Applicability of the principles of the CJEU’s Cadbury Schweppes verdict dated 12 September 2006 C-196/04 in terms of German controlled foreign corporation tax rules

The point of dispute pertained to the issue of whether the prerequisites for the addition of passive income have been fulfilled in accordance with the German controlled foreign corporation tax rules (Foreign Transaction Tax Act).

In fiscal year 2007, the plaintiff and appellant (plaintiff), who is unconditionally taxable in Germany, held a stake of 100% in B B.V. (which is located in the Netherlands), which in turn held a stake of 100% in C Ltd., which is located in Cyprus. The plaintiff informed the defendant and the appellee (the finance authorities) that C Ltd. only earned passive income from licence fees.

The plaintiff referred to the verdict that was issued by the Court of Justice of the European Union - previously: European Court of Justice - (CJEU) in the case of Cadbury Schweppes and which was dated 12 September 2006 C-196/04 (EU:C:2006:544, 2006 collection, I-7995), and claimed that the application of the controlled foreign corporation tax rules would be ruled out on account of the fact that C Ltd. is located in Cyprus, which is a member state of the European Union.

During the appeal proceedings, the Federal Finance Court (BFH) confirmed its previous case law and decreed that the legal principles of the CJEU’s Cadbury Schweppes verdict would also apply to the dispute in question. The fact that the primary law of the EU and the union-law-related fundamental freedoms enjoys primacy of application that supersedes national law should also be considered with regard to the tax burdens associated with the German controlled foreign corporation tax rules.

According to the BFH, the prerequisites of an ‘actual economic activity’ of C Ltd. in its country of residence had, as so-called counter-evidence, been fulfilled. The delimitation of the fundamental freedoms did not necessitate any further explanation.