

Tax on dividends (*additional contribution to company tax related to distributed amounts*). Decision n° 2017-660 QPC dated 6 October 2017.

On 6 October 2017, French Constitutional Supreme Court (*Council Constitutional*) ruled unconstitutional first sub-paragraph of paragraph I of Article 235 *ter* ZCA of French tax Code (*Code général des impôts*), in its drafting derived from of Law N° 2015-1786 dated 29 December 2015 (the challenged regulation). This decision, commonly named tax on dividends, applies as from the date of its publication (i.e. 8 October 2017) to all cases not definitely ruled as of this date. The challenged regulation creates a new tax to be paid by entities subject to company tax named « *additional contribution to company tax in relation to amounts distributed* ». This contribution is due by the entity who distributes revenues (within the meaning of Articles 109 to 117 of the said Code). The amount due is equal to 3% of the distributed amounts.

The *Council Constitutional* was seized of the case by the French Administrative Supreme Court (*Conseil d'Etat*) on the basis of a QPC (*Question Prioritaire de Constitutionnalité*).

This means that Law N° 2015-1786 dated 29 December 2015 was in force when the *Council Constitutional* was seized, but part of it was challenged before the *Conseil d'Etat*, which transferred a question to the *Council Constitutional* raised by the plaintiff, the *société de participations financières*. The question was to determine whether or not the challenged regulation was unconstitutional.

This constitutionality *a posteriori* conformity is not only based on the French Constitution *strictly speaking* but encompasses all human and civil rights guaranteed by French Constitution. This is the reason why many laws may potentially be challenged irrespective of a given area of law (e.g. tax, corporate, business, labor, civil, administrative).

The question raised before the *Council Constitutional* was in relation to an additional contribution to company tax related to distributed amounts. The relevant part of the challenged regulation was first sub-paragraph of paragraph I of Article 235 *ter* ZCA of the French *Code général des impôts*, which states that “*Companies, or French or foreign entities subject to company tax in France, UCITS mentioned in Article L214-1 of the French monetary and financial Code excluded, and those which qualify for the definition of micro, small and medium companies given in annex I of Commission regulation (UE) n°651/2014 dated 17 June 2014 stating certain categories of aids compatible with*

the internal market by application of Articles 107 and 108 of the Treaty are subject to an additional tax to this tax in respect of amounts distributed within the meaning of Articles 109 to 117 of the present Code.”.

This means that an additional tax is created in respect of (i) profits or products that are not put in reserve or incorporated in the share capital, (ii) any sums or values put at the disposal of the partners, shareholders or holders of units and not withheld on profits, (iii) unless evidenced the contrary, amounts put at the disposal of the partners (directly or indirectly) in respect of advances, loans or deposit (iv) sums or values attributed to holders of beneficiary unit or in respect of founder in relation to buybacks of the said units, (v) remunerations and occult advantages, (vi) non-deductible fraction of remuneration (within the meaning of Article 39 (1°)(1) of the French *Code général des impôts*), (vii) expenses and charges which reduction for company tax basis is forbidden according to sub-paragraph and c) of the said Article 39.

The question raised was to determine whether or not this additional contribution to company tax was unconstitutional. The plaintiff, which was a company, alleged a non-equal treatment not justified between the redistributions of dividends from subsidiaries depending on the location of the said subsidiaries. According to the challenged regulation, if the subsidiary is located in the EU, it does not bear the additional contribution. If the subsidiary is located in France or in a third country it is subject to the additional contribution.

In addition, the plaintiff alleged that the challenged regulation creates a non-equal treatment not justified between companies distributing dividends received from subsidiaries located in the EU and the subsidiaries distributing dividends taken from their operating profit.

As a result, the plaintiff alleged that the challenged regulation breaches the equality treatment in relation to public burdens (*principed'égalitédevant les charges publiques*).

In response, the *Council Constitutional* used the « *bloc de constitutionnalité* » i.e. civil rights applicable in addition to the Constitution itself. In particular, the *Conseil Constitutionnel* based its decision on Articles 6 and 13 of the *Déclaration des droits de l'homme et du citoyen* dated 1789.

According to Article 6, the law « *must be the same for all, if it protects or if it punishes.* ». However, the equal treatment does not contravene the possibility for the law to rule differently situations that are different. In addition, a derogation to equal treatment also exists in the event of public

interest. This position is in line with case law ruled by the *Conseil d'Etat* (e.g. CE Den oyez dated 10 May 1974 (Section) n° 8803288148, Rec. Lebon).

According to Article 13, a common contribution is essential for the maintenance of the public force and for expenses of administration. Such contribution must be allocated between all citizens, depending on their capacity. Using a core rule of the Constitution (Article 34), the *Council Constitutional* stated that it is for the law to determine, within the respect of constitutional principles and given the features of each tax, rules according to which have to be assessed the contributive capacities. In particular, to ensure respect of equal treatment, the law must ground its assessment upon rational and objective criteria, depending on goals determined by the law itself. However, this assessment must not give rise to a characterized breach of equal treatment before public burdens.

In addition, the *Council Constitutional* referred to the *Conseil d'Etat* case law: Article 235 *ter* ZCA cannot be applied to profits redistributed by a parent (mother) company taken from a subsidiary established in a EU member state other than France to which the daughter/mother regime of Directive dated 30 November 2011 applies. Article 235 *ter* ZCA can, however, be applied to other profits distributed by such mother company.

As a result, the challenged regulation creates a non-equal treatment between mother companies depending on whether or not the dividends are distributed by a subsidiary established in a member state other than in France. Yet, these companies are in the same situation with regards to the object of the contribution consisting of taxing any distributed amounts, regardless of their geographical origin, including those subject to the mother/daughter EU regime.

By instituting this additional contribution to company tax related to distributed amounts, French parliament aimed at compensating the loss of sustainable income generated by the suppression of withholding tax on UCITs. Thus, the aim of French parliament was clearly a yield objective. To rule the case, the *Council Constitutional* states that such a goal is not, itself, of a public interest nature justifying the non-equal treatment between mother companies redistributing dividends from subsidiaries established in a EU member state and those redistributing dividends from subsidiaries established in France or in a third country. As a result, the equality principle before the law and the public burdens is breached and the challenged regulation is therefore unconstitutional.

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Up to date 8October 2017.