Lisbon, We Have a Tax Withholding Problem: Time for non-discriminatory Withholding Tax Relief Procedures?

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1. Structural Issues in the Portuguese Withholding Tax System

Structural difficulties remain at the core of the Portuguese withholding tax system, a topic now revisited after the recent ECJ judgment in the case of *Santander Renta Variable España Pensiones, Fondo de Pensiones* (C-525/24).

The ECJ has already consistently held that the Treaty on the Funcioning of the European Union (TFEU) precludes national tax legislation which, as a general rule, takes into account gross income when taxing non-residents in circumstances in which residents are taxed on net income and non-residents lack a real opportunity to deduct business linked expenses. The cases mentioned below address certain domestic exemptions that are drafted in a way that inherently favours resident entities, while non-resident taxpayers in objectively comparable situations may not have a realistic pathway to equivalent treatment, other than pursuing litigation to avoid withholding taxation on gross income.

Notably, resident investment funds and certain pension entities benefit from a withholding tax exemption on, for example, dividends under specific provisions of the Tax Incentives Statute, and resident credit institutions are not subject to withholding on domestic-sourced interest (under the Corporate Income Tax Code).

Since withholding tax is, as a rule, levied on the gross amount of the payment/income, a withholding tax exemption will inherently and consequently mean that the resident payee will (if at all) be taxed on its net income, through the annual corporate income tax return.

The law, however, does not clearly provide non-resident entities access to these specific withholding exemptions — not because their economic position or activity differs, but because the exemption provisions are drafted with domestic institutional categories in mind – nor does it provide for clear mechanisms ensuring that non-resident entities are, when applicable, subject to tax in Portugal on the net, and not on the gross, income.

As a result, certain non-resident funds, pension schemes and financial institutions, or non-resident entities in general, remain subject to final gross withholding in Portugal, unless they initiate litigation or, in some cases, meet demanding evidentiary requirements that domestic entities do not face — at least on a payment-by-payment basis.

The ECJ has held that specific provisions in Portuguese tax law affecting tax withholding to non-resident entities are inconsistent with EU Law. In particular, the trend is noted in *Brisal – KBC Finance Ireland* (C-18/15), *AllianzGI-Fonds AEVN* (C-545/19) and the recent *Santander Renta Variable España Pensiones* (C-525/24). This is further evidenced in decisions concerning provisions of other jurisdictions, such as *Emerging Markets* (C-190/12) and

Fidelity Funds (C-480/16).

The taxation of non-residents in Portugal therefore reflects a steady divergence between domestic law and EU law. This tension remains particularly visible in two areas briefly reviewed in this note:

(1) interest payments to non-resident financial institutions; and
(2) dividend/interest payments to non-resident investment or pension funds.

2. Interest Payments to Non-Resident Financial Institutions: The Incomplete Legacy of *Brisal*

A classic illustration of the issues identified in the Portuguese withholding tax system concerns interest paid to non-resident financial institutions. Resident credit institutions benefit from an exemption from withholding tax on domestic-source interest, allowing the income to be taxed under the annual corporate tax return on a net basis. Non-resident financial institutions, however, are generally subject to final withholding on the gross amount.

This particular asymmetry in Portuguese law was examined in *Brisal – KBC Finance Ireland* (C-18/15), in which the ECJ accepted that a Member State may apply different withholding tax systems to resident and non-resident financial institutions, provided that the mechanism is proportionate and justified by an overriding reason in the general interest. Notwithstanding, the ECJ also determined that a withholding system is only compatible with the TFEU if non-resident entities have a real – not theoretical – opportunity to demonstrate directly linked expenses. Denying non-residents the possibility to deduct costs directly linked to the lending activity is, then, non-compliant with EU law.

Yet, nearly a decade later, court cases continue to pile up, as Portuguese legislation still lacks a clear mechanism enabling non-resident financial institutions to produce evidence of directly linked costs. Such a mechanism should protect commercially sensitive information from disclosure to borrowers or intermediaries and be sufficiently standardized to avoid forcing the parties into ad hoc procedural solutions.

The absence of a workable and clear mechanism translates into an acceptance of the gross withholding taxation — often resulting in increased financing costs (e.g. through gross-up clauses) — or bearing the financial and administrative burden of litigation.

3. Dividend Payments to Non-Resident Investment and Pension Funds: Two Structurally Distinct, but Converging, Restrictions

3.1. Investment funds: Domestic-form exemptions and the *AllianzGI* line

Portuguese law grants an exemption from withholding tax on income distributed to resident collective investment undertakings under the special tax regime set out in the Tax Incentives Statute. The exemption applies automatically, but its scope is limited to undertakings constituted under Portuguese law. By drafting the provision in domestic institutional terms, the legislature excludes, *a contrario*, non-resident funds, regardless of their investment strategy, regulatory supervision or functional comparability.

This structural feature has generated extensive litigation. Numerous decisions from the higher tax courts and the Tax Arbitration Court (CAAD) have addressed claims by non-resident investment funds seeking equal treatment. Stemming from the *AllianzGI* ECJ case, these domestic decisions culminated in the Supreme Administrative Court's judgment in Case 7/2024, which expressly harmonized domestic jurisprudence. The Court endorsed the reasoning of *AllianzGI* and related ECJ case law, stressing that Member States cannot condition exemption on a fund's adherence to a domestic legal form nor disregard the material comparability of foreign investment vehicles.

The Supreme Administrative Court therefore confirmed that limiting the exemption to Portuguese-law collective undertakings is incompatible with the TFEU.

Yet despite this consolidated jurisprudence — at both the domestic and European levels — Portuguese legislation continues to offer no mechanism for non-resident funds to obtain relief at source. The only available path to non-resident funds remains the refund or litigation procedure, which naturally does not address the structural asymmetry. As a result, eligible non-resident funds must rely on litigation to achieve what resident funds obtain without further administrative burden.

3.2. Pension funds: The evidentiary barrier highlighted in *Santander* (C-525/24)

Dividend payments to non-resident pension funds reveal a related – but distinct – restriction: in these cases, the exemption to non-residents is expressly foreseen in the regime, as the required documentation is difficult to obtain from the relevant tax authorities.

In *Santander Renta Variable España Pensiones* (C-525/24), the ECJ clarified the limits applicable to such requirements. The ECJ acknowledged that a Member State may request certain certified declarations for the purposes of granting an exemption at source, provided that the foreign authority is competent to issue them and that no less restrictive alternative exists. However, the Court also found that the same requirement cannot be imposed as a mandatory condition for obtaining a refund, as this renders relief practically unattainable when the non-resident cannot obtain such a certificate, and therefore infringes the TFEU.

The Portuguese system should rely on a streamlined mechanism for relief at source, namely when exemptions apply to comparable resident entities, and not rely primarily on refund or litigation procedures. In fact, in general, even where relief at source is contemplated, the certification requirements often cannot be met in practice, because foreign tax or supervisory authorities may lack the legal competence to issue the documentation requested or may not consider themselves obliged to produce such declarations solely to satisfy Portuguese procedural rules.

Consequently, relief becomes inaccessible – not for material, but for operational requirements. In the cases at hand, non-resident pension funds may face a barrier linked to evidentiary requirements, precisely the type of restriction that, under the *Santander* judgment, was deemed incompatible with the TFEU.

4. Conclusion

In all three mentioned areas —interest paid to non-resident financial institutions, dividends paid to non-resident investment funds and dividends paid to non-resident pension funds — the ECJ has confirmed that the Portuguese rules, whether by design or in practice, may result in indirect discrimination for non-resident taxpayers. Each case was decided on its own grounds, but all reflect a common issue: A withholding tax relief framework anchored in domestic institutional categories without equivalent mechanisms enabling non-residents to obtain an equal treatment or without standardized procedures that may enable non-resident taxpayers to obtain relief in a predictable and proportionate manner.

Some of the practical challenges arise not only from the law itself but also, more broadly, from requirements imposed by the tax authorities. The standard withholding tax relief procedures often hinge on mandatory presentation of tax residency certificates, as deemed required by the tax authorities. Portuguese courts have clarified that such certificates are probative documents rather than constitutive in nature; yet, in practice, non-residents frequently need to litigate to demonstrate tax residency through other equally reliable documents.

Although instruments such as the Directive on Faster and Safer Relief of Excess Withholding Taxes (2025/50)

(FASTER) do not directly govern the income types addressed in this note, they reflect a broader EU policy orientation toward administrative simplification and proportionality on withholding tax relief. Aligning the Portuguese system with these principles — together with the jurisprudence now consolidated by the ECJ and the Portuguese courts — may, upon the transposition of FASTER, offer a timely opportunity to also address direct and indirect discriminations in Portuguese tax withholding on non-resident entities, such as the in the cases identified above.

IBFD references:

- EU tax law developments are reported on the daily IBFD Tax News Service page.
- A.P. Dourado et al., *Tax Neutrality Treatment of Investment Funds in the European Union*, 16 World Tax J. 3 (2024), Journal Articles & Opinion Pieces IBFD.
- J.S. Ribeiro, *Did the ECJ Go Too Far in* Brisal *(Case C-18/15)?*, 57 Eur. Taxn. 11 (2017), Journal Articles & Opinion Pieces IBFD, available at https://doi.org/10.59403/15m63cq.
- PT: ECJ, 27 Nov. 2025, Case C-525/24, *Santander Renta Variable España Pensiones, Fondo de Pensiones v. Autoridade Tributária e Aduaneira*, Case Law IBFD.
- PT: ECJ, 13 July 2016, Case C-18/15, *Brisal – Auto Estradas do Litoral S.A., KBC Finance Ireland v. Fazenda Pública*, Case Law IBFD.
- PT: ECJ, 17 Mar. 2022, Case C-545/19, *AllianzGI-FONDS AEVN v. Autoridade Tributária e Aduaneira*, Case Law IBFD.
- For details on the FASTER Directive, *see* C. Valério & D. Arsenovic, *European Union – Direct Taxation sec. 3.6.*, Global Topics IBFD.

