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France alert
Constitutional court rules 3% surtax on dividends is unconstitutional

The French Constitutional Court published a decision on 6 October 2017, concluding that the 3% surtax on profit distributions—in its entirety—violates the constitution.

The 3% surtax has been the target of intense criticism since it was introduced in 2012, and has given rise to claims that the surtax is contrary to the French constitution, as well as EU law and France's tax treaties. Challenges to aspects of the surtax have been before various French courts and the Court of Justice of the European Union (CJEU).

The 3% surtax, imposed on French entities subject to corporate income tax, including French permanent establishments of foreign companies, is levied on most dividend distributions (including deemed dividends) at the level of the French payer, although certain distributions are exempt. The surtax is calculated on the gross amount of the dividends, with the tax due at the time the distribution is made. French tax law does not provide any mechanism to avoid a double (or multiple) levying of the surtax where dividends are distributed up a chain of companies.

The scope of the exemption from the surtax was broadened as from 1 January 2017, after the constitutional court ruled in 2016 that the exemption that applied only to distributions made within a French tax-consolidated group violated constitutional principles (for prior coverage, see the tax alerts **dated 5 October 2016** and **23 December 2016**).

On 17 May 2017, the CJEU ruled that dividends distributed by a French company that represent a redistribution of dividends the company previously received from its EU subsidiaries cannot be subject to the 3% surtax on profit distributions, because this would be a form of a double taxation prohibited by the EU parent-subsidiary directive (for prior coverage, see the alert **dated 18 May 2017**).

Following the release of the CJEU decision, the French Supreme Administrative Court (SAC) requested a preliminary ruling on the constitutionality of the 3% surtax from the constitutional court (for prior coverage, see the *World Tax Advisor* **"in brief" item dated 18 August 2017).** According to the SAC, the CJEU decision created "reverse discrimination," since redistributions of dividends received from a French or non-EU subsidiary still will fall within the scope of the surtax, while redistributions by a French company of dividends received from an EU subsidiary will not be subject to the surtax.

The constitutional court now has ruled that this difference in treatment violates the equality principle and, therefore, the 3% surtax must be declared unconstitutional and invalid. The court decided that the entire surtax is incompatible with constitutional principles. As a result, the surtax no longer has to be paid.

The constitutional court decision applies as from the date of publication, and can be invoked by taxpayers for claims that have not yet been definitively settled or subject to a final court decision. In other words, taxpayers may file claims for reimbursement of the surtax paid in the past provided the claim has not been settled and the statute of limitations has not expired.

It should be noted that the government recently announced that the 3% surtax may be abolished in December 2017 within the framework of the next finance act (for prior coverage, *see* the tax alert **dated 28 September 2017**).

Contacts

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