

ATOZ ALERT

Article 63 TFEU Reclaims in Germany - Behemoth vs Leviathan on WHT Refunds

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On 22 August 2024, the German Federal Fiscal Court (*Bundesfinanzhof*) (“BFH”) published their decisions dated 13 March 2024, related to reclaims of withholding tax (“WHT”) filed on behalf of two European resident funds. The BFH ruled in favour of taxpayers. The cases are related to dividends distributed prior to the amendment of the German Investment Tax Act (*Investmentsteuergesetz*) of 2018. This is yet another step towards clarifying the position of foreign investment funds and the application of German WHT.

BACKGROUND

The cases at hand ([IR 1/20](#) and [IR 2/20](#)) deal with the question of whether Section 11 of the German Investment Tax Act in the 2004 version of the law (applicable during the dispute years 2008 to 2013) constitutes an infringement of Article 63 of the Treaty of the Functioning of the European Union (“TFEU”). Section 11 provided for a WHT exemption for German investment companies, while such exemption was not available for non-resident comparable vehicles. The claimants, a French and Luxembourgish funds (an FCP and a SICAV respectively), were not eligible for the exemption and were subject to a 26.375% WHT rate, later reduced to 15% through the application of the corresponding double tax treaties (“DTT”) with Germany.

In the refund requests filed in 2013 and 2014, the claimants requested the refund of the remaining 15% WHT suffered in the application of the corresponding DTT, plus interest, arguing that:

- equal treatment to German domestic investment funds should be applied to comparable foreign funds, in accordance with the principle of free movement of capital as provided by Article 63 of the TFEU;
- the WHT suffered was not neutralised by an offset mechanism in their residence country and there was, therefore, no justification for the absence of the refund.

The refund requests were rejected by the German Federal tax office in 2016 based on the need to preserve the coherence of the tax system. Subsequently, the appeals filed were rejected by the Hessian Tax Court.

The decisions of the BFH published on 22 August follows years of dispute on the matter and the decisions rendered by the Court of Justice of the European Union (“CJEU”) in June 2022 on *ACC Silicones LTD* case C-

572/20 (more information is available in our [ATOZ Alert](#)) and in April 2023 on the *L Fund* case – C-537/20 (more information is available in our [ATOZ Insights-August 2023](#)).

ANALYSIS OF THE DECISIONS

As a starting point, the BFH clarified that the responsibility for the reimbursement of WHT levied from non-resident taxpayers (as in the case at hand) rests with the German Federal Central Tax Office. This change in responsibility was introduced by the amendment of the Withholding Tax Relief Modernisation Act of June 2021. This is an important point, as prior to that date, no clear guidance existed as to which is the German tax office responsible for the WHT refund requests filed by non-resident taxpayers. Foreign investment vehicles were filing multiple refund requests to various tax offices depending on the securities in their portfolios, without visibility on who was actually responsible for dealing with the reclaims.

Regarding the subject matter of the cases, the BFH overruled the decisions of the Hessian Tax Court and concluded that European resident funds are entitled to a refund of the WHT suffered and interest (of approximately 0.5% per month). The need to ensure the coherence of the tax system cannot be accepted as a justification in the cases at hand. This argument can only be accepted if systematic taxation of the German resident investors in domestic funds could be proven. In the dispute years such regulation did not exist, in fact in quite a lot of situations there was no taxation at investors' level at all.

Based on the provisions of Section 11 Paragraphs 1 and 2 of the Investment Tax Act 2004, solely domestic investment vehicles are able to benefit from the tax exemption during the years at dispute. With this regard, the BFH makes reference to its own decision from 11 October 2023 (IR 23/23) and the CJEU case C-537/20, where it was concluded that the claimant (a Luxembourg Specialised Investment Fund) is entitled to a refund of WHT. The BFH also reminds that the tax exemption of an independent tax subject (as the claimants) cannot be conditioned upon the situation of another tax subject (the investors) and the unequal tax treatment is likely to dissuade German residents from investing in foreign investment vehicles, as well as foreign investment funds from investing in German corporations.

Since the claimants' situations are comparable to a German domestic investment vehicle, the refunds should be granted.

Another important point that the BFH confirms is the statute of limitation for filing refund requests. According to the BFH, applications should be filed within four years as of the end of the calendar year in which the tax liability arose (the moment of the dividend distributions).

The BFH position on late interest is similar to the CJEU's – in case of wrongfully collected taxes, an interest is due from the moment of the tax collection until the tax is refunded, as the amount of tax was not available to the taxpayer. A reasonable period for accessing the refund reclaims by the responsible tax offices should be deducted from the period for which interest is calculated.

NEXT STEPS

The BFH has now returned the cases to the Hessian Lower Court to review the supporting documentation evidencing the levy of WHT and the funds' beneficial ownership of the income. The BFH also burdened the Hessian Lower Court with the computation of the interest.

As similar decisions were already issued by the CJEU ([ACC Silicones Ltd case in June 2022](#) and *L Fund* case in April 2023), it seems unlikely that another German case will be filed with the CJEU.

IMPACT OF THE DECISIONS AND THE WAY FORWARD

The cases decided by the BFH are important for pending WHT reclaims in Germany for years prior to 2018 and, in principle, should trigger the Federal Tax Office to start reviewing the outstanding reclaims filed on behalf of EU investment vehicles.

We are aware that the Federal Tax Office already started sending requests for additional information in the context of pending EU investment vehicle cases. Among others, they are requesting fund documentation (prospectuses, UCITs certificates, etc.) as well as bank documentation (custodian and sub-custodian vouchers, bank accounts where refunds can be processed, etc.).

The new investment tax law introduced and entered into force in January 2018 has abolished the old Section 11 of the German Investment Tax Act. As a result, since the beginning of 2018, the dividend distributions to both domestic and foreign investment funds have been subject to a 15% WHT. Consequently, a WHT refund can not be claimed anymore on the basis of this new German case law.

Do you have further questions?



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