

Spain; United States; Netherlands

# National Court Holds Payments for Software Subject to Withholding Tax as Royalties

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The National Court has rejected the appeal of HERTZ DE ESPAÑA, SL (the Appellant) against the tax assessment made by Spanish tax authorities on applicability of withholding taxes to payments for customised software.

The Appellant is a subsidiary of two Dutch entities which are integrated into the HERTZ Group, whose parent company is the US company, Hertz Global Holding Inc. Its core business is the short-term rental of vehicles without drivers. The Appellant used the software developed by the group for the reservation, rental, and fleet management of its vehicles.

The Spanish tax authorities considered that the software was not standard but offered an adaptation for its optimal functioning, following the requirements of the activities carried out by the group. Accordingly, they deemed that the payments for the use of the software were royalties, subject to tax and not exempted from Spanish Non-Resident Income Tax (NRIT).

The National Court agreed with the tax authorities. It explained that the decisive element to determine whether payments can be qualified as royalties is the adaptability of the software to different or evolving hardware, software, or other operating or usage environments. In the case at hand, the software could not be considered standard, but complex, tailored, and targeted to the multinational Hertz group because it included programming, design and consultancy services, a specific data structure for the client's data files, various additions, and modifications as part of the service and additional non-standard terms agreed within the context of a contract.

The decision SAN 1918/2023 - ECLI:ES:AN:2023:1918, of 29 March 2023, is available [here](#) (as a PDF and in Spanish only).

The decision may be appealed before the Spanish Supreme Court within 30 days of notification of the decision.

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