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By PwC Deutschland | 18 February 2015

Dividend to controlling shareholder taxable on resolution

The Supreme Tax Court has held that a dividend payable by a solvent subsidiary to its shareholder with a controlling interest is generally taxable income for the latter on the date of the resolution regardless of a resolution for a later date of payment.

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A GmbH resolved in November an interim dividend for the year with a payment date in the following January. The tax office for the main shareholder – with an 81% controlling interest – ignored the later repayment date of the resolution and assessed him to income tax on the dividend income in the year of the resolution. The Supreme Tax Court followed this interpretation of the law in its confirmation of previous rulings to the effect that a shareholder with a controlling interest would generally be able to demand at will payment of a dividend due and must therefore be seen as being able to dispose over the income as of the date of the resolution. The two exceptions to this general principle were where the company would be currently unable to meet a dividend claim for lack of funds, or where it was precluded from doing so by a provision in its statutes. The court went on to hold that the same principle applied down the chain. Thus the company was still to be regarded as “solvent” in this context where its ability to pay the dividend resolved depended on receipt of a larger dividend from a cash-rich subsidiary held as to 97.5%. This latter dividend had been resolved two months previously, but with the same January payment date. As the nearly sole shareholder, the company would be able to force earlier payment as needed to meet an earlier claim for payment by its own controlling interest shareholder.

This ruling contrasts with the withholding tax provisions. Dividend withholding tax is due by reference to the dividend payment date set in the resolution, regardless of the level of the shareholding. This follows from an explicit provision in the withholding tax rules and cannot be extended to the point in time of the deemed income realisation by the controlling shareholder.

Supreme Tax Court judgment VIII R 2/12 of December 2, 2014 published on February 18, 2015

Keywords

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