

European Tax Newsalert

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ECJ declares French dividend withholding tax on foreign investment funds discriminatory

On May 10, 2012, the European Court of Justice (ECJ) ruled that subjecting foreign investments funds to French dividend withholding tax is discriminatory pursuant to the European Union's (EU) free movement of capital principle. This ECJ decision applies to residents in the EU and third countries (such as the United States).

A French tribunal initiated the decision, requesting preliminary ECJ ruling on several issues. The tribunal referred the following questions to the ECJ:

- In order to determine whether discrimination exists, at what level should the court compare a French investment fund (an 'OPCVM') with a foreign investment fund? In order to determine whether French tax legislation creates a difference in treatment, should the court conduct the analysis at the fund's level or at the unit holders' level?
- If the court determines that the investor's status must be considered, under which conditions would the French withholding tax and the free movement of capital be compatible?

The ECJ answered only the first question: French tax law creates different treatment between resident and non-resident investment funds.

The ECJ specifically analyzed the comparability of those funds and whether the analysis should consider the investors. The ECJ clearly stated that the French



provision is based on the funds' "residence". The comparison should be assessed solely at the funds' level. When considering the law's intention, i.e., to prevent dividends from being subject to a series of tax charges, the ECJ established that domestic and foreign funds are comparable.

The Court set aside other arguments that the French government presented (e.g., the balanced allocation of taxing right between the EU Member States, the effectiveness of fiscal supervision and the coherence of the tax system).

Regarding non-EU states, the Court did not analyze the impact of article 64 § 1 of the TFEU (i.e., grandfathering provision), as it was not part of the preliminary ruling question.

Impact on foreign (e.g., US) investment funds

This decision provides an opportunity for US investment funds, which may be considered comparable to French OPCVM funds. As such, US regulated investment companies may be entitled to file French dividend withholding tax refund claims with the French tax authorities.

This decision should open a new period for claiming refunds for 2012 and previous years.

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