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Flash Info Tax

France : Net basis on WHT - A case-law opens claim opportunities in relation with withholding tax on services

In a decision dated November 22nd, 2019, the French Supreme Court ruled as an infringement of the EU freedom to provide services the fact that the French Tax Law denies the possibility to deduct the direct professional costs incurred from the withholding tax base.

Background

In application of French Tax Law, a withholding tax is levied at the standard corporate income tax rate on all payments made by French tax residents during the course of their business in consideration of several activities, services or rights (a few categories is listed in order for the withholding tax to have a wide scope, beyond mere services) when the supplier does not have a French "fixed professional installation" (again, this wording deliberately allows for a broader scope than the typical permanent establishment definition).

In most cases, this withholding tax on services is not applicable, or its rate is reduced, pursuant to the provisions of the relevant Double Tax Treaty. Nevertheless there may be no Double Tax Treaty, such as for service providers located in Denmark, or the Double Tax Treaty may not be applicable, as in the case at hand (apparently because of lack of evidence that the beneficiary companies were tax residents in the meaning of the applicable Double Tax Treaty).

The litigious rule

When the domestic withholding tax applies, it is levied on the gross amount of the payment since French Tax Law denies the possibility to

deduct any costs incurred to provide the service from the withholding tax base.

The decision

Though this rule has been recently held compliant with the French Constitution by the French Constitutional Court in a decision dated May 24th, 2019, the French Supreme Administrative Court ruled that it was contrary to the free provision of services (protected by Article 56 and 57 of the Treaty on the Functioning of the European Union).

The Court takes care to refer to a well-established case-law of the Court of Justice of the European Union ("**ECJ**"), but without mentioning specific cases. We may however relate this decision to several well-known ECJ cases: Gerritse (June 12th, 2003, C-234/01), FKP Scorpio Konzertproduktionen (October 3rd, 2006, C-290/04) and Centro Equestre da Lezieia Grande (February 15th, 2007, C-345/04). As in those, for services, assessing the withholding tax on a net basis is agreed, but the wording of the decision's *ratio decidendi* limits the scope of deductibility to professional costs directly incurred for the provision of the services.

Though this decision has been held pursuant to one of the categories in the scope of the litigious withholding tax, the outcome reached by the Court seems more widely applicable to all the services that fall within the withholding tax scope, regardless of the particular categories.

Sure enough, only service providers established in an EU Member State can claim the benefit of the freedom to provide services and accordingly take advantage of this decision.

Next steps

We recommend taxpayers to claim the refund of withholding taxes unduly levied on payments made in 2017 before their right become statute-barred on December 31st, 2019.

To assess their position, taxpayers should typically first identify what flows were impacted by this withholding tax. They should then gathered all the documentation available to support their right to deduct from the withholding tax base the costs incurred to provide the services. A thorough review of this documentation will be necessary to make the cut-off between direct and indirect costs, having in mind that it will be without doubt scrutinized by the French Tax Administration.

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