

The Deka case: withholding tax on dividends paid to foreign investment funds



On 30 January 2020, the European Court of Justice ("ECJ") issued its judgement in the case of the German investment fund Köln Aktienfonds Deka ("KA Deka"). KA Deka had filed a refund request for Dutch dividend withholding tax withheld on dividend that it had received from its Dutch (portfolio) investments, arguing that a Dutch fund qualifying as a so-called "fiscal investment fund" (*fiscale beleggingsinstelling*, "FBI") was allowed to receive such refund under Dutch law (as applicable until 2007).

The ECJ had to address two preliminary questions from the Dutch Supreme Court on the compatibility of the Dutch dividend withholding tax regime with EU law in the treatment of a non-resident UCIT in comparison to a Dutch resident UCIT qualifying as a FBI.

In order to qualify as an FBI, an UCIT has to meet the following two conditions:

- » The shareholders or participants must meet certain requirements, generally related to the percentage of investment (the "shareholder requirements").
- » The UCIT must distribute all proceeds eligible for distribution within 8 months after the relevant financial year to its shareholders/participants (the "redistribution requirement").

With respect to the shareholder requirements, KA Deka argued that it does not have access to its shareholders information. With respect to the

redistribution requirement it argued that, to the extent that annual earnings are not distributed, they are deemed to be distributed and taxed at the level of its shareholders / participants under specific German law.

The ECJ decided that the shareholder requirements comply with the free movement of capital, under two conditions: (i) the requirements should not "de facto" constitute a less favorable treatment for non-resident UCITS and (ii) the tax authorities should require proof from both resident and non-resident UCITS that they comply with the shareholder requirements. It will be for the Dutch national court to investigate whether these conditions are met.

On the redistribution requirement the ECJ ruled that it is in conflict with the free movement of capital, if two conditions are met. First, in the home state of the UCITS, the proceeds should be deemed distributed or are included in the shareholders' or participants' tax base in that state, as if they were distributed. Second, in view of the objective pursued by the requirement, the non-resident UCITS is in a situation comparable to that of an FBI, which again will have to be investigated by the Dutch national court. The CJEU confirms that, if the objective of the redistribution requirement is taxing the proceeds at the level of the participant, a non-resident UCITS is comparable to an FBI.

This ECJ judgement is of relevance for funds and other interested parties in a similar position. It could also have an impact on several cases pending before the Dutch courts in which non-resident UCITS claim a refund of Dutch dividend withholding tax based on the free movement of capital under the EU law. It is noted that the KA Deka case does not cover situations where the shareholders or participants are residents in a state that is neither the home state of the UCITS, nor the investment state.

In follow-up to this ruling, the case will go back to the Dutch Supreme Court after which it will be

up to the Dutch Lower Court to determine how to precisely apply the framework laid down by the ECJ and the Dutch Supreme Court in the case of KA Deka.

We recommend investment funds which have incurred dividend withholding tax on their

investments in EU member states where such dividend withholding tax would not have been due with respect to a domestic investment fund, to further assess the impact of this ECJ decision on their position and the possibility to claim back dividend withholding tax. We would be happy to assist.

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