Assessment of WHT on deemed dividend distributions – new administrative practice

On 30 March 2015, the Austrian Federal Ministry of Finance issued an information (BMF-010200/0015-VI/1/2015) on the assessment of WHT on deemed dividend distributions.

In contrast to the administrative practice in the past, WHT shall in the future – based on current jurisdiction – primarily be levied from the recipient of dividend income. The distributing company may still be held liable for WHT. The information is silent on its application in case on non-resident shareholders. The new administrative practice will be as follows:

► WHT on deemed dividend distributions shall primarily be levied from the recipient of dividend income.
► The distributing company can still be held liable for WHT – subordinated or in addition to the recipient of dividend income - if the uncollectibility at the level of the recipient of dividend income is finally determined, if there are reasonable doubts on the collectability or if there are administrative and financial reasons (e.g., large number of recipients). The tax office will have to bring forward reasons if it exercises its discretionary power and levies WHT from the recipient of dividend income.

The information (in German) is available under the following link:

https://findok.bmf.gv.at/findok?execution=e1s3&dokumentId=089b6c66-67c4-4928-b2fa-6c324b962a85
EU Advocate General finds Austrian goodwill amortization does not constitute State Aid but does infringe on EU freedom of establishment

Executive summary

As reported in the Global Tax Alert dated 20 April 2015, Advocate General (GA) Kokott of the Court of Justice of the European Union (CJEU) issued her opinion in the case of C-66/14, Finanzamt Linz/Bundesfinanzgericht on 16 April 2015. The Austrian Administrative High Court had requested a preliminary ruling from the CJEU regarding the compatibility of the goodwill amortization within the Austrian tax group regime with the freedom of establishment and State Aid rules. In her opinion, the GA concluded that the regulation of the Austrian goodwill amortization does not qualify as prohibited State Aid but it is an infringement of the freedom of establishment.

Detailed discussion

Background

In the Austrian group taxation regime, amortization of goodwill can be claimed for tax purposes on the acquisition of domestic participations in operating group members which have been acquired from a third party after 1 January 2005 and before 1 March 2014. The goodwill amortization is not applicable for foreign group members. The amortization leads to tax deductible costs and at the same time reduces the tax book value of the respective participation. The Austrian Administrative High Court applied to the CJEU for a preliminary ruling regarding the conformity of the goodwill amortization with European Union law. The Austrian Administrative Court submitted the following questions to the CJEU:

- Does the exclusion of foreign group members from the goodwill amortization infringe the freedom of establishment?
- Can the goodwill amortization be qualified as a prohibited State Aid, which benefits companies acquiring domestic participations?

Infringement of freedom of establishment

The GA determined that since the goodwill amortization is only applicable to domestic group members and the situation of a foreign group member is objectively comparable with the situation of a domestic group member, the Austrian domestic rule on tax goodwill amortization is an infringement of the freedom of establishment. This restriction of the freedom of establishment also cannot be justified by the argument of the coherence of the Austrian tax system, which was brought forward by Austria. Accordingly, GA Kokott concluded that the restriction of the goodwill amortization (being applicable only to domestic group members) infringes the freedom of establishment.

No infringement of State Aid Rule

Generally, a privilege, which favors one or a group of taxpayers, can be a benefit which can be seen as prohibited State Aid. According to the GA’s opinion, the tax reduction caused by the goodwill amortization can be seen as such a benefit.
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However, as part of the selectivity criterion, the GA mainly focused on the fact of whether factually and legally comparable situations are treated differently by the tax regime and in particular if certain industries or certain companies receive a selective benefit. A prohibited State Aid does therefore particularly exist if benefits are granted for purposes which are outside of the (primary) purpose tax system. The GA did not find selectivity in different tax systems for corporations and individuals. Also the fact that the goodwill amortization is only applicable in the case of a formation of a tax group, in the opinion of the GA, does not constitute selectivity, as (i) statements of the CJEU regarding the fundamental freedoms, that the tax treatment of participations within a tax group regime can differ from the tax treatment of participations outside a tax group regime, are also applicable regarding the selectivity and (ii) the formation of a tax group is optional for all corporations. As basically all corporations (which qualify as a group parent) can acquire corresponding participations and make use of the goodwill amortization, the Austrian regulation does not lead to a benefit for certain industries or certain companies. Even though in some cases the CJEU has set lower requirements on the criterion of selectivity, GA Kokott rejects an extensive interpretation (according to which the Austrian regulation could be seen as selective measure) especially in tax law, as this could substantially limit the sovereignty of the Member States and would contradict the principle of subsidiarity. In summary, the GA concluded that the regulation of the goodwill amortization does not constitute a prohibited State Aid.

Impact

GA Kokott therefore concluded that based on European Union law the Austrian goodwill amortization is not a prohibited State Aid but the goodwill amortization is not in line with the freedom of establishment. Although the CJEU is not bound by the GA’s opinion, the opinion is an important indicator, as in the majority of cases, the CJEU follows the GA’s opinions. Taxpayers should review their facts to determine if a claim (including for past years) for goodwill amortization for foreign group members is possible.

Austrian government presents a package to improve the framework conditions for charitable activities

On 24 March 2015, the Austrian government presented a package to improve the framework conditions for charitable activities. The simple, unbureaucratic and transparent setting up of private non-profit foundations shall be fostered. Additionally the tax-deductibility of donations shall be expanded.

The enactment of the corresponding law remains to be seen.
OECD Developments

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OECD issues discussion draft on economic analysis of base erosion and profit shifting under BEPS Action 11  [Read more]
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