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By PwC Deutschland | 17 March 2025

No deduction of foreign taxes for trade tax purposes within a tax group

The Supreme Tax Court decided that the portfolio dividends received by the controlled company within a tax group from domestic and foreign corporations via an investment fund are subject to trade tax in full. A deduction of foreign withholding taxes in accordance with Section 34c (2) of the German Income Tax Act is not possible when determining the trade income tax basis of the tax consolidation group (Organschaft).

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Background

In the 2007 financial year, the AG, as a controlled subsidiary within a tax group (*Organschaft*), received portfolio dividends (from shareholdings of less than 10%) via an investment fund. As an equity fund, the fund had invested primarily in shares of domestic and foreign companies. The foreign dividends were subject to withholding tax in the countries of residence of the distributing corporations (Belgium, Switzerland, Denmark, Spain, Finland, France, Italy, Japan, the Netherlands, Norway, Portugal, Sweden, the UK and the USA). The tax office recognized the portfolio dividends (including the foreign withholding taxes) when determining the income of the AG to be consolidated with its parent (the plaintiff). At the level of the plaintiff, 95% of the dividends were exempt from corporation tax after attribution of the income of the AG in accordance with Section 8b (1) sentence 1, (5) sentence 1 of the Corporation Tax Act. The plaintiff had applied for the tax-deduction of the foreign withholding taxes when determining the attributable trading income of the AG.

Both the tax office and the tax court of first instance denied claim. As a result, both the dividends received by the controlled company via the fund and the foreign withholding tax thereon were included in the trading profit of the tax group for trade tax purposes.

Decision

The Supreme Tax Court confirmed the previous decision. The deduction of foreign withholding taxes pursuant to Section 34c (2) ITA when determining the trading income of the controlled company within the trade tax *Organschaft* is already precluded by the reference in Section 7 of the Trade Tax Act as “profit from trade operations”. In addition, the application of Section 8b (1) CTA (when determining the income of the controlling company for corporation tax purposes) leads to an income tax exemption in the tax group which precludes the requested deduction.

Finally, the Supreme Tax Court notes that this conclusion is not in conflict with current EU law.

Source:

Supreme Tax Court judgment of 16 October 2024 (I R 16/20) – published on 13 March 2025.

Keywords

foreign tax credit, trade tax group