



Italy: Supreme Court rules in favour of a Swiss social security institute

Tax & Legal Alert
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The Italian Supreme Court has ruled that a Swiss social security institute subject to tax in Switzerland - even though exempt from income taxes - is entitled to a refund of the withholding tax ('WHT') imposed on dividends distributed by Italian companies (Decision no. 25195, filed on 24 August 2022).

The Swiss social security institute, which was assisted by KPMG Italy, received dividends distributed by Italian companies and paid WHT in Italy at the standard rate of 27 percent. It claimed a refund of the portion of WHT that exceeded the tax rate of 15 percent, invoking article 10(2) of the Italy-Switzerland Double Taxation Treaty ('DTT').

The Supreme Court held that taxation under the DDT is applicable solely because of the other Contracting State's power to tax the dividends, the actual levying of the tax being irrelevant for this purpose. This implies that the liability to tax, which determines whether a taxpayer is a resident under article 4 DDT, does not require the actual payment of income tax in the Contracting State of residence.

The Supreme Court also found the Swiss social security institute to be the beneficial owner of the dividends, since legally and economically they were at its disposal. This means that it may rely on article 10(2) DTT, which provides for a 15 percent tax rate.

This decision assumes great importance for entities that are subject to tax, even though exempt, in their State of residence. If they receive dividends from Italian entities, they are entitled to rely on article 4 DTT and, provided the dividends are at their disposal, they can invoke the lower rate of tax provided for by article 10(2) DTT (and by other double tax treaties that include a similar provision).

Social security institutes and similar entities are recommended to challenge the 'silent' rejection of previously filed claims by lodging an appeal with the Italian Tax Court. Those that have not yet filed refund claims are advised to submit them within 48 months of paying WHT on dividend distributions.

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