

## European Court of Justice rules on Dutch withholding tax reclaim by German investment fund

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On 30 January 2020, the Court of Justice of the European Union (CJEU) issued its decision in a Dutch case that relates to a German resident investment fund that filed several Dutch dividend withholding tax refund claims with the Dutch tax authorities on the basis of the free movement of capital principle set forth in Article 56 of the EC Treaty (nowadays: Article 63 of the Treaty on the Functioning of the European Union). The CJEU held that some of the requirements for a refund imposed under Dutch law may, under circumstances, be found to be incompatible with the free movement of capital. The case is now referred back to the Dutch Supreme Court for further verification.

### Detailed discussion

In 2015, the Dutch Supreme Court concluded that foreign investment funds are not comparable to Dutch fiscal investment institutions due to the fact that these foreign funds are not withholding agents for the Dutch dividend withholding tax. The Supreme Court therefore ruled that the European Union (EU) treaty freedoms did not require the Netherlands to refund Dutch dividend withholding tax incurred by foreign investment funds on their Dutch portfolio dividend income.

However, as a result of subsequent developments in the CJEU's case law, the correctness of the Supreme Court was challenged, inter alia, by the German investment fund in the case at hand.

## Preliminary questions

In March 2017, the Dutch Supreme Court eventually decided to request a preliminary ruling from the CJEU. The request for a preliminary ruling concerned the compatibility with the free movement of capital of the following two conditions of the fiscal investment institution regime, namely:

1. The requirements relating to the shareholders/participants of the investment fund (shareholder requirement); and
2. The obligation to distribute the profits which accrue to its shareholders/participants on an annual basis within 8 months of the end of its financial year (redistribution requirement).

## Shareholder requirement

The CJEU decided that the shareholder requirements comply with EU law, provided that: (i) those conditions do not de facto disadvantage nonresident investment funds, and (ii) the tax authorities also require proof of compliance with those conditions to be provided by resident investment funds. This is, however, for the referring national (Dutch) court to verify.

## Redistribution requirement

The CJEU decided that the distribution requirement may not comply with EU law, insofar as the proceeds of the foreign investment fund are:

- Deemed, in the Member State where the fund is established, to have been distributed to its shareholders/participants; or
- Recognized for purposes of the tax which that Member State levies on shareholders/participants as though that profit had been distributed.

The above is conditional, however, on the presumption that the underlying objective of the Dutch redistribution requirement is to ensure taxation at the level of the shareholder. Whether or not this is the case, it for the national (Dutch) court to verify.

## Implications

Since the CJEU decided to let several considerations up to the Dutch Supreme Court for verification, the CJEU's ruling does not provide final clearance. Yet, the CJEU's ruling suggests that the Dutch tax authorities may no longer require foreign investment funds to meet the Dutch requirements in full. On the other hand, the CJEU's ruling may increase the relevancy of the burden of proof.

The CJEU's judgement solely focuses on the system that applied before 2008. The question whether the Dutch dividend withholding tax system for Dutch investment funds, as it stands from 2008 onwards, is incompatible with the free movement of capital, is currently pending before the Dutch Supreme Court in another leading case.

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