Tax Notes

Our business – your insight

Group dividends (decision of the Federal Administrative Court of 28 February 2018)

In its decision of 28 February 2018 (A-7299/2016), the Federal Administrative Court had to deal with the eligibility for refund of the Swiss withholding tax levied on a dividend paid to an Irish group company. Of particular interest in the present case is the fact that, in addition to the direct parent company of the receiving company (which also has its registered office in Ireland), the final beneficiary shareholder and ultimate parent company - a world-leading industrial group based in Italy- falls within the scope of the EU-Swiss agreement on the taxation of savings income. The Court had already stated in an earlier decision (A-5692/2015) that the term 'beneficial owner' is implicitly contained in Article 9 of the AEOI Agreement (formerly Article 15 of the EU-Swiss agreement on the taxation of savings income). In the current decision, the Federal Administrative Court has for the first time now affirmed the requirement of the 'beneficial ownership' in a pure EU/Swiss group relationship. The court thus takes the view that the concept of the beneficial ownership does not necessarily have to serve to prevent abusive usage of treaty benefits because, as mentioned at the beginning, all Group companies fell within the scope of application of the EU-Swiss agreement on the taxation of savings income. Hence, there was no question of an abusive group structure, such as the interposition of a company without entitlement to tax treaty benefits

In the end, the Federal Administrative Court had ultimately denied the beneficial ownership to the Irish company in this decision. The decisive factor for the rejection was the predominantly identical composition of the 'Board of Directors' of the complainant and likewise of its Irish parent company. From this, the court concluded that all decision-making powers concerning the disputed dividend ultimately emanated from the parent company and that the beneficial ownership of the complainant should be denied.

The result of this jurisprudence is that, in a group of predominantly top-level management and executive bodies with simultaneously-held positions, there is a natural presumption that the attainment and use of an intra-group dividend is not at the discretion of the dividend recipient and therefore the beneficial ownership should always be denied.

In our view, the decision does not take into account the economic circumstances in group structures. In reality, the boards of directors of group subsidiaries used by the parent company are independent in the very fewest of cases. Though perhaps not legal, in reality it is never at the discretion of such a board of directors to decide on the use of a profit distribution of a subsidiary. Such decisions are made by the Group's headquarters and implemented by the organs of the subsidiaries, provided that they do not violate mandatory local law. Correspondingly, a complaint against this decision has been raised by PrimeTax to the Federal Court.

Transfer stamp tax duty in case of employee participation intermediation

On the occasion of the tax audits increasingly carried out by the Federal Tax Administration, including those concerning transfer stamp tax, we would like to point out two transactions in these and the following tax notes, wherein a potential transfer stamp tax duty should be checked respectively.

It is commonly known that the transfer stamp tax is levied essentially on the purchases and sales of domestic and foreign securities which are made (with various exceptions) by domestic securities dealers (including companies with more than CHF 10 million investments in their balance sheets). Correspondingly, transactions with employee participations may also be subject to transfer stamp tax if a domestic securities dealer is involved. In this case, the securities dealer may become not liable to tax as direct contractual partner but also as an intermediary. In a recently conducted tax audit, the Federal Tax Administration had a

tendency to assume that such tax liability was due to the mediation activities of a domestic securities dealer. The tax liability as a result of mediation activities was finally disregarded by the Federal Tax Administration-based on the argument put forward-that the affected securities dealer has only information gathering and forwarding functions in the process of employee participation assignments (e.g. annual employee assessments and nomination for an assignment). The final decision on the assignment, however, was taken by the foreign group head office and the nominated employees were also able to refuse the assignment, i.e. no automatic assignment was made by the domestic securities dealer upon nomination.

Withholding tax declarations after the General Meeting

Most of the companies' financial statements which have been completed for the financial year as of 31.12.2017 are available in the meantime. This is because, under Swiss commercial law, the annual financial statements must be prepared within six months of the end of the financial year and approved by the General Meeting. After that, any possibly necessary withholding tax declarations must not be forgotten. If a dividend distribution was decided upon, essentially a withholding tax of 35% is due on that. This should be declared within 30 days after the maturity date using corresponding official forms and-unless the notification procedure is applicable-must be paid to the Swiss Federal Tax Administration. If no explicit maturity date has been decided, the date of the General Meeting applies as the maturity date. If no dividend is decided upon, a withholding tax declaration should be made anyway in certain cases (a so-called 'nil declaration'), e.g. if the balance sheet total exceeds CHF 5 million, which is also to be submitted with the corresponding annual financial statements within 30 days after the General Meeting to the Federal Tax Administration. Failure to meet this deadline may incur negative consequences such as default interest and possibly fines for the company (whereby failing to comply with the deadline in the notification procedure no longer leads to its forfeiture). Finally, it is important to remember that changes in the tax capital contribution reserves must also be notified to the Federal Tax Administration within 30 days after the General Meeting via official forms (including annual financial statement).

Taxation of an ICO

PrimeTax currently advises various companies in tax matters regarding cryptocurrencies (companies that have an Initial Coin Offering-or also referred to as ICO-or those that have significant holdings of cryptocurrencies, etc.).
Only recently, PrimeTax hadsucessfully obtained a binding preliminary tax ruling for a company in Zug setting up an ICO.
It should be ensured that, in the tax period of the ICO, the taxable income is offset by an accrual for project financing. The presentation of the business purpose of the accrual is decisive for the successful application of the ruling. In this respect, the project description, the project costs and the defined milestones are of particular significance. The latter is important for the tax authority to be able to estimate the time of the project completion. Amazingly enough, numerous ICO in Switzerland were being set up by and large without a ruling as regards direct taxes. Many companies have put themselves at risk in this way.
In the March issue of the EXPERT FOCUS by EXPERTsuisse, we published a specialist article which deals in detail with the tax aspects of this new form of financing.

Judith Lorenz
lic. oec. publ., Certified Tax Expert
Senior Manager
judith.lorenz@primetax.ch
+41 58 252 22 12

Dominic Nazareno
M.A. HSG, Certified Tax Expert
Senior Manager
dominic.nazareno@primetax.ch
+41 58 252 22 03