EU Direct Tax Newsalert

Dutch Supreme Court finds Dutch dividend withholding tax treatment of foreign shareholders occasionally discriminatory

On 4 March 2016, the Dutch Supreme Court (Court) delivered its final judgments in *X*, *Miljoen*, and *Société Générale* (Joined Cases C-10/14, C-14/14, C-17/14). The Court held that the Dutch dividend withholding tax breaches the freedom of capital to the extent that the tax borne by foreign shareholders in the Netherlands is more burdensome than the personal or corporate income tax which is borne by their Dutch resident counterparts. The Court's judgments follow the preliminary rulings of the Court of Justice of the European Union (CJEU) in these cases of 17 September 2015.

Facts of the cases

The cases concern a foreign shareholder that received a dividend from a Dutch company subject to Dutch dividend withholding tax levied on the gross amount of the dividend. A dividend distribution to an equivalent resident shareholder would also have been subject to such a tax. However, a resident shareholder is eligible to credit such tax against their personal or corporate income tax, i.e., a tax levied at a higher rate on dividend income net of any expenses incurred. An excess of dividend withholding tax is refundable as the Dutch dividend withholding tax operates as a pre-levy domestically. *X* and *Miljoen* concerned Belgian individual shareholders. *Société Générale* concerned a French corporate shareholder.

The CJEU's comparability analysis

The CJEU's comparability analysis in its Judgments in *X*, *Miljoen* and *Société Générale* centered on whether the foreign dividend recipient involved was an individual or a corporate body. As regards foreign individual shareholders, the CJEU ruled that the comparative tax burden should be calculated by reference to a calendar year taking into account all shares held in Dutch companies and taking into account the tax-free amount that resident shareholders would have enjoyed. The CJEU also held that the tax-free amount that would have been available to resident shareholders does not need to be spread pro rata parte across the respective non-resident shareholders' worldwide income. Instead, that amount may be taken into account in full to determine the maximum amount of tax that may be levied from the foreign shareholder's dividend receipt.

Concerning foreign corporate shareholders, the CJEU ruled that only those costs directly linked to actual dividend payments such as collection fees should be taken into account for determining the comparative tax burden. Financing costs and pre-acquisition dividends included in the acquisition price of the respective shareholding do not qualify as such, the CJEU held.

The Dutch Supreme Court's decision

In *Miljoen* and *Société Générale*, the Court established that the foreign dividend recipients involved did not bear a comparatively higher tax burden. In *X* however, the Court found the dividend withholding tax burden excessive, so the excess part had to be repaid to *X*.

Takeaway

Foreign dividend recipients that actually bear a comparatively heavier tax burden in the Netherlands are from now on eligible for a refund of the excess Dutch dividend taxes levied. The Court's decision increases the chances of success on a refund of Dutch dividend withholding tax for foreign investment funds. Comparative calculations must be made on a case-by-case basis.

At the same time, despite the Court's clarifications, a degree of uncertainty remains as to exactly which costs are eligible and must be taken into account when comparing foreign and resident shareholders, both corporate and individual.

Foreign shareholders that recently received Dutch dividends and whose dividend tax assessments are still open to appeal, may consider assessing their tax burden. Any comparative outcomes which are to their detriment may render those foreign shareholders eligible for a refund on EU law grounds. The same holds for any future dividend tax imposts.

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