

AN AMERICAN INVESTMENT FUND PROGRESSING TOWARDS RECEIVING A REFUND OF POLISH TAXES WITHHELD BY ENTITIES PAYING IT DIVIDENDS.

On 15 April 2015, the Warsaw Administrative Court overturned a decision of the Polish Tax Office refusing a refund to an American investment fund of withholding taxes remitted to the Polish Tax Office by entities paying out dividends to the Fund in 2006-2009.

The American investment fund filed an application for the tax refund due to the fact that the Polish Corporate Income Tax Act imposes a withholding tax on dividends paid to non-EU/EEA investment funds while Polish investment funds enjoyed a full tax exemption, infringing the EU free movement of capital rule. The Tax Office refused the refund, arguing that the American investment fund was not comparable to a Polish investment fund and had no right to the exemption. The Tax Office of the second instance upheld this decision. The Fund then decided to file a complaint against this ruling to the administrative court.

Wolf Theiss tax advisers Adrian Jonca and Katarzyna Stec, as attorneys of the Fund in the dispute, have been successfully representing it in front of the Warsaw Administrative Court, which cancelled the Tax Office's decision refusing the refund and required the Tax Office to conduct the tax proceedings according to the guidelines provided by the Court.

According to the oral justification of the Court's ruling (a written one has not yet been delivered to the Fund), the Tax Office had not analyzed whether the Fund was equivalent to a Polish investment fund in terms of aim and range of activities undertaken by both entities. The Court pointed out that in such a case it was not in the position to assess whether the Fund and a Polish investment fund were equivalent. According to the Court's ruling, the Tax Office is obliged to analyze the aforementioned issues thoroughly and, having done the equivalence test, assess whether these entities were at least comparable.

The verdict is not final as both the Tax Office and the Fund have the right to file an appeal against the verdict to the Supreme Administrative Court.

Our view

The verdict is in line with the judgment of the European Court of Justice dated 10 April 2014 no. C-190/12 and confirms the current tendency of Polish administrative courts to

avoid taking a clear position on comparing American and Polish investment funds by transferring the obligation to make such a comparison to the Tax Office.

The practical consequences of the ruling are that in order to end the dispute with the Tax Office and close the proceedings for the tax refund, the Fund has to convince the Tax Office (or the Supreme Administrative Court in case the Fund decides to file an appeal against the Court ruling) that the US investment fund regulatory framework is equivalent to that in the EU and that, therefore, the Fund is comparable to a Polish investment fund.

Although the oral justification of the Court's ruling does not address evidentiary value, in our view the evidence of comparability that has been provided by the Fund to both the Tax Office and the Court so far sufficiently shows its comparability to a Polish investment fund.

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