Germany:  
Federal Tax Court rules on procedural aspects of refund of withholding tax claims

In two decisions, Germany’s Federal Tax Court (BFH) has rejected a taxpayer’s claim for a refund of withholding tax based on the fundamental freedoms in the Treaty on the Functioning of the EU (TFEU) on procedural grounds and concluded that the Federal Tax Office is not the competent authority to resolve such claims.

Facts

Gaz de France, a company established in France, had the legal form of an SAS. (The SAS, frequently used as a joint venture vehicle, is similar to both a French limited liability company and a joint stock company.) The SAS wholly owned Gaz de France Deutschland GmbH (GmbH), a German limited liability company. In 1999, the GmbH distributed profits to its French parent company and withheld tax on the dividends in accordance with the relevant rules in the German Income Tax Act and the France-Germany tax treaty. The German Federal Tax Office rejected the SAS’s request for a refund of the withholding tax on the grounds that the SAS was not a “parent company” within the meaning of the EU parent-subsidiary directive since it was not included on the list of companies in the annex to the directive in the years at issue.

After the taxpayer appealed to the German courts, the local tax court of Cologne referred the case to the European Court of Justice (ECJ). On 1 October 2009, the ECJ ruled that a French SAS was not covered by the parent-subsidiary directive before the 2003 amendments to the directive and, therefore, it could not benefit from the 0% withholding tax on German dividends (even though the SAS wholly owned a German corporation). The ECJ also held that denying the benefits of the directive to French entities that had a legal form not listed in the annex to the directive did not restrict the freedom of establishment or the free movement of capital.

The taxpayer then raised another EU law argument to obtain relief from German withholding tax on the dividends paid by the German subsidiary to its French parent. The taxpayer based its argument on the fact that the ECJ has held in several cases that the levy of withholding tax on dividends paid to foreign shareholders violates the fundamental freedoms of the TFEU if no withholding tax is levied on dividends paid to comparable domestic shareholders or where domestic shareholders are effectively exempt from corporate income tax on such dividends, as is the case in Germany. The taxpayer argued that it was entitled to receive the German dividends free from withholding tax based on primary EU law because a German resident corporate taxpayer would be entitled to the benefits of the participation exemption and ultimately could have received the dividends free of tax.

The tax court of Cologne rejected the taxpayer’s claim for a refund of withholding tax based on the fundamental freedoms in the TFEU on procedural grounds and concluded that the Federal Tax Office is not the competent authority to resolve such claims. While the decision of the tax court of Cologne in the proceedings initiated by Gaz de France became binding, the taxpayers in two parallel proceedings that were stayed by the Cologne court until the Gaz de France decision and were subsequently rejected (again on procedural grounds) appealed to the BFH.

BFH decision

In line with a 2011 ECJ decision (Commission v. Germany, in which the ECJ implicitly reversed its own decision in 2009 in a similar case involving a Swiss parent company), the BFH held that, in principle, the French SAS is entitled to a refund of almost the full amount of German withholding tax (because 5% of dividends are taxable as nondeductible expenses, the BFH held that foreign corporate shareholders have to accept an effective tax on dividends of about 0.75%). However, the SAS cannot claim relief from withholding tax at source as would be possible under the directive, but instead it must request a refund.

The BFH confirmed the view that the Federal Tax Office is competent to resolve withholding tax issues only where relief is claimed under a tax treaty or the parent-subsidiary directive – it is not competent to decide on other refunds procedures, including refunds claimed under primary EU law (i.e. the Treaty freedoms). Thus, the taxpayer lost the case on procedural grounds. Reclaims of withholding tax based on the fact that the levy of withholding tax infringes the TFEU cannot be filed with the Federal Tax Office; instead, the foreign parent company would have to claim an exemption under general domestic rules. The BFH also agreed with the local tax court of Cologne that the tax office in the district in which the taxpayer’s assets or the most valuable part of its assets are located is the competent agency to decide on the refund request.
Comments

The case is relevant to all companies requesting refunds for German withholding tax on dividends based on the argument that the levy violates the TFEU freedoms ("Denkavit claims"). The BFH had the opportunity to re-examine its position taken in its decision in the Swiss case, which involved a third country situation, rather than a pure intra-EU situation as in the current case, and to clarify some of the uncertainties regarding the procedural rules applying to Denkavit claims in Germany.

Since the case involved a single (100%) participation held by the French SAS, it was easy to determine the competent local tax office and the BFH did not have any reason to further discuss this issue. However, in most cases, there is usually a foreign portfolio shareholder with multiple German shareholdings. Given that it is unclear which types of assets must be taken into account, where shareholdings are deemed to be located for purposes of the rule and how to determine which shareholding (or other asset) constitutes the most valuable part of the assets of the foreign investor, practical experience shows that it is impossible to safely identify a single local tax office competent for the EU withholding tax reclaims of a foreign portfolio investor. Thus, the decision demonstrates that filing refund requests at the federal level likely will not be considered sufficient, but the court’s decision does not clarify where the request should be filed. The German tax authorities are gathering information on reclaims filed throughout the country, but have not issued any guidance in this context.

Given the uncertainty regarding procedural rules, foreign shareholders (resident in EU/EEA member states as well as in third states) that have suffered withholding tax on German dividends should file refund claims with both the Federal Tax Office and the competent local tax office. If more than one participation is held, claims should be filed with all local tax offices to which withholding tax was paid.

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