

REITS and the EU Directives

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EU Directives

- Parent-Subsidiary Directive (PSD)
- Interest-Royalty Directive (IRD)
- Merger Directive (MD)

Relevance of access by REITS to EU Directives

- Withholding taxes on profit distributions and interest/royalty payments made by REIT;
- Double taxation of profits distributions and interest/royalty payments received by REIT;
- Reorganisations (mergers etc.) may lead to taxation at REIT/investor level

Requirements for access to EU Directives

2(a) PSD / 2(c) IRD and 3 MD

Company of / from a Member State:

- (a) Legal form requirement
- (b) Residence requirement
- (c) Subject-to-tax requirement

3(1) PSD

Parent company / subsidiary: min. 10% holding in capital

Legal form requirement

“takes one of the forms listed in Annex I, Part A;

- Only EU legal forms
- Only listed legal forms (*Gaz de France*, C-247/08)

Most REITS will take a qualifying legal form

Residence requirement

“according to the tax laws of a Member State is considered to be resident in that Member State for tax purposes and, under the terms of a double taxation agreement concluded with a third country, is not considered to be resident for tax purposes outside the Community”

- Only domestic tax residence relevant, or also tax treaty residence (“fully liable”)?
- Tax treaty residence \neq EU Directive residence (see Dutch “*fbi*”)

Subject-to-tax requirement

“is subject to one of the taxes listed in Annex I, Part B, without the possibility of an option or of being exempt, or to any other tax which may be substituted for any of those taxes.”

- In many Member States REITS are exempt from CIT **x**
- If REITS are subject to tax:
 - Limited taxable base (e.g. only non-real property income) **✓**
 - Special investment tax **x**
 - Special rate **✓**, but what if 0%-rate? **✓/x**
 - Partly taxable/exempt (e.g. for non-property rental income) **✓/x**

“Parent company” and “subsidiary”

“Minimum holding of 10% in the capital of a company of another Member State”

- UCITS IV Directive requires diversification / portfolio investments;
- Many REIT regimes allow (some) investments in addition to real estate activity;
- Many REIT regimes are restricted to portfolio investors

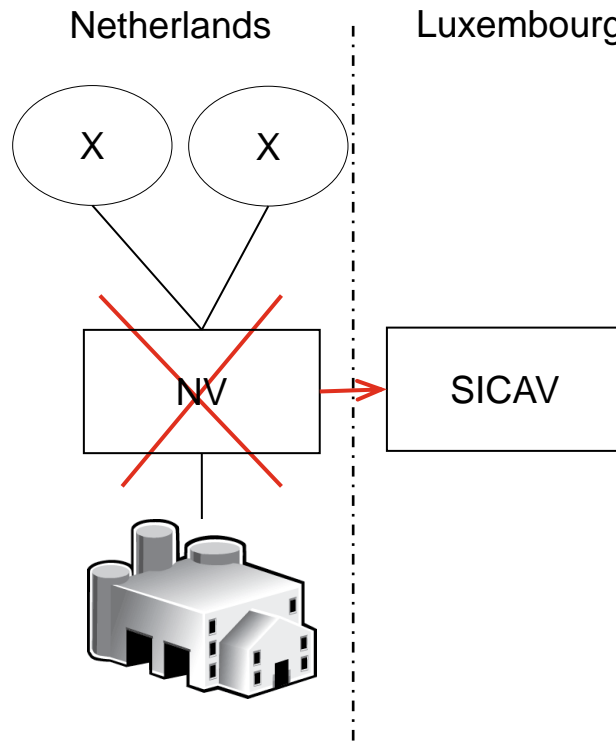
Access to PSD and the need to avoid double taxation

OECD: Tax Treaty Issues Related to REITS

“Another issue is to what extent domestic rules on participation exemption and, more generally, the EU parent-subsidiary directive, would allow a State to tax a distribution to a large investor at a rate commensurate with the rate applicable to income from immovable property rather than at the rate applicable to a dividend to a large corporate shareholder.”

Does the avoidance of double taxation under the PSD frustrate the objectives of REIT-regimes?

Access to MD: retention of taxing rights



Conclusions / recommendations

PSD / IRR:

- (Effective) tax exemption of REITS reduces risk of double taxation
- REIT requirements limit scope for investments in PSD- “subsidiaries” or the generation of interest / royalty income
- REIT requirements limit possibilities of investments in REITS by PSD- “parent companies”

MD:

As only the retention of taxing rights matters, Article 3 MD can be abolished

Thank you...

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