

Italian Tax Court of First Instance rules that withholding tax levied on dividends distributed to a Luxembourg investment fund is incompatible with EU law

On 7 February 2022, the Pescara Tax Court of First Instance ruled that a Luxembourg SICAV is comparable to an Italian investment fund and, therefore, is entitled to the refund of the full withholding tax suffered on the dividends received from Italian companies.

The fact of the case

The case originates from a refund claim submitted by a Luxembourg investment fund in the form of Société d'investissement à capital variable (SICAV) to the Italian Tax Authorities requesting the full refund of the dividend withholding tax (equal to 20% until July 2014 and increased to 26% from 2015 onwards) suffered by the foreign investment fund with respect to the dividends received from Italian listed companies during the years 2014, 2015 and 2016. It should be noted that the investment fund did not have access to the reduced dividend withholding tax provided by the Double Tax Treaty between Italy and Luxembourg.

The request for refund was based on EU law, in particular on breaches of Articles 49, 54 and 63 of the TFEU by the Italian legislator to the extent it provided - during the years at issue - for the application of dividend withholding tax in the case of non-resident investment fund whilst Italian investment funds were totally exempt on the same type of Italian-sourced dividends thus discriminating against the former to the advantage of the latter.

In the absence of a reply from the Italian Tax Authorities, the investment fund filed an appeal before the Tax Court against the “silent” rejection of the refund claim.

The Pescara Tax Court of First Instance’s judgment

The Judges of the Pescara Tax Court of First Instance upheld the request for refund of the withholding tax suffered by the claimant. The Judges recognised that the claimant, being an investment fund in the form of a SICAV harmonised under Directive 2009/65/EC and subject to the supervision of the Commission du Surveillance du Secteur Financier (CSSF) was comparable to an Italian fund, both being subject to the supervision of the respective competent authorities.

In reference to relevant jurisprudence of the CJEU (i.a., *Santander*, C- 338/11), the Judges confirmed that the application of the dividend withholding tax towards the non-resident SICAV was solely due to the fact that the foreign investment fund was not resident in Italy and therefore it constituted an infringement of Articles 63 and 49 of the TFEU.

Finally, the Judges highlighted that the discriminatory treatment was also acknowledged by the Italian legislator itself which, starting from 2021, abolished the withholding tax toward EU qualified investment funds (but with effect only from 2021 onwards, see our previous newsalert [here](#)).

Takeaway

The judgment is of fundamental importance since it represents the first strong official confirmation by a Tax Court in Italy of the discriminatory tax treatment suffered by foreign investment funds in Italy on the dividends received. Notwithstanding the fact that the judgement refers to EU foreign investment funds and in particular to an EU investment fund in the form of a corporation, the reasons put forward by the Judges in upholding the position of the claimant appear to be applicable also to non-EU foreign investment funds as well as to foreign investment fund in a contractual form. Although it remains to be seen if the case will be appealed, this favourable judgment is of great interest for all the non-resident investment funds. At present, Italian Tax Authorities are not processing these type of refund claims. Therefore, foreign investment funds will need to consider what action is appropriate in respect of claims already filed as well as any new refund claims for the years not yet statute barred in order to safeguard their rights to any refunds.

Let's talk

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