

Withholding Taxation in Primary EU Law: Some Trends

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- Benchmark
- Most relevant fundamental freedoms
- Autonomous function of withholding taxes
- From gross to net taxable base
- Exemption and refund of dividend withholding taxes
- Tax credit for withholding taxes
- Main conclusions

- Moving towards an internal market (Art. 3(3) TEU/Art. 26(2) TFEU)
 - Similar to a domestic/single market (e.g., *Polydor*)
 - Avoidance of double taxation (e.g., *Gilly*)
 - Increasing economic integration of MS economies
 - Competition must not be distorted
- 27 tax jurisdictions (e.g., *National Grid Indus*)
 - Balanced allocation of tax jurisdiction between Member States
 - Fiscal coherence
 - Territoriality principle
- Open market economy with free competition (Art. 119-120 TFEU)
- Efficient allocation of production factors (Art. 120 TFEU)
 - Tax neutrality: level playing field
 - International tax neutrality (ITN)
 - Capital and labour import neutrality (CLIN)
- Ability-to-pay principle (e.g., *Schumacker*, *Bevola*)
- Direct benefit principle (e.g., *National Grid Indus*)
- Origin-based taxation (e.g., *National Grid Indus*)

Most relevant fundamental freedoms

- Freedom of establishment (art. 49 TFEU)
- Freedom to provide services (art. 56 TFEU)
- Free movement of capital (art. 63 TFEU)

- *Scorpio*: Withholding tax allowed to ensure efficiency of collection of income taxes
 - Prevention of non-taxation in both State of residence and State of source (see also *X NV/Feyenoord* (Case C-498/10), *Viva Telecom Bulgaria*)
 - In 1993, no European or bilateral (NL-DE) instrument for recovery assistance
 - Since 30 June 2002 assistance is possible under Directive 2001/44/EC (now: 2010/24/EU)
 - *Not intended to replace withholding tax* (*Feyenoord*)
 - Administrative burden with mutual assistance not necessarily less than withholding tax for both withholding agent and tax authorities (*Feyenoord*)
 - Withholding tax is appropriate and proportionate means
 - Exemption certificate may be required to ensure proper functioning of withholding tax procedure
- Trend does not contribute to moving towards an internal market

From gross to net taxable base

- Net base, if also for residents (*Gerritse, Scorpio, Bouanich, Centro Equestre, Miljoen, X. (Case C-14/14), Société Générale (Case C-17/14)*)
 - Personal income tax or corporate income tax of resident taxpayer < (dividend) withholding tax due by non-resident taxpayer
 - Difference must be refunded
 - Trend contributes to moving towards an internal market

- Eligible costs
 - *Scorpio, Centro Equestre, Schröder*
 - Costs directly linked to economic activity through which taxable income has been earned already to be considered at source if they are known to the withholding agent
 - Other costs to be considered in refund procedure
 - *Société Générale* (Case C-17/14)
 - Only costs *directly* linked to *actual payment* of relevant income, in this case *dividend*
 - *Not*: bought-in dividend and *interest* on loans to finance share purchases
 - NL Hoge Raad, BNB 2012/23: 'costs' are current expenses, such as *interest* on debt financing
 - AG Kokott (*Brisal*): highly critical of *Société Générale*
 - Not followed by CJEU (*Viva Telecom Bulgaria*)
 - Professional expenses linked with liabilities if residents may consider liabilities (*Pensioenfond Metaal en Techniek*)
 - Pending Case C-782/22 (XX): should future payment obligations be considered for Dutch DWHT purposes?
 - Trend does not contribute to moving towards an internal market

- Eligible tax-exempt wealth
 - *Miljoen* and *X*. (Case C-14/14): **yes**, no deduction for personal and family circumstances as in *Schumacker*
 - NL Hoge Raad, BNB 2012/44+45: **no**, deduction for personal and family circumstances as in *Schumacker*
 - Trend contributes to moving towards an internal market
- Eligible losses incurred in shareholder's State of residence (*Sofina*)
 - Inconsistent with *Futura*: State of source does **not** need to consider losses incurred in State of residence
 - Inconsistent with Marks & Spencer case law: only consider **final** losses
 - Trend does not contribute to moving towards an internal market
- Alternative: **optional** non-resident tax liability (*National Grid Indus*, *Brisal*, *Anton van Zantbeek*)
 - Personal income tax
 - Corporate income tax
 - Contribution to moving towards an internal market

Exemption and refund of dividend withholding taxes

- Exemption from withholding DWHT (*Denkavit Internationaal, Amurta*)
 - If applicable in national situations, but not in cross-border situations
 - Situation of resident taxpayer *comparable* to situation of non-resident taxpayer if both taxpayers are subject to tax in their respective States of residence
 - Exception *Truck Center*: *interest* payment
 - WHT on cross-border payments
 - No WHT on domestic payment
 - Interest taxed under CIT
 - Tax assessment
 - Advanced payments of CIT
 - Difference in tax treatment is not necessarily advantage for resident recipient company
 - Advanced payments of CIT (also *N. Luxembourg 1*)
 - Amount of WHT is significantly < CIT
 - No restriction of arts. 49 or 63 TFEU
 - No contribution to moving towards an internal market?

Exemption and refund of dividend withholding taxes

- Exemption from withholding DWHT (*Denkavit Internationaal, Amurta*) (continued)
 - No justification if *no tax credit* in shareholder's State of residence (*Denkavit Internationaal*, Case 521/07 (*EC v. The Netherlands*), Case C-342/10 (*EC v. Finland*), Case C-387/11 (*EC v Belgium*), *Société Générale* (Case C-17/14), *Emerging Markets, Canada*)
 - Art. 65(3) TFEU: arbitrary discrimination or disguised restriction
 - Art. 64 TFEU: potential escape via standstill provision in relation to third countries
 - Trend contributes to moving towards an internal market
 - (Full) tax credit only considered if included in *tax treaty* (*Amurta*, Case 540/07 (*EC v Italy*), Case C-284/09 (*EC v Germany*), Case C-342/10 (*EC v Finland*)
 - Inconsistent with *De Groot, Denkavit Internationaal II*
 - Trend does not contribute to moving towards an internal market

Exemption and refund of dividend withholding taxes

- Refusing exemption or refund is disproportional
 - Refund in respect of dividends received by non-resident investment fund (*Fidelity Fund*)
 - Exemption in respect of dividend received by non-resident investment fund (*Köln Aktienfonds Deka*)
 - If this investment fund *pays a tax equivalent* to State of source WHT which State of source resident investment funds are required to retain
 - DWHT of State of residence of State of source non-resident?
 - If *Member State of establishment of investment fund taxes* the proceeds of investment at level of shareholders/participants
 - Inconsistent with guaranteeing balanced allocation of tax jurisdiction between MS
 - State of source DWHT?
 - NL HR BNB 2021/73: yes, Dutch tax equivalent payment
 - NL Court of Appeals 's-Hertogenbosch V-N 2022/51.6: judgment possibly in breach of *Fidelity Fund*
 - Inconsistent with Art. 10(5) OECD
 - No tax?: no credit in State of residence of participant in State of source non-resident
- Trend does not contribute to moving towards an internal market

Exemption and refund of dividend withholding taxes

- *A-Fonds*:
 - Arts. 107-108 TFEU (State aid) do not allow national court to assess whether a residence condition complies with art. 63(1) TFEU, where scheme for refund of dividend tax for legal persons governed by public law constitutes an aid scheme
 - No obligation for national court to notify
 - Contribution to moving towards an internal market

- Withholding tax in State of source justified
 - Initially if *full tax credit* for WHT in shareholder's residence State (*Amurta*, Case 540/07 (*EC v Italy*), C-487/08 (*EC v. Spain*), Case C-284/09 (*EC v Germany*), Case C-342/10 (*EC v Finland*)
 - Now if actual complete or sufficient credit: *ordinary tax credit* for WHT is sufficient (X. (Case C-14/14), *Société Générale* (Case C-17/14), *Canada*, *Société Générale* (Case C-403/19)
 - Additional taxation caused by shareholder's State of residence
 - Trend contributes to moving towards an internal market

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 - Only costs directly linked to actual payment of dividend
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- Exemption and refund of dividend withholding taxes
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 - (Full) tax credit only considered if included in tax treaty
 - Trend does not contribute to moving towards an internal market
 - Refusing exemption or refund is disproportional if non-resident investment fund pays a tax equivalent to State of source WHT which State of source resident investment funds are required to retain
 - Trend does not contribute to moving towards an internal market
 - National courts are not allowed to make an assessment under art. 63(1) TFEU where a refund scheme constitutes State aid
 - Contribution to moving towards an internal market
- Tax credit for withholding taxes
 - Form full tax credit to ordinary tax credit in State of residence of shareholder to justify WHT in State of source
 - Trend contributes to moving towards an internal market