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Dutch Court of Appeal: Finnish investment fund is entitled to Dutch dividend withholding tax refund

On March 9, 2012, a Dutch Court of Appeal issued an important decision about the refund of Dutch dividend withholding tax withheld on Dutch portfolio dividends received by a Finnish tax-exempt investment fund.

The case concerned a so-called 'open end' Finnish resident investment fund (its participants can freely enter and leave the fund), which is exempt from Finnish corporate income tax. During 2008 the fund received Dutch portfolio dividends on which Dutch dividend withholding tax was withheld. The Court of Appeal decided that the refusal to grant a Dutch dividend withholding tax refund on the portfolio dividends received infringes on the free movement of capital within the European Union ("EU"). Accordingly, the Finnish investment fund was entitled to a Dutch dividend withholding tax refund with interest.

Dutch tax-resident entities that are not subject to Dutch corporate income tax, and that are not tax-exempt investment institutions or fiscal investment institutions, are entitled to a refund of Dutch dividend withholding tax withheld on Dutch portfolio dividends received (Article 10 Dutch Dividend Withholding Tax Act 1965 ("DWTa 1965")). Entities covered by this provision include pension funds and certain government institutions.

Under Article 10 DWTa 1965, tax-exempt entities in EU/European Economic Area ("EEA") member states (and in third countries with a (bilateral or multilateral)



agreement on exchange of information) are, in principle, only entitled to a Dutch dividend withholding tax refund on Dutch portfolio dividends if they would be exempt from Dutch corporate income tax if they were Dutch tax residents.

The Finnish investment fund would have been subject to Dutch corporate income tax if it were a Dutch tax resident. Consequently, the Dutch tax inspector denied the Finnish investment fund's request for a Dutch dividend withholding tax refund on the Dutch portfolio dividends received. The Finnish investment fund argued that this denial infringed on the freedom of capital.

The Court of Appeal observed that Article 10(1) DWTa 1965 aims to avoid economic double taxation of the profits distributed by a Dutch tax-resident entity where a dividend payment recipient is exempt from Dutch corporate income tax. The Court of Appeal held that Article 10 DWTa 1965 discriminates to the extent that no refund is granted for Dutch dividend withholding tax on Dutch portfolio dividends where the recipient is a tax-exempt Finnish investment fund. The court's holding is without regard to whether the Finnish investment fund would have been exempt from Dutch corporate income tax if it were a Dutch tax resident. The Court of Appeals accepted no justifications for this discrimination.

Accordingly, the Court of Appeals decided that the Finnish investment fund was entitled to a Dutch dividend withholding tax refund with interest.

The Dutch tax authorities announced that they will appeal this decision with the Dutch Supreme Court.

Impact on US entities and observations

The decision of the Court of Appeal means US tax-exempt entities could claim a Dutch dividend withholding tax refund on Dutch portfolio dividends received. Such entities should consider safeguarding their rights to a (potential) Dutch dividend withholding tax refund.

The statute of limitations for filing dividend withholding tax refund claims in the Netherlands is under debate. The statutory limitation to file a refund claim is three years from the end of the financial year in which the dividend was received. However, based on a State Secretary for Finance's decree, under certain circumstances, the statute of limitation may be extended to five years.

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