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### ***European Court of Justice ruling 10 April 2014: Claiming back tax unlawfully deducted at source from non-EU investment funds***

#### ***Answers to the 5 most frequently asked questions***

Cross-border investment can be tricky and frequently entails paying tax twice. Foreign countries generally try to get their share through tax, too. The existing double-tax agreements are only marginally helpful, as claims for returns require a lot of effort. As the financial press has reported over the last few weeks, the European Court of Justice concedes tax relief in the form of tax refund to non-EU based investment funds, too (*EuGH, ruling on 10 April 2014 – C-190/12 – Emerging Markets Series of DFA Investment Trust Company ./. Dyrektor Izby Skarbowej w Bydgoszczy*). European Court of Justice rulings are often difficult to understand for non-lawyers. Therefore, you will find answers to the five most frequent questions on the above decision, as well as on its practical implications for you.

#### **1. Who is now eligible to claim back WHT on dividends?**

So far, only investment funds based in the EU could fully reclaim tax deducted when dividends of EU-based companies were poured out. They benefited from the freedom to move capital within the EU. Through the present decision, the European Court of Justice extends this freedom to investment funds based outside the EU. The essential point is the intention with which money is being invested: the aim must be purely a financial investment, without any intention of influencing or controlling the company in question. Therefore, investment funds located in Switzerland, the US, Cayman Islands, British Virgin Islands, Bermuda, Isle of Man, Channel Islands, Russia, and further countries outside the EU are eligible for tax refunds.

#### **2. What are the new arguments informing the decision?**

The Court of Justice is now of the opinion that non-EU-resident investment funds are essentially in a similar position as those located inside the EU, so that there is no reason for unequal treatment. The European Court of Justice asserts that considerations of effective fiscal supervision, a coherent system of taxation, or even spread of fiscal jurisdiction among member states do not present a sufficient argument for unequal treatment.



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### 3. In which countries can WHT on dividends be claimed back?

Regulations deducting tax at the source now to be found in violation of EU legislation are in place, for example, in Germany, Austria, Belgium, Denmark, Finland, France, Italy, the Netherlands, Norway, Poland, Romania, Spain, and Sweden. Now, investment funds from third countries, such as the US, Cayman, Russia or Switzerland, can reclaim tax unlawfully deducted at the source in these countries. This constitutes a significant improvement over the previous and only partial refund on the basis of double-tax agreements.

### 4. What are the necessary requirements?

In order to qualify for a refund, the future question is going to be whether unequal treatment can be justified, and more specifically, whether the freedom to move capital applies to a case in question. Restricting this freedom, and by extension that of funds from third countries, can only be justified in one case, namely when the jurisdiction of a member state requires specific conditions for a refund to be met, which can only be verified on enquiry to a third country. In order to fulfil this requirement, information may be requested from the relevant authorities of the third country in question, which, in some cases, can be difficult. In some cases, there is no legal basis for administrative assistance across states.

### 5. How far back does this apply?

The retrospective nature of fiscal court rulings is a burden on national budgets. In the present case, the Polish government's request to limit the retroactive application of the ruling was rejected. National periods of limitation vary between 2 years in France and 10 in Belgium. It is therefore important to submit applications on time, before they become time-barred.

***Do you have any questions? – We're looking forward to your call/message!***

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