

NovioTax Google Ireland not taxable in France via its French subsidiary

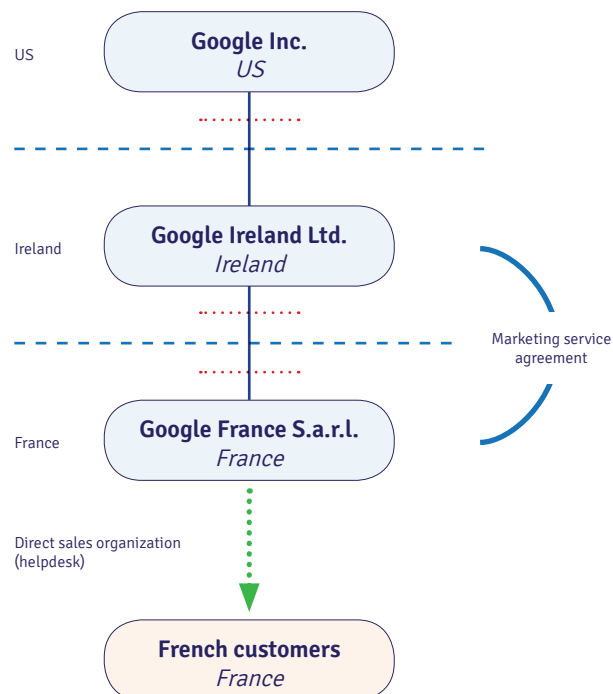
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Google Ireland not taxable in France

On 25 April 2019 the Paris Administrative Court of Appeal confirmed the decision ruled on 12 July 2017 by the first-instance Court that Google Ireland Limited did not have a permanent establishment in France between 2005 and 2010 and was therefore not taxable in France. The key question before the first-instance Court in the original case was if Google Ireland Limited had a permanent establishment (PE) in France. The French tax administration (FTA) argued that the online advertisement services that Google Ireland Limited provided to customers in France through a French Google subsidiary (Google France SARL) constituted a PE in France, and was therefore taxable. The Paris Administrative Court of Appeal found that the establishment in France did not have the capability to carry out the advertising activities in France on its own behalf and declined the statement of the FTA.

Facts and points of discussion

In 2002, the American company Google Inc. had concluded a marketing and services agreement (MSA) with the French subsidiary Google France SARL (for support and marketing services in France). In 2004 Google transferred the marketing and services agreement to Google Ireland Limited, residing in Ireland. The MSA included the performance of digital services through the online advertising platform of Google (AdWords). Under the MSA Google France SARL provided commercial assistance and advice to French customers who used the AdWords service. The services provided in France were invoiced by Google Ireland Limited. Hereafter a summarized group overview is provided.



The AdWords services were offered to French customers in two ways, "OSO" (Online Sales Organization) and "DSO" (Direct Sales Organization). The first one was intended for customers wanting to develop their own online advertising campaigns, the second one included a helpdesk provided by employees of Google France SARL, intended to support advertisers with AdWords. The FTA concluded that the DSO services constituted a business activity in France (on behalf of Google Ireland Limited).

The FTA argued that through the DSO, Google Ireland Limited was engaged in performing services in France and was de facto selling the AdWords service through a French PE. Consequently, the FTA reasoned that the income derived from the AdWords service (charged to French customers via Google Ireland Limited) was attributable to the French PE and was vice versa taxable in France.

Google Ireland Limited's defence focused (mainly) on the definition of a permanent establishment and on one of the conditions contained in the MSA. Under the terms of the MSA Google France SARL did not have the power to formally act on behalf of Google Ireland Limited or to execute any contract or agreement on behalf of Google Ireland Limited.

The decision of the Court

The Paris Administrative Court of Appeal ruled that the business carried on by Google Ireland Limited in France did not constitute a permanent establishment in France. Observing the existing DTAA between France and Ireland, Google France SARL's employees should have the power to act on behalf of Google Ireland Limited vis-à-vis the French clients. This was not the case. The ultimate decision to conclude advertising contracts was made solely by Google Ireland Limited. In addition, the Paris Administrative Court of Appeal argued that Google France SARL did not have the necessary human resources or technical means to enable Google Ireland Limited to carry out the advertising services in France.

Observations

The decisions of the French first-instance Court and the Paris Administrative Court of Appeal should be considered in the context of the international debate on the tax challenges arising from the digitalization of the economy. It is apparent from the facts of the case that user data and user participation are valued significantly by the FTA. Typically, in the existing transfer pricing practice, factors such as the market and the location of consumers, are (typically) not reflected (enough) in the amount of business profits. In this respect and from a conceptual point of view the case is valuable to understand transfer pricing principles in France and the value of demand factors, as represented by sales, markets and the location of consumers.

In addition the Google Ireland Limited case should be considered in light of the ongoing debate on base erosion and profit shifting. Reference is made to Action Plan 7 of the BEPS-project, Article 12 of the Multilateral Instrument (MLI) and in particular the French Zimmer case (2010) and the Spanish Dell case (2016). In the Zimmer and Dell case the French- and Spanish Supreme Court had to determine whether French or Spanish premises (owned by a French / Spanish subsidiary) made it possible for the (non-French/Spanish) parent company to carry out its activities in France/ Spain and thus was at the disposal of the parent company giving rise to a PE in France/Spain. In the Zimmer case the French Supreme Court denied the existence of a PE, opposite to the Spanish Supreme Court in the Dell case where it ruled that a PE was established (although the facts are not similar in these cases). Conceptually this reasoning has also been applied in the Google Ireland Limited case by the FTA.

Takeaways

- In the existing transfer pricing practice, factors such as the market and the location of consumers, are (typically) not reflected (enough) in the amount of business profits. In this respect and although the FTA lost its case it is valuable to understand transfer pricing principles in France and the value of demand factors, as represented by sales, markets and the location of consumers. Conceptually the Google France case aligns with the international debate on the tax challenges arising from the digitalization of the economy.
- The interpretation of the PE concept could be a source of uncertainty for companies. Businesses may have to review and reconsider their existing structures and identify whether or not they align with the facts and circumstances, to prevent them from having a taxable presence in other countries. Reference is made to the position of the FTA that aligns (conceptually) with the French Zimmer case (2010) and the Spanish Dell case (2016).

ABOUT NOVIOTAX

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