

Austria

REQUESTS FOR PRELIMINARY RULINGS CONCERNING THE EC-INCOMPATIBILITY OF AUSTRIA'S INTERNATIONAL PARTICIPATION EXEMPTION REGIME: C-436/08, HARIBO, AND C-437/08, ÖSTERREICHISCHE SALINEN

As reported in the last issue of *EC Tax Review*,¹ the Austrian Supreme Administrative Court (VwGH) has recently rendered its decision in a case concerning the Austrian participation exemption regime.² The court found that the different treatment of domestic and inbound inter-company dividends amounts to a prohibited discrimination,³ but that such discrimination can be cured by granting an (indirect) foreign tax credit instead of an exemption. Based on this decision, the Austrian Federal Ministry of Finance has issued an information implementing this judgment⁴ and now allows for a credit for foreign corporate tax for all inter-company dividends from the EU Member States and Norway that do not fulfil the criteria for exemption, provided that the taxpayer furnishes detailed information that includes the exact name of the distributing company, the amount of the holding and the corporate tax rate applicable to the distributing company.

The VwGH's decision and the Ministry's information have been heavily criticized in tax literature.⁵ In two decisions issued on 29 September 2008, the Tax Senate (UFS) of Linz has followed up on this criticism and referred several questions to the European Court of Justice (ECJ):⁶

The first case, which is pending before the ECJ as C-436/08, *Haribo*,⁷ concerns the viability of applying the credit method (for cross-border holdings of less than 10%) as opposed to the – generally applicable – exemption method (for domestic holdings and cross-border holdings of at least 10%) to cure the breach of Community law. This issue becomes increasingly difficult when minority shareholders and shareholdings via investment funds are concerned, as in such cases the taxpayer can hardly fulfil his burden of proof concerning, for example, the amount of foreign corporate tax levied; in this respect, the Tax Senate also questions if it were for the tax administration to make use of the Mutual Assistance Directive⁸ to gather such information. Moreover, the ECJ is asked to assess the impact of the free movement of capital on third-country portfolio dividends.

The second case, which is pending as C-437/08, *Österreichische Salinen*,⁹ is the continued proceeding following the VwGH's decision, which is now back at the level of the Tax Senate. Here, the Tax Senate is mainly concerned about the practical impact of the credit method in lieu of the exemption method, especially when it comes to the amount of creditable tax and the question of a credit carry-forward in loss situations; such carry-forward is generally not available under Austrian law,¹⁰ which may lead to discriminatory inter-temporal double taxation. Also, the Tax Senate inquires whether the denial of a credit carry-forward infringes on EC law when third-country portfolio dividends are at issue.

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¹ See Georg Kofler, 'Austria: Supreme Administrative Court rules on EC-Compatibility of the international participation exemption regime', *EC Tax Rev.* 6 (2008): 293.

² See VwGH, 17 Apr. 2008, 2008/15/0064, available at <www.ris.bka.gv.at/vwgh>; the preceding decision was by the UFS Linz, 13 Jan. 2005, RV/0279-L/04, available at <<https://findok.bmf.gv.at>>.

³ Dividends received by a company resident in Austria from a domestic company are in any event tax exempt, while, in contrast, dividends from a foreign company are only exempt if a minimum holding requirement (now: at least 10%) and a holding period (now: a continuous period of at least one year) are fulfilled; see, for example, Georg Kofler & Michael Timpel, 'Double Taxation Conventions and European Directives in the Direct Tax Area', in *Tax Treaty Law and EC Law*, eds Michael Lang, Josef Schuch & Claus Starlinger (Vienna: Linde, 2007) 191, 200 et seq. with further references.

⁴ This information (BMF-010216/0090-VI/6/2008) was published on 13 Jun. 2008; it is available (in German) at <<https://findok.bmf.gv.at>>, and was reprinted in *Finanz Journal* 2008, p. 274, in *Österreichische Steuerzeitung* 2008, p. 270, and in *Steuer- und Wirtschaftskartei* 2008, p. S 528 et seq.

⁵ For an overview see, for example, Thomas Bieber, Werner Haslehner, Georg Kofler & Clemens Ph. Schindler, 'Taxation of Cross-Border Portfolio Dividends in Austria: The Austrian Supreme Administrative Court Interprets EC Law', *European Taxation* 11 (2008): 583-589, with further references.

⁶ For a first analysis of these referrals see Marco Laudacher, 'Auslandsdividenden und Anrechnungsmethode', *Steuer- und Wirtschaftskartei* (2008): 1176-1179, and Babette Prechtl, 'Steuerpflicht von Portfoliodividenden erneut auf dem Prüfstand', *Steuer und Wirtschaft International* (2008): 497-504.

⁷ For the request see UFS Linz, 29 Sep. 2008, RV/0611-L/05, available at <<https://findok.bmf.gv.at>>.

⁸ Council Directive of 19 Dec. 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation and taxation of insurance premiums (77/799/EEC), [1977] OJ (L336), p. 15, as amended.

⁹ For the request see UFS Linz, 29 Sep. 2008, RV/0493-L/08, available at <<https://findok.bmf.gv.at>>.

¹⁰ See, for example, VwGH, 20 Apr. 1999, 99/14/0012, ÖStZB 1999, pp. 696 et seq.; VwGH, 28 Sep. 2004, 2000/14/0172, *Steuer und Wirtschaft International* 2005, pp. 302 et seq.