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Belgium Exempts Dividends Paid by French Property Investment Partnership

by Marc Quaghebeur

Belgium's highest court, the *Cour de Cassation*, has confirmed that dividends paid out by a French *société civile immobilière* (SCI, or property investment partnership) are not subject to Belgian income tax.

Under French law, certain civil companies are deemed to be separate from their shareholders (*personne morale*) contrary to Belgian law. That is particularly the case for the SCI.

Two major decisions of the *Conseil d'Etat* (France's Administrative Supreme Court) — *Conseil d'Etat*, Apr. 4, 1997, no. 144,211 and *Conseil d'Etat*, Feb. 9, 2000, no. 178,389 — have clarified that particular status. Profits arising from activities in France are taxable in France at the level of the transparent entity. However, the tax due by the entity is paid by each shareholder, based on his shareholding. The same applies to nonresident shareholders.

The shareholders of an SCI are personally liable for French tax on the income of the SCI and on any capital gains realized by the SCI on the disposal of property. Individual partners generally are subject to individual income tax, and corporate partners are subject to corporate income tax.

French SCI Under Belgian Law

In its *Prince de Ligne* decision of June 4, 1974, the Court of Appeal of Brussels took a position that would become the general basis for determining the tax regime applied in Belgium to foreign bodies that are transparent for tax purposes under the foreign tax rules.

In that case, a Belgian resident individual had shares in a French SCI, and the Belgian tax authorities had decided to treat the French SCI as transparent for tax purposes in Belgium as well. Thus, the Belgian resident was assessed on his share of the undistributed income of the SCI.

The court decided that Belgian tax authorities had to acknowledge that the SCI is separate from its shareholders in accordance with French domestic law. However, acknowledging the legal personality of the SCI does not mean that the French domestic tax regime must be transposed into Belgian tax law.

The court ruled that Belgian tax authorities had to give the income the same classification it has under Belgian domestic tax law. In practice, the income collected by a Belgian shareholder of a French SCI must be taxed as a dividend. However, there was no tax liability, as the profits had not been distributed.

A court had never previously had to decide on the tax regime for profits (originating from real property) distributed by an SCI. The question was whether those profits are subject to tax in Belgium as dividends, or whether they constitute real estate income, in which case they would be exempt under Belgium tax law.

In its decision of November 7, 2002, in SCI *Rouquier et Rivay*, the Court of Appeal of Brussels maintained the position it had taken nearly 30 years earlier, qualifying the income as a taxable dividend. (Court of Appeal of Brussels, Nov. 7, 2002, *Rouquier et Rivay, F.J.F.*, 2003/118)

The court relied heavily on article 2 of the final protocol of the double tax treaty between Belgium and France. That provision confirmed the fiscal transparency of the SCI, as well as the fact that the fiscal transparency does not curb Belgium's right to tax the profit distributions as dividend income.

Rouquier et Rivay

However, that provision applied only to a specific type of real property company — the *société civile immobilière d'attribution* — which is set up to build or acquire real property and to distribute the ownership among the shareholders or management of the real property distributed. All the parties in *Rouquier et Rivay* had agreed that this was not the type of company involved.

The court's decision was heavily criticized at the time, but it was not until December 2, 2004, that the *Cour de Cassation* overturned the decision.

First, it went back to the general provisions of the Belgium-France treaty and found that the court of appeal should not have applied the exception of article 2 of the treaty protocol.

The term "dividends," as defined in article 15, paragraph 5, explicitly refers to the definition of dividends under French law, and that is limited to profit distributions paid out by companies that are subject to the French corporate income tax (article 108 of the French Code *général des impôts*). That is not the case for an SCI. The *Cour de Cassation* confirmed the "translucid" tax regime for those companies: Individual shareholders are deemed to own a share in the real property, and the income they receive from the SCI qualifies as real estate income under French law. A Belgian judge does not have the option to qualify that income as dividend income for Belgian tax purposes.

The *Cour de Cassation* then found another argument in article 3, paragraphs 1 and 2, of the treaty, which provide that real property income is subject to tax only in the country where the property is located, and that the notion of real property must be defined in accordance with the laws of that country.

Because the SCI is translucid for French tax purposes, and the shareholders are deemed to own a share in the real property, their share in the profits is subject to tax in France, and Belgium must grant an exemption.

Conclusion

The *Cour de Cassation* decision confirms that Belgian resident individuals who have a shareholding in an SCI are not subject to Belgian income tax on the income they collect from the SCI.

It also provides some relief for Belgian resident companies. If the profits had to be treated as a dividend, those companies risked paying corporate income tax in Belgium on the full amount of the dividend, as the profits from an SCI could not qualify for the participation exemption for dividends received under Belgian domestic tax law. Indeed, one of the conditions for the participation exemption is that the company paying out the dividend must be subject to corporate income tax, and that was not the case for the SCI. ◆

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