

On 13 July 2016, the Court of Justice of the European Union (CJEU) ruled on a case referred by the Portuguese Supreme Administrative Court (STA), regarding potentially discriminatory aspects of the Portuguese withholding tax rules on interest payments (*Brisal* Case C-18/15).

According to the Portuguese corporate income tax code, interest paid to non-residents is subject to withholding tax. Contrarily to the rules that apply to resident lenders, interest paid to non-resident lenders is imposed on the gross income, i.e. without the possibility of deducting any related expenses incurred by the beneficiary.

For this reason, the CJEU determined that the Portuguese withholding tax rules infringe the fundamental freedom to provide services in the EU (which prohibits discrimination against nationals of EU Member States without objectively justifiable reasons). The CJEU furthermore ruled that non-resident lenders must be able to deduct the same expenses allowed to residents.

The CJEU verdict will allow non-resident lenders, who are currently subject to withholding taxes on gross interest paid by Portuguese residents, to argue that the withholding tax should instead be levied on the net interest received, i.e. after the deduction of business expenses directly related to the loan. The ruling also provides legal grounds to request the reimbursement of withholding taxes levied on interest received in the past 4 years.

Finally, in both cases, the non-resident lender must produce sufficient evidence of the directly related expenses which according to the CJEU may include travel and accommodation expenses, legal or tax advice, financing costs necessary to the pursuit of the activity and the fraction of general expenses necessary for the granting of that particular loan.