



EU Tax Centre

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CJEU decision on Emerging Markets Series of DFA Investment Trust Company case

Poland – free movement of capital – third country shareholdings

On April 10, 2014, the Court of Justice of the European Union (CJEU) rendered its decision in the Emerging Markets Series of DFA Investment Trust Company case ([C-190/12](#)). The Court concluded that free movement of capital precludes legislation such as applied in Poland under which a tax exemption is not extended to outbound dividends paid to an investment fund established in a non-EU Member State, provided there is an obligation of mutual administrative assistance between the two countries which enables the national tax authorities to verify information provided by the investment fund.

Background

Polish source dividends paid to resident investment funds operating in accordance with the Polish law on investment funds were exempt from Polish corporation tax. A similar exemption applied to EU/EEA investment funds that satisfied certain conditions regarding their formation and business. Conversely, dividends paid to a third country investment fund, such as the US claimant fund in the case, were subject to a 19 percent final withholding tax (subject to a potential double tax treaty reduction).

The Polish Administrative Court sought a ruling from the Court of Justice of the EU on, inter alia, whether the different tax treatment provided under the Polish law for dividends paid to resident and non-resident investment funds is in breach of EU law.

The AG's opinion

The Advocate General (AG) (see [Euro Tax Flash 219](#)) concluded that the different tax treatment constituted a restriction on the free movement of capital but that this could be justified based on the need to ensure the effectiveness of fiscal supervision. A key premise in reaching this conclusion was that because of the absence of a framework for exchange of information regarding regulatory matters, equivalent to the EU UCITS Directive (85/611/EEC) the Polish authorities could not verify that a third country investment fund carried out its activities under equivalent conditions as those provided under the Polish law applicable to investment funds.

The CJEU's Decision

The CJEU agreed with the AG that the Polish rules constituted a restriction of the free movement of capital, but took a different position as regards whether the restriction was justified. The Court made a distinction between situations where a regulatory framework of mutual assistance exists between the EU Member State and the third country in question and where there is no such framework. In the former situation, the taxpayer should be given the opportunity to provide the evidence that they operate within a regulatory framework equivalent to that in the EU. The Court noted that a framework of cooperation did exist between Poland and the US, in the form of the information exchange provisions in the bilateral tax convention as well as the OECD Multilateral Convention on Mutual Administrative Assistance. The Court held that it could not be ruled out a priori that the US investment fund could not provide such evidence. However it was for the referring court to decide whether those provisions were in fact capable of enabling the Polish tax authorities to verify that evidence.

The CJEU further rejected justification arguments based on coherence of the Polish tax system and the balanced allocation of taxing rights. The Polish government's request for a temporal limitation of the effect of the ruling was rejected.

EU Tax Centre Comment

This is clearly a very positive decision for third country investors claiming back EU withholding taxes under EU law principles. Although a key question has been left for the referring Polish court to determine, we believe there are strong grounds for arguing that the information exchange provisions in place between Poland and the US are sufficient to meet the criteria laid down by the CJEU.

Should you require further assistance in this matter, please contact the EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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