

Private Clients: Overview of recent case law

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Introduction

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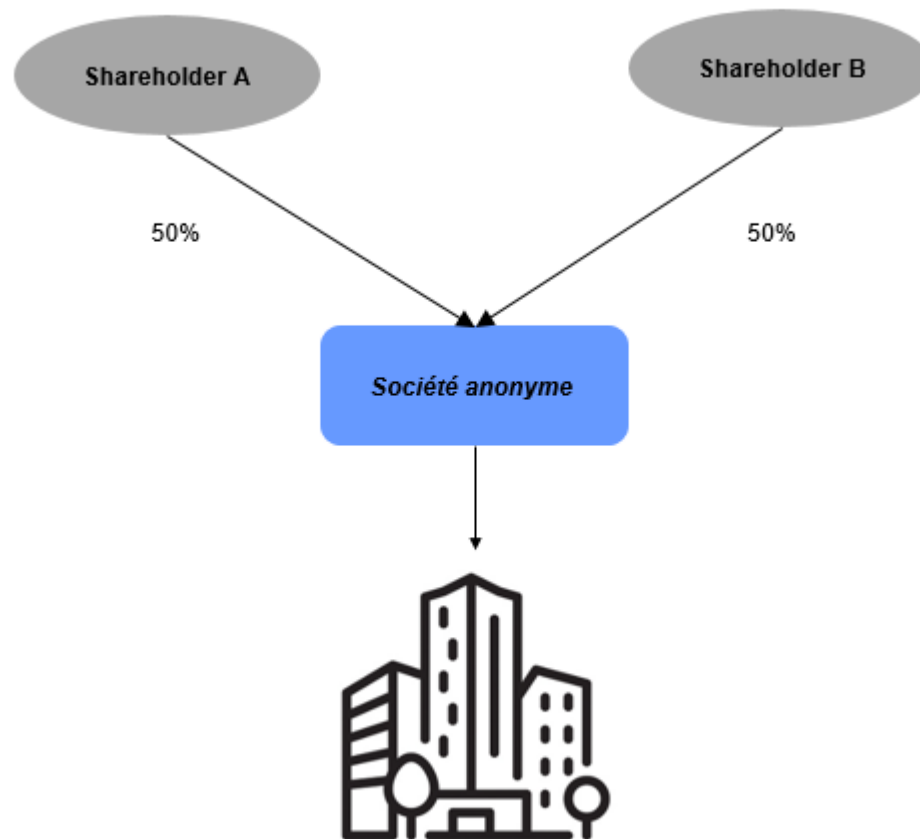


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Agenda

- Judicial appointment of a liquidator in the context of a voluntary liquidation
- Revocation of wills / liberal intent for manual donations
- Abuse of law / hidden dividend distribution

1/ Corporate law case law



■ **Art. 480-2.**

In the absence of stricter provisions in the articles of association, if as a result of a loss, the net assets are reduced to an amount less than half of the company's capital, the board of directors or the management board, as the case may be, shall convene a general meeting to be held within a period not exceeding two months from the time at which the loss was or should have been recorded by them; such general meeting shall deliberate, as the case may be, in accordance with the conditions set forth in Article 450-3 on the possible dissolution of the company and possibly on other measures announced on the agenda.

[***]

The same rules shall be observed if, as a result of the loss, the net assets are reduced to an amount lower than one quarter of the company's capital, but in this case the dissolution will take place if it is approved by one quarter of the votes cast at the meeting.

■ **Art. 1100-3.**

If no liquidators are appointed, the managing shareholders in unlimited companies or partnerships, the managers in private limited companies and the directors or members of the management board, as the case may be, in public limited companies and in cooperatives shall be considered to be liquidators vis-à-vis third parties.

Tribunal d'Arrondissement (Vle Chambre), 26 May 2011, not published:
Tribunal d'Arrondissement (Vle Chambre), 8 December 2011, not published:

- A 50/50 participation in a company may be highly problematic if not properly planned;
- Approval of accounts is not a condition for application of article 480-2 (former article 100) of the law of 10 August 1915 on commercial companies, as amended;
- In case no liquidator is appointed by the general meeting of shareholders, the managers / directors of the company shall act as the liquidator;
- Courts are reluctant to interfere in the life of a company when situation is not completely blocked.

2/ Civil law

District Court of Luxembourg, XI^e Chamber, 16 May 2012, docket number 137502

Court of Appeal, 21st November 2013, docket number 39045

Cour de Cassation, 5th July 2018, docket number 77/2018, Pas., Tome 39, p. 131 et seq.

Article 1035 of the Civil Code :

A will may only be revoked, in whole or in part, by a subsequent will or by a notarial deed declaring the change of the last wishes.

Article 980, 1st paragraph, of the Civil Code :

Instruments that revoke an authentic will must be drawn up and signed by two notaries, or by a notary accompanied by two witnesses.

- **The revocation of an authentic will may take place by the subsequent drafting of another will, whatever the form of this new will.**

**Court of Appeal,
21st March 2018,**
docket number 88/2019

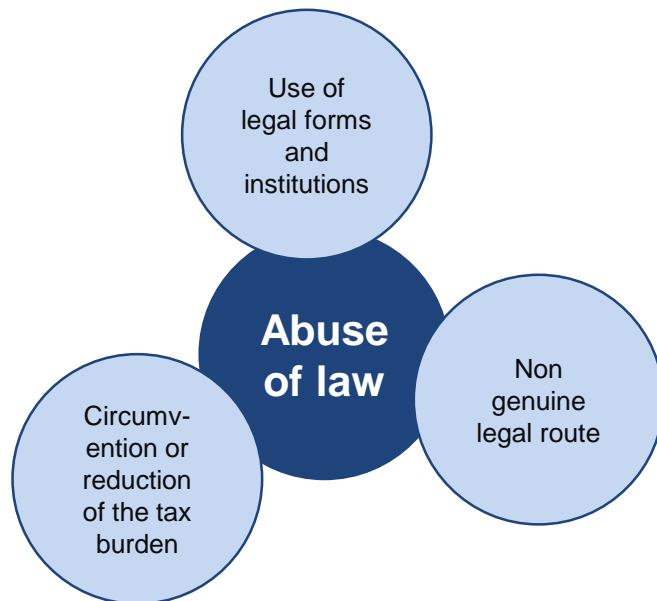
**Cour de
Cassation, 23rd
May 2019,** docket
number 88/2019, Pas.,
Tome 39, p. 372 et seq

Article 2279, 1st paragraph, of the Civil Code :
In the case of movables, possession is equivalent to title

- A bank transfer alone is not sufficient to characterise a manual donation, if contested by the alleged beneficiary ;
- The person who invokes the manual donation must prove the material element and the liberal intent of the donor.

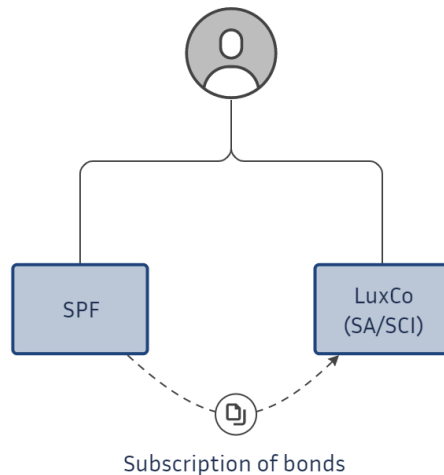
3/ Tax case law: abuse of law – general principle

- §6 al1 of the adaptation law dated 16 October 1934 (such as amended by the law of 21 December 2018 implementing ATAD I):



- The tax law may not be circumvented by an **abuse of legal forms and institutions**. There is an abuse of law if the legal route, which having been used for the main purpose or one of the main purposes of **circumventing or reducing tax** contrary to the object or purpose of the tax law, is **not genuine** having regard to all relevant facts and circumstances. An arrangement may comprise more than one step or part. An arrangement or a series of arrangements are regarded as non-genuine to the extent that they are **not put in place for valid commercial reasons** which reflect economic reality.

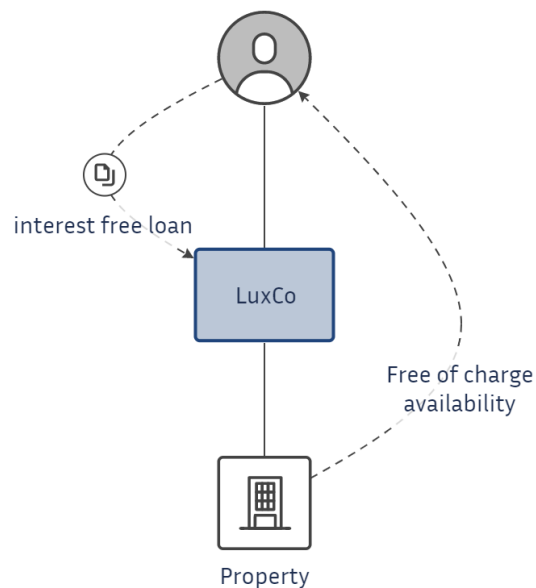
3/ Tax case law: abuse of law – CA, 14 July 2020, N° 43929C



Key take aways:

- SPF can subscribe to bonds, except if they are in fact similar to ordinary loans due to:
 - (i) absence of the collective nature of the bonds (e.g. a single creditor);
 - (ii) absence of the negotiability of the bonds (e.g. shareholders of creditor and debtor are same person making transfers to third parties illusory).
 - SCI cannot issue bonds.
 - Conditions of an abuse of law:
 - *Use of legal forms and institutions*: set-up of several entities (i.e. legal institutions) owned by the same shareholders.
 - *Circumvention or reduction of the tax burden*: deferral of taxation in order to realize tax savings though the use of a SPF, which is exempt from CIT, MBT and IF.
 - *Non genuine legal route*: financing in contradiction to the intention of the legislator (use of bonds in order to circumvent the actual use of an ordinary loan) and absence of a non fiscal purpose justifying the set-up of the structure.
- Non deductibility of the interest at the level of LuxCo.

3/ Tax case law: hidden dividend distribution – CA, 11 March 2021, N° 44908C



Key take aways:

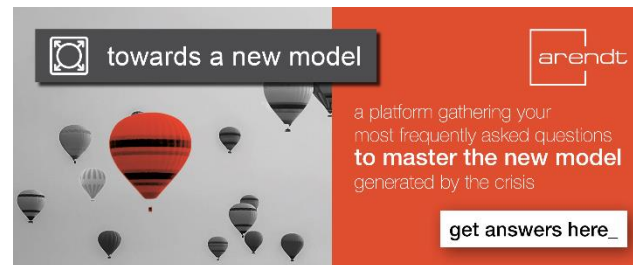
- The burden of proof in relation to a hidden dividend distribution:
 1. The burden of proof rests with the tax administration via an impartial and objective review of the tax returns and identification of items that appear questionable without having to bring a justification.
 2. Reversal of the burden of proof: taxpayer must prove that there is no reduction in profit or that it is economically justified and not only motivated by the shareholding link.

- Conditions of a hidden dividend distribution:
 - *granting of an advantage*: rental of a property by LuxCo free of charge;
 - *to a direct or indirect shareholder of a company, which would not have received such advantage without the shareholding link*: shareholder of LuxCo by reason of its participation in LuxCo;
 - *without effective consideration*: the free provision of the apartment is compensated by the waiver of the interest under the loan.

- No hidden dividend distribution in the case at hand.



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