



# Italy: WHT refund on dividends distributed by Italian entities to Spanish pension funds - Supreme Court decision

## Tax Alert

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The Italian Supreme Court (*Corte di Cassazione*) has ruled that Spanish pension funds, subject to tax in Spain at a 0% rate, are entitled to the refund of WHT imposed on dividends distributed by Italian companies (decision no. 1967, filed on 29 January 2020).

In the case decided by the Supreme Court a Spanish management company, as legal representative of 11 Spanish pension funds, requested the refund of the 15% WHT, applied according to the Italian-Spanish DTT, on dividends distributed in 2006 by Italian companies to pension funds. The original claim was based on the consideration that dividends distributed to Spanish shareholders should be taxed on the same basis as those distributed to Italian companies, which at the time of the events were subject to tax at 1.65%.

Even though the DTT WHT of 15% was lower than the 27% WHT applied by Italian law, the Supreme Court considered that it was still in violation of EU Treaty rules.

The Supreme Court stated that even for an entity, such as a Spanish pension fund, which is subject to 0% tax in its country of residence, the WHT refund must be recognized, as that entity is liable to tax in Spain.

As the Parent-Subsidiary Directive is not applicable, EU Treaty rules prevail over the DTT rules; consequently, dividends distributed to Spanish pension funds must be taxed in the same way as those distributed to Italian entities starting from the 2004 tax year (the period from which the participation exemption was in force in Italy).

The principle set out by the Supreme Court assumes great importance for all entities, such as pension funds, that are subject to tax even though exempt in their country of residence and cannot recover the WHT levied in Italy. Those entities are entitled to the refund of the difference between the WHT levied (27% or 15%) and the taxation imposed in Italy on dividends distributed to Italian entities (1.65% from 2004 to 2007; 1.375% from 2008 to 2016; 1.2% from 2017).

Taxpayers are strongly recommended to appeal, before the Italian Tax Court, the silent-rejection of previously filed claims. Pension funds that have not yet filed refund claims are advised to submit them for WHT paid on dividends distributed from 2016 onwards (the statutory time limit is 48 months from the payment date of the WHT).

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