Court of Justice of the European Union
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Press and Information

Judgment in Case C-190/12
Emerging Markets Series of DFA Investment Trust Company v Dyrektor Izby Skarbowej w Bydgoszczy

A Member State may not exclude from a tax exemption dividends paid by nationally established companies to an investment fund established in a non-Member State if there exists between the two States an obligation of mutual administrative assistance

It is however for the national court to examine whether the agreed mechanism for the exchange of information enables the tax authorities to verify the information provided by the investment fund

In Poland, the law on corporation tax[1] provides, inter alia, that investment funds are exempt from the tax. In order to qualify for the exemption, those funds must however have their registered office in Poland.

Emerging Markets Series of DFA Investment Trust Company, an American investment fund, one part of its business consisting in investment in Polish companies, requested in 2010 from the Polish tax authority the refund of an overpayment of flat-rate corporation tax for the years 2005 and 2006. That tax had been levied, at a rate of 15%, on dividends paid to the fund by the companies established in Poland.

On the rejection of that request, the fund brought an action before the Wojewódzki Sąd Administracyjny w Bydgoszczy (the administrative court of Bydgoszcz, Poland). That court seeks a ruling from the Court of Justice on, inter alia, the question whether EU law precludes tax legislation under which dividends paid by companies established in that Member State to an investment fund established in a non-Member State cannot qualify for the tax exemption.

In its judgment today, the Court considers first that the free movement of capital applies in a situation where, under national tax legislation, the dividends paid by companies established in a Member State to an investment fund established in a non-Member State do not qualify for a tax exemption, while investment funds established in that Member State receive such an exemption. The Court then observes that a difference in the tax treatment of dividends as between resident and non-resident investment funds may discourage, on the one hand, investment funds established in a non-Member country from investing in companies established in Poland, and, on the other hand, investors resident in Poland from acquiring shares in non-resident investment funds.

The Court states in that regard that the provision of the Treaty[2], under which Member States may distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested, is a derogation from the fundamental principle of the free movement of capital and must therefore be interpreted strictly. The Court states that, if national tax legislation is to be regarded as compatible with the provisions of the Treaty on the free movement of capital, the difference in treatment must concern situations which are objectively not comparable or be justified by an overriding reason in the public interest.

The Court considers that, with regard to tax legislation which adopts as the main distinguishing criterion the place of residence of investment funds, according to which criterion tax is or is not

[1] In the version applicable at the material time, that is in 2005 and 2006.
[2] Article 65 TFEU.

deducted at source on dividends paid to them by Polish companies, **non-resident investment funds are in a situation which is objectively comparable to that of investment funds whose registered office is situated in Poland**.

As regards the need to maintain the effectiveness of fiscal supervision, the Court holds that such a justification for a restriction can only be accepted where the legislation of a Member State makes entitlement to a tax advantage dependent on the satisfaction of conditions compliance with which can be verified only by obtaining information from the competent authorities of a non-Member State and where, because that non-Member State is not bound under an agreement to provide information, it proves impossible to obtain that information from it. The Court finds that in this case, there is a regulatory framework[3] of mutual administrative assistance between Poland and the United States of America which permits the exchange of information required for the application of tax legislation. It is nonetheless for the referring court to examine whether the obligations under agreements are in fact capable of enabling the Polish tax authorities to verify, where it may be necessary, the information provided by investment funds established in the United States of America, in order to determine that they operate within a regulatory framework equivalent to that of the EU.

As regards the need to preserve the coherence of the tax system, the Court states that, if an argument based on such a justification is to succeed, it is necessary that there be a direct link between the tax advantage concerned and the compensating of that advantage by a particular tax levy, with the direct nature of that link falling to be examined in the light of the objective pursued by the rules in question. In the absence of such a direct link, the Polish legislation cannot be justified by the need to preserve the coherence of the tax system.

As regards the need to preserve the allocation of the power to tax and to safeguard tax revenue, the Court states that, where a Member State has chosen not to tax resident investment funds in receipt of nationally-sourced dividends, it cannot rely on the argument that there is a need to ensure a balanced allocation between the Member States of the power to tax in order to justify the taxation of non-resident investment funds in receipt of such income. Further, a lack of reciprocity in relations between Member States and non-Member States cannot justify a restriction on movements of capital between those States. Likewise, diminution of tax revenue cannot be regarded as an overriding reason in the public interest capable of justifying such a restriction.

Last, **the Court rejects the request of the Polish Government that the effects of its judgment be limited in time**. The Court states in that regard that the financial consequences which might ensue for a Member State from a preliminary ruling do not in themselves justify limiting the temporal effects of the ruling.

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[3] The convention of 1974 entered into by the Government of the Republic of Poland and the Government of the United States of America for the avoidance of double taxation and to prevent tax evasion, and the convention of the Organisation for Economic Co-operation and Development (OECD) and the Council of Europe, signed in Strasbourg on 25 January 1988, on mutual administrative assistance in tax matters.