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By PwC Deutschland | 31 January 2018

German taxation of dividends paid to Canadian pension fund in conflict with EU law?

The Lower Tax Court of Munich referred preliminary questions to the European Court of Justice regarding the compatibility of the German regime of dividend withholding tax imposed on a Canadian pension fund with the free movement of capital as provided in Article 63 of the Treaty on the Functioning of the European Union.

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The plaintiff is a Canadian pension fund in the legal form of a common law trust. The fund received dividends from German stock corporations in the years from 2007 through 2010. The dividends were subject to withholding tax (WHT) of 25%. Pursuant to the Canadian-German double tax treaty, WHT in the amount of 10% of the dividend was repaid to the fund. It thus suffered a final WHT of 15%. The fund applied for a refund of the remaining 15% but the claim was dismissed by the German tax authorities, as German law does not provide for such reimbursement. The Lower Tax Court of Munich considers the Canadian pension fund to be comparable to a pension fund under German law (*Pensionsfonds*). Moreover, the court is of the view that there is a direct link between the dividend income received by a pension fund and its technical reserves which reflect its obligation to pay out the largest part of the income to its insured pensioners. The court does not see any reason why this discrimination could be justified. However, it assumes that Germany's taxation of the plaintiff, which is a resident of a third country, could be compatible with the free movement of capital pursuant to the standstill clause in Article 64 of the Treaty on the Functioning of the European Union (TFEU).

According to Article 64 TFEU the free movement of capital may be restricted if the restrictive national rule already existed on 31 December 1993 and the restriction is related to the provision of financial services.

In this context the Lower Tax Court raises the question whether:

- Article 64 TFEU allows the discrimination in the given case as Germany only changed the taxation regime of its domestic funds after 31 December 1993 whilst foreign funds have always been treated in the same way;
- the restriction involves financial services in the sense of Article 64 TFEU as it is linked to the investments made by the Canadian pension fund rather than to the services it provides to its pensioners.

Lower Tax Court of Munich, decision of October 23, 2017 (7 K 1435/15); the ECJ case reference is C-641/17, *College Pension Plan of British Columbia*

Keywords

dividend withholding tax, pension fund, standstill clause