

## CJEU rules that German requirements for withholding tax refund claimed by non-resident corporate taxpayers with a portfolio shareholding are incompatible with EU Law

On 16 June 2022, the Court of Justice of the European Union (CJEU) rendered its judgment in the case C-572/20 (ACC Silicones) finding that German requirements for withholding tax refund claimed by non-resident corporate taxpayers with a portfolio shareholding are in breach of EU law.

### Facts of the case

The case originated from an action brought by a UK company before the Fiscal Court of Cologne. The company owned 5.26% of the shares in a German company, received dividends in the years 2006-2008 from the latter company and now claims a withholding tax reduction from 15% (tax treaty level) to 0%.

The Fiscal Court of Cologne requested the CJEU for a preliminary ruling asking whether Germany's requirements for withholding tax refund claims filed by non-resident corporate taxpayers with seat or place of management in the EU or EEA whose shareholding in the distributing German company is too small to benefit from the Parent-Subsidiary Directive (i.e. below 20% until 2006 and below 15% in 2007 and 2008) while domestic companies were exempt from such requirements led to a breach of Article 63 TFEU on the free movement of capital.

The first questionable condition requires that the German withholding tax was neither credited against taxes levied by the residence state of the shareholder or the residence state(s) of the latter company's direct or indirect shareholder(s), nor deducted as expense by any of said companies. Secondly, non-resident taxpayers must provide a certificate issued by the authorities of their residence state which proves that no credit or deduction was granted at the level of any direct or indirect shareholder.

### CJEU judgment

The CJEU concluded that Article 63 TFEU precludes the German requirements for a refund of withholding tax.

In particular, the CJEU ruled that:

- The request for a preliminary ruling is not admissible in so far as it concerns cases where dividends are distributed to a corporate taxpayer residing outside the EU or EEA.
- The requirements for withholding tax refund claims differ depending on whether the recipient of the dividends is a resident or a non-resident corporate taxpayer (since resident shareholders do not have to prove non-credibility and non-deductibility at any direct or indirect shareholder level).
- The difference in treatment between resident and non-resident corporate taxpayers concerns objectively comparable situations as far as the risk of a double relief for WHT at shareholder level and any level above the direct shareholder is concerned. Therefore, in both cases the aim of preventing that withholding tax is credited twice must be pursued in a coherent and systematic manner and there is no reason to link the withholding tax refund in cross-border cases to stricter conditions than in domestic cases.
- The breach of Article 63 TFEU can not be ruled out based on the DTA German-UK, because a full credit of German withholding tax is only possible in cases where the amount of UK tax charged on dividends is at least equal to the amount of German withholding tax.
- The breach of Article 63 TFEU may not be justified by overriding reasons in the public interest, in particular the need to ensure a balanced allocation of taxing rights between the Member States.

### Takeaway

This judgment is of great importance to non-resident corporate taxpayers with a portfolio shareholding in German companies if their withholding tax is higher than the corporate income tax of a comparable German shareholder. Those entities can claim a withholding tax refund in Germany unless the tax treaty ensures that it is fully credited in their state of residence.

## Let's talk

For a deeper discussion, please contact:

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