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Net taxation referral to the CJEU regarding dividend income received by a non-resident insurance company

Netherlands – Withholding tax on dividends – Net Taxation

On December 14, 2022, the Dutch Court of Appeals in Hertogenbosch (CoA) issued an important judgment in which it has referred preliminary questions to the Court of Justice of the European Union (CJEU). The case concerns a UK based life insurance company that received dividend income from the Netherlands. The UK company was represented by KPMG.

CJEU referral

The dividend income received by the plaintiff was subject to 15 percent Dutch dividend withholding tax. However, had this UK insurance company been a resident of the Netherlands, the Dutch tax burden on the dividend income would have been zero. The reason for this is, that the Dutch dividends were received as part of unit linked products that were offered to UK pension schemes.

The Dutch CoA is seeking clarification concerning the interpretation of in particular the CJEU's judgment in the case C-17/14 (September 17, 2015, ECLI:EU:C:2015:608) and whether this applies in general to all cases where a non-resident receives dividend income from another member state.

ETC comment

The CJEU's judgment in the case C-17/14 case concerns a so-called net taxation case. The principle of net taxation is based on EU case law and requires a non-resident to be subject to the same level of taxation as a resident taxpayer. Therefore, the tax burden for residents and non-residents should be equal. In addition, in calculating the tax base, a non-resident is entitled to claim a deduction from its gross revenues of directly related expenses.

In the case C-17/14 case, a French bank received dividend income from the Netherlands which was subject to a 15 percent Dutch dividend withholding tax. In its judgment, the CJEU ruled that the plaintiff

was only entitled to a deduction of the costs that related to the collection of the dividends and not to the directly related expenses. Since the costs related to the collection of the dividends is relatively very small, this judgment did not result in any tax refund.

The Dutch tax authorities have since then, used the CJEU's judgment in the case C-17/14 as guiding precedent for all cases concerning non-residents receiving dividend income from the Netherlands. A similar approach has been taken by the tax authorities in many other member states as well.

The UK insurance company has argued in front of the Dutch Court that the CJEU's judgment in the case C-17/14 is not necessarily wrong, but that that the facts in that case are fundamentally different in the sense that the dividend income was critical to its business model and its service offering to its clients whereas that seems to have been different in the case in the case C-17/1. Given this difference, the September 17, 2015 judgment should not be the leading case for resolving the dispute. Consequently, the other net taxation judgments of the CJEU providing for a deduction of the directly related expenses must be used as guidance here. Therefore, in respect to a UK based life insurance company, should the costs incurred as a result of an increase in the company's future payment obligations; result in a deduction when calculating taxable income?

The referral to the CJEU by the Dutch CoA should provide clarity on this question.

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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