

WITHHOLDING TAXES

- EU Tax Law and national anti-avoidance legislation -

Introduction

Investments into the EU by non-EU groups of companies are often organized via various holding company structures. Although there might be valid non-tax reasons for these holding structures, one of the main advantages of a successful holding company structure is to facilitate repatriation of funds with a minimal levy of source withholding taxes on dividends, interest and royalty payments.

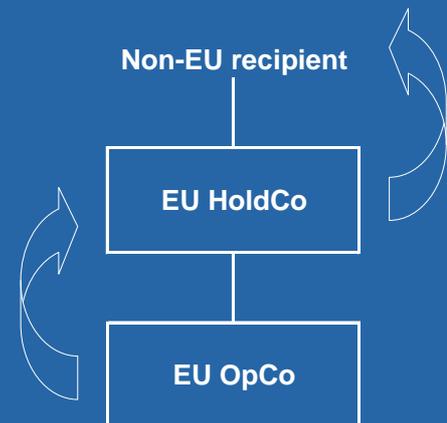
This implies that EU investments are often structured via holding companies incorporated in EU member states with low or zero withholding taxes on payments to non-EU countries. Payments from an operating EU company, which normally would be subject to withholding taxes if paid directly to a non-EU recipient, can in that way be repatriated to an EU holding company and further be repatriated to the non-EU recipient without levy of withholding taxes in accordance with the tax laws of the states involved. Thus, these structures make use of the fact that payments to a holding company incorporated in another EU member state are often exempted from source state withholding taxes.

Tax authorities are naturally looking into these structures in order to determine whether national or international tax legislation provides for remedies against conduit structures that seek to avoid national withholding taxation. The importance of beneficial ownership clauses and various look-through or substance requirements are consequently attracting an increasing interest from all market participants, including tax authorities.

However, provisions that ultimately seek to prevent the use of conduit structures generally also result in a different tax treatment of payments to holding companies affected by these provisions compared to the tax treatment of payments to other recipients. This different treatment can be contrary to EU Fundamental Freedoms (mainly the freedom of establishment), and would therefore require a more thorough investigation of the relevant EU provisions in order to determine possible limitations imposed by EU law.

The purpose of this PhD project is therefore to analyse and identify the relevant legal boundaries imposed by EU law on the application of national anti-avoidance provisions. This requires a thorough analysis of the legal framework relevant to withholding taxation and anti-avoidance provisions, including an analysis of the relevant ECJ jurisprudence. It is expected that especially the various justifications accepted by the ECJ as regards discriminatory tax provisions will have a decisive importance in relation to the EU law conformity of anti-avoidance provisions. Consequently, special attention will be devoted to this part of the EU law analyses.

Relevant company structure and transactions



Legal framework

EU Fundamental Freedoms
EU Secondary Legislation
International Tax Law
National Tax Law

EU Law analyses

Non-discrimination test
Relevant comparable
Justifications
Proportionality

Interim findings

To be updated before the conference

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