

Luxembourg Tax Authorities clarify application of EU Parent-Subsidiary Directive with respect to Gibraltar companies

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On 1 December 2020, the Luxembourg Tax Authorities issued guidance¹ on the (non-) applicability of the Directive on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (Parent Subsidiary Directive or PSD) to companies established in Gibraltar.

This Circular follows the decision of the Court of Justice of the European Union (CJEU) in the case of *GVC Services (Bulgaria) EOOD* (Case C-458/18), in which the CJEU confirmed that companies incorporated under Gibraltar law are not covered by the PSD, as they may not be considered as companies incorporated under the law of the United Kingdom (UK) for purposes of the PSD, nor can the tax levied in Gibraltar be considered as a corporation tax in the UK.

Following the CJEU's decision, the Circular confirms that as from 1 January 2021 the exemption provided for dividends and capital gains received by domestic permanent establishments of a company covered by article 2 of the PSD or derived by Luxembourg resident entities from a participation in a company covered by the same article will no longer apply where the company is incorporated under Gibraltar law.

Correspondingly, the withholding tax exemption provided for dividends paid by a Luxembourg company to a company covered by article 2 of the PSD will no longer be granted where the beneficiary is a Gibraltar company, nor will a participation held in a Gibraltar company be considered a qualifying participation for the net wealth tax exemption given that such company is not covered by the PSD.

As noted by the CJEU, its decision on the non-applicability of the PSD to companies incorporated under Gibraltar law is without prejudice to a Member State's obligation to comply with the principles of freedom of establishment and free movement of capital protected under European Union (EU) Law. As a result and in light of these freedoms, business relations involving companies incorporated and/or tax resident in Gibraltar that are directly held by or hold a Luxembourg company should be able to benefit from the participation exemption under the PSD until 31 December 2020, the date at which EU legislation will no longer apply to the UK.

The Circular also confirms that dividends paid by and capital gains derived from a Gibraltar company to a Luxembourg company may still be tax exempt under the participation exemption rules applicable to non-EU resident companies. Luxembourg law provides for a tax exemption of dividends/capital gains received from companies not covered by the PSD, provided that they are corporate entities fully subject to a tax corresponding to the Luxembourg corporate income tax (and subject to the same holding period and threshold conditions as applicable to EU companies being met). The same applies for the net wealth tax exemption with respect to a participation held in a company incorporated under Gibraltar law. No exemption from withholding tax on dividends paid by a Luxembourg company to a company incorporated under Gibraltar law can however apply in the future since Gibraltar has no double tax treaty with Luxembourg (which is one of the conditions for the withholding tax exemption to apply to dividend distributions to non-EU shareholders).

Endnote

1. Circular L.I.R. n° 147/2, 166/2 and Eval. n° 63 on the (non-)applicability of Directive 2011/96/EU of 30 November 2011.

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