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# INSIGHTS

## TAX NEUTRAL OR CAUGHT IN THE NET? THE WORLD OF LUXEMBOURG SECURITIZATION VEHICLES

## ARE HOLDING COMPANIES SO 20TH CENTURY? A LOOK AT RECENT DEVELOPMENTS IN FRANCE

## DOUBLE DUTCH: A UNIQUE APPROACH IN THE NETHERLANDS TO U.S. L.L.C.'S OWNED BY U.S. TRUSTS

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# EDITORS' NOTE

In this month's edition of *Insights*, our articles address the following:

- **Tax Neutral or Caught in the Net? The World of Luxembourg Securitization Vehicles.** The Luxembourg securitization vehicle ("Lux S.V."), governed by the Securitization Law of 22 March 2004 remains a core pillar in structured finance and asset repackaging across Europe. As Luxembourg continues to implement E.U. directives such as A.T.A.D. I & II, D.A.C.6., and the O.E.C.D.'s B.E.P.S. action plan – Including Pillar Two and substance-driven anti-abuse frameworks – Lux S.V.'s face growing scrutiny. In their article, James T. O'Neal, Co-head of Maples and Calder (Luxembourg)'s Tax Team, and Naima Bouzago Ouali, an Associate in Maples and Calder (Luxembourg)'s Tax Team, analyze how A.T.A.D. I & II's Hybrid Mismatch Rules and A.T.A.D. I's Interest Limitation Rules can be successfully navigated in the appropriate set of facts, thereby preserving their tax neutrality. Hybrid mismatch rules, investor payment tax treatment, and interest limitation rules that include the single company worldwide group exception are addressed.

- **Are Holding Companies so 20th Century? A Look at Recent Developments in France.** Historically, holding companies have been used by corporate groups to place certain assets in certain locations to serve certain markets. They have also been used by individuals for wealth management and estate planning purposes. Today, holding companies located in an E.U. Member State or elsewhere are likely to face challenges when interacting with group members in France. Claims of treaty benefits are regularly challenged by French tax authorities. Whether the benefit is a tax treaty related withholding tax exemption on dividends or royalties or access to E.U. Directives such as the Parent-Subsidiary Directive, French tax authorities regularly challenge claims of an entitlement to the anticipated tax benefit. In her article, Emilie Lecomte, a Partner in the Tax Department of SQUAIR Law Firm, Paris, explains the risks faced by a foreign holding company that expects to benefit from favorable tax regimes for French-source income. Recent cases are discussed.

- **Double Dutch: A Unique Approach in the Netherlands to U.S. L.L.C.'s Owned by U.S. Trusts.** Trusts play a crucial role in U.S. estate planning. However, the use of a U.S. trust in an international context can create a multitude of challenges. The Dutch tax system's approach to the taxation of trusts poses a number of concerns for U.S. trust fund beneficiaries living in the Netherlands benefitting from a testamentary trust. In the not unusual set of circumstance where an L.L.C. is established to hold investments of the trust, double taxation without the benefit of foreign tax credits is more than a theoretical problem. In her article, Mignon de Wilde, a partner and tax adviser in the Amsterdam office of Arcagna Tax Consultants and Notaries, cautions that only two solutions seem to be available. Advance tax planning during the lifetime of the settlor is the preferred alternative. Seeking Competent Authority relief under the Netherlands-U.S. Income Tax Treaty is available in principle. Favorable authority exists in the Netherlands, less so in the U.S.

- **The §245A D.R.D. Meets the I.R.S.: Only *Loper Bright* Might Provide Relief.** Alan Greenspan is an American economist who served as the 13th chairman of the U.S. Federal Reserve from 1987 to 2006. He is known to have authored the following quote: "I know you think you understand what you thought I said but I'm not sure you realize that what you heard is not what I meant." This statement epitomizes the conflict between the I.R.S. and various taxpayers regarding the application of Code §245A to the computation of C.F.C. income for purposes of Subpart F. Code §245A allows a domestic corporation to reduce taxable income by means of a dividends received deduction ("D.R.D.") for the foreign-source portion of a dividend received by a U.S. corporation from a ≥10%-owned foreign corporation. Treas. Reg. §1.952-2 requires that a C.F.C. must calculate its income for U.S. income tax purposes by using U.S. rules as though it were a domestic corporation. Finally, Code §245A(e)(2) expressly provides a rule for C.F.C.'s receiving hybrid dividends from a lower-tier subsidiary. The D.R.D. is expressly disallowed at the level of a C.F.C. receiving the hybrid dividend. Nonetheless, in C.C.A. 202436010, the I.R.S. enunciated its view that a C.F.C. could not claim a benefit from the D.R.D. Rather, the benefit is first claimed by a domestic corporation when it recognizes income. So, which position is correct? In his article, Wooyoung Lee discusses the law, the regulations, the C.C.A., and cases addressing the deference that should be given by courts to the views of an administrative agency when evaluating the interpretation of a statute.

- **Budget Resolution Tax Provisions Contain Reprisal Tax Aimed at O.E.C.D. Proposals.** On Friday, May 22, 2025, the U.S. House of Representatives adopted a budget resolution containing provisions that would impose increased taxes for persons based in countries that impose taxes found to discriminate against U.S. companies or their subsidiaries. If a country is determined to have "crossed the line," residents of that country and their subsidiaries would face up to a 20% increase in withholding taxes on U.S. source investment income, income taxes on income that is effectively connected to the conduct of a U.S. trade or business, and certain other taxes. In his article, Stanley C. Ruchelman lists the foreign persons that will be subject to the reprisal tax, the tax regimes that are expressly targeted, the implementation schedule, and the taxes that will be increased.

We hope you enjoy this issue.

- The Editors

# TAX NEUTRAL OR CAUGHT IN THE NET? WORLD OF LUXEMBOURG SECURITIZATION VEHICLES

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**Tags**
Hybrid Mismatch
Interest Limitation Rule
Investor Payments
Luxembourg
S.C.W.G. Exception
Securitization Vehicle
Stand Alone Entity
Structured Arrangements

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## INTRODUCTION

The Luxembourg securitization vehicle ("Lux S.V."), governed by the Securitization Law of 22 March 2004 ("Lux Securitization Law"), remains a core pillar in structured finance and asset repackaging across Europe. As Luxembourg continues to implement European Union ("E.U.") directives such as A.T.A.D. I & II, D.A.C.6., and the O.E.C.D.'s B.E.P.S. action plan – Including Pillar Two and substance-driven anti-abuse frameworks – Lux S.V.'s face growing scrutiny. This article analyzes how two of the principal, potentially applicable anti-abuse rules to Lux S.V.'s – namely A.T.A.D. I & II's Anti-Hybrid Rules ("Hybrid Mismatch Rules") and A.T.A.D. I's interest limitation rules ("I.L.R.'s") – can still be successfully navigated in the appropriate set of facts, thus preserving their tax neutrality.

We focus on these two rules in particular. First, as we elaborate below, the Lux Securitization Law allows tax deductibility on all forms of payments to investors of Lux S.V.'s. For example, a Lux S.V. will often issue profit participating loans ("P.P.L.'s") or could even issue types of share classes. In all such cases, payments on these financial instruments would be considered from the Lux Securitization Law as deductible for tax purposes. Tax deductible payments on such equity like financial instruments (the elusive "tax deductible dividend") would lead a skillful tax practitioner to question such presumably deductible dividend payments as a trap for the anti-hybrid rules now enacted across the E.U. and elsewhere. However, as we will discuss below, despite such "deductible dividends," the Lux S.V. can navigate through the anti-hybrid rules when the right conditions are fulfilled.

Secondly, under the Lux Securitization Law, all such deductible payments to investors ("Investor Payments"), from a Luxembourg tax point of view, are essentially characterized as interest expenses. Accordingly, any Lux S.V. contemplating holding assets that generate income other than interest or its economic equivalent is exposed to the risk of the application of the I.L.R.'s, which generally limit the deduction of interest quite dramatically. As explained below, Luxembourg as an E.U. Member State dutifully enacting A.T.A.D. has I.L.R.'s that limit interest expense financing of other types of income (*e.g.*, equity returns, royalties, other types of investment income, etc.) to 30% of E.B.I.T.D.A. or, to put it more bluntly, denying up to 70% of interest expense attempting to offset these other types of income. Nonetheless, Lux S.V.'s even when investing into these noninterest income generating assets may still achieve tax neutrality when certain conditions are fulfilled.

As we elaborate below, Lux S.V.'s can often still achieve tax neutrality with the right set of facts, even when applying the Hybrid Mismatch Rules and I.L.R.'s.

## LUX S.V.'S IN CORPORATE FORM: LEADING CONTENDER IN STRUCTURED FINANCE

Lux S.V.'s are often chosen as the cross-border structured financing vehicles, establishing Luxembourg as a leading hub for securitization both in Europe and globally.[1] As of March 2025, there were over 1,586 active Lux S.V.'s operating under the Lux Securitization Law. In 2022, Luxembourg accounted for more than 28% of all Euro area Financial Vehicle Corporations, second only to Ireland, and ranked just behind Ireland and Italy in terms of securitized asset volumes.

The legal and regulatory framework in Luxembourg is both flexible and robust, having proven resilience through various market cycles going back over twenty years, when Luxembourg's securitization regime was first enacted. Issuers and their senior creditors may benefit from compliance with E.U. securitization requirements and the cost advantages offered by compartmentalization. Luxembourg's status as Europe's largest fund center has fostered a strong financial services industry, with deep expertise in securitization.[2]

The vast majority of these vehicles (approximately 95%) are structured as corporate entities (*i.e.*, as Luxembourg S.A.'s, S.A.R.L.'s, or S.C.A.'s) treated as Luxembourg tax resident companies, though benefitting from the Lux Securitization Law's tax efficient regime.[3] On the other hand, only around 5% are established as securitization funds that are tax transparent, often in the form of a Luxembourg Fiduciary Estate.[4]

Notably, most vehicles utilize a multicompartment structure, with many having between two and ten compartments, and some exceeding 500 compartments. It is also worth noting that 98% of Lux S.V.'s opt not to be subject to regulation in Luxembourg, whereas 2% or so of Lux S.V.'s are under regulation by Luxembourg's *Commission de Surveillance du Secteur Financier* ("C.S.S.F.). These supervised entities

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1 Securitization in Luxembourg, PwC Market Survey 2024 (in Cooperation with the Luxembourg Capital Markets Association ("PwC-LuxCMA 2024 Survey").

2 Luxembourg: The Global Fund Centre, Association of the Luxembourg Fund Industry, 2021.

3 PwC-LuxCMA 2024 Survey. In Luxembourg, the three forms of tax resident companies include the *Société Anonyme* ("S.A." or public company), the *Société à Responsibilité Limitée* ("S.A.R.L." or private company), and the *Société en Commandite par Actions* ("S.C.A." or Partnership Limited by Shares).

4 PwC-LuxCMA 2024 Survey. Lux S.V.'s can also be set-up as "Luxembourg securitization funds" in the form of a Fiduciary Estate. In this respect, the Fiduciary Estate ("*fiducie*") is similar to a Common Law trust. Under Luxembourg law, the Fiduciary Estate is a contractual arrangement pursuant to which the "Principal" (similar to a trust's settlor) confers the legal title ownership to a credit institution or regulated entity called the "*Fiduciaire*" (similar to a trustee) to act pursuant to the instructions of the Principal towards the beneficiaries of the Fiduciary Estate. The Lux Securitization Law allows the *Fiduciaire* to be an unregulated Luxembourg company (also often in the form of an S.A.R.L.) rather than a credit institution or regulated entity. The Lux Securitization Fund (as a Fiduciary Estate) is tax transparent and so provided the beneficiaries do not have contacts in Luxembourg (*e.g.*, resident, permanent establishment).

are typically those that issue financial instruments to the public on a continuous basis and involve tranching.[5]

As over 90% of Lux S.V.'s are established in the form a Luxembourg S.A.R.L., the analysis will focus on the application of the Luxembourg tax treatment for such forms of Lux S.V.'s. We briefly highlight that, should the Lux S.V. vehicle be in the form of the Fiduciary Estate, it is generally considered as tax transparent and so the actual application of the Hybrid Mismatch Rules (in particular the anti-financial instrument rule) as well as the I.L.R.'s should not be applicable.

As the name implies, a securitization vehicle is essentially used for the acquisition of income generating assets and the financing of such acquisition by the issuance of securities. The Lux Securitization Law provides for a very broad definition of "securities" which can be issued to its investors.

## LUXEMBOURG S.V.'S IN THE FORM OF AN S.A.R.L. – OVERVIEW OF LUXEMBOURG TAX TREATMENT

The Lux S.V. in the form of an S.A.R.L. is considered from a Luxembourg tax point of view as a tax resident company subject to Luxembourg corporate income tax at an aggregate rate of 23.87%.[6] In addition, the investment made by the investors through the subscription of securities issued by the securitization vehicle must be linked/indexed to the assets funded thanks to their investment.

***"As the name implies, a securitization vehicle is essentially used for the acquisition of income generating assets and the financing of such acquisition by the issuance of securities."***

However, the Luxembourg Income Tax Law ("L.I.T.L.") provides that all payments made to investors and all other types of creditors ("Investor Payments") are characterized, for Luxembourg tax purposes, as deductible expenses. As a result, these payments benefit from a deduction from the Luxembourg corporate tax base of the Lux S.V.[7] As previously mentioned, the Lux Securitization Law provides a very broad definition of the types of financial instruments that a Lux S.V. can issue to its investors, which generate deductible "Investor Payments," such as preferred shares and P.P.L.'s.

Unlike other tax resident Luxembourg companies, the Lux Securitization Law removes the application of withholding tax on Investor Payments by characterizing all such Investor Payments as interest expenses for Luxembourg tax purposes.

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5 PwC-LuxCMA 2024 Survey. These supervised Lux S.V.'s are Securitization entities within the meaning of Article 2, point 2, of Regulation (EU) No 2017/2402 of the European Parliament and of the Council of 12 December 2017 creating a general framework for securitization and a specific framework for simple, transparent, and standardized securitizations, and amending Directives 2009/65/EC, 2009/138/EC, and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012.

6 The Luxembourg aggregate income tax rate consists of Luxembourg corporate income tax at 16%, a surcharge for the unemployment fund of 7% on the corporate income tax charge, and municipal business tax of 6.75% (assuming Luxembourg City's rate).

7 L.I.T.L. Article 46.14 provides that expenses paid to investors and all other forms of creditors of a securitization company are considered as deductible business expenses (*les engagements assumés vis-à-vis des investisseurs et de tout autre créancier par une société de titrisation rentrent parmi les dépenses d'exploitation*).

Under Luxembourg tax law, interest payments are excluded from the application of withholding tax.[8]

## ANTI-ABUSE RULES IMPACTING LUX S.V.'S

### Hybrid Mismatch Rules Impact on the Lux S.V.

As discussed above, the Lux S.V.'s Investor Payments are tax deductible under the Lux Securitization Law due to their automatic characterization as interest expenses. This invariably result in outcomes that normally trigger the Hybrid Mismatch Rules – particularly involving the anti-hybrid rules aimed at financial instruments discussed in more detail below. As mentioned earlier, it is not uncommon for Lux S.V.'s to be P.P.L.'s or even classes of shares with dividend rights, which include a provision entitling the investor to a *pro-rata* percentage of the Lux S.V.'s profits. As a result, such characterization could lead to such deductible "interest expense" from the Luxembourg tax perspective that could be treated as tax exempt dividends in the investor's jurisdiction, as would occur under a participation exemption that does not tax dividends received. This would seem at first glance to be an ideal mismatch scenario with a deductible dividend on the Luxembourg side of the equation and similarly risk of exemption in the investor's jurisdiction. However, as discussed further below, the O.E.C.D. addresses this issue in its B.E.P.S. Report which enables the Lux S.V. to maintain its tax neutrality.[9]

The E.U. Anti-Tax Avoidance Directive II ("A.T.A.D. II") rules aim to prevent tax benefits, such as an interest deduction claimed through Lux S.V.'s, from being obtained under a variety of circumstances involving transactions between Associated Enterprises[10]

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8 L.I.T.L. Articles 97.1(5) provides that interest expense is a type of income from capital and Article 97.6. specifically provides clarification that "distributions and other products allocated to investors and other creditors of a securitization entity constitute income from capital within the meaning of paragraph 1, number 5 of this article" (*Les distributions et autres produits alloués aux investisseurs et autres créanciers d'un organisme de titrisation constituent des revenus provenant de capitaux mobiliers au sens de l'alinéa 1er numéro 5 du présent article*). L.I.T.L. Article 146 lists the types of income from capital subject to withholding tax and does not specifically enumerate interest expenses as defined in L.I.T.L. Article 97.1(5).

9 O.E.C.D.'s Final Report on B.E.P.S. Action 2 on Hybrid Mismatches, 2015.

10 As detailed in LITL Section 168ter(18) "Associated Enterprise" is generally defined as provided for in the A.T.A.D I & II Directives and includes the following: (i) an entity or individual owning directly or indirectly 50% (for a hybrid entity) or 25% (for a hybrid instrument) of votes, capital, and profits of a taxpayer (and vice versa); (ii) an entity forming part of the same consolidated financial group; (iii) an enterprise having a noticeable influence on management of a taxpayer (and vice versa); or (iv) an individual or entity "acting together" with another individual or entity in respect of the voting rights or capital ownership of an entity, should be considered as holding a participation in all of the aggregated voting rights or capital ownership of that entity that are held by the other individual or entity. If the aggregated ownership or rights is above the 25% (for hybrid instruments) or 50% (for hybrid entities), these persons or entities acting together can be in scope of the hybrid mismatch, even if individually they would not make the threshold. Two persons should be treated as acting together in respect of ownership or control of any voting rights or equity interests if, *inter alia*: (i) one person regularly acts in accordance with the wishes of the other person in respect of ownership or control of such rights or interests, (ii) they have entered into an arrangement in respect of ownership or control of any such rights or interests; or (iii) the ownership or control of any such rights or interests are managed by the same person or group of persons. For Luxembourg investment funds, investors holding less than 10% of capital or voting rights in the fund are assumed not to be acting together (unless proven otherwise).

that use, *inter alia*, hybrid entities or hybrid financial instruments ("Hybrid Mismatch Rules").[11] A hybrid entity is generally considered tax transparent in one jurisdiction but tax opaque in another. To illustrate, Country A considers the entity a corporation, but Country B considers the same entity a transparent partnership. A hybrid instrument is generally considered equity in one jurisdiction but debt in another. To illustrate, Country A considers the instrument debt giving rise to a taxable deduction, but Country B considers the same payment a dividend and exempts it from tax. The A.T.A.D. II anti-hybrid rules focus on shutting down hybrid mismatch outcomes, where for example, an item of income is deductible in one jurisdiction but not included as taxable income in any other jurisdiction ("deduction / no inclusion" or "D/NI") or when there is a double deduction ("D/D"). Luxembourg has implemented A.T.A.D. II's Hybrid Mismatch Rules in 2020.

Specifically, Hybrid Mismatch Rules include the following categories, which could most often apply to Lux S.V.'s:[12]

- **Hybrid Instrument:** A hybrid mismatch involving a hybrid instrument between "associated enterprises"
- **Structured Arrangement:** A "structured arrangement," broadly defined as an arrangement involving a hybrid mismatch, where the mismatch is priced into the terms of the arrangement, or an arrangement that has been designed to produce a hybrid mismatch

## Policy Impacting Hybrid Financial Instruments and Lux S.V.'s

It is important to highlight that the E.U. Council has taken the position that the interpretation of the A.T.A.D. Directives should be based on the "final reports on the O.E.C.D. Action Items against B.E.P.S." and that the E.U.'s anti-hybrid rules should also be "consistent with O.E.C.D. B.E.P.S. conclusions."[13] Furthermore, the preamble to A.T.A.D. II makes clear the following rule of application:

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[11] European Council Directive 2017(952 of 29 May 2017 ("A.T.A.D. II Directive"), amending European Council Directive 2016/1164 as Regards Hybrid Mismatches with Third Countries ("A.T.A.D. II").

[12] Other anti-hybrid rules which are described in L.I.T.L. Article 168ter but not elaborated on in this article include: (a) reverse hybrid mismatch: a hybrid mismatch resulting from a payment to or from a hybrid entity to an associated enterprise; (b) dual residency: a situation of dual residency (*i.e.* being subject to tax in two or more jurisdictions); (c) no tax residency: a situation where the entity is not tax resident in any jurisdiction; and (d) Imported hybrid mismatches: occurs when a taxpayer in one country (Country A) claims a tax benefit (such as a deduction) as a result of a hybrid mismatch (*e.g.*, D/NI or DD) that actually takes place between two other countries (Countries B and C) and the benefit is "imported" into Country A because the taxpayer is connected, directly or indirectly, to the arrangement in Countries B and C. Additionally, there is the reverse entity hybrid under L.I.T.L. Article 168quater that is only applicable to Luxembourg tax transparent entities. It should not impact Lux S.V.'s in corporate form as discussed in this Article.

[13] E.U. Council Directive 12 July 2016 (2016/1164) laying down rules against tax avoidance practices that directly affect the functioning of the internal market ("A.T.A.D. I"), preamble, paragraph 2.

> Member States should use the applicable explanations and examples in the O.E.C.D. B.E.P.S. report on Action 2 as a source of illustration or interpretation to the extent that they are consistent with the provisions of this Directive and with European Union law.[14]

In the O.E.C.D.'s Final Report on B.E.P.S. Action 2 on Hybrid Mismatches ("O.E.C.D. B.E.P.S. Action 2 Final Report") for Recommendation 1.5, the O.E.C.D. specifically addressed the situation where investment vehicle regimes, including R.E.I.T.'s and S.V.'s, are allowed to have tax deductible dividend payments because of a tax policy of preserving the tax neutrality of both the payer and payee. This report specifically cites the following:

> Although the payment of a deductible dividend is likely to give rise to a mismatch in tax outcomes, such a payment will not generally give rise to a hybrid mismatch under Recommendation 1 provided any resulting mismatch will be attributable to the payer's tax status rather than the ordinary tax treatment of dividends under the laws of that jurisdiction.[15]
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> * * *
>
> Accordingly, the exception applies where the regulatory and tax framework in the establishment jurisdiction has the effect that the financial instruments issued by the investment vehicle will result in all or substantially all of the income of the vehicle being paid and distributed to holders within a reasonable period of time and where the tax policy of the establishment jurisdiction is that such payments will be subject to tax in the hands of investors. Recommendation 1.5 specifically notes that the defensive rule in Recommendation 1.1(b) should continue to apply to such payments on receipt.[16]

The O.E.C.D. Final Report even provides specifically in Example 1.10, that if a "deductible dividend" occurs due to the tax status of the payer and not due the specific terms and conditions of the hybrid instrument, then even if this would otherwise result in a "D/NI" hybrid mismatch, the hybrid mismatch rule should not apply. The O.E.C.D. Final Report states, that in such cases, it is the responsibility of the payee jurisdiction to enact a defensive rule under Recommendation 2.1. (*i.e.*, tax an otherwise deductible dividend). However, whether or not the payee jurisdiction has enacted a rule for Recommendation 2.1 should not impact the deductibility of the dividend payment in such cases (*i.e.*, due to the tax status).

As mentioned above pursuant to the O.E.C.D. B.E.P.S. Report, the special tax status of the Lux S.V., benefitting from the Lux Securitization Law, is what enables the tax deductibility of these Investor Payments (whether P.P.L., preferred share, or other similar instrument with strong equity-like characteristics) and not due to the terms and conditions of the instrument itself. Going back to our example above,

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[14] AT.A.D. II, Preamble, paragraph 28.

[15] O.E.C.D. Action 2 Final Report, Paragraph 100.

[16] *Id.*, Paragraph 101.

dividends paid by a Lux S.V. which are deducted for Luxembourg tax purposes might be considered to be equity in another jurisdiction and thus result in a "D/NI" outcome. However, because the tax deduction would be a result of the "tax status" rather than the terms of the financial instrument, this mismatch should be outside the scope of the hybrid mismatch rules per O.E.C.D. Policy and the E.U.'s deference to such policy recommendations. Accordingly, Lux S.V.'s in most cases should be able to navigate successfully a D/NI outcome based on this policy.

### Structured Arrangements

Generally speaking, Lux S.V.'s should fall outside the scope of structured arrangements. A key requirement for an arrangement to be classified as a "structured arrangement" and thus trigger this anti-abuse rule is the presence of a hybrid mismatch that is either intentionally priced into the terms of the arrangement or where the arrangement has been designed to produce a hybrid mismatch outcome. In the absence of these elements, Lux S.V.'s would typically not be considered structured arrangements for the purposes of the anti-abuse rules.

In addition, the Luxembourg State Council stated the following in its opinion to the draft Luxembourg law implementing A.T.A.D. II:

> * * * if a Luxembourg company issues a financial instrument on the market without knowing at the time of issuance who the subscribers will be and without having deliberately drawn up the terms of that financial instrument with a view to actively approaching investors for whom that instrument will be the source of a hybrid mismatch, the State Council considers that there can be no question of a structured arrangement.[17]

*"Generally speaking, Lux S.V.'s should fall outside the scope of structured arrangements."*

As discussed above, Lux S.V.'s are chosen in light of the various legal and regulatory reasons, including the significant legal and regulatory benefits, as well as the policy objective of creating a tax neutral vehicle for cross-border structured finance. Given that all securities owed to investors are already structured to enable tax deductibility, such abusive scenarios as described by the Luxembourg State Council should generally fall outside the scope of the Lux S.V. and their approach to investors.

## INTEREST LIMITATION RULES ("I.L.R.'S"): POTENTIAL BRUTAL APPLICATION & EXEMPTIONS AVAILABLE TO LUX S.V.'S

### Overview of the I.L.R.'s in Luxembourg

Luxembourg's I.L.R.'s were introduced as part of the implementation of A.T.A.D. I, effective from January 1, 2019. The I.L.R.'s are designed to limit the deductibility of

[17] Opinion of the State Council (*Avis du Conseil d'Etat*), 10 December 2019.

excess “exceeding borrowing costs” (“E.B.C.’s”) for corporate taxpayers, thereby preventing base erosion through excessive interest deductions.[18]

The I.L.R.’s provide that the deduction of E.B.C.’s of a taxpayer is limited to 30% of its taxable E.B.I.T.D.A. (earnings before interest, tax, depreciation and amortization) or €3.0 million, whichever is higher. The E.B.C.’s correspond to the amount by which the deductible borrowing costs of a taxpayer exceeds taxable interest income and other economically equivalent taxable revenues accrued.[19]

Consequently, if a Lux S.V. receives interest income and equivalent taxable revenues that equal or exceed its tax-deductible borrowing costs, the Lux S.V. will have no E.B.C. and will therefore not be impacted by the E.B.C. disallowance rules. However, if (i) the Lux S.V. is set up to receive other types of income such as dividends or other returns on equity, royalties, lease payments, or any other type of income not qualifying as interest or its economic equivalent and (ii) the E.B.C.’s exceed €3.0 million, then up to 70% of its revenue would be taxed. To put this in perspective, if the I.L.R.’s were to hit with full force and fury, the Lux S.V. would end-up with an

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18 L.I.T.L. Article 168bis. The Luxembourg law of 21 December 2018 implemented the I.L.R.’s of A.T.A.D. 1. Borrowing costs are defined as interest expenses on all forms of debt (to both related and unrelated parties), other costs economically equivalent to interest and expenses incurred in connection with the raising of finance, including, without being limited to (non-exhaustive list): payments under profit participating loans, imputed interest on instruments such as convertible bonds and zero coupon bonds, amounts under alternative financing arrangements (*e.g.*, Islamic finance), the finance cost element of finance lease payments, capitalized interest included in the balance sheet value of a related asset, or the amortization of capitalized interest, amounts measured by reference to a funding return under transfer pricing rules where applicable, notional interest amounts under derivative instruments or hedging arrangements related to an entity’s borrowings, certain foreign exchange gains and losses on borrowings and instruments connected with the raising of finance, guarantee fees for financing arrangements, and arrangement fees and similar costs related to the borrowing of funds.

19 In practice, this means that E.B.C.’s that do not exceed € 3.0 million annually are fully tax deductible in the hands of a taxpayer, irrespective of any other element. However, where E.B.C.’s exceed €3.0 million annually, the overall deductible amount is to be computed based on the Lux S.V.’s taxable E.B.I.T.D.A. The I.L.R.’s do not define the notion of taxable interest income and other economically equivalent taxable revenues. However, a tax circular published by the Luxembourg tax authorities on 25 mars 2022 (n°168bis/1) confirms that this concept should be interpreted consistently and symmetrically with the notion of borrowing costs. From this perspective, amounts that are not considered as borrowing costs at the level of the borrower are in principle not to be considered as interest income and other economically equivalent taxable revenues. Please note that the above-mentioned tax circular has not yet clarified whether a gain on debt investments (*e.g.* nonperforming loans) should be considered as “other economically equivalent income” for the purpose of the I.L.R.’s. Such classification may depend on the accounting treatment of the gain and on the application of the economic approach concept under which the gain remunerating the risk taken by the creditor could be seen as economically equivalent to an interest payment for the purpose of the I.L.R.’s. The same circular also provides that: (1) only foreign exchange gains or losses relating to the interest of a debt are included in the definition of borrowing costs (foreign exchange gains and losses arising from the principal amount are not taken into account) and (2) deduction for impairment of loan receivables does not trigger any borrowing costs for the creditor.

effective Luxembourg corporate income tax rate of 16.71% and that would hardly be the cherished tax neutral vehicle sought after (*i.e.*, 70% of E.B.I.T.A. x Luxembourg corporate income tax at the aggregate rate of 23.87%).

However, Luxembourg I.L.R.'s provides two exemptions that could be applicable to Lux S.V.'s in particular, which are the stand-alone entity exception ("Stand Alone Entity Exception") and the single company worldwide group exception ("S.C.W.G. Exception"). These are discussed below.

We also highlight here that the vast majority of Lux S.V.'s are set up as so-called orphan structures in order to achieve bankruptcy remoteness. The most common arrangement for these orphan structures would be the establishment of a Dutch *stichting* which would hold 100% of the common shares of the Lux S.V. (often referred to as an "Orphan Structure") and the Lux S.V. would then acquire its asset portfolio with funds obtained through the issuance of P.P.L.'s or preferred shares (or a variety of their financial instruments) to a pool of investors. These profit linked securities would give rise to Investor Payments and benefit from the tax deductibility afforded by the Lux Securitization Law as described above.

We briefly also mention that the I.L.R.'s contain a comprehensive list of exceptions to the I.L.R.'s (*e.g.*, U.C.I.T.'s, alternative investment funds, insurance companies, and retirement pensions funds) but these are generally not applicable to a typical Orphan Structure involving an unregulated Lux S.V.[20] It is also worth highlighting that one of these exceptions include E.U. Regulated Luxembourg Securitization Vehicles. Note however that the European Commission ("E.C.") has warned Luxembourg (and Portugal) that such exception is not consistent with E.U. Policy on the I.L.R.'s. Nonetheless, the exception remains in the Luxembourg Tax Code despite a lingering 2022 draft tax law calling for its abolition.[21]

**Stand Alone Entity Exception**

The Stand Alone Entity Exception could be applicable to a Lux S.V. if it cumulatively meets three conditions:

- The Lux S.V. is not part of a consolidated group for financial accounting purposes.
- The Lux S.V. has no Associated Enterprises, including both any entity and any individual that is recognized as being an associated enterprise.
- The Lux S.V. has no permanent establishment ("P.E.") located in a jurisdiction other than Luxembourg.

20 L.I.T.L. Article 168bis (1)6 under the definition of financial undertakings.

21 On May 14, 2020, the European Commission sent formal notice letters to advise Luxembourg and Portugal to remove the exemptions from interest limitation rules currently available to certain securitization vehicles ("S.V.'s"), claiming that the respective provisions of applicable domestic legislation go beyond the allowed exemptions under Article 4 of the A.T.A.D. On March 9, 2022, the Luxembourg Ministry of Finance published draft law No.7974 proposing to abolish this exception. However, as of the writing of this article, the exception for Luxembourg E.U. regulated Lux S.V.'s remains in the Lux Tax Law (See L.I.T.L. Section 168bis(1)7.j).

Consequently, a Luxembourg company can only benefit from the standalone entity exception if it is held by shareholders holding directly or indirectly a participation of less than 25% in terms of voting rights, capital ownership, and profit entitlement.[22]

We also highlight that the prevailing interpretation of the Stand-Alone Entity Exception includes the position that "Orphan Structures" should be excluded from benefitting from this exception. The principal source of authority for this is the 2018 Opinion of the Luxembourg Chamber of Commerce on A.T.A.D. I, which concluded a Dutch *stichting* owning 100% of the common shares of the Lux S.V. is an Associated Enterprise. Consequently, the Stand-Alone Entity exception is inapplicable.[23]

## S.C.W.G. Exception to the I.L.R.'s

As of January 1, 2025, Luxembourg tax law provides an exception to the application of the I.L.R.'s for taxpayers qualifying as S.C.W.G.'s. The preliminary requirements to qualify for the S.C.W.G. Exception are as follows:

- The Luxembourg entity is not part of a group which files consolidated accounts.
- The Luxembourg entity is not a taxpayer which does not have an associated enterprise or a permanent establishment outside of Luxembourg.[24]

In most cases, both of these conditions are likely to be fulfilled for the relevant Lux S.V. typically held within the Orphan Structure described above. First, the Lux S.V. in the Orphan Structure likely does not prepare consolidated accounts, nor should it be anticipated to be included in any consolidated accounts. In the Orphan Structure, the Dutch *stichting* should be considered as an Associated Enterprise, thereby fulfilling the second condition, as it would normally own 100% of both the capital and voting rights of the Lux S.V., which is well above the Associated Enterprise thresholds which requires of at least 25% of the voting, capital, or profit rights. Additionally, the Dutch *stichting* is located outside of Luxembourg, in the Netherlands.

Additionally, it is required that the Lux S.V.'s ratio of equity to total assets is equal to or greater than the equity to total asset ratio of the group.[25] In the typical Orphan Structure, the "group" should thus consist of the *stichting* and its wholly owned Lux S.V. The investors normally being third parties should not be taken into consideration. As such, the Dutch *stichting* and the Lux S.V. would be the only two entities for purposes of applying this comparative net asset ratio. However, when Lux S.V.'s are utilized within investment groups, additional analysis under the Associated Enterprise rules should be conducted to verify any potential risk of the investors possibly

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22 L.I.T.L. Article 168bis(1)6 and (8)a.

23 Opinion of the Luxembourg Chamber of Commerce (*Avis de la Chambre de Commerce*) on draft law number 7318, section 1.b

24 L.I.T.L. Article 168bis(9). It is also worth highlighting that Ireland has had a similar provision to the S.C.W.G. in its enactment of A.T.A.D.'s I.L.R. in the Irish Finance Act of 2021. See also Office of the Revenue Commissioners Irish Tax and Customs Publication "Guidance on Interest Limitation Rule Part 35D-01-01." In comparison to the receipt by Luxembourg and Portugal negative letters from the E.C. on the exception for E.U. Regulated S.V.'s, Ireland has not received any negative feedback to its S.C.W.G. exception as of the date of publication of this article.

25 *Id.*

qualifying as Associated Enterprises for purposes of applying the comparative equity-to-total assets ratio analysis.

Under the Orphan Structure, the net equity-to-asset ratio should also be fulfilled, provided that the Dutch *stichting* only holds the common shares of the Lux S.V. and Lux S.V. is not anticipated take any debt from the Dutch *stichting* (*i.e.*, only equity and zero debt issued between the Lux S.V. the stichting).

*"Lux S.V.'s should remain a popular choice for structured finance vehicles."*

In addition to the above requirements, the Lux S.V. must notify the Luxembourg Tax Authority, which as of the writing of this article, would simply be ticking the box on the Luxembourg corporate income tax return.[26]

The application of the S.C.W.G.'s Exception remains subject to Luxembourg's General Anti-Abuse Rule, particularly if there were any artificial steps applied with an aim to fulfilling the equity-to-total asset ratios mentioned above. We highlight that the Orphan Structure is widely implemented among existing Lux S.V. structures and benefits from a well-established and credible business purpose of obtaining bankruptcy remoteness. As such, Orphan Structures aiming to come within the S.C.W.G.'s Exception should not be at risk under the G.A.A.R.[27]

## CONCLUSION

The world of cross-border structured finance seems to be growing. The amount of anti-abuse rules seems perpetually on the rise. Nonetheless, as illustrated in this article, Lux S.V.'s should be able to navigate through two or more of potentially applicable anti-abuse rules in effect in the E.U. For this reason, Lux S.V.'s should remain a popular choice for structured finance vehicles.

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[26] *Id.* As of the writing of this article, it is expected that the Luxembourg Corporate Income Tax Return (Form 500) will simply have a line where the Lux S.V. can answer "yes" that it is availing itself of the S.C.W.G. Exception.

[27] *Id.*

# ARE HOLDING COMPANIES SO TWENTIETH CENTURY? A LOOK AT RECENT DEVELOPMENTS IN FRANCE

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**Tags**
Back-to-Back
Beneficial Owner
Danish Cases
Economic Substance
Holding Company
Intermediary

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## INTRODUCTION

Historically, holding companies have been used by corporate groups to place certain assets in certain locations to serve certain markets. They have also been used by individuals for wealth management and estate planning purposes. Today, holding companies located in an E.U. Member State or elsewhere are likely to face challenges when interacting with group members in France. Claims of treaty benefits are regularly challenged by French tax authorities. Whether the benefit is a tax treaty related withholding tax exemption on dividends or royalties or access to E.U. Directives such as the Parent-Subsidiary Directive, French tax authorities regularly challenge the claim of a recipient to receive the anticipated tax benefit. Often, French tax authorities contend that the recipient of income is not the "beneficial owner" of the income, and for that reason, is not entitled to the treaty benefit claimed.

Today, French tax law attacks the use by nonresident individuals who establish foreign holding companies that own assets in France or who indirectly derive income from those assets. Examples are foreign professional athletes, performers, engineers, and the like who own holding companies located in their residence state that regularly receive revenue originating in France. These ownership structures may trigger application of certain anti-abuse rules leading to unfavorable tax consequences. Here, other anti-abuse rules come into play. Also, it is not uncommon for French tax authorities to challenge the tax residence of an ultimate beneficial owner ("U.B.O.") who is regularly present in France. For these individuals, navigating the French tax environment can be daunting as a series of anti-abuse rules can be asserted in the course of a tax examination.

This article focuses on risks faced by a foreign holding company that expects to benefit from favorable tax regimes for French-source income, only to find that French tax authorities successfully challenge its status as the beneficial owner of the income. Under the view of French tax authorities and courts, a foreign holding company is properly treated as the beneficial owner of a stream of income only when it has economic substance and plays a meaningful role in the transaction under examination.

## KEY-ELEMENTS – A PRACTICAL PERSPECTIVE

Without rehashing the Danish Cases decided by the European Court of Justice ("E.C.J.") in February 2019, the decision has been followed in several French cases regarding claims of treaty benefits and the application of the E.U. Parent-Subsidiary Directive. The Danish Cases have given rise to legal uncertainty when it comes to discerning between (i) the circumstances in which a holding company will be viewed to be the beneficial owner of an income stream and (ii) the circumstances in which a holding company will be viewed to be part of an abusive tax plan. At the time the

 

Danish Cases were decided, French case law did not provide guidance as to the circumstances in which a purported owner was considered to be the beneficial owner. The lack of guidance in the law lead to an increase in the number of tax audits, which in turn lead to several court decisions leading to a recent clarification by the French *Conseil d'Etat*:

- Will the assertion by French tax authorities that a holding company is not the beneficial owner of an income stream trigger a general presumption of tax fraud by the taxpayer?
- Will an assertion by French tax authorities that a holding company is not the beneficial owner of an income stream trigger a presumption of abusive tax planning?
- Is an assertion by French tax authorities that a holding company is not the beneficial owner of an income stream a game changer in practice?

Several relatively recent decisions indicate that a challenge to the beneficial ownership of French source income by a foreign holding company has become a key strategy that is used by French tax authorities. In practice, it may be easier for the tax authorities to achieve a favorable decision under the beneficial ownership test than under the other standard anti-abuse rules of French tax law. Over the past few years, several decisions have addressed the issue, and the notion of beneficial ownership is a key issue to be carefully considered along with standard anti-abuse rules that are at the disposal of the French tax administration. Among such anti-abuse rules are:

- The abuse of law principle (Article L64 of the French Tax Procedure Code -"F.T.P.C.") that is applied to arrangements that are characterized exclusively as tax-driven schemes.
- The general anti-abuse rules ("G.A.A.R.") introduced to implement the A.T.A.D. Directive that allow French tax authorities to broaden tax audits of shell companies. The French G.A.A.R. is based on the principal purpose test ("French P.P.T.") set out by Article L64 A of the F.T.P.C. as a catch-all clause. It provides that no account is given to arrangements that have been put into place for the main purpose (or one of the main purposes) of obtaining a tax advantage that defeats the object or purpose of applicable tax law and that are not genuine in light of all relevant facts and circumstances.
- The specific anti-abuse rule related to the withholding tax exemption on outbound dividends under the E.U. Parent-Subsidiary Directive (Article 119 *ter* 3 of the French tax code ("F.T.C."). The withholding tax exemption for dividends paid by a French corporation to a parent resident in an E.U. jurisdiction is denied where the dividend is part of an arrangement that has as a main objective the tax exemption, itself, rather than a valid commercial reason that reflects economic reality. The French tax authorities provide in their guidelines that the notion of a "commercial reason" is understood in the broad sense of any economic justification, even if it is not linked to the exercise of a commercial activity such as defined by the French tax code. Asset-holding structures carrying on financial activities or structures serving an organizational purpose are expressly mentioned as being likely to be considered as valid commercial reasons for the application of these provisions.

- The specific anti-abuse rule related to the French corporate income tax (Article 205 A of the F.T.C.), which results, in particular, in the denial of the French participation exemption regime for intercompany dividends or capital gains realized from the disposition of shares of a subsidiary.
- The specific anti-abuse rule of the favorable French merger tax regime (Article 210-0 A of FTC).

All these recent tools provide French tax authorities with a broad choice of strategy in challenging a withholding tax exemption for a payment to a holding company based outside France.

## SHIFT TOWARDS ECONOMIC JUSTIFICATION FOR THE USE OF A HOLDING COMPANY

Before the implementation of G.A.A.R. and the increased importance of the beneficial ownership concept (this concept has not been introduced recently but in 1977 in the relevant O.E.C.D. Commentary), the position of French judges regarding the use of offshore holding companies in a cross-border context was influenced the substance-over-form doctrine. In practice, tax treaty benefits and benefits under the Parent-Subsidiary Directive were allowed as long as the holding company maintained business premises, full-time employees, and business assets.

However, in line with the classical economic approach of the O.E.C.D. and the holding in the Danish Cases, discussions that are now being held with French tax authorities have a different focus. The questions raised now look to determine whether (i) the foreign holding company should be recognized as the actual beneficial owner of the French income or (ii) the foreign holding company serves merely as a conduit to other persons. Substance is no longer enough. French tax authorities follow the money trail. This approach makes it much easier for tax authorities to successfully deny a tax benefit.

### Clarifications Regarding Holding Companies: Good News but Not Enough

In recent cases, French judges have attempted to identify several relevant criteria, but the relative importance of each depends on the facts and circumstances that are present in the case. There is no hierarchical value that applies to each fact pattern. The entire bundle of facts is evaluated by the judges and those facts that are viewed to be most material to the transaction before the court are given the most weight in reaching a decision. As a result, uncertainty continues to exist, especially for pure holding companies that have little substance in terms of head count, function, and activities. Typically, such companies are regarded by the French tax authorities as existing merely to receive funds mostly for the purpose of paying dividends to U.B.O.'s or reinvesting in new ventures as decided by business managers located in third countries, possibly outside the European Union and without any income tax treaty concluded with France. In other words, the structures are viewed to be established for treaty shopping purposes.

The distinction between the apparent recipient and the actual beneficial owner already existed under certain tax treaties negotiated by France. For example, the tax treaties concluded with Switzerland, Panama, Andorra, and Luxembourg exclude pass-through entities from receiving treaty benefits. Moreover, denial of treaty benefits for double dip financing arrangements were already provided in tax treaties concluded with Italy and Qatar. Similarly, requirements under which the intent of the beneficial owner must be in line with a genuine arrangement reflecting economic reality appear in tax treaties with the U.K., Qatar, Japan, and Malta.

Decisions of French judges who apply a beneficial ownership test in various fact patterns apply all of the above concepts when evaluating factors on a case-by-case basis. In practice, factors that are not economically relevant to the facts presented should be identified first, leaving the decision of the judge to be influenced by the facts of the case deemed to be the most relevant. However, in practice it is difficult to anticipate the factors that will be viewed by a judge to be material in any particular fact pattern.

***"Decisions of French judges who apply a beneficial ownership test in various fact patterns apply all of the above concepts when evaluating factors on a case-by-case basis."***

**Recent Cases**

Recent decisions and their underlying facts are helpful guides when structuring a group of companies involving a French subsidiary. Below are a few illustrative cases in chronological order, that may provide some guidance in appropriate fact patterns. Note, however, that each case before each judge was decided based those facts that were viewed to be the most material by that judge.

*Conseil d'Etat Decisions n°430594 and 432845 of February 5, 2021*

These decisions confirmed that the notion of beneficial ownership is separate from the notion of abuse from a French tax point of view.

X Co. was a U.K. resident. It acted as the collector of revenue on behalf of artists that licensed the use, broadcast and distribution of musical works. X Co. argued that Article 13 of the U.K.-France Income Tax Treaty provides for a withholding tax exemption regarding royalty payments made to a U.K. licensor by a French licensee. However, X Co. was not regarded by the French tax authorities as the beneficial owner of the royalty payments. Consequently, the treaty was not regarded by the French tax authorities as applicable to X Co.

In the case, the court recognized (i) X Co had economic substance, (ii) the artists legally assigned their rights to X Co., and (iii) X Co.'s Board of Directors determined the allocation of income from the exploitation of licensed works. However, the court determined that the U.K. company was not the beneficial owner of the royalties for purposes of the exemption provided by Article 13. Of importance to the decision was the fact that the bulk of the royalties received by X Co. were ultimately paid to the composers and musicians. The court found them to be the beneficial owners of the French source income collected by X Co.

*Conseil d'Etat Decision n°454980 of March 11, 2022*

The case dealt with a Swiss holding company that derived dividends from its French subsidiary. The Swiss holding company was wholly owned by Mr. X, an individual who was a Portuguese tax resident.

At the time of the challenge by French tax authorities, the Swiss holding company was in existence for 36 years. It received dividends from subsidiaries in several countries including France. The proceeds of dividend income were held by the Swiss holding company. Nonetheless, the French tax authorities disallowed application of the withholding tax exemption for dividends, contending that the Swiss company lacked substance, as it had no employees, no material resources, and no physical activity.

The court upheld the disallowance. It did not matter that dividends received by the Swiss company were not distributed to Mr. X as dividends. Nor did it matter that the profits were automatically transferred to reserves or retained earnings of the Swiss company. The funds held by the Swiss holding company were regarded as being, at the disposal of Mr. X, the sole shareholder of the Swiss company, and Mr. X had a history of borrowing funds from the Swiss holding company. These facts demonstrated that the Swiss company did not have the right to use the funds for its own needs. Rather, it acted as a mere conduit company.

*Conseil d'Etat Decision n°444451 of May 20, 2022*

The case involved F Co., a French company distributing sport programs to fitness clubs. F Co. had initially signed a distribution contract for fitness programs with a New Zealand company, N Co. At some point following a tax audit, the contractual arrangement was revised and F Co. signed subdistribution agreements for the same programs with a Belgian company and a Maltese company.

The payments made by the French company to the Belgian company were characterized as royalties, which were exempt from withholding tax in France in application of the France-Belgium Income Tax Treaty. In comparison, royalties paid directly to N Co., a resident of New Zealand, would have been subject to a 10% withholding tax under the France-New Zealand Income tax treaty. Sums paid as royalties to the Maltese company were subject to a withholding tax rate of 10% under the France-Malta Income Tax Treaty. The rate was identical to the 10% rate in the France-New Zealand Income Tax Treaty.

The French tax authorities challenged the application of the exemption as it considered the Belgian holding company to be a conduit company without any power to use the royalties earned. They reassessed F Co. by applying the France-New Zealand Income Tax Treaty, considering that the New Zealand company was the actual beneficial owner of the sums paid by F Co.

The court of original jurisdiction in France focused its analysis on the character of the income. Were the payments properly characterized as royalties or income from provision of services? It did not decide if the application of the France-New Zealand Income Tax Treaty was appropriate. Note that Article 12 of the France-New Zealand Income Tax Treaty refers to (i) royalties paid to a *resident* and (ii) the *resident* status of the payee, suggesting that benefits under the treaty required a direct payment of royalties to a resident of New Zealand.

The *Conseil d'Etat* refused to apply article 12 literally, concluding that when an agent or representative of a treaty resident is located in a third country, it is possible to apply the tax treaty concluded between the state of residence of the beneficial owner and the state of the income's source, provided that the beneficial owner is clearly identified. Consequently, the judges sitting in the court of original jurisdiction should have determined whether the New Zealand company was the actual beneficial owner of the royalty income.

The decision of the *Conseil d'Etat* is consistent with O.E.C.D. Commentary on point. As in effect since 2017, the O.E.C.D. Commentary provides in pertinent part as follows:

> Subject to other conditions imposed by the Article and the other provisions of the Convention, the exemption from taxation in the State of source remains available when an intermediary, such as an agent or nominee located in a Contracting State or in a third State, is interposed between the beneficiary and the payer, in those cases where the beneficial owner is a resident of the other Contracting State (the text of the Model was amended in 1997 to clarify this point, which has been the consistent position of all member countries).[1]

In practice, the principle is important for foreign based groups that face a strict approach by French tax authorities regarding license fees paid to an intermediate holding company, even when there is no risk of treaty shopping by the U.B.O. Example include circumstances where (i) the U.B.O. sets up an intermediary licensing company that is based in the same country as the U.B.O. or (ii) the U.B.O. sets up an intermediary licensing company in a third country that has an income tax treaty in effect with France that provided equivalent relief in regard to French withholding tax on royalties.

The decision is consistent with the O.E.C.D. economic approach instead of a formalist approach where only the direct recipient of the income in question is taken into account. The *Conseil d'Etat* focused on one main purpose of a tax treaty, the elimination of double taxation. To our knowledge, the decision is among first in the E.U. to have provided clarification on that point. It provides a welcome degree of legal certainty to foreign groups operating in France through local subsidiaries.

***"The Conseil d'Etat focused on one main purpose of a tax treaty, the elimination of double taxation."***

*Conseil d'Etat Decision n°471147 of November 8, 2024*

This case is important because it confirms that in identifying the beneficial owner of a dividend, facts control rather than legal arrangements among members of a controlled group of companies.

F Co. was a French real estate leasing company, wholly owned by the L Co. 2. In turn, L Co. 2 was wholly owned by L. Co. 1. Each of L Co. 1 and L Co. 2 were Luxembourg companies. L Co. 1 entered into a trust agreement as trustee with four companies resident in Guernsey and an individual resident in Germany serving as grantors and beneficiaries. Under the trust arrangement, L Co. 1 undertook the obligation to pay 90% of the dividends it would receive from L Co. 2 to the four Guernsey companies and the German resident individual that were the trust's grantors and beneficiaries.

On July 2, 2014, F Co. paid an interim dividend of €3.6 million to L Co. 2. The next day, L Co. 2 paid the entire amount to L Co. 1. F Co. did not collect French withholding tax on the dividend payment, in accordance with Article 119 *ter* of the F.T.C., which implements the E.U. Parent-Subsidiary Directive, exempting dividends from withholding tax when distributed to an E.U. parent company.

French tax authorities challenged the application of the exemption, citing as authority Article 119 *bis* of the F.T.C. They also imposed a 10% penalty. No assertion of abuse of law was raised.

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[1] Page C(12)-4 of Model Tax Convention on income and on Capital (Full Version), which appears at page 761 of the Digital Version, as it read on November 21, 2017.

F Co argued that L Co. had real economic substance and could not be classified as a mere conduit entity. The following reasons were given in support:

- L Co. 2 was the full owner of the dividend.
- When L Co. 2 distributed the proceeds of the dividend to its sole shareholder, L Co. 1, the distribution reflected the free exercise of discretion by its directors. In support of that assertion, it pointed to a subsequent year in which L Co.2 received a dividend from F. Co and retained the entire amount received.
- The payment of €3.6 million was justified by the fact that neither the Guernsey companies nor the German resident individual ever received a return on the initial investment of €25m transferred to L Co. 1, three years previously.

The court upheld the tax assessment imposed by the French tax authorities. It considered that the undisputed facts were sufficient to conclude that L Co. 2 was not the beneficial owner of the dividend received from F Co :

- Regarding the €3.6 million distribution, L Co. 2 paid an interim dividend to its sole shareholder, L Co. 1, the day after receiving the F Co. dividend.
- L Co. 2 had no other funds available from which to pay that dividend or any other dividend at the time.
- L Co. 2's sole activity was limited to holding the shares of F Co.
- All of L Co. 2's decisions were totally controlled by its sole shareholder L Co. 1, acting through the joint managers of the two companies.

## CONCLUSION

From a French tax perspective, the status of a foreign holding company as the beneficial owner of the amount it receives is determined based on facts of the particular situation. Those facts serve as clues, and no single fact controls in all circumstances.

Nonetheless, the following fact patterns have been determined to be troublesome in recent cases:

- The foreign holding company receiving a payment from a French party does not, itself, conduct a business activity of its own.
- The foreign holding company receiving a payment from a related party in France makes a payment of the same amount shortly thereafter to a related party.
- The foreign holding company receiving a payment from France does not keep any funds for use in its own business.
- The foreign holding company receiving a payment from a related party in France is an offshore holding company benefiting from a tax favorable regime in its country of residence.

- The foreign company receiving a payment from a related party in France does not make economic use of the funds for the purpose of its own business carried on in its country of residence. It does not have the power from a legal or a practical point of view, to use the income received.

Further clarifications would be welcome to enhance legal certainty for international groups operating in France and are eagerly awaited.

# DOUBLE DUTCH: A UNIQUE APPROACH IN THE NETHERLANDS TO U.S. L.L.C.'S OWNED BY TRUSTS

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**Tags**
Classification of an L.L.C.
Classification of an L.P.
Competent **Author**ity Relief
Foreign Trusts
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## INTRODUCTION

Trusts play a crucial role in U.S. estate planning. However, the use of a U.S. trust in an international context can create a multitude of challenges. As illustrated in this article, the Dutch tax system's approach to the taxation of trusts poses a number of concerns for trust beneficiaries residing in the Netherlands.

This article addresses Mrs. X, a U.S. citizen who lives in the Netherlands. Mrs. X is a beneficiary of a U.S. trust created by her mother, a U.S. resident. Due to a mismatch in the U.S. and Dutch tax treatment of the trust, Mrs. X is subject to tax in the Netherlands and in the U.S. without there being an appropriate solution to double taxation short of competent authority relief under the Netherlands-U.S. Income Tax Treaty ("the Treaty). Had the mother obtained proper planning at the time Mrs. X first became a Dutch resident, a costly and time-consuming mutual agreement procedure could have been avoided.

## BACKGROUND

While Mrs. X was in university in the U.S., she elected to study abroad for one semester of her junior year.[1] She chose to study in the Netherlands where she met Mr. X, a Dutch national and resident. Soon after graduation, Mr. and Mrs. X were married, at which time Mrs. X relocated to the Netherlands.

Mrs. X is the sole beneficiary of a U.S. trust, that was established by her mother when Mrs. X was a child. Throughout her life, the mother was a U.S. citizen and a U.S. resident. At the death of the mother, a professional trustee was engaged to oversee the activities of the trust.

At all times relevant, the trust held, and continues to hold the following assets:

- A 50% interest in U.S. L.L.C. 1.The principal source of income of U.S. L.L.C. 1 is rental property located in the U.S. The L.L.C. is classified as a partnership for U.S. income tax purposes.
- A minority interest in U.S. L.P. 2. U.S. L.P. 2 owns U.S. real property which is leased to third parties and other passive assets. The principal source of U.S. L.P. 2's income is rental income from property located in the U.S.

U.S. L.L.C. 1 and U.S. L.P. 2 are profitable, and both entities make annual profit distributions to the trust. The terms of the trust deed require all income to be distributed

[1] At U.S. universities, the third year of a four-year program to obtain a bachelor's degree is referred to as the junior year.

 

annually. Mrs. X does not have any income other than the annual distributions she receives from the trust.

## DUTCH TAX TREATMENT

### Taxation of Trusts

Trusts do not exist under Dutch civil law. However, because the Netherlands is a party to the Hague Trust Convention,[2] Dutch civil law recognizes trusts created under the laws of foreign countries.

The Dutch tax treatment of a trust will generally depend on whether the trust is considered discretionary or nondiscretionary ("fixed"). For discretionary trusts, the trust is likely to be classified as separate private property, known in Dutch as *Afgezonderd Particulier Vermogen*. As a consequence, for Dutch income tax purposes, the trust's assets, liabilities, income, and expenses are attributed to the settlor of the trust.[3] After the settlor dies, the trust's assts, liabilities, income, and expenses are generally attributed to the settlor's heirs. The same attribution rules will apply for purposes of Dutch gift and inheritance tax.[4]

If a trust is classified as separate private property, the Dutch tax classification of the entities owned entirely or partially by the trust is critical to determining the Dutch tax position of the settlor during his or her lifetime, and thereafter, the tax position of the heirs.

### Tax Classification Rules for Foreign Entities

The Dutch tax authority issued new rules to be used in determining the Dutch tax classification of foreign entities as of January 1, 2025. Minimizing hybrid mismatches was a specific goal of the new rules. The tax classification rules are premised on the assumption that the most appropriate method available to determine the Dutch tax classification of a foreign entity is to compare the foreign entity to a Dutch entity. This is commonly referred to as the comparison method. The Dutch authorities prefer the comparison method as it aligns with principles of Dutch taxation and is in accordance with existing European Union case law.[5]

The comparison method focuses on the following two characteristics of the foreign entity, (i) the entity's nature and (ii) the entity's design.[6] The nature of the foreign entity is determined based on the function and intent of the entity as viewed under the legal regime of its formation. The design of the foreign entity is based on the entity's individual attributes.

The Dutch tax authority issued a decree (the "Decree") on the comparison of foreign legal forms that explains when the characteristics of a foreign entity are sufficiently comparable to those of a Dutch entity so as to allow the comparison method to be

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2 Convention on the Law Applicable to Trusts and on Their Recognition (Concluded 1 July 1985).

3 Article 2.14a Personal Income Tax Act of 2001.

4 Article 16 and 17 Succession Act of 1956.

5 Parliamentary documents II 2023/24, 36425, no. 3, p. 4.

6 *Besluit Vergelijking Buitenlandse Rechtsvormen*, art. 2 (Nov. 9, 2024).

applied.[7] The Decree presents the essential characteristics of certain Dutch legal entities which serve as points of comparison. For a Dutch corporation such as a *Naamloze Vennootschap* ("an N.V.") or a *Besloten Vennootschap* ("a B.V."), the essential characteristics include (i) capital divided into freely transferable shares, (ii) legal personality, (iii) limited liability for shareholders, and (iv) the ability to make profit distributions.[8] For a Dutch limited partnership commonly known as a *Commanditaire Vennootschap* ("a C.V."), the essential characteristics include (a) capital divided into shares, (b) a business purpose with contributions from all members and the motive of generating profits that are divided among the members, (c) at least one managing general partner that bears unlimited liability, and (d) at least one limited partner that benefits from limited liability.[9]


Where a foreign entity is not sufficiently comparable to a Dutch entity, the comparison method is inapplicable. In these situations, the classification method will depend on the tax residence of the foreign entity. If the foreign entity is a Dutch tax resident, the foreign entity will be considered nontransparent for Dutch tax purposes. This is referred to as the "fixed method." On the other hand, if the foreign entity is not a Dutch tax resident, the foreign entity's classification for Dutch tax purposes will mirror the tax classification of the jurisdiction in which the foreign entity is a tax resident. This is referred to as the "symmetrical method."

The Dutch tax authority utilizes the comparison method to determine the Dutch tax classification of certain commonly encountered foreign entities. While the Dutch tax authority's classification of a foreign entity can be challenged by a taxpayer, there is a rebuttable presumption that the tax classification adopted by the Dutch tax authority is correct. To overcome the presumption of correctness, a taxpayer must demonstrate that the characteristics of the foreign entity are sufficiently different in order for a different tax classification to be accepted.

Relevant for this article is the Dutch tax classification of U.S. L.L.C. 1 and U.S. L.P. 2. The Dutch tax authority has determined that a U.S. L.L.C. is comparable to a Dutch corporation while a U.S. L.P. is comparable to a Dutch limited partnership. This means that, for Dutch tax purposes, a U.S. L.L.C. is a nontransparent entity while a U.S. L.P. is generally a transparent entity.

## Dutch Tax Position of Mrs. X

Mrs. X, as a Dutch tax resident, is subject to Dutch income tax on her worldwide income. Determining Mrs. X's Dutch income tax exposure requires application of the tax rules in relation to the classification of trusts and foreign entities. Mrs. X's interest in the trust qualifies as separate private property. Because the settlor of the trust no longer is alive, Mrs. X is considered to directly own the trust's assets and liabilities, and directly receive the trust's income and expenses, for Dutch tax purposes. She is considered to be a shareholder of U.S. L.L.C. 1 and a partner of the U.S. L.P. 2.

Accordingly, Mrs. X is deemed to receive the following income for Dutch tax purposes:

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7 *Id.*

8 *Id.*, art. 3 (Nov. 9, 2024).

9 *Id.*, art. 11 (Nov. 9, 2024).

- Profit distributions from a foreign corporation, of which she is a 50% shareholder
- Rental income from U.S. real property held via a foreign partnership

## U.S. TAX TREATMENT

The trust is subject to U.S. income tax on income that is accumulated, rather than distributed to beneficiaries.[10] On the other hand, the trust is allowed a deduction against its U.S. income for the income distributed to Mrs. X.[11] The trust distributes all of its net income annually to its sole beneficiary, Mrs. X. Consequently, the trust effectively does not pay U.S. income tax on its rental income derived from U.S. L.L.C. 1 and U.S. L.L.P 2.

***"The trust is subject to U.S. income tax on income that is accumulated, rather than distributed to beneficiaries."***

Mrs. X is a U.S. citizen and subject to U.S. income tax on her worldwide income. Mrs. X receives annual distributions from the trust which consist primarily of rental income. The rental income received by Mrs. X was generated from U.S. real property and for U.S. tax purposes is U.S. source income. Therefore, Mrs. X is not entitled to a foreign tax credit against her U.S. income tax for the income tax paid in the Netherlands.

## THE TREATY

### Asymmetrical Treatment of L.L.C.'s

Mrs. X is subject to income tax in both the Netherlands and the U.S. However, the rationale for being taxed is quite different in the two countries.

- In the U.S., both U.S. L.L.C. 1 and U.S. L.P 2 are deemed to be transparent. Income flows up to the trust automatically. Under rules applicable to the taxation of nongrantor trusts, Mrs. X recognizes income only to the extent the trust distributes proceeds to her during the year or within the first 65 days of the following year and is specially designated by the trust as a distribution of the prior year's income. Where those facts exist, all of the income that that is recognized by Mrs. X is properly characterized by reference to the character in the hands of U.S. L.L.C. 1 and U.S. L.P. 2.
- In the Netherlands, U.S. L.L.C. 1 is characterized as the equivalent of a B.V. which is taxed as a corporation. Only U.S. L.P. 2 is viewed to be tax transparent. Consequently, only the revenue of U.S. L.P. 2 is considered to be immediately recognized by the Trust when and as generated by U.S. L.P. 2. Only that income is treated as rental income by the trust. Because U.S. L.L.C. 1 is treated as an opaque entity for income tax purposes, meaning that it is not transparent, the trust recognizes income only when it receives an actual distribution from U.S. L.L.C. 1. Finally, the trust's income is attributed to Mrs. X for personal income tax purposes.

While one aim of the Treaty is to prevent double taxation, the Treaty does not effectively achieve that goal in the situation of Mrs. X. Unfavorable treatment arises

[10] Code §641(a).

[11] Code §651(a) in the fact pattern presented. Also see Code §661 in other circumstances.

from the saving clause of the Treaty and the scope of the withholding tax provision for dividends.

As with all income tax treaties entered into by the U.S., the Treaty contains a savings clause that allows the U.S. to tax a U.S. citizen as if the Treaty had not come into effect.[12] As a result, reductions in U.S. tax for income items such as dividends, interest, and royalties are not enjoyed by a U.S. citizen who is a tax resident of the Netherlands. Instead, a form of relief is provided in Article 25 (Methods of Elimination of Double Taxation).[13]

Where the saving clause applies to a U.S. citizen residing in the Netherlands who receives a dividend from a U.S. corporation, the Netherlands is required to allow a reduced tax credit for U.S. taxes paid on U.S. source dividend income. The credit is capped at the applicable rate of withholding tax provided by the Treaty, 15% for individuals. In turn, the U.S. is required to allow a foreign tax credit for the residual Dutch tax paid in excess of the 15% deemed withholding tax and will treat the income as if it were derived from foreign sources. However, a profit distribution by an L.L.C. to a resident of the Netherlands is generally not treated as a dividend. In discussing the scope of Article 10 (Dividends), the Technical Explanation of the 2004 Protocol to the Treaty prepared by the Treasury Department states the following:

> [A] distribution by a limited liability company is not characterized by the United States as a dividend and, therefore, is not a dividend for purposes of Article 10, provided the limited liability company is not taxable as a corporation under U.S. law.

The same problem does not exist with regard to U.S. L.P. 2, which as mentioned above, is treated as a tax transparent entity in the U.S. and the Netherlands. Also as mentioned above, both U.S. L.P. 2 and the trust are treated as transparent for Dutch tax purposes. In the U.S., similar treatment is provided to U.S. L.P. 2, and the trust is treated as a conduit to Mrs. X to the extent that the proceeds of income recognized by the trust are distributed to Mrs. X in the year income is recognized or deemed distributed in that year under the 65-day rule discussed above.

## DUTCH VIEW OF ECONOMIC DOUBLE TAXATION

In 2010, when the regime for the taxation of separate private property was introduced in the Netherlands, the risk of double taxation as a result of the attribution rules was recognized by Dutch lawmakers, as illustrated by the following quote from the discussion of the new regime in the Dutch Second Chamber (the Dutch "House of Representatives"). An unofficial, but accurate, translation of the quote is as follows:

> In principle, a tax treaty does not limit the Netherlands to determine, due to a change in the law, that its residents will be deemed to receive income from the APV and subject this income to personal income tax, while another country taxes the same income at the level of a different person with personal income tax. Then, the result is economic double taxation in the sense that the same income is

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12 Paragraph 1 of Article 24 (Basis of Taxation).

13 Paragraph 6 of Article 25 (Methods of Elimination of Double Taxation).

> taxed at the level of more than one taxpayer. There is no legal double taxation in the sense that the same income is taxed twice at the level of the same taxpayer. In principle, the purpose of a tax treaty is not to prevent economic double taxation and as such does not protect against this.[14]

## POTENTIAL SOLUTION

In the scenario that an applicable tax treaty does not provide a solution for double taxation issues, and neither country provides a unilateral solution, double taxation may be solved by competent authority proceedings under Article 29 of the Treaty.

In 2019, the competent authorities of the Netherlands and Germany reached a competent authority agreement in a case that is somewhat similar to that of Mrs. X.[15] In that case, a Dutch tax resident held an interest in a German *Kommanditgesellschaft* ("KG"). From a Dutch tax perspective, the KG was a non-transparent entity. From a German perspective the KG was a transparent entity. As a consequence, the German tax authority considered the Dutch Tax Resident to have a permanent establishment in Germany. At the same time, the Dutch tax authority considered the taxpayer to hold the shares in a German corporation. As such, the taxpayer was subject to Dutch income tax on profits received from the corporation. The applicable tax treaty did not provide for a solution for double taxation in this scenario.

The competent authorities agreed to relieve the double taxation by treating the KG as an opaque entity under German law. As a result, the Netherlands decreased its taxable income with a notional deduction of 30% to allow for a fictitious German income tax on the profits of the permanent establishment. In addition, the Netherlands allowed for a 15% foreign tax credit, to simulate the tax credit on dividends received by a Dutch taxpayer from a German company.

If, in the case of Mrs. X, a similar approach is applied, the distributions from U.S. L.L.C. 1 that are included in the Dutch taxable income of Mrs. X could be decreased by 21%, the U.S. Federal corporate income tax rate. In principle, the remaining 79% would be taxable in the Netherlands at a rate in the range of 31%, depending on various factors. On this fictitious profit distribution, Mrs. X should be allowed to claim a 15% foreign withholding tax credit. As a result, Mrs. X would pay 24.5% Dutch personal income tax on the income she receives from the trust insofar this income is allocable to U.S. L.L.C. 1. In principle, the U.S. should allow Mrs. X to claim a foreign tax credit for the residual Dutch personal income tax she incurs and to treat most of the income as foreign source income for foreign tax credit purposes.

Alternatively, the competent authorities may simply determine that an approach similar to that which appears in Paragraph 6 of Article 25 (Methods of Elimination of Double Taxation).

If self-help is required to address the issue, U.S. L.L.C. 1 may consider converting itself to a limited partnership under relevant state law. Because U.S. L.L.C.1 is currently classified as a partnership for U.S. income tax purposes, this would not require the admittance of an additional partner. Under U.S. tax law, a conversion of

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14 Parliamentary documents II 2009/10, 31930, no. 18, p.2.

15 Decree of 14 December 2020, no. 63177.

a partnership from L.L.C. form to L.P. form is generally treated as a continuation, which is a nonrecognition event in the U.S.[16] It is likely, however, that such a conversion would result in capital gain recognition for Dutch tax purposes, assuming that the interest in U.S. L.L.C. 1 has increased in value when measured in terms of euros.[17]

## CONCLUSION

It is often thought that the use of U.S. trusts can be disastrous for Dutch taxpayers. This article illustrates that, while the tax treatment of a structure involving a trust and an L.L.C. can result in very high taxation, with proper planning and restructuring it is possible to obtain a favorable outcome. If it is too late for tax planning, as was the case for Mrs. X, a solution can be sought via the competent authorities of the Netherlands and the U.S.

***"It is often thought that the use of U.S. trusts can be disastrous for Dutch taxpayers."***

16 Code §708.

17 Article 4.16(1)(g) Personal Income Tax Act of 2001. Also see the publication of the Knowledge Group of the Dutch tax authority of July 18, 2023, KG:003:2023:3, holding that the conversion of an opaque Dutch partnership into a transparent Dutch partnership results in a capital gain.

# THE §245A D.R.D. MEETS THE I.R.S.: ONLY *LOPER BRIGHT* MIGHT PROVIDE RELIEF

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**Tags**
Controlled Foreign Corporation
Dividends Received Deduction
Foreign Tax Credit
*Loper Bright*

## INTRODUCTION

In Chief Counsel Advice ("C.C.A.") Memo. 202436010, the I.R.S. concluded that the dividends-received deduction ("D.R.D.") under Code §245A is not available to controlled foreign corporations ("C.F.C.'s"). The I.R.S.'s position drew heavily on the plain language of the relevant statute. The emphasis on the statute's plain language is not a new legal principle, but the timing of the memorandum is interesting given it was released a few months after *Loper Bright Enterprises v. Raimondo*,[1] a landmark Supreme Court case decided in June 2024. *Loper Bright* struck down the long-standing *Chevron* doctrine,[2] under which courts were directed to defer to a Federal agency's reasonable interpretation of ambiguous statutory provisions. In *Loper Bright*, the Supreme Court reasserted the judiciary's responsibility to interpret the law and held that the *Chevron* doctrine gave too much interpretive power to Federal agencies. In the tax context, this has led practitioners to speculate about *Loper Bright*'s effect on Treasury Regulations. The speculation is partly fueled by a lack of clarity on what tests and standards will be used under *Loper Bright* to determine the validity of regulations promulgated by Federal agencies.

## D.R.D.

As the name suggests, a D.R.D. is a deduction that a corporate shareholder can claim when receiving dividends if certain conditions are met. The general purpose behind the D.R.D. is to reduce the tax burden on income that is being shifted from one corporation to another but is staying within corporate solution. The Code §245A D.R.D. applies to the foreign-source portion of a dividend received by a U.S. corporate shareholder from a foreign corporation. To qualify for the deduction, the recipient must hold at least 10% of the distributing corporation's shares measured either by vote or by value.[3] Additionally, the recipient must have held the stock for more than 365 days in the two-year period beginning one year before the ex-dividend date.[4] If the recipient qualifies for the Code §245A requirements, the D.R.D. provides a deduction equal to 100% of the foreign-source portion of the dividend.

This D.R.D. was enacted in 2017 as part of the U.S.'s partial shift to a territorial tax system.

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1 603 U.S. 369 (2024).

2 Named after *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

3 Code §951(b).

4 Code §246(c)(5).

By the statute's plain language, the Code §245A D.R.D. is available only to domestic corporations. However, practitioners have found several clues that this D.R.D. should also be available to C.F.C.'s that receive a dividend from a 10%-owned foreign corporation. A C.F.C. is a foreign corporation in which more than 50% of the corporation's stock, measured by vote or by value, is owned by U.S. shareholders each of whom own at least 10% of the corporation's stock, measured by vote or by value.[5]

Because computation of income can yield different results under U.S. rules compared to foreign rules, Treas. Reg. §1.952-2 requires that a C.F.C. calculate its income for U.S. income tax purposes by using U.S. rules. Notably, a C.F.C. is directed to calculate its gross income and taxable income as though it were a domestic corporation. Certain exceptions and special rules are laid out, such as those relating to insurance income, but Code §245A is not among those exclusions.

Other statutory rules might infer the availability of the D.R.D. Paragraph (e)(2) of Code §245A applies to a C.F.C. that receives a hybrid dividend from its foreign subsidiary that is also a C.F.C. with respect to the upper-tier C.F.C.'s U.S. shareholders. The upper-tier C.F.C. is not entitled to claim the D.R.D. to offset Subpart F income. As a result, a U.S. shareholder holding directly or indirectly a ≥10% interest in the upper-tier C.F.C. is taxed in the U.S. on its share of the Subpart F income of that C.F.C.

Notably, a hybrid dividend is a dividend for which a Code §245A D.R.D. would be allowed but for paragraph (e) and for which the lower-tier C.F.C. payor received a deduction or other tax benefit in a foreign country.[6] An example of a hybrid dividend is an amount paid by a corporation that the U.S. views as a dividend for a shareholder, but the foreign country of residence of the payor views as a deductible expense, such as interest paid on a debt instrument.[7]

This definition of hybrid dividend implies a dividend that would, in principle, be eligible for the Code §245A D.R.D. were it not for paragraph (e). Paragraph (e)(2) indicates that a C.F.C. can receive a Code §245A-eligible-dividend. If a C.F.C. can never claim the Code §245A D.R.D., the hybrid dividend rule would be superfluous as no dividend received by a C.F.C. could ever qualify for the D.R.D., whether hybrid or not hybrid.

Code §964(e)(4) also deals with structures involving a C.F.C. owning a foreign subsidiary. This provision applies where a C.F.C. sells stock in the foreign subsidiary and, under rules similar to Code §1248, is required to treat the gain as a dividend to the extent of the earnings and profits of the foreign subsidiary.[8] This deemed dividend is also included in the C.F.C.'s U.S. shareholders' income as Subpart F income. However, a U.S. shareholder who would have been eligible to claim the Code §245A D.R.D. had the shareholder received an actual dividend can apply the Code §245A D.R.D. to this Subpart F inclusion. Therefore, the C.F.C. is effectively allowed a Code §245A D.R.D. on the deemed dividend. It would seem logical to allow the D.R.D. for actual dividends. However, the language is limited to such deemed dividends and does not extend to actual dividends.

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5 Code §§957(a), 951(b).

6 Code §245A(e)(4).

7 For this purpose, any limitation on the deduction claimed for the payment is irrelevant.

8 Code §1248 recharacterizes certain sales of foreign corporate stock by U.S. shareholders as dividends.

 

## LEGISLATIVE HISTORY

The legislative history behind Code §245A is ambiguous. A footnote in the House of Representative's Conference Report,[9] describing U.S. corporations eligible for the Code §245A D.R.D., supports the availability of the D.R.D. for C.F.C.'s:

> [U.S. corporations eligible for the §245A D.R.D. include] a controlled foreign corporation treated as a domestic corporation for purposes of computing the taxable income thereof. See Treas. Reg. Sec. 1.952-2(b)(1). Therefore, a C.F.C. receiving a dividend from a 10-percent owned foreign corporation that constitutes subpart F income may be eligible for the D.R.D. with respect to such income.

The Joint Committee on Taxation's Bluebook, which explains the new law after its enactment, offers a different viewpoint:

> A corporate U.S. shareholder of a C.F.C. receiving a dividend from a 10-percent owned foreign corporation shall be allowed a D.R.D. with respect to the subpart F inclusion attributable to such dividend in the same manner as a dividend would be allowed under section 245A.[10]

The Bluebook thus suggests that while Congress intended to extend Code §964(e)(4) treatment to actual dividends received by a C.F.C., and therefore mimic the effect of a Code §245A D.R.D., Congress's intent did not go as far as to actually allow the D.R.D. to the C.F.C.

## THE I.R.S. POSITION

C.C.A. 202436010 holds that the statute's unambiguous language means that "the analysis of the issue ends there* * *." It further states:

> In fact, the reading of section 245A(a) to allow a section 245A D.R.D. for a C.F.C. would render the use of the word "domestic" in the statute surplusage, and under a "cardinal principle of statutory construction," statutes are to be interpreted to give effect to every word of the statute.[11] The use of the word "domestic" in section 245A(a) contrasts with the language of sections 243(a) and 245(a), each of which allows a deduction for a dividend received by a "corporation" without specifying that the corporation needed to be domestic. Thus, unlike section 245A(a), sections 243(a) and 245(a) provide dividends received deductions to both domestic and foreign corporations. Had Congress wanted to provide a section 245A D.R.D. to both domestic and foreign corporations, it could have used language analogous to sections 243 and 245. Instead, section 245A(a) specifically requires a *domestic* corporation that is a United States shareholder, and that word must be given its plain meaning.

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[9] H.R. Rep. No. 115-466 (2917).

[10] But the Bluebook notes that a "technical correction may be necessary to reflect this intent."

[11] Citing *Williams v. Taylor*, 529 U.S. 362 (2000).

The C.C.A. also considers and rejects the specific arguments above. It argues, relying on regulatory definitions, that the Subpart F inclusion required under Code §245A(e)(2) does not imply that the D.R.D. would otherwise apply. Instead, it suggests that this provision operates by treating the C.F.C. as a domestic corporation for this purpose and then determining whether the D.R.D. would be available to the deemed domestic corporation. Arguably, however, the I.R.S.'s regulatory interpretation of Code §245A(e)(2) also departs from statutory language, as the statute's plain language does not treat a C.F.C. as a domestic corporation for purposes of defining a hybrid dividend.

## VARIAN

The first court case to discuss the impact of *Loper Bright* in a tax context was *Varian Medical Systems v. Commr.*,[12] where the Tax Court examined another issue related to the Code §245A D.R.D.: the interaction of the D.R.D. with the Code §78 gross-up. The Code §78 gross-up applies to a U.S. corporation that claims a foreign tax credit for foreign taxes paid by certain 10%-owned foreign subsidiaries. It requires such a corporation to treat as a dividend the amount of foreign tax paid by the C.F.C. with respect to the included income. Without the gross-up, a taxpayer could effectively claim a double benefit of a foreign tax credit and a deduction for foreign tax paid. However, Code §78 states that the grossed-up amount is not treated as a dividend for purposes of Code §245 D.R.D.[13] In other words, the gross-up dividend cannot be reduced or eliminated by a Code §245 D.R.D. When Code §245A was enacted, this rule's scope was extended to cover the Code 245A D.R.D.

*"The C.C.A. . . . argues, relying on regulatory definitions, that the Subpart F inclusion required under Code §245A(e)(2) does not imply that the D.R.D. would otherwise apply."*

However, there was a timing issue as to effective dates of the provisions in play in the case. Code §245A applies to distributions made after December 31, 2017. The revised version of Code §78, which takes into account the Code §245A D.R.D., applies to tax years beginning after December 31, 2017. For a calendar-year taxpayer, both provisions applied to the 2018 tax year, and there was no timing mismatch. But for a fiscal-year taxpayer, revised Code §78 seemed not to apply until its new tax year began in 2018. This meant that the Code §245A D.R.D. was theoretically applicable to the gross-up until the new tax year began sometime in 2018.

That was the taxpayer's situation and its position in *Varian*. The taxpayer's tax year began on September 29, 2017. This meant that its first tax year to which revised Code §78 applied to – *i.e.*, the first tax year beginning after December 31, 2017 – did not begin until September 29, 2018. But since Code §245A D.R.D. is available for all post-2017 distributions without regard to the tax year, the taxpayer applied the D.R.D. to its gross-up for its 2017–18 tax year.

The I.R.S. argued that the Code §245A D.R.D. only applies to actual dividends distributed out of a corporation's earnings and profits. The court found several objections to this. No such limitation exists in the statutory language, and the definition of "dividend" implies that when a dividend is deemed made, it is also deemed to be distributed, satisfying the I.R.S.'s purported requirement. The I.R.S. pointed out that

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12 163 T.C. No. 4 (2024).

13 This D.R.D. is similar to the Code §245A D.R.D. but applies to the U.S.-source portion of the dividend rather than the foreign-source portion.

some other Code provisions that create deemed dividends, such as Code §1248,[14] specify that Code §245A applies to the deemed dividend. This would imply that by default, Code §245A does not apply to deemed dividends. But the court explained that Code §78, unlike those other provisions, creates a deemed dividend "for purposes of this title [*i.e.*, the Code]." It concluded:

> Saying that an amount will be treated in a particular manner "for purposes of this title" (*i.e.*, the Code) is equivalent to listing every section in the Code and saying that the amount will be so treated for purposes of each section. Thus, Congress did not need to say more to bring a section 78 dividend within the scope of section 245A.

After rejecting the definitional argument of the I.R.S., the court turned to the I.R.S.'s regulatory argument. In 2019, the I.R.S., having taken note of the mismatch issue with Code §§245A and 78, amended Treas. Reg. §1.78-1(a) to read as follows:

> A section 78 dividend is treated as a dividend for all purposes of the Code, except that it is not treated as a dividend for purposes of section 245 or 245A, and does not increase the earnings and profits of the domestic corporation or decrease the earnings and profits of the foreign corporation.

This regulation disallows the application of the Code §245A D.R.D. to a gross-up. But it also contradicts the statute. For the court, that was a non-starter:

> But, as we have already observed, the plain text of the statutes provides for the deduction. As the Supreme Court has said, "self-serving regulations never 'justify departing from the statute's clear text.'" *Niz-Chavez v. Garland*, 593 U.S. 155, 141 S. Ct. 1474, 1485, 209 L. Ed. 2d 433 (2021) (quoting *Pereira v. Sessions*, 585 U.S. 198, 138 S. Ct. 2105, 2118, 201 L. Ed. 2d 433 (2018)); see also *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 328, 134 S. Ct. 2427, 189 L. Ed. 2d 372 (2014) ("[T]he need to rewrite clear provisions of the statute should have alerted [the Government] that it had taken a wrong interpretive turn."); *Koshland v. Helvering*, 298 U.S. 441, 447, 56 S. Ct. 767, 80 L. Ed. 1268, 1936-1 C.B. 219 (1936) ("[W]here . . . the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."); *Abdo v. Commissioner*, No. 5514-20, 162 T.C., slip op. at 21 (Apr. 2, 2024) (reviewed) ("Respondent's regulation . . . cannot change the result dictated by an unambiguous statute." (citing *Niz-Chavez*, 141 S. Ct. at 1485)).

## IMPACT OF *LOPER BRIGHT*?

Although the I.R.S. adopted its *Varian* position before *Loper Bright* was decided, the court asked the I.R.S. for its views on the impact of *Loper Bright* on the case. But it seems unlikely that it made a difference. The statutes here were unambiguous with respect to their effective dates. The court noted that "even under *Chevron*, '[i]f

[14] Code §1248 recharacterizes gain on the sale of C.F.C. stock as a dividend to the extent of untaxed E&P in the C.F.C.

the intent of Congress is clear, that is the end of the matter,' [*Chevron*, 467 U.S. at 842,]* * *"[15]

Therefore, *Varian* did not provide much clarity regarding the impact of *Loper Bright*. But under the *Loper Bright* framework, courts may place greater emphasis on uncovering the unambiguous meaning of a statute. *Loper Bright* holds that "statutes, no matter how impenetrable, do – in fact, must – have a single, best meaning." The single, best meaning here was easy to find. That will not necessarily be the case with other statutes.

## *FEDEX* AND DELEGATIONS OF AUTHORITY

*Loper Bright* was also cited by the Western District of Tennessee in *FedEx Corp. and Subsidiaries v. United States*.[16] *FedEx* provides a little more guidance on the application of *Loper Bright*.

The *FedEx* case concerned the "transition tax," also known as the Code §965 tax, enacted in 2017. Under Code §965, certain U.S. shareholders of certain foreign corporations were required to pay a one-time tax on the foreign corporation's deferred (and therefore untaxed) foreign earnings. A U.S. shareholder subject to the transition tax and with applicable interests in multiple foreign corporations was allowed to offset the taxable foreign earnings from profitable foreign subsidiaries with losses from unprofitable foreign subsidiaries.[17]

The case concerned FedEx's claim for foreign tax credit for foreign taxes paid by its subsidiaries on the earnings offset by losses, which the court referred to as "offset earnings." Under former Code §902, a U.S. corporation that received a dividend from a foreign subsidiary was deemed to have paid the foreign tax paid by the subsidiary on the income giving rise to earnings and profits from which the dividend was paid. In this way, a U.S. corporation owning sufficient shares in a foreign corporation could actually claim a credit, thereby reducing the U.S. tax on the dividend. Where the U.S. corporation reported a Subpart F inclusion instead of a dividend, Code §960 deemed the Subpart F inclusion to be a dividend for purposes of Code §902. This meant that a U.S. shareholder of a C.F.C. could, in principle, also claim foreign tax credit for the Subpart F income inclusion, assuming sufficient ownership was held in the foreign corporation.

The I.R.S. previously issued a regulation that disallowed foreign tax credits for dividends paid from offset earnings.[18] The general policy behind the foreign tax credit is to reduce or eliminate double taxation on a specific item of income that would otherwise arise because both the foreign country and the U.S. could tax the same income. The foreign country could tax the income as earned and the U.S. could tax the resulting earnings and profits as distributed.[19] Since offset earnings are not

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15 Citing *Loper Bright*.

16 No. 2:20-cv-02794 (2025).

17 Code §965(b)(1).

18 Treas. Reg. §1.965-5(c)(1)(ii).

19 In addition, the foreign country could impose withholding tax on dividend distributions paid by the foreign corporation.

taxed by the U.S., the I.R.S. was concerned that allowing foreign tax credit would completely eliminate taxation on applicable income.

This regulation was held invalid by the *FedEx* court in 2023, which granted summary judgment to FedEx on that issue. FedEx's victory rested on the interaction of the following statutory language.

- Code §960(a)(1), as mentioned earlier, allows a U.S. shareholder of a C.F.C. to claim foreign tax credit for foreign tax paid by the C.F.C. on income that is included in the U.S. shareholder's income as Subpart F income.

- When this income is actually repatriated to the U.S. shareholder, Code §959 provides that the U.S. will not tax the income again, since it was already taxed under the Subpart F regime, and Code §965(b)(4)(A) extends this treatment to offset earnings, ensuring that the offset earnings are not taxed when repatriated. Correspondingly, Code §960(a)(2) provides that on a repatriation under Code §959, the U.S. shareholder cannot claim foreign tax credit on foreign tax that was already credited under Code §960(a)(1), as would otherwise have been allowed under the general rule of former Code §902.

- Finally, Code §960(a)(3) provides that if repatriated earnings are excluded from income under Code §959, the repatriated earnings will be treated as a dividend for purposes of Code §902 to take into account foreign tax that was not previously credited under Code §960(a)(1). Therefore, any foreign tax paid by the C.F.C. for which the U.S. shareholder did not previously receive a credit is credited under this paragraph.

FedEx's argument was as follows:

- FedEx's repatriated offset earnings are excluded from income under Code §959, per Code §965(b)(4)(A).

- FedEx's C.F.C. paid foreign tax on the offset earnings that was not previously credited under Code §960(a)(1).

- Therefore, Code §960(a)(3) allows a credit to be taken.

The government argued that Code §965(b)(4)(A) requires the offset earnings to be treated as though they have been previously included in income under Subpart F, even though they were not. Code §960(a)(1) specifically provides that for amounts previously included under Subpart F, the U.S. shareholder is deemed to have paid the associated foreign taxes. And Code §960(a)(2) provides that taxes previously deemed paid under Code §960(a)(1) will not be credited.

But FedEx prevailed because Code §965(b)(4)(A) is limited to purposes of applying Code §959. The court agreed that the government incorrectly applied the deemed prior inclusion under Code §965(b)(4)(A) to Code §960(a), contradicting that provision's plain language. The court found the government's construction of the statutes to be inconsistent and too complex compared to FedEx's interpretation. It held that the regulation disallowing the foreign tax credit was invalid.

### ***Loper Bright***

Earlier this year, the court revisited the issue and asked the parties for observations in light of *Loper Bright*.

Even under *Loper Bright*, the Supreme Court acknowledged that delegation to an agency can still be possible:

> [Some statutes] expressly delegate to an agency the authority to give meaning to a particular statutory term. * * *Others empower an agency to prescribe rules to fill up the details of a statutory scheme, or to regulate subject to the limits imposed by a term or phrase that leaves agencies with flexibility, such as 'appropriate' or 'reasonable.'

The government noted that Code §965(o) authorizes the Department of the Treasury to issue regulations "as may be necessary or appropriate," including "regulations or other guidance to prevent the avoidance of the purposes of this section…" The government then invoked Treas. Reg. §1.965-5(c)(1)(i), also referred to as the "regulatory haircut rule."[20]

To incentivize compliance with the transition tax, Congress included a deduction in Code §965(c) that effectively reduced the transition tax rate to 15.5% for earnings embodied in cash and cash equivalents and 8% for earnings embodied in all other assets. Under the haircut rule, the foreign taxes paid on the portion of income that for which this deduction is allowed are not allowed to be credited. This rule aims to prevent a taxpayer from claiming a double benefit of the Code §965(c) deduction and foreign tax credit on the same portion of an item of income. The government argued that even if it could not fully deny FedEx foreign tax credit, it could use the haircut rule to reduce FedEx's foreign tax credit.

***"Under the haircut rule, the foreign taxes paid on the portion of income that for which this deduction is allowed are not allowed to be credited."***

However, the haircut rule only applies to amounts for which the Code §965(c) deduction is allowed. And the Code §965(c) deduction, in turn, only applies to amounts that are included in income under Subpart F. As part of the court's previous grant of partial summary judgment, it held that offset earnings are not included in Subpart F income. Therefore, the deduction could not apply to offset earnings, and the haircut rule does not apply to income if there is no Code §965(c) deduction. The court found that offset earnings were outside the scope of the haircut rule, partly because of statutory definitions.

The court agreed that delegations of authority can still be respected under *Loper Bright*, but cautioned that such delegations did not give the I.R.S. complete freedom in writing regulations:

> *Loper Bright* holds that, when assessing the legality of agency regulations, courts must independently interpret the governing statutes, and sometimes the "best reading of a statute is that it delegates discretionary authority to an agency." 144 S.Ct. at 2263. The Supreme Court elaborated that, when a statute delegates regulatory authority to an agency, courts must "recogniz[e] constitutional delegations, fi[x] the boundaries of the delegated authority, and ensur[e] that the agency has engaged in reasoned decisionmaking within those boundaries."

Here, the court refused to accept the application of the regulatory haircut rule because it would have been against the plain meaning of the relevant statutes, as

[20] There is also a parallel "statutory haircut rule" in Code §965(g)(1). The court dismissed the application of the statutory rule for similar reasons as the regulatory one.

previously litigated. The court concluded that "[p]romulgating a regulation that contradicts statutory language is outside the boundaries of the authority delegated to the I.R.S."

The court therefore outlined a few more contours of the *Loper Bright* framework. Delegations of authority do not necessarily give the I.R.S. *carte blanche* to issue regulations. Instead, courts are required to evaluate the delegation of authority itself to determine its boundaries. And regulations issued under a delegation of authority are invalid to the extent they contradict a statute's language.

## CONCLUSION

The currently pending budget resolution bill in Congress contains many tax provisions that grant rulemaking authority to the Treasury Department on various subjects, including tax-free tips, deductions for state and local taxes, and amortization of R&D expenses. These provisions were clearly added with *Loper Bright* in mind. The *FedEx* court's scrutiny of the delegation in Code §965(o) suggests that lawmakers will need to be particularly clear and specific when granting authority to write regulations. The effect, as is generally the case under *Loper Bright*, will likely be less discretion given to the I.R.S.

# BUDGET RESOLUTION TAX PROVISIONS CONTAIN REPRISAL TAX AIMED AT O.E.C.D. PROPOSALS

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**Tags**
Code §891
Code §899
Digital Services Tax
Discriminatory Tax
Diverted Profits Tax
D.S.T.
Underground Profits Rule
U.T.P.R.

## INTRODUCTION

On Friday, May 22, 2025, the U.S. House of Representatives adopted a budget resolution containing provisions that would impose increased taxes for persons based in countries that impose taxes found to discriminate against U.S. companies or their subsidiaries.[1] In broad terms, if a country is determined to have "crossed the line," residents of that country and their subsidiaries would face up to a 20% increase in withholding taxes on U.S. source investment income, income taxes on income that is effectively connected to the conduct of a U.S. trade or business, and certain other taxes. The tax increase will be effected in 5-percentage point increments over a 4-year period, ultimately resulting in a 20-point increase in tax beginning in 2026.

### Targets

The provision is intended to have broad application, covering the following persons and entities:

- Foreign governments, sovereign wealth funds, and public agencies of countries designated as discriminatory foreign countries
- Individuals and legal entities (including corporations, partnerships, trusts, and foundations) that are resident in, established in, or effectively managed in a discriminatory foreign country
- Entities that are substantially owned or controlled, directly or indirectly, by any of the above persons after application of broad ownership-by-attributions rules

Tax regimes that are expressly considered to be discriminatory include the following:

- Taxes that implement the Undertaxed Profits Rule of the O.E.C.D. These taxes are designed so ensure a global minimum tax of 15%, which is primarily enforced by an income inclusion rule at the parent level of a group and secondarily enforced by an income inclusion rule or a deduction disallowance rule wherever the multinational group operates.
- Digital Services Taxes on revenues earned by large multinational digital companies. These taxes are imposed on activities such as online advertising, operation of digital marketplaces, and user data sales. They target companies that generate significant revenue from users in a country without having a physical presence in that country.

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1 Proposed Code §899 (Enforcement of Remedies Against Unfair Foreign Taxes.)

- Diverted Profits Taxes designed to counteract aggressive tax planning within multinational groups. From the viewpoint of the country in which the customer is based, the tax targets arrangements that divert profits to a low-tax jurisdiction, often through complex structures or transactions lacking genuine economic substance.

- Any other extraterritorial tax, discriminatory tax, or other tax enacted with a public or stated purpose that the tax be economically borne, directly or indirectly, disproportionately by US persons as determined by the Secretary of the Treasury.

**Implementation Schedule**

In general, the implementation date for imposing the tax increase against a particular foreign jurisdiction is the first day of the calendar year following the year in which the latest of the following events occurs:

- 90 days after the enactment, which generally targets persons in jurisdictions that have already adopted a targeted foreign tax

- 180 days after the enactment of an unfair foreign tax, which generally targets persons in jurisdictions that adopt a discriminatory foreign tax after the 90-day period mentioned above

- The initial effective date of the unfair foreign tax, which generally targets persons in jurisdictions that adopt a targeted foreign tax

Withholding agents will not be penalized for under-withholding regarding amounts paid prior to 2027, subject to a good faith requirement.

**Increased Taxes**

In addition to income taxes and withholding taxes on investment income, several other taxes will be increased if the measure is adopted in present form. They include

- Code 59A (Tax on Base Erosion Payments of Taxpayers With Substantial Gross Receipts),

- Code §884 (Branch Profits Tax),

- Code §897 (Disposition of Investment in United States Real Property),

- Code §1441 (Withholding of Tax on Nonresident Aliens),

- Code §1442 (Withholding of Tax on Foreign Corporations),

- Code §1443 (Foreign Tax-Exempt Organizations),

- Code §1445 (Withholding of Tax on Dispositions of United States Real Property Interests),

- Code §1446 (Withholding of Tax on Foreign Partners' Share of Effectively Connected Income), and

- Code §4948 (Application of Taxes and Denial of Exemption With Respect to Certain Foreign Organizations).

## PATH FORWARD

The measure awaits consideration by the Senate. As in the House of Representatives, the Republican Party is the majority party in the Senate. Assuming the measure is adopted more or less in present form, the O.E.C.D. and the E.U. face a Hobson's Choice. The above taxes could be repealed, without substitute measures that might run afoul of Code §899. In that scenario, the effect of Code §899 will be minimal, just as the effect of another reprisal tax provision, Code §891,[2] which was enacted in 1934, and has never been invoked by a sitting President, although it was successfully threatened against France at the time of enactment.[3]

On the other hand, if those taxes come into effect, Code §899 will disrupt trade patterns, especially if other defense tactics are adopted by the U.S., the O.E.C.D., and the E.U.

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2 Code § 891 (Doubling of Rates of Tax on Citizens and Corporations of Certain Foreign Countries.) In pertinent part, it provides as follows:

> Whenever the President finds that, under the laws of any foreign country, citizens or corporations of the United States are being subjected to discriminatory or extraterritorial taxes, the President shall so proclaim and the rates of tax imposed by section 1 , 3 , 11 , 801 , 831 , 852 , 871 , and 881 shall, for the taxable year during which such proclamation is made and for each taxable year thereafter, be doubled in the case of each citizen and corporation of such foreign country; but the tax at such doubled rate shall be considered as imposed by such sections as the case may be. In no case shall this section operate to increase the taxes imposed by such sections (computed without regard to this section ) to an amount in excess of 80 percent of the taxable income of the taxpayer (computed without regard to the deductions allowable under section 151 and under part VIII of subchapter B).

3 See Joseph J. Thorndike, "Tax History: Threats, Leverage, and the Early Success of Reprisal Taxes," *Tax Notes* (March 21, 2016) .

## About Us

Ruchelman P.L.L.C. is a boutique law firm based in New York City. It was founded in 1989 by an alumnus of a legacy firm that is now Deloitte's.

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