euAnswer-to-Question-_1_

By refusing to allow the deduction of the incurred loss of the PE against the overall group income, a restriction on freedom of movement seems to be triggered. This restriction would have not taken place had it been for a domestic transaction (in this case, exclusiviely within Azalia).

The Merger Directive would be applicable here, whose objective is to remove tax obstances in cross-border reorganizations (like the one described here). Since the companies are subject to corporate tax and resident to Member States of the EU, the Directive remains applicable.

As per the Directive, when transferring company assets, there should be a defferal of the applicable taxes charged on the difference between their real value and their value for tax purposes. This would be the case as longas the receiving companies connects these assets to its owne perament establishment in the receiving entity in the Member State, which seems to be the case here.

As per the A OY C case, following a cross-border merger transaction, the tax losses should be allowed to be deducted if the same relief is allowed to domestic transactions of the same nature. In this case, it seems that Azalia is not willing to accept the tax losses resultinh from the absorbtion of the PE, which seems to be a business-oriented restructuring of the group.

Nonetheless, cross-border use of losses within a group do not form part of the fundamental freedoms that EU taxpayers enjoy; these losses need to be final losses for their cross-border use to be necessary and proportionate (as per the Marks Spencer case). As per the relevant case law, ACo¥s subsidiary in the

Member State could apply for tax relief for these losses in that State, since they do not seem to be final. Therefore, the law of Azelia in that case does not seem to infinge on article 49 of the TFEU.

euAnswer-to-Question-_2_

First of all, we seem to be in the presence of a restriction in the availability of relief for losses suffered, due to the fact that these losses were incurred in a different EU member state. Companies are free to transfer their seat, and by doing so they exercise their freedom of establishment.

It should be stressed that we are not in the presence of a double deduction of losses, since XCo is not attempting (nor able) to claim these losses in both member states. As per the Marks & Spenser Case, the refusal to recognize and provide relief for these (final) losses, incurred in another member state, prevent XCo from establishing itself in another member state (in this case, from Xanthia to Zubia). Although the MS Case was elaborated in the context of a parent company and its subsidiaries, its principles can be extrapolated in casu, since the member state of Zubia restricts its freedom of establishment - within the meaning of art. 49 TFEUMERGER
 - by not providing for the relief following the change of the company¥s effective place of management.

In other words, had XCo maintained its effective place of management in Zubia from the beginning, the company would be able to claim relief. The refusal to claim this relief stems from the fact that the losses concerned rose from economic activities outside that state (but within the EU member states network). As a result, and given the lack of prospect of using these losses in the original state, Zubia is limiting the freedom of establishment,as per article 49 TFUE. The restriction of granting

this tax advantage of tax relief following the change in the place of effective management seems to prevent XCo from establishing itself (or its effective management)in a different state of the EU, without an appropriate justification.

In conclusion, XCo could thus rely on the EU Court of Justice case law and its interpretation of the TFUE in order to achieve tax relief for the above-mentionned losses.

Furthemore, EU law seems to be moving towards a more unified approach on the computation of taxes within the Single Market, as the Common COnsolitated Corporate Tax Base proposal shows. Per this proposal, cross-border companies within the EU will be able to calculate their taxable profit within the Union at once, without dealing with each member state¥s system seperately. This consolidation element is aligned with the mechanism described above; nonetheless, it should be kept in mind that the proposal has not been accepted yet and thus it should be only taken as an indication of EU¥s approach of freely offseting losses and profits within various the Member States, without (significant restrictions).

euAnswer-to-Question-_4_

For State Aid to enter into consideration, article 107 of the TFUE requires certain conditions to be met; a benefit to be paid/allocated to a taxpayer, by the resources of a Member State, which impactes the EU Single Market in a negative manner and lasty, for that benefit to present a “selective” character.

Although State Aid rules have been originally drafted to prevent practices of “subsidizing” exporting industries within one State - to the determiment of the exports of the other Member States - it has evolved to be relevant to EU tax matters (in particular within States such as Luxembourg or Ireland which have allegedly provided multinational groupes with advantages of

selective character through national tax rulings).

It should be noted that within the EU tax law context, State Aid only applies to economic activities, excluding otheractivities that may not be onerous (humanitarian activities and foreign aid, religious activities, free services to citizens etc.), although the line can be thin in some cases.

In this case, the EU member state legislation seem to be meeting all the conditions of article 107 TFEU (conferring a benefit with a selective character, by the tax collection resources of that State, affecting the internal market negative of the EU). In particular, this seems to be a selective benefit because it only targets EU resident companies and allows advantages only for qualified foreign companies who have an identical (!) tax applicable. The question here is whether the tax incentives/advantages are qualified as a benefit paid by the resources of a Member State. The answer lies in the relevant EU case law, which points that special tax deductions (or even defferals) as well as reduced corporate tax rates can be considered as favoured transactions “granted through state resources” and thus contrary to the EU State Aid rules (case Italian Rep. v. EC Commission). Therefore, due to the specific provisions of this legislation, a characteristic form of state aid seems to be conferrered to Marina tax resident companies making a specific investment action. This is incompatible with EU state aid rules and could lead to an eventual investigation by the EU Commission.

Lastly, there is no mentionning to the existence of a DT treaty (or equivalent), but this is not of relevance here; State Aid rules can be triggered even if there is such a Treaty, which would not exempt the Member State in question from its responsbility.

euAnswer-to-Question-_7_

With the aim of creating a more favorable economic environment and reducing burdens, the Council of the EU approved Directive 2017/1852 introducing, among others, a new procedure aiming to eliminate double taxation within the Union.

More specifically, as per the directive, disputes between two or more member states in relation to the interpretation and application of the existing double-taxation agreements, the following process is set-up-

- a phase of complaint, in which a given taxpayer can request from both tax authorities to resolve an issue (iwthin three years from the receipt of the notification).
- a phase of mutual agreement (MAP). In this case, the authorities have two years to reach a mutually-agreed decision on the issue resolving the double taxation. Once resolved, the decision must be notified to the concerned taxapyer, who is at liberty to accept it or not. If accepted, the taxpayer shall waive its right to further remedies. The decision is thus implemented without further delay.
- if the authorities fail to reach an agreement within the time framework forseen in the Directive, an advisory commission is to be appointed. This commission has six months to deliver its final decision, which the concerned tax authorities can only overturn if they reach a commonly accepted solution among them. If not, they are bound by the opinion of the appointed advisory commission.

For the directive to apply, there needs to be an "affected person" as per article 2. The affected person must be resident in a member state, raising question as to its applicability for permanent establishments, when the HQ are resident outside the EU.

Aside from the Directive, the EU Arbitration Convention could also enter into consideration, relevant to transfer pricing issues arising from intercompany transactions within a Group in

the EU.

euAnswer-to-Question-_8_

The Council of the EU has been publishinga list of non-cooperation jurisdictions for tax purposes, which is ever since being reviewed on a two-year basis. The aim of this EU list is to promote tax good governance mechanism, transparency and to tackle tax avoidance and evasion, among others.

For a jurisdiction to be included in the blaclist, they are screend in terms of tax transparency, harmful preferential tax measures or facilitation of offshore structures without real economic content and application (or lack thereof) of anti-BEPS measures.

Apart from serving as a theoritical base of jurisdictions that do not meet the tax governance criteria, several countermeasures against them are forseen. These countermeasures are mostly related to financing and ivestment operations and the Member States have committed to apply at least one of the follwing legislative measures against them (refusal to deduct costs incurred in one of the covered jurisidctions, application of Controlled-Foreign-Company rules, measures relevant to witholding taxes and even limitation of the participation exemption on shareholder dividends). It should be noted that the adoption of these measures into the national legal orders of these Member States has not been harmonized or unanimously completed.

The EU list has faciliatee efforts to improve good tax governance since business with activities in the jurisdictions listed (on Annex I), have now enhanced reporting obligations relative to deductible cross-border payments (in line with the MDR Directive). Additionally, even non-tax defensive measures enter into force, as the ones mentionned above.

It should be noted that EU¥s efforts to improve tax governance through the publication of the list are more relevant than ever. Some of the largest companies worlwide - by market capitalization - rely on the value of intangible assets, that can be more easily syphoned through non-cooperative jurisdictions than more traditional (tangible) assets. Therefore, it is of primary importance to scrutinize actions that could erode the taxable base of companies based or generating taxable activity in the EU, where they to erode their base through payments or artificial structures based in non-cooperative territories.