



Italy: second-level tax court rules in favor of a Luxembourg SICAV

Tax & Legal Alert
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On 21 December 2022 the second-level tax court of Abruzzo (the 'Court') rejected an appeal by the Italian Tax Authority ('ITA'), thus confirming that the Italian tax treatment of dividends paid to investors in Luxembourg is discriminatory and breaches EU law¹.

This decision confirmed the one² issued by the first-level tax court of Pescara, which acknowledged the refund.

The Court also ordered ITA to pay legal costs of EUR15,000.

Background

The first-level tax court decision upheld the refund claim for withholding tax levied on dividends between 2014 and 2016, submitted by a Luxembourg SICAV³, and established that the claimant was comparable to an Italian fund.

Granting an exemption to Italian UCITS (including SICAVs), while imposing WHT on outgoing dividends, based on residence, restricts the free movement of capital and dissuades non-residents from investing in Italy.

The ITA decided to appeal this decision.

The decision

The Court confirmed that Italy's dividend tax regime discriminates against non-resident entities⁴.

It stated that, according to the Supreme Court and the CJEU, a fundamental freedom may be violated either when the tax system of a Member State provides for discriminatory treatment based on tax residence, or when the access requirements for favorable regimes are extremely stringent for foreign entities.

The Court declared that the claimant was entitled to receive the full refund.

KPMG comment

This decision is extremely important as it reaffirms the Italian tax courts' intention to abolish discriminatory tax treatment suffered by foreign investment funds in Italy.

For this reason, foreign entities should consider filing WHT claims in Italy to safeguard their right to a refund. They should then initiate court proceedings if the ITA does not reply within 90 days of the filing date of the claim.

The ITA rarely replies, so the sole way to obtain a refund is by lodging a court appeal. The statutory time limit to start litigation is 10 years + 90 days from the filing date of the claim; otherwise, the amount may be lost.

If a claim is successful, 2% annual interest is normally added to the refunded amount.

We believe now is the right time to take the appeal route, also in light of some favorable decisions issued by the Supreme Court along the same lines.

Notes

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

(2) Decision no. 49/2022 of 7 February 2022.

(3) An investment fund in the form of a SICAV harmonized under Directive 2009/65/EC and subject to the supervision of the *Commission de Surveillance du Secteur Financier* (CSSF).

(4) See several decisions issued in July 2022 by the Italian Supreme Court related to a German investment fund.

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