Non-EU pension funds can claim back withholdings on dividends from their investments in Spain

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The Spanish Supreme Court confirms that non-EU pension funds can claim back withholdings on dividends from their investments in Spain.

In three recent judgments, one of which is dated 17 December 2020 and the other two 22 December 2020, the Supreme Court carried out a comparative analysis of Canadian pension funds and those resident in Spain for the purpose of determining whether they were entitled to receive a refund of withholdings levied on dividends obtained on Spanish territory, rejected in all three cases by judgments of the lower court *Tribunal Superior de Justicia de Madrid*.

In the judgment of 17 December 2020 - to which the above-mentioned judgments of 22 December refer expressly for reasons of unity of legal doctrine and legal certainty - the Supreme Court reaches a decision on the claim submitted by Teachers Pension Plan, a Canadian pension fund, represented by GA_P, which seeks, in the context of Non-Resident Income Tax, a refund of the amount withheld from dividends received from Spanish listed shares, on the basis of discriminatory treatment restricting the free movement of capital under the Treaty on the Functioning of the European Union (TFEU). In asserting its claim, the appellant pension plan considers that the application of the 15% withholding set out in the Spanish-Canadian Double Taxation Convention is discriminatory in comparison with the situation of Spanish pension funds of similar characteristics, which are taxed at 0% for those dividends under corporate income tax. In 2011, EU resident pension funds were given access to this tax treatment (0%), but non-EU pension funds were excluded.

In this context, the Supreme Court resolves the question on the basis of the arguments put forward in its judgment of 13 November 2019 (appeal no. 3023/2018), a judgment it reproduces, in which the Court of Last Resort upheld the claims - similar to those analysed in the three aforementioned judgments - raised at that time by a US mutual fund, which was granted the right to request and obtain the excess withholding levied, with the appropriate late payment interest[1].

In the same vein, as we have said, the Supreme Court has now responded to the questions which, in similar terms, were also raised as aspects of interest for the formation of case law ('cassational' interest) in both the 17 and 22 December judgments.

Thus, firstly, as regards the comparative analysis of pension funds resident in Canada and pension funds resident in Spain - which is necessary in order to determine whether or not the different tax treatment of dividends received from companies resident in Spain constitutes a restriction on the free movement of capital, as contended by the appellant - the court considers that that analysis must be carried out in accordance with Spanish domestic legislation on pension funds.

In this regard, it should be noted that the legislation in force in the year in question (2007) did not provide for any exemption for dividends earned by non-resident pension funds, while residents were taxed, in accordance with the provisions of Article 29(6) of the Corporate Income Tax (Recast) Act, at a tax rate of 0%. Therefore, the Court states, if such a derogation were applied, it would be done solely and exclusively on the basis of residence, without carrying out any comparative analysis which, moreover, and in accordance with the case law of the Court of Justice of the European Union (in particular, the recent judgment of 13 November 2019 -C-641/17 - *College Pension Plan of British Columbia v. Finanzamt München III*), should be done bearing in mind that the existence of objectively comparable situations does not require that they be identical, it being sufficient that they be similar or equivalent.

To that end, the pension fund provided documentation relating to the operation and structure of pension schemes and funds in Canada and to the rules governing the fund, incorporating a certificate required of pension funds resident in EU and EEA States by Article 7 of Order HAC/3623/2003 of 23 December 2003, which regulated the conditions for submission of the collective declaration (form 215), used by the appellant to claim the refunds in dispute. Without denying the validity of that documentation, the *Tribunal Superior de Justicia de Madrid* considered it insufficient to establish the equivalence of the Canadian fund with the Spanish fund.

Nevertheless, and taking into account that neither said Order nor any other rules or regulations set out the means that would serve to prove, where appropriate, the aforementioned equivalence

[1] We refer here to the GAP analysis of the Supreme Court ruling of 13 November 2019: https://www.ga-p.com/wp-content/uploads/2020/01/Retenci%C3%B3n-sobre-los-dividendos-obtenidos-en-Espa%C3%B1a-1.pdf and the article published in Bloomberg Tax, a specialist international tax journal: https://news.bloombergtax.com/daily-tax-report-international/spanish-supreme-court-rules-in-favor-of-spanish-dividend-withholding-tax-refund?context=search&index=1.

or similarity - aspects that were regulated after the amendment that Act 2/2010 carried out on Article 14 of the Non-Resident Income Tax (Recast) Act -, the court went on to determine, as a second question with cassational interest, whether the exchange-of-information clause provided for in Article 26 of the Spanish-Canadian Double Taxation Convention was a sufficient mechanism to obtain information about the aforementioned funds.

Given that, in a situation of legislative vacuum such as that described above, any formal requirement cannot be of such a nature as to prevent or seriously impede the attainment of the earnings to which the interested party may legitimately be entitled, since that would entail an infringement of the principle of free movement of capital - as the judgment of 13 November 2019 in respect of the United States investment fund abovementioned -, the Supreme Court now rules in the affirmative. Thus, it takes the view that the exchange-of-information clause did indeed allow the Spanish tax authorities to request from the Canadian authorities the information necessary to determine the equivalence between the appellant pension fund and the Spanish ones, which led it to conclude that the Canadian funds are exempt from tax on dividends earned from Spanish entities.

This Supreme Court doctrine, as well as that established in relation to US investment funds, opens up the possibility of claiming the refund of undue tax revenue from pension funds from third countries (outside the EU), provided that the conditions for comparability and exchange of information are proven. In addition, this doctrine will also serve to speed up the various proceedings for the refund of undue revenue from non-EU pension schemes that are currently instituted at the tax authorities and courts.