Poland; Denmark

Regional Administrative Court in Warsaw: Indirect Shareholder Dividends May Be Exempt from Withholding Tax

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Report from Magdalena Olejnicka, Principal Associate, IBFD

The Regional Administrative Court (*Wojewódzki Sąd Administracyjny,* WSA) in Warsaw has recently decided in the case of *a Polish subsidiary of a Danish holding company (the applicant) v. the ruling of the National Tax Information* (*Krajowa Informacja Skarbowa,* KIS). In its judgement of 14 September 2023 (No. II SA/Wa 1513/23), the WSA confirmed the possibility of applying a look-through approach concerning the exemption from withholding tax (WHT) on dividends per article 22(4) of the Corporate Income Tax (CIT) Law.

(a) Facts. The applicant was a Polish company, a subsidiary of a Danish holding company (the parent company). The parent company had no operational involvement, or staff, and its role was limited to asset management and exercising corporate rights in majority-owned companies. The entity superior to the parent company was another Danish company (the superior company), which in contrast to the parent company, conducted business activities with an appropriate infrastructure matching its scale. It rented an office, employed qualified staff, and performed its basic economic functions using its own resources, including individuals managing operations on-site.

The applicant requested an individual ruling from the KIS to confirm the applicability of the look-through approach for the exemption from WHT on dividends paid to the superior company per article 22(4) of the CIT Law.

(b) Issue. According to the applicant, following the look-through principle, the exemption under article 22(4) of the CIT Law could be applied when the actual beneficial owner of the dividend holds shares either directly in the dividend-distributing entity or indirectly as an indirect shareholder.

However, the KIS denied the exemption arguing that the dividend could not be exempt under article 22(4) because the superior company was not a direct shareholder of the entity paying the dividend and did not meet the requirement set out in that article. This requirement mandated a direct ownership of at least 10% of shares in the capital of the dividend-distributing company.

(c) Decision. In response to the applicant's appeal, the WSA rejected the KIS interpretation emphasizing that the CIT Law's dividend exemptions aim to implement the Parent-Subsidiary Directive (2011/96). The directive provides that dividends and other profits distributed by subsidiaries to parent companies are exempt from tax to prevent double taxation of dividend payments between companies based in the EU or EEA. Accordingly, the WSA ruled that the payment of dividends to a holding company, with the dividends' beneficial owner being a partner in that company, are tax exempt in Poland, given other conditions are met.

Note: Due to the uncertainty surrounding the use of the look-through approach for dividends paid to indirect shareholders, and the inconsistent jurisprudence of administrative courts and the KIS rulings, the Ministry of Finance prepared guidelines on the application of withholding tax to cross-border payments of passive income. The draft guidelines were published on 28 September 2023. For previous reporting, *see* Ministry of Finance Announces Consultations on Guidelines to Withholding Tax on Cross-Border Payments (2 October 2023).

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