



# Italy: a first-level tax court rules in favor of non-EU entities (US collective investment funds)

**Tax & Legal Alert**  
26 April 2023

## Office

### 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 17 April 2023 the first-level tax court of Pescara (the 'Court') issued a series of decisions confirming that the Italian tax treatment of dividends paid to investors in the US is **discriminatory** and **breaches EU law<sup>1</sup>, as already established by the Supreme Court in a series of rulings issued in July 2022<sup>2</sup>**.

These are the first positive decisions in Italy in favor of **non-EU** entities issued by a first-level tax court and are consistent with previous rulings issued by the Court of Justice of the European Union ('CJEU').

## Background

Six US mutual investment funds (the 'Claimants') filed several refund claims for withholding tax ('WHT') levied on dividends received during the period 2007-2010. The refunds were requested based on the incompatibility of the US-Italy Double Tax Treaty ('DTT') provisions and Italian domestic rules regarding the freedom of movement of capital within the EU, which also applies to non-EU entities.

These Claimants had requested the refund of the difference between the WHT rate (15 or 27 percent) levied on dividends paid to US collective investment funds and the Italian substitute tax (12.5 percent), that would have been applied<sup>3</sup> to Italian investment funds on the annual increase in net asset value in that period.

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 the EU could also be discouraged from acquiring shares in non-resident investment funds.

## The Pescara decisions

The Court declared that even if a taxpayer is not resident in an EU Member State, the free movement of capital rule<sup>4</sup> still applies. In application of CJEU case law<sup>5</sup>, the Court also confirmed the discrimination between non-resident and resident entities in the dividend tax regime provided for by Italian law and DTTs.

Granting a lower tax rate to Italian collective investment funds and imposing a higher WHT on outgoing dividends, including those paid to non-EU entities, is a restriction on the free movement of capital, dissuading non-EU entities from investing in Italy.

Consequently, the Court decided that the Claimants were legitimately entitled to a refund of the difference between the rate of 15 or 27 percent and the domestic 12.5 percent rate.

## KPMG comment

Considering that these decisions regard non-EU entities that invest in Italy, we advise similar 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 refunded amount.

The Italian Revenue Agency rarely replies within 90 days<sup>6</sup> 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 a tax court. An appeal must be launched within 10 years + 90 days of the filing date, otherwise the amount may be lost.

Additionally, since 1 July 2011 Italian investment funds have not been taxed<sup>7</sup>, 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.

KPMG tax specialists are on hand to assist you with filing initial WHT claims and launching appeals for previously filed claims.

## Notes

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

(2) See KPMG Tax & Legal Alert of 13 July 2022.

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

(4) Article 63(1) TFEU.

(5) C-190/12 "Emerging Markets".

(6) The official waiting period.

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

Document prepared by [Sabrina Navarra](#) and [Alberto Renda](#)

## Contacts

### KPMG in Italy, Tax & Legal

#### Tax & Legal Professional Practice Team

E: [it-fm-tpp@kpmg.it](mailto:it-fm-tpp@kpmg.it)

[kpmg.com/it](https://kpmg.com/it)

[kpmg.com/it/socialmedia](https://kpmg.com/it/socialmedia)



Tax & Legal Alert / KPMG in Italy / 26 April 2023

© 2023 Studio Associato - Consulenza legale e tributaria, an Italian professional partnership and a member firm of the KPMG global organization of independent member firms affiliated with KPMG International Limited, a private English company limited by guarantee. All rights reserved.

The KPMG name and logo are trademarks used under license by the independent member firms of the KPMG global organization.

Studio Associato - Consulenza legale e tributaria is a leading Italian law firm and a member firm of KPMG International for tax and legal services.

The information contained herein is of a general nature and is not intended to address the circumstances of any particular individual or entity. Although we endeavour to provide accurate and timely information, there can be no guarantee that such information is accurate as of the date it is received or that it will continue to be accurate in the future. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation.