

TAX

ALLIANZGI-FONDS AEVN CASE (C-545/19):
WHT APPLICABLE TO DIVIDENDS OBTAINED
BY NON-RESIDENT COLLECTIVE INVESTMENT
UNDERTAKINGS IS NOT ACCEPTED BY THE ECJ

VdA EXPERTISE



March 2022

The European Court of Justice (ECJ) confirmed today that the withholding tax (WHT) applicable in Portugal on dividends paid to non-resident collective investment undertakings is incompatible with EU Law, in line with the arguments that we have sustained at the referring proceeding before the Tax Arbitration Court in Portugal

Foreign collective investment undertakings investing in Portugal are subject to WHT on dividends paid by Portuguese companies, which results in a clear disadvantage compared to resident funds which are not subject to CIT on same dividends.

In view of this discrimination, several collective investment undertakings have been challenging the application of the WHT based on the breach of EU Law (in line with litigation in other Member States based on similar grounds). This litigation was initially filed before a Tax Arbitration Court in Portugal which requested a preliminary ruling on whether the difference in treatment was in breach of the Free Movement of Capital and, therefore, incompatible with EU Law.

In the decision released today, the ECJ confirmed that there is a breach that renders Portuguese domestic WHT provisions incompatible with the Free Movement of Capital. For the ECJ *"the difference in treatment between resident and non-resident collective investment undertakings relates to objectively comparable situations"* and this difference in treatment may not be justified by an overriding reason in the public interest or the allocation of the powers of taxation.

This ruling will have a direct impact on several cases pending the ECJ's position in this leading case. On the other hand, this decision confirms the understanding already followed by several national court decisions, ruled on the understanding that there were sufficient grounds for the assessment of a breach of EU Law, considering the existing ECJ case law – that understanding was confirmed today in the AllianzGI-Fonds AEVN case (C-545/19).

The impact of this decision goes beyond national borders, paving the way for the elimination of WHT on dividends received by collective investment undertakings throughout Europe.

It is now up to the Portuguese legislator to amend domestic rules as to align the WHT regime applicable on dividends obtained by investment funds with the ECJ verdict, namely taking advantage of the fact that Portuguese State Budget Law for 2022 has not yet been approved.

This decision creates leeway for these funds to claim back WHT suffered in Portugal in the past 4 years, as well as WHT suffered until Portuguese domestic regime is amended.

As the ECJ decision is based on the Free Movement of Capital, the WHT recovery should also be possible to third countries collective investment undertakings.

Contacts



TIAGO MARREIROS MOREIRA
TM@VDA.PT



FRANCISCO CABRAL MATOS
FCM@VDA.PT



JOANA LOBATO HEITOR
JLH@VDA.PT



RITA PEREIRA DE ABREU
RMA@VDA.PT