



Euro Tax Flash from KPMG's EU Tax Centre



Background

[The Dutch Supreme Court's judgment of July 10, 2015](#)

[The request for a preliminary ruling](#)

[EU Tax Centre comment](#)

Dutch Supreme Court refers questions for a preliminary ruling to the Court of Justice of the European Union about dividend withholding tax refunds for foreign investment funds

Free movement of capital – Taxation of income of investment funds – Dividend withholding tax reclaims – Comparability

On March 3, 2017 the Dutch Supreme Court referred questions to the Court of Justice of the European Union ('CJEU') for a preliminary ruling in two cases, which both concern foreign investment funds reclaiming Dutch withholding tax based on discrimination under EU law. Meijburg & Co acted as legal counsel for the taxpayer in both cases.

Background

On July 10, 2015 the Dutch Supreme Court rendered a negative [judgment](#) in a case concerning a Luxembourg investment fund, which claimed that the difference in the tax treatment of Dutch and Luxembourg investment funds resulted in a restriction of the free movement of capital (Article 63 TFEU) and that it was therefore entitled to a refund. The Supreme Court denied the request.

Although the taxpayer - foreign investment funds - in the two cases pending before the Dutch District Court are different, both cases deal, in principle, with the same issue. In August 2016, the Supreme Court was asked to reconsider the negative judgment it had rendered on July 10, 2015.

The Dutch Supreme Court's judgment of July 10, 2015

In this judgment the Supreme Court ruled that Dutch dividend withholding tax is a final tax for a non-resident individual investing in Dutch shares. It concluded that 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 they had invested directly in Dutch shares. In the latter case, 15% Dutch withholding tax is imposed, whereas no Dutch or Luxembourg withholding tax is imposed on dividends distributed by the Luxembourg fund. The Supreme Court therefore ruled that the Luxembourg fund was not objectively comparable to a Dutch FBI and there was, accordingly, no restriction on the free movement of capital. Meijburg & Co also acted as legal counsel in this case.

The request for a preliminary ruling

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 and consequently the participant is taxed in the same way as if the participant had invested directly in the underlying shares of the fund ('tax neutrality').

One of the main reasons for asking the Supreme Court to reconsider its decision of July 10, 2015 was the judgment of the CJEU in the [Miljoen case](#) (see also [ETF 254](#), [ETF 256](#) and [ETF 287](#)), which had not been published at the time of the Supreme Court's judgment. The Supreme Court points out that the Miljoen case did not deal with the special regime that a FBI is subject to, but with the comparability of a foreign person or company with a Dutch person or company that is subject to the "normal" Dutch corporate income tax regime. Furthermore, the Supreme Court argues that it cannot be concluded from the Miljoen case that the judgment of July 2015 is wrong. The Supreme Court finds support for this decision in the "Pensioenfonds Metaal en Techniek" case, rendered after the Miljoen case. However, the Supreme Court points out that a Danish court referred questions to the CJEU for a preliminary ruling in a similar case - the Fidelity Funds case (C-480/16). Therefore, in the opinion of the Supreme Court, there are good grounds for questioning whether the judgment of July 2015 is right and it therefore decided to request the CJEU for a preliminary ruling. The CJEU was asked to rule on whether refusing a refund of withholding tax on the ground that a foreign investment fund does not have a Dutch withholding tax obligation, is in accordance with the free movement of capital. By way of subsidiary questions, the CJEU was also asked to

indicate how strictly the applicable shareholder and distribution requirements for an FFI should be interpreted when making the comparison with a non-resident fund. Finally, the Supreme Court also asked whether there is an infringement in a situation where the participants in a foreign investment fund are residents of the Netherlands.



EU Tax Centre comment

The judgment of July 10, 2015 did not resolve the distortion within the EU internal market and we therefore welcome the fact that the Dutch Supreme Court has decided to request a preliminary ruling. This is of major importance, especially since approximately 1,500 cases concerning the refund of Dutch dividend withholding tax are already pending before the district courts. This number is expected to increase to 2,000 - 3,000. We expect the District Court to stay the proceedings in similar cases until the CJEU has issued its ruling on the cases which now have been referred. If a negative decision on a refund request is nonetheless received, either from the Dutch tax authorities or a Dutch court, we recommend that you file a notice of objection or an appeal against this decision in order to preserve your 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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