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Netherlands - Supreme Court rules SICAV not entitled to refund of dividend withholding tax

Operational Tax News – Aberdeen Alert

A Luxembourg SICAV is not entitled to a dividend withholding tax refund because it is not comparable to a Dutch FII.

The Netherlands Supreme Court issued a decision on 10 July 2015, concluding that a Luxembourg fund for collective investment (SICAV) is not entitled to a refund of Dutch dividend withholding tax because a SICAV is not comparable to a Dutch financial investment institution (FII). The court followed the 19 March 2015 opinion of the Netherlands Advocate General (AG).

Facts of the case

In 2007 and 2008, a Luxembourg SICAV received Dutch portfolio dividends, on which a 15% Dutch dividend withholding tax was levied. Since a SICAV is exempt from corporate income tax in Luxembourg, it was not able to credit the Dutch dividend withholding tax against its corporate income tax liability. The SICAV requested a refund of the withholding tax from the Dutch tax authorities on the basis that it was comparable to a Dutch FII. A Dutch FII would be subject to dividend withholding tax, but under the law applicable in the years at issue, an FII was entitled to refund of the tax; as a result, an FII would effectively not be subject to withholding tax in the Netherlands. The SICAV argued it should be subject to the same treatment. The SICAV also argued that the different treatment of Luxembourg SICAVs and Dutch FIIs constitutes an infringement of the free movement of capital principle in the Treaty on the Functioning of the European Union. After the Dutch tax authorities denied the refund request and rejected the EU arguments raised by the SICAV, the SICAV filed an appeal with the Dutch courts.

Supreme Court decision

In a short decision, the Supreme Court agreed with the opinion of the AG and held that the SICAV was not entitled to a refund of the Dutch dividend withholding tax because a SICAV is not comparable to a Dutch FII.

To ensure that investors participating in a collective investment vehicle, such as an FII, are subject to the same tax treatment as they would have been had they made the investment directly, a Dutch FII is subject to a 0% corporate income tax rate (provided certain conditions are fulfilled, including some distribution requirements) and the Dutch dividend withholding tax levied on dividends paid by a Dutch company to an FII is eliminated by a refund; however, tax is withheld when the FII itself pays out dividends to FII participants so that only the participants bear a withholding tax burden.

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Under Dutch law, a nonresident individual that invests in a Dutch resident entity is not entitled to a refund of dividend withholding tax, i.e. the tax levy is a final levy. When a nonresident individual invests in the Netherlands via an FII, the Dutch dividend withholding tax on the dividend distribution by the FII is considered a final levy. If a nonresident individual uses a nonresident investment fund (such as a SICAV) to invest in the Netherlands, the Dutch dividend withholding tax levied on the investment fund also is a final levy. Thus, the nonresidents are subject to the same withholding tax treatment whether they invest in a Dutch resident entity directly or through a resident or nonresident investment fund.

Consequences

The consequences of the Supreme Court's decision could be far-reaching. If interpreted broadly, it would mean that nonresident investment institutions, such as SICAVs, never will be entitled to a Dutch dividend withholding tax refund. It is unfortunate that the Supreme Court did not refer the case to the Court of Justice of the European Union (CJEU) to provide guidance on the factors that should be taken into account in determining comparability and whether the tax position of individual investors must be considered. In 2012, the CJEU ruled in the Santander case, which involved different withholding tax treatment of resident and nonresident investment vehicles (and which the CJEU held constituted a restriction of the free movement of capital), that the tax circumstances of individual investors in the investment vehicle are not relevant (e.g. whether the investors were subject to tax on dividends received from the investment). The Dutch Supreme Court, however, does not refer to Santander in its decision.

The Supreme Court also does not refer to cases that are pending before the CJEU that involve the issue of comparability in a dividend withholding tax situation (e.g. Miljoen (C-10/14), X (C-14/14) and Société Générale (C-17/14)). In those cases, CJEU AG Jääskinen recently opined that the combined levy of dividend withholding tax and individual income tax in domestic situations should be compared to the dividend withholding tax as a final levy in cross-border situations (see **tax alert dated 29 June 2015**). In the case of a Dutch FII, the combined tax levy would be lower than the 15% dividend withholding tax on a distribution to a SICAV, thus infringing EU law.

The Supreme Court's decision is disappointing and could have an enormous impact on pending dividend withholding tax refund requests. The Dutch tax authorities likely will begin to reject refund requests on the basis of this decision.

Source: Supreme Court of 10 July 2015, case 14/03956.

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