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By PwC Deutschland | 25 March 2022

Documentation requirements for refund of withholding tax on portfolio dividends of foreign shareholders in breach of EU law?

In his Opinion of 20 January 2022, the Advocate General (AG) suggests to the European Court of Justice (ECJ) that Germany's requirements for withholding tax claims filed by non-resident corporate taxpayers with seat or place of management in the EU or EEA are too strict in two respects and thus in violation of Article 63 TFEU on the free movement of capital.

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In response to the ECJ decision in the case *Commission vs. Germany* (C-284/09), the German legislator in 2013 introduced a law according to which non-resident corporate income taxpayers whose shareholding in the distributing German company is too small to benefit from the Parent-Subsidiary Directive (i.e., below 10%) can claim a withholding tax reduction to 0% if the requirements of the new procedural rules are met.

In summary, the AG confirms the doubts raised in a referral by the Regional Tax Court of Cologne as to the compatibility of the German provisions with EU law and sees an infringement of Article 63 TFEU on the free movement of capital, since said documentation is not required from a company domiciled in Germany for the purpose of reimbursement of capital gains tax in the case of the same amount of shareholding. This difference in treatment can only be justified if it either concerns situations which are not objectively comparable or if it is justified by an overriding reason in the general interest. However, this could not reasonably be assumed to be the case here.

Two conditions of the 2013 law are questionable in the case at hand, in which a UK company, owning 5.26% of the shares in a German company, received dividends in the years 2006-2008 from the latter company and now claims a withholding tax reduction from 15% (tax treaty level) to 0%.

First, as regards the requirement that the German withholding tax was neither credited against taxes levied by the residence state of the shareholder or its direct or indirect shareholder(s), nor deducted as expense by any of the said companies, the AG is of the view that it restricts the free movement of capital (Article 63 TFEU).

This is because in a purely domestic situation no such requirement existed. In 2006-2008, the dividend was tax exempt at the level of the German shareholder who, in addition, got a credit for the withholding tax. According to the AG, the restriction cannot be justified by the balanced allocation of taxing rights between Member States or the need to avoid that withholding tax be taken into account twice. Germany must refund the withholding tax unless the tax treaty ensures that it is fully credited in the residence state of the shareholder.

Secondly, non-resident taxpayers must provide a certificate issued by the authorities of their residence state which proves that no credit or deduction was granted at the level of any direct or indirect shareholder. AG Collins considers this requirement to be disproportionate because it can be “practically impossible” to meet.

Source:

ECJ case reference C?572/20, *ACC Silicones* - **Opinion of 20 January 2022**.

Note: This post contains to a large extent excerpts from an article published in Pwc EU Tax News – January/February 2022

Keywords

documentation, portfolio dividend, withholding tax refund