Deloitte.

Luxembourg Tax Alert

Luxembourg tax authorities release Circular on how to apply the participation exemption regime to Gibraltar entities

3 December 2020

In April 2020, the European Court of Justice ruled in a case concerning Bulgaria (case C-458/18) that the EU Parent-Subsidiary Directive's (PSD) concepts of "companies incorporated under United Kingdom law" and "corporation tax in the United Kingdom" must be interpreted as not applying to companies incorporated in Gibraltar and subject to Gibraltar corporation tax.

On 1 December 2020, the Luxembourg tax authorities released a Circular aiming to clarify the effects of this decision. The Circular foresees that the national provisions transposing the PSD will no longer apply to companies incorporated in Gibraltar as from 1 January 2021.

In practice, Articles 166 (1) 3 and 166 (2) 1 of the Luxembourg income tax law (LITL) on dividends exemption—which refer to Article 2 of the PSD—will no longer apply to dividend distributions made by subsidiaries incorporated in Gibraltar to eligible Luxembourg entities as from 1 January 2021. In contrast, Article 166 (2) 3 LITL still applies. This provision foresees that a dividend exemption may apply if the dividends are distributed by a foreign company subject to an income tax comparable to the Luxembourg income tax (i.e., "subject to tax test").

The same reasoning applies to net worth tax purposes.

The Circular does not refer to the capital gain rules. However, to the extent the "subject to tax test" applies to exempt dividends distributed by a subsidiary incorporated in Gibraltar, it may also apply to exempt capital gains in case of sale of the participation as from 1 January 2021.

Article 147 2. a) LITL on withholding tax exemption—which also refers to Article 2 of the PSD—will no longer apply to dividends distributed by an eligible Luxembourg entity to companies incorporated in Gibraltar as from 1 January 2021.

It is worth mentioning that the Circular does not refer to the "subject to tax test" foreseen by Article 147 LITL. This dedicated provision does not apply in this context, since it also requires residence in a country that has concluded a DTT with Luxembourg, which is not the case for Gibraltar.

The release of this Circular is more than welcome, as it provides clarifications for Luxembourg taxpayers with a parent entity or subsidiary located in Gibraltar. These Luxembourg taxpayers should promptly and carefully review the tax treatment of their future operations with these foreign entities.

Your contacts

Bernard David
Partner – Tax Business Leader
Tel : +352 45145 2799
bdavid@deloitte.lu

Eric Centi
Partner – Financial Services Tax Leader
Tel : +352 45145 2162
ecenti@deloitte.lu

Christophe de Sutter
Partner – International Tax Leader
Tel : +352 45145 3503
cdesutter@deloitte.lu

Dany Teillant
Partner – Private Equity Tax Leader
Tel : +352 45145 2246
dteillant@deloitte.lu

Stephane Tilkin
Partner – International Tax
Tel: +352 45145 2307
stilkin@deloitte.lu

Deloitte Luxembourg
20 Boulevard de Kockelscheuer
L-1821 Luxembourg
Grand Duchy of Luxembourg

Tel: +352 451 451
Fax: +352 451 452 401
www.deloitte.lu

Designed and produced by MarCom at Deloitte Luxembourg