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Treaty improved tax credit not a TFEU infringement?

An ECJ advocate general has suggested that a tax treaty can justify a hindrance on the free movement of capital from granting a tax credit privilege to recipients of a dividend from a third country but not to those with dividends from a member state.

A Belgian couple received dividends from an investment in Poland. Belgian law allows a credit of foreign withholding tax on dividends received by natural persons only if the investment is held for business reasons (trade investments). Since the couple held the investment solely in the hope of earning dividends, it ranked as “private” and the dividend was subject to income tax without any relief for the Polish income tax withheld at source. The couple protested at this apparent discrimination against a member state, given that the full foreign withholding tax would have been credited against the income tax due, had the dividend been paid by a Japanese company. This is because the Belgian/Japanese double tax treaty credits the withholding tax without regard to the purpose of the investment, whereas the double tax treaty with Poland merely credits the withholding tax as prescribed by Belgian law.

The ECJ advocate general on the case has suggested the court rule that there is a hindrance on the freedom of capital movement from the discrimination against a member state from the preferential treatment of dividends received from a state outside the EU. However, this discrimination can be justified by the existence of a double tax treaty as long as the treaty requires credit of the withholding tax at issue as opposed to merely permitting it. In consequence, the tax treaty takes precedence over the free movement of capital unless it was entered into for the sole purpose of curtailing a fundamental freedom of the EU.

The ECJ case reference is C-176/15 *Riskin* opinion of April 12, 2016.

Keywords

discrimination, free movement of capital, withholding tax