Mutual assistance in tax collection in the European Union: what practical consequences for taxpayers?

The increasing budget requirements of European countries and their implications for taxpayers

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Mutual assistance in tax collection in the European Union: what practical consequences for taxpayers?

Chair
Federico Raffaelli – CMS Adonnino Ascoli & Cavasola Scamoni (Italy)

Speakers
Anne Grousset – CMS Bureau Francis Lefebvre (France)
Daniel Gutmann – CMS Bureau Francis Lefebvre (France)
Felipe Masa – CMS Albiñana & Suárez de Lezo (Spain)

Coordinator
Pierre Sappey – CMS Bureau Francis Lefebvre (France)
Programme

— EU legal background and general overview

— Direct taxation: overview of practical problems

— Administrative cooperation: a VAT case

— Closing remarks
EU legal background and general overview

Lead speaker: Felipe Masa, CMS Albiñana & Suárez de Lezo (Spain)
EU legal background and general overview

— General Overview:

- Mutual assistance involves a set of mechanisms that allow cooperation between tax administrations of Member States to ensure the payment of taxes.

- Cooperation means, amongst others, the implementation of administrative proceedings enabling a better settlement or collection of those taxes due to any of the involved Member States Administrations, such as exchange of information or recovery of tax debts.
EU legal background and general overview

— General Overview:

• Administrative cooperation in the field of tax collection can be highly useful in certain situations, in particular where:
  — the taxpayer is not present in the Member State of taxation and has no tangible or intangible assets located on the territory of this State,
  — the taxpayer has relocated his assets in another State, or there is a risk that he could do so, or,
  — tax audits are conducted simultaneously in several States

• The aim of this legislation is to avoid tax fraud or asset relocation by taxpayers.
EU legal background and general overview

— EU historical background:

- Directive 76/308/EC: Mutual assistance in recovery of taxes and customs duties
- Directive 2001/44/EC: Modernization and extension of the mutual assistance procedure in the field of recovery of tax claims
- Directive 2004/56/EC: Mutual assistance in the field of direct taxation, certain excise duties and taxation of insurance premiums
EU legal background and general overview

— EU historical background:

• Directive 76/308/EC: Mutual assistance in recovery of taxes and customs duties
  — Directive 76/308/EC constitutes the first normative reference that provides for mutual assistance.
  — It regulates mutual assistance for the recovery of claims resulting from operations forming part of the system of financing the European agricultural guidance and guarantee fund, as well as customs duties.
  — The practical modalities for its implementation were set by Directive 77/794/EC.
EU legal background and general overview

— EU historical background:

• Directives 2001/44/EC and 2004/56/EC: Modernization and extension of the mutual assistance procedure
  — Directive 2011/44/EC extends the scope of mutual assistance laid down by Directive 76/308/EC to credits relating to certain taxes on income and property, in order to protect the financial interests of the Member States.

— The regulated procedure establishes mutual assistance in relation to:
  • (a) Information requests / (b) Notification requests
  • (c) Action interim requests / (d) Collection of credits requests
EU legal background and general overview

— EU historical background:

- Directives 2001/44/EC and 2004/56/EC: Modernization and extension of the mutual assistance procedure

— Requests may refer to:

- (a) refunds, interventions and other measures forming part of the system of total or partial financing of the European Fund of agriculture guidance.
- (b) import duties.
- (c) export duties.
- (d) value added tax.
- (e) excise duties on tobacco, alcohol, and hydrocarbons.
EU legal background and general overview

— EU historical background:
  • Directives 2001/44/EC and 2004/56/EC: Modernization and extension of the mutual assistance procedure
  — Requests may refer to:
    • (f) taxes on income or net wealth.
    • (g) taxes on insurance premiums.
    • (h) interest, surcharges, administrative penalties (excluding criminal sanctions).
EU legal background and general overview

— EU Legal background:

• Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures

• Report from the Commission on the use of the provisions on mutual assistance for the recovery of tax claims (2005-2008)

• Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures

• Directive 2011/16/EU of 15 February 2011 on administrative cooperation in the field of taxation
EU legal background and general overview

— EU Legal background:


  — The global recovery ratio for the recovery requests between EC Member States is around 5%.

  — The recovered amounts have risen by over 600% in 2006 and 2008 compared to the 2003 figures.

  — 80% of the amounts recovered relate to requests made in the last two years.
EU legal background and general overview

— EU Legal background:

• Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

— Scope of the new legislation:

• (a) all taxes and fees (of public character).
• (b) collected by the State or its subdivisions (territorial or administrative), including local authorities.
• (c) some items are excluded, in particular social security contributions.

— New organizational structure to facilitate the implementation of the Directive: (i) central Office of liaison, (ii) Liaison Office and (iii) shuttle service.
EU legal background and general overview

— EU Legal background:

• Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

— As a general rule, the requested Member State is obliged to provide information that may be useful to the requesting State for the purpose of the collection of its own claims.

— However, there is no obligation to provide information by the requested State when:
  • (a) the requested State could not obtain such information for the payment of its own claims
  • (b) disclosure of a commercial, industrial or professional secret.
  • (c) disclosure could affect public order
EU legal background and general overview

— EU Legal background:

• Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

  — The requested authority may not decline to supply information solely because this information is held by a bank or a similar institution.

  — There is no obligation to provide assistance where the seniority of the credit is more than five years or if the credit is below Euro 1,500.
EU legal background and general overview

— EU Legal background:

- Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

  — The applicant authority may not make a request for recovery if and as long as the claim and/or the instrument permitting its enforcement in the applicant Member State are contested in that Member State.

  — For the purpose of the recovery in the requested Member State, any claim in respect of which a request for recovery has been made shall be treated as if it was a claim of the requested Member State, except where otherwise provided for in the Directive.
EU legal background and general overview

— EU Legal background:

• Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

  — If the requested authority considers that the same or similar taxes or duties are not levied on its territory, it shall make use of the powers and procedures provided under the law of the requested Member State which apply to claims concerning the tax levied on personal income.

  — The requested authority may, where the law in force in the requested Member State so permits, allow the debtor time to pay or authorise payment by installment and it may charge interest in that respect.
EU legal background and general overview

— EU Legal background:

- Directive 2010/24/EU dated 16 March 2010 (with effect from January 1, 2012) concerning mutual assistance for the recovery of claims relating to taxes, duties and other measures:

  - The Directive establishes the separation between the various acts which can be disputed:
    - (a) if the dispute deals with the claim itself or with an enforcement measure in the applicant State, it must be brought before the competent bodies of the applicant Member State.
    - (b) if the dispute deals with enforcement measures in the requested State, it must be brought before the competent bodies of that State.

  - The Directive develops the standard models for notifications and the documents permitting enforcement and adoption of precautionary measures.
EU legal background and general overview

— EU Legal background:
  • Directive 2011/16/EU on administrative cooperation in the field of taxation:
    — Exchange of information / other forms of administrative cooperation.
    — Very wide scope.
    — Must be implemented by December 31, 2012.
    — Grandfathering clause and anti-blocking secrecy statutes rules.
    — Deadlines in order to answer the other Member State: 2 months or 6 months.
  — Automatic exchange of information:
    • Until 2017: Employment income, director’s fees, pensions, life insurance products and income from immovable property.
    • As from 2017: dividends, royalties and capital gains.
EU legal background and general overview

— EU Legal background:
  • Directive 2011/16/EU on administrative cooperation in the field of taxation
  — Arrangements for administrative cooperation:
    • (a) cross-border inspections
    • (b) simultaneous tax controls
    • (c) exchange of experiences or good practices: prevent transnational aggressive tax planning schemes
Direct taxation – overview of practical problems

Lead speaker: Daniel Gutmann, CMS Bureau Francis Lefebvre (France)
Direct taxation
Case n°1: French company liable to foreign tax

— Facts of the case
• Foreign tax authorities allege that a French company had a PE on their territory
• The French company no longer has any assets situated in the foreign country
• Foreign tax authorities initiate a mutual assistance proceeding

— Legal framework
• European directives + double tax treaties
• French legislation reformed by Law 28.12.2011: art. L. 283 A et s. LPF
  — Applicable to requests as of 1 January 2012
  — Decree still expected
Direct taxation
Practical aspects of the recovery of tax debts

— An instrument permitting the enforcement must exist prior to the request

— The claim must exceed 1,500 €

— Assistance takes place where:
  • the claim or the instrument permitting the enforcement of the claim is not contested in the State where the applicant authority is situated, and
  • the appropriate recovery procedures implemented in that State cannot result in the payment in full of the claim
    — This is presumed when the taxpayer has no asset located in the State of the applicant authority
Direct taxation
Practical aspects (cont.)

— Steps of the enforcement procedure
  • Request for recovery sent to the French tax authorities
  • Acknowledgment of receipt of the request
  • Recovery subject to French provisions
    — BUT statutes of limitation regarding the enforcement are governed by the laws of the applicant State
  • Precautionary steps may also be taken
  • Suspension of the procedure if:
    — a mutual agreement procedure is initiated
    — The claim or the instrument permitting the enforcement is challenged in the State of the applicant authority
Direct taxation
How to react when a mutual assistance procedure is started?

— Ways to challenge the administrative assistance procedure and/or enforcement decisions
  • Validity of the procedure
    — Check whether the conditions for mutual assistance are actually met
    — Check whether formal rules are properly implemented
  • Request a suspension of payment in France
  • Challenge the claim in the other State
Direct taxation
Case n°2: non-resident company liable to tax in France

— Facts of the case
  • The French tax authorities allege that an EU-resident company (EU-co) failed to declare the existence of a PE in France

— Practical effects
  • The French tax authorities require EU-co to pay corporate income tax (order of payment)
  • If no payment occurs, what may happen?
    — Seizure of French assets
    — Otherwise, mutual assistance… see case n°1
Direct taxation
Other actions available for tax authorities?

— Civil Law
“Action paulienne”: proceedings where EU-co has intentionally impoverished itself ➔ French authorities may claim that such impoverishment does not produce any effect

• First problem: which is the competent Court?
  Council Regulation 44/2001, Art. 5.5: France (subject to discussion)

• Assuming that French Courts are competent, may a French judgment be executed in the other Member State?
Direct taxation
Other actions available for tax authorities?

— Criminal law

• EU-co may be sentenced to a penalty by the French criminal judge (“tax fraud”, Art. 1741 FTC)

  Tax fraud is located on the French territory (art. 113-2 Criminal code)

• May the shareholders of EU-co be held co-authors of the tax fraud?
Direct taxation
Other actions available for tax authorities?

— Criminal law (cont.)
  • Pb: may this criminal judgment be implemented in another Member State?

• Yes: Council framework decision of 6 Oct. 2006 on the application of the principle of mutual recognition to confiscation orders (Art. 713 et s. LPF)
  — The other MS must recognize and execute on its territory confiscation orders issued by a French criminal judge
Administrative cooperation - A VAT example

Lead speaker: Anne Grousset, CMS Bureau Francis Lefebvre (France)
Administrative cooperation - A VAT example

— Administrative cooperation and information exchanges in the field of VAT (904/2010/EC):

• This regulation sets out rules and procedures for cooperation and exchanges of information between European Union countries’ tax authorities with a view to:
  — assess VAT correctly;
  — monitor the correct application of VAT;
  — combat VAT fraud;
  — protect VAT revenue.

• Each EU country must designate a single central liaison office as a contact point for cooperation with the other EU countries and the Commission.
Administrative cooperation - A VAT example

— Administrative cooperation and information exchanges in the field of VAT (904/2010/EC):

• By electronic means, the requesting authority sends requests for information and for administrative enquiries to the requested authority using a standard form. The information must be provided without delay and at the latest three months from the date of receipt of the request;

• The requesting authority may participate in the administrative enquiries carried out in the requested EU country;

• In some cases, without any prior requests, the competent authorities must automatically provide each other with certain categories of information using a standard form;

• This regulation establishes a storing system of information and a network to combat VAT fraud, Eurofisc.
Administrative cooperation - A VAT example

— Case: The administrative cooperation in the field of the carousel fraud

• Carousel Fraud (Reminder)

— A “taxable person” acquires goods from another Member State free of VAT. Subsequently, the “missing trader” resells the goods at a VAT-inclusive price, but does not remit to the national tax authorities the VAT collected.

— The client deducts the input VAT and resells the goods within the country or outside the country.

— Carousel fraud implies that the same goods are repeatedly supplied as a cross-border transaction, in a “circular pattern” (between the same parties), enabling the fraudsters to steal VAT from the authorities at each turn.
Administrative cooperation - A VAT example

— Case: The administrative cooperation in the field of the carousel fraud

- Carousel Fraud (Reminder)
  - The goods are sold through a series of companies in a certain country and then re-exported to another EU Member State, hence the goods move in “carousel”.
  - The company involved in the fraud is a company established in France.
  - The supplier invoices VAT to the exporter but does not remit it to the local tax authorities.
  - The exporter, on his part, claims the input VAT back suffered on its acquisition and, as a result, the tax authorities suffer a loss.
  - Fraud can be committed through transactions involving innocent businesses.
Administrative cooperation - A VAT example

Spain

Company A
“the supplier”
[Transactions exempt from VAT]

100% of the shares

Company B
“the missing trader”
[Collects VAT from C but does not reverse it]

France

Company C
[Deducts VAT or asks for VAT refund]

Transactions continue and reach final customers
Administrative cooperation - A VAT example

— Carousel Fraud: Sanctions/Practical effects

- Challenge of the VAT deduction right;
- The joint and several liability for the payment of the VAT;
- Challenge the VAT exemption of the intra-community delivery;
- Criminal prosecutions based on:
  - Tax fraud: art. 1741 and following of the FTC (sentence: a fine of 37,500€ (or 75,000€) and imprisonment for five years);
  - Legal representatives may also be convicted (art. 121-2 of the penal code);
  - Accountants, or any persons who established false balance sheet, may also be convicted (art. 1772 1°-1 of the FTC); (sentence: a fine of 4,500€ and imprisonment for five years);
  - Fraud based on art. 313-1 of the penal code (sentence: a fine of 375,000€ and imprisonment for five years).
Administrative cooperation - A VAT example

— Carousel Fraud

• The Company B involved in the fraud is established in France;
• The French tax authorities (FTA) deliver a tax reassessment against the Company B;
• In order to prove the Carousel Fraud, the FTA must obtain information from the EU Member state where the Company A is established;
• The FTA will request from the central liaison office of this EU Member state:
  — Information on the trading between the Company A and the Company B;
  — An administrative enquiry on the amounts declared by the Company A, in particular concerning intra-community supply;
  — Information concerning the legal representatives of the Company B;
  — The officials of the FTA may be present at the offices of the EU Member state to have access to copies of documents such as documents relating to the delivery of goods, the payment method...
Closing remarks

Lead speaker: Federico Raffaelli, CMS Adonnino Ascoli & Cavasola Scamoni (Italy)