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Economic substance and abuse of rights: tax realism at all costs?

Economic substance became a central notion in the struggle against a tax fraud and tax evasion, a consensus seeming to have been found by the authorities to make a new reference norm in the field. This article aims to demonstrate in which aspects the use of this notion is superabundant, at best, and a source of insecurity for economic actors at worst. Thus, it invites judges and taxation authorities to place their reflection to the limits determined by legal certainty principle.

- The struggle against a tax fraud and tax evasion has a vital importance. The state of public finances consequent of the financial crisis of the 2008 as well as multiplication of aggressive tax optimizations of the transnational companies has persuaded the decision-makers to pass from the legal evaluation of situation to economical one. The uniform term for the complex of actions is economic substance.

- This notion constitutes a keystone of the international and European projects of struggle against a tax fraud and tax evasion. The plan of action BEPS of OCDE (OCDE, Plan d'action concernant l'érosion de la base

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d'imposition et le transfert de bénéfices, dit. projet BEPS : Edition OCDE, 2013) tends to line up the rules of taxation on the economic substance, preventing the artificial movement of the taxable benefits from the country where the values were created to the another one. The notion of the substance has an essential place in this project for the purpose of integration of the taxation to the economic reality in the most systematic way. The plan includes six actions aiming to dispose the taxation rights on the economic substance:

- Action 5 aims to guarantee benefit taxation under the preferential regime in the state which is the place of the actual activity Implicating that it will be actually provided the taxpayer for the aimed activity in any concrete country to benefit those advantages;

- Action 6 aims to prevent the use of the dummy companies without any economic substance to gain a double exoneration;

- Action 7 leads to modification of the definition of the stable company in such way that it could prevent the artificial avoidance of the stable company status for the purpose of tax base decrease and transfer of the benefit;

- Finally, actions 8, 9, 10 are intended to guarantee that the price of the transfer calculated between linked societies comply with the value creation. Thus, benefit taxation of the group of companies should be lined up better with the economic substance of the societies members, dividing more correctly the taxable income between the tax jurisdictions.

- The State Members of the European Union likewise the OCDE members were engaged to Implement the results of the elaboration of the 15 actions of plan BEPS. Thus, it is consistent that the states will take the measures to inhibit the practice of tax invasion and to guarantee the fair and effective taxation in the Union in the way which would be

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sufficiently consistent and coordinated. (Cons. EU, dir. 2016/1164/EU, 12 juill. 2016, consid. 2 établissant des règles pour lutter contre les pratiques d'évasion fiscale qui ont une incidence directe sur le fonctionnement du marché intérieur) Those considerations were materialized by the adoption of the anti-evasion tax directives of the 12 July 2016. (Cons. EU, no 2016/1164, 12 juill. 2016, préc.)

- The spirit of this directive is summed up by the Council which states that «the current politic priorities in the international taxation domain highlights the necessity to make sure that the taxes would be played in the place where the benefit and values were created» (Ibidem, consid.1.). As usual, the general anti-abuse clause was included in the directive. This clause refers implicitly to the notion of the economic substance refusing application an assemblage regime which were not set up for the valid commercial reasons reflecting economic reality. The aspects which were innovative in the initial proposition of this directive are those which referred expressly to the notion of the economic substance indicating that the of the assemblage «the tax liability is calculated on the basis of the economic substance in conformity with the national legislation» (Article 7 de la proposition de directive du Conseil établissant des règles pur lutter contre les pratiques d'évasion fiscal qui ont une incidence directe sur le fonctionnement du marché intérieur, 28 janv. 2016), the reference which does not appear anymore in the adopted final version.

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