

Parent-subsidiary exemption: account 115 challenged

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In a judgement dated 11 May 2021 (No. 42417), the Luxembourg Lower Administrative Court (*Tribunal Administratif*) challenges the qualification of contribution in account 115 for the purposes of the application of the Luxembourg parent-subsidiary regime.

Background

In the matter at hand, in 2014 the taxpayer, a Luxembourg resident company (“**LuxCo**”) acquired a shareholding in another Luxembourg resident company (“**Subsidiary**”). The same day, further to the acquisition, LuxCo made a so-called “account 115 contribution” to its Subsidiary.

An equity contribution by means of an “account 115 contribution” involves a contribution of value in the special equity reserve account of the company as reflected in the Luxembourg standard chart of accounts (“**LSCA**”) under sub-account 115 named “capital contribution without issue of shares”. The absence of share issuance removes the requirement that otherwise applies to making such transactions by way of notarial deed.

Subsequently, LuxCo received a dividend distribution from its Subsidiary for which it paid withholding tax of 15%. LuxCo then claimed a refund of the withholding tax based on Article 147 of the Luxembourg income tax law (“**LITL**”) considering that all the conditions required to benefit from the parent-subsidiary regime were met.

In this respect, it is recalled that the minimum shareholding that qualifies for the dividend withholding tax exemption under the Luxembourg parent-subsidiary regime is either a 10% participation or, alternatively, an acquisition price of a minimum of €1,200,000. In the case at hand, although LuxCo only held a shareholding of 4,5% in the Subsidiary, it claimed that the said shareholding had been acquired for more than €1,200,000. In order to determine the acquisition price, LuxCo took into account the purchase price but also the amount contributed in account 115.

The Luxembourg tax authorities did not grant the request on the grounds that the account 115 contribution cannot be assimilated to an equity participation, running contrary to the LSCA classification following which the account 115 is a sub-account of the 111 account named “share premium and similar premium”. They pointed out, based on the Luxembourg commercial company law that, unlike a share premium, the account 115 contribution is an informal contribution that does not involve an issuance of shares.

According to Luxco, however, neither contributions were remunerated by new shares, but both do increase the value of the existing shares. Furthermore, LuxCo also pointed out that:

- it is necessary to distinguish between the two alternative conditions that must be met in order to benefit from the Luxembourg parent-subsidiary regime: the minimum 10% shareholding condition is to be analysed from the capital of the subsidiary while the minimum acquisition value of the participation is to be analysed having regard to the accounts of the parent company;
- hidden capital contributions have always been treated as equity for tax purposes by the Luxembourg courts based on an economic analysis of the case so that a capital contribution which is not even hidden but only informal should consistently follow the same treatment;
- in order to determine the minimum acquisition value of the participation for the purposes of Article 147 LITL, reference should be made to the "effective acquisition price" of the participation within the meaning of Article 25 of the LITL, which would be obtained by adding the incidental costs to the purchase price. In the case at hand, the acquisition price of the shareholding in the Subsidiary should be made up of the purchase price as well as the amount contributed to account 115 (even more so as both the sale and the contribution took place on the same day).

Decision of the lower Court

The Luxembourg Lower Administrative Court upheld the position of the Luxembourg tax authorities that rejected the claim for a refund of withholding tax because it does not result from the facts of the case that the account 115 contribution was a component of the purchase price. The fact that the sale and the 115 account contribution occurred the same day is not sufficient to show the connection between them. On the contrary, the legal documentation (and especially the share purchase agreement) rather shows the opposite by stating that: “The Company hereby accepts such Contribution without any obligation to pay a consideration or to issue any shares in its capital in return”.

LuxCo has lodged an appeal against this judgement before the Luxembourg Higher Administrative Court (*Cour Administrative*).

While the position of the Luxembourg Lower Administrative Court is questionable, pending the decision of the Higher Administrative Court, qualifying companies would be advised not to rely on the amounts (to be) contributed to account 115 to meet the minimum acquisition price requirement for the purposes of the parent-subsidary exemption, save in specific circumstances where the link between this contribution and the share acquisition price is demonstrated.

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