



German tax refund opportunity

Non-German pension funds should consider making a claim for any tax withheld on German dividend income

Why is this relevant now?

The Court of Justice of the European Union (“CJEU”) has recently held that German withholding taxes (“German WHT”) are contrary to the EU’s rules on free movement of capital and are therefore unlawful. The EU requires unlawfully levied taxes to be repaid, subject to national limitation periods (here 4 years).

Who can claim?

Any non-German pension fund that has paid German WHT on dividend income should consider making a claim against the German tax authorities. This applies to tax exempt EU and non-EU pension funds.

Do I need to act now?

Yes. There is relatively short limitation period. If you can show that your pension fund is tax exempt you are likely to have a valid claim.

Can I get further details?

Yes. We have set out below the background to the case. If you are interested please speak to your usual Eversheds Sutherland

contact and we can put you in touch with the right team to assist you.

College Pension Plan of British Columbia vs Finanzamt München III (Case C-641/17)

The College Pension Plan of British Columbia (“Canadian Pension Fund”) has taken a case through the Court of Justice of the European Union (“CJEU”) on the basis that German withholding tax violates its right of the free movement of capital. On 13 November 2019, the CJEU ruled in favour of the Canadian Pension Fund and acknowledged that the German system of taxation constitutes an unjustified restriction to the free movement of capital.

From 2007 to 2010, the Canadian Pension Fund (a tax-exempt Canadian pension fund in the legal form of a common law trust) invested in German stock corporations and therefore received dividends. In accordance with the double taxation treaty between Canada and Germany, these payments were subject to German WHT (tax rate 15%) and only the net amount (i.e. dividends minus the German WHT) have been credited to the Canadian Pension Fund.

The Canadian Pension Fund applied for a refund of the German WHT due to the fact that German pension funds are practically exempt from tax under German law and therefore, the Canadian Pension Fund has been treated discriminatorily compared to its German equivalent. In general, German pension funds are able to deduct technical reserves which take account of future pension liabilities. Furthermore, only the net income is subject to corporate income tax (tax rate 15%).

The German tax authorities denied the refund of the levied German WHT. But, the Canadian Pension Fund proceeded with its claim and appealed before the Munich Fiscal Court (reference number: 7 K 1435/15). The German fiscal court referred to the CJEU asking whether or not the German WHT is compliant with the legal right granting the free movement of capital (Art. 63 TFEU).

On 13 November 2019, the CJEU ruled in favour of the Canadian Pension Fund and acknowledged an unjustified restriction to the free movement of capital due to the fact that foreign pension funds are treated less favourably than German pension funds under the German taxation system, in particular the possibility of German pension funds to credit the WHT against their final corporate income tax. Furthermore, the CJEU acknowledge that the "Standstill Clause", which allows a legal restriction to the free movement of capital in principle, does not apply in the case at hand.

Now the Munich Fiscal Court has to render a final decision regarding the claim of the Canadian

Pension Fund taking into account the binding rulings of the CJEU.

Our assessment

In light of the case of the Canadian Pension Fund, we recommend that all foreign pension funds being subject to unlimited German tax liability and any other foreign funds equivalent to a German pension funds (*Pensionsfonds*), which have been subject to German WHT in the past fiscal years, should compare the case at hand with their own potential claims against the German fiscal authorities. This needs to be analysed on a case by case basis.

Thus, past fiscal years, which have not yet become time barred, should be compared to the case of the Canadian Pension Fund (C-641/17) regarding discriminatory treatment and unlawfully deducted German WHT. Claims regarding the refund of German WHT concerning the year 2015 (or in some cases even earlier) can still be filed until 31 December 2019. Any administrative proceedings dealing with legal remedy does not trigger administrative fees.

In order to rightfully assess the opportunity, each potential claim concerning German WHT should be analysed in detail. Should you have any questions or need assistance to successfully claim a refund, please do not hesitate to contact Dr. Simon Weppner or Giles Salmond.

We are looking forward to supporting your claim.

Your contacts



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