

Dutch Supreme Court: foreign tax exempt investment funds are not entitled to refund of Dutch dividend withholding tax

On 15 November 2013, the Dutch Supreme Court reversed the decision from the High Court of Den Bosch of 9 March 2012 in which the High Court ruled that foreign tax exempt investment funds are entitled to refund of Dutch dividend withholding tax.

Facts

The claimant, a Finnish open-end investment fund ('the Fund') which was tax exempt in Finland, claimed a refund of in Dutch dividend withholding tax ('DWT') on its Dutch portfolio (<5%) shares, which claim the tax inspector and the lower tax court had denied.

Article 10 paragraph 1 of the Dutch DWT Act allows a refund of Dutch DWT to Dutch entities which are not subject to tax in the Netherlands. The provision is aimed primarily at Dutch pension funds and other tax exempt (mostly public interest) bodies. Article 10 paragraph 2 of the Dutch DWT Act¹ allows for refund of Dutch DWT to EU or EEA entities, provided that such entities:

- are not subject to tax in its country of establishment, and
- would not be subject to tax in the Netherlands if it had been established in the Netherlands.

High Court decision of 9 March 2012

On 9 March 2012, the High Court of Den Bosch ruled that the purpose of article 10 Dutch DWT Act is to avoid double economic taxation over the profit of a Dutch company to the extent that the profit of such company is distributed as a dividend to companies established in the Netherlands which are not subject to tax in the Netherlands. In light of that purpose, the situation of the Fund receiving Dutch portfolio dividends is objectively comparable to the situation of a Dutch fund receiving Dutch portfolio dividends. The fact that article 10 Dutch DWT Act is aimed primarily at public interest bodies is not relevant in this respect. The fact that the Fund would be subject to tax in the Netherlands if it had been established in the Netherlands is also not relevant. The fact remains that the Fund is exempt from tax in Finland, and that the Dutch DWT is an actual burden to the Fund (as the Fund is not able to credit the Dutch DWT against any tax liability in Finland). This is a violation of the free movement of capital which is not justified by any overriding principle of public interest

Supreme Court decision of 15 November 2013

On 15 November 2013, the Dutch Supreme Court ruled that the Fund is not entitled to refund of Dutch dividend withholding tax. The Supreme Court analyses whether the Fund is objectively comparable to an entity which is tax resident in the Netherlands and which falls within the scope of article 10 Dutch DWT Act. In determining whether a member state discriminates companies resident in another member state, through the levy of withholding tax on income, it is not relevant how the income is treated for tax purposes in the other member state. In the levy of its tax, a member state is not required to (automatically) adopt a tax benefit or incentive which is awarded by another member state to a company resident in that other member state (ECJ 14 September 2006, *Centro di Musicologia Walter Stauffer*, C-386/04 and ECJ 27 January 2009, *Persche*, C-318/07). The mere circumstance that the Fund is tax exempt in Finland does not yet mean that it is comparable to a Dutch entity which is non subject to tax in the Netherlands. The comparability also does not follow from the purpose of article 10 paragraph 1 Dutch DWT Act. The purpose of this article to avoid dividend withholding tax - in addition to avoiding corporate income tax - on dividends, is limited to certain legal entities which are excluded from corporate income tax due to the nature of their activities or the destination of their profit.

¹ As of 1 January 2012, article 10 paragraph 3 of the Dutch DWT act allows the refund of DWT on portfolio dividends to entities in certain non-EU member states, provided that such entities are not subject to tax in their country of establishment, and would not be subject to tax in the Netherlands if they had been established in the Netherlands.

It is a fact that the Fund, if it had been resident in the Netherlands, would have been subject to tax in the Netherlands. This is why the Fund does not belong to the group of entities for which article 10 paragraph 1 Dutch DWT Act was written.

Comparison with the ECJ decision in the Santander Case (ECJ 10 May 2012 C-338/11–C347/11)

At first glance, the Santander Case would appear comparable to the Dutch Supreme Court case of 15 November 2013. In the Santander Case, the ECJ ruled that certain EU resident and non-EU resident private collective investment vehicles were entitled to a refund of French dividend withholding tax, as French resident private collective investment vehicles were exempt from French dividend withholding tax. A critical difference with the Dutch Supreme Court case of 15 November 2013, however, appears to be that the French exemption from dividend withholding tax was dependent solely on the place of residence of the taxpayer. Neither the tax position of the collective investment vehicle nor the tax position of its participants in the collective investment vehicle were taken into account by the French dividend withholding tax.