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WHT APPLICABLE TO DIVIDENDS OBTAINED IN PORTUGAL BY NON-EU INVESTMENT FUNDS

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WHT applicable to dividends obtained in Portugal by non-EU investment funds.

Dividends distributed by Portuguese companies to non-resident investment funds are generally subject to a 25% withholding tax ("WHT") rate. The WHT may be reduced in accordance with a Double Tax Treaty ("DTT"), as long as the non-resident investment fund is eligible to claim DTT benefits – this applies to both EU and non-EU countries. However, no WHT is applied to dividends paid to Portuguese investment funds.

This different treatment between resident and non-resident investment funds has been considered as incompatible with EU Law (namely, a breach of the Free Movement of Capital) and on those grounds a considerable number of cases has already been brought before Portuguese Tax Courts by foreign (mostly EU) investment funds, claiming the application of a full exemption (alleging a comparable situation to Portuguese investment funds that does not allow discrimination of treatment), leading to a WHT refund.

Third countries are not excluded from the protection provided by EU Law, namely by the Free Movement of Capital as per Article 63 of the Treaty of the Functioning of the European Union, ("TFEU") that foresees that all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited.

Additionally, the European Court of Justice (ECJ) has stated in several cases that Article 63 of the TFUE does indeed directly apply to third countries – e.g. case C-464/14 and case C-190/12.

All in all, it is a fact that the majority of the previous and ongoing cases on domestic and European courts regarding discrimination and free movement of capital of non-resident funds relates to EU funds.

However, the jurisprudence has seem to be pointing to a place where third country-based funds may also claim a refund on the grounds of breach of the EU principle of non-discrimination and free movement of capital regarding the taxation of dividends paid to non-EU funds.

In order to claim a refund of the WHT levied by non-resident and third country-based funds, it is mandatory to firstly file an administrative claim with the tax authorities within two-years (as from the legal deadline to deliver the WHT to the Portuguese tax authorities).

In light of the above, there is an effective opportunity to seek for amendments in the Portuguese legislation in order to cease this discriminatory treatment.

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