Tax News Bulletin
5 June 2014

European Court of Justice: Dutch dividend withholding tax allowed on dividends to the (former) Netherlands Antilles in order to combat tax avoidance

On 5 June 2014, the European Court of Justice ("ECJ") published its judgment in the combined cases X BV (C-24/12) and TBG Limited (C-27/12). The ECJ ruled that a tax measure of a Member State which restricts movements of capital between that Member State and its own overseas country and territory whilst pursuing the objective of combating tax avoidance in an effective and proportionate manner is allowed. The Dutch Supreme Court ("DSC") should still assess whether the objective of combating tax avoidance with the Dutch dividend withholding tax is pursued in an effective and proportionate manner.

Facts

X BV and HAIC NV, both established in the Netherlands, issued a dividend to their parent company in the Netherlands Antilles (one of the Netherlands' own overseas countries and territories ("OCT")) in respectively 2005 and 2006. According to the Taxation Rules for the Kingdom (Belastingregeling voor het Koninkrijk) 8.3% dividend withholding tax was withheld and paid. The dividends were exempt from tax in the Netherlands Antilles.

Dividends paid by companies established in the Netherlands to companies established in the Netherlands or in another Member State are exempt from withholding tax if certain conditions are fulfilled. By contrast, such an exemption is not granted to dividends paid to companies established in the Netherlands Antilles. Therefore the DSC asked the question to the ECJ whether an own OCT of a Member State can be regarded as a third country, in which case it would be possible to rely on Article 56 EC Treaty in respect of the movement of capital between a Member State and its own OCT. If this question was answered in the affirmative

the DSC asked what elements should be considered when assessing the 'standstill' provision.

Applicable legislation according to the ECJ

The ECJ noted that (i) OCTs listed in Annex II to the EC Treaty form the subject-matter of the special arrangements for association set out in Part Four thereof and (ii) the existence of the special arrangements between the European Union and OCTs results in the general provisions of the EC Treaty, namely those which are not referred to in Part Four of that treaty, not being applicable to OCTs in the absence of an express reference. The ECJ concludes that Part Four of the EC Treaty does not contain any provision relating to the free movement of capital.

At the date of the facts, the applicable legislation was Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ('OCT Decision'). The ECJ notes that the OCT Decision states what restrictions on payment and on movements of capital are prohibited between the European Union and OCTs (Article 47(1)). Therefore, the OCT Decision is applicable and not Article 56 EC Treaty.

Judgment

The ECJ noted that Article 47(1) of the OCT Decision has a particularly wide scope, close to the scope of Article 56 EC in the relations between Member States and third countries. Therefore, it is necessary to examine the question referred from the point of view of Article 47(1) of the OCT Decision and to verify whether the scope of that provision is clarified or circumscribed by other rules of the special arrangements applying to the EU-OCT association. Furthermore, the ECJ noted that upon the liberalisation, for the EU-OCT association, of movements of capital, particular attention was paid to the fact that numerous OCTs are considered to be tax havens. Thus, the OCT Decision includes, in Article 55, a tax carve-out clause expressly aimed at preventing tax avoidance.

The ECJ ruled that a tax measure such as that at issue, which is, according to the DSC's description of its history and purpose, intended to prevent excessive capital flow towards the Netherlands Antilles and to counter the appeal of that OCT as a tax haven, comes under the tax carve-out clause cited above and remains, consequently, outside the scope of application of Article 47(1) of the OCT Decision, provided it pursues that objective in an effective and proportionate manner, which is a matter for the DSC to assess.

It follows from the foregoing, and without there being a need to examine the question as to what extent the rules of European Union law applicable to the relations between the European Union and OCTs apply between a Member State and its own OCT, that the answer to the first question is that European Union law must be interpreted as not precluding a tax measure of a Member State which restricts movements of capital between that Member State and its own OCT whilst pursuing the objective of combating tax avoidance in an effective and proportionate manner. As a result, the DSC should still assess whether the objective of combating tax avoidance with the Dutch dividend withholding tax is pursued in an effective and proportionate manner. Given the answer to the first question, the ECJ mentioned that there is no need to answer the second question.