Abuse of Law in European Tax law

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Legal certainty

versus

Abuse of Law

- Legal certainty: law must be know and foreseeable
- Consequence: free to choose that best fiscal way (*Halifax*)

- But not when there is abuse…..

Abuse-test

*Emsland-Stärke: (*for VAT in *Gemeente Leusden/Holin* and after that in *Halifax)*

- Objective-test (purpose and scope of EC law)
- Subjective intention-test
  - Ask them!
  - Otherwise: look at the objective circumstances to know the subjective intention
  - Not everybody thinks that the subjective intention is necessary (Pistone/Lang)

Abuse of Law

- General principle of EC law (Court in *Kofoed ‘reflects’*)
  - but: not a right of a taxpayer, it restricts your right
  - It is not always applicable
  - application through interpretation
  - but a special form of interpretation (last resort/exception)
- Or ‘’principle governing the interpretation of Community law’

Abuse of law

- The same in indirect taxation (VAT) and direct taxation?

- *3 M Italia* (C-417/10) (pending)

Different levels of abuse

- **EC Level**
  - Abusing/using EC rules to circumvent EC rules (VAT)

- **National level**
  - Abusing/using EC rules to circumvent national law (direct taxation)

When is there abuse?

- Avoidance of *tax*

- Postponement of paying tax
  - Is that avoidance of tax?

  - Pending case in the Netherlands

When is there abuse?

- Tax jurisdiction shopping (*Centros/Cadbury Schweppes*)

- Wholly artificial arrangements
  - If you have some business considerations means you are safe?
  - No: *Part service* (essential aim)
  - The best fiscal way can also be abusive

When is there abuse?

- Wholly artificial arrangements
  - U-turns (*Emsland-Stärke, Leclerc, Lasteryrie)*
  - Economic reality
    - *Cadbury*: objective factors: ‘premises, staff, equipment’
    - *Thin cap LGO*: objective factor: ‘loan at arm’s length?’

How specific should an anti-abuse provision be?

- *Too general not allowed*
  - ‘to every situation’ (do not take into account specific circumstances that indicate abuse)
  - ‘for whatever reason’ (thus without taking the subjective intention into account’)
- *When specific enough*?
  - Difficult to answer
    - *Cadbury Schweppes*
    - *Thin Cap LGO*

How specific should an anti-abuse provision be?

- *Excluding cross-border profit and losses*
  - *Marks & Spencer*
  - *Oy AA*
  - *X Holding*

How specific should an anti-abuse provision be – versus Third States

- *Commission/Italy* (dividends)

Specific issues

- **Merger directive** (company tax):

- Cannot refuse the facilities of this directive to attack avoidance of another tax (transfer tax); *Zwijnenburg* case

- *Foggia* (pending): abuse: intentions of the company involved or the whole group relevant?

Consequences of abuse

- Must not lead to a penalty *(Emsland/Halifax)*
- Re-characterisation of interest paid only so far there is abuse (*Thin cap LGO*)
- Pending case: *Weald Leasing*
- Redefinition also in other member State?
  - For VAT? Not for direct taxation?

EU Council

- Council resolution on coordination of the CFC and thin capitalisation rules within the European Union (H&I 2010/9.1. comments by Gutmann)

Amsterdam Centre for Tax Law ACTL

- http://www.jur.uva.nl/actl

- Join our LinkedIn group (www.linkedin.com)

- Wintercourse on International Tax Law (January 2011)

- OECD seminar: 19 November 2010