

**Euro Tax Flash**

**Issue 236 - October 15, 2014**

## **Euro Tax Flash from KPMG's EU Tax Centre**



### **CJEU Decision in Van Caster (C-326/12)**

Free movement of capital – Investment Funds – Obligation to communicate and publish certain information – Germany

In a [judgment](#) rendered on October 9, 2014 the CJEU ruled that German legislation which requires both resident and non-resident investment funds to communicate and publish specific information on income, in the absence of which investors were liable to tax on a deemed sum rather than actual income, was contrary to the free movement of capital (Art 63 TFEU). This restriction could not be justified since the domestic rules did not allow taxpayers the opportunity to provide their own evidence or information on the actual income received.

#### **Background**

The taxpayers were two German resident individuals who received income from units held in Belgian investment funds. These included units in investment funds for which German reporting requirements on income had not been complied with.

The tax authorities imposed assessments on the basis of the deemed income from the funds, rather than the actual income received.

### **CJEU Decision**

Although the domestic rules applied to both resident and non-resident funds, the reporting requirements were generally met by resident funds, but were unlikely to be complied with by non-resident funds that were not active in the German market. The CJEU concluded that the German rules were therefore likely to deter an investor from acquiring holdings in a non-resident fund due to the likely exposure to disadvantageous tax treatment. This difference in treatment constituted a restriction on the free movement of capital.

The restriction could not be justified on the basis of preserving the balanced allocation of taxing powers. According to CJEU case law, such a restriction may be justified if the aim is to prevent actions that may jeopardize the right of a Member State to exercise its fiscal jurisdiction. However, the CJEU concluded that the purpose of the rules in question was not to protect the power to tax activities in Germany or to tax the income of German residents that had been derived in another Member State.

The restriction could potentially be justified on the basis of effective fiscal supervision and the need to ensure effective tax collection. According to CJEU case law, an individual Member State may determine the substantive conditions that must be met and the information that must be provided in order to establish the correct tax liability. However, any restriction to the Treaty freedoms must be proportionate to the objective it sets out to achieve. The German rules prevented all taxpayers with holdings in non-resident funds from providing their own evidence to establish the correct taxation of the income. As such, the restriction went beyond what was necessary to achieve the objective and could not be justified.

Moreover, the German tax authorities could have relied on the EU Directive on Mutual Assistance and Administrative Co-operation. The CJEU observed that an exchange of information with tax authorities in other Member States could have been used to obtain all the necessary information.

### **EU Tax Centre Comment**

This decision will be relevant to clients resident in Germany and other Member States with holdings in non-resident investment funds facing similar disadvantageous tax treatment under domestic rules.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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