

Apple - CJEU sets aside 2020 EU General Court decision and gives final judgment confirming Commission Decision that Ireland provided State aid via ‘tax rulings’

On 10 September 2024 the Court of Justice of the EU (CJEU) ruled that the 2020 judgment of the EU General Court (GC) in the Apple State aid case be set aside and gave final judgment, requiring Ireland to recover the State aid from Apple.

According to the CJEU, the GC erroneously misinterpreted the Decision of the European Commission (EC) when it ruled that the EC had not shown to the requisite legal standard that the intellectual property (IP) licenses (and associated profits) had to be attributed to the Irish branches of two non-Irish resident Apple Group entities. Having set aside the GC judgment, the CJEU considered that the state of the proceedings was such that it may give final judgment in the actions by confirming the EC's approach to the allocation of profits – that approach being to compare the activities of the Irish branches of the non-Irish resident Apple Group companies to the activities performed by the head offices of those branches. Under this approach, the ‘tax rulings’ issued by the Irish tax authority were considered by the EC to endorse methods for allocating profits which produce an outcome that separate and standalone undertakings operating under normal market conditions would not have accepted.

Background and facts

- In 2016, the EC issued a Decision finding that Ireland had provided State aid to Apple (Decision). In that Decision the EC concluded that two rulings granted in 1991 and 2007 approving of the method of attribution of profits to the Irish branches of two Irish incorporated, non-resident companies constitute unlawful State aid.
- The companies, although incorporated in Ireland, were not, during the relevant period, tax resident in Ireland or in any other tax jurisdiction. In Ireland, their tax liability was limited to the profit of their Irish branches. Irish tax law was silent as to how the profit attributable to the Irish branches was to be determined.
- The primary points of divergence between Ireland and the EC related to how licences were to be attributed within the companies between the head offices on the one hand and the Irish branches on the other. The ‘tax rulings’ had approved the method of determining the companies tax base proposed by the companies, which entailed the actual allocation of the IP licences (and the greater part of the profits) outside the Irish branches. According to the EC, such attribution of profits reduced the tax liability of the companies, conferring a selective advantage.
- Both Ireland and Apple appealed the EC Decision before the GC. In July 2020, the GC issued its judgment which annulled the EC's decision of 2016. The GC concluded that the EC's line of reasoning was based on *‘erroneous assessments of normal taxation under the Irish tax law applicable in the present instance’*. The GC concluded that the EC had not succeeded in showing that the IP licenses should have been allocated to the Irish branches when determining the profits of the companies in Ireland. As part of that judgment, the GC also concluded that any defects identified by the EC in the rulings or transfer pricing approaches were not, in themselves, sufficient to prove the existence of an advantage for State aid purposes.
- The EC appealed the GC judgment to the CJEU and, on 23 May 2023, the CJEU heard the appeal.
- On 10 September 2024 the CJEU ruled that the 2020 judgment of the GC be set aside and the CJEU gave final judgment, confirming the EC decision that Ireland provided State aid via ‘tax rulings’ and that Ireland must recover the aid from Apple.

Judgment of the CJEU

As part of submissions made before the GC, Ireland argued that the EC incorrectly applied the legislation attributing income to the Irish tax base. It was submitted at the time that the Irish system precludes what was described as an ‘exclusion’ approach. The ‘exclusion’ approach being one that involves the examination of a non-resident company's profits and if those profits cannot be allocated to other parts of that company, then they are to be allocated to the branch. Ireland argued that the

appropriate approach to take when attributing income to branches under the principles of the Irish tax framework is to examine the actual activities of an Irish branch and the value of the activities actually carried out by the branch. The GC accepted this argument and held that the EC allocated profits to the Irish branches using an 'exclusion' approach and that this was incompatible with the Irish tax framework. The GC found that the EC did not attempt to show that the Irish branches had in fact controlled the IP licences, a requirement under Irish tax law, when it concluded that the Irish tax authorities should have allocated the IP licences and the profits therefrom to those branches.

At appeal before the CJEU the EC submitted that it accepted that an 'exclusion' approach is incompatible with the Irish tax framework. However, it argued before the CJEU that it did not apply the 'exclusion' approach in reaching its Decision. The CJEU agreed with the EC and held that the GC erred in law when it concluded, by misinterpreting the Decision at issue, that the EC had adopted an 'exclusion' approach in its primary line of reasoning. That error by the GC was found by the CJEU to vitiate the conclusions reached by the GC that the EC erred, by applying the 'exclusion' approach, when assessing the provisions of Irish tax law relating to the taxation of Irish branches.

In addition, the CJEU held that this error of interpretation of the EC's Decision by the GC also vitiates the grounds of the GC judgment by which the GC criticised the EC's other findings in relation to the normal taxation of profits under Irish tax law, concerning the arm's length principle and the authorised OECD approach.

The CJEU found that instead of adopting the 'exclusion' approach, the EC allocated the IP licenses to the Irish branches by the linking of two separate findings. The first finding of the EC being an absence of functions and risks assumed by the head offices. The second being the multiplicity and centrality of the functions assumed by the branches. In relation to the question of profit allocation, the EC was found to have concluded as it did by taking the view that the profits to be allocated to the branch of a non-resident company must be regarded as the profits that the branch *'would have earned at arm's length, in particular in its dealings with the other parts of the company, if it were a separate and independent enterprise engaged in the same or similar activities under the same or similar conditions, taking into account the assets used, the functions performed and the risks assumed by the company through its branch and through the other parts of the company'*.

In light of this, the CJEU found that the approach followed by the EC was not an 'exclusion' approach in circumstances where the EC approach to concluding, as it did, was that the Irish tax authorities should have compared the functions performed, the assets used and the risks assumed by the companies through their head offices and their Irish branches, respectively.

The CJEU also held that the GC wrongly compared the functions performed by the branches relating to the licences with the functions performed by Apple Inc (the company which ultimately controlled the Irish incorporated, non-resident companies and also entered into a cost sharing agreement with the aforesaid companies) in relation to the Apple Group's IP, rather than with those actually performed by the head offices in connection with those licences. As a result, the CJEU found that the GC's assessment in that the EC erred in finding that the Irish branches of the companies performed 'significant people functions' with respect to the Apple Group's IP was based largely on an examination of functions performed at the level of Apple Inc. The CJEU considered such an examination not to be relevant in the present case, according to its interpretation of Irish law. As a result, the CJEU concluded that functions performed by Apple Inc were erroneously taken into account by the GC when deciding that the EC had failed to demonstrate the existence of an advantage.

Takeaway

The setting aside of the GC decision and giving of final judgment by the CJEU brings matters in this particular case to an end. It remains to be seen what the implications of this judgment are for the other ongoing State aid cases that concern transfer pricing.

Let's talk

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