



# Italy: Provincial Tax Court of Pescara rules in favour of a Luxembourg SICAV

## Tax & Legal Alert

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On 7 February 2022 the Provincial Tax Court of Pescara (the 'Court') issued a decision against the Italian Revenue Agency ('*Agenzia delle Entrate*') and awarded a Luxembourg SICAV (the 'Claimant') a full refund of withholding tax ('WHT') levied on dividends distributed by Italian companies.

This is the first decision to award a SICAV in Italy a full WHT refund based on previous rulings of the Court of Justice of the European Union ('CJEU').

### The refund claim

In December 2017 the Claimant, a UCITS-compliant SICAV, submitted a refund claim for WHT levied on dividends in 2014 - 2016, based on the incompatibility of Italian provisions with the freedom of movement of capital under the EU Treaty.

### The decision

Undertakings for collective investment (UCIs) established in Italy are considered taxable entities for corporate income tax purposes (IRES)<sup>(1)</sup> but are exempt from IRES if they are subject to prudential supervision<sup>(2)</sup>. As a result, no WHT is levied on dividends paid to domestic UCITS<sup>(3)</sup>.

However, Luxembourg SICAVs, such as the Claimant, did not benefit from any tax exemption until 31 December 2020 and were therefore subject to WHT even if subject to prudential supervision in their own country.

(1) Article 73(1)(c) of Presidential Decree no. 917 of 22 December 1986 (Italian Income Tax Code or IITC).

(2) Article 73(1)(5-*quinquies*) IITC.

(3) Article 27 of Presidential Decree no. 600/1973.

This exclusion from the tax exemption was based exclusively on residency, which was discriminatory as Italian SICAVs and Luxembourg SICAVs are comparable, all being subject to forms of prudential supervision by their own regulatory authority. Granting an exemption to Italian UCITS (including SICAVs) while imposing a WHT on outgoing dividends was a typical restriction on the free movement of capital dissuading non-residents from investing in Italy.

The Court recognized that, according to CJEU case law, the violation of a fundamental freedom may occur either when the tax system of a Member State discriminates against certain parties because of their tax residence, or when the requirements for access to certain favorable regimes are so stringent for foreign parties that it may dissuade them from investing in that Member State, thus limiting the free movement of capital guaranteed by article 63 TFEU.

In addition, the Court noted that the 2021 Italian Budget Law included a provision to standardize the tax regime of dividends from Italian sources<sup>(4)</sup>. Following this change, dividends distributed by IRES taxpayers (e.g. Italian companies) and received by foreign UCITS should be entitled to the same favorable treatment, thus remedying the previous discrimination.

The Court concluded by stating that the Claimant was entitled to receive the full amount requested in the refund claim filed in 2017.

## KPMG commentary

This outcome could pave the way for definitive recognition that UCITS entities (investment funds or SICAVs) that have invested in Italy are entitled to refunds.

We strongly recommend continuing to file WHT refund claims in Italy and then initiating court proceedings if the Italian Revenue Agency does not reply within 90 days of the filing date of the refund claim (which means that the claim has been tacitly denied).

Typically, the Italian Revenue Agency does not reply to WHT refund claims; therefore, the only way forward to obtain the refund is to lodge an appeal with the Court.

An appeal must be launched within 10 years + 90 days of the initial filing date of the WHT refund claim; otherwise the amount may be lost. If successful, 2% annual interest would normally be added to the refunded amount.

We believe now is the right time to take the appeal route, not only because of this positive decision but also because of two favorable Italian Supreme Court decisions issued on 16 February 2022 in relation to the refund of WHT paid on dividends in 2007 by Spanish investment funds, SICAVs and pension funds.

(4) Article 1 (631) and (633) of Law no. 178 of 30 December 2020.

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