

Euro Tax Flash from KPMG's EU Tax Centre

CJEU rejects Source State loss recalculation for dividend WHT refunds

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At a glance: The CJEU ruled that a source State may not require loss-making non-resident companies to systematically recalculate their result under its own tax rules to obtain a dividend withholding tax refund.

Taxpayer impact: The judgment may create new refund opportunities for loss-making corporate investors that have suffered dividend WHT, particularly in jurisdictions where refund procedures similarly require losses to be recalculated under domestic tax rules.

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CJEU – Free movement of capital – Dividend withholding tax – Loss-making non-resident companies – Refunds – Deferral of taxation – Burden of proof – Tax consolidation – Proportionality

Key findings of the CJEU

- The CJEU Grand Chamber in its judgement in case C-241/25 held that requiring non-resident companies to systematically recalculate their taxable result under the source State's rules in order to obtain a refund of dividend withholding tax is an additional administrative burden borne only by non-residents and constitutes a restriction on the free movement of capital.
- In the Court's view, the restriction could not be justified by the need to preserve the balanced allocation of taxing powers or the coherence of the tax system. The fight against tax fraud and evasion is a legitimate objective, according to the Court, but a systematic recalculation requirement is disproportionate, as it rests on a generalized suspicion of fraud and makes it excessively difficult for a non-resident loss-making company to obtain a refund or deferral.

Background

The plaintiff in case C-241/25 is a company resident for tax purposes in France and part of a French tax consolidated group. In 2012, it received dividends from Swedish companies (shareholdings below 10 percent) on which Swedish dividend withholding tax was levied.

The plaintiff applied for a refund of the withholding tax with respect to a tax year during which it was loss-making, arguing that a comparable Swedish company would not have been taxed on those dividends. According to the plaintiff, the withholding tax therefore constituted an unjustified restriction on the free movement of capital under Article 63 of the Treaty on the Functioning of the European Union (TFEU).

The Swedish Tax Agency rejected the request on the ground that the claimed loss had not been calculated under Swedish tax rules. On appeal, the Administrative Court in Falun found that the French tax returns filed for the plaintiff and its tax group showed significant tax losses in France for the year concerned. However, in its view, the returns did not demonstrate that the loss was equivalent to the loss a Swedish company would have incurred in the same situation, as the plaintiff had not recalculated the result of the tax group as a whole under Swedish tax rules.

At the time of the facts, Swedish law did not provide for a specific deferral or refund mechanism for loss-making non-resident companies (a refund was only available for tax withheld in excess of the applicable treaty rate). Following the CJEU's judgment in case C-575/17, Sweden introduced rules, effective from January 1, 2020, under which a non-resident legal person established in the EU may apply for a deferral of the dividend tax payment. The deferral is granted for as long as the company records a loss calculated under Swedish tax rules. Where the applicant belongs to a group subject to consolidated taxation in its State of residence, the deferral is calculated by reference to all group members. Although these rules did not apply to the case at hand (which preceded their application), the Swedish Tax Agency required the plaintiff to provide the evidence they prescribe. Sweden has no tax consolidation regime but allows profits and losses to be balanced within a group through intra-group transfers, subject to certain conditions.

Against this background, the Swedish Supreme Administrative Court referred the following questions to the CJEU:

- Is it compatible with Article 63 TFEU for a source State to require a non-resident company claiming to be in a situation objectively comparable to that of a loss-making resident company to prove this by recalculating its taxable result under the source State's rules for resident companies?
- If the non-resident company is subject to consolidated taxation, is it compatible with Article 63 TFEU for the source State to require the result of the tax group as a whole to be taken into account in determining comparability?
- Is the answer to the second question affected if the source State has no tax consolidation regime but does have rules on intra-group transfers that, in certain circumstances, allow profits and losses to be offset within the group?

On June 18, 2026, Advocate General Richard de la Tour recommended in his opinion that the Court find that Article 63 TFEU precludes the rules under dispute – please refer to E-News Issue 232 for details of the AG's opinion.

CJEU decision

On November 17, 2026, the Grand Chamber of the CJEU delivered its judgment, largely following the AG's Opinion. The Court examined the three questions together.

Existence of a restriction on the free movement of capital

The CJEU recalled its settled case law, according to which disadvantageous treatment of dividends paid to non-resident companies, compared with the treatment accorded to dividends paid to resident companies, is liable to deter non-resident companies from investing in that Member State and therefore constitutes a restriction on the free movement of capital. Such a difference in treatment is prohibited by Article 63.

The Court recalled that a restriction on the free movement of capital may result not only from the substantive conditions for a tax advantage, but also from the evidence non-resident companies must provide to obtain it. The CJEU noted that, under the Swedish practice, loss-making non-resident companies could, in principle, avoid immediate taxation of dividends in the same way as resident companies. However, unlike resident companies, they had to systematically recalculate their taxable result under Swedish tax rules. The Court held that this additional administrative burden, borne only by non-residents, impedes cross-border transactions and constitutes a tax disadvantage.

In the Court's view, the practice was liable to deter non-resident companies from investing in Sweden and therefore represented a restriction on the free movement of capital.

Comparability

The CJEU recalled its settled case-law under which, once a Member State taxes dividends paid to both resident and non-resident taxpayers, those taxpayers are, in principle, in objectively comparable situations for the purposes of that taxation. Since Sweden taxes dividends from shareholdings below 10 percent regardless of whether they are paid to resident or non-resident companies, the Court found the two categories of taxpayers to be objectively comparable.

The CJEU therefore rejected the arguments put forward by Germany and Sweden that resident and non-resident loss-making companies were not in objectively comparable situations.

In particular, the Court rejected the Swedish Government's argument that comparability would require the same rules to apply to the income and expenses of resident and non-resident companies, which could require non-resident companies to adjust their accounts. The CJEU emphasized that the possibility to defer taxation or obtain a refund is generally intended to reflect a taxpayer's reduced ability to pay where it records an overall loss. A company's ability to pay is not affected by the fact that it might have recorded a profit under another Member State's tax rules, and any recalculation concerns a hypothetical situation. In the absence of harmonization, differences between national rules may work in either direction and cannot call comparability into question.

The Court also dismissed the objections raised by the German and Spanish Governments against the CJEU's decisions in cases C-575/17 and C-601/23[1]. The Court clarified that the comparability analysis under its settled case-law is not limited to the taxation of dividends as such, for example their inclusion in the tax base, the applicable tax rate or mechanisms for avoiding economic double taxation.

The Court further held that arguments based on the principle of territoriality do not affect the assessment of comparability. Rather, they must be considered when examining whether a difference in treatment can be justified and whether it is proportionate. The case law relied on by Germany concerning the deduction of expenses directly linked to dividend income (C-10/14, C-14/14 and C-17/14) was not considered relevant, as it concerned the tax base rather than the timing of tax payment.

Justification and proportionality

Having found that the rules under dispute represent a restriction on the free movement of capital with respect to objectively comparable situations, the CJEU analyzed and rejected the justifications brought forward by several Member States.

[1] In essence, in its decisions in the two contested cases, the CJEU confirmed that the situation of a loss-making resident company receiving dividends and that of a loss-making non-resident company receiving dividends are objectively comparable.

The Court first rejected Sweden's argument that the restriction could be justified by the need to preserve the balanced allocation of taxing powers between Member States. Drawing on its previous case law[2], the CJEU reiterated that a system under which loss-making non-resident companies are subject to immediate and final taxation on dividends, while comparable resident companies are effectively taxed only once they become profitable, cannot be justified on this basis. For the same reasons, this justification cannot support a national administrative practice that imposes an additional administrative burden on non-resident companies seeking the tax advantage concerned, where resident companies are not subject to that burden.

The Court also rejected Sweden's argument based on the need to preserve the coherence of the national tax system, noting that such a justification requires a direct link between the tax advantage concerned and a specific tax levy offsetting that advantage. In the Court's view, Sweden failed to demonstrate the existence of such a link.

With respect to Sweden's plea that the rules under dispute were justified by the need to fight against tax avoidance (risk of shifting shares and dividend rights to a loss-making non-resident), the CJEU recalled that, whilst combating abuse is a legitimate objective, the measures nevertheless need to be proportionate. Based on settled case law, tax authorities are entitled to require taxpayers to provide the evidence necessary to verify that the conditions for a tax advantage are met, including evidence that a non-resident company is genuinely loss-making and that the conditions for a tax deferral or withholding tax refund have not been artificially created. However, the Court stressed that non-resident taxpayers cannot be required to provide documentation complying in every respect with the form and level of detail prescribed by the Member State granting the tax benefit, where the documentation actually provided enables the tax authorities to verify clearly and precisely that the conditions for the benefit are met. Moreover, even assuming that the rules under dispute were capable of achieving the objective of preventing tax fraud and evasion, the CJEU found that the requirement to compute losses under Swedish law is disproportionate to the objective pursued because it is based on a general presumption of fraud and not on evidence suggesting that fraud or an artificial arrangement intended to avoid payment of dividend tax is at issue.

Finally, the Court held that its conclusion was not called into question by its decision in case C-446/03 (commonly referred to the "final losses doctrine"), under which foreign losses may, in principle, be taken into account only in exceptional circumstances, namely where they are definitive. The Court distinguished that case law on the basis that the present case did not concern the deduction of foreign losses. Rather, it concerned the point in time at which Sweden, as the Member State in which the dividends originated, may exercise its right to tax income generated within its territory.

The Court therefore ruled that the free movement of capital precludes a practice of a Member State's tax authority requiring a non-resident company that belongs to a tax consolidated group in its State of residence, and that relies on its loss-making position to obtain a refund of withholding tax levied on dividends from a resident company, to prove that position by systematically recalculating its taxable result under the rules applied to resident companies.

[2] In essence, in the previous case law quoted, the Court recognized that preserving a balanced allocation of taxing powers between Member States can justify restrictions on EU fundamental freedoms, particularly where measures protect a Member State's right to tax activities carried out in its territory. However, where a Member State has chosen not to tax resident companies on domestic dividends, it cannot rely on the need to ensure a balanced allocation of the power of taxation between Member States to justify the taxation of non-resident companies in a comparable situation. Furthermore, this justification cannot be based merely on the risk of losing tax revenue.

ETC Comment:

It is interesting to note that the case was heard by the Grand Chamber at the request of the German Government. The Grand Chamber, composed of 15 judges rather than the three or five judges typically sitting in Chambers, hears cases of particular importance, or when a Member State or an EU institution requests it. According to the text of the decision, the German Government, supported by the Spanish Government, raised objections in principle to the Court's findings in its judgments in cases C-575/17 and C-601/23 (please refer to Euro Tax Flash 386 and Euro Tax Flash 554, respectively for further details on the two cases). In particular, the Court held in those judgements that loss-making resident and non-resident companies receiving dividends are in objectively comparable situations. The Court ultimately maintained its settled case-law and largely followed the AG's opinion in finding that the two situations are objectively comparable. The Court further clarified in its decision in the present case that its cited case law cannot be interpreted as relating solely to the taxation of dividends as such (i.e., the inclusion of dividends in the taxable base and the applicable tax rate, or to mechanisms for avoiding chain taxation). Importantly, the judgment clarifies a practical question left open by the earlier rulings: how a non-resident company may demonstrate that it is loss-making. The Court held that the source State cannot systematically require a non-resident company seeking a withholding tax refund to prove its loss-making position by recalculating its taxable result under the tax rules applicable to resident companies.

Following C-525/24, which concerned Portuguese evidentiary requirements imposed on non-resident pension funds seeking a dividend withholding tax exemption or refund, the judgment provides another example of administrative practices and evidentiary requirements giving rise to restrictions on the free movement of capital. As Member States align their substantive rules with CJEU case law, such procedural requirements may therefore become increasingly relevant in assessing compliance with EU law.

Loss-making EU corporate investors that have suffered dividend withholding tax should review pending and potential refund claims, bearing in mind applicable limitation periods.

Should you have any queries, please do not hesitate to contact KPMG's EU Tax Centre or, as appropriate, your local KPMG tax advisor.

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