

Fiscal Court of Munich refers German dividend withholding tax regime to CJEU in the case of a Canadian pension fund

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In brief

On 23 October 2017, the Fiscal Court of Munich referred the question to the CJEU whether the German regime of dividend withholding tax (WHT) imposed on a Canadian pension fund is compatible with the free movement of capital provided in Article 63 TFEU (C-641/17, College Pension Plan of British Columbia).

Background

The plaintiff is a Canadian pension fund in the legal form of a common law trust. The fund received dividends from German stock corporations in the years 2007-2010. The dividends were subject to WHT of 25% (plus solidarity surcharge of 1.375% which is disregarded for the sake of simplicity). Pursuant to the Canadian-German double taxation treaty, WHT in the amount of 10% of the dividend was refunded to the fund. The fund, thus, suffered a final WHT of 15%.

The fund applied for a refund of the remaining 15% but the claim was dismissed by the German tax authorities, as German law does not provide for such reimbursement. The fund brought the case before the Fiscal Court of Munich (court of first instance) arguing the dismissal of the refund claim was discriminatory because a German pension fund would be allowed to deduct technical reserves taking account of its future pension liabilities when determining the income basis.

More specifically, in case of a German pension fund, only the net income is subjected to corporate income tax of 15%. The proceeds of the fund are offset to the extent that they have to be attributed to the pension claims of future pensioners and increase, therefore, the technical provisions. The non-attributable part of the revenue is usually small and the net income of a German pension fund consequently much lower. The German WHT that a German pension fund suffers during a fiscal year is credited against its final corporate income tax. If the German WHT exceeds the corporate income tax, the exceeding amount will be reimbursed to it.

The reasoning of the Fiscal Court

The Fiscal Court of Munich considers the Canadian pension fund to be comparable to a pension fund under German law ("Pensionsfonds"). Moreover, the court is of the view that there is a direct link between the dividend income received by a pension fund and its technical reserves which reflect its obligation to pay out the largest part of the income to its insured pensioners (as required by the CJEU e.g. in C-342/10, Commission vs. Finland). In addition, the court does not see any reason why the discrimination under German law could be justified.

However, the referring court assumes that Germany's taxation of the plaintiff, which is a resident of a third country, could be compatible with the free movement of capital pursuant to Article 64 TFEU ("standstill clause"). In this context, the Fiscal Court of Munich raises the question whether (i) Article 64 TFEU allows discrimination in the given case as Germany only changed the taxation regime of its domestic funds after 31 December 1993 whilst foreign funds have always been treated in the same way and (ii) whether the restriction involves financial services in the sense of Article 64 TFEU as it is rather linked to the investments made by the Canadian pension fund than to the services it provides to its pensioners.

Takeaway

It is common practice that foreign pension funds have filed their claims for refunds of German dividend WHT for some time. Such claims are usually not processed by the German tax authorities as no guidance has been given by the Federal Ministry of Finance on how to handle them. The current case shows that it is worthwhile considering to bring such claims forward to courts if the applicant appears sufficiently comparable to a German pension fund. This is particularly true for EU resident pension funds in whose cases a restriction on the free movement of capital cannot be legitimised by Article 64 TFEU.

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Arne Schmitger	Partner	+ 49 30 2636 5466	arne.schmitger@pwc.com
Jürgen Lüdicke	Partner	+ 49 40 6378 8423	juergen.luedicke@pwc.com
Oliver Weber	Partner	+352 49 48 48 3175	oliver.weber@lu.pwc.com
Sidonie Braud	Partner	+352 49 48 48 5469	sidonie.braud@lu.pwc.com

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