



Euro Tax Flash from KPMG's EU Tax Centre



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CJEU decision on the French Supreme Court's case law in the Accor case

Failure of a Member State to fulfil obligations – Reference for a preliminary ruling – French Supreme Court – Accor (C-310/09) – Tax credit – Double economic taxation

On October 4, 2018, the Court of Justice of the European Union (CJEU) issued its decision in the Commission vs. France case (C-416/17) regarding the compatibility with EU law of the French Supreme Court's case law interpreting the CJEU decision in the Accor case (C-310/09). The Court concluded that such case law is contrary to the fundamental freedoms and further noted that France failed to fulfil its obligations under the EU treaties, as the French Supreme Court did not refer the matter to the CJEU.

Background

On September 15, 2011, the CJEU rendered its judgment in the Accor case (C-310/09) and concluded that granting a French company a tax credit for advance tax payments due on French-sourced dividends redistributed to its shareholders, while no equivalent tax credit is available in respect of dividends received from subsidiaries located in other Member States, is contrary to the freedom of establishment and the free movement of capital.

Following the CJEU judgment, the French Supreme Tax Court rendered two decisions on December 10, 2012, subjecting the refund of the unduly levied taxes to certain conditions, including (1) the refusal to take into account taxation suffered by non-resident sub-subsidiaries, (2) the provision of certain evidentiary documents and (3) limiting the refunded amounts to one-third of the dividends distributed.

The European Commission took the view that such restrictions were contrary to EU law and referred France to the CJEU in 2016.

The CJEU decision

The CJEU first addressed the question whether the refusal to take into account taxation suffered by non-resident sub-subsidiaries is contrary to the freedom of establishment and to the free movement of capital. Referring to settled case law, the Court noted that a Member State which puts in place a system for preventing or mitigating economic double taxation as regards dividends paid to residents, has the obligation to treat distributions made by resident and non-resident companies in the same way. This obligation persists regardless of the level at which such taxation occurs in the chain of participations. Observing that the French legislation results in a less advantageous tax treatment for dividends received from non-resident sub-subsidiaries, than within a purely domestic chain of participations, the Court concluded that the decision of the French Supreme Tax Court is contrary to EU law.

The CJEU then examined whether the requirements set forth by the French Supreme Tax Court to present certain evidentiary documents in order to benefit from a refund are disproportionate. The judges concluded that the obligation for the claimants to provide – irrespective of the expiration of the legal document retention period in this respect – documentary evidence relating to the nature and rate of the tax actually charged, as well as the relevant tax returns submitted at the time of the distribution, are in line with the principles of equivalence and effectiveness.

Referring to the Opinion issued by its Advocate General in the case at hand, the CJEU noted that limiting the refunded amounts to one-third of the dividends distributed does not result in a heavier tax burden for French shareholders receiving foreign-sourced dividends, compared to a dividend distribution in a purely domestic context.

Based on this analysis, the CJEU concluded that France failed to comply with its obligation under the EU treaties to refer a question to the CJEU, where there is uncertainty about the interpretation of EU law, and no judicial remedy is available under national law.

EU Tax Centre comment

As regards the compatibility with EU law of the French refund mechanism for the tax paid by French companies receiving dividends from non-resident subsidiaries, the Court's decision is largely in line with previous case law on this matter and contributes few new elements to the interpretation to be given to its decision in the Accor case. However, it is interesting to note that this is the first time that the European Commission has referred a Member State to the CJEU for failure to comply with its obligation to refer a question to the CJEU, where no judicial remedy is available under national law.

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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