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Imputation credit for foreign corporation tax refused

Despite apparently favourable ECJ judgments, the Supreme Tax Court has once again refused a taxpayer credit for the foreign corporation tax due on a dividend received during the currency of the old, imputation tax System.

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Up to 2000, shareholders taxed their dividend income under the “imputation system”. Their dividend received was grossed up with the corporation tax borne by the company and the resulting income tax due was then reduced by the corporation tax gross-up amount as though it were a prepayment. This system was protected by extensive documentation rules and other formalities. Foreign dividends were outside it; a foreign dividend was exempt for a company but taxable on its nominal amount in the hands of a natural person. That natural person received no credit for any corporation tax paid by the distributing company and was thus effectively taxed twice, once through the company and once in his own name as an income tax payer. The heirs of a German resident with Dutch and Danish dividend income in 1995-7 saw this as discrimination against those receiving dividends from other EU countries and turned to the courts for redress. In the meantime, the ECJ has ruled twice on the matter (*Meilicke I* C-292/04 of March 6, 2007 and *Meilicke II* C-262/09 of June 30 2011), holding the discrimination to be a restriction on the taxpayer’s freedom of capital movement but making his rights conditional on heavy burdens of documentation.

The latest judgment in the case is the rejection by the Supreme Tax Court of an appeal against the lower tax court’s refusal to grant imputation relief for the Dutch and Danish corporation tax paid for lack of documentation of the amounts. In summary, the Supreme Tax Court made two points: an imputation credit for foreign corporation tax presupposed the income to have been grossed up with the relevant amount, and that the documentation submitted was clearly inadequate. The gross-up would equate the foreign and German income, but would presuppose revising the computation of taxable income in the assessment. Whether this was still possible was not clear from the judgment, but even if it were, it would be a matter for the tax office and then the lower tax court. On the documentation issue, the Supreme Tax Court was less than concrete; more was needed that a purely theoretical calculation based on the statutory rate of corporation tax in the foreign country concerned, although it would not be necessary to prove actual payment of the foreign tax due. Also the documentation – to be obtained from the foreign company – need not follow German forms, although it should meet the German requirements in substance. Deficiencies went to the burden of the taxpayer.

Further developments are to be expected.

Supreme Tax Court judgment I R 69/12 of January 15, 2015 published on June 10

Schlagwörter

Foreign Taxes Act, imputation, imputation system