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By PwC Deutschland | 23. Juni 2026

ECJ: Is non-resident company required to calculate losses according to tax rules of source State to obtain relief from withholding tax?

In a request for a preliminary ruling from Sweden regarding the refund of withholding tax, the ECJ is asked whether a recalculation of the loss in accordance with the rules of the source State is required for a loss-making non-resident company receiving dividends to benefit from the same treatment as a loss-making resident company. In his Opinion, the Advocate General considers such requirements to be an unjustified and disproportionate burden on foreign corporate entities and a violation of Article 63 TFEU.

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Background

The case referred: In 2012 withholding tax was levied on dividends received by Société Générale SA (SG), a French company which is resident for tax purposes in France and forms part of a tax group, from Swedish companies. The Swedish tax authorities rejected SG's application for reimbursement of the tax withheld even though SG was in a loss situation and a loss-making Swedish company would not have been taxed on those dividends.

The core question is on how the losses incurred by a non-resident company receiving dividends and wishing to be treated in the same way as a loss-making resident company in the Member State in which the dividends are paid should be calculated. Should that calculation be made in accordance with the rules of the source State or with those of the Member State of residence of the non-resident company?

In the course of its review in the current dispute, the ECJ must take into account its landmark decision of 22 November 2018 (case: **C?575/17** *Sofina and Others*) which was later confirmed in the judgment of 19 December 2024 in the case **C?601/23** *Credit Suisse Securities (Europe)*.

In the **judgment Sofina**, the ECJ decided on facts and legislation very similar to those in the present case, that is to say the tax authorities' refusal to reimburse the withholding tax levied on dividends received by a loss-making non-resident company, whereas a resident company is taxed for the current year only if it is profit-making. The Court concluded that the restriction on the free movement of capital resulting from the national legislation in question went beyond what is necessary to achieve the objective of ensuring the collection of tax. Consequently, a simple deferral of taxation on dividends also granted to loss-making non-resident companies would be sufficient to achieve the objectives pursued whilst eliminating the restrictions on the free movement of capital. In the **judgment Credit Suisse Securities**, the Court reproduced that reasoning, applying it to a scenario in which reimbursement of the withholding tax on the dividends paid to a non-resident company was refused, whereas a loss-making resident company is entitled to reimbursement of such tax withheld at source.

Opinion

The Advocate General proposes to the Court that Article 63 TFEU precludes

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legislation of a Member State (here: Sweden) under which a non-resident company receiving dividends subject to withholding tax must, in order to benefit from the same treatment as that provided for resident companies receiving dividends and in a loss-making situation, calculate its loss in accordance with the tax rules of the source State.

The restriction on the free movement of capital is not disputed by any of the parties in the present case. It arises not only from the fact that, at the time, no option to defer taxation was available to loss-making non-resident companies, but also from the legislation adopted to take account of the rule in *Sofina* and applicable from 1 January 2020. To benefit from a deferral of the taxation of dividends withheld at source, a loss-making non-resident company must prove that it is in a loss-making situation in accordance with the Swedish rules. This difference in treatment is liable to discourage non-resident companies from investing in companies established in Sweden.

Such an unequal treatment is permissible only if it relates to situations which are not objectively comparable or if it is justified by an overriding reason in the public interest. In the present case, the difficulty concerning comparability stems from the fact that loss-making non-resident companies **must establish that loss in accordance with the rules of Swedish tax law**, which entails an **additional administrative burden for non-resident companies** and amounts **to treating them in the same way as resident companies**. Such treatment goes beyond the objective comparability required by ECJ case law.

Source:

ECJ case reference C?241/25 *Société Générale SA* - **Opinion of 18 June 2026**.

Schlagwörter

loss abroad, withholding tax refund