movement of Capital ("FMoC")
- Free movement of Services ("FMoS")

FMoP

The FMoP states that people within the EU should be free to move and work where they please. It is important to specify that workers are specifically covered under Article 45 of the Treaty on the Funtioning of the European Union ("TFEU"). As such, Mr X should not be penalised for working in one state whilst commuting to another.

Relevant cases

Schumacker C-279/93

The concept of discrimination based on residency is also explored through the Schumacker case. Mr Schumacker. Mr Schumacker, a Belgian national, was concerned that Germany was taxing his income differently to how a Germany resident would be taxed. That is to say - he was suffering from a restriction.

The ECCJ found that Mr Schumacker was correct to challenge - the application of different taxation to non-residents to residents was not compatible with EU law so long as the two situations were comparable. As Mr Schumacker was the sole earner in the family and all of the family income derived from Mr Schumacker's wages in Germany - these situations were seen to be comparable.

As such - any deductions or tax rates applicable to German residents would have to be made available

Bachmann C-204/90

Bachmann Case C-204/90 provides guidance on this matter. Mr Bachmann was a resident in Germany but employed in Belgium, and was concerned various payments he made as a result of his employment in Belgium (namely his invalidity contract and life assurance) would be not be tax deductible in Belgium but not would be in Germany.

This case found itself to the ECCJ, which ruled that whilst a restriction on a fundamental freedom was clear, the justification for the maintenance of fiscal cohesion was sufficient to allow the differing treatments between the two countries.

Wielock C-80/94

The Wielock case gives an insight into the arguemtn of fiscal cohesion not being a justification for a freedom being infringed. Mr Wielock argued that his treatment was different in the Netherlands, from where he was receiving pension payments, than to residents.

The ECCJ argued that in the event of a DTC having been signed the argument of fiscal cohesion would not apply.

Conclusion

State A has a right to maintain fiscal cohesion and therefore to grant it's deductions to national, so long as they are also granted to workers from other states in comparable situations.

State B does not have to "match" the benefits offered in State A in terms of tax allowances, as they have the right to maintain a balance of taxation powers.

However, any deductions and/or allowances available in State B must be made available to Mr X in the event he accepts the offer of employment.

Answer-to-Question-_3_

Introduction

The taxtion of energy has become an increasingly popular topic, particularly in developed economies. This is typically seen indirectly, through a tax on the carbon emissions of major corporations (with CO2 being a proxy for the energy consumptions and impact of global entities).

Fundamental Freedoms breached?

To consider whether this levy would be allowable under EU law it is necessary to consider whether any of the Fundamental Freedoms are being breached. The EU does not typically consider domestic taxation unless a freedom is breached, nor does it comment on hypotheticals so would unable to provide significant input or support in determining the legality of the proposed levy.

Freedom of Establishment

FoE is perhaps the most likely Freedom which could be breached by this tax. A corporation which is a resident in the EU is being given an adverse tax treatment compared to those not resident within the Union. However, the FoE does not extend to Third States - as such this is of little concern.

Given all countries within the EU are being impacted this in the same way, and that a non-resident Member State would suffer the same taxation as a resident Member State there is no restriction on the FOE.

Freedom of Movement of Capital

A concern however is the seemingly targeted nature of the legislation. As foreign owned entities are much more likely to be subject to this tax than those within the Union, there is a concern that there is discrimination against foreign investment into the EU.

The EU does allow for legislation which targets countries differently, in the event that the two (or more) countries are not in directly comparable situations.

Public interest?

It is clear that reducing energy (which a tax would almost certainly lead to) is in the public interest of the EU as well as the broader global community. However, given energy is a fundamental necessity in the modern world and most businesses are wholly reliant on their energy consumption in their productivity (ie Big tech, digital work, manufacturing) it is possible that this could be likened to a tax on water.

Is it proportionate?

Once considering the restriction on FoE and potentially FMoC, it is important to consider whether this action is proportionate to the objective of the taxes. The purpose of maximising tax revenue is not actually a primary objective of the EU. A levy on turnover is quite unusual, particularly a specific % being applied.

It should also be noted that the world is experiencing the most aggressive increase in energy prices since the oil crisis of the 70s as well as double digit inflation across the globe. It would be very difficult to argue that increasing the relative cost (on the assumption that there is some link between the rate of this tax ties to energy consumption).

Alternative means of achieving this goal

A taxation directed on revenue is very aggressive compared to effectively all other taxes raised in the EU. It may be advisable to introduce a separate tax base for the calculation of the impact of energy intensive work (ie, to disallow the costs on non-energy efficient vehicles or perhaps to disallow energy/rate costs). Both these suggestions would serve the purposes of increasing tax revenues, whilst not being a disproportionate attack on large companies and incentivising energy companies to "factor in" the increased cost of consumption.

Conclusion

It is unlikely that this tax would be compatible with EU law on the basis that it is wholly disproportionate and appears to discrimiante against foreign owned corporations within the common market. Beyond this, it is likely to dissuade investment into the EU, which clearly is going to impact the economies of the member states in a negative capacity.

Answer-to-Question-_5_

Introduction

The use of corporate losses to offset taxable profits is a commonplace measure across the globe. The UK has perhaps the most famous example in the form of group relief, but there are mechanisms for the domestic offset of losses in virtually all developed economies.

The matter of cross border losses has been an area of significant development in the last 20 years. A key case within EU law on this matter is that of Marks and Spencer ("M&S").

M&S Case

(i) Summary of the facts

M&S, a popular retailer based in Leeds (United Kingdom), owned subsidiaries in France, Belgium and Germany. These subisidiaries were loss making for tax purposes. Tax losses, as all trainee tax advisors learn, are an asset for companies as they present a legal entitlement to a future economic benefit. M&S wished to make use of these losses to offset it's profitable business in the UK, reducing it's overall charge in the UK.

(ii) **Her Majesty's Revenue & Customs ("HMRC")**

HMRC assumed the position that these losses should not be allowed - and as such the surrender of losses to offset M&S profits was not accepted. M&S challenged the finding in domestic court, which found in favour of HMRC.

(iii) **The ECJ - the M&S argument**

The case was challenged by M&S on the basis of an infringement on a Freedom of Establishment ("FoE") basise. The argument being - domestic rules do not discriminate against domestic losses, but a multinational group is suffering discrimination on the basis of it's geography.

(iv) **Findings of the court**

The EU found that such restrictions were justifiable on the basis that:

- they helped prevent tax avoidance
- they assisted with the prevention of double use of the losses (tracking loss positions and utilisation is to this day a challenge for Authorities)
- they maintaned a balanced allocation of taxing powers

(v) The no possibilities test

The EU did, however, find that there would be scenarios where losses should be allowable. This is usually referred to as the "no possibilities test". Where losses are accrued in a country where there is no reasonable expectation for such losses to be used, then the losses may be repatriated to offset domestic profits.

There are some additional caveats to consider, as the no possibilites test is not always sufficient to allow the movement of losses across borders.

Permanent establishments

The impact of permanent establishments has since been developed further.

Nordea Bank

This involved Nordea arguing that losses in a PE should be moved in the event of a transfer back to a resident state on the basis that the parent state was liable to taxaton on the income suffered.

Timac Aggro 2015

This case led the ECJ to state that losses which were suffered in a PE in a where taxes were levied in the PE state could not be returned to the parent company state as a means of offsetting taxes.

Philips case

Phillips was located in the UK as the owner of a PE in one country and a subsidiary in another. They attemtped to surrender losses from the PE to the subsidiary on the basis that such losses would not be usable, in line with the findings in the M&S case.

This surrender was rejected by both the domestic courts and the EU on the basis that the ultimate taxing rights on the entities involved.

Summary

- Losses may not be surrendered by Member States in normal circumstances
- Losses may be surrendered by Member States should the following circumstances apply:

(i) The no possibilities test has been considered and correctly applied

(ii) The taxing rights of the parent company must be considered in the matters of permanent establishments. In the event the state of the parent company has taxing rights on the income of the PE then the losses should be allowable for offset, in the event the taxing rights are with the state of the PE then the losses must not be allowable.

Answer-to-Question-_7_

Introduction

The Common Consolidated Tax Base ("CCCTB") was a proposal made with the view of further harmonising the tax regimes of the EU. At present, there is no overarching or harmonising mechanism for the EU to achieve a consistent tax base.

Motivation

At present, taxation (and direct taxation specifically) are an area which provides a significant challenge to the function of the Common Market, as well as being a significant administratrive hurdle. The use of tax incentivies to attract major corporations, as well as disincentives to nudge behaviours that are unfavourable has led to the EU having wildly different domestic tax laws.

Further, over the last 20 years the global economy has changed radically. Case law from the 1800s is poorly equipped to deal with Big Tech or digital only business, with the increasing complexity in calculating the tax bases of these entities.

Such complexities and disparities increase the risk of double taxation (and non-taxation) which distory the functioning of the internal market (as described by the Explanatory Memorandum).

The EC sought to tackle these challenges through a consistent tax base, and with more consistent tax treatments.

The plan

The CCTB had two steps:

Step 1

The creation of a standard tax base for EU member states, which would have served the purpose of further harmonising taxes which are currently very different between member states.

Among the proposals for Step 1 were:

- An exemption from the rules for income deriving from dividends so long as there at least 10% ownership.

- A very generous tax treatment for R&D purposes, notably a 50% deduction allowed for expenses up to EUR 20,000,000 and a 25% deduction for expenses beyond this. Given the CCCTB would only apply to very large corporates, this is significantly more beneficialy than the RDEC available in the United Kingdom and the above the line R&D Credit available in France for example.

- Changes to interest limitation such that interes costs may be used to offset interest income before being subject to standard interest restrictons. It's important to note that this has effectively taken place as the UK Corporate Interest Restriction calculation looks specifically at the Net Group Interest Expense (NGIE) when calculating it's restriction.

Step 2

The consolidation of group turnovers and subsequent reallocation of profits to member states based on a weighted average formula looking at size and asset location.

Findings

The CCCTB received a significant backlash from member states, such as the Netherlands, as well as from the BEPS Monitoring Group. Of particular concern was the incredibly generous R&D Super Deduction outlined.

The CCTB was effectively replaced by the BEFIT proposals, with the initial documentation published in September 2023. These still include a harmonisation of the tax base, on a per entity base calculation, but have removed some of the more aggressive suggestions such as the R&D super deduction.