Recent case law on Foreign Tax Credits

Conseil d'Etat, March 8 2023, SA Natixis, n° 456349

Can a French company in a loss position use foreign tax credits?

- Between 2008 and 2011, French companies members of Natixis, a tax consolidated group, received foreign-source passive income subject to withholding tax in the foreign States

- During those fiscal years, the group was in a loss position. It became profitable again in 2012.

- *=) Could Natixis be allowed treaty tax credits ?*

- Applicable treaties = betw. France and UK, Morocco, Portugal, Brasil, Canada, Poland, Australia, Cameroon, Argentina, South Korea, New-Zealand, China, Turkey, Italy and Japan =) all of them follow the credit method of Article 23 B OECD model

What had already been ruled (1/2)

Foreign tax credits are not refundable by the French tax administration :

Conseil d'Etat, June 27 2016, *Societe Faurecia*, n° 388984 392534

"It does not follow from the stipulations of the conventions, nor from any provision or principle of national law, that the tax credit which could not be offset should be refunded by France to the resident who received this income".

(applicable tax treaties : betw. France & Brasil, Canada, China, South Korea, Spain, USA, India, Japan, Poland, Czech Republic, Portugal, Slovakia, Thailand)

What had already been ruled (2/2)

- **Before 2017**, foreign withholding taxes **might be deducted** from the French corporate tax base of the financial year during which the income was received only when the clear stipulations of the tax treaty did not provide otherwise

  CE, Mar. 12 2014, Société Céline, n°362528

  =) Italian and Japanese withholding taxes were not deductible

  CE, June 7 2017, Société LVMH Moët Hennessy Louis Vuitton, n°386579

  =) Chinese and New Zealand withholding taxes were deductible

- **After 2017**, French lawmaker **forbade deduction** of ALL witholding taxes levied in accordance to a tax treaty (article 39, 1, 4° CGI).

Was there another way around ? Natixis claim

Natixis asked that the foreign tax credits which it could not use during 2008-2011 financial years be carried forward and offset in 2012.

- When a company is in a tax loss position, French law allows to carry the loss forward : it is treated as a charge in the following financial year and deducted from the profit recorded for that year
- Foreign-source income reduces the loss that can be carried forward
- Natixis claimed that taxation of foreign-source income by France occurs in the subsequent profit-making year, contrary to the purpose of the tax treaties which is to eliminate double taxation

Ruling : foreign tax credits cannot be carried over

- Applicable tax treaties do not contain any provision expressly allowing a French resident to carry forward the foreign tax credit

- Companies are **not** subject to double taxation :
  - Companies in a loss position at the end of a fiscal year do not pay any tax in France on the income they received during this year
  - The possibility to carry the loss forward is irrelevant in this respect

Reasoning

- The purpose of tax treaties is to eliminate *juridical* double taxation, not *economical* double taxation

  "International juridical double taxation can be generally defined as the imposition of comparable taxes in two (or more) States on the same taxpayer in respect of the same subject matter and for identical periods" (introduction to OECD Commentaries)

- OECD Commentaries on Article 23 B leave the matter to domestic law :

  "Further problems may arise in case of losses (…). They depend very much on domestic laws and practice, and the solution must, therefore, be left to each State. In this context, it may be noted that some States are very liberal in applying the credit method. Some States are also considering or have already adopted the possibility of carrying over unused tax credits. Contracting States are, of course, free in bilateral negotiations to amend the Article to deal with any of the aforementioned Problems".

Other issues

- The Conseil d'Etat ruled that the impossibility to carry over unused tax credits :
  - Is not precluded by EU law (free movement of capital) :

    no discrimination between profitable companies and companies in a loss position

    no discrimination between companies receiving foreign-source or French-source positive income
  - Nor by Art. 1 Protocol 1 and Art. 14 of the European convention on Human Rights (protection of property) :

    Foreign tax credit is not a "possession" within the meaning of this article