



MASTER 2
PROCEDURE ET FISCALITE APPLIQUEES
METZ

TOPICAL ITEM !

NOVEMBER 2020

Conseil d'État, Assemblée, 28th of October 2020, CHARBIT n°428048



Can the tax authority circumvent the application of the guarantee provided for in article 80 A of the Tax Procedures Book by relying on the procedure for repression of abuse of rights derived from the article L. 64 of the same book ?

CE, Ass., 28/10/2020 (n°428048)

« The tax administration can implement the procedure for repression of abuse of rights provided for in article L. 64 of the TPB and circumvent the application of this guarantee mechanism if it establishes, thanks to objective elements, that the situation for which the taxpayer falls into the provisions of the law, in the interpretation given by the Minister in guidance notes or circulars, results from an artificial tax arrangement devoid of any justification and purely designed to avoid taxation »

ABOUT THE FACTS...

In 2010, Mr Charbit has acquired Balmain partnership units that have been sold, months later, to an SCI without any financial substance. The day after the deal, he also sold shares from a company in which he was the CEO to Balmain, generating a capital gain. After the cession, he waited 3 years before recovering the disposal of his securities by taking over the control of the SCI buying all the shares.

The tax administration has considered, after a desk audit of the tax file of the spouses Charbit, that the cession of the shares they detained was only set up to bring their participation in the share capital below 1%. Thus, they could fall into the provisions of the instruction 5 C-1-07 published on the BOI n°10 of the 22 of January 2007, giving more flexibility to the conditions provided for in the tax law in order to benefit from a deduction for the duration of ownership relative to gains on sale.

Consequently, the tax administration decided to ignore, for the purposes of calculating tax liability, the constituent elements of an abuse of rights, following article L.64 of the TPB. In view of the fact that these operations can not be opposed, the tax authority fined the spouses with an extra income tax assessment for the year 2010, backed up by default interests and the 80% penalty provided for in article 1729 of the CGT in order to repress abuses of rights.

TA de Paris, 4th of January 2017

Reject of the application of Mr A trying to reduce his assessment

Mr A appeals in cassation...

CAA de Paris, 20th of December 2018

Reject of the appeal of Mr A against the decision of the TA

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AS A REMINDER...

The provisions laid down in article L. 80 A of the Tax Procedures Book protect a taxpayer from changes in the interpretation given by the tax authority of tax law instruments.



This guarantee mechanism allows a taxpayer to rely on an interpretation of tax law given by the tax authority (as long as its terms are observed), even if the tax authority did not correctly stated the law.

What is the position of the Conseil d'État ?

In the ruling released the 28th of October 2020, the Conseil d'Etat confirms its previous case law (**8th of April 1998**) that says a taxpayer does not have to look for the intention of the tax authority when he applies the administrative doctrine : it only has to apply the letter. Therefore, the tax authority can not oppose to the taxpayer the fact that the interpretation of the tax law upon which it relied exceeded the legal scope that the authority actually intended to adopt.

However, the Conseil d'État will admit that the article L64 of the TPB - basis of the abuse of rights - can be invoked by the tax authority to ignore the taxpayer actions based on the letter of its doctrine. Thus, according to the Conseil d'État, the taxpayer commits an abuse of rights if it applied the letter of an interpretation of the tax law and set up an artificial tax arrangements which are devoid of any justification (objective condition) and purely designed to avoid taxation (subjective condition).



The Conseil d'Etat infers from both of these provisions that the tax authority can sanction a taxpayer who relied upon an interpretation of tax law by setting up an artificial tax arrangement, in order to obtain an advantage. In such situation, the provisions laid down in article 80 A do not apply.

In order to suppress this type of abuse of rights, the tax authority has to establish, **thanks to objective elements, the existence of an artificial tax arrangement.**

By this ruling, using the notion of artificial tax arrangement, the Conseil d'État ensures continuity of its jurisprudence (cf. ruling Verdannet), but also falls within a normative trend that aims to fight against artificial tax arrangements (cf. article 205 A of the General Tax Code in France ; the ATAD 2 directive at European level, or OECD's work at an international level).

KEY POINTS OF THIS RULING...

The tax administration can circumvent the application of the guarantee mechanism provided for by article L80 A of the TPB by implementing the procedure for repression of abuse of rights provided for by article L64 TPB if there is an artificial tax arrangement.

The tax authority can sanction a taxpayer who relied upon an interpretation of tax law by setting up an artificial tax arrangement, and the provisions laid down in Article 80 A do not apply.

However, in order to suppress this type of abuse of rights, the tax authority has to establish, thanks to objective elements, the existence of an artificial tax arrangement.