

High Court of Den Bosch rules: denying refund of Dutch dividend withholding tax to non-Dutch tax exempt investors is a violation of EU law (9 March 2012)

Facts

The claimant, a Finnish open-end investment fund ('the Fund') which was not subject to tax in Finland, claimed a refund of € 35,324 in Dutch dividend withholding tax ('DWT') on its Dutch portfolio (<5%) shares, which claim the tax inspector 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.

Dispute

The Fund was not subject to tax in Finland. However, as it was an open-end investment fund, it would be subject to tax in the Netherlands if it had been established in the Netherlands. The Fund argued - in fact - that the condition, contained in article 10 paragraph 2 Dutch DWT Act, that the Fund must be exempt in the Netherlands if it had been established in the Netherlands, is a violation of the free movement of capital (art 63 EU Treaty).

High Court decision

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 (OHP: 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

The Dutch tax administration has indicated that it will appeal this decision before the Supreme Court.

Conclusion

If the decision is confirmed by the Supreme Court, foreign exempt investors should be entitled to claim refund of Dutch DWT, irrespective of whether or not they have public interest character, and irrespective of whether they would also be exempt from tax if they had been established in the Netherlands. As the decision is based on the free movement of capital, which has effect also toward non-EU member states, the decision is favorable also to non-EU tax exempt investors.

We recommend all foreign tax exempt investors, both inside and outside the EU/EEA, to file (at least protective) claims for refund of Dutch DWT. Claims can be filed back as far as three years from the end of the year in which the dividends have been paid. Therefore, claims for 2009 can be filed until the end of 2012. OHP can assist you in preparing and filing DWT refund claims.

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.