

**Contributions to the “115 account” do not automatically qualify for the application of the participation exemption regime for equity investments**

In an interesting decision of March 31, 2022, the Luxembourg Administrative Court upheld a decision of the Administrative Tribunal and decided that contributions to the “115 account” (capital contribution without issuance of shares) are not to be taken into account for the determination of the acquisition price of shares of a participation when applying the Luxembourg dividend withholding tax exemption.

The case was related to a withholding tax refund claimed by a Luxembourg company based on article 147 of the Luxembourg Income Tax Law (“LITL”) and specifically to the determination of the EUR 1.2 million minimum acquisition price.

A Luxembourg limited liability company had acquired a participation in the share capital of a Luxembourg public limited company under the terms of a share purchase agreement and a share premium contribution agreement both entered into on 10 April 2014 and pursuant to which the purchaser paid for the acquisition of a certain amount of shares and made a capital contribution in the “115 account” of the acquired company.



A 15% tax withholding was applied upon the dividend distribution dated 14 January 2016 and the parent company claimed the refund of the tax withheld in accordance with article 147 of the LITL which provides that the refund of the withheld tax applied on the dividend distribution may be requested by the tax payer who holds a direct participation in the capital of the debtor (i) either of 10% (not applicable in the case at hand) or (ii) of an acquisition price of at least 1.2 million euros.

As to this second condition, the Court has rather unexpectedly considered that the contribution into the “115 account” made by the parent company did not increase the acquisition price of its participation in the subsidiary, arguing that a contribution into a “115 account” do not confer any direct right in the share capital to the contributing party and that such contribution was not sufficiently linked to the participation to be considered as part of the acquisition price.

The Court further pointed out that it did not result from the constitutive documents of the subsidiary that that the amount paid by the parent in the form of a contribution to “115 account” was to be allocated exclusively to the parent, notably in case of repayment of the contribution, in such a way that the proportion of the increase of the value of the participation held by the parent could not be determined.

In light of this decision, particular attention should be paid to the way of documenting a contribution into a “115 account” to benefit for the application of the participation exemption regime with regard to the 1.2 million euros threshold requirement.

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