The Italian Revenue Agency rules that dividends paid by an Italian subsidiary admitted to the cooperative compliance regime to its Swiss parent may be exempt from withholding tax under Article 9 of the EU-Switzerland Agreement even if distributed before the minimum holding period is met

On 6 August 2021, the Italian Revenue Agency issued Ruling Reply No. 537, dealing with the exemption from dividend withholding tax pursuant to Article 9 of the 2004 agreement between the European Union and the Swiss Confederation (the "**EU-Switzerland Agreement**"). Under the EU-Switzerland Agreement, no withholding tax applies on dividends paid by companies residing in EU Member States to their Swiss parent companies if conditions similar to those set forth in the Parent Subsidiary Directive (Council Directive 2011/96/EU; the "**PS Directive**") are met. One of these conditions is that the parent company directly holds at least 25 per cent of the capital of the subsidiary for a minimum period of two years.

The case concerned an Italian resident company ("**ItaCo**") that intended to distribute dividends to its Swiss resident parent company ("**SwissCo**") before the completion of the two-year minimum holding period. ItaCo was a company admitted to the Italian cooperative compliance programme, which is a regime introduced in 2015 and aimed at enhancing cooperation between the Italian Revenue Agency and taxpayers to increase certainty in tax matters and prevent tax litigation.

Under past practice of the Italian Revenue Agency, in this situation the Italian subsidiary should have levied the dividend withholding tax, and the parent company could have then applied for the refund of the withholding tax with the Italian Revenue Agency once the parent company had reached the two-year holding period (see Circular Letter No. 60/E of 19 June 2001 and Ruling No. 109/E of 29 July 2005). Therefore, the Italian subsidiary could not apply the withholding tax exemption only based on the declaration of the parent company committing to hold the participation for at least two years. According to the Italian Revenue Agency such position did not violate EU law (or the EU-Switzerland Agreement) because, as indicated by the Court of Justice of the European Union in the *Denkavit* case (Joined Cases C-283/94, C-291/94 and C-292/94), it is for the EU Member States to set the rules for ensuring compliance with the minimum holding period requirement, in accordance with the procedures laid down in their domestic law, and the EU Member States are not obliged under the PS Directive to grant the exemption before such period is met on the basis of a unilateral undertaking by the parent company to observe the minimum holding period.

In Ruling Reply No. 537 of 2021, the Italian Revenue Agency refers again to the *Denkavit* case and holds that, pursuant to the rules on the interpretation of international treaties under Articles 31-33 of the Vienna Convention on the Law

of Treaties, the EU-Switzerland Agreement should be interpreted consistently with the PS Directive because the EU-Switzerland Agreement is meant to enact a regime that is equivalent to the PS Directive.

However, the Italian Revenue Agency reaches here a conclusion that departs from its past practice because the reasons that justified its previous stricter approach (i.e. difficulty in collecting information from the taxpayer and ensuring enforcement if the parent company failed to meet the two-year test) do not apply to a company, like ItaCo, which is admitted to the cooperative compliance programme. Under this regime, (i) the company is indeed bound to promptly notify the Italian Revenue Agency of all the information useful for the assessment of its tax position, and (ii) the Italian Revenue Agency is committed to grant specific simplifications in tax fulfilments as a result of the information received. Therefore, the difficulty in policing the compliance with the two-year holding period after the distribution cannot be a compelling reason to deny the direct application of the exemption before the expiry of the two-year term. Consequently, the Italian Revenue Agency allowed ItaCo to make the planned dividend distribution to SwissCo before the fulfilment of the two-year holding period without applying the withholding tax and based on a simple undertaking of SwissCo to keep the participation for such minimum holding period, provided that the withholding tax would anyway become due at a later stage if SwissCo fails to hold on to the shares for at least two years.

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