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By PwC Deutschland | 07 August 2025

Referral to ECJ regarding a possible violation of the free movement of capital by way of dividend withholding tax for third-country companies

In its decision of 3 June 2025 – VIII R 21/22, the Supreme Tax Court referred various questions to the Court of Justice of the European Union (ECJ) for a preliminary ruling in connection with the dividend withholding tax paid to third-country companies.

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The appellant, a Japanese corporation, received dividends in the years 2009 to 2011 from a German corporation of which it was the sole shareholder. In accordance with the provisions of the double taxation agreement (Art. 10(2) DTA Japan 1966 = DTA), 15% capital gains tax was withheld from the dividends. This tax deduction settled the tax liability definitively. Due to a change in Japanese law, the appellant was granted a tax exemption of 95% of the dividend amount from 1 April 2009. The full credit of the German capital gains tax against Japanese corporation tax, which had been possible until then under Art. 23(2) DTA, was thus largely rendered ineffective. Since the corporation tax assessment of German parent companies that receive dividends from German subsidiaries results in the crediting and, where applicable, refunding of dividend withholding tax, the appellant took the view that the final dividend withholding tax deduction violated its freedom of capital movement under Article 63 of the Treaty on the Functioning of the European Union (TFEU). The dividend withholding tax withheld should be refunded to it. The lower tax court took a different view. It dismissed the action which sought the issuance of exemption certificates.

The VIII Senate considered that there were several legal issues which should be clarified under EU law:

Firstly, the central question is whether **the freedom of establishment supersedes the free movement of capital** as a test criterion. If the appellant can rely on the free movement of capital, it is doubtful whether the dividend withholding tax constitutes a violation of the free movement of capital by the Federal Republic of Germany, since the crediting of German capital gains tax against Japanese corporation tax, as provided for unchanged in the DTA, is ineffective only because of changes in Japanese domestic law.

In addition, the VIII Senate asked the ECJ to rule on whether such a restriction can be justified and whether, in the event of a restriction contrary to EU law, the refund of the dividend withholding tax may be made dependent on the Federal Central Tax Office being able to verify the appellant's information on the basis of an exchange of information with the Japanese tax authorities.

Source:

Supreme Tax Court Decision (VIII R 21/22) of 3 June 2025, published on 7 August 2025.

Keywords

European Court of Justice (ECJ), free movement of capital, freedom of establishment