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Maximum imputation credit for foreign tax is amount paid

The ECJ has held that the foreign tax imputation credit on a dividend received from abroad is the lower of the corporation tax shown to have been paid abroad and the income tax due on the dividend by recipient.

Up to the calendar year 2001 dividends were taxed on an imputation system, whereby the dividend received by the shareholder was grossed-up with the corporation tax paid by the company making the distribution. The grossed-up amount was then subject to income or corporation tax at the shareholder's overall rate, with a credit of the gross-up amount being given against the tax due. The ultimate effect was to tax corporate earnings at the rate borne by the final, natural person shareholder recipient. Foreign dividends were excluded from the imputation mechanism and were therefore effectively taxed twice - the foreign corporation tax on the earnings of the company and the German income tax on the after-tax dividend from abroad. In a first case brought by the heirs of a Herr Meilicke, the ECJ held that this double taxation of foreign dividends was a restriction on the free movement of capital, incompatible with community law (Case 292/04 *Meilicke* judgment of March 6, 2007). However, it did not rule on the calculation of the imputation credit from a foreign tax system or on the required evidence of payment of the foreign corporation tax, given that a foreign company would be unable to meet the documentation formality specified by the Income Tax Act and based on the German administrative system. The ECJ has now addressed these points in a second *Meilicke* judgment.

The court has now held that the amount of the credit must be the lower of the amount of corporation tax actually paid by the foreign company on the income from which the dividend was paid and the amount of German income tax due on the dividend by the resident shareholder. Anything else would give the shareholder an unfair advantage over the recipient of a domestic dividend, or would force the government to refund a corporation tax excess paid abroad (where the foreign corporation tax rate is higher than the income tax burden on the domestic shareholder). Both amounts are to be calculated exactly and are not open to estimate or presumption. The calculation of the foreign tax is to be supported by conclusive evidence of payment, with any uncertainty going to the disadvantage of the taxpayer. In particular, the shareholder's tax office cannot be required to make, or accept, an estimate of the foreign corporation tax due, or to clarify the situation of the paying company abroad through the mechanism of the Mutual Assistance Directive. On the other hand, the tax office must accept objective evidence and cannot fall back on a formal requirement that a foreign company could not meet by definition (here the form of certificate to be issued by the dividend payer, showing the gross dividend to the recipient and the uplift factor). In the same vein, the ECJ has also vetoed an amendment to the Tax Management Act passed shortly after lodgement of the first *Meilicke* case with the ECJ. This amendment removed the late submission of certificates or confirmations from the definition of a subsequent event as a basis for re-opening a tax assessment. Its effect was immediate and it would therefore have excluded most resident shareholders in foreign companies from the retrospective benefits of a favourable *Meilicke* judgment. It is now for the national court to determine and apply a reasonable changeover period.

The ECJ case reference is C-262/09 *Meilicke*, judgment of June 30, 2011.

Schlagwörter

Foreign Taxes Act, Meilicke, foreign dividend, imputation