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By PwC Deutschland | 09 October 2012

Brazilian interest on share capital is dividend in Germany

The Supreme Tax Court has held the tax deductible interest on share capital under Brazilian law to rank as dividend income in Germany.

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Within certain limits, Brazilian law allows the shareholders in general meeting to resolve a payment of interest on share capital to the shareholders as an alternative, or in addition, to a regular dividend. If the limits are adhered to, the payment is deductible for the company as an interest expense. It is paid out net of a final-burden withholding tax of 15%. A German corporate shareholder claimed exemption of such a payment in Germany on the grounds that it should be treated as a dividend, falling, in this case, under the treaty exemption for dividends on significant shareholdings. The tax office argued that it should be taxed as interest income.

The Supreme Tax Court has now held the payment to be a dividend. It was resolved from time to time by the shareholders acting as such. Despite its Brazilian classification as interest, it was not a payment for the provision of capital by way of loan and the shareholders as recipients had no claim to its repetition in future years. In any case, it could only be resolved if the company had sufficient earnings to cover it. As a payment to the shareholders other than a repayment of capital, it could only be seen in Germany as a dividend and should be taxed, or exempted, as such. Its legal status in Brazil was irrelevant to German taxation. The Brazilian tax deduction by the company as an interest expense was also irrelevant to the German dividend treatment for the shareholder, there being no treaty requirement for consistent effects on both parties. The German switch-over for the prevention of “white” (ultimately entirely untaxed) income also did not come into play, as the withholding tax deduction was not a consequence of a treaty relief, but of a Brazilian legal provision applied in its own right.

The double tax treaty with Brazil ceased to apply as of January 1, 2006.

Supreme Tax Court judgment I R 6, 8/11 of June 6, 2012 published on September 19

Keywords

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