KPMG

Euro Tax Flash from KPMG's EU Tax Centre

AG Opinion in the Sofina case (C-575/17)

France – Free Movement of Capital – Freedom of Establishment – Withholding Tax on Dividends – Net Taxation – Comparability

On August 7, 2018, Advocate General (AG) Wathelet, of the Court of Justice of the European Union (CJEU) rendered his Opinion in the Sofina and Others case (C-575/17). The case concerned the compatibility with EU law of the French withholding tax levied on dividends paid by French companies to non-resident loss-making companies. The AG concluded that the French legislation is contrary to the free movement of capital and to the freedom of establishment.

Background

Sofina SA, Rebelco SA, and Sidro SA are three Belgian companies that received French-sourced dividends, subject to a 15% withholding tax (WHT), in accordance with the applicable double tax treaty between France and Belgium. The three Belgian companies being loss-making, the WHT resulted in a non-recoverable expense. By contrast, loss-making French companies are only taxed on the amount of the dividends they receive once they become profitable again. The Belgian companies considered that this less favorable tax treatment infringes EU law and requested a refund of the tax levied.

On September 20, 2017, the French Supreme Tax Court requested a preliminary ruling from the CJEU to clarify whether the French dividend taxation regime constitutes a restriction on the free movement of capital, and whether it can be justified. The French Court questioned, in particular, whether the resulting cash flow disadvantage for non-resident loss-making companies is compatible with EU law, thereby also referring to cases where a non-resident loss-making company terminates its activity without recovering its profitable position. Lastly, the French Court asked whether the fact that non-residents cannot deduct expenses directly linked to the collection of dividends may be justified by the difference in tax rates between income tax paid by residents and the WHT paid by non-residents, although the actual tax burden is not higher for the latter.

The AG Opinion

The AG first noted that the French legislation results in the less favorable tax treatment of dividends paid to a non-resident loss-making company, since dividends paid to a French shareholder in a similar situation would either never be effectively taxed or would be taxed at a later stage, thus creating a cash flow disadvantage. Referring to CJEU settled case-law on this, the AG concluded that such a difference in treatment constitutes a restriction on both the free movement of capital and the freedom of establishment.

The AG then addressed whether such a restriction is justified. He first observed that resident and non-resident companies are in a comparable situation, since France taxes dividend income received, not only by resident but also by non-resident shareholders. He then went on to assess and reject the need to ensure a balanced allocation of taxing rights between Member States and the need to ensure the effective collection of tax as possible justifications based on an overriding reason in the public interest.

As regards the net taxation argument, the AG further confirmed that denying non-resident shareholders the possibility of deducting expenses related to the dividend distribution constitutes a restriction on the fundamental freedoms. Discarding the argumentation put forward by the French government, he also noted that such a restriction cannot be justified either by the fact that non-residents are subject to a lower tax rate than residents, or by the need to ensure the effective collection of tax. In this respect, it is not necessary to compare the actual tax burden paid by residents and non-residents, since, even if the applicable tax rate for non-residents is lower, there is no indication that the amount of deductible expenses to which residents are entitled would compensate this difference.

Consequently, French rules on the taxation of dividends received by non-resident loss-making companies constitute an unjustified breach of EU law.

EU Tax Centre comment

The AG's Opinion is broadly in line with previous case law from the CJEU on the taxation of outbound dividends. Although it remains to be seen to what extent the CJEU will follow the AG's reasoning, it is likely that the Court's final decision will be consistent with the conclusions presented in this Opinion. It will be particularly interesting to follow the Court's argumentation on the net taxation issue, which could open further tax reclaim opportunities for EU-resident shareholders that do not benefit from the participation exemption regime.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre, or, as appropriate, your local KPMG tax advisor.

Robert van der Jagt
Chairman, KPMG’s EU Tax Centre and
Partner,
Meijburg & Co

---

kpmg.com/socialmedia

Privacy | Legal

You have received this message from KPMG’s EU Tax Centre. If you wish to unsubscribe, please send an Email to eutax@kpmg.com.

If you have any questions, please send an email to eutax@kpmg.com

To unsubscribe from the Euro Tax Flash mailing list, please e-mail KPMG's EU Tax Centre mailbox (eutax@kpmg.com) with "Unsubscribe Euro Tax Flash" as the subject line. For non-KPMG parties – please indicate in the message field your name, company and country, as well as the name of your local KPMG contact.

KPMG's EU Tax Centre, Laan van Langerhuize 9, 1186 DS Amstelveen, Netherlands