

The Tax department is a dedicated team of highly skilled tax professionals providing comprehensive consultancy and compliance services.

Our solid knowledge of local and international regulations, combined with our wide experience, allow us to serve our clients in a tailored, responsive and value-added manner.

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Luxembourg Tax Alert

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EU Withholding Tax Reclaims - Positive decision rendered for Non-EU/EEA funds pursuing withholding tax reclaims in Europe



On 10th April 2014, the Court of Justice of the European Union (the "CJEU" or the "Court") released its decision in case *C-190/12 Emerging Markets Series of DFA Investment Trust Company* regarding a reference for a preliminary ruling on difference of treatment between dividends paid to resident and non-resident funds.

Until January 2011, dividends distributed by a Polish company to a non-EU fund were taxed, as a general rule, at the rate of 19% by means of deduction of tax at source (except where a different rate applied under a tax treaty) while such dividends were exempt from tax when they were paid to a Polish fund, if the latter satisfied the conditions imposed by the law on investment funds.

Such difference of treatment is compatible with the EU Law and the free movement of capital only to the extent that it refers to situations which are not objectively comparable or can be justified by an overriding reason in the public interest.

Comparability between non-EU/EEA and EU funds

Contrary to the argumentation developed by the Polish tax authorities and some other Member States, the fact that non-EU/EEA funds are not subject to the uniform regulatory framework implemented by the UCITS Directive cannot in itself be sufficient reason to conclude that non-EU/EEA funds are in a legal and factual situation that is fundamentally different from that of EU funds. This would deprive the principle of free movement of capital of any practical effect. In the present case, the Court concluded that non-resident funds are in a situation which is objectively comparable to that of funds whose registered office is situated in Poland.

Effectiveness of fiscal supervision

The Court considers that a framework of mutual administrative assistance does exist between Poland and the U.S. by reference to their double tax convention which allows exchange of information for tax purposes.

The Polish tax authorities are therefore in a position a request to US funds to provide relevant evidence to enable them to determine, in cooperation with the US tax authorities, that those U.S. funds operate under conditions equivalent to those applicable to funds established in the EU.

The Court has referred to the Polish tax court to examine whether the exchange of information mechanism in place between the U.S. and Poland is sufficient to enable the Polish tax authorities to verify the information provided by the claimant fund and assess whether the US funds operate within a regulatory framework equivalent to that of the EU.

Impact for non-EU/EEA investment funds

This is a landmark case which could make it easier for non-EU funds to recover withholding taxes from EU Member States.

For claims to succeed, it will be crucial for non-EU/EEA funds to:

- demonstrate that they are comparable to funds established in the countries of claims;
- ensure that there are mutual administrative assistance mechanisms between their State of residence and the country of the claims, that authorise the exchange of information for tax purposes.

Considering our extensive and successful experience in the filing of tax reclaims, the Deloitte Aberdeen Tax Reclaim Team is in a position to assist your non-EU based funds.

If you have any queries regarding the above, please do not hesitate to contact us.

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