

ATOZ ALERT

Non-application of the EU Participation Exemption Regime to Gibraltar Companies: Luxembourg Tax Implications Clarified

2 December 2020

On 1 December 2020, the Luxembourg tax authorities issued Circular L.I.R. n°147/2, 166/2 and Eval. N°63 (“**Circular**”) related to the application of the EU Parent Subsidiary Directive (“**PSD**”) to companies incorporated in Gibraltar. The Circular is a response to the decision rendered on 2 April 2020 by the Court of Justice of the European Union (“**CJEU**”) in the case of GVC Services (“**Decision**”), according to which the PSD does not apply to Gibraltar companies. The Circular confirms the conclusions we reached in our [ATOZ Reports of 30 November 2020](#) on the implications of the Decision for Luxembourg corporate taxpayers. In addition, it clarifies that the CJEU Decision will not have any retroactive effect and will only apply as from 1 January 2021, which is good news.

Background

In the Decision, the CJEU excluded companies incorporated in Gibraltar from the benefit of the PSD. In practice, it means that dividends received and capital gains realised by a Luxembourg company (“**LuxCo**”) on a qualifying participation in a Gibraltar company (“**GibCo**”) should not be exempt from corporate income tax (“**CIT**”) and municipal business tax (“**MBT**”) under the provisions implementing the PSD into Luxembourg law (i.e. Article 166-2 n°1 of the Luxembourg income tax law “**LITL**”). In addition, a participation held by a LuxCo in a GibCo should not benefit from the net wealth tax (“**NWT**”) exemption applicable to participations held in Companies resident in the European Union (“**EU**”) within the meaning of the PSD (i.e. Paragraph 60-2 n°1 of the Luxembourg evaluation law, “**BewG**”).

For the same reason, dividends distributed by a LuxCo to a GibCo (i.e. where a GibCo holds a qualifying participation in a LuxCo) should not be exempt from Luxembourg withholding tax (“**WHT**”) under the provisions implementing the PSD into Luxembourg law (i.e. Article 147-2-a of the LITL).

Until the Decision, based on a well-established market practice set by the Parliament and the Commission of the EU, the PSD applied to Gibraltar companies. The Decision therefore had a significant and sudden negative impact on European holding structures involving Gibraltar companies, in particular in Luxembourg.

Clarifications provided by the Circular

As an administrative tolerance in order to take into account the concerns of taxpayers who legitimately relied on the approach taken by the EU Commission and Parliament prior to the CJEU Decision, the tax authorities clarified in the Circular that the Decision will not have any retroactive effect and will only apply as from 1 January 2021.

In addition, the tax authorities provided the following guidance:

- Dividends received and capital gains realised until 31 December 2020 by a LuxCo from its participation in a GibCo should continue to benefit from the PSD as implemented into Luxembourg law (i.e. Article 166-2 n°1 of the LITL). Such dividends and gains will therefore not be subject to CIT and MBT if all the other applicable conditions are met (e.g. holding period and shareholding threshold) as at 31 December 2020.
- Dividends distributed by a LuxCo to a GibCo until 31 December 2020 should continue to benefit from the Luxembourg provisions implementing the PSD (i.e. Article 147-2-a of the LITL) until 31 December 2020. Such distributions will therefore not be subject to WHT if all the other applicable conditions are met (e.g. holding period and shareholding threshold).

In practice, it means that the Decision will not have any negative CIT, MBT and WHT effects on dividend distributions and capital gains realised until 31 December 2020.

However, as from 1 January 2021, the PSD provisions implemented into the LITL will no longer apply to Gibraltar resident companies. In the same way, the shares held by a LuxCo in a GibCo as at 1 January 2021 will no longer be exempt from NWT under the provisions of the Luxembourg law referring to EU Companies within the meaning of the PSD (i.e. Paragraph 60-2 n°1 of BewG).

Despite the non-application of the Luxembourg provisions implementing the PSD as from 1 January 2021, the Circular confirms that the other provisions of the Luxembourg participation exemption regime (i.e. the provisions regarding the CIT, MBT and NWT exemption applicable under certain conditions to non-resident companies other than the ones within the meaning of the PSD) will continue to apply if the GibCo is a fully taxable company subject to income tax at a rate comparable to the Luxembourg CIT (a minimum income tax of 8.5% generally satisfies this requirement), levied on a basis similar to the Luxembourg one (which could be the case in certain circumstances).

As far as dividend distributions from a LuxCo to a GibCo are concerned, these will no longer benefit from any WHT exemption, since the exemption of dividends arising from non-resident fully taxable companies only applies to those companies tax resident in a country with which Luxembourg has signed a double tax treaty (and Luxembourg does not have a double tax treaty with Gibraltar).

Implications for Luxembourg taxpayers

The Circular of the tax authorities is positive as it provides some legal certainty to taxpayers and makes sure that the Decision of the CJEU does not have any negative retroactive effects. Still, Luxembourg taxpayers with investments into or from Gibraltar should seek advice from their tax advisers in order to analyse the impact of the Decision on their investments in further detail and take action, if necessary. In this respect, as from 1 January 2021, taxpayers wishing to restructure their investments in/through a Gibraltar company should also pay attention to the consequences of the Decision on the Directive 2009/133/EC on the common system of taxation applicable to mergers, divisions, partial divisions, transfers of assets and exchanges of shares.

As usual in tax matters, there is no one-fits-all approach and a careful tailor-made review of any envisaged transactions should be considered before engaging into any corporate implementation steps in order to avoid unnecessary costs and wasting time.

Do you have further questions?



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