

Italian Tax Authorities allow withholding tax exemption under EU-Switzerland Agreement in absence of actual dividend taxation at Swiss parent company

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Executive summary

With Ruling n. 57 of 15 February 2019 (Ruling 57/2019), the Italian Tax Authorities (ITA) confirmed application of the withholding tax exemption under Article 15 of the European Union (EU)-Switzerland Agreement (the Agreement)¹ in relation to dividends paid by an Italian subsidiary to its Swiss parent benefitting from the local dividend exemption regime. The ITA stated that the existence of a Swiss tax regime, whose legal purpose corresponds to that of the Italian dividend exemption, does not prevent the mentioned withholding tax exemption.

This conclusion appears reasoned though opposite to a position held by the Italian Supreme Court with decision n. 3225 of 13 December 2018 (Case 3225/2018), where the judges denied the withholding tax exemption under the EU Parent-Subsidiary Directive. In that case, the Court claimed that no double taxation occurred since a local dividend exemption was available to the EU parent, without making any distinction between juridical and economic double taxation.²

Based on the reasoning of Ruling 57/2019, it appears that in Case 3225/2018 the withholding tax exemption should have been allowed to avoid double (economic) taxation in line with the EU Parent-Subsidiary rules.

Detailed discussion

Article 15 of the Agreement provides a measure for the avoidance of double taxation on dividends paid between EU and Swiss companies whose rationale strictly aligns to that of the EU Parent-Subsidiary Directive for dividend payments between EU companies.

In the instant case, an Italian company sought an advance tax ruling by asking for confirmation of the withholding tax exemption on a dividend payment to its Swiss parent. By submitting a tax certificate released by the Swiss tax authorities, it demonstrated that the Swiss parent had opted out from the beneficial tax regime for Swiss holding companies. On such basis, the Italian company claimed the application of Article 15 of the Agreement, according to which the withholding tax exemption should be granted where (among the other prerequisites) “both companies are subject to corporation tax without being exempted.”

The ITA concluded that:

- To benefit from the withholding tax exemption under the mentioned Article 15, a Swiss parent needs to be subject to local corporate income tax without exemption from any of the three levels of taxation (i.e., municipal, cantonal and federal).
- A formal renounce to the Swiss holdings preferred tax regime suffices to prove the company as “subject to corporation tax without being exempted.”

- The circumstance that the dividends are actually excluded from Swiss taxation under an ordinary regime similar to the Italian dividend exemption does not preclude withholding tax exemption.

Implications

Given the concerns raised by Case 3225/2018 and the discussions around its non-compatibility with the EU Parent Subsidiary Directive, Ruling 57/2019 is a positive development as it supports the position that such Supreme Court decision is a one-off ruling, possibly the result of some factual misunderstanding and seemingly incorrect.³

Ruling 57/2019 illustrates that even in presence of a dividend exemption regime applied at the level of the parent company, Italy, as the source jurisdiction, has to allow the withholding tax exemption in order to avoid (economic) double taxation. Therefore, it can be inferred that for the purposes of the said exemption regime it suffices that the parent company is liable (and not subject) to tax on the dividend.

The principle expressed with reference to Article 15 of the Agreement should likewise apply in the case of the EU Parent-Subsidiary Directive.⁴

Endnotes

1. Reference is made to Article 15 (*Payments of dividends, interest and royalties to companies*) of the Agreement between the European Community and the Swiss Confederation providing for measures equivalent to those laid down in Council Directive 2003/48/EC on taxation of savings income in the form of interest payments of 26 October 2004.
2. See EY Global Tax Alert, [Italian Supreme Court denies withholding tax exemption under EU Parent-Subsidiary Directive in absence of actual dividend taxation at EU parent company level](#), dated 4 February 2019.
3. Even if Supreme Court decisions have an important weight in the interpretation of the rules, it is to be noted that Italy is not a “Common Law” system. Therefore Italian jurisprudence is legally binding only on the parties involved in the case.
4. This should be even more true in the case of the EU Directive where, in addition to an obligation for the source State to not apply any withholding tax, it is explicitly required that the residence state allow a dividend exemption regime (or an underlying tax credit for the corporate income tax paid by the subsidiary). Article 15 of the Agreement only requires the source state to refrain from applying any withholding tax.

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