Anti-avoidance / M&A
Excess cash and LBO: caution

A recent decision deserves particular attention in the application of the general anti-avoidance measure admitted by case law.

Due to the judicial delays, we have only recently seen the first case law ruling on the general anti-avoidance rule as it is currently applied. This is useful for the most balanced understanding possible of this system, which was rewritten 10 years ago and is torn by various claims.

1. WHAT TO REMEMBER?

Be cautious when faced with an LBO of a target company with distributable *excess cash* (90% of the purchase price). There is a risk of abuse.

The judgment illustrates the importance of **formalising the non-tax motivation** of a transaction, and the care that must be taken in the transactions envisaged.

In a particular case, the tax abuse was admitted because the taxpayer **could not prove** the existence of a valid non-tax reason for the reorganisation in question was chosen. This was the case even though various steps were taken when the transferor was no longer involved in the structure (a memo from the transferor's advisor seemed to support the abusive intent); other case law has ruled out the application of the anti-avoidance provision when the taxpayer concerned is not involved to the acts that are likely to be abusive (Trib. Luxembourg, 7 September 2022).

2. THE JUDGMENT: ANTWERP, 6 SEPTEMBER 2022

2.1 The facts

An entrepreneur, a private individual, sold the shares in his company. The acquiring holding company took out a bank loan of EUR 14.25 million to acquire the target company, part of which (EUR 8 million) was repaid to the banks by a loan granted by a sub-subsidiary of the target company one month after the acquisition.

2.2 Complaints by the tax authorities

The entrepreneur realised a (Belgian tax-exempt) capital gain on the shares, while the group he sold had surplus cash with the possibility of excess cash with the possibility of distributing it. The structure of the share sale with bank financing reimbursed by the target's cash is, in the company's view, abusive: this excess cash should have been distributed (and taxed) as **dividends** before the share sale, thus depleting the group's excess cash.

It is first for the tax authorities to prove that the subjective requirement of tax abuse is met. Once the tax authorities have established the objective and subjective elements of tax abuse, it is for the taxpayer to prove the contrary. The Court of Appeal notes that the defendant in appeal does not go beyond mere allegations in this respect.

2.3 **Scope**

The tax adjustment was made at the level of the transferor. On the basis of the facts described in the judgment, the tax administration does not appear to have attempted to act against the target.

Contacts

+32 (0)2 891 80 55 www.advisius.law www.linkedin.com/company/advisius/