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## Payments to holding companies | CJEU provides guidance on tax abuse and beneficial ownership concepts

### Six cases on withholding tax exemptions on interest & dividend payments

The Court of Justice of the European Union (“CJEU”) has very recently rendered its decisions on six cases concerning the conditions under which a company paying interest<sup>1</sup> or dividends<sup>2</sup> to a holding company can be denied an exemption from withholding taxes laid down in the EU Interest & Royalties Directive and the EU Parent-Subsidiary Directive (“EU IRD and PSD”) respectively.

#### Points of interest

The CJEU ruled *inter alia* on the tax abuse and the concept of beneficial ownership of interest in relation to payments from companies resident in an EU Member State to EU holding companies (e.g. in Cyprus, Luxemburg, Sweden), whereby such payments were to flow to ultimate parent companies established in a third country (e.g. in the US, Jersey etc.).

The Judgements are of interest to Greek taxpayers and their investors participating in cross-border shareholding, financing and/or IP licencing structures, be it within the EU or other OECD States. Critical elements to be considered by companies involved in such structures include the actual business conduct, their ability to utilise their profits at their discretion, relevant contractual terms, the flow of funds, the structure of costs and the resources of the companies.

#### Tax abuse | Extended list of indications

The CJEU ruled that due to a general principle of EU law, where there is an abusive or fraudulent practice, the EU IRD or PSD exemption, as the case may be, is to be refused even if there are no domestic or tax treaty rules providing for such a refusal. The Court provided a number of indications which can demonstrate an abuse of rights.

Indications highlighted by the CJEU may be established with reference to the following facts:

- All or almost all of the interest or dividends were, very soon after their receipt, passed on by the recipient company to entities which were established in third countries or did not fulfil the conditions for application of the EU IRD or PSD respectively.

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<sup>1</sup> *Joined cases C-115/16, C-118/16, C-119/16 & C-229/19 concerning interest payments.*

<sup>2</sup> *Joined cases C-116/16 & 117/16 concerning dividend payments.*

- The recipient company acted as a conduit company, having as sole activity the receipt of the income and its transmission to the beneficial owner or to other conduit companies. The absence of an actual economic activity was inferred from an analysis of all relevant facts including the management of the company, its balance sheet, the cost structure, the presence of staff, premises and equipment.
- The various contracts that existed between the companies involved in the financial transactions, which gave rise to intragroup flows of funds from a profit-making company to shareholding entities, as well as the way the transactions were financed, the valuation of the intermediary companies' equity and the companies' inability to make economic use of the received income.
- The structure was put in place simultaneously or shortly after the introduction of a major change to the legislation.
- The structure involved setting up of complex financial transactions.

To be noted that the fact that the ultimate parent company was resident in a third state, with which a tax treaty was in place, was considered as immaterial.

As regards the burden of proving the tax abuse of rights, the CJEU held that the tax authorities of the Member State challenging the application of the EU IRD and PSD are required to establish the elements constituting an abusive practice. In this respect, the CJEU held, contrary to the Opinion of the Advocate General, that tax authorities have the task to establish that the supposed beneficial owner is merely a conduit company, without being required to identify the beneficial owner of the payment.

### **Beneficial ownership concept aligned with OECD definition**

As regards the concept of beneficial ownership as a condition of application of the EU IRD tax exemption, the CJEU ruled that a beneficial owner of the interest is the entity which actually benefits from the interest economically and accordingly has the power to freely determine the use to which it is put.

### **Impact on domestic anti-tax abuse rules**

The above judgements may serve as a tool to interpret domestic anti-tax abuse rules. In this context, Greek taxpayers participating in cross-border shareholding, financing and/or licencing structures should assess their position against the extended "benchmarks".

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