# Italy: Supreme Court rules in favour of non-EU entities (US collective investment funds)

**Tax & Legal Alert**
13 July 2022


**Offices**

**Milan**
Via Vittor Pisani 31, 20124
T: +39 02 676441

**Ancona**
Via I° Maggio 150/a, 60131
T: +39 071 2916378

**Bologna**
Via Innocenzo Malvasia 6, 40131
T: +39 051 4392711

**Florence**
Viale Niccolò Machiavelli 29, 50125
T: +39 055 261961

**Genoa**
P.zza della Vittoria 15/12, 16121
T: +39 010 5702225

**Naples**
Via F. Caracciolo 17, 80122
T: +39 081 662617

**Padua**
Piazza Salvemini 2, 35131
T: +39 049 8239611

**Perugia**
Via Campo di Marte 19, 06124
T: +39 075 5734518

**Pescara**
P.zza Duca D'Aosta 31, 65121
T: +39 085 4210479

**Rome**
Via Curtatone 3, 00185
T: +39 06 809631

**Turin**
C.so Vittorio Emanuele II 48, 10123
T: +39 011 883166

**Verona**
Via Leone Pancaldo 68, 37138
T: +39 045 8114111


On 6 July 2022 the Italian Supreme Court (the 'Supreme Court'), issued a decision confirming that the Italian tax treatment of dividends paid to investors in the US is **discriminatory** and **breaches EU law**(1).

This is the first positive Supreme Court decision in favour of **non-EU entities in Italy** and is consistent with previous rulings issued by the Court of Justice of the European Union ('CJEU').

## Background

A US mutual investment fund (the 'Claimant') filed several refund claims for withholding tax ('WHT') levied on dividends received between 2007 and 2010, based on the incompatibility of the provisions of the US-Italy Double Tax Treaty ('DTT') with the freedom of movement of capital within the EU.

The Claimant requested the refund of the difference between the DTT rate (15%) of WHT levied on dividends paid to US collective investment funds and the Italian substitute tax (12.5%), that would have been applied(2) to Italian investment funds on the annual increase in net asset value ('NAV').

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

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

(2) Pursuant to article 9(2) of Law no. 77 of 1983.

## The decision

The Supreme Court declared that even if a taxpayer is not resident in an EU Member State, the free movement of capital rule(3) still applies. EU law prevails over DTTs or domestic rules that conflict with it.

Granting a lower tax rate (or an exemption) to Italian collective investment funds and imposing a higher WHT on outgoing dividends, distributed to foreign entities, is a restriction on the free movement of capital, dissuading non-EU entities from investing in Italy.

Consequently, the Supreme Court decided that the Claimant was legitimately entitled to the refund of the difference between the DTT rate (15 per cent) and the domestic 12.5 per cent rate.

## KPMG comments

Considering that this decision regards non-EU entities that invest in Italy, we advise these entities to continue filing WHT refund claims and to initiate 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(4) 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 may be lost.

Additionally, as of 1 July 2011 Italian investment funds are no longer subject to taxation(5), as taxation is levied exclusively on the investor when it receives the dividend. This means that a refund of the **full WHT amount** for both EU and non-EU entities may be requested.

(3) Article 63(1) TFEU.

(4) The official waiting period.

(5) Under Decree Law no. 225 of 29 December 2010.

Document prepared and written by Sabrina Navarra and Alberto Renda

**Contacts**

**KPMG in Italy, Tax & Legal**

**Tax & Legal Professional Practice Team**
E: it-fm-tpp@kpmg.it

**kpmg.com/it**

**kpmg.com/it/socialmedia**

**Tax & Legal Alert** / KPMG in Italy / 13 July 2022