French 3% contribution tax on distributions: Claim opportunities for French subsidiaries of MNEs following new developments regarding compliance with the French Constitution

Tax Update

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Par:

On April 6, 2016 the First Instance Court of Montreuil filed a request with the French Constitutional Court in relation to potential breaches of the French Constitution (more precisely the Declaration of Human Rights dated August 26, 1789), by the 3% contribution tax on distributions.

The potential breaches concern Articles 6 and 13 of the Declaration of Human Rights which respectively provide for (i) the right for all citizens to be treated equally by the tax law and (ii) the principle according to which tax must be equally distributed among all citizens, in proportion to their ability to pay.

The request will initially be reviewed by the Administrative Supreme Court (Conseil d'Etat), and if successful will be referred to the Constitutional Court. In such a case, the Constitutional Court would have to release a decision concerning the validity of the 3% tax on distributions prior to autumn 2016.

Considering that the tax came into force in 2012, the statute of limitations will apply in certain cases. As such, French subsidiary companies of MNEs should consider the opportunity to file a claim before the decision of the Constitutional Court is handed down, in order to preserve their rights to obtain a repayment of the 3% contribution tax, if the legislation is deemed to be in breach of the French Constitution (or on the grounds of its non-compliance with EU law).

As a recap, the 3% contribution came into force in August 2012 and is assessed on any distributions made by entities liable to corporate income tax in France. Exceptions apply to distributions between company members of a French tax unity.

Before being questioned on the grounds of the French Constitution, the European Commission launched an infringement procedure against France in February 2015, on the grounds that the 3% tax was non-compliant with EU law. The 3% contribution was indeed already suspected to be in breach of the freedom of establishment, provided for by the Treaty on the Functioning of the EU, and with the EU directive, n° 90/435/CEE, which forbids the taxation of dividends distributed between EU parent and subsidiary companies subject to certain conditions.

Recent European case law, notably the European Court of Justice decision, September 2, 2015 n° C-386/14, has confirmed the arguments according to which the 3% contribution tax would constitute a breach of the freedom of establishment.
The European Court of Justice indeed ruled that French tax legislation is not compliant with the freedom of establishment insofar as it provides for a full participation-exemption regime for dividends received by a French parent company from its 95% held French subsidiaries members of a tax unity, while the exemption applicable to dividends received from the 95% held EU subsidiaries is only partial, as they are not eligible to become part of a tax unity because of their residency.

The same line of reasoning could be potentially applied to the 3% contribution rules which introduce a discrimination between distributions to a French parent company (head of a tax unity), which are exempt from 3% contribution, and distributions to EU parent companies, who are non-eligible for a tax unity due to their residency.

Finally, it is worth noting that the Belgian Constitutional Court asked the European Court of Justice for a preliminary ruling with respect to the compatibility with EU law of the Belgian “fairness tax”, which bears similarities to the French 3% contribution tax.