



EU Direct Tax Newsalert

CJEU rules on subject-to-tax requirement of Parent-Subsidiary Directive

On 8 March 2017, the Court of Justice of the European Union (“CJEU”) rendered its Judgment in *Wereldhave Belgium and Others* concerning the interpretation of the subject-to-tax requirement of the Parent-Subsidiary Directive (“PSD”) (C-448/15).

Background

In 1999 and 2000, a Belgian Real Estate Investment Company (“REIT”) distributed dividends to its two Dutch parent companies qualifying as “fiscal investment institutions” (fiscale beleggingsinstelling, “FII”) subject to a zero rate of corporation tax in the Netherlands. The Belgian tax authorities refused to grant the PSD withholding tax exemption for these dividends claiming that FIIs do not fulfil the subject-to-tax requirement of the PSD.

CJEU Judgment

The CJEU ruled that the PSD’s subject-to-tax requirement lays down a positive criterion (“being subject to tax”) and a negative one (“not being exempt from that tax and not having the possibility of an option”). Consequently, the PSD does not merely require that a company should fall within the scope of the tax in question but also seeks to exclude situations involving the possibility that despite being subject to tax, the company is not actually liable to pay that tax. Although FIIs are formally not exempt from tax in the Netherlands, they are practically in a situation in which they are not liable to pay that tax. The entitlement to be taxed at a zero rate is according to the CJEU tantamount to not subjecting those companies to corporation tax. Such an interpretation is consistent with the broad logic of the PSD, which seeks to prevent double taxation of profits distributed by subsidiaries to parent companies. Based on this reasoning, the CJEU concluded that FIIs do not satisfy the subject-to-tax requirement.

Unlike the Advocate General, the CJEU did not address the interpretational value of unpublished Council minutes foregoing the adoption of the PSD. Nevertheless, the conclusion of the CJEU is in line with the unpublished statements which expressly excluded certain classes of entities, such as FIIs, from the scope of the PSD.

The appellants also claimed that the withholding tax was not compliant with the freedom of establishment (Article 49 TFEU) and

the free movement of capital (Article 63 TFEU), which in their view can be derived from the *Tate & Lyle* CJEU Judgment (C-384/11). However, the CJEU argued that this second question was inadmissible since the order for reference lacks information concerning the tax rules applicable to Belgian investment companies at the relevant time.

Note that for dividends prior to 12 June 2003 (as in the above dispute), the Belgian tax authorities (followed by the Belgian Court of Appeal of Antwerp) take the position that based on a strict reading of the Belgian tax law at that time, Belgian investment companies cannot obtain a credit or refund of Belgian withholding tax levied on these dividends. This position, based on which the application of *Commission v Belgium* (C-387/11, the so-called Fokus Bank claims) is limited in time, is in our view debatable as it is not in line with the existing practice. It remains to be seen whether the referring Court of Appeal of Brussels will share this view.

Takeaway

The CJEU’s interpretation of the PSD’s subject-to-tax requirement is more severe than a mere formal subjective tax liability. However, the precise extent of this interpretation remains unclear in certain situations, for instance for entities benefitting from a partial or almost entire exemption of income. The interpretation of the CJEU is not only relevant for the application of the PSD withholding tax exemption but also for the participation exemption in the hands of companies receiving dividends from their subsidiaries.

For dividends distributed by Belgian companies to foreign investment companies (regardless of any participation threshold) between 12 June 2003 and the end of assessment year 2013, a refund of Belgian withholding tax is possible based on *Commission v Belgium* (C-387/11), provided the claim is not statute barred. For dividends distributed before 12 June 2013, the outcome depends on the appreciation of the national courts.

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