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EU tax alert

CJEU rules Belgian "fairness tax" partly incompatible with EU law

On 17 May 2017, the Court of Justice of the European Union (CJEU) issued its decision on the Belgian constitutional court's preliminary ruling request relating to the compatibility of the "fairness tax" with primary and secondary EU law. The court essentially follows the opinion of Advocate General (AG) Kokott that the tax is partly incompatible with the EU parent-subsidiary directive (PSD) (for prior coverage, see tax@hand **article dated 18 November 2016**).

The fairness tax has applied in Belgium since tax year 2014. It is a separate income tax imposed at a rate of 5.15% on dividend distributions made by companies (that are not small or medium-sized enterprises) to the extent such companies offset taxable income in the year of distribution with the current year notional interest deduction and/or tax losses carried forward. The fairness tax is levied on both resident companies and permanent establishments (PEs) of foreign companies.

The fairness tax has been subject to criticism since it was introduced. In January 2014, an annulment proceeding was initiated before the Belgian constitutional court on the grounds that the tax was incompatible with the Belgian constitution, the Treaty on the Functioning of the EU (TFEU), the PSD and Belgium's tax treaties. In an interim decision issued on 28 January 2015, the constitutional court referred the case to the CJEU (for prior coverage, see the *World Tax Advisor* **article dated 27 February 2015**).

AG Kokott issued her opinion in the case on 17 November 2017, finding that the fairness tax does not violate the freedom of establishment guaranteed by the TFEU, nor does it constitute a prohibited withholding tax under the PSD. However, the AG concluded that the fairness tax violates the PSD to the extent it would be due upon a redistribution of dividends received.

The CJEU's decision is essentially in line with the AG's opinion:

- The fairness tax does not violate of the freedom of establishment principle, subject to the Belgian constitutional court verifying that, in practice, a foreign company with a Belgian PE is not treated less favorably than a Belgian company when calculating the taxable base of the fairness tax;
- The fairness tax is not a prohibited withholding tax under the PSD; and
- The fairness tax violates the PSD requirement for member states to refrain from imposing tax on dividends received to the extent the fairness tax is due on a redistribution of dividends received in a year following that in which the dividends originally were received from a subsidiary.

Comments

The case now will be sent back to Belgium's constitutional court, which will have to issue its own decision, taking into account the findings of the CJEU and the other grounds for annulling the fairness tax. The constitutional court has the power to annul the fairness tax legislation in whole or in part if it is found to be in breach of EU law, the Belgian constitution and/or Belgium's tax treaties. At this stage, it is unknown when the constitutional court will issue its decision.

It should be noted that, also on 17 May 2017, the CJEU issued its decision in a French case, concluding that dividends distributed by a French company that represent a redistribution of dividends the company previously had received from its EU subsidiaries cannot be subject to the French 3% surtax on profit distributions. The court concluded that subjecting such dividends to the surtax would be a form of a double taxation prohibited by the PSD.

Contacts

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