Euro Tax Flash from KPMG's EU Tax Centre

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CJEU decision in the Belgische Staat v. Comm. VA Wereldhave Belgium case concerning the dividend withholding tax exemption for Dutch UCITS under the Parent-Subsidiary Directive (C-448/15)

Parent-Subsidiary Directive – Subject to tax criteria - Dividend withholding tax exemption – Dutch UCITS – Zero tax rate

On March 8, 2017 the Court of Justice of the European Union ('CJEU', or 'Court') rendered its decision in the Belgische Staat v. Comm. VA Wereldhave Belgium case (C-448/15). The case concerned the applicability of the EU Parent-Subsidiary Directive ('Directive') to a withholding tax imposed by Belgium on dividends paid by a Belgian subsidiary ('Wereldhave Belgium') to its parent companies located in the Netherlands, which were investment funds ('Dutch UCITS'). The Court ruled that neither of the Dutch UCITS in question qualified as a 'company of a Member State' for the purposes of Article 2(c) of the Directive since, although subject to corporate income tax, they were effectively not taxed. Therefore the Directive did not preclude Belgium from taxing the dividends.

Background

Wereldhave Belgium, a limited partnership with share capital, distributed profits to its Dutch UCITS shareholders (Wereldhave International NV and Wereldhave NV). The Dutch UCITS in question were collective investment undertakings which are, by virtue of their status as fiscal investment institutions, subject to corporate income tax in the Netherlands at a zero rate, provided that all of their profits are redistributed to their shareholders ('the redistribution requirement').

The two Dutch UCITS requested exemption from the Belgian withholding tax on dividend income under the Directive. Although the Belgian Court of First Instance initially approved the exemption, the Belgian State appealed this decision. The Belgian Court of Appeal requested the CJEU for a preliminary ruling on whether or not the national legislation under which withholding tax was levied on dividends paid to the UCITS in question was compatible with the Directive.

The CJEU's decision

The CJEU first addressed whether the Directive precludes a Member State from levying withholding tax on dividends paid by a subsidiary in that Member State to a company established in another Member State that is subject to corporate tax at a zero rate, provided that all of its profits are paid to its shareholders. The Court analyzed the wording of Article 2 of the Directive, which contains a positive condition that the company to which the Directive applies must be subject to one of the taxes listed in that provision, and a negative condition that the company does not have the possibility of having an option to be subject to or of being exempt from that tax.

The Court agreed with the Advocate General that both the legislative provisions of the Directive and its objective and purpose, i.e. preventing profits distributed by subsidiary companies to parent companies within the European Union being subject to double taxation, have to be taken into consideration. The CJEU ruled that there is no risk of double taxation since the UCITS are already entitled to a zero rate of taxation on all their profits, provided these profits are distributed to their shareholders.

The Court also followed the Advocate General's conclusion that a company that is eligible for a zero rate is, in certain circumstances, practically the same as the situation which Article 2(c) of Directive seeks to avoid, i.e. where there is actually no tax payable.

In light of the above, the Court ruled that a Dutch UCITS does not qualify as a 'company of a Member State' for the purposes of Article 2 of the Directive and thus the withholding tax exemption provided by that Directive does not apply to dividends paid to such entities.

The second question referred to the Court was whether or not the tax treatment in this case was compatible with both the free movement of establishment and the free movement of capital under the TFEU. The CJEU ruled that this question was inadmissible on the grounds that the referring court did not properly explain its factual and legislative context.

EU Tax Centre comment

This decision is of practical importance for the '*subject to tax versus actually liable to pay tax*' discussion and how the Directive applies to this. It clarifies which companies fall within the scope of the Directive and confirms that dividend distributions to Dutch UCITS, which are formally '*subject to*' a corporate income tax, but under the redistribution requirement stipulated by Dutch law are actually not liable to pay corporate income tax in their state of residence, fall outside the scope of the Directive.

It should also be noted that when interpreting the operative part of the Directive, the Court emphasised the importance of reading it together with the preamble.

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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