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# EU Direct Tax Newsalert

## CJEU judgment on German dividends taxation for non-resident pension funds

On 13 November 2019, the Court of Justice of the European Union (CJEU) issued its judgment in the case *College Pension Plan of British Columbia* (C-641/17).

### Background

College Plan British Columbia (CPP) is a pension fund providing retirement benefits to former civil servants resident in Canada. In Canada, CPP accrues for future retirement payment and is exempt from all income taxes. CPP received dividends from portfolio shareholdings in German resident stock corporations (shareholding less than 1%). 15% WHT under the German-Canadian double tax treaty was due.

According to German law, CPP's German tax burden was "final" due to the WHT withheld by the stock corporation, whereas in a comparable situation a German pension fund would be able to significantly reduce its tax base by deducting the provisions for future pension payments which it accrued during the tax year. WHT would be credited against the corporate income tax due at the end of the year. If the tax withheld at source during the year exceeded the final corporate income tax, the domestic pension fund would receive a refund of the exceeding amount.

CPP applied for a full WHT refund with the tax authority in Munich on grounds of EU law.

After CPP's refund application was rejected, CPP brought action before the fiscal court in Munich and claimed that the final WHT infringes the free movement of capital (Art. 63 TFEU).

### CJEU Judgment

The CJEU held that the final WHT for non-resident pension fund constitutes a restriction of the free movement of capital.

In this respect, the CJEU points out that a discrimination can only be assumed in case that the non-resident pension fund is *comparable* to qualifying German pensions funds which are subject to specific insurance law requirements.

The CJEU held that non-resident pension funds are considered to be comparable to qualifying German pension funds, if they either voluntarily or within the laws of their respective State of residence accrue liabilities for future pension payment obligations.

The CJEU left it to the national court to examine whether this requirement is met by CPP.

Furthermore, the CJEU held that the restriction is not justified by the balanced allocation of taxing powers, by the coherence of tax systems or by the effectiveness of tax supervision.

Finally, the CJEU held that the legislation in dispute is not covered by the so-called standstill clause (Art. 64 TFEU).

The court essentially held that portfolio investments made by pension funds can neither be qualified as direct investments nor as a provision of financial services within the meaning of Art. 64 TFEU.

### Takeaway

The German WHT treatment of non-resident pension funds infringes EU law.

Non-resident pension funds should continue to apply for a refund of WHT if they were subjected to a final WHT in Germany.

Non-resident pension funds should also examine the possibilities of legal action against a final WHT in Germany.

It seems essential to be able to provide evidence that the fund either voluntarily or by legal obligation accrued for future retirement payments in its State of residence in a similar way as German resident pension funds do under German law.

Following the CJEU judgment, it is now up to the Fiscal court of Munich to examine whether CPP meets the requirements of accruing provisions in a similar manner as German pension funds do.

