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Real Estate tax alert
Belgium

ECJ denies WHT exemption under the Parent – Subsidiary Directive for dividends to Dutch FBI

This newsletter discusses a recent judgment by the European Court of Justice which may be relevant for the Belgian REIT ('Real Estate Investment Trust', i.e. the "GVV / SIR") and REIF ('Real Estate Investment Fund', i.e. the "GVBF / FIIS") sector.

Case at hand and decision

On 8 March 2017, the European Court of Justice ("ECJ") ruled on the interpretation of the 'subject-to-tax' clause in the Parent-Subsidiary Directive (90/435/EEG) ("PSD"; case C-448/15, Wereldhave).

According to the PSD, cross-border dividend payments in the EU/EEA are tax exempt, provided that a number of conditions are fulfilled, i.e. a minimum holding period, a minimum shareholding and a 'subject-to-tax' requirement. This 'subject-to-tax' requirement entails two aspects. On the one hand, the parent company and the dividend distributing subsidiary should be subject to corporation tax in the EU/EEA ('positive criterion'). On the other, both companies should not be exempt nor benefit from an option with regard to that tax ('negative criterion').

If the PSD is applicable, the subsidiary's Member State should refrain from levying WHT on outbound dividend payments. The parent company's Member State should exempt the dividend income (through a credit or exemption mechanism).

In the case at hand, a Belgian SICAFI (i.e. a Belgian REIT since all Belgian quoted REITs have taken the form of a "SIR" / "GVV") has paid a dividend to its Dutch shareholders. The Dutch shareholders were REITs benefiting from the so-called FBI-regime ("Fiscale Beleggingsinstellingen"). This implies (amongst other things) that the respective companies are subject to Dutch corporate income tax, but that the applicable rate is 0% provided that all income is distributed to the shareholders of said FBI (i.e. full distribution requirement).

A question was raised on whether these companies can invoke the PSD in view of the parent companies' tax regime, so that Belgium should refrain from levying WHT on dividends paid by the Belgian SICAFI.

The ECJ denied the WHT exemption under the PSD in the case at hand.

A FBI is *stricto senso* subject to Dutch corporate income tax, but benefits from a zero rate subject to conditions. Although the FBI's are subject to Dutch corporate income tax (i.e. positive criterion being fulfilled), their situation is one in which a company is not actually liable to pay that tax (i.e. negative criterion is not fulfilled). A zero rate taxation is *de facto* the same as being exempt from that tax. Hence, the 'subject-to-tax' clause is not fulfilled. According to the ECJ, the aim of the PSD is to eliminate double taxation of profits distributed by subsidiary companies to parent companies. However, where a parent company is subject to a zero rate taxation, the risk of double taxation is non-existent.

Notwithstanding the fact that the case only addresses the dividend receiving company (i.e. parent company - FBI in the case at hand), it is also relevant for dividend paying companies (i.e. subsidiary - SICAFI in the case at hand) because both parent and subsidiary are subject to the same 'subject-to-tax' clause.

Relevance for Belgian REITs and REIFs

A question could then be raised on whether Belgian regulated real estate fund vehicles (BEVAK/SICAFI, GVV/SIR, GVBF/FIIS) can benefit from the WHT exemption under the PSD (as a dividend receiving entity, or as a dividend distributing entity).

These vehicles are subject to the Belgian corporate income tax and are subject to the normal corporate tax rate (33.99%). However, their taxable basis is limited to disallowed items, and non-arm's length benefits received (if any), therefore excluding their 'ordinary' income consisting of rental income, dividends, capital gains etc.

Although the fact pattern is not the same as in the Wereldhave – case (knowing that these vehicles do have, albeit a very small, taxable basis being subject to the standard tax rate, as opposed to the FBI where the rate is 0%), the ECJ case probably gives some ammunition, for both Belgian and local tax authorities, to deny application of the Parent – Subsidiary directive in cases of cross-border dividend payments to or from these regulated vehicles. Essentially, they do not suffer any risk of 'double taxation' on income being distributed to them or by them.

It should be noted that the above is only relevant in cross-border situations (within and outside EU/EEA) and should not affect dividend distributions between a Belgian subsidiary and a Belgian parent company, because in that situation, the PSD based 'subject-to-tax' clause is not applicable in the same way.

Contacts

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