

Spain; France

# Spanish Supreme Court Declares Incompatibility of NRIT Withholding Taxation, on Dividends Distributed to Foreign Hedge Funds, with EU Law

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Report from our correspondent Teresa Morales, Uría Menéndez, Madrid

On 5 April 2023, the Supreme Court admitted the cassation appeal of Ecureuil Profil 90 (the Appellant) against the refusal of the Spanish tax authorities for refunding withholding taxes on dividends paid by Spanish companies.

The Appellant is an alternative investment fund (AIF) or hedge fund, resident in France, managed by the alternative investment fund management company (AIFM) Natixis Asset Management. The Appellant has a French tax residence certificate for the purposes of the tax treaty concluded between Spain and France and is subject to authorization, registration, supervision, inspection and sanction by the French supervisory body (*Autorité des Marchés Financiers*).

The Appellant was subject to withholding taxation on the dividends received from Spanish companies at a 15% rate in the application of the [France - Spain Income and Capital Tax Treaty \(1995\)](#). Subsequently, the Appellant requested a partial refund of the taxes withheld arguing that it implied an infringement of the EU free movement of capital, on the grounds that Spanish hedge funds (*fondos de inversión libre*) can benefit from a 1% CIT tax rate.

The Supreme Court concluded that the Appellant was entitled to a refund of non-resident income tax (NRIT) withholding taxes, considering that the Appellant, a French hedge fund, was comparable to Spanish hedge funds. According to the Court, the main comparability elements are:

- Capital contributions are open to the "general" public;
- The hedge fund or alternative investment fund (AIF) is subject to the authorization by the foreign financial regulator that is equivalent to the Spanish National Securities Market Commission (*Spanish CNMV*); and
- The hedge fund or AIF is managed by entities authorized to operate as an Alternative Investment Fund Manager (Directive 2011/61/EU on AIFMs).

The decision STS 1432/2023 - ECLI:ES:TS:2023:1432, of 5 April 2023, is available [here](#) (as a PDF and in Spanish only).

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