News alert
EU Direct Tax Group

25 November 2013

EC proposes amendments to Parent Subsidiary Directive to tackle PPLs and introduce common GAAR

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On 25 November 2013, the European Commission (hereafter: EC) proposed amendments to the Parent Subsidiary Directive (2011/96/EU; hereafter: PSD) in the context of the fight against tax fraud and evasion and aggressive tax planning/BEPS in the EU. The proposal seeks to tackle hybrid financial mismatches within the scope of application of the PSD and to introduce a general anti-abuse rule (GAAR) to protect the functioning of the directive.

The proposal follows the political guidance agreed in 2009 within the EU's Code of Conduct Group on business taxation to avoid the distorting effects of mismatches resulting from differences in the tax treatment of hybrid loans (PPLs) between EU Member States. The proposal allows this political guidance to be implemented in domestic tax law. If the EC's proposal would be adopted by the EU Member States, Art. 4(1)(a) of the PSD would provide that where a parent company, by virtue of its association with its subsidiary, receives distributed profits, the Member State of the parent company shall refrain from taxing such profits to the extent that such profits are not deductible by the subsidiary of the parent company.

The EC also proposes to replace the current anti-abuse provision in the PSD by inserting a common GAAR, based on the similar clause included in its 6 December 2012 ATP Recommendation.

The main amendments in short:

- PSD shall not preclude the application of domestic or agreement-based provisions regarding tax evasion
- EU Member States shall withdraw the benefit of PSD in the case of an artificial arrangement or an artificial series of arrangements put into place for the essential purpose of obtaining an improper tax advantage under the PSD and which defeats the object, spirit and purpose of the tax provisions invoked
- A transaction, scheme, action, operation, agreement, understanding, promise, or undertaking is an artificial arrangement or a part of an artificial series of arrangements where it does not reflect economic reality
- In determining the artificiality, EU Member States shall ascertain whether one or more of the following situations are involved:
  (a) the legal characterisation of the individual steps which an arrangement consists of is inconsistent with the legal substance of the arrangement as a whole
  (b) the arrangement is carried out in a manner not ordinarily used in a reasonable business conduct
  (c) the arrangement includes elements having the effect of offsetting or cancelling each other
  (d) the transactions concluded are circular in nature
  (e) the arrangement results in a significant tax benefit which is not reflected in the business risks undertaken by the taxpayer.
- MS shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by 31 December 2014.