

TAX ALERT

Incompatibility of the tax on capital gains resulting from the sale of French substantial shareholdings by companies resident in EU

In a judgment of October 14th, 2020 (CE, October 14, 2020, n° 421524, AVM International Holding), the French Administrative Supreme Court (“Conseil d’Etat”) ruled that the tax provided for in Article 244 bis B of the French Tax Code (FTC) due by EU resident companies on long-term capital gains relating to a substantial shareholding (25%) in a French company violate EU law and more particularly the freedom of establishment.

Pursuant to Article 244 bis B of the FTC, and subject to double tax treaties, non-resident companies are subject to a tax (at a rate of 19% at the date of the facts and 28% today) when the selling company has held more than 25% of a French company whose shares are being sold, at any time over the last five years.

Companies resident in France, for their part, benefit from an exemption regime for their long-term capital gains on the sale of shares held for at least two years, with the exception of a share of costs and expenses (which was 10% at the time of the facts and 12% today).

This discriminates against a French company which, placed in the same situation, would only be subject to corporate income tax on the share of costs and expenses.

To avoid such discrimination, since 2008, administrative guidelines have provided that capital gains tax realised by companies resident in EU Member States is capped at the amount of corporate income tax that would have been payable by the seller if he had been a French tax resident.

In the present case, an Italian company owning 33% of the capital of a French company had paid the tax at a rate, then applicable, of 19%.

Therefore, the Italian company requested the refund of the entire amount of the tax paid. The French Tax Authorities partially upheld this claim by limiting the tax refund to the amount provided for by administrative guidelines.

Then, the company challenged the absence of full tax relief, on the basis that Article 244 bis B of the FTC did not comply with EU law.

The French Administrative Supreme Court, seized of the case, followed the company's arguments and ruled that the tax provided for in article 244 bis B of the FTC violated EU law, without the French Tax Authorities being able to remedy this incompatibility with European law.

Therefore, the Italian company was entitled to request refund of the entire tax paid.

This decision opens up the possibility of claims to EU companies resident, that have paid the tax on sales carried out as of January 1st, 2018.

Companies resident in EU Member States that have signed a tax treaty with France that includes a “substantial shareholding clause” are concerned.

In practice, this concerns Spain, Italy, Austria, Sweden, Iceland, Malta, Bulgaria, Hungary and Cyprus.

For taxes paid during 2018, such a claim must be filed with the French Tax Authorities before December 31th, 2020 in order to be admissible.

Hervé QUERE
Attorney-at-Law
Partner