

Operational Tax News

Supreme Court partly withdraws requests for a preliminary ruling in dividend tax cases

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On the back of the Fidelity Funds judgment, the Dutch Supreme Court has partly withdrawn the requests for a preliminary ruling on the compatibility of the Dutch dividend withholding tax with EU law.

Foreign investment funds

A large number of foreign investment funds claim refunds of dividend tax withheld in the Netherlands. Under Dutch legislation applicable at the time, domestic investment institutions similar to the foreign investment funds could request a refund of the dividend tax withheld. Since the foreign investment funds could not avail themselves of this refund option, they consider the Dutch legislation to be contrary to EU law.

Requests for a preliminary ruling

Two of these proceedings were brought before to the Supreme Court in 2017. They involved two investment funds, one established in Germany and one in the United Kingdom. Both funds had investments in Dutch companies. The Dutch companies paid dividends on which dividend tax was withheld. Because the foreign funds, in contrast to similar investment institutions established in the Netherlands, did not qualify for a dividend tax refund, the Supreme Court referred the proceedings to the Court of Justice of the European Union (CJEU) for a preliminary ruling.

Fidelity Funds judgment

Recently, the CJEU ruled on the compatibility with EU law of slightly similar Danish tax legislation, in the Fidelity Funds judgment. Under this legislation a dividend distribution to a Danish investment fund is exempted from withholding tax, while this exemption does not apply to foreign funds. The CJEU ruled that this is not compatible with EU law.

Withdrawal

On the back of the Fidelity Funds judgment, the CJEU explicitly asked the Dutch Supreme Court whether it wanted to uphold the requests for a preliminary ruling on the compatibility of the dividend tax refund scheme in the case of foreign investment funds. Because the Supreme Court considers the Fidelity Funds judgment to have indeed answered some of the questions, it has been decided to withdraw those questions. However, two questions are upheld. They discuss the grounds based on which a Dutch fiscal investment institution (which qualifies for the refund of Dutch dividend withholding tax) should be compared to a similar foreign investment institution.

The pending proceedings regard the refund scheme applicable to fiscal investment institutions established in the Netherlands through 31 December 2007. Effective 2008, the payment reduction method applies to these investment institutions. This, too, is limited to investment institutions established in the Netherlands. The question whether this is compatible with EU law will need to be answered at a later stage.

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