Answer-to-Question-_7_

- what are the "fundamental freedoms" in TFEU?
    - Freedom of movement of persons, services and capital
    - Freedom of Establishment
    - Freedom of Services
    - Freedom of capital and payments

- As per Gilly C336/96, abolistion of double taxation within the EU community is one of the objective of the EU Treaty. It must be noted though that there is no unifying or harmonising measure for the elimination of double taxation adopted at EU Community level.

- In the absense of a unifying or harmonising measure in EU Law, it falls on the Member State to dictate via national legislation its system for taxing profits and income.

- In Gilly, the taxpayers suffered double taxation due to national legislation in Germany and France. CJEU rule that there is a posibility of a restriction on an EU Fundamental Freedom, but whether the tax treatment of taxpayers is favourable or unfavourable is determined by the level of taxation in the Member State. CJEU have no jurisdiction to determine infringement in this case.

- Direct Taxaxtion of a Member State falls within Member State's competence. CJEU does not have the jurisdiction to rule on possible infringement of national legislation on direct tax matters.

- However, any national legislation should still need to be compliant with EU Law (Itelcar C282/12)

- Member State are competent to apply a number of connecting factors for the purpose of allocating jurisdiction between contracting parties. This may sometimes result in double taxation of taxpayers (Gilly CC336/96)

- Treaty encourage Member State to conclude agreements between Member States that prevent or eliminate double taxation. It does not provide that the Member State of residence be unconditionally obliged to prevent the resulting double taxation (Dameseaux C128/08).

Answer-to-Question-___8

- what is CFC?

It is one of a widely used provision with the obligation to prevent tax avoidance as one of its purpose and avoid multi-national shifting profits to a low tax jurisdiction with no valid commercial reasons.

In the UK, a subsidiary of a UK parent might fall into CFC provision includes:

- is a subsidiary that a parent have significant influence, control and management, and
- the subsidiary is in a low tax jurisdiction compared to the UK tax (there is a specific threshold)
- not part of the excluded territories, engaged in exempt activities and other exceptions as defined in UK CFC rules

If a subsidiary of the UK company falls within CFC rules, relevant profits of the CFC would be taxable in the UK on the UK company which owned the CFC.

ATAD's CFC rules generally works as per UK CFC with the additional condition that CFC rules are appropriate and does not go beyond what is necessary to achieve the purpose for a CFC rule (Cadburry Schweppes C196/04).

Answer-to-Question-___4

4.1

In order to understand whether the levy of withholding tax is compatible with EU law, it is important to understand which EU fundamental freedom is at scope.

The objective of the national legislation is the taxation of dividends regardless of the level of investment in the company distributing dividends. By settled-case law (FII Group Litigation C35/11, Emerging Markets C190/12, ELISA C451/05), this case falls within the scope of free movement of capital.

Tax levied on dividends from a non-resident entities whilst dividends from resident entities are exempt, place a heavier tax burden on dividends receivable from non-resident entities. This can make investments in non-resident entities less attractive for residence. As per settled case laws (Manninen C319/02, Lenz, Verkooijen), CJEU have ruled that this amounts to a restrictions of the fundamental freedoms guaranteed by the EU Treaty.

This restriction can be permissible only if it's demonstrated that:

- resident and non-resident entities are not in comparable situation
- justified by overriding reason in the public interest
- that does not go beyond what is necessary to achieve the objective of the legislation

with regards to whether resident or non-resident entities are in comparable situation, this is not in question as the legislation impacts on just the resident taxpayer.

Possible justification for this restriction includes:
- to avoid double taxation: dividends from both resident and non-resident entities have the posibilities to be subjected to tax charges that might cause double taxation - first at the layer of the company and then at the hands of the receipient. Conferring exemption on dividend receivable from resident entities but not on dividends on non-resident doesn't seem to be in point. Ensuring exemption for both dividends from both resident and non-resident entities would actually eliminate posibilities of double taxation.

- preserve cohesion of national tax system: national rule is designed to ensure that resident income is taxed once at the hands of the distributing entities. For such a justification to succeed, there should be a direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax deduction. Granting exemption on dividends receivable from non-resident entities would not threaten the cohesion of the Member State Z's tax system (Manninen). It would actually constitue a measure less restrictive of the free movement of capital than that currently laid down.

COnsidering the above, it would appear that national legislation as it stands might not be compatible with EU law.

4.2

If the Member State concerned have concluded a double tax agreement with the proviso that credit is given by the distributing entity's state of residence, the national legislation might not be considered as restrictive if:

- the tax credit can be offset in full against the tax liability of the taxpayer, and
- if the taxpayers tax liability is lower than the withholding tax, there's a posibility of a refund from the distributing entity's state of residence and,
- any tax credit or refund can be actioned without undue delay

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Answer-to-Question-___1

Facts:

- Member State A's Tax on property income
- depending on availability of information

- property income from property in Member State A
    = administrative value less 40%

- property income from property other Member State

    - Rented property = actual rental income less 40% less taxes paid in resident state

    - not rented property = notional rental income less 40% less taxes paid in resident state

Memo

Compatibility of Amended Tax Legislation on Immovable Property with EU Law

<u>Background</u>

Further to our meeting on xxxx, you have engaged us to review

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whether the proposed amendments to taxing income from immovable properties on residents of Member State A would be compatible with the provisions of the Treaty on Functioning of the European Union (EU Law).

Direct tax of each Member State is the competence of the Member State. Though any national legilsation would still have to be compliant with EU law - particularly, it should not infrige upon taxpayers fundamental freedoms including:
- Freedom of movement of persons, services and capital
- Freedom of Establishment
- Freedom of Services
- Freedom of capital and payments

Fundamental Freedoms

To understand whether the amendment would be compatible with EU Law, we would need to consider:
1. which freedom(s) is(are) in scope
2. whether any of the above freedoms have been restricted.

It is important to understand the objective and purpose of the national legislation in order to conclude on which freedoms would be in scope. The objective of the national legislation is to tax income derived from immovable properties owned by residents of Member State A. Based on settled case law, legislation concerning tax on immovable properties (which could also be seen as legislation concerning "investment in immovable properties") falls within "free movement of capital" included within Annex I

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of Council Directive 88/261/EEC (ELISA, K C322/11).

Restriction in Fundamental Freedom

It is highly likely that income from immovable properties located in other Member State would have already been taxed in that Member State. Taxing the same income again in Member State A would be seen as bringing about a heavier tax burden on resident owner of non-resident properties compared to resident owner of properties located in the same Member State as the owner.

The higher burden of tax on immovable properties located outside of Member State A is also demonstrated by the difference in method of asssing the tax including:
- administrative value for properites located in A whilst actual or notional rental income for properties located outside of A
- The method of deducting tax already paid directly from rental or notional rental income does not eliminate the possibility of double taxation on same income - as tax rate levied by A and tax rates levided by other Member State have not been taken into account

This could make it less attrative for resident owner to invest in properties outside of Member State A and as such, hinder their free movement of capital.

This restriction is not compatible with EU Law.

Justifications and Proportionality

The above restriction could be justified by:
- overriding reasons in the public interest eg preseving the balanced allocation of the power to impose taxes between Member State
- which does not go beyond what is necessary to achieve the objective of the national legislation

There could be an argument that the restriction is justified by the need to preserve the balanced allocation of the power to impose taxes between Member State. However, we believe that the less restrictive method would be to allow:
- any taxes already suffered to be deducted after calculating the tax assessible in Member State A
- the income assessed on immovable properties located outside of Member State A is the same as those located in Member State A

Conclusion

There is a high likelihood that the proposed amendments to national legislation would contravene EU law. Changes are required to be compliant with EU law.

Answer-to-Question-___2

Facts:

- LOW transfer place of effective management (PEM) from A to B.
- LOW registered in A
- A impose exit tax on company's unrealised capital gains (National Grid)
- payment of tax may be deferred up to 5 years if LOW provide bank guarantee to A as secure repayment
- 3 years after transfer of PEM, LOW sold assets and triggered exit tax at price lower than their FV at time of transfer.
- LOW request A to consider this decrease in value when calculating exit tax amount. A refused

- LOW request B to deduct losses suffered in A. B refused. (Marks & Spencer - possibilities)
- LOW request B to consider this decrease in value when calculating exit tax amount. B refused

2.1 Exit Taxation

Exit taxation have been levied on LOW when it transferred its place of effective management (PEM) from A to B. LOW's status as a company incorporated in A had not been affected. As per settled case law (National Grid, Lasteyrie du Saillant), LOW can rely on Article 49 TFEU (ie freedom of establishment) for the purpose of

having a claim under EU law.

It could be argued that A's national legislation of imposing an exit taxation on unrealised gain would make it less attrative for entities to incorporate in A. Thus restricting their freedom of estabilishment.

THis contravenes EU law.

National Grid considers the justification of this restriction is to ensure balanced allocation of powers to tax in accordance with principle of territoriality. Transfer of PEM cannot mean that A has to "abandon its right to tax a capital gain which arose within the ambit of its powers of taxation before the transfer" (National Grid, ACT Group Litigation C374/04). CJEU held that Member State is entitled to tax the economic value generated by an unrealised capital gain in its jurisdiction even if the gain has not been realised.

However, does this legilsation go beyond what is necessary to meet objective?

2.2 Decrease in value consideration

The exit tax have already been assessed on LOW unlike in X Holdings. As per National Grid, it was held that not taking into consideration any changes in foreign exchange is not disproportionate to achieving the objective of the national legislation. Applying the concept to A's national legislation, it can be concluded that the legislation is not disproporionate in

no considering the decrease in value.

With regards to B, it should also be worth bearing in mind that Member State cannot be required to take account of the possible adverse consequences arising from legislation of other Member State.

2.3 Utilisation of Losses from A

Case law such as K C322/11 have considered whether similar losses occured in the State of Origin could be utilised in the State that the taxpayer had transfered its PEM. In K, losses are only permissible in the resident state if the losses arose from property located in the resident state. It was considered a restriction to freedom of movement of capital but justified by having to safeguard the symmetry between the taxing rights of Member States. However, the restriction was not justified by the need to prevent losses being taken into account twice, or risk of tax avoidance. Need to ensure cohesion of tax system may also justify this restriction.

As per Marks & Spencer case, it would be important to consider whether any of the losses are definitive and whether there's any possibility for the losses to be utilised in the original state in the current, prior or future years.

If the losses are definitive, there might be an argument. Though

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K C322/11 held that even if losses are definitive, it's of no relevance.

Last but not least, it should also be worth bearing in mind that Member State cannot be required to take account of the possible adverse consequences arising from legislation of other Member State.