ARTICLE

GROUP LEAD HOLDING COMPANY: THE COUNCIL OF STATE TAKES A POSITION

Private Equity Private Clients Tax Law | 09/07/18 | Xavier Rohmer

In a June 13, 2018 decision [1], the fully bench of the Council of State defines the concept of a "lead holding company" for the first time.

This concept, which is central to applying a certain number of tax measures [2], has been the subject of numerous questions in recent years due to its vagueness and the resulting legal uncertainty for taxpayers.

The facts leading to the Council of State's decision are as follows:on December 1, 2006, shareholders sold the shares they held in the holding company Cofices, which held an operational subsidiary.They then considered that the capital gains realized in this sale were exempt pursuant to the allowance for the retention period provided by the version in force at the time of the facts of Articles 150-0 D *ter* and 150-0 D *bis* of the French Tax Code.

Pursuant to these measures, the allowance is applicable to sales of shares in a holding company only if the company can be categorized as a "lead holding company".

In this case, the tax authorities rejected the application of the allowance because there was no "lead holding company" agreement between Cofices and its subsidiary.The lower court ruled in the tax authorities' favor, holding that the condition related to the company's activity was not met because the holding company had not, "*actively and continuously participated in conducting the group's policy and in the control of its subsidiaries*" [3].

In a didactic holding, the Council of State overturned the appeals decisions, stating that:

> "*A holding company that has as its principal activity, in addition to managing a portfolio of shareholding, the active participation in conducting the group's policy and in the control of its subsidiaries and, if applicable and purely internally, the provision of specific, administrative, legal, accounting, financial and real estate services, is the lead company of its group.*"

This decision is instructive in several respects:

Theoretically, the definition as laid down by the Council of State restates the criteria laid down by law [4] and administrative doctrine [5]: a holding company which (i) actively participates in conducting the group's policy, (ii) which controls the subsidiaries, and (ii) if applicable, performs services, is a lead holding company.

However, and this is the decision's principal contribution, the Council of State indicates that the activity as the lead company must be exercised as the principal activity.It follows that a holding company may be its group's lead company while owning minority "non-lead" shareholding.

In this respect, the Council of State points out that in this case the subsidiary's market value represented 56.2% of Cofices's total assets.In so doing, the Council of State confirms the fact that the concept of a "principal" activity depends on the relative weight of the "lead" shareholding in relation to the weight of the other assets held by the holding company—it being understood that the analysis of the proportionality of the "principal" nature of the "lead" activity was performed on the basis of the actual value of the assets held by the holding company and not on the basis of the historical value of such assets, as the tax authorities suggested.

In addition, it is of interest to note that the Council of State implicitly disregards any reference to the income made from the holding company's assets in assessing the "principal" nature of the "lead" activity.

From a practical point of view, the Council of State's factual analysis is also replete with lessons.In effect, the Council of State point out that:

- the CEO of the holding company was also CEO of the subsidiary;

- independent persons, specialized in the subsidiary's activity, were on the holding company's board of directors:

- the holding company's corporate purpose expressly provided for its role as the group's lead company;

- the minutes of the holding company's board of directors' meetings showed concrete actions beyond the role of a mere shareholder;

- an assistance agreement for administrative, strategy and development matters stating that the holding company would actively participate in the subsidiary's strategy and development had been signed (and not a lead holding company agreement).

In this respect, it should be noted that the Council of State does not appear to draw any particular conclusions from the fact that the holding company had not concluded a “lead holding company” agreement as such with its operational subsidiary, as the Council of State was instead interested in the effective role the holding company had vis-à-vis its operational subsidiary, precisely as the public rapporteur suggested to it.

Therefore, the Council of State handed down a clear decision replete with information on which the Supreme Court (*Cour de Cassation*), which is competent for the wealth tax, the real estate wealth tax, and transfer duties on donations, should agree.

---

[1] Council of State, 3rd, 8th, 9th, and 10th chambers together, Jun. 13, 2018, nos. 395495, 399121, 399122, and 399124.

[2] Notably for transfer duties on donations (“Dutreil” agreements), the wealth tax/real estate wealth tax, the “Madelin” tax reduction and the allowance applicable to executives selling their company.

[3] Nantes Administrative Court of Appeal, Oct. 22, 2015, no. 14NT00291; Paris Administrative Court of Appeal, Feb. 25, 2016, nos. 14PA01391, 15PA01104 and 14PA00515.

[4] For example, for the real estate wealth tax:Article 966 of the French Tax Code.

[5] For example, for “Dutreil” agreements:BOI-ENR-DMTG-10-20-40-10, no. 50.
