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Spanish High Court grants dividend withholding tax refunds to European non-UCITS funds

Legal flash

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In its judgment dated July 30, 2021, the High Court prevents the unequal treatment of dividends paid to Spanish and European non-UCITS investment funds.

- Resident investment funds are taxed at a fixed rate of 1%. Therefore, withholding taxes levied at higher rates for non-resident funds (up to 21%) are against the free movement of capital.
- This is the first Spanish case in which European investment funds that are not covered by Directive 2009/65/EC ("UCITS Directive") are granted a withholding tax refund to be treated like Spanish resident investment funds.
- The procedure has been led by Cuatrecasas' tax and tax litigation teams.

Spanish case law has already confirmed that higher taxation imposed on non-resident investment funds as compared to resident funds restricts the free movement of capital granted by the Treaty on the Functioning of the European Union. For example, dividend withholding tax refunds have been granted to European investment funds covered by the UCITS Directive and to US investment funds (see our Legal Flash *here*).

In its judgment dated July 30, 2021, the High Court confirms for the first time that this reasoning also applies to investment funds resident in other Member States that are not covered by the UCITS Directive. Therefore, the 1% tax rate applicable to resident funds should also apply to non-resident funds, which are entitled to claim a refund for taxes withheld in Spain at higher rates.

Specifically, the High Court refuted all arguments presented by the Spanish authorities. The most important is the discussion as to the comparability test and the law to be applied in this regard. The Court stated that the evidence submitted by the funds – issued inter alia by the regulatory authorities of their jurisdiction (Germany in this case) – was adequate, given that a) the High Court considers that fulfilling the requirements to be complied with by a fund under German law was sufficient, and b) the Spanish tax authorities did not specify which documents should be provided instead and did not use the tools available to them for information exchange and collaboration with the German authorities.

Although the High Court judgment can still be appealed before the Spanish Supreme Court, it is a landmark case confirming that non-resident investment funds are entitled to obtain refunds for Spanish dividend withholding taxes in a wide range of situations.

For additional information, please contact Cuatrecasas.