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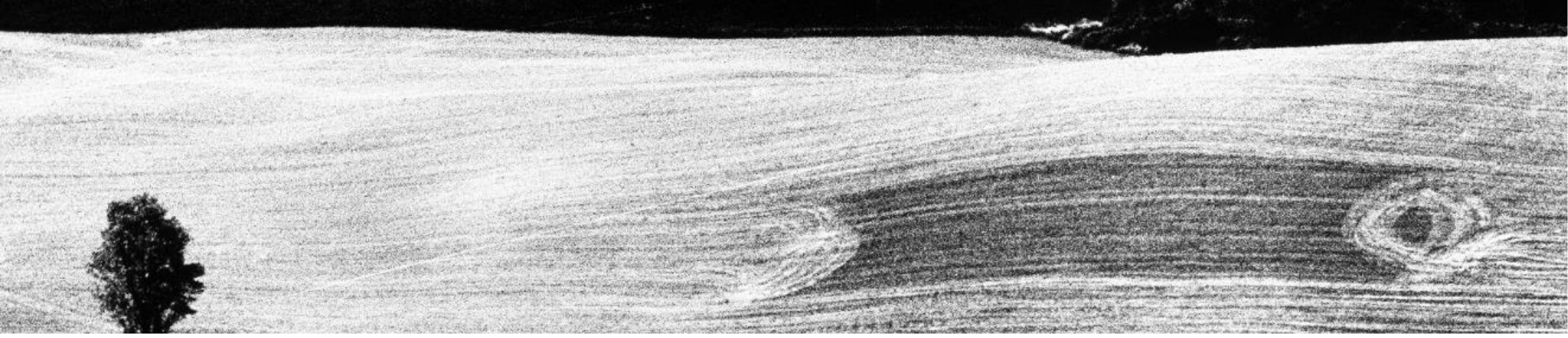
# Newsalert

*Tax*

*CJEU – Income tax exemption for real estate investment funds: infringement of EU Law if the exemption is limited to domestic funds*



## Introduction

On 27 April 2023 the Court of Justice of the European Union ("**CJEU**") issued its judgment in the case C-537/20 (*L Fund*).

The case concerned the potential infringement of EU Law by a German tax rule, according to which income arising from immovable properties in Germany received by non-resident investment funds are partially subject to corporate income tax in Germany, while investment funds established in Germany are exempt from income taxes.

## The decision

The case resulted from a tax assessment by the German Tax Authorities against a *fond de placement immobilier* established under Luxembourg law as *fond d'investissement spécialisé* ("**Fund**") with respect to income deriving from the rental and the disposal of properties owned in Germany.

Under *German* tax law, as applicable to the case under analysis, investment funds resident in Germany are exempt from corporate income tax, conversely the Fund – as foreign investment fund established in Luxembourg – was partially liable to corporate income tax on the income arising from the rental and the disposal of real estate properties in Germany.

The Fund filed corporate income tax returns in Germany, but stated that in its view it was not to be liable *for* corporate income tax in that State.

The Fund *challenged* the assessment notices before the *Finanzgericht Münster* (Munster Tax Court) which confirmed the position of the German Tax Authority. Subsequently, the Fund appealed the decision before the German Federal Tax Court which submitted to the CJEU the question whether the above tax regime is compatible with the EU principle of free movement of capital (Article 63 TFEU).

According to the CJEU, Article 63 TFEU must be interpreted as precluding legislation of a Member State (Germany) which makes non-resident investment funds partially liable to corporate income tax in respect of the income from property which they receive in the *territory* of that Member State, whereas resident investment funds are exempted from that tax.

# Preliminary remarks

The Italian tax regime applicable to real estate investment funds is similar to that analysed by the CJEU: while resident qualified real estate funds are exempt from income taxes (on rental income and gains), non-resident funds, investing directly in properties in Italy, may be subject to income tax[1] deriving from those properties. On the other side, income realized by a resident real estate fund may be subject to tax in the hands of its investors, at the moment of the distribution of profits or with a "fiscal transparency" regime[2] (thus, the taxation is shifted from the fund to the investors). However, in this respect several exemptions are provided by the domestic legislation or through the application of double tax treaties.

The CJEU stated that the discrimination between resident funds and non-resident funds cannot be justified by the circumstance that the resident funds are exempted from income taxation because of the shifting of the taxation on the investors (paragraph 60 of the decision).

The CJEU decision does not address specifically as a condition the comparability between the non-resident fund and the resident fund, from the perspective of the EU law (*i.e.* AIFMD, UCITS).

The decision at issue may be relevant for EU/non-EU real estate funds investing directly in properties located in Italy for which a procedure to recover income taxes levied in Italy may be considered. Such aspect should be further analysed depending also on the approach that the Authority will adopt, at least initially, with respect to such CJEU's decision.

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*For any further clarification please do not hesitate to contact Chiomenti's Tax Practice Area at tax@chiomenti.net*

[1] On rental income and gains, with some exceptions regarding the gains.

[2] In brief, for certain Italian resident investors, the fund income is attributed to the investor irrespective of the distribution.