

Taxation.

Withholding tax on non-residents credit and refund: CJEU rules no tax discrimination to loss making non-resident companies.

On 19 December 2024, the Court of Justice of the European Union (CJEU) issued a ruling on the taxation of non-residents in Biscay (*Vizcaya*) one of the Spanish Basque historic jurisdictions, the terms of which may be extended to the rest of the State where the Non-Resident Income Tax Law (IRNR) does not allow loss making non-resident entities to recover withholding taxes paid.

In case C-601/23, a non-resident company without a permanent establishment brought an action against the Provincial Council of Vizcaya on the basis of the application of IRNR in Biscay on the grounds that Article 63 of the Treaty on the Functioning of the European Union (TFEU) was infringed, by not allowing the refund of the withholding tax (19%) – reduced to 10% by virtue of the applicable double taxation agreement – on the dividends received by the foreign company with accumulated losses, while the Corporation Tax (IS) as applicable in Biscay allows the refund of withholding tax paid by loss making resident entities.

The affected company was unable to credit or offset the withholding paid as it did not have taxable profit but a negative tax base instead, due to losses, so it requested the refund in Biscay of the amounts withheld, and allege discrimination because had it been a resident, it would have been taxed with taxable base "0" in the Corporate Income Tax and could even request a refund of the withholdings withheld.

In the contentious-administrative procedural process before the High Court of Justice of the Basque Country (TSJPV), this court referred a question to the CJEU for a preliminary ruling on the interpretation of the applicability of Article 63 TFEU on the free movement of capitals. The CJEU has ruled that the regulations of the Biscay are restrictive of the free movement of capital by not allowing repayment in these cases and therefore, it infringes EU law, and rejects both different tax treatment (even at the reduced rate of 10% of the double taxation treaty) that discourages investments and movement of capitals, and the argument of guaranteeing tax collection, which does not justify discriminating against the taxpayer and pointing out that the tax authorities must use mutual assistance mechanisms (e.g. facilitating the provision of evidence, like the existence of losses).