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For more detailed information, please do not hesitate to contact:

Martin Poulsen – PwC Denmark  
+ 45 2136 3759  
[martin.poulsen@pwc.com](mailto:martin.poulsen@pwc.com)

Henrik Laust Poulsen – PwC Denmark  
+ 45 5219 0341  
[henrik.poulsen@pwc.com](mailto:henrik.poulsen@pwc.com)

Or your usual PwC contact

# EU Direct Tax News Alert

## Danish High Court rejects Fidelity Funds WHT reclaim on Danish sourced dividends

On 2 April 2019, the Danish Eastern High Court denied the refund of withholding tax on Danish sourced dividends suffered by non-Danish investment funds.

The claimants are investment funds resident in the United Kingdom and Luxembourg and qualify as Undertakings for the Collective Investment of Transferable Securities (UCITS) (hereafter "the Funds" or "the claimant"). The Funds invested in Danish shares and received dividends for the period 2000-2009, which were subject to Danish withholding tax ("WHT").

The main question in the case was whether non-resident investment funds could be subject to WHT on dividends received from their Danish shares while resident investment funds compliant with the investment funds with minimum taxation status are tax exempt on Danish sourced dividends.

### The Danish High Court judgement

The Danish Eastern High Court had referred the question of compatibility of the WHT legislation to the Court of Justice of the EU (*Fidelity Funds (C-480/16)*).

The CJEU stated in its preliminary ruling from June 2018 that:

Article 63 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, under which the dividends distributed by a company resident in that Member State to a non-resident UCITS are subject to WHT, while dividends distributed to a UCITS resident in that same Member State are exempt from such tax, provided that that undertaking makes a minimum distribution to its members, or technically calculates a minimum distribution, and withholds on that actual or notional distribution the tax payable by its members.

However, the Danish Eastern High Court stated in its judgment that since the claimant did not opt for the investment funds with minimum taxation status, they could not be compared with a Danish investment fund with such tax status but

should be compared with Danish investment companies, which are subject to 15% WHT on Danish sourced dividends. In doing so, however, the Eastern High Court completely disregarded the fact that even if the non-resident funds had complied with the requirements to be treated as an investment fund with minimum taxation, the Funds would not have been able to benefit from the exemption due to the Danish residency requirement.

The Danish High Court judgement has been appealed by the claimant to the Danish Supreme Court and the final outcome of the case is therefore still pending.

### Takeaway

Based on the CJEU's judgment, we find that non-resident investment funds – both UCITS and AIFs comparable to Danish AIFs – should be entitled to reclaim taxes withheld on dividend payments from Danish portfolio shares. As the CJEU judgment concerns the free movement of capital, investment funds resident in third countries should also be able to file a claim.

In our opinion, the Eastern High Court unjustifiably disregarded the fact that the Funds under Danish tax rules would not have been able to benefit from the tax exemption even if it had complied with the investment funds with minimum taxation status.

Based on the above, we recommend that foreign investment funds should continue to file protective claims in order to avoid potential claims from being statute barred. Claims should be filed for the years back to 2009. The general limitation period is, according to Danish tax law, three years but there are arguments to extend it to five or even 10 years.

Please do not hesitate to contact us, if you have any questions to the judgement, the potential for filing protective claims or questions regards the expected future legislation.

