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By PwC Deutschland | 08 November 2026

ECJ Opinion: Final withholding tax on dividends paid to Japanese parent company

The Supreme Tax Court has referred several questions to the European Court of Justice (ECJ) for a preliminary ruling pertaining to the withholding tax on dividends paid to companies in third countries (in this case, a Japanese corporation). Advocate General Laulhé Shaelou has now presented her Opinion.

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I. Background

The plaintiff, a Japanese corporation, received dividends during the years at issue (2009 through 2011) from its German subsidiary (a GmbH). In accordance with the provisions of the double tax treaty (DTT), 15% capital gains tax was withheld from each dividend payment. This withholding tax was final (more details of the preliminary request from the Supreme Tax Court, see the **blog post of 7 August 2025**).

II. Reasons for referral

The German withholding tax on investment income levied pursuant to Article 10(2) of the DTT was, as corporate income tax on distributions made before 1 April 2009, fully creditable against the Japanese corporate income tax applicable to the dividends received by the GmbH.

Effective 1 April 2009, the relevant Japanese regulations were amended whereby dividends for the years in dispute were subject to tax exemption: 5% of the dividend amount continued to be included in the plaintiff's income subject to corporate income tax while the remaining 95% was exempt. From that point on, due to the tax exemption, virtually no Japanese corporate income tax was levied on the dividends thereby making it impossible to credit the withholding tax as provided for in Article 23(2) of the DTT.

The plaintiff argued that the definitive German tax withheld on dividends from the GmbH violated the freedom of capital movement as of 1 April 2009 since it could no longer claim a credit for the German withholding tax due to changes in Japanese law. It felt to be at a disadvantage compared to resident parent corporations for which, pursuant to Section 8b(1) of the German Corporation Tax Act, 95% of the dividend is tax-exempt but the withholding tax can nevertheless be credited against corporate income tax and any excess amount refunded. The lower tax court had dismissed the complaint, among others, on the grounds that in the present case the principle of the free movement of capital was superseded by the overriding freedom of establishment which the plaintiff could thus not invoke because it was headquartered in a third country.

III. Opinion of the Advocate General (to questions 1 through 4)

(1) Review of the applicable fundamental freedom:

National legislation under which dividends paid by a company resident in a Member State to its parent company established in a third country are subject to a definitive withholding tax **must be assessed in the light of the free movement of capital** if that legislation applies irrespective of the size or legal significance of the shareholding held by the latter.

(2) The standstill clause:

National legislation providing for a withholding tax with discharging effect on dividends paid by resident companies to companies established in a third country, which is not applied to dividends paid by resident companies to other resident companies, **constitutes a restriction on the free movement of capital**. **However**, such a restriction is compatible with EU law if it has existed, continuously, since 31 December

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1993, and in so far as it affects movement of capital involving direct investment. It is for the Supreme Tax Court to determine whether the German regulation has been in effect continuously since 1993.

(3) No justification for restriction:

National legislation providing for a definitive withholding tax on dividends paid by a company established in that Member State to companies incorporated in a third country **cannot be justified by overriding reasons of public interest**, such as the preservation of a balanced allocation of powers of taxation between Member States and third countries, or the need to prevent the benefit of a double tax advantage, (…) or of a comparable tax burden or similar fiscal framework in the third country.

(4) Obligation to provide evidence of non-creditable amount: Article 63 TFEU does not preclude national legislation that, in a situation such as that at issue in the main proceedings, permits the tax authorities to require a company established in a third country to prove exactly how much capital gains tax levied in that Member State cannot be credited against the corporation tax payable in its country of establishment.

Summary: Regarding the applicability of the free movement of capital and the lack of justification, the Advocate General follows the line of thought already established in the legal literature, referring in particular to the *Kronos International* case (**C-47/12**). She largely rejects the arguments against a refund as mentioned in the referral of the Supreme Tax Court as there were: Elimination of the freedom of establishment, the restriction being caused by Japan, and double benefit. However, the standstill clause will be what matters. Although it was not the subject of the questions referred, the issue was brought into the proceedings by the parties involved.

ECJ, case reference **C?533/25** *F Corporation* - Opinion delivered on 5 November 2026.

Keywords

dividend withholding tax, final settlement tax, foreign tax credit, loss carry forward