

CJEU rules that German tax treatment of income earned by a non-resident property fund from German property is not compatible with EU Law (*L Fund*, C-537/20)

On 27 April 2023, the Court of Justice of the European Union (CJEU) decided in the case [C-537/20](#) (*L Fund*) that Germany infringes the free movement of capital by subjecting the income earned by a foreign specialised property fund on German property income to corporate taxation, whereas resident specialised property funds are exempted from corporate tax.

Facts of the case

The plaintiff is a Luxembourg specialised property fund without a registered office or a central administration in Germany. It has two institutional investors who have neither their head office nor their central administration in Germany. Under Luxembourg law, as a specialised investment fund, the plaintiff is generally not taxable. By virtue of that right, dividends distributed by the plaintiff are not subject to withholding tax in Luxembourg and are not taxable at the level of its investors.

In the years 2008 to 2010, the plaintiff generated income from the letting and sale of property in Germany. According to sec. 11 para. 1 sentence 2 German Investment Tax Act 2004, German property funds with exclusively foreign investors are exempted from corporate income tax. In contrast, foreign property funds with exclusively foreign investors (as in the case at hand) do not benefit from the corporate income tax exemption and their income generated in Germany is subject to non-resident taxation at the fund's level.

The Federal Fiscal Court requested the CJEU for a preliminary ruling asking whether the German tax treatment of income earned by non-resident property funds from property located in Germany is compatible with the free movement of capital.

CJEU judgment

The CJEU concluded that Article 63 TFEU must be interpreted as precluding German legislation to make non-resident specialised property funds liable to corporate income tax in respect of the income from property which they receive in Germany, whereas resident specialised property funds are exempted from corporate tax. In particular, the CJEU ruled that:

- i) the German legislation discourages, on one hand, non-resident specialised property funds from investing in companies established in Germany and, on the other hand, investors resident in Germany from acquiring shares in foreign specialised property funds;
- ii) the difference in treatment between resident and non-resident specialised property funds concerns objectively comparable situations;
- iii) this difference in treatment cannot be justified by overriding reasons in the public interest, namely the need to preserve the coherence of the tax system, and the balanced allocation of taxing rights.

Takeaway

This judgment is of great importance to foreign specialised property funds and other similar non-resident investment vehicles. Those foreign specialised funds should consider lodging an appeal against their German tax assessment notices after analysing the individual case.

Let's talk

For a deeper discussion, please contact:

Arne Schnitger
PwC Germany
+49 30 2636 5466
arne.schnitger@pwc.com

Björn Bodewaldt
PwC Germany
+49 40 6378 1023
bjoern.bodewaldt@pwc.com

Or contact any other member of PwC's [EU Direct Tax Group](#)

EU DIRECT TAX GROUP

The EU Direct Tax Group (EUDTG) is PwC's pan-European network of EU law experts. We specialise in all areas of direct tax, including the fundamental freedoms, EU directives and State aid rules. You will be only too well aware that EU direct tax law is moving quickly, and it's difficult to keep up. But it is crucial that taxpayers with an EU or EEA presence understand the impact as they explore their activities, opportunities and investment decisions. Find out more on: www.pwc.com/eudtg

Interested in receiving our free EU tax news? Send an e-mail to eudtg@nl.pwc.com with "subscription EU Tax News".

© 2023 PwC. All rights reserved. PwC refers to the PwC network and/or one or more of its member firms, each of which is a separate legal entity. Please see www.pwc.com/structure for further details. This content is for general information purposes only and should not be used as a substitute for consultation with professional advisors. PwC helps organisations and individuals create the value they're looking for. We're a network of firms in 157 countries with more than 195,000 people who are committed to delivering quality in assurance, tax and advisory services. Find out more and tell us what matters to you by visiting us at www.pwc.com