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The Reimbursement of Withholding Tax on Dividends Distribution of Non-Resident Minority Stakeholders of Italian Companies: an EU Judgment

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On November 19, 2009, the EC Court of Justice issued judgment C-540/07 in the case *European Commission v. Republic of Italy* on the tax treatment of dividends distributed by Italian companies to non-resident companies located in the EU or in the EEA.

According to the EC Court of Justice, the Republic of Italy has failed to fulfill its obligations under article 56 of the Treaty as well as to Articles 56 and 40 of the EEA by making dividends distributed to companies established in other Member States subject to a less favorable tax regime than that applied to dividends distributed to resident companies.

Following this judgment, companies resident in the EU[1] or in the EEA[2] which have received dividends from an Italian subsidiary where they held less than 20% can request the refund for the withholding tax paid in Italy.

The legal background of the case is discussed as follows:

1. As of January 1, 1992, the Republic of Italy implemented the Parent-Subsidiary Directive (Directive 90/435/EC) introducing a new tax regime on dividends distributed by Italian companies to EU companies by adding Article 27-bis to Presidential Decree No. 600 of September 29, 1973 (hereinafter, the “Italian Assessment Code”). Notably, according to such provision, dividends distributed to EU companies having the requisites provided by the Parent-Subsidiary Directive were exempted from withholding in Italy. The requisites provided for by the Directive were:

   (i) a shareholding equal to 25% held for more than a year, (ii) of one of the corporate entities provided for in Annex A to the Parent-Subsidiary Directive, and (iii) subject to Corporate Income Tax in the State of residence according to Annex B of the same Directive. The shareholding requisite was subsequently amended in 2007 to a 20% threshold by directive 2003/123/EC.

2. Starting from January 1, 2004, the Republic of Italy introduced a new tax regime for dividends distributed to Italian resident companies, introducing the exemption from withholding tax also for resident companies.

3. For non-resident companies which were not covered by the Parent-Subsidiary Directive, however, the Republic of Italy maintained in force the provision of Article 27 of the Assessment Code which provided a 27% withholding for non-resident companies in Italy and which did not have the requisites provided for by the Parent-Subsidiary Directive. Thus

all EU and EEA companies having a minority stake in an Italian company from 2004 through 2007, when dividends were distributed, were subject to a 27% withholding tax, whilst Italian companies having the same characteristics were not. Please note that according to the same provision such non-resident companies could benefit from a tax refund equal to 4/9 of the tax paid in Italy if they were able to show that dividends were subject to tax in the State of residence.

4. As of January 1, 2008, such withholding for non-resident companies was abolished by Article 1, para. 67 lett. (a) no. 4 of Law No. 244 of December 24, 2007.

As mentioned, on the basis of such background, the EC Court of Justice ruled that such less favorable tax treatment for companies resident in the EU as well as in the EEA was contrary to Article 56 of the Treaty, as well as to Articles 56 and 40 of the EEA.

Thus, companies resident in the EU or in the EEA which received dividends from an Italian company and were subject to withholding in Italy are now entitled to a refund of such withholding in Italy.

There still is an issue open to discussion with respect to the statute of limitation for the reimbursement. Indeed, while according to the provision of Article 38, para. 2 of Presidential Decree No. 602 of September 29, 1973 withholding taxes unduly paid should be asked for reimbursement within two years from payment, there is an interesting argument based on the Emmott case law (C-208/90) of the Court of Justice as subsequently interpreted by the Fantask case (C-188/95) whereby the statute of limitation should commence from the date of issuance of the judgment (i.e., November 19, 2009), thus allowing the reimbursement of withholding paid from 2004 through 2007.

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If you have any questions concerning these developing issues, please do not hesitate to contact:

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1 As a mere remainder the Member States of the EU are: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, United Kingdom, Slovakia, Slovenia, Spain and Sweden.

2 Member States of the EEA are Iceland, Liechtenstein and Norway.

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