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By PwC Deutschland | 17. Mai 2026

Profits distributed after commencement of liquidation not subject to withholding tax

With regard to the refund of withholding tax on profit distributions made by a domestic subsidiary to its EU parent company, the Supreme Tax Court decided that these distributions are not excluded from the tax relief under the EU Parent-Subsidiary Directive if they relate to profits that, although distributed after the commencement of the subsidiary's liquidation, were generated prior to the opening of the liquidation proceedings.

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It follows from the decision that withholding taxes withheld and remitted on such profit distributions must be refunded in full. The decision is based on an interpretation of Section 43b (1) Sentence 4 Income Tax Act (ITA) that is consistent with the Parent-Subsidiary Directive (PSD) and contributes to legal clarity in cross-border corporate structures, the Supreme Tax Court said in a recent press release on this matter.

Background

The plaintiff, a Société Anonyme with its registered office in Luxembourg, was the sole shareholder of a GmbH (limited liability company) domiciled in Germany. The GmbH was dissolved as of 31 December 2010 and subsequently went into liquidation. On 20 October 2015, it was removed from the commercial register. The plaintiff asked the Federal Central Tax Office (FCTO) to issue an exemption notice and refund the German withholding tax on capital investment income including income from a profit distribution from the GmbH. This distribution was exclusively from current profits generated during GmbH's active period prior to the commencement of liquidation proceedings.

The FCTO saw the distribution "in connection with the liquidation" and granted an exemption and refund except for the withholding tax provided for in the double tax agreement with Luxembourg (DTA) which at the time had been 10% of the investment income. The tax court of first instance upheld the appeal and required the FCTO to grant full exemption and refund of the withholding taxes.

Decision

The appeal filed by the FCTO against this decision failed. The Supreme Tax Court upheld the lower tax court's ruling. Notwithstanding the provisions of the DTA, the plaintiff is entitled to full exemption and reimbursement of the withholding taxes withheld and remitted.

Section 43b (1) Sentence 4 ITA does not prevent this. Under this provision, exemption from dividend withholding tax does not apply to investment income flowing in connection of the liquidation or restructuring of a subsidiary. To ensure compliance with EU law, the provision must be interpreted in accordance with the directive and not applied if, after the commencement of liquidation, the domestic subsidiary distributes profits to its EU parent company that were generated prior to the opening of the liquidation proceedings.

In the opinion of the Supreme Tax Court, this follows clearly and unambiguously from the national tax system in liquidation cases: Section 11 (4) Sentence 3 of the Corporation Tax Act explicitly provides that profits earned prior to liquidation but distributed during the winding-up period are not allocated to the winding-up phase but rather to the preceding years.

Source: Supreme Tax Court, judgment of 3 March 2026 (VIII R 8/24) published on 15 May 2026.

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Schlagwörter

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