



Euro Tax Flash

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Dutch District Court requests Supreme Court to reconsider negative judgment on dividend withholding tax refunds for foreign investment fund

Withholding Tax on Dividends – The Netherlands – Investment Funds – Discriminatory Tax Treatment – Preliminary Question

In its judgment of July 10, 2015, the Dutch Supreme Court denied a request for the refund of Dutch dividend withholding tax filed by a Luxembourg investment fund. On August 1, 2016, a Dutch District Court rendered two judgments, in which it requested the Supreme Court to reconsider its negative judgment of July 10, 2015. Meijburg & Co acted as the legal counsel of the taxpayer in both cases.

Facts

Although the taxpayers are different in each case, the judgments in principle deal with the same issue. A foreign – EU resident – investment fund received Dutch portfolio dividends on which Dutch dividend withholding tax was levied. The fund claimed a full refund of this Dutch dividend withholding tax. The fund considered itself to be comparable with a Dutch resident fiscal investment institution ("FBI"). At the time in question FBIs were effectively exempt from Dutch corporate income tax and entitled to a credit/refund of the dividend withholding tax withheld on their investments. Dutch withholding tax was however due on dividends paid by the

FBI to its participants. This means that the fund is able to effectively pass on the underlying withholding tax to its participants.

In the cases before the District Court as well as in the case before the Supreme Court, the foreign fund in question claimed that the difference in tax treatment results in a restriction of the free movement of capital (Article 63 TFEU) and that it was therefore entitled to a refund.

In the judgment rendered on July 10, 2015 concerning a Luxembourg investment fund, the Supreme Court argued as follows. Dutch dividend withholding tax is a final tax for a non-resident individual investing in Dutch shares. If a Luxembourg investment fund would be entitled to a refund of the tax withheld on its Dutch dividend income, the participant in the Luxembourg fund would pay less tax than if he had invested directly in Dutch shares. In the latter case, 15% Dutch withholding tax is imposed, whereas there is no Dutch or Luxembourg withholding tax on dividends distributed by the Luxembourg fund. Therefore, the Luxembourg fund was not objectively comparable to a Dutch FBI and there was accordingly no restriction on the free movement of capital. In this case Meijburg & Co also acted as legal counsel.

One of the main reasons for the Dutch District Court to ask the Dutch Supreme Court to reconsider the judgment it rendered on July 10, 2015 is the judgment rendered by the Court of Justice of the European Union (CJEU) in the *Miljoen* case (which had not been published at the time of the Supreme Court's judgment) (see [ETF 256](#)). According to the District Court, this case raises the question whether the Dutch Supreme Court applied the correct test in comparing a resident with a non-resident fund. It also questions the relevance of the Supreme Court's argument in support of its decision, i.e. that a participant in a non-resident fund would otherwise pay less tax than in the case of a direct investment in Dutch shares. The District Court points out that the consequence of not allowing the non-resident fund to reclaim the withholding tax means that the tax burden on a non-resident participant in that fund is higher than in the case of a direct investment.

The District Court also raised the question whether it is relevant for the comparison that a foreign fund also has Dutch individual participants. By way of subsidiary questions, the Dutch Supreme Court was also requested to indicate how strictly the applicable shareholder and distribution requirements for an FBI should be interpreted in making the comparison with a non-resident fund.

EU Tax Centre comment

The Dutch Supreme Court judgment of July 10, 2015 did not resolve the distortion within the EU internal market caused by the Dutch rules so it is a good thing that the Supreme Court is being asked to reconsider its decision. It should be noted that this is the first time that a Dutch lower court has referred questions for a preliminary ruling to the Dutch Supreme Court. It seems likely that the Supreme Court will forward the questions to the CJEU, given the uncertainty that exists although there is still a chance that it will simply answer the questions by referring to its negative ruling of July 10, 2015. The outcome may have implications for similar claims in other Member States.

The Dutch District Court is expected to stay the proceedings in most of the very many pending cases concerning requests for the refund of Dutch dividend withholding tax filed by foreign investment funds, until the Dutch Supreme Court (or possibly the CJEU) provides answers to the questions raised. If a negative decision on a refund request is nonetheless received, either

from the Dutch tax authorities or a Dutch court, it is recommended that taxpayers take the necessary steps to preserve their rights.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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