

MEMO# 32066

November 27, 2019

Spanish Supreme Court Rules that US Fund is Comparable to Spanish UCITS and Entitled to Tax Refund in "Article 63" Case

[32066]

November 27, 2019 TO: ICI Members

ICI Global Members

Accounting/Treasurers Committee

ICI Global Investing Subcommittee

ICI Global Tax Committee

Tax Committee SUBJECTS: Fund Accounting & Financial Reporting

International/Global

Tax RE: Spanish Supreme Court Rules that US Fund is Comparable to Spanish UCITS and Entitled to Tax Refund in "Article 63" Case

We are pleased to inform you that the Spanish Supreme Court has ruled that a US regulated investment company (RIC) is comparable to a Spanish UCITS and entitled to recover Spanish tax withheld on dividends paid by a Spanish company. This result is a significant victory for fund investors.

By imposing withholding tax on RICs but not on Spanish UCITS, the Court ruled, Spain violated the free movement of capital article (Article 63) of the Treaty on the Functioning of the European Union (TFEU). The Court's November 13 decision in favor of the Delaware Pooled Trust is attached.

The Supreme Court rejected the two arguments advanced by the Spanish tax authorities. First, the Court concluded that RICs and Spanish UCITS are comparable despite some differences in how RICs are organized and operated; the Court noted that the Court of Justice of the European Union's (CJEU's) standard for applying Article 63 is "comparable," rather than "identical," treatment.[\[1\]](#) Second, the Court concluded that the exchange of information article of the Spain-US income tax treaty was sufficient to allow the Spanish tax authorities to verify the RIC's statements regarding its tax status.

The ICI has assisted its members in responding to both of the Spanish tax authorities' arguments.[\[2\]](#) First, we have provided several litigants with a report describing how RICs are organized and operated.[\[3\]](#) Second, we worked with the Securities and Exchange

Commission to develop a template by which the SEC could verify that a RIC is registered under the Investment Company Act of 1940 and regulated by the SEC.^[4] Finally, we secured from the IRS Treaty Assistance and Interpretation Team (TAIT) a letter, dated November 13, 2015, stating that the treaty provides the IRS with authority to respond to the Spanish tax administration requests.

Counsel for ICI members are reviewing the Spanish Supreme Court decision to determine what steps must be taken to establish that withheld Spanish tax should be refunded. We encourage ICI members to consult with counsel regarding their individual situations.

Keith Lawson
Deputy General Counsel - Tax Law

[Attachment](#)

endnotes

[1] This comparability standard was applied by the CJEU in the *Santander* case that involved ten funds, including two US funds, challenging the French imposition of tax only on non-French funds. See ICI Memorandum No. [26165](#), dated May 18, 2012. See also ICI Memorandum No. [28035](#), dated April 14, 2014 (the CJEU decision in *DFA Emerging Markets* involving Poland and its ability to receive administrative assistance from the IRS).

[2] We also have assisted members with claims filed in other European jurisdictions. For example, we have filed complaints with the European Commission against France and Germany, (see ICI Memorandum No. [29002](#), dated May 21, 2015), made submissions to tax authorities in several other European jurisdictions (see, e.g., ICI Memoranda No. [26213](#), dated June 4, 2012; [26316](#), dated July 19, 2012; and [28433](#), dated October 6, 2014), funded a lawsuit against France (see ICI Memorandum No. [29002](#), dated May 21, 2015), and coordinated closely with members' counsel in Europe and the United States.

[3] See, e.g., ICI Memorandum No. [27579](#), dated September 20, 2013.

[4] The first verification letters were provided to the Spanish tax authorities in 2015. As of March 2017, the SEC had issued over 100 verification letters regarding Spanish claims. See ICI Memorandum No. [30632](#), dated March 10, 2017.