

## LEGAL ALERT

# DISCRIMINATION AGAINST NON-RESIDENT INVESTMENT FUNDS ON WITHHOLDING TAX DUE ON DIVIDENDS

The matter has been under the spotlight for a while now, but yesterday a decision from the European Court of Justice (ECJ) may have shed a special and decisive light on it. The decision was issued in [AllianzGI Fonds AEVN case \(C-545/19\)](#), following a preliminary ruling request submitted by a Portuguese arbitral court and will certainly encourage more foreign taxpayers to challenge tax assessments in Portugal.

Under the Portuguese tax regime provided in article 22 of the [Portuguese Tax Benefits Code](#), investment funds and other collective investment undertakings established in accordance with Portuguese law are subject to corporate income tax. However, relevant items of their income, including interest, dividends and rents, is excluded from taxation in Portugal. Furthermore, these entities are not subject to withholding tax on any income they obtain from Portuguese source. The withholding tax waiver is not, however, applicable to nonresident collective investment undertakings.

In light of this difference in treatment between resident and non-resident collective investment undertakings, several foreign investment funds have been challenging withholdings suffered in Portugal, in particular, over dividends distributed by Portuguese companies on the grounds that such difference was precluded by European Union (EU) freedoms.

**Faced with the question, the ECJ has found that granting the withholding tax waiver only to Portuguese funds was not compatible with the free movement of capital.**

This decision is in line and strengthens the position already taken by some Portuguese courts which have ruled on the matter. In addition, given the reference to the free movement of capital, it may apply to foreign investment funds which are either resident in another EU Member-State or in a third country. **As a result, it is expected that more taxpayers challenge withholding tax assessments, including both future and past assessments over dividends and other income subject to withholding tax in Portugal in similar circumstances when obtained by collective investment undertakings resident in or outside the EU.**

Our team is available to clarify any specific questions and to provide assistance with any related subject.

The tax team

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