

On 3 March 2017, the Dutch Supreme Court referred questions for a preliminary ruling to the Court of Justice of the European Union (CJEU) relating to the alleged discriminatory withholding tax levied on foreign investment funds. A positive outcome for the applicants, meaning the levied withholding tax on foreign investment funds is indeed discriminatory, would mean that the Netherlands would have to allow for refunds of dividend withholding tax for distributions by Dutch companies to non-resident funds that are sufficiently comparable to Dutch funds qualifying for the FBI-regime.

### Background

In several cases the Dutch Supreme Court has ruled that a foreign investment fund is not entitled to a refund of Dutch dividend withholding tax (WHT). For instance, in a judgment dated 10 July 2015, it ruled that a Luxembourg SICAV is not objectively comparable to a Dutch fiscal investment institution (FBI), which is effectively entitled to a refund of Dutch WHT.

On 1 August 2016, a Dutch District Court referred questions for a preliminary ruling to the Dutch Supreme Court in two of these cases relating to a UK and German investment fund. The foreign funds argue that they are comparable to a Dutch FBI, and that denying such refund would place them in a disadvantageous position than if they were a resident of the Netherlands and have been granted a FBI status. According to the funds, this discriminatory treatment constitutes an infringement of the free movement of capital as laid down in the Treaty on the Functioning of the EU. Given the apparent legal uncertainties, the Dutch Advocate-General suggested that the Dutch Supreme Court should refer questions for a preliminary ruling to the CJEU.

### Discriminatory treatment?

On 10 July 2015, the Dutch Supreme Court already decided in a similar case (involving a Luxembourg investment fund) that a non-resident investment fund is not comparable to a Dutch FBI because, unlike a Dutch FBI, a non-resident fund is not subject to Dutch WHT when dividends are distributed by the non-resident investment fund to its investors.

However, based on a recent, comparable Danish case in which preliminary questions were asked to the CJEU (Fidelity Funds, C-480/16), the Supreme Court found that there is currently no full clarity as to how the comparability requirement has to be applied. In other words, the Dutch Supreme Court was of the view that there are good grounds for questioning whether the abovementioned judgment of July 2015 is correct. Therefore, the Supreme Court decided to ask preliminary questions to the CJEU.

### The preliminary questions

The Dutch Supreme Court raised the following questions in its judgments:

1. Is it contrary to EU law (in particular an infringement of the free movement of capital) that the Netherlands does not grant a refund of Dutch WHT to foreign investment funds, which are not obliged to withhold WHT while such refund is provided to a Dutch investment fund which annually distributes dividends and withholds Dutch WHT on such distributions?

2. Is it contrary to EU law that the Netherlands does not grant a refund of Dutch WHT to foreign investment funds, which do not demonstrate that the shareholder and redistribution requirements are met, while such refund is granted to a Dutch investment fund which annually distributes dividends and withholds Dutch WHT on such distributions?
3. Is it contrary to EU law that the refund of Dutch WHT is refused to foreign investment funds and not to Dutch investment funds as a result of which foreign investment funds are placed at a disadvantageous position to attract Dutch investors or investors established in the Netherlands?

### Commentary by HVK Stevens

Given the apparent legal uncertainties, we consider it logical that the Dutch Supreme Court referred preliminary questions to the CJEU.

Until the questions at hand are answered, we recommend foreign investment funds to preserve their rights by either objecting or appealing possible negative decisions, either from the Dutch tax authorities or a Dutch court, regarding a refund request. Moreover, we recommend foreign investment funds to safeguard their rights for the years for which a refund request has not yet been submitted. HVK Stevens would be pleased to assist you in this matter.

Should you have any questions, feel free to contact:

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