



Italy: Supreme Court positive decision

Tax & Legal Alert

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On 16 February 2022, the Italian Supreme Court (the 'Supreme Court') issued two identical decisions confirming that **Spanish investment funds, SICAVs and pension funds** are **all** entitled to the refund of withholding tax ('WHT') levied on dividends paid by Italian companies. This is the first positive Supreme Court decision in favour of **foreign investment funds in Italy** and is in line with its previous rulings in favour of pension funds and is consistent with CJEU case law.

Background

In 2009 a Spanish asset manager, as legal representative of several Spanish investment funds and pension funds, filed refund claims for the WHT levied on dividends received in 2007, based on the incompatibility of domestic Italian provisions with the freedom of movement of capital within the EU.

Under Italian tax law, dividends paid to resident companies are not subject to any withholding tax. Dividends are excluded from the Italian corporate income tax base for 95% of their amount and the remaining 5% is subject to corporate tax at the standard rate of 24% (or 27.5% for FYs 2008-2016). Therefore, dividends paid to Italian companies are taxed at 1.2% (1.375% for 2008-2016). On the contrary, foreign investment funds, SICAVs and pension funds, are subject to a 26% WHT rate (or 27%, or 20%, depending on the period of the dividend distribution) or to the DTT rate of 15% if those entities were eligible for DTT rules⁽¹⁾.

Further to the CJEU decision in Case C-540/07⁽²⁾, article 27(3) of Presidential Decree no. 600/1973 was modified and it reduced the 26% WHT rate to 1.20% (1.375% for 2008-2016) for dividend payments made to non-Italian resident companies and entities which are subject to corporate income tax in an EU or EEA Member State and resident therein.

(1) Pursuant to article 27(3) of Presidential Decree no. 600 of 29 September 1973

(2) In which EU judges recognized that Italian legislation was not consistent with EU legislation

The decisions

The Supreme Court declared that all European companies or entities subject to tax for corporate tax purposes can benefit from the reduced WHT rate⁽³⁾, including those that do not pay taxes by virtue of certain exemptions linked to the type of income they produce, or to the place in which their activity is carried out.

Therefore, any entity, established within the EU, which is considered as a taxable person for corporate income tax purposes, is entitled to the application of the Italian tax rate on dividends. This WHT rate was 1.375% (for the years 2008-2016) and 1.2% (from 2017 onwards), instead of the 27% WHT rate or the 15% DTT rate, in the case at hand. To be eligible, the requirements include the tax residence of the entity in an EU Member State and the liability to corporate income tax in that State, therefore the legal form of the entity is not relevant.

This exemption, applicable until now only to Italian entities⁽⁴⁾, avoids the double taxation of this profit and concerns the distribution of all dividends, with a guarantee of full, equal treatment. There is no cause for discrimination between resident dividend recipients, in relation to their legal status, depending on whether they are mutual funds or joint stock companies. This may be relevant for any 'internal' difference in treatment to be assessed in the light of constitutional principles, but it has no relevance for the purposes of compliance with EU principles.

By granting a WHT reduction to Italian investment funds (including SICAVs) and pension funds while at the same time imposing a 26% WHT rate (or 15% DTT rate) on outgoing dividends, Italian tax legislation restricted the free movement of capital, dissuading non-residents from investing in Italy.

Consequently, the Supreme Court decided that the claimant was legitimately entitled to the refund requested for the difference between the DTT rate and the 1.375% rate.

(3) Provided for by article 27(3) as amended

(4) Of the dividend (95%)

KPMG Comment

Considering that these decisions regard European entities considered as taxable persons for corporate income tax purposes in their State of residence, we advise entities (e.g. investment funds, SICAVs and pension funds) that are tax resident in an EU Member State and subject to corporate income tax therein, **to continue filing WHT refund claims in Italy and to initiate court proceedings.**

The Italian Revenue Agency does not usually reply within 90 days⁽⁵⁾ 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 had elapsed. The sole way to obtain a refund is by launching an appeal before the Tax Court. We highly recommend launching tax court appeals on the basis of these positive decisions.

If successful, 2% annual interest would also be added to the refunded amount.

An appeal must be launched within 10 years from the initial filing date to avoid losing the amount requested.

It is important to act immediately for all WHT reclaims filed after March 2012.

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