

Distributors and agents: legal status makes the difference

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The recent decision of the French tax supreme court (CE 04.10.2019, n°418817, SAS Piaggio France), which ruled on the transfer of clientele upon the conversion of a distributor into a mere agent, is of special interest considering the recent publication of the ordinance on the disclosure of tax schemes. Said ordinance considers that transfers of hard to value intangibles between related parties are likely to be viewed as aggressive tax planning to be disclosed to tax authorities.

The case is referring to a topical group restructuring strategy, whereby full fledged distributors, who buy products from related parties and distribute them to their clients, convert into mere commercial agents. Considering that agents who, as pure intermediaries, are contracting sales in the name and on behalf of the principal, it could be argued that the clientele is transferred upon the change in status from distributor to agent.

In the case presently analyzed, French tax authorities sustained that the clientele owned by the distributor was necessarily transferred to the principal and that such transfer should have been carried out for consideration. The main contribution the French tax supreme court resides in the application to principles set by the commercial law that differentiate the distributor, who owns its clientele, from the agent who does not. The taxpayer answered with economic rather than legal arguments, arguing that, considering the high recognition of the Piaggio trademark owned by a foreign related party, the clientele was necessarily owned by the owner of the legal title of the trademark, that the protection granted to the agent was more advantageous, namely, payment of indemnities in case of the termination of the agency agreement and lower exposure to business contingencies,.

The administrative court of appeal of Versailles (CAA Versailles 30.01.2018 n° 15VE02906 and 16VE02158, SAS Piaggio France), after claims made by the tax payer against the tax administration were rejected by the lower court, gave right to the tax payer and cancelled the tax reassessments notified by the tax administration on that ground. According to the court's judgement the tax administration did not support its assessment that the change in the distribution agreement resulted in a transfer of the clientele for no consideration.

The Court of Versailles did not follow the conclusions of the general attorney who had adopted a legal approach in order to conclude for the existence of a transfer of clientele. As a matter of fact, the court decision was quite surprising and somewhat confusing. When cancelling the court of appeal's decision and asking it to revisit its judgement, the tax supreme court very clearly confirms the preeminence of the legal approach in the determination of the potential transfer of clientele. Therefore its decision adopts the approach of precedents that, still as a result of the legal analysis of the changes in the status of distributors, did not recognize the transfer of clientele as a result of the conversion of a distributor in a "commissionaire", an opaque intermediary, which remains the legal owner of its own clientele (CAA Paris 31.12.2012 n°10PA00748 Sopebsa).

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