

Dutch Supreme Court asks the Court of Justice of the European Union to assess Dutch dividend withholding tax on foreign investment funds

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On 3 March 2017, the Dutch Supreme Court requested a preliminary ruling from the Court of Justice of the European Union (CJEU) in two cases that relate to a German and a UK resident investment fund that both filed several Dutch dividend withholding tax refund claims with the Dutch tax authorities on the basis of the free movement of capital principle set forth in Article 63 of the Treaty on the Functioning of the European Union (EU). In 2015, the Dutch Supreme Court concluded that foreign investment funds are not comparable to Dutch fiscal investment institutions as they are not withholding agents for Dutch dividend withholding tax upon redistribution of their investment income to their ultimate investors. If the refund would be granted, foreign investors investing in Dutch securities through a foreign investment fund would effectively be better off (no Dutch withholding tax burden) than foreign direct portfolio investors investing in Dutch securities. The Supreme Court therefore ruled that the EU treaty freedoms do not require the Netherlands to refund Dutch dividend withholding tax incurred by foreign investment funds on their Dutch portfolio dividend income.

However, as a result of subsequent developments in the CJEU's case law, the correctness of the Supreme Court decision has been challenged. Based on the recent CJEU case law, foreign direct portfolio investors directly investing in Dutch securities may be eligible for a refund of Dutch dividend withholding tax. By contrast, based on the Supreme Court's 2015 decision, foreign investors

investing in Dutch securities through a foreign investment fund would effectively not qualify for such refund. In light of these developments, the Dutch Lower Court requested the Dutch Supreme Court to reassess its earlier 2015 decision in the two cases at hand in August 2016.¹ The Lower Court explicitly asked the Supreme Court whether it sees arguments to reconsider its 2015 ruling, and how certain aspects relating to the comparability between the foreign and Dutch fiscal investment institutions.

Accordingly, the Dutch Supreme Court decided to refer the two cases to the CJEU on 3 March for a preliminary ruling. The Dutch Supreme Court acknowledges that the correctness of its 2015 decision is not beyond challenge. The

Supreme Court has furthermore asked the CJEU to clarify to what extent a foreign investment fund can be considered to be comparable to a Dutch fiscal investment institution that is entitled to a dividend withholding tax refund.

The request for the preliminary ruling from the CJEU is a positive development for foreign investment funds holding Dutch securities as the correctness of the strict Supreme Court decision from 2015 will now be assessed by the CJEU. In anticipation to the final outcome in the two cases, foreign investment funds should assess their Dutch withholding tax position and where appropriate, consider filing protective claims with the Dutch tax administration.

Endnote

1. See EY Global Tax Alert, [Dutch Lower Court requests Dutch Supreme Court to reconsider its case law on withholding tax reclaim requests filed by foreign investment funds](#), dated 6 September 2016.

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