

# High Court Requests Preliminary Ruling on Compatibility of Withholding Taxation on Dividends Paid to Non-Residents with EU Law

25 October 2023

Report from our correspondent Teresa Morales, Uría Menéndez, Madrid

The High Court of Justice of the Basque Country has referred a question to the Court of Justice of the European Union (ECJ) on the compatibility of withholding taxation on dividends paid to non-residents with EU free movement of capital (Article 63 of the Treaty on the Functioning of the European Union).

(a) Facts. In this case, a company resident in the United Kingdom received dividends from a company resident in Bizkaia (Basque Country). The Spanish company withheld 10% of non-resident's income under the tax [Spain-United Kingdom Income and Capital Tax Treaty \(2013\)](#) (the Treaty). The English company could not recover the tax paid in Spain although it had suffered losses in that tax year. Nevertheless, if the recipient were a Spanish company, the mechanics of the corporate income tax would have allowed the recovery of taxes withheld.

(b) Issue. The High Court questioned the compatibility with EU law given the ECJ decision on case C-416/17 Commission v. France (4 October 2018) and previous Supreme Court's cases on the incompatibility of Spanish withholding taxation with EU law (see [Spanish Supreme Court Confirms Incompatibility of NRIT Withholding Taxation, on Dividends Distributed to German Hedge Funds, with EU Law \(23 May 2023\)](#)).

(c) Decision. Accordingly, the High Court requested the ECJ to answer the following question:

"If article 63 of the Treaty on the Functioning of the European Union, regarding the free movement of capital, must be interpreted in the sense that is contrary to the treaty of the Kingdom of Spain, and in particular the fiscally autonomous historic territory of the Bizkaia (although they apply the same tax rate to residents), it does not refund tax withheld in the source country by a resident while making a payment to a non-resident and it cannot be neutralized based on a tax treaty, while residents who incur losses in the tax year, can recover the withholding tax?" (own translation).

The High Court's decree was issued on 19 September 2023 and published on 4 October 2023 (ECLI:ES:TSJPV:2023:138A). It is available [here](#) (as a PDF and in Spanish only).

