

An Austrian perspective on intermediary holding companies and withholding tax relief

The question of the necessary substance requirements for foreign holding companies in order to qualify for an exemption or refund of withholding taxes has been a hot topic in various EU member states. A decision of the Austrian Supreme Administrative Court and a recent opinion by the Ministry of Finance provide some guidance on his topic.



In its decision of March 27, 2019, 2018/13/0004, the Austrian Supreme Administrative Court dealt with the question whether the investment in an Austrian company via Luxembourg holding companies are abusive in the light of the EU Parent-Subsidiary-Directive. In this case an Austrian company was partly held by an intermediary holding company resident in Luxembourg (LuxCo2), which passed through any dividends it received to another holding company in Luxembourg (LuxCo1). LuxCo2 neither had own personnel nor an active business. LuxCo1 had its own employees, its own premises and the management activities of its shareholdings were subject to VAT. LuxCo1 itself was owned by funds in the Cayman Islands, Australia, European countries and others.

The Austrian tax authorities and the Austrian Fiscal Court rejected the request for refund of Austrian withholding tax based on Austrian general anti-avoidance rules (GAAR). As the beneficial owners of the structure were partly tax resident outside the EU, the interposition of

the Luxembourg holding companies was seen as directive shopping.

According to the Austrian Supreme Administrative Court however, the application of the Austrian GAAR would require both the applying LuxCo2 and its parent company LuxCo1 to be established without economic or other non-tax reasons and both having no own economic activities. The court found no grounds to assume that LuxCo1 had no own economic activities. According to the court, the activities of a managing holding company must not include that its employees give professional advice to its subsidiaries on the management of its business. In this regard the Austrian court referred to the Deister and Juhler cases of the ECJ and stated that contrary to Deister Holding and Juhler Holding, LuxCo1 even was subject to VAT.

Regarding the requirement of economic reasons for a structure, the court found that an economic reason can also exist if the desired economic goal could be achieved by an alternative structure. The taxpayer must not prove that the acquisition of the Austrian company would have failed without the interposition of intermediary EU holding companies.

A withholding tax relief can therefore be granted in cases where at least the indirect holding company of an Austrian company fulfills the substance requirements of the EU Parent Subsidiary Directive.

No exemption at source for non-EU intermediary holding companies

Contrary to the opinion of the Supreme Administrative court, the Austrian Ministry of Finance (MoF) recently dealt with the question

of withholding tax relief regarding non-EU-holding companies, where the MoF comes to a different conclusion. In the case at question in [EAS 3422](#) issued on January 7, 2020, 100% of an Austrian company were held by a US intermediary holding company (USCo2) which again was held by a US stock listed company having an active business (USCo1). According to the MoF, an exemption at source of Austrian withholding tax on dividends paid to non-EU-intermediary holding companies must not be granted, where the direct holding company of the Austrian company does not fulfil the substance requirements (i.e. if USCo2 does not have an active business itself, no exemption at source can be granted). In such cases, withholding tax relief might only be achieved by applying for a refund.

Take-away

Whether or not a foreign holding company qualifies for an exemption at source or a refund from Austrian withholding tax must always be assessed based on the facts of the respective case. Especially non-EU shareholders of Austrian companies must think twice about structuring their investment via an intermediate holding company, as they will not receive an exemption at source from Austrian withholding tax.

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