



EU alert

CJEU rules on French denial of WHT exemption on dividends paid to EU parent controlled by non-EU company

The European Court of Justice (CJEU) issued a decision on 7 September 2017 that involved a pre-2016 French law that automatically denied the withholding tax exemption on dividends under the EU parent-subsidiary directive (PSD) where the dividends were paid to an EU parent company that was controlled by a non-EU company, and the latter company was unable to demonstrate that the principal purpose of the structure was not to take advantage of the exemption. The court held that the rules created a general presumption of fraud and abuse that went beyond what was necessary to prevent tax evasion, and that they infringed both the previous version of the PSD and the EU freedom of establishment principle. The CJEU followed the opinion of Advocate General Kokott issued on 19 January 2017.

Background

The French tax code provides for a withholding tax exemption on dividends distributed by a French subsidiary to its EU parent company (subject to the fulfillment of certain conditions, such as a minimum participation requirement), in accordance with the PSD. Before 2016, the PSD allowed member states to include domestic or treaty-based measures to prevent fraud or abuse of the exemption. Before 2016, the exemption was denied under French law if the EU parent was controlled, directly or indirectly, by one or more residents outside the EU, unless the beneficiary could demonstrate that the principal purpose, or one of the principal purposes, of the chain of interests was not to take advantage of the exemption. France amended the rules effective 1 January 2016 to implement the general anti-abuse (GAAR) clause in the amended PSD (as modified

in January 2015 by directive EU/2015/121). (The PSD GAAR, which applies to fiscal years beginning on or after 1 January 2016, requires EU member states to refrain from granting the benefits under the PSD if one of the main purposes of an arrangement is to obtain a tax advantage that would defeat the object or purpose of the PSD, and the arrangement is not genuine. In such cases, the GAAR will operate to deny the withholding tax exemption on dividends paid by French companies to certain EU entities and to disallow the benefits of the domestic participation exemption on dividends paid to French parent companies.) Current French law is identical to the rules in the PSD.

The case involved a French company that paid dividends to its Luxembourg parent company in 2005 and 2006. The Luxembourg parent was owned by a Cyprus company, which, in turn, was controlled by a Swiss company. The French tax authorities imposed the standard withholding tax provided under French law because the recipient of the dividends was unable to demonstrate that the principal purpose, or one of the principal purposes of the chain of interests, was not to take advantage of the withholding tax exemption on dividends. The companies appealed the denial of the exemption, with the case eventually reaching the France's Supreme Administrative Court.

On 30 December 2015, the supreme administrative court referred the case to the CJEU for a preliminary ruling on whether the pre-2016 French rules were:

- Compatible with the previous wording of article 1(2) of the PSD, which allowed EU member states to deny the withholding tax exemption to prevent fraud and abuse;
- Compatible with article 49 or article 63 of the Treaty on the Functioning of the European Union, i.e. the freedom of establishment and free movement of capital principles, respectively.

Decision of the CJEU

The CJEU held that the French rules at issue violated both the PSD (in its former wording) and the EU freedom of establishment principle.

According to the CJEU, measures designed to prevent fraud or abuse must be interpreted in a strict manner and are limited to specific measures that target wholly artificial arrangements that do not reflect economic reality and whose purpose is to obtain an undue tax advantage. The French rules created an automatic presumption of fraud and abuse when an EU company receiving dividends from France was directly or indirectly controlled by a non-EU person. The rules did not require the French tax authorities to produce any evidence that fraud and abuse were present—the burden was shifted to the non-EU company to demonstrate there were no tax reasons for the structure. Although the rule aimed at targeting artificial arrangements designed to unduly benefit from the exemption, the rule captured any situation where an EU company that was directly or indirectly controlled by a resident of a third country had its registered office—for any reason—outside France. The simple fact of control by shareholders outside the EU cannot be regarded as abusive. Thus, the French rules were too broad and went beyond what was required to prevent fraud and abuse.

The CJEU also concluded that the French rules were incompatible with the freedom of establishment principle because the withholding tax exemption on dividends paid by a French company to a

nonresident parent controlled by companies resident in third states was conditioned on the parent company having to prove that the structure was not created to take advantage of the exemption, whereas dividends paid to a resident company controlled by a resident of a third state was not subject to that condition. This disparity in treatment is likely to dissuade a nonresident parent company from exercising an activity in France through a French subsidiary. The court determined that French objective of combating fraud and tax evasion cannot be justified.

Comments

The CJEU decision should be beneficial for taxpayers that are parties to pending litigation regarding France's previous rules (i.e. for dividends distributed before 1 January 2016). However, it should be noted that because in most cases, the withholding tax exemption was denied on several grounds (not only the ultimate holding by a non-EU company), the impact may be limited and each situation should be examined on a case-by-case basis.

Contacts

If you have any questions or would like additional information on the topics covered in this alert, please email one of the following Deloitte professionals:

Nathalie Aymé
nayme@taj.fr

Christopher Le Bon
clebon@taj.fr

Grégoire Madec
gmadec@taj.fr

Sophie Tardieu
stardieu@taj.fr

*Taj is a member firm of
Deloitte Touche Tohmatsu
Limited*

Additional resources

[Global Tax Alerts subscription page](#)

[Global Tax Alerts archive](#)

[World Tax Advisor](#)

[Deloitte International Tax Source \(DITS\)](#)

[Deloitte tax@hand app](#)

[Dbriefs](#)



Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee (“DTTL”), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as “Deloitte Global”) does not provide services to clients. Please see www.deloitte.com/about to learn more about our global network of member firms.

Deloitte provides audit & assurance, consulting, financial advisory, risk advisory, tax and related services to public and private clients spanning multiple industries. Deloitte serves four out of five Fortune Global 500® companies through a globally connected network of member firms in more than 150 countries and territories bringing world-class capabilities, insights, and high-quality service to address clients’ most complex business challenges. To learn more about how Deloitte’s approximately 245,000 professionals make an impact that matters, please connect with us on [Facebook](#), [LinkedIn](#), or [Twitter](#).

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the “Deloitte Network”) is, by means of this communication, rendering professional advice or services. Before making any decision or taking any action that may affect your finances or your business, you should consult a qualified professional adviser. No entity in the Deloitte Network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2017. For information, contact Deloitte Touche Tohmatsu Limited.

[Add Deloitte as a safe sender](#)

If you no longer wish to receive these emails, please send an email to the sender with the word “Unsubscribe” in the subject line.