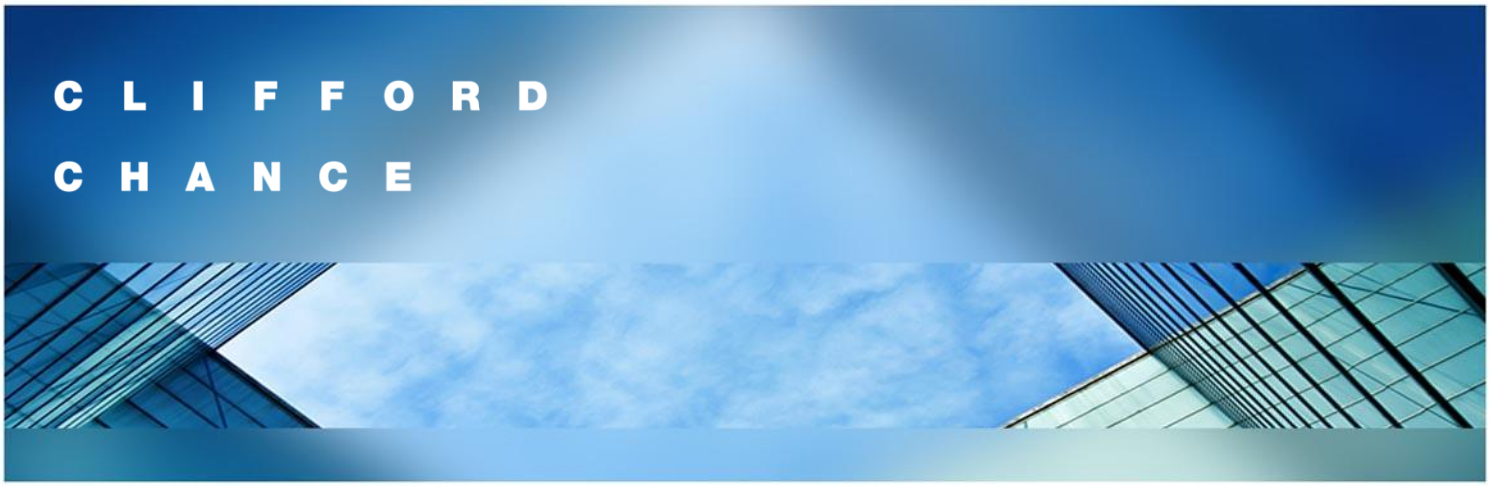

INTERMEDIARY (LUXEMBOURG) HOLDING AND FINANCING STRUCTURES UNDER HIGHER SCRUTINY: BELGIAN SUPREME COURT CONFIRMS STRICT APPLICATION OF EU ANTI-ABUSE RULES FOLLOWING DANISH CASELAW ON BENEFICIAL OWNERSHIP

In a landmark case Clifford Chance Brussels has been defending, the Belgian Supreme Court has now issued its ruling. The outcome of the case is mixed, but on the application of the EU anti-abuse rules the Belgian Supreme Court is taking a very stringent position, which is likely to be used by the Belgian tax authorities in pending and future cases involving intermediary holding or financing companies. The importance this case will have for the Belgian and European tax practice cannot be underestimated.

The factual background of the case is complex, but in essence the Belgian tax administration is challenging the application of the withholding tax exemption of the EU Parent-Subsidiary Directive on a dividend distribution by a Belgian operational company to an intermediate holding company established in Luxembourg. LuxCo was established as a joint venture vehicle when a new third party investor took an important (40%) stake in the Belgian operational group. The dividend proceeds were generated at the occasion of an intra-group sale of part of the business funded with external debts (a so-called "leveraged recap"). The entry of the new investor, the setup of Luxco and the leveraged recap/distribution of the dividend all took place around the same date. The Belgian tax authorities challenged the application of the withholding tax exemption on the dividend between Belco and Luxco on the basis that the series of transactions mentioned above constituted an artificial construction solely aimed at avoiding withholding tax.

The practical importance of this case for the Belgian and European tax practice cannot be underestimated:

- The Supreme Court confirms the direct, automatic application of the EU anti-abuse rules which have been developed by the ECJ "along the way" following the 2017 *Italmoda* and *Cussens* cases (in VAT matters) and the 2019 *Danish* cases (in direct tax matters) and retroactively on facts dating from before these cases (i.e. 2012, at a time no such direct application was allowed following the then prevailing ECJ *Kofoed* case law). The EU anti-abuse rules are considered to prevail over other fundamental EU rules and principles, such as the principle of legal certainty and legitimate expectations, the principle of separation of competencies between the EU and the Member States and the Belgian constitutional principle of legality of taxes. More than ever, and for each EU jurisdiction, it will be essential to assess the impact the EU rules and evolving ECJ case law in addition to the applicable national anti-abuse rules.
- The Supreme Court advances a very extensive interpretation of the concept of "wholly artificial" (the cornerstone principle of the EU anti-abuse principle) by admitting that an intermediate holding can be created for valid business reasons (in this case the setup of a joint venture vehicle with a new third party investor) but still constitute tax abuse if "used" to repatriate profits free of withholding. The distinction seems odd in this context as it is difficult to conceive how a series of transactions can be considered as "wholly artificial" when the most important/decisive step - being the

incorporation of an intermediate holding company in Luxembourg - is confirmed to have taken place for valid business reasons. Could one infer from this that the judges can weigh the tax advantages of a structure against its business motives and conclude that there is a tax abuse whenever the tax advantages are considered more important than the business motives? No, because this would clearly go against the concept of "wholly artificial" as defined by the ECJ and be contrary to the principle of the right to opt for the least taxable route as still defended by the Belgian courts. However, it does in our view move the boundaries, and may make it easier for the tax administration to invoke tax abuse.

- Slightly unsurprisingly, the Court confirms that in assessing whether tax abuse exists in the context of a dividend distribution, the tax administration can consider the wider context of a series of transactions and is not limited to the tax avoidance motives at the level of the dividend paying entity itself. It can also consider tax avoidance motives higher up the chain, eg. at the level of the beneficial owners who are not legally a party to the – in this case – Belgian dividend distribution.
- Additional interesting legal questions being addressed in the Supreme Court ruling such as one with regard to the extensive interpretation of the extended statute of limitations foreseen in article 358, §1, 2° ITC (with a not so surprising but far reaching outcome) and one with regard to the technical consequences of a taxable merger between two Belgian holding companies (with a very surprising and again far reaching outcome).

Don’t hesitate to reach out to us for more insight in the Supreme Court ruling and the impact this may have on your intermediary holding and financing structures in Luxembourg or other EU jurisdictions.

CONTACTS

Alexandre Ooms
Partner

T +32 2 533 5073
E Alexandre.Ooms
@cliffordchance.com

Stijn Van Walleghem
Associate

T +32 2 533 5089
E Stijn.Vanwalleghem
@cliffordchance.com

Thomas Linard de Guertechin
Associate

T +32 2 533 5909
E Thomas.Linardde guertechin
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ
© Clifford Chance 2024
Clifford Chance LLP is a limited liability partnership registered in England and Wales under number OC323571
Registered office: 10 Upper Bank Street, London, E14 5JJ
We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.; AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP; Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.