

February 12, 2025

Possibility of recovery of tax withholdings made in Spain on income obtained by non-residents without a permanent establishment (judgment of the Court of Justice of the European Union -ECJ- of December 19, 2024)

The aforementioned ruling of the ECJ declares contrary to the free movement of capital in the European Union the existing legislation in a Member State (it refers to the regional legislation of Vizcaya -Basque Country-, but we consider it extensible to that of the Spanish State) by virtue of which dividends distributed by a Spanish company are subject to a withholding tax that is returned in full if the dividends are received by a resident company that closes its fiscal year with a loss, while if they are received by a non-resident company in the same situation, no return is contemplated.

This ECJ judgment has a clear precedent in the ECJ judgment of November 22, 2018 (SOFINA SA case, in relation to France), so it can be considered consolidated case law.

Pending the reaction of the Spanish authorities (regional and/or state) to a decision declaring a rule contrary to European law, it is legitimate to assess the possibilities of getting the refund of tax withholdings not recovered due to losses, or of avoiding such tax withholdings in the future.

The requirements that should be met for the ruling to be potentially beneficial would be, a priori:

1º Non-resident company in Spain, without permanent establishment, which has paid tax withholdings on account during the last four years on income obtained in Spain, through form 216.

2º That said company has closed with losses the fiscal year to which said income subject to withholding tax corresponds.

Notes

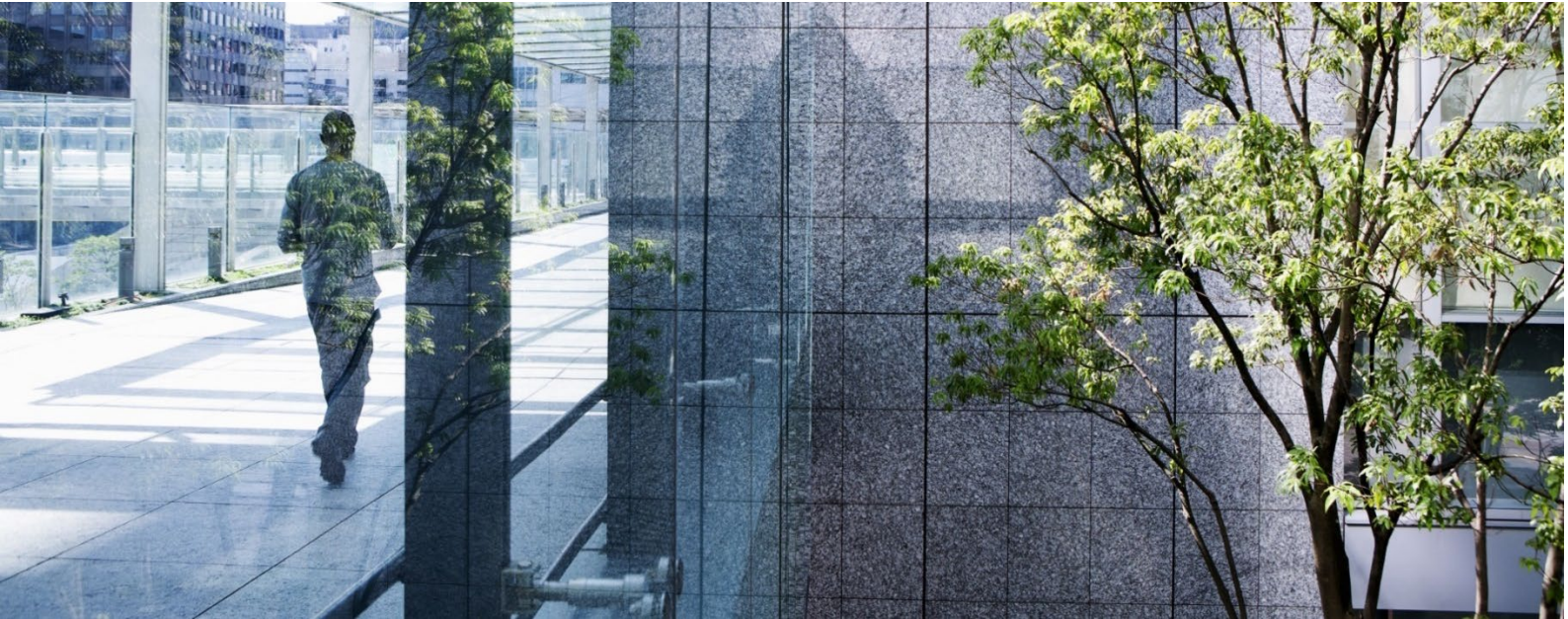
1^a We understand that this case law of the ECJ can be invoked by third States (not members of the European Union), as it is a regulation contrary to the free movement of capital, which is a EU freedom that can be invoked by residents in third States, if their investment or capital is located in the European Union.

2^a Although the possibilities of recovering tax withholdings seem clearer in relation to certain income, such as dividends or interest, we would not rule out analyzing the possibilities of getting the refund of all tax withholdings made through form 216, regardless of the type of income.

If you consider that your company or any other entity of your group could be in the situation described above, we invite you to contact us to study the possibilities of success of a refund request (or the non-payment of withholdings in the future) based on this recent ECJ ruling.

Contact

derecho.laboral@forvismazars.com



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