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Foreign corporate shareholder has claim on refund of dividend withholding tax

The Supreme Tax Court has followed an ECJ case in holding that a foreign corporate shareholder may claim from the local tax office a refund of the tax deducted at source from its dividend.

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A GmbH paid a dividend to its sole shareholder, a French company in the legal form of a *société par actions simplifiée* – SAS. It deducted withholding tax at the 5% treaty rate for dividends to other corporations as, at the time, the SAS had not yet been included in the annex to the EU Parent/Subsidiary Directive or in the corresponding provisions of national law. However, there was and is no doubt that the SAS is a corporation entitled to treaty relief.

In the meantime, the ECJ has held that the German withholding tax on dividends paid to other corporations abroad is an infringement of the freedom of capital movement, because a German corporation will always receive a full credit or refund of the tax deducted at source, whereas a foreign recipient will never do so from Germany and will only do so in the home country if the dividend income is subject to tax there at a higher rate (case C-284/09 *Commission v. Germany*, judgment of October 20, 2011). The Supreme Tax Court has followed this judgment in the present case, holding that the foreign dividend recipient corporation must be treated in the same way as a domestic entity. Accordingly, it cannot claim refund or exemption from the Central Tax Office as though it fell under the Parent/Subsidiary Directive, but can turn to the locally competent tax office for a refund after the event.

Supreme Tax Court judgment I R 25/10 of January 11, 2012 published on April 11

Keywords

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