Italy: Supreme Court rules in favour of US pension funds

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The Italian Supreme Court (the ‘Supreme Court’) issued two decisions (on 1 and 2 September 2022) confirming that the Italian tax treatment of dividends paid to investors in the US is **discriminatory** and **breaches EU law**[(1)].

Following the previous positive Supreme Court decision issued on 6 July 2022 in favour of non-EU collective investment funds in Italy, the Supreme Court has issued further decisions in favour of **non-EU pension funds** that are consistent with previous rulings issued by the Court of Justice of the European Union (‘CJEU’).

Background

Certain US pension funds (the ‘Claimants’) had filed several refund claims for withholding tax (‘WHT’) levied on dividends received during 2008 - 2009, based on the incompatibility of the provisions of the US-Italy Double Tax Treaty (‘DTT’)/the Italian domestic rules with the freedom of movement of capital within the EU.

These Claimants had requested the refund of the difference between the DTT rate (15 percent)/the domestic rate (27 percent) of WHT levied on dividends paid to US pension funds and the Italian substitute tax (11 percent), that would have been applied[(2)] to Italian pension funds on the net income earned.

This discrimination is contrary to EU law and may discourage pension funds established in a non-EU Member State from investing in companies established in the EU. Investors resident in the EU could also be discouraged from acquiring shares in non-resident pension funds.

The decisions

The Supreme Court stated that, referring specifically to non-EU pension funds, that the different treatment between U.S. pension funds and Italian pension funds may hinder investments, thus resulting in a restriction on the free movement of capital, ordinarily prohibited with respect to non-EU countries according to article 63, TFEU.

(1) Article 63 of Treaty of the Functioning of the European Union (TFEU).

(2) Pursuant to article 17 of Legislative Decree no. 252 of 2005. Starting from 1 January 2015 the Italian substitute tax was increased to 20 percent.

Moreover, the Supreme Court, referring to CJEU case law, stated that this results in a restriction which cannot be justified under article 65 TFEU, in terms of general interest or differences between the two cases (supervisory requirements or different tax regimes).

The Supreme Court made it clear that the fact that the regime applicable to U.S. funds provides for a tax levy only at the time of payment of pension benefits, while Italian funds are also taxed on income at the time of its production, cannot justify the different tax treatment.

Following the EU infringement proceedings, Italian legislation has extended its domestic tax rules to resident EU funds despite the different tax regime applicable to Italian funds, thus demonstrating that it does not hinder the comparison of foreign funds with Italian ones.

Consequently, the Supreme Court decided that the Claimants were legitimately entitled to the refund of the difference between the DTT rate (15 percent)/domestic rate (27 percent) and the domestic 11 percent rate applicable to Italian pension funds.

KPMG comments

Considering that this decision regards non-EU entities that invest in Italy, we advise these entities to keep their filed claims 'alive' by submitting a refresher letter and launching court proceedings to obtain a refund.

If successful, interest would also be added to the refund.

The Italian Revenue Agency does not usually reply within 90 days[3] of the filing date of the refund claim, which means the claim has been refused because of the Revenue Agency's silence on the matter after the official waiting period has elapsed.

The only way forward to obtain a refund is by lodging an appeal before the Tax Court. An appeal must be launched within 10 years of the initial filing date, otherwise the amount will probably be lost.

(3) The official waiting period.

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