

INFORMATION NOTE

FOREIGN INVESTMENT FUNDS

ECJ'S HEARING

The European Court of Justice's hearing in the joined cases of FIM Santander Top 25 Euro Fi (C-338/11 to C347-11) was held on February 16, 2012, in Luxembourg.

Indeed, the French Administrative Court of Montreuil had decided to stay the proceedings in these cases and to refer the following preliminary questions to the Court of Justice:

"1. Shall the situation of unitholders be taken into account, alongside that of investment funds?"

2. If so, under what conditions could the withholding tax in question be regarded as complying with the free movement of capital principle?"

PURPOSE AND CONDUCT OF THE HEARING

The Chamber was composed of the following judges: K. Lenaerts, D. Svaby, T. von Danwitz, G. Arestis and J. Malenovsky.

The hearing consisted of three parts: oral submissions, questions from the members of the Court and replies.

ORAL SUBMISSIONS

Following the written procedure, the aim of the oral submissions is to highlight or elaborate on the issues that Counsel considers to be particularly important for the Court's decision.

It had been agreed between all the Counsels involved in the 10 cases to present a single pleading (Fidal is Counsel in 4 of these 10 cases). This approach was highly appreciated by the Court.

The Counsels' pleading was aimed at demonstrating that, in examining the potential existence of discrimination, the comparison should be made only at the level of the funds themselves.

The government and the EU Commission explained their proposed answers to the referred questions. The position of the EU Commission was exactly in line with ours and the Commission suggested that the Court reply only to the first question.

QUESTIONS AND REPLIES

The President of the Court asked the French government to explain how the French unitholders' situation is to be taken into account when they invest in a non-resident investment fund that has invested in French companies. He pointed out that, in such a situation, the withholding tax levied by France cannot be neutralized by any double tax treaty provisions. The French government replied that this situation is unusual and that an administrative tolerance measure could be applied either to (i) grant a tax credit or (ii) avoid the WHT levy where sufficient information is given upfront by the French unitholders.

The Court replied that French legislation does not provide for any such administrative tolerance and that, in any event, it would entail additional administrative obligations for the unitholders, which are not suffered in presence of a French investment fund.

The President made an additional observation regarding the difference between



capitalization investment funds and distribution investment funds: in a capitalization fund, the comparison can only be made at the level of the funds. The levy of the French withholding will negatively impact the value of the units in a non-resident fund, whereas the value of the units in a French investment fund will be improved.

Lastly, it was pointed out to the Court that certain investment funds are outside the scope of the double tax treaties. The government's allegation of a risk of double refunds was rejected by the Counsels, but the Court replied that this point was not within the scope of the referred questions.

NEXT STEP

The Court has decided, in accordance with Article 20 (5) of the Statute, that the cases will be judged without a submission from the Advocate-General. The Court's decision is expected to be rendered shortly.

OUR ASSISTANCE

The lawyers with whom you regularly work at FIDAL's Direction Internationale are available for any assistance you may need.

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