EU tax alert

Opinion delivered in joined cases C-436/08 (Haribo) and C-437/08 (Österreichische Salinen)

On 11 November 2010, Advocate General Juliane Kokott delivered her Opinion on the joined cases C-436/08 (Haribo) and C-437/08 (Österreichische Salinen). Both cases concern the treatment of foreign portfolio dividends, i.e., dividends from non-Austrian participations under 10% (portfolio participations).

According to Advocate General Kokott, dividend payments from third country participations may not receive treatment that is deemed discriminatory when compared against dividend payments from EU/EEA participations. Therefore, the conditional exemption method should apply in relation to third country portfolio dividends as such is also provided in Austrian domestic tax law for portfolio dividends received from EU/EEA participations. Furthermore, Member States may not put the exemption of EEA portfolio dividends under the condition of the availability of exchange of information and mutual assistance for the recovery of tax claims (Amts- und Vollstreckungshilfe) between Austria and the EEA country of the distributing company.

Facts of the Haribo case (C-436/08) and the Österreichische Salinen case (C-437/08)

Haribo derived portfolio dividends from participations in EU companies as well as from participations in third country companies. Whereas portfolio dividends from participations in Austrian companies are exempt from tax (exemption method), portfolio dividends from EU/EEA and third country participations were originally taxed in Austria and any tax imposed in the country of the distributing company – limited to the amount of the Austrian tax – was credited against the Austria tax (credit method).

Due to a (retroactively applicable) change of the Austrian law, portfolio dividends from participations in EU and EEA companies are also exempt from corporate income tax. However, the exemption of EEA portfolio dividends is subject to the availability of exchange of information and mutual assistance for the recovery of tax claims (Amts- und Vollstreckungshilfe) between Austria and the EEA country of the distributing company.

In addition, exemption is denied if the taxpayer is not able to provide the information that is necessary for the application of the tax exemption or the tax credit to the tax administration. The requirement to provide respective proof could effectively hamper the application of the exemption method (impossible or disproportionately costly task of adducing evidence).

Whereas portfolio dividends from Austria and from EU/EEA countries are exempt under the new Austrian law, portfolio dividends from third country participations are neither tax exempt nor does the Austrian tax law provide for a tax credit (of the underlying tax), i.e., portfolio dividends from third country participations are in any case subject to corporate income tax in Austria.

The facts in Österreichische Salinen are similar to those in Haribo. The company also derived portfolio dividends. Additionally, Österreichische Salinen suffered a loss in the respective year and was therefore not able to credit the foreign tax in the same tax year.
Equality of the exemption method and the credit method

According to the Court of Justice in the Test Claimants in the FII Group Litigation case (C-446/04), the exemption method and the credit method are equal, provided that the rate of tax applied to foreign-sourced dividends is not higher than the rate of tax applied to domestically sourced dividends, and that the tax credit is at least equal to the amount paid in the Member State of the distributing company.

Exchange of information and mutual assistance for the recovery of tax claims

Portfolio dividends from participations in EEA countries are exempt from corporate income tax in Austria only if exchange of information and mutual assistance for the recovery of tax claims are provided by the country of the distributing company. According to the Austrian Government, the application of the exemption method or the credit method requires the ability to gather information, e.g., about the distributing company in relation to a possible tax exemption of the distributing company. However, according to Advocate General Kokott, mutual assistance for the recovery of tax claims is not necessary for the application of the exemption or the credit method in relation to foreign portfolio dividends.

In contrast, the exchange of information is certainly necessary in order to check the statements of the taxpayer. However, the Austrian tax law does not contain such requirement for dividends from EEA countries where the participation is above 10%. Therefore, the current requirement in relation to the exchange of information is, according to Advocate General Kokott, not in conformity with EU law.

Impossible or disproportionately costly task of adducing evidence

In many cases, a taxpayer might not be able to provide to the tax administration the information necessary for the application of the exemption or credit method. For the application of the exemption method, the taxpayer has to demonstrate, for example, that the foreign distributing company is subject to a comparable corporate income tax, that the income of the distributing company is taxed at a certain level and that the distributing company is not subject to a tax exemption. In addition, for the application of the credit method, the taxpayer has to provide information about the foreign taxation of the dividends.

According to the Court of Justice in the Test Claimants in the FII Group Litigation case (C-446/04), an additional administrative burden on taxpayers, with evidence being required as to the amount of tax actually paid in the Member State in which the company making the distribution is resident, cannot be regarded as a difference in treatment which is contrary to freedom of establishment. In fact, particular administrative burdens imposed on resident companies receiving foreign-sourced dividends are an intrinsic part of the operation of a tax credit system. Therefore, according to Advocate General Kokott, the task of adducing evidence cannot be passed on to the tax administration. Furthermore, the Member States are not required to absorb the taxpayers’ risk of lack of information by granting a tax exemption or a tax credit.

Tax treatment of third country portfolio dividends

The Austrian tax law does neither provide for the exemption method nor for the credit method in relation to third country portfolio dividends. Therefore, portfolio dividends from participations in third countries are subject to corporate income tax, whereas portfolio dividends from Austrian participations are exempt.

In her Opinion, Advocate General Kokott stressed the fact that the European Union explicitly extended the free movement of capital to third countries. Therefore, the taxation of third country portfolio dividends is against the treaty freedoms.
Carry forward of foreign tax credit

In the case of a loss situation, income from portfolio dividends reduces the loss that can be carried forward. Furthermore, if foreign underlying tax is not credited (due to domestic losses) economic double taxation of portfolio dividends remains. As a result, the credit method does not avoid economic double taxation in such a case. Consequently, the fact that Austria does not provide for a carry forward of foreign tax credit is, according to Advocate General Kokott, not in conformity with EU law.

Implications

In Haribo case situations, companies should review their positions for economic double taxation of portfolio dividends (from EU, EEA and third countries).

Furthermore, according to the Austrian tax administration, it is highly likely that a carry forward of a foreign tax credit will be denied at present. However, in the event that the European Court of Justice agrees with the Opinion of Advocate General Kokott, a carry forward of certain foreign tax credits should be implemented according to EU law. This issue could also have impact on the position of the Austrian tax administration in relation to tax credit carry forward concerning other income.

How Ernst & Young can help

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Roland Rief
Tel: +43 1 21170 1257
roland.rief@at.ey.com

Markus Stefaner
Tel: +43 1 21170 1283
markus.stefaner@at.ey.com

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