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NOTE

From:	Presidency
To:	Working Party on Tax Questions (Direct Taxation)
Subject:	Proposal for a COUNCIL DIRECTIVE laying down rules to prevent the misuse of shell entities for tax purposes and amending Directive 2011/16/EU - Presidency paper on the rebuttal of the presumption

In view of the meeting of the Working Party on Tax Questions on 5 September 2023, delegations will find attached the abovementioned Presidency paper.

Unshell proposal

Presidency paper on rebuttal

WPTQ 5 September 2023

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The purpose of this Presidency paper is to explain the rationale behind the rebuttal of the presumption (Article 9) as it appears in the Presidency compromise text, and more precisely the logic behind the following provision: *"**If, within six months from the request, the competent authority of the Member State of the entity has not issued a notice, the request for rebuttal of the presumption shall be deemed to have been rejected**."* (second subparagraph of Article 9(2)).

In most cases the general principle in administrative law is positive administrative silence, i.e. in the lack of an explicit notice by the administration, the interested person´s request is deemed to have been accepted.

However, there are certain cases in which, in order to achieve the objectives pursued by certain laws, it is necessary that the effect of the lack of a decision by the Administration within the established period is the opposite, i.e. the interested person´s request must be deemed to have been rejected.

The Unshell Directive foresees a rebuttal procedure for those entities which are presumed to be shell entities according to Article 6(2). These entities are entities in the scope of the Directive (therefore above the thresholds established in Article 2a, which obtain passive income mainly from outside their State, that have no effective administrators, and mainly they do not have premises, bank account, employees, or whose board of directors does not meet in their State. These are manifest cases of entities that are presumed to be shell entities, and in most cases, they will be finally considered as shell entities at the end of the rebuttal procedure. Thus, the deemed rejection of the request after a period of six months is believed to be a proportionate measure.

Some Member States have stated their preference to not include a specific effect in case of not issuing a specific notice after the period of six months, therefore to leave it to be treated by domestic rules of each Member State. In such a case, we would have to bear in mind that the CJEU has stated that, while EU law in no way precludes the Member States' establishing rules on implicit acceptance or authorization, such rules must nevertheless not impair the effectiveness of EU law. (Judgment of 27 June 2018 (Case C-246/17)).

Additionally, CJEU has stated that the negative silence system, in some matters, and with the aim to ensure legal certainty in the event that the authority responsible for ruling on an application does not take an express decision within the established period, would not infringe EU law. On the contrary, failure to act would constitute an implied decision rejecting the application, thus enabling the party which made that application to apply to the courts (for instance Judgment of 24 March 2011 (C 400/8)).

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The presumption that the request for the rebuttal is deemed to have been rejected is necessary not only to achieve the aims of this Directive, but also to ensure the legal certainty of the taxpayers. This presumption allows the entities to present the appropriate appeals before the administrative / judicial courts. This will be a guarantee for entities in certain situations in which, due to the administrative burden, it is not possible to issue an explicit decision within the established timeframe, since in these situations they will be able to present the appeals they consider appropriate.

The existence of this presumption does not affect the general rule of administrative law of the obligation for the Administration to decide on administrative procedures. The general rule in administrative procedures is still that a decision by the Administration is required. The end of the six months period for resolving the rebuttal procedure will mean that the request is deemed to be rejected, without prejudice to the Administration's obligation to expressly resolve the request for the rebuttal. In the same vein, in the event of an appeal before an administrative / judicial court, the obligation of the Administration to decide on the request for the rebuttal does not disappear either. The explicit decision of the Administration after the six months period will have binding effects, and in the event that the rebuttal is accepted, the effects of the rejection of the request will be reversed.

Please find below an example to see how it would work in practice:

An entity that meets the criteria set out in Article 6(2) of this Directive will communicate to the Tax Administration that it is presumed to be a shell entity. At the same time, if this entity considers itself to be genuine in the sense that it has valid commercial reasons which reflect economic reality according to Article 9, the entity will request for the rebuttal of this presumption. If the request is presented on July, 1 2026, the Administration will have to decide by January, 1 2027. If by that date such a notice is not issued, the request for the rebuttal will be deemed rejected and the entity will be considered a shell entity, for the time being, while there is no explicit decision by the Tax Administration. It will mean that Tax Administrations will proceed with the exchange of information in accordance with Article 13, Article 11 tax consequences will be triggered and in case the entity request a tax certificate, it will contain the mention of being a shell.

From this date on, the entity could present an appeal before an administrative / judicial court against this deemed decision of the Administration. If, for example, on May, 1 2027, the Administration issues an explicit decision accepting the request of the rebuttal, the situation presumed on January, 1 2027 will be overrun and the entity will no longer be considered a shell entity. The taxpayer will be able to request a tax certificate with no mention of shell. In addition, the taxpayer will have the right to request the refund of surplus withholding tax that may have been paid in the meantime.

The Presidency concludes that the proposal is a reasonable measure to guarantee the achievement of the objectives of this Directive. It is necessary to establish a period (six months) for taking a decision on whether an entity is a shell entity or not, but it is also necessary that the lack of a decision does not undermine the objectives of this Directive and ensures the right of the taxpayers to legal certainty in their relations with the Administration. These are the reasons why there must be a presumption that if a decision is not taken within the six months period, the request should be considered rejected.

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