



## **The French partial taxation of costs and expenses related to dividends received from European subsidiaries outside France constitutes a restriction on the freedom of establishment**

In its judgment of 2 September answering the question referred for a preliminary ruling by the Administrative Court of Appeal of Versailles in a decision of 29 July 2014 (12VE03691, Groupe Steria), the Court of Justice of the European Union considers that the neutralisation of the add-back of the proportion of costs and expenses solely for intra-group dividends constitutes a restriction on the freedom of establishment prohibited by Article 49 of the Treaty on the Functioning of the European Union (TFEU).

It is recalled that Article 223 B of the French tax code provides for the neutralisation of the add-back of the proportion of costs and expenses related to the dividends received by a French parent company from a French subsidiary when both companies are members of the same consolidated tax group. The result is a difference of treatment depending on whether the dividends are received from a French subsidiary member of the same consolidated tax group as the parent company or, from a subsidiary established in another Member State which could have been part of this consolidated tax group if it had been established in France. The proportion of costs and expenses is fixed in every case at 5% of the gross dividend.

Following the opinion of the Advocate General, the Court states that it cannot be inferred from the X Holding judgment of 25 February 2010 (C-337/08) that any difference of treatment between, on the first hand, companies part of a consolidated group and, on the other hand, companies not belonging to such a group is compatible with Article 49 of the TFEU (§ 27). Each tax benefit granted under a tax group regime, other than the transfer of losses within the group, should be considered separately.

In the case of the neutralisation of the add-back of the proportion of costs and expenses, the absence of neutralisation of the partial taxation of costs and expenses related to dividends received by a French company from a subsidiary established in another Member State constitutes a restriction on freedom of establishment which is justified neither by the principle of allocation of the taxation power between the Member States (justification used in the X Holding judgment), nor by the coherence of the tax consolidation regime.

As a consequence of this judgment, French parent companies of subsidiaries established in another member States can claim the repayment of the corporate income tax paid on dividends received from these subsidiaries during 2013 and 2014 fiscal years, which can be evaluate to around 2% of the dividends.

Furthermore, it is appropriate to consider all the benefits of the French tax consolidation regime with regard to the principle of freedom of establishment (including the exemption from the 3% corporation surtax on dividends which benefits to intra-group dividends).

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