

Breaking Tax News Tackling taxes



Administrative Court: Credit Method on Portfolio Dividends Received from Third Countries before 2011

Background.

In February 2011 the ECJ passed its judgment in the joined cases Haribo und Salinen (C-436/08 und C-437/08) and held therein, that the taxation of portfolio dividends received from third countries under Austrian CIT is against EU law. Since the ECJ's function is only to interpret EU law, the Court gave no answer to the question how the national law in the case at hand (Sec. 10 CIT Act) has to be interpreted to be in line with EU law. The Court just held, that **credit and exemption method** have to be seen as **equivalent** from an EU law perspective.

2011 Legislation.

The Austrian legislator has already reacted to this judgment in the course a tax law amendment in 2011 ("BBG 2011"): As from the assessment year 2011, **portfolio dividends received from companies resident in third countries** are **tax exempt** if the respective country has agreed upon an agreement on mutual assistance with regard to **administrative assistance** (see our BTN 7/2011 of March 17, 2011). Only if the distributed dividends were not sufficiently taxed in the country of the distributing company (i.e. the CIT rate is below 15 %), a switch over from the exemption to credit method is triggered. Since these new provisions, however, are only applicable on dividends distributed after 1 January 2011, the amendment provides no clarification which method has to be applied on portfolio dividends received from third countries before January 1, 2011.

Tax Court of Appeals judgment.

The Tax Court of Appeals (UFS) held in a corresponding case, that a tax law amendment in 2009 ("BBG 2009"), which extended the exemption method to portfolio dividends from EU and EEA countries, gives rise to the assumption, that the legislator would also have extended the **exemption method to portfolio dividends from third countries** in case it would have been aware of the violation of EU law. On the basis of this reasoning the UFS exempted the third-country dividends. The tax authorities appealed against this decision.

Administrative Court judgement.

The Administrative Court (VwGH) did not share the view of the UFS (25.10.2011, 2011/15/0070). The VwGH confirmed its reasoning already held in 2008: In case of violation of EU law, the respective **national provisions have to be applied in a way interfering in the least possible way with the provisions** at stake. Since the Austrian CIT Act before the BBG 2011 set out taxation of portfolio dividends received from third countries, it was obvious, according to the VwGH, that the **application of the credit method interfered less with the intention of the legislator than the exemption method**. The credit method is only to be applied if it is possible to request the necessary information from the third country due to the fact that this country has agreed upon an exchange of information with Austria. The VwGH did not further clarify how the exchange of information clause in

a double tax treaty has to be designed in detail in order to fulfill the requirement of a comprehensive mutual assistance. The UFS will have to deal with this question in the continued proceedings.

Your Deloitte Tax Advisor will be happy to answer your questions.

Conclusion.

Summarizing, **portfolio dividends distributed by companies resident in third countries before January 1, 2011 are subject to the credit method** on the condition that the respective country has agreed upon mutual assistance with Austria. Therefore, if the CIT rate in the residence country of the distributing company is below the Austrian CIT rate (before 2005: 34 %, since 2005: 25 %), the Austrian company receiving the dividends will be obliged to pay the tax difference in Austria. However, comparable **portfolio dividends distributed after January 1, 2011 are tax exempt** due to the amendments of the BBG 2011, provided the distributed profits have been sufficiently taxed in the distributing country.

Audit . Tax . Consulting . Financial Advisory .

Responsible for the contents: Deloitte Austria. This Newsletter merely contains general information that cannot substitute professional advice in individual cases. Accordingly, Deloitte expressly excludes and disclaims any warranty and liability for the newsletter and the information contained therein. Please contact us for personal advice. Please inform your advisor, if you wish this Newsletter to be transmitted electronically to any other staff member of your company, or if you do not want to receive this information in the future anymore. Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee, and its network of member firms, each of which is a legally separate and independent entity. Please see www.deloitte.com/about for a detailed description of the legal structure of Deloitte Touche Tohmatsu Limited and its member firms.