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CJEU rules different treatment of French and EU dividends under French tax consolidation rules violates EU law

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The Court of Justice of the European Union (CJEU) issued its much-anticipated decision in the *Groupe Steria* case on 2 September 2015 (case C-386/14), concluding that the French tax consolidation rules violate the freedom of establishment principle in the Treaty on the Functioning of the European Union because a domestic tax group of French companies can obtain certain tax benefits for dividends that are not available to tax integrated parent companies with subsidiaries established in other EU member states. The case was referred to the CJEU in 2014 by the Versailles administrative court of appeal.

The CJEU decision follows the opinion issued by Advocate General Kokott on 11 June 2015 (for prior coverage, see the *World Tax Advisor* article dated 26 June 2015).

Background of the case

Under French tax law, when a French parent company receives dividends from a subsidiary, the dividends are 95% tax exempt under the domestic participation exemption (provided certain requirements are met). The remaining 5% is deemed to represent nondeductible costs relating to the exempt dividends and is taxed at the standard corporate income tax rate (the maximum effective tax rate currently is 38%, taking into account the surcharges).

The 95% participation exemption applies regardless of whether the dividends are received from a French subsidiary or a subsidiary in another country (whether within or outside the EU, except for noncooperative states). However, under a special rule in the French tax code, the 5% deemed expenses may be deducted from profits if a French parent company and its French 95% held subsidiaries are members of the same tax consolidated group, with the result that a full exemption can be obtained for intragroup dividends. However, since only French companies can be members of a French tax consolidated group, tax integrated parent companies with subsidiaries established in other EU member states cannot benefit from the full exemption and there is no possibility to deduct the 5% deemed expenses; as a result, up to 5% of dividends from EU subsidiaries are taxed, as compared to no taxation in the case of a French tax integrated subsidiary.

Steria, the head of a French tax integrated group, was denied a deduction of the 5% of deemed expenses incurred in relation to its holdings in subsidiaries established in other EU member states. While Steria agreed that these companies could not be part of the French tax consolidated group, it took the view that the French tax consolidation rules were inconsistent with the freedom of establishment because of the less favorable treatment of a French parent company with subsidiaries in other EU member states, as compared to the treatment of a French parent with only domestic subsidiaries.

CJEU decision

The CJEU ruled that the French tax consolidation rules do represent an impermissible restriction of the freedom of establishment and that the rules make it less attractive for companies with EU subsidiaries to exercise that freedom, because they would be deterred from setting up subsidiaries in other member states. The CJEU also held that the difference in treatment cannot be justified by the need to safeguard the balanced allocation of taxing power between the member states or by the need to safeguard the cohesion of the French tax system.

Comments

Affected tax integrated groups may be entitled to obtain a refund of French corporate income tax paid on the 5% deemed taxable expenses with respect to dividends received from subsidiaries resident in other member states (provided certain requirements are met). Such groups should consider filing claims to preserve their rights to restitution for fiscal years 2012, 2013 and 2014 (no later than 31 December 2015 for corporate income tax paid in 2013) to avoid being barred by the French statute of limitations.

The French Ministry of Finance has not yet announced whether, or the extent to which, the tax group regime will be amended. It is possible that the government may decide to abolish the full exemption mechanism available under the current rules.