

Newsalert

EU Direct Tax Group

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A-G opinion on the compatibility of the French Tax Code with the Parent-Subsidiary: Banque Fédérative du Crédit Mutuel case

On 24 January 2008, A-G Sharpston delivered her opinion in the “Banque Fédérative du Crédit Mutuel” case (C-27/07) on the compatibility of a French tax provision with the Parent-Subsidiary Directive, according to which a foreign source dividend benefiting from the affiliation privilege must be taxed up to 5% of its gross amount and not up to 5% of its amount net of WHT at source.

The question raised

Article 4 of the Parent-Subsidiary Directive rules that when dividends received from a subsidiary benefit from the affiliation privilege and are consequently tax exempt, “management expenses” related to said substantial shareholdings which must be added back to taxable profits may not exceed 5% of the “profits distributed by the subsidiary”.

The French tax code refers to that provision. Dividends from subsidiaries which are eligible to the affiliation privilege are tax exempt, but the French parent company must add back to taxable income 5% of the gross dividend received, i.e. including tax credit. Administrative guidelines explicit that “tax credits” include both French and foreign tax credits levied at source pursuant to DTT concluded by France.

Banque Fédérative du Crédit Mutuel requested nullification of the guidelines arguing that the inclusion of foreign tax credits in the basis of calculation for the 5% notional taxation does not comply with Article 4 of the Parent-Subsidiary Directive. For Banque Fédérative du Crédit Mutuel, a foreign tax credit not encashed by the parent company may not qualify as a “distributed profit” keeping in mind such a foreign tax credit may eventually not be creditable in France, which is the case since the precompte was abolished in 2005 following the ECJ Manninen case. The Conseil d’Etat referred the question to the ECJ.

The opinion of A-G Sharpston

A-G Sharpston concluded that it is not contrary to Article 4 of the Directive to compute the 5% notional taxation on the basis of the gross dividend distributed i.e. including any foreign tax credit.

In her arguments, the A-G does not see why “profits distributed” should not correspond to the amount of dividend actually received, increased by the amount of tax credit corresponding to the tax withheld at source. The A-G places herself from the perspective of the subsidiary: if the subsidiary declares a dividend of €100, the distributed profit is €100, irrespective of whether or not a tax is withheld at source.

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Jacques Taquet
Nicolas Jacquot

+33 1 56 57 83 60
+33 1 56 57 40 33

jacques.taquet@fr.landwellglobal.com
nicolas.jacquot@fr.landwellglobal.com

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