Company reorganization – case law

Demerger followed by a sale of shares: not abusive

Demerger of an operational company owning real estate followed by the sale of the shares of the real estate company are the subject of specific attention by the Belgian tax authorities. These transactions are considered to be potentially abusive. The Tribunal of First Instance of Antwerp issued an interesting judgment on 25 March 2024 in favor of a taxpayer involved in a split-off + sale of shares transaction.

This judgment highlights the importance of **valid economic reasons** and clear legal facts when assessing such transactions for the application of anti-abuse measures.

The tax authorities have appealed against the judgment. To be continued.

FACTS

A Belgian holding company ('HoldCo') controlled a multinational group with a property portfolio.

As part of a reorganization, the group decided to split its operating activities and real estate into separate entities. The aim was to set up for each geographical region: one operating company and one real estate company for each operating site.

Belgian company B transferred its operating activities to a new entity (N) by means of a split-off (partial demerger), while retaining its buildings, thus becoming a pure real estate company.

The shares of B were then sold by HoldCo to a third-party investor. On this occasion, HoldCo realized a capital gain on the B shares. HoldCo claimed full tax exemption for these capital gains.

DISPUTE WITH THE TAX AUTHORITIES

The Belgian tax authorities refused to allow HoldCo to benefit from the exemption for capital gains on shares realized on the sale of B.

The Belgian tax authorities argued that the transaction constituted a '**non-genuine arrangement'** under the specific anti-abuse measure from the 'Parent-Subsidiary' Directive, as well as a 'tax abuse' under the general Belgian anti-abuse rule.

According to the Belgian tax authorities, the transaction was in fact a sale of real estate in a 'sale and lease back' operation, legally structured as a split-off of the company into two entities, B (existing company keeping the real estate assets) and N (new company obtaining the operating activities), followed by the sale of B's shares.

In the eyes of the tax authorities, this type of construction was motivated by purely tax considerations and the definitive exemption of the capital gain realized (instead of a sale of assets, taxable and subject to registration duties).

HoldCo brought the dispute before the Tribunal of first instance of Antwerp.

THE TRIBUNAL'S CONCLUSIONS

The Tribunal rejected the tax authorities' arguments on several grounds:

There was no unauthentic/artificial arrangement:

- The demerger was supported by valid economic reasons, in line with the group's reorganization strategy. This strategy, **documented** in minutes, aimed to separate the ownership and operation of the real estate.
- The proceeds from the sale of the shares were used to obtain a bank loan and **reinvested** in depreciable assets, thus reinforcing the economic nature of the operation.
- The sale of shares, rather than the buildings themselves, allowed existing contracts to be **renegotiated**, which was an economically rational decision.

General anti-abuse measure not applicable:

- The Tribunal recalled that the Belgian tax authorities cannot recharacterize legal acts in order to change the established facts. The recharacterization envisaged would have meant considering that the holding company had sold the buildings directly, which was contrary to the legal and economic reality.

The judgment was unfavorable to the tax authorities who appealed against it.

SYNTHETIC COMMENTARY

This decision highlights several important lessons:

1. **Economic reasons and documentation**: it is very important to **clearly state the economic reasons** justifying a restructuring operation. The presence of such grounds, combined with the economic use of the funds resulting from the sale of shares, is a central element in the discussion.

2. **Separate legal personality**: the tribunal reaffirmed that the tax authorities cannot ignore legal separation between group entities when reclassifying a transaction. This principle protects groups from excessive tax recharacterizations.

3. **Tax prudence in restructuring**: while this decision is favorable to taxpayers, it also highlights the tax authorities' mistrust of property demergers followed by shares transfers. The decisions of the Ruling Committee provide a strict framework for these operations, requiring the reinvestment of disposal proceeds in the remaining business.

The tax authorities have appealed the decision, and an arrest will be issued. This is a case that should be monitored, as the arrest of the Court of appeal could provide further clarification on the tax authorities' limits on the possibilities for tax reclassification of demergers of real estate companies.

For the time being, however, this judgement provides interesting insights for companies wishing to carry out this type of reorganization.

Contacts

+32 (0)2 891 80 55

www.advisius.law

www.linkedin.com/company/advisius/