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By PwC Deutschland | 05 September 2021

Distributions from Luxembourg investment company (SICAV) exempt from German income tax

Corporations with at least a 25% share in a Société d'investissement à capital variable (SICAV), a Luxembourg investment company, do not have to pay income tax in Germany on the dividends received from the SICAV in 2010. This also applies if the Luxembourg tax authorities – for whatever reason - did not exercise their right of taxation at source and the distributions hence remained untaxed.

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Background

The plaintiff, a German limited liability company (GmbH), held almost all the shares in a Luxembourg SICAV. The SICAV is a special form of stock corporation comparable to the German investment stock corporation with variable capital. The double tax agreement (DTA) between Germany and Luxembourg from 1958 (which was in force in 2010, the year of dispute), provided that relief for dividends on significant holdings, i. e. dividends paid by a corporation to another corporation, is granted if the shareholding is at least 25%. Luxembourg, as the country of residence of the SICAV, had the right to tax the dividends at source at a flat rate. However, Luxembourg did not exercise this right in the case of the SICAV.

Whilst the plaintiff treated the distributions received from the SICAV in 2010 as tax-exempt, the tax office did not consider the intercompany dividend privilege under the tax treaty as being applicable in the case of dispute. Instead, it treated the distributions as investment income, which had to be determined in accordance with the Investment Tax Act of 2003 and was therefore to be included in the German tax assessment base.

Decision

The Supreme Tax Court took a different view. The fact that Luxembourg had not exercised its right to tax the SICAV's distributions did not alter Germany's waiver of its right to tax under the double tax treaty.

The SICAV is a corporation within the meaning of Article 20(2) sentence 3 DTA. In the absence of an explicit definition or other references in the 1958 tax treaty, the definition whether a corporation exists is subject to the interpretation of Germany as the country applying the treaty in the case of dispute. As far as foreign companies are concerned, it needs to be determined, when applying a comparison of types, if they corresponded to a German corporation. The Supreme Tax Court found that the SICAV, as a special type of stock corporation with variable capital, is a corporation within the meaning of Section 1(1) No.1 Corporation Tax Act (CTA). In contrast, the tax office argued that the SICAV fell within the scope of Sec. 1(1) No. 4 CTA (“other legal persons of private law”).

The current decision of the Supreme Tax Court concerns the year 2010 and in this respect still relates to the old DTA from 1958. In the meantime, Germany and Luxembourg have concluded a new DTA, which has been in force since 2014. This agreement contains a subject-to-tax clause, where income from Luxembourg is only tax-exempt in Germany if actually taxed in Luxembourg.

Source:

Supreme Tax Court decision of 15 March 2021 (case ref.: I R 61/17), published on 2 September 2021.

Keywords

SICAV, intercompany dividend privilege