TAX ALERT

18/01/2023

Withholding tax exemption on outbound dividend distributions: all is not lost for holding companies.

The decision of the Danish Supreme Court of 9 January 2023[1] has confirmed the possibility of applying the tax treaty between the country of the source of income and the country of the **beneficial owner** (versus the country of the apparent recipient) for the purpose of exemption from withholding tax. This defence in case of tax audit had already flourished before the French Supreme Court (*Conseil d'Etat*) in the "Planet" case of 20 May 2022[2].

In this context, the decision of 7 December 2022 "Foncière Vélizy Rose"[3] of the Paris Administrative Court of Appeal appears to be a missed opportunity for the taxpayer. However, this decision is interesting in the sense that it illustrates the application of the "beneficial owner" clause to the structuring of a French real estate investment via a chain of holdings of two Luxembourg holding companies.

Investors had set up a Luxembourg holding company to invest in Foncière Vélizy Rose (the French company that owned the property and distributed the disputed dividends). This holding company fulfilled the operational objective of creating a joint venture of a group of investors united by a shareholders' agreement, while protecting the shareholders from the risks associated with bankruptcy. The shares of this first holding company were then transferred to a Luxembourg master holding company. At the same time a trust agreement was put in place linking the master holding company to the other investors.

The tax authorities, followed by the judges of the Paris Court, denied the withholding tax exemption under the European Parent-Subsidiary Directive and the Franco-Luxembourg Tax Treaty on dividends paid by Foncière Vélizy Rose to the Luxembourg holding company shareholder between 2013 and 2015 on the grounds that the latter was only an apparent beneficiary of the income. Disregarding the arguments put forward by the taxpayer regarding the level of substance of the two Luxembourg holding companies, the Court stated that the mere fact that a company acts as a **mere "relay"** cannot allow it to be considered as the "beneficial owner" of the dividends. In this particular case, the dividends distributed by Foncière Vélizy Rose to its Luxembourg shareholder had been redistributed, the next day, in their entirety, to the Master Holding...

The implacable character of the beneficial owner clause, independent in its wording from the notion of substance or abuse of law, is illustrated here in line with previous case law decisions (CAA de Versailles, 27 May 2021, n°19VE00090 Alphatrad, in the context of a holding company or CE, 5 Feb. 2021, n° 430594 and 432845, min. c/ Performing Rights Society in the case of royalties paid by SACEM).

Today, in such a case, taxpayers in the course of tax audit or litigation process should not fail to ask the judge to apply the "Planet" caselaw solution (when it is advantageous). They will have to claim the reduction of withholding tax resulting from the applicable tax treaty between the State of the distributing company and the State of the "true" beneficiary of the dividend (potentially a final shareholder of the holding chain), if such a reduction is indeed applicable.

Operators in the structuring phase of their investments may be encouraged to analyse alternative acquisition scenarios using French vehicles outside the scope of the withholding tax.

Real estate Tax Team

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[1] *Supreme Court of Denmark, 9 January 2023, no. 69/2021, 79/2021 and 70/2021, Denmark vs NetApp Denmark ApS and TDC A/S following the CJEU (Grand Chamber) decision of 26 February 2019, Skatteministeriet vs T Danmark and Y Denmark Aps Joined cases C-116/16 and C-117/16*

[2] *Conseil d'Etat, 20 May 2022, No. 444451, Sté Planet.*

[3] *Paris Administrative Court of Appeal, 7 December 2022, No. 21PA05986.*

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