Euro Tax Flash

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Euro Tax Flash
from KPMG's EU Tax Centre

CJEU decision in the Riskin and Timmermans case

Free movement of capital – Taxation of dividends - Obligation arising from a tax treaty

On June 30, 2016 the Court of Justice of the European Union (CJEU) issued its decision in the Riskin and Timmermans case (C-176/15). The Court concluded that the freedom of capital does not preclude a Member State from treating dividends received from another Member State less favorably than those received from a third country, as a result of an obligation arising from a tax treaty concluded with this third country.

Background

Depending on the applicable tax treaty, Belgium may allow taxpayers to credit the withholding tax levied at source by a third state from the Belgian tax payable on foreign dividends, whereas it makes that credit subject to additional conditions in the case of dividends paid by companies established in another Member State, for example.

In the case at hand, the Belgium-Poland tax treaty provides that - subject to the applicable provisions of its domestic law - Belgium may choose to eliminate double taxation of dividends by granting a tax credit corresponding to the Polish tax levied at source. However, Belgian law provides that, in such cases, foreign tax may be credited only to the extent that the income is derived from the conduct of a professional activity in Belgium. As a result, Belgian taxpayers, such as Mr. Riskin and Ms. Timmermans, who received dividends from Poland cannot benefit from a tax credit when the participation is not held in the context of a business activity. On the contrary, tax treaties concluded with certain third countries, such as with the United States, do not refer to Belgian law and in such cases, Belgium grants a tax credit unconditionally.

As a result, dividends received from certain third countries (e.g. the United States) are treated more favorably than dividends received from another Member State (e.g. Poland).

The CJEU decision

The Court first acknowledged the existence of a restriction to the free movement of capital, since Belgian residents who invest in some countries like the United States are treated more favorably than those who invest in countries like Poland, when such investment is not linked to a professional activity in Belgium. However, the Court further found that this restriction is justified since the situations in question are not comparable.

Referring to the cases D (C-376/03) and Orange European Smallcap Fund (C- 194/06), the Court stated that the benefits granted by a tax treaty are an integral part of all the rules under the treaty and contribute to the overall balance of mutual relations between the two contracting States. As the more favorable provision included in the Belgium-USA tax treaty is the result of the negotiation between the two States, such provision cannot be seen separately from the remaining treaty. Therefore, the benefit of this provision can be granted only to Belgian residents falling within the scope of that treaty. For this reason, Belgium does not have to extend this benefit to dividends from other countries.

According to the Court, Belgian residents who receive dividends from Member States, such as Poland, are not in a situation that is objectively comparable to that of Belgian residents who receive dividends from a third State and therefore this difference of treatment does not constitute a restriction prohibited by EU law.

EU Tax Centre comment

This decision largely follows the AG’s opinion and is in line with previous case law of the CJEU. Although the circumstances of the case at hand are somewhat different from those in the D and Orange European Smallcap Fund cases, this decision may be interpreted as yet another indication that the CJEU does not consider the “most-favored nation principle” to prevent Member States from negotiating and concluding different tax treaties between them or with third countries.

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

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