



Euro Tax Flash from KPMG's EU Tax Centre



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CJEU decision in *The Trustees of the BT Pension Scheme* case (C-628/15)

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Litigation - Tax Credit - FID regime - Dividend Distribution

On September 14, 2017, the Court of Justice of the European Union (CJEU) rendered its decision in the case of *The Trustees of the BT Pension Scheme v. UK* ([C-628/15](#)). The case concerns the refusal by the UK to grant a tax credit to resident shareholders receiving UK sourced dividends, when those dividends originate from foreign sourced profits. The key question was whether the shareholders, as UK resident trustees, could rely on the fundamental freedoms.

The Court ruled that the free movement of capital is applicable and that EU law requires a Member State to provide remedies to resident shareholders who have been unduly deprived of the benefit of a tax credit in respect of such dividends where they would have obtained a tax credit in the case of dividends that originate from domestic profits. The Court further considered that the circumstances of the case at hand, and in particular the tax exempt status of the shareholders, do not alter its conclusions.

Background

Under the UK legislation at the time in question (1997-1998) UK resident companies receiving UK sourced dividends could, when distributing dividends to their own shareholders, benefit from a tax credit against the (advance) corporation tax they would otherwise be liable to pay, which credit reflected the UK tax paid on the dividends they had received. Their own shareholders were, in turn, entitled to a credit (or refund). On the contrary, while UK resident companies receiving foreign sourced dividends could also benefit from such a tax credit (under the "Foreign Income

Dividends" (FID) regime) when distributing dividends to their own shareholders, the latter were not entitled to a tax credit if they were exempt from UK tax on dividends.

In the case at hand, the BT Pension Scheme, a UK pension fund not subject to tax on its investment income, held participations in UK resident companies that had elected for the application of the FID regime. As a consequence, it received foreign sourced dividends for which no tax credit was available. The trustees of the fund, considering that this was inconsistent with EU law, filed a claim with the UK tax authorities to obtain a tax credit or the refund of the excess tax paid.

In its judgment of December 12, 2006 in the Test Claimants in the FII Group Litigation ([C-446/04](#)) the CJEU had already held that this difference in treatment constitutes an infringement of the free movement of capital. However, the UK tax authorities considered that because the BT Pension Scheme - a UK fund - invested in UK resident companies, the free movement of capital between Member States was not applicable and therefore dismissed the claim.

The case was brought before the UK Court of Appeal, which referred several questions to the CJEU, including whether shareholders receiving dividends under the FID regime were conferred any rights under EU law, where those shareholders are resident in the same Member State as the company distributing the dividends.

The CJEU's decision

The Court first examined whether the fundamental freedoms are applicable to the case at hand.

Considering the financial nature of the claimant's investment, which did not enable it to exercise a definite influence over the companies in which it had invested, the Court initially clarified that it is the free movement of capital, rather than the freedom of establishment that should be tested. Relying on its previous case law in the Test Claimants in the FII Group Litigation case, the Court further recalled that the UK tax legislation under review does establish a restriction to the free movement of capital and determined that these conclusions are applicable to the circumstances at hand, since the absence of a tax credit has the effect of discouraging shareholders from investing in the capital of UK resident companies receiving foreign sourced dividends, compared to UK resident companies receiving UK sourced dividends.

The Court further underlined that although the free movement of capital does not apply to situations that are confined to one Member State, the legislation at issue does not concern such situations, as the difference in treatment arises precisely where dividends originate in foreign sourced profits. As a consequence, the free movement of capital does confer rights on shareholders receiving dividends under the FID regime, whether or not those shareholders are resident in the same Member State as the company distributing the dividends.

In addition, the Court concluded that this restriction to the free movement of capital cannot be justified, again citing its previous case law in the Test Claimants in the FII Group Litigation case.

As regards the question whether EU law imposes any requirements as to the remedies to be provided under domestic law in this case, the Court recalled that it is settled case law that a Member State is required, in principle, to repay charges levied in breach of EU law and therefore the Trustees are entitled to the repayment of the tax credit they have been unduly denied. However, it is for the domestic legal system of each Member State to set the relating procedural rules in accordance with the principles of equivalence and effectiveness.

Finally, referring to the Advocate General's Opinion, the Court ruled that none of the circumstances mentioned by the referring court are such as to alter its conclusions, in particular the fact that (1) the shareholder is exempt from income tax on the dividends received, (2) the national court decided that no damages can be claimed under EU law from the Member State by the company distributing the dividend, and (3) the company distributing the dividends may have increased the amounts distributed to compensate for the absence of a tax credit.

EU Tax Centre comment

The CJEU decision is in line with the AG's Opinion and is not surprising, considering the conclusions already reached in 2006 by the Court in the Test Claimants in the FII Group Litigation case. The Court nevertheless sheds interesting light on the potential applicability of the fundamental freedoms to situations primarily involving a purely domestic transaction, but that may be indirectly related to trade or investment between Member States. It should be noted that the UK legislation that gave rise to the dispute, including the FID regime, was abolished in 1999.

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



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