lexGO.be
Law jobs online

Are French dividends now more advantageous than Belgian dividends?

Mrs. Saskia Lust Partner saskia.lust@loyensloeff.com

Mr. Jean MeeÃ¹s Senior Associate jean.meeus@loyensloeff.com

A Belgian resident who receives dividends from a foreign source often suffers a double taxation: a withholding tax in de source state of the dividend and a tax in Belgium (often via a liberatory withholding tax).

To mitigate this double taxation, Belgium concluded Double Tax Agreements (DTA) with several states, including France.
For many years, the Belgian tax administration's interpretation of the French-Belgian DTA regarding movable income has been subject of controversy.

On 15 October 2020, the Belgian Supreme Court has (once again) ruled in favour of the taxpayer in respect to the application of the French-Belgian DTA. This judgement can lead to a more favourable tax treatment of French source dividends than Belgian source dividends.

Background

The French-Belgian DTA provides for two mechanisms to avoid double taxation of French dividends received by Belgian residents:

- The French withholding tax is limited to 15% (art. 15) ;
- The fixed foreign tax rate (FFTR) of minimum 15% is deducted from the Belgian withholding tax rate (art. 19, A.1., par. 2), i.e. a tax credit is granted.

Since 1 January 2018, France reduced its tax rates (excluding any potential social security contributions) from 30% to 12,80%. Since then, the 15% cap for French withholding tax is no longer relevant.

For more than 30 years, the Belgian tax administration refused to apply a credit of FFTR on French dividends received by Belgian residents on the basis of changes made to Belgian

LexGO sprl - www.lexgo.be - (c) 2021 - All rights reserved

domestic law. Article 285 of the Belgian Income Tax Code (BITC) provides that a credit of FFTR is reserved for capitals and assets that are used for a professional activity in Belgium and for dividends attributed or granted by investment companies.

Since then, Belgium applies the withholding tax (currently at a tax rate of 30%) on the net dividend (i.e. after deduction of the French withholding tax), without the possibility to credit the French withholding tax of 12,80%.

This results in a total tax burden of 38,96% for French dividends (excluding any potential social security contributions in France).

Example: If a gross dividend of 100 EUR is received, France will levy a withholding tax of 12,80%, i.e. 12,80 EUR.

In Belgium, the withholding tax of 30% is levied on the net dividend of 87,20 EUR, i.e. 13,08 EUR. The total tax burden therefore amounts to 38,96 EUR.

Jurisprudence of the Supreme Court

The Belgian tax administration's refusal to apply the credit of the FFTR resulted in a first judgement of 16 June 2017.

In this judgement, the Court recalled that international law takes precedence over domestic law and that, following this principle, Belgian residents who receive French dividends should benefit of the credit of the FFTR, as provided for in the DTA.

Despite this clear judgement of the Supreme Court, the Belgian tax administration continued to deny the application of the credit of the FFTR.

A new judgement of the Supreme Court of 15 October 2020 confirmed the 2017 judgement.

A U-turn of the tax administration?

This time, however, it appears that the tax administration changed its mind, as on 20 January, the spokesperson of the Minister of Finance announced in the press that the tax administration will comply with the Supreme Court's jurisprudence.

As a result, the tax consequences of French dividends can now be summarized as follows:

- 12,80% withholding tax in France (excluding any potential social security contributions in France) ;
- Belgian withholding tax is limited to 15% (the rate of 30% is reduced with the 15% FFTR, following a credit of the FFTR on the basis of the French-Belgian DTA), and is calculated on the net dividend.

LexGO sprl - www.lexgo.be - (c) 2021 - All rights reserved

lexGO.be Law jobs online

Example: If a gross dividend of 100 EUR is received, France will levy a withholding tax of 12,80 EUR.

Belgium will levy a withholding tax limited to 15% on the net dividend of 87,20 EUR, i.e. 13,80 EUR.

The credit of the FFTR therefore reduces the total tax burden to 25,88%, i.e. 4,12% less than the withholding tax of 30% due on Belgian source dividends.

Outstanding questions

Notwithstanding the statement of the Minister of Finance's spokesperson in the press, to date, no official standpoint nor circular letter has been published.

An official communication would be welcome to clarify the primacy of international law and the DTA over domestic law, i.e. article 285 BITC, in accordance with the Supreme Court's judgement.

Another question concerns the amount of the FFTR that can be credited following the reduction of the French withholding tax to 12,80%. The French-Belgian DTA provides for a FFTR of minimum 15%. This means that the Belgian tax administration must grant a credit of a 15% FFTR, despite the fact that the French dividend has only been subject to an effective tax rate of 12,80% in France.

At present, it is not clear which position the Belgian tax administration will take in respect to the inconsistency between the text of the DTA (15%) and the actual French withholding tax (12,80%).

Scope of the judgement

The Supreme Court's judgement is grounded on the specific wording of article 19, A.1, paragraph 2 of the French-Belgian DTA, that provides for (the credit of) an explicit FFTR of 15%.

Not all DTAs concluded by Belgium provide for the crediting of a FFTR.

Considering the specific wording, it appears that the same reasoning can only be applied to dividends from states with which Belgium concluded a DTA including the same wording (i.a. Australia, Israel, Italy).

A new version of the French-Belgian DTA has recently been negotiated between France and Belgium. The draft of the new DTA provides for the abolition of the credit of the FFTR.

It is not certain when this new DTA will enter into force.

Refund of overpayment?

LexGO sprl - www.lexgo.be - (c) 2021 - All rights reserved

lexGO.be Law jobs online

For dividends received in 2020, it must be possible to obtain a refund of the overpayment of the Belgian withholding tax via the personal income tax return regarding assessment year 2021.

Hereto, the French dividends (including the 30% Belgian withholding tax) must be included in code 160-04 (section VII.A).

Section VII.F must then be completed with the country (France), the code (160-04), the amount of the dividend (including the Belgian withholding tax of 30%) and the nature of the income (dividends).

The refund of the overpaid withholding tax is then taken into account in the tax assessment.

We advise to attach the detailed underlying reasoning of this request for refund to the tax return.

In respect to dividends received in 2018, it is possible to file an objection during the 6 months following the sending of the tax assessment.

It is not certain that the Belgian tax administration will accept such an objection if the French dividends received in 2019 have not been included in code 160-04 (cf. supra), as the reporting of such dividends is optional, considering the liberatory nature of the withholding tax.

Caveat

As mentioned before, the new position of the Belgian tax administration in respect to the Supreme Court's jurisprudence has only been communicated in the press by the Finance Minister's spokesperson.

To date, no official communication has been published.

It is therefore not certain that the tax administration will accept the refund of the withholding tax regarding income year 2020 and / or the objections regarding income year 2019.

Conclusion

We applaud the informal acceptance of the Supreme Court's jurisprudence by the Belgian tax administration, finally allowing the correct application of the French-Belgian DTA.

A circular letter confirming this position in an official way would however be welcome. It is also advisable to specify which amount of FFTR will be credited, following the reduction of the French withholding tax to 12,80%.

Pending the introduction of a new French-Belgian DTA, it appears that French source dividends benefit from a more favourable tax treatment than Belgian source dividends.

LexGO sprl - www.lexgo.be - (c) 2021 - All rights reserved

lexGO.be Law jobs online

LexGO sprl - www.lexgo.be - (c) 2021 - All rights reserved