

Supreme Administrative Court Questions Constitutionality of Withholding Tax on Dividends Paid to Non-Resident Loss-Making Companies

21 July 2023

Report from our correspondent Pierre Burg

On 13 July 2023, the French Supreme Administrative Court (*Conseil d'Etat*) requested the Constitutional Court to rule on the conformity of the withholding tax applicable to dividends paid to non-resident loss-making companies with the domestic constitutional principles (judgement no. [455810](#), *Compagnie Gervais Danone*).

Starting from 1 January 2020, non-resident loss-making companies may claim a temporary refund of the French dividend withholding tax, subject to conditions provided for in article 235 quater of the General Tax Code (see [Finance Bill 2020 – Corporate taxation \(30 September 2019\)](#)). This measure was introduced in response to the ECJ decision in *Sofina and Others (Case C-575/17)*, where the ECJ ruled that the dividend withholding tax was contrary to the EU law because it imposed immediate taxation on non-resident loss-making companies, while resident loss-making companies were not subject to taxation in the year they received dividends from French sources.

According to the Supreme Administrative Court, the difference in treatment that existed before 1 January 2020 between resident and non-resident loss-making companies was unjustified. This raises a question regarding its compliance with the constitutional principle of equality before the law.

Furthermore, the Court noted that despite the introduction of new rules, the dividend withholding tax may still lead to discriminatory outcomes. Specifically, Article 235 quater of the General Tax Code does not apply to companies established outside the European Union that hold a participation considered a "direct investment" (these companies may not benefit from the free movement of capital pursuant to the standstill clause provided for by article 64 of the [Treaty on the Functioning of the European Union \(TFEU\)](#)).

Therefore, the Supreme Administrative Court requested the Constitutional Court to rule whether these two differential treatments are in line with the constitutional principle of equality before the law. The Constitutional Court will render its decision within 3 months.

