

German Federal Fiscal Court Rules in Favour of French and Luxembourgish Investment Funds – Withholding Tax Refund plus Interest Payment Granted

Two important judgments (case numbers I R 1/20 and I R 2/20) on cases with a very similar factual background were published on 22 August 2024: Germany's Federal Fiscal Court (the Supreme Court for tax cases) decided that the exclusion of foreign investment funds, which are comparable to German investment funds, from the tax exemption under the German Investment Tax Act 2004 violates the free movement of capital. Foreign investment funds can, therefore, claim a refund of dividend withholding tax if they are comparable to a domestic investment fund.

Background and facts

A French *Fonds Commun de Placement* (FCP, case I R 1/20) and a Luxembourgish *Société d'Investissement à Capital Variable* (SICAV, case I R 2/20) in the legal form of a *Société Anonyme* received dividends from German companies in the years 2008-2013 and 2009-2013, respectively. Withholding tax of 26.375% of each dividend was withheld and paid to the German tax office.

Pursuant to Germany's Double Taxation Treaties with France and Luxembourg the withholding tax was reduced to 15% (i.e. both investment funds received a refund of tax in the amount of 11.375% of the dividend).

The investment funds applied for the refund of the remaining withholding tax (15%) plus interest. Both claimants made the case that not refunding the 15% would lead to an infringement of the free movement of capital (Article 63 TFEU) since they were comparable to a German investment fund which would have been tax exempt under the Investment Tax Act 2004.

Judgments of the Federal Fiscal Court

The Court held that a refund claim must be filed within the statutory four-year period applicable to withholding taxes. The four-year period starts at the end of the year in which the respective dividend was received, or the withholding tax was paid. The Federal Fiscal Court did not decide whether a longer period of seven years may be applicable in cases where withholding tax refunds can be obtained via a tax assessment (i.e., via filing a corporate income tax return) as this was not decisive in these specific cases.

Due to the four-year limitation period the French FCP's claims were unfounded in as far as they related to dividends received in 2008 and 2009 since the FCP's claims were only filed in 2014.

As regards to the other claims of the French FCP (years 2010-2013) and all claims of the Luxembourg SICAV the court ruled in favour of the plaintiffs. Levying withholding tax of 15% results in a discrimination of foreign investment funds which cannot be justified. Whether the investors of the funds are taxed in either the fund's state of residence or the investors' state(s) of residence is not relevant as it does not affect the tax exemption of German funds.

Moreover, the Federal Fiscal Court confirmed that the amount to be refunded is subject to interest. The interest period is generally assumed to start six months after the respective claim has been filed. From 2012 onwards the interest period may even begin at the date of the dividend receipt due to a change in law which allowed German investment funds under certain conditions to receive dividends without the need for the payor to withhold any tax.

The applicable interest rate is 6% per annum. The Court left it undecided whether the interest rate must be reduced to 1.8% per annum as of 1 January 2019 because the lawsuits were already filed in 2017.

The Federal Fiscal Court referred the case back to the local fiscal court to determine whether the investment funds can also substantiate their claims formally (e.g., via dividend vouchers) and to determine the specific amount of interest that has been accumulated so far.

Takeaway

The decisions confirm the view that foreign withholding taxes levied on behalf of investment funds need to be refunded for years until 31 December 2017 based on EU law. Furthermore, the decisions indicate that it is important to provide for a good formal documentation to substantiate the claims and provide proof of the comparability of the different foreign investment funds with German investment funds.

The German tax authorities had already started processing claims filed for a refund of withholding taxes in the past. It can be expected that this current practice will continue after the last two decisions of the Federal Fiscal Court and that requests for more information will be sent to by the German tax authorities to the claimants soon. It is currently expected that claims will have to be substantiated by providing a comparability analysis and a formal proof that withholding tax were levied via dividend vouchers.

Given that claims for the relevant years may have been filed several years ago, claimants of such withholding refunds should consider starting to prepare the required documentation as soon as possible as deadlines set by the tax authorities can be tight.

The Court decisions do not affect any withholding tax claims relating to dividends received after 31 December 2017.

Let's talk

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