

Operational Tax News

Netherlands – AG Opinion

5 December 2016

Background

Over the last few years, many foreign investment vehicles have filed refund requests in the Netherlands on the grounds that the dividend withholding tax levied was contrary to EU law. The Dutch tax authorities have rejected these requests, so there are now about 1,500 appeals on the denied requests pending before the Dutch first instance tax court. To alleviate its burden, the court has referred two of the cases to the Supreme Court to obtain clarity on the issue.

The two referred cases involve dividend distributions made by Dutch resident companies to a UK investment fund and a German investment fund. Dutch dividend withholding tax was levied on the dividend distributions and refunds of the tax were denied. The first instance tax court requested a ruling on whether it can rely on the Supreme Court decision of 10 July 2015 in making its own decisions on the cases.

If so, no foreign investment vehicles could benefit from a refund of withholding tax based on the purpose and intent of the Dutch law. The first instance tax court, however, appears to have some doubts about such a far-reaching interpretation, so it has also asked whether all of the requirements of the Dutch fiscal investment institution (FII) regime must be met (legally or factually) for a non-resident investment vehicle to be deemed comparable to a Dutch FII.

On 9 November 2016, the Advocate General (“AG”) to the Dutch Supreme Court advised the Supreme Court to refer the case to the Court of Justice of the European Union (CJEU). Even though the AG believes that Dutch dividend withholding tax is compatible with EU law, the referral could be reasonable for practical and procedural reasons. As many cases are pending and these cases could still increase without a final CJEU decision, a referral would be the only solution to end the discussion.

AG Opinion

According to the AG, there is no legal reason to refer the cases to the CJEU as it considers the case as “acte éclairé”. However, due to the large number of cases pending and the increase of the number of the reimbursement requests, the AG suggests the Supreme Court to refer a preliminary question to the CJEU as that could end the increasing number of reimbursement requests and workload of the Dutch tax authorities and the (lower) tax courts.

For more details please refer to the [Tax Alert from Deloitte Netherlands](#).

Client impact

Until the questions have been answered, we recommend foreign investment funds to continue to safeguard their rights by filing WHT reclaims.

We agree with the view that a referral to the CJEU would be the best solutions for now and will provide clarification about the WHT reclaims pending.

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