

New referral to the CJEU – Net taxation – Taxation of dividend income received by a non-resident insurance company

On December 14, 2022 the Court of Appeals in 's-Hertogenbosch (CoA) rendered an important judgment in which it asked the Court of Justice of the EU (CJEU) for a preliminary ruling in a case concerning a UK-based life insurance company that received dividend income from the Netherlands. The UK company was represented by KPMG Meijburg & Co.

The dividend income was subject to 15% Dutch dividend withholding tax. However, had the UK insurance company been a resident of the Netherlands, the Dutch tax burden on the dividend income would have been nil. This is because the Dutch dividends were received as part of unit-linked products that had been offered to UK pension schemes.

The Dutch CoA is seeking clarification on the interpretation of, in particular, the CJEU's judgment in the *Société Générale* case (C-17/14, September 17, 2015, ECLI:EU:C:2015:608) and whether this applies in general to all cases where a non-resident receives dividend income from another Member State.

The CJEU's judgment in the *Société Générale* case dealt with net taxation. The principle of net taxation is based on EU case law and requires a non-resident to be subject to the same level of taxation as a resident taxpayer. The tax burden for residents and non-residents should therefore be the same. In addition, a non-resident is entitled to deduct directly related expenses from its gross revenues when calculating the tax base.

In the *Société Générale* case, a French bank received dividend income from the Netherlands that was subject to 15% Dutch dividend withholding tax. In its judgment, the CJEU ruled that *Société Générale* was only entitled to a deduction of the costs relating to the collection of the dividends and not to the directly related expenses. Since the costs related to the collection of the dividends were relatively small, this judgment did not result in a tax refund.

The Dutch tax authorities have since used the CJEU's judgment in the *Société Générale* case as a guiding precedent for all cases concerning non-residents that receive dividend income from the Netherlands. A similar approach has also been taken by tax authorities in many other Member States.

The UK insurance company argued before the Dutch CoA that although the CJEU's judgment in the *Société Générale* case is not necessarily wrong, the facts in *Société Générale* are fundamentally different in the sense that the dividend income was critical to its business model and the services it offered its clients. In light of this difference, the September 17, 2015 judgment should not be the leading case for resolving the dispute, and other CJEU net taxation judgments providing for a deduction of the directly related expenses must be used as guidance here. Therefore, with regard to a UK-based life insurance company, should the costs incurred as a result of an increase in the company's future payment obligations result in a deduction when calculating taxable income?

The referral to the CJEU by the Dutch CoA should provide clarity on this question.

Please do not hesitate to contact us if you have any questions about the above. Meijburg's advisors would be pleased to use their expertise to help you.

KPMG Meijburg & Co
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