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I. Selected recent decisions of the Swiss Supreme Court

1. DTT with France - Exchange of information confirmed – request based on stolen data – Supreme Court decision of 16 February 2017 (2C_893/2015), planned for official publication

This landmark judgment relates to a request for administrative assistance from the French tax authorities to the Swiss federal tax administration (FTA) in relation to a list of persons who were suspected of holding undeclared assets at UBS Switzerland. Some of these persons were Swiss residents (like the appellant), while others resided in France or in other jurisdictions. The request of the French tax administration was based on data which they had received from the judicial authorities. The appellant argued that these data were stolen from UBS France by employees of the bank and filed an appeal to the Federal Administrative Tribunal against the decision of the FTA of 21 October 2014, confirming the transfer of information in relation to French source income. The Federal Administrative Tribunal ruled in favour of the taxpayer but the FTA appealed the decision to the Supreme Court which eventually overturned the decision of the lower court and confirmed that the requested information had to be exchanged.

At issue in the case was first of all the interpretation of art. 28, para. 3(b) of Switzerland's tax treaty with France (DTT CH-F), which, similarly to art. 26(3)(b) OECD MC, provides that: " *In no case shall the provisions of paragraphs 1 and 2 be construed so as to impose on a Contracting State the obligation: to supply information which is not obtainable under the laws or in the normal course of the administration of that or of the other Contracting State* ». Based on a literal and teleological interpretation of art. 28(3)(b) DTT CH-F, the Supreme Court arrived at the conclusion that this provision does not refer to the factual circumstances (including unlawful acts) which lead to an information request. Rather, for the Supreme Court, solely decisive is the fact that the information requested is in itself obtainable under the laws of both Contracting States. Referring to art. 28(5) DTT CH-F with respect to Switzerland and to the factual circumstances and domestic framework as regards France, the Supreme Court answered the question in the affirmative.

Next, the Supreme Court turned to the interpretation of art. 7(c) of the Tax Administrative Assistance Act (TAAA) which provides that an information request *"will not be considered if: it violates the principle of good faith, particularly if it is based on information obtained through a criminal offence under Swiss law".* For the Supreme Court, it follows that the notion of *"criminal offence under Swiss law"* refers to offences which are not only liable to prosecution under Swiss criminal law but also fall within Switzerland's territorial or extra-territorial criminal law competence (see art. 3(1) and 8(1) and art. 4-7 of the Swiss Criminal Code). In the present instance, the Supreme Court held that these conditions were not satisfied as the information obtained originated from an affiliate of the group abroad and it had on the other hand not been established that employees from UBS Switzerland had been involved in the supply of information to the French judicial authorities (para 8.5.6). Hence, because the Supreme Court found that the conditions of art. 7, let. c TAAA were not satisfied, the question of whether the requirement that information should not "*based on information obtained through a criminal offence under Swiss law"* should be understood as a separate unilateral limitation introduced by Switzerland, or on the contrary, as an expression of the principle of good faith under public international law was left opened (para 8.4 to 8.6). This question however was settled by the Supreme Court in its subsequent decision of 17 March 2017 (2C_1000/2015) discussed below.

With regard to the application of the good faith principle by the French tax authorities, the Supreme Court took the view that it could not be challenged, as the unlawful origin, under French law, of the data based on which the request was made, had not been sufficiently evidenced (para. 8.7).

Consequently, the Supreme Court confirmed the exchange of information.

In our view, the findings of the Supreme Court may however be criticized on two grounds. First of all, while it is true that art. 28(3)(b) DTT CH-F does not expressly refer to the factual circumstances based on which the request is made, we are of the opinion that information cannot be obtained on the basis of the legislation of one or the other contracting State when it is based on unlawful acts. According to Swiss scholars – which are in our view not appropriately quoted by the Supreme Court (para 6.3.5) – this interpretation derives from the principle of good faith to which art. 26 OECD MC implicitly refers, via art. 31(1) of the Vienna Convention on the Law of Treaties. In addition, like art. 26(3)(b) OECD MC, art. 28(3)(b) DTT CH-F expressly mentions the legislation of both contracting States, so that the transfer of information should also be refused when the request is based on data that were obtained in violation of the laws of the requesting State. In case of doubt, as correctly mentioned by the lower Court, the FTA should conduct further investigation and obtain an actual confirmation from the other Contracting State that the request of information is not based on unlawful acts under the law of that State. In this regard and from procedural a standpoint, the Supreme Court confirmed in a subsequent decision of 3 April 2017 (2C_325/2017) that if the Federal Administrative Tribunal considers that the evidence provided does not justify rebutting the presumption of good faith of the requesting State and asking further confirmations or information from it, this cannot be challenged at the level of the Supreme Court. From a policy perspective, this decision thus evidences that the good faith of the requesting State is challenged under very limited circumstances.

Finally, let us observe that on 29 March 2017, the Supreme Court rejected 8 other appeals filed against information requests made by France based on the same data stolen from UBS and confirmed the exchange of information (2C_1023/2015, 2C_1024/2015, 2C_1025/2015, 2C_1043/2015, 2C_1097/2015, 2C_1101/2015, 2C_1102/2015 and 2C_988/2015).

2. DTT with France - Exchange of information denied – request based data stolen from HSBC by Mr. Hervé Falciani - Supreme Court decision of 17 March 2017 (2C_1000/2015), planned for official publication

This second case, in which the Supreme Court denied on the contrary the exchange of information, concerned bank accounts held by two residents of France. The peculiarity of the case lies in the fact that the individuals concerned were identified based on data stolen from HSBC Switzerland by Mr. Hervé Falciani, on the ground of which, through letters rogatory sent to Uruguay and Belgium, French tax authorities had obtained indications that both individuals held at least one account at another Swiss bank. It was obviously settled that the data theft committed by Mr. Falciani in Switzerland represented a *"criminal offence under Swiss law"* within the meaning of art. 7(c) of the Tax Administrative Assistance Act (TAAA). At issue, on the other hand, was the question of whether exchange of information by Switzerland should be denied where the request is made by the other contracting State on the basis of information obtained legally but that the investigation has been initiated in that State thanks to a criminal offence committed in Switzerland, namely the data stolen from HSBC Switzerland. To begin with, the Supreme Court clarified a question which it had left opened in its decision of 16 February 2017 (2C_893/2015) commented above, namely that art. 7(c) TAAA merely exemplifies the principle of good faith under the Vienna Convention on the Law of Treaties applicable to the interpretation of DTTs (para. 6.2). For the Supreme Court, the principle of good faith, as exemplified by art. 7(c) TAAA, implies that France should not request information directly or indirectly linked to stolen data. The Supreme Court hence confirmed that the transfer of information should be refused, due to the evidenced link between data stolen from HSBC Switzerland and the request submitted by the French tax authorities. In that respect, it is however worth stressing that in applying the principle of good faith, the Supreme Court referred mainly to the specific context of DTT CH-F, whereby French authorities committed not to use the data stolen from HSBC to submit an exchange of information request based on art. 28 DTT CH-F. We are of the opinion that the same conclusion should be drawn in the absence of such specific commitment.

3. DTT with France – Exchange of information in the area of transfer pricing - Supreme Court decision of 13 February 2017 (2C_411/2016), planned for official publication

This case, which involved again the DTT with France, concerned a change made by a multinational group to its transfer pricing policy, notably an alleged transfer of functions and risks into Switzerland. Some of the entities of the group were based in Switzerland. As a result, French tax authorities sent a request for information to the Federal Tax Administration (FTA) with a view to assess the transfer prices between Swiss and French entities of the group. The information requested included inter alia the bylaws of the Swiss companies, the nature of their activities, their human and material resources, a copy of their financial statements, the level of their tax liability in Switzerland and information concerning their privileged tax regime. Further, in order to assess the reality of transfer of functions and risks into Switzerland, the French tax authorities also asked whether the Swiss entities were actually employing individuals who were initially linked to the French entities. In essence, the taxpayer argued that the information requested was not foreseeably relevant as a transfer pricing study had already been provided to the French tax authorities. The Supreme Court dismissed this argument and ruled that most of the information requested was actually foreseeably relevant. Following a reasoning similar to the one exposed in the cases commented above, the Supreme Court indeed observed that, based on the principle of good faith, Switzerland, as the requested State, may, as a matter of principle, rely on the assessment of the relevance of the information requested by the other Contracting State. Interestingly, part of the information requested was designed to establish whether the Swiss entities availed of a privileged regime within the meaning of art. 238 A of the French Tax Code ("Code général des impôts"). Following the line of reasoning of the FTA, the Supreme Court considered that this request was well founded as this provision precisely entails a reversal of the burden of proof in favour of the tax administration. By contrast, the last piece of information requested by the French tax authorities (regarding employees who previously worked for the group in France) was however not regarded as foreseeably relevant.

This decision is important as it provides a good illustration of the approach which the Supreme Court intends to follow when it comes to exchange of information in group structures.

4. DTT with France - Exchange of information in the area of intra-group services – Supreme Court decision of 13 February 2017 (2C_954/2015)

The decision addresses the case of two information requests submitted by the French tax authorities designed to assess the reality of services rendered by two Swiss companies to a French company of the same group. The information requested included a confirmation that the companies are known to the Swiss authorities and that they are subject to the ordinary tax regime, the applicable tax rate and amount of taxes paid, a copy of their 2010 and 2011 balance sheet and P&L, the nature of the activities carried out, the human and material resources at the disposal of the companies, the name and address of their managers and partners as well as the allocation of the capital among the latter. The Swiss companies appealed against the decision of the Federal Tax Administration (FTA), which was overruled by the Federal Administrative Tribunal (decision of 25 September 2015, A-6663/2014) on the ground that the information was not foreseeably relevant, so that the request was characterized as a "fishing expedition". In that respect, the Federal Administrative Tribunal referred in particular to a provision of the French law, according to which French tax authorities could deny the deduction of expenses that the taxpayer fails to justify when it is requested to do so. Hence, the lower court took the view that the administrative assistance was of no use to assess the reality of the services which, according to the Swiss companies, had actually not even been provided. The FTA appealed against that decision to the Supreme Court.

Referring to previous case law as well as on the international law principles of good faith and mutual trust, the Supreme Court confirmed that the foreseeable relevance of the information requested should be examined primarily by the requesting State and that the other contracting State should assume that this condition to the exchange of information is satisfied as long as the requesting State provides all indications needed in relation to the request (art. XI, para. 3 of the protocol to DTT CH-F). This assumption can thus be reversed only based on specific and strong evidence. In that respect, the Supreme Court held that the lower court had challenged the statement from the French tax authorities concerning the relevance of the information requested based on no specific evidence and on its own interpretation of French tax law. The Supreme Court therefore concluded that the information requested should be provided to the French tax authorities and accepted the appeal on that point. However, concerning the intent of the FTA to transfer information not even requested by the French tax authorities, the Supreme Court confirmed that this is not possible in the absence of a legal basis in Swiss domestic law, which did not exist in relation to the tax years covered by the request.

This decision is in the same trend as the one taken in the above mentioned transfer pricing case (2C_411/2016). In the field of exchange of information, it shows that the Supreme Court subjects the questioning of the requesting State's good faith and of the principle of mutual trust to very strict conditions. This approach was subsequently confirmed in a decision of 7 April 2017 (2C_241/2016) rendered in a case where Supreme Court rejected the argument of the appellant, consisting in challenging the possibility to use the information requested under the laws of the requesting State.

5. DTT with Israel - Pension payments – Subject to tax requirement – Supreme Court decision of 25 January 2017 (2C_606/2016), planned for official publication

This decision deals with the application of Switzerland's tax treaty with Israel (DTT CH-IS) to the lump sum payment made by a Swiss pension fund to a resident of Israel, who benefited from the special regime applicable to new immigrants consisting, in essence, in a ten years exemption on income stemming from assets held prior to the immigration in Israel. As a rule, the DTT CH-IS allocates the right to tax pension payments (not related to public functions) exclusively to the State of residence (art. 18). Art. 5 of the protocol provides, however, that "... *as long as income derived by a resident of Israel from sources within Switzerland is, under the law in force in Israel, subject to tax in Israel only by reference to the amount which is received in Israel, and not by reference to the full amount thereof, or such income is exempted from tax in Israel, the exemption from, or reduction in rate of Swiss tax provided for (with or without conditions) by any article of the Convention shall apply only to the portion of that income which is received in Israel or otherwise subject to tax in Israel*". The Supreme Court confirmed first of all that this clause applies to all Swiss source income and not only to Swiss source interest and dividends. It also held that this provision of the protocol reflects the intention of the contracting States to avoid double non taxation, so that the exemption from Swiss taxes based on the DTT CH-IS is subject to the condition that the income is not only remitted into Israel but also effectively subject to tax therein. This decision, which is to be approved, stresses the need to carefully distinguish a subject to tax provision, such as the one incorporated in the protocol to the DTT CH-IS, from a genuine remittance basis clause (see thereupon Federal Administrative Tribunal decision ATAF A-4677/2010 of 12 May 2011). Indeed, in the case of a remittance regime, treaty benefits may only be denied where the income has not been transferred in the other contracting State (see inter alia thereupon Supreme Court decision 2C_436/2011 of 13 December 2011).

6. DTT with France – Severance payments – Supreme Court decision of 10 February 2017 (2C_628/2016), planned for official publication

A Swiss resident individual (canton of Geneva) worked as an employee of the French subsidiary of a German company. He was relieved from his work duties on 31 May 2012 but remained employed until 31 December 2012. He received a total amount of EUR 134'250 in the context of expenses triggered by the termination of his employment contract, which were paid in several instalments. For the first time in these circumstances, the Supreme Court was given the opportunity to address the characterization of these payments under the DTT with France and, more specifically, whether they should be treated as employment income (art. 17), pension income (art. 18) or other income (art. 23). The Supreme Court first of all excluded a qualification as pension income, due to the fact that the employee was not close to retirement age and in the absence of any indication that the payment was intended to serve as a transition to retirement. With regard to the distinction between employment and other income, the Supreme Court specified that the analysis shall be conducted as objectively as possible and based on the substance of the facts rather than on the agreement entered into by the parties to the employment relationship. The Supreme Court concluded that despite the fact that the payments were founded on the employment relationship, they had not been made in consideration of services to be provided by the employee as the latter had stopped working on 31 May 2012. Hence, the Supreme Court characterized the payments as other income in the sense of art. 23 DTT CH-F, Switzerland thus receiving full taxing rights as the State of residence.

II. Selected decisions of the CJEU and opinions of the Advocates General

1. Opinion of Advocate General Mengozzi of 27 April 2017 in case C-648/15 (Republic of Austria v Federal Republic of Germany) - Interpretation of a convention for the avoidance of double taxation — Taxation of particular certificates or financial instruments (Genussscheine)

On 27 April 2017, Advocate General Mengozzi delivered his opinion in case C-648/15 concerning the interpretation of the DTT between Austria and Germany. As noted by the Advocate General, the case is the first in which a Member State, here the Republic of Austria, has brought before the Court, pursuant to Article 273 TFEU, a dispute, between it and another Member State, namely the Federal Republic of Germany, 'which relates to the subject matter of the Treaties' and 'is submitted to it under a special agreement between the parties'.

This dispute relates to the interpretation and application of Article 11 of the DTT between Austria and Germany for the purposes of the taxation of interest from registered certificates known as '*Genussscheine*' acquired by UniCredit Bank Austria, a company established in Austria, from a German bank, the Westdeutsche Landesbank Girozentrale Düsseldorf und Münster, now Landesbank NRW. In essence, while Austria considers that, as the Member State of residence of the beneficial owner of the interest paid, it alone is entitled to tax that income, pursuant to Article 11(1) of the German-Austrian Convention, the Federal Republic of Germany also claims the right to tax that income, as the Member State in which that interest originates, because the interest must be classified as 'income from rights or debt-claims with participation in profits' within the meaning of Article 11(2) of the DTT. This conflict of interpretation led to double taxation of the interest received by Bank Austria, which gave rise to the dispute before the Court.

As mentioned by the Advocate General, in addition to the opportunity to resolve the foregoing dispute, the present case, more broadly, will offer the Court the opportunity to define the limits of its jurisdiction under Article 273 TFEU and, in view of the nature of the dispute before it, the procedural and interpretative rules and substantive law applicable in this context. This provision indeed states that: *« The Court of Justice shall have jurisdiction in any dispute between Member States which relates to the subject matter of the Treaties if the dispute is submitted to it under a special agreement between the parties »*

In his opinion, the Advocate General upholds the conclusion of Austria and arrives at the conclusion that the « *phrase 'income from rights or debt-claims with participation in profits', contained in Article 11(2) of the German-Austrian Convention, must be interpreted as meaning that it covers income which provides a creditor with a part or a share of the debtor's profits, to the exclusion of income which varies only in the event of losses incurred by that debtor* ».

The findings of the Court in this case will be of importance and will also represent a contribution to tax treaty interpretation.

2. CJEU decision of 8 March 2017 (C-448/15), Wereldhave – Parent Subsidiary Directive – Interpretation of the expression *"Company subject to tax without the possibility of an option or of being exempt – Taxation at a zero rate"*

In this case the Court had to deal with the interpretation of the subject to tax requirement embodied in the Parent Subsidiary Directive. Under the Directive, the definition of qualifying "Company of a Member State" requires the entity to be subject to tax "without the possibility of an option or of being exempt"

At issue were distributions of dividends made by a Belgian company in which two Dutch companies had a stake of respectively 35% and 45%. The taxpayer argued that these distributions should not be subject to a withholding tax pursuant to the Parent Subsidiary Directive as the Dutch entities were to be regarded as qualifying entities. The Court of First Instance of Brussels ruled in favor of the taxpayer. The Belgian State brought an appeal against those decisions before the referring court, claiming, inter alia, that the Dutch entities were fiscal investment institutions ('FIIs') which are subject to corporation tax in the Netherlands at a zero rate and should therefore not be eligible for the exemption under the Directive. Under Dutch law, the FIIs were indeed subject to a zero rate of taxation provided they distributed all of their profits to their shareholders. In substance, the Belgian State maintained that the expression « subject to [tax], without the possibility of an option or of being exempt », requires not only a subjective but also an objective tax liability.

The CJEU ruled in favour of the Belgian State and concluded in particular, based on an interpretation of the Directive, that « *a company which is subject to tax at a zero rate, provided that all of its profits are paid to its shareholders, is not exempt from that tax, it is, in practical terms, in the same situation as the one which Article 2(c) of Directive 90/435 seeks to exclude, that is to say, a situation in which it is not liable to pay that tax* » (para 33.).

The decision provides an important clarification as regards the interpretation of the "subject to tax requirement" of the Parent Subsidiary Directive. From this perspective, the decision stresses that there is indeed a difference between this concept and the notion of "liable to tax" under Art. 4 of the OECD Model Tax Convention which, at least under the interpretation favoured by the OECD Commentary and that of several States (including Switzerland), merely requires a subjective liability.

Relevance for Switzerland

From a Swiss perspective, the question naturally arises as whether the interpretation conveyed by the Court in this ruling will also followed by EU Member States when applying art. 9 of the EU-Swiss amending protocol to the

Savings Agreement as States of source. Art. 9 of this protocol indeed also requires that: *"both companies are subject to corporation tax without being exempted and both adopt the form of a limited company »* . It should however be observed that the findings of the Court seem to be limited to "full exemptions" and do not seem to exclude the benefit of the Directive in the case of partial objective exemptions or where the company receiving the dividends is in a loss situation (see in the same vein, Arginelli, Kluwer International Tax Blog)

3. CJEU decision of 9 February 2017 (C-283/15): freedom of establishment – extension of the Court's findings in Schumacker (C-279/93) to a case involving several source States

The issue addressed by the Court concerned a Dutch citizen who resided in Spain, where he owned a property. His professional income consisted in payments from a Dutch company (60%) as well as from a Swiss company (40%). Based on the applicable double tax treaties, the right to tax this income was allocated respectively and exclusively to The Netherlands and to Switzerland. Should he have been a resident of The Netherlands, the taxpayer would have been subject to tax on a worldwide basis but would have been entitled to claim a deduction for the negative income he realised in Spain, resulting from the fact that the interest paid on the mortgage concluded to acquire his house in Spain was higher than the corresponding deemed rental income as determined under Dutch law. Yet, as a non-resident subject taxation at source, such deduction was not available to him, unless he would opt to be subject to tax as a resident of the Netherlands. In addition, the individual could not claim such deduction in Spain, as he did not realise any Spanish source income. Despite the fact that he was entitled to opt in favour of the ordinary regime, the individual filed an appeal against the decision of the Dutch tax authorities, arguing that such distinction made under the tax at source regime between residents and non-residents contravenes the free movement of establishment enshrined in art. 49 TFEU, the items of income at stake being characterized as self-employed income.

The Court first of all stresses that taking into consideration negative income stemming from real estate located in the State of residence is a tax advantage linked to the personal situation, which aims at assessing the taxpayers' ability to pay tax. It goes on in re-stating that according to its previous case law (notably Asscher, C-107/94, para. 29), the findings of the Schumacker case which related to employment income are also applicable to the freedom of establishment. The Court further confirms that the type of distinctions made by the Dutch tax authorities between resident and non-resident taxpayers cannot be regarded as discriminatory merely due to the fact that the non-resident taxpayer derives income in the State where the activity is carried out in more or less the same circumstances as a resident taxpayer would. To be regarded as discriminatory, the non-resident taxpayer should indeed be in a situation that is comparable to that of a resident taxpayer. This will be the case only if the State of residence of the former cannot grant him the tax advantages resulting from his personal circumstances because he receives most of his income outside that State. In that respect, the Court takes the view that in these circumstances, the fact that income of the taxpayer is sourced not in one but in several States other than his State of residence does not make any difference. What matters is only the fact that the State of residence cannot take personal and family circumstances into consideration due to the lack of sufficient taxable income, while other (Member) States might do so. This fact pattern was not clearly addressed in the previous case law of the CJEU and looks like a turning point compared to the Schumacker case. Furthermore, the court takes the position that in case there are not only one but several "States of activity" which provide this type of tax advantages, the deduction shall be claimed in each of them in proportion to their share of the taxpayer's income. In this context, a "State of activity" means a State that has the power to tax all or part of the income from the activity of the taxpayer, irrespective of where the activity generating such income is performed. Finally, the fact that the "States of activity" include one Member State as well as a third State does not affect the conclusion of the Court, as far as the Member State is concerned.

Relevance for Switzerland

This decision of the CJEU provides important clarifications concerning the impact of the fundamental freedoms conveyed by the TFEU on the direct taxation of employment as well as self-employed income. This clarification could potentially also have some impact in Switzerland with regards to the taxation of income remunerating employment activities carried out in Switzerland by EU or Swiss citizens residing in a EU Member State. In these circumstances, based on existing legal provisions and subject to double tax treaties (regarding for ex. frontier workers), the income derived by non-resident individuals from a Swiss employment is indeed subject to a tax at source, whereas the tax burden of resident individuals would normally be determined based on an ordinary tax return. As a result, non-resident employees are treated differently than resident employees, which may work at their disadvantage, or not. On 26 January 2010 (ATF 136 II 241), the Swiss Supreme Court decided that this distinction between resident and non-resident workers infringes the provisions of the Agreement on the Free Movement of Persons concluded on 21 June 1999 between Switzerland and the EU, which is into force since 1st June 2002 (AFMP). In its reasoning the Federal Tribunal referred to the case law of the CJUE existing as of 1st June 1999, in particular Schumacker, as foreseen by art. 16, para. 2 AFMP (for a similar decision on the EU side, see CJEU decision of 28 February 2013, *Ettwein,* C-425/11, see also as regards the relation between the AFMP and DTTs, CJEU decision of 19 November 2015, *Bukovansky*, C-241/14). As a result, amendments of the federal direct tax law as well as of the federal harmonization law were adopted by the Swiss parliament on 16 December 2016, which should enter into force in 2019. With regard to non-resident workers, they provide (art. 99a of the Federal Direct Tax Act (FDTA) as well as 35a of the Federal Harmonization Tax Act) that they will be entitled to be subject to ordinary taxation, if they request if no later than 31 March of the following year and that:

- A significant portion of their worldwide income, including spouse income, is subject to tax in Switzerland (let. a), or
- They are in a situation that is comparable to that of a Swiss resident taxpayer (let. b), or
- A subsequent ordinary taxation is required to claim their entitlement to deductions as provided by a double tax treaty (let. c).

Based on the explanatory comments of the Federal Council (FF 2015/649), the proposed provisions target situations similar the one addressed in 2010 by the Swiss Supreme Court as well as to the Schumaker case, i.e. where the non-resident taxpayer does derive most of his income (for ex. 90%) from Switzerland.

With regard to the impact of this decision on the application of the AFMP, art. 16, para. 2 provides that « *insofar as the application of this Agreement involves concepts of Community law, account shall be taken of the relevant case-law of the Court of Justice of the European Communities prior to the date of its signature. Case-law after that date shall be brought to Switzerland's attention. To ensure that the Agreement works properly, the Joint Committee shall, at the request of either Contracting Party, determine the implications of such case-law* ». In essence, the question to be settled is whether this decision should be regarded as putting into effect pre-1999 case law or whether it should be considered as genuinely new case law. Irrespective of the outcome, it is worth stressing that Switzerland would not be required to grant a deduction for negative income suffered in relation to foreign real estate, as this tax advantage would anyway not be granted to a resident of Switzerland, as confirmed by the Swiss Supreme Court on 6 March 2014 (2C_585/2012). Yet, it might be in the interest of a non-resident worker who is placed in circumstances similar to the one addressed by the CJEU to apply for ordinary taxation, so as to claim other deductions that are not or only partially taken into consideration in the tax at source tariff, such as significant professional expenses (for ex. travel) or extraordinary pension fund contributions. Should the Swiss authorities take the view that the present CJEU decision should be taken into consideration in the application of the AFPM, this would in our view not necessarily require an amendment of the above-mentioned proposed provisions, as the wording of art. 99a let. b FDTA seems sufficiently broad. In that respect, one additional issue to consider would however be whether the proposed provisions would sufficiently remove any discrimination between resident and non-resident workers from the perspective of the AFPM. In a decision of 18 March 2010 (C-440/08), the CJEU took indeed the view that the above mentioned right for non-resident individuals working in The Netherlands to opt for ordinary taxation did not remove the discriminatory nature of the tax at source regime. Yet, this latter decision is subsequent to the signature of the AFMP, so that it shall not be automatically be taken into consideration when applying this agreement.

4. Opinion of Advocate General Kokott of 19 January 2017 in case C-6/16 (Eqiom SAS previously Holcim France – Application of an anti-abuse rule in the framework of the Parent-Subsidiary Directive involving a group structure ultimately controlled by a Swiss resident company

On 19 January 2017 Advocate General Kokott delivered her opinion in the Eqiom SAS (previously Holcim) case. The case, of great practical relevance, concerns the application of the EU Parent-Subsidiary Directive and the exemption from withholding tax on dividend distributions made by a French subsidiary to a Luxembourg company owned by a company in Cyprus which was in turn controlled by a company with its seat in Switzerland.

At issue in the present case is the application of a provision of the French Tax Code ("Code Général des Impôts") – Art. 119b(3) CGI – which provides for a reversal of the burden of proof against the taxpayer where, as is the case in the present instance, a dividend distribution is made to an EU company ultimately controlled by a resident of a third country. Specifically, art. 119b(3) CGI stipulates that an exemption from withholding tax does not apply where the distributed dividends are for the benefit of a legal person controlled directly or indirectly by one or more residents of States that are not members of the Union, *"unless that legal person provides proof that the principal purpose or one of the principal purposes of the chain of interests is not to take advantage of the exemption"*.

In her opinion the Advocate General first of all considers that this provision is not compatible with art. 1(2) of the EU Parent Subsidiary Directive which provides that*: "'This Directive shall not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse ».* The Advocate General rightly notes that this reservation requires the application of domestic anti-abuse rules of Member States to remain proportionate in the framework of the Directive. That is, it follows *a contrario* from the wording of art. 1(2) that the directive precludes such provisions which do not serve to prevent fraud and abuse and go beyond what is needed to that end. From this perspective, art. 119b (3) CGI is not compatible with the Directive in that it leads to a presumption of abuse and it is then up to the taxpayer to provide proof that the chain of interests is not essentially for tax purposes.

Finally, for the Advocate General this measure also entails an unjustified restriction to freedom of establishment which, in accordance with settled case law, applies even if an EU parent company is controlled by shareholders located outside the internal market. Indeed, because art. 119b(3) CGI does not solely target wholly artificial arrangements it may not be justified by an overriding reason in the public interest

Relevance for Switzerland

This opinion, which is to be approved, stresses first of all that, when fighting aggressive tax planning, Member States may not adopt disproportionate anti-abuse rules even where third countries, such as Switzerland in the present instance, are involved. In our opinion, the analysis of the Advocate General as regards the need to comply with principle of proportionality in relation to art. 1(2) of the EU Parent Subsidiary Directive could also be transposed to art. 9 of the EU-Swiss amending protocol to the Savings Agreement which contains a very similar language: *"Without prejudice to the application of domestic or agreement-based provisions for the prevention of fraud or abuse in Switzerland and in Member States, dividends paid by subsidiary companies to parent companies shall not be subject to taxation in the source State ».* Accordingly, it could be argued that the same limitation should apply with respect to dividends paid by a EU subsidiary to its Swiss parent company. It is therefore to be hoped that the CJEU will be following the reasoning of the Advocate General.

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