



A win for KPMG Italy: first-level tax court rules in favour of a Luxembourg SICAV

Tax & Legal Alert

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KPMG Italy has won a case before the first-level tax court of Pescara (the 'Court') on behalf of a Luxembourg SICAV (the 'Appellant'). The Court ruled that the Appellant was entitled to the full refund of withholding tax ('WHT') levied on dividends between 2009 and 2012. This decision was issued on 7 July 2023.

Background

The Appellant, a UCITS-compliant SICAV¹, submitted a refund claim for WHT of 27 and 20 percent levied on outgoing dividends, based on the incompatibility of Italian domestic rules regarding the freedom of movement of capital within the EU².

In addition to the claim, the Appellant also submitted tax residence certificates, a UCITS attestation and dividend vouchers.

As the Italian Tax Authorities ('ITA') did not reply to the refund claim within 90 days of being filed, the Appellant launched an appeal against the implicit rejection before the Court.

The appeal invoked EU law and the infringement of the principles set out in certain judgments of the European Court of Justice (CJEU)³, as well as underlining the regulatory changes under article 1(631) of Law no. 178/2020 (the '2021 Budget Law').

The Court proceedings and the decision

The ITA affirmed that the documents lodged as evidence were inadequate and they also challenged the lack of proof of discrimination between dividends distributed to Italian SICAVs and those distributed to Luxembourg SICAVs.

According to the ITA, Italian and Luxembourg SICAVs were not comparable, as Italian UCIs were under stricter supervision than Luxembourg UCIs. The ITA also stated that the Appellant had not proved to be the beneficial owner of the income.

The Appellant, however, highlighted previous cases in which the tax courts⁴ and the Supreme Court⁵ had refunded the entire WHT levied. In addition, the Appellant reiterated that the documents filed, proved that it was entitled to the refund.

The Court, in application of CJEU case law, declared that the Italian tax treatment of dividends paid to foreign investors was discriminatory and breached EU law.

The amendment introduced by the 2021 Budget Law confirms that discrimination existed between resident and non-resident entities and, thus, aims to remove obstacles to the free movement of capital, including the double taxation of dividends.

In a nutshell, the Court granted the full refund as, despite the challenges raised by the ITA, the filed documents were considered sufficient to prove that the appellant qualified as a harmonised UCITS, as well as being the beneficial owner of the dividends.

KPMG comments

The tide seems to be turning favourably, after years of stalemate.

KPMG tax specialists are on hand to assist you with filing initial WHT claims within 48 months of the payment date. If you have already submitted a claim and can provide the documentation required to demonstrate the entitlement of the refund, we will be able to initiate court proceedings. If successful, interest would also be added to the requested amount.

NOTES

(1) Established in Luxembourg, harmonised under Directive 2009/65/EC and subject to the supervision of the *Commission du Surveillance du Secteur Financier* ("CSSF").

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

(3) See judgment of 18 June 2009, case C-303/07 "Aberdeen", judgment of 10 May 2012, joined cases C-338/11 to C-347/11 "Santander", judgment of 21 June 2018, C-480/16 "Fidelity Funds", judgment of 30 January 2020, C-156/17 "KA Deka" and judgment of 29 April 2021, case C-480/2019 "Veronsaajien".

(4) See our KPMG Italy - Tax & Alerts of 23 February 2022 related to the judgment of the first-level tax court of Pescara in favour of a LUX SICAV and of 27 February 2023 related to the judgment of the second-level tax court of Abruzzo which confirmed the approach of the first-level tax court of Pescara.

(5) See judgments nos. 21581, 21587, 21598, 21599, 21610, 21641, 21642, 21643, 21645 and 21647 of 7 July 2022, judgment no. 21882 of 11 July 2022, judgments nos. 22263, 22268 and 22271 of 14 July 2022 and judgments nos. 26537, 26536 and 26535 of 8 September 2022.

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