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Newsalert
EU Direct Tax Group

EU Court rules in favour of Groupe Steria in French cross-border dividend case

EU Direct Tax Group

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On 2 September 2015, the CJEU ruled in the Groupe Steria SCA case (C-386/14) that the freedom of establishment precludes legislation of a Member State which results in the add back for tax purposes of costs in respect of holdings in EU companies whilst at the same time under a special regime of group taxation exclusively available to domestic companies, allowing a full deduction for costs related to holdings of companies included within the tax consolidation.

French legislation

Under French law, dividends received by a parent company from a qualifying affiliate are tax exempt. However, a lump sum amount corresponding to 5% of the dividends remains taxable. This amount is deemed to represent the tax deductible expenses incurred for the management of the participation (referred to as the 'portion of costs and expenses'). When the tax consolidation regime applies, i.e. between French resident companies meeting various conditions including a direct or indirect 95% ownership, the taxable portion of the dividend is 'neutralized' for the computation of the group taxable result, leading to a 'full exemption' of intra-group dividends.

Facts and circumstances

Steria was a member of a tax consolidated group (the parent of which was Groupe Steria SCA) and held 95% of the share capital of subsidiaries established in other Member States. As a result, the dividends received from the subsidiaries were exempt but for the 5% lump sum portion of costs and expenses which had been added back to the taxable results of the company.

Groupe Steria SCA filed a claim to obtain the reimbursement of the corporate tax assessed on the taxable portion of the dividends arguing that the difference of treatment between domestic and cross-border situations was incompatible with the freedom of establishment.

CJEU's decision

The CJEU held that the difference of treatment which excludes cross-border situations from the advantage of having the 5% portion of costs and expenses neutralized makes it less attractive for a French parent company to exercise its freedom of establishment, as it would be deterred from setting up subsidiaries in other Member States.

In that regard, the Court noted that the situation of companies belonging to a tax consolidated group is comparable to that of companies not belonging to such a group, in so far as, in each case, the parent company bears the costs and expenses related to its shareholding in the subsidiary, and moreover, the profits made by the subsidiary and from which the dividends distributed are derived are, in principle, subject to double taxation.

Lastly, the CJEU held that the difference of treatment could not be justified by an overriding reason in the general interest on the grounds of the balanced allocation of taxing powers (as here, unlike the *X Holding* case, the restriction relates to matters within the sovereignty of only the Member State concerned i.e. France) and coherence of the tax system (as there is no tax advantage directly linked to the disadvantage).

The CJEU therefore concluded that the rule is not compatible with the freedom of establishment.

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