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By PwC Deutschland | 17 January 2011

Corporation tax imputation credit – round two

An ECJ advocate general has suggested the court give rather general guidance on the calculation and verification of the creditable corporation tax underlying a dividend from another EU country.

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Up to 2000 corporation tax was levied on an imputation system of taxing the grossed up amounts of dividends received but granting a tax credit in the amount of the gross-up factor. This was equal to the corporation tax borne by the dividend payer on the profit distributed. The objective was to ensure that business income was taxed once and once only – ultimately at the personal income tax rate of the natural person shareholder – no matter through how many hands it passed before reaching its final destination. The system was, however, national in that it excluded foreign source dividends (and, for that matter, foreign shareholders) from the tax credit. A German resident shareholder of a foreign company was thus effectively taxed twice on his dividend, once through the corporation tax paid by the company on its net result, and a second time through the German corporation or income tax on his dividend receipt. The ECJ held this double incidence of taxation from the failure to relieve the foreign tax borne to be contrary to community law, at least in respect of dividends from elsewhere within the EU, but did not give guidance on how the relief might be calculated or verified (case C-292/04 *Meilicke* judgment of March 6, 2007). The referring court has now requested this guidance.

The advocate general on the case has suggested the court rule that the imputation credit to be granted on an EU dividend should be the lower of the foreign corporation tax actually borne by the company on the profits distributed, but no higher that the German domestic gross-up factor of 3/7 ths. If the foreign corporation tax is higher than its German counterpart, the difference will go unrelieved, but this, in the view of the advocate general, is acceptable, partly because there is no guarantee that a move within the EU will be fiscally neutral, and partly because Germany cannot be required to credit a tax that she would not herself have charged.

The opinion now published is far less specific in respect of the calculation and demonstration of the amount of the credit. The German system at the time required a tax certificate issued by the dividend paying company as conclusive, but also as the only, evidence of the underlying tax borne and now to be credited to the shareholder. Unfortunately albeit unsurprisingly, the certificate was designed around the (complicated) German system of corporation tax calculation, and most companies from other countries will be unable to issue it for lack of the requisite records including those necessary to trace tax-free income. Here, the advocate general contents herself with the conclusion that a foreign dividend recipient should follow the domestic system, unless to do so would make it impossible or excessively difficult to obtain the relief sought. She goes on to add that a court has basically no power to estimate amounts if it does not have the same power in respect of domestic dividends. On the other hand she opines against insistence on the formality of the certificate in the face of other evidence of the tax borne. Finally, she addresses a specific problem of German procedure. A final assessment can only be reopened in particular circumstances, one of which is a subsequent event revealing a previously existing condition. Shortly after the first *Meilicke* case was filed, the law was changed to disqualify certificates and confirmations issued in retrospect as subsequent events. The advocate general would now have that this change offends against community law inasmuch as it was introduced without a reasonable period of notice – she suggests at least twelve months – to enable those who might need them to obtain certificates from abroad.

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The ECJ case reference is C-262/09 *Meilicke* opinion of January 13, 2011.

Keywords

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