

The impact of the CJEU's case law on withholding taxation vis-à-vis investment and pension funds

NORDISKA SKATTEVETENSKAPLIGA FORSKNINGSRÅDETS JUBILEUMSKONFERENS

50 years - Nordic tax systems facing global challenges

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Agenda

- Cases concerning investment funds
 - From Aberdeen Property in 2009 to A SCPI in 2022
- Cases concerning pension funds
 - Reference made by the Högsta förvaltningsdomstolen i Sverige C-39/23, *Keva et al.*

Finnish investment funds – comparability

- Both UCITS and non-UCITS based open-ended mutual funds:
 - Not legal persons
 - Represented by a management company and assets held by a custodian
 - Separate taxable entities, but exempt from tax under Finnish Income Tax Act
 - Entitled to Finnish tax treaty benefits (tax treaty persons)
- The tax treatment of foreign fund's Finnish source dividends depends on the fund's comparability to Finnish investment fund (or to other Finnish entities) – comparability analysis

EU reclaims in Finland

- The Aberdeen case in 2009 (C-303/07) increased filings in Finland:
 - The ECJ concluded that although in Finnish law there is no corporate form with a legal form identical to that of a Lux-SICAV, that itself cannot lead to the result that the two are not comparable. As inter-company dividends are tax-exempt in a comparable domestic situation, Finnish WHT on outbound dividends paid to the Lux-SICAV violated Art. 49 TFEU
 - The FTA considers that SICAVs are similar to Finnish limited liability companies
 - **Listed SICAV:** Refunds granted

C-480/19, judgment 29 April 2021

- Do Art. 63 and 65 TFEU preclude interpretation according to which income received by a natural person residing in Finland from an UCITS undertaking based in another EU Member State and constituted in accordance with the UCITS Directive is not, for the purposes of income tax, treated in the same way as income received from a Finnish investment fund constituted in accordance with contract law within the meaning of the UCITS Directive (contract form), because the legal form of the UCITS located in the other MS does not correspond to the legal structure of the domestic investment fund?
- Concerned the taxation of a Finnish unitholder in a foreign corporate form fund. The CJEU held that the income received from a foreign corporate form fund should not be treated differently from the income received from Finnish contractual based fund for Finnish unitholder

Reform in 2020

- The definition of a “**tax exempt investment fund**” was clarified in 2020 and covers also certain non-Finnish funds:
 - **contractual-based, open-ended UCITS investment funds which have at least 30 unitholders**
- If both the above requirements (**open-ended, UCITS**) are not met, the exemption still applies if the fund
 1. distributes at least $\frac{3}{4}$ of its annual profit (excluding unrealized step-ups in values) to its unitholders; and
 2. has a capital of at least two million euros; and
 3. has only unitholders which are either professional investors or comparable wealthy private individuals
- Foreign entities do not have to be identical in order to be comparable with domestic ones. E.g. German *Spezialfonds* should be considered comparable with Finnish ones if they in large have the corresponding legal framework and investment activities as Finnish special funds

Case C-342/20

- Do Art. 49, 63 and 65 TFEU preclude national legislation under which only foreign open-ended investment funds constituted by contract can be regarded as equivalent to Finnish investment funds exempt from income tax, meaning that foreign investment funds established in a legal form other than by contract are subject to withholding tax in Finland, even though there are otherwise no significant objective differences between their situation and that of Finnish investment funds?
- Concerns the tax treatment of a French corporate form fund in Finland

Judgment in C-342/20

- The Finnish investment fund tax exemption regime designed for contractual based funds contains a restriction on free movement of capital
- A French open-ended corporate form investment fund should be treated similarly as a Finnish open-ended contractual based investment fund for Finnish income tax purposes notwithstanding the difference in the legal form. The funds are in a comparable position and the different tax treatment cannot be justified by an overriding reason in the public interest
- The Finnish fund level tax practice did not treat similarly contractual and corporate form funds: most corporate form funds, especially European SICAVs were not held comparable with Finnish contractual funds and thus entitled to full WHT refunds

The impact of EU law on foreign investment funds

• Aberdeen Property

- Finnish parent company, Aberdeen Property Fininvest Alpha Oy wanted to distribute dividends to its wholly owned subsidiary Nordic Fund SICAV established in Luxemburg
- Taxation of dividends?
- Finland could not levy a WHT as corresponding domestic distribution of inter-company dividends would have been tax-exempt
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• E v. Veronsaajien oikeudenvallontayksikkö

- Taxation of income received by a Finnish individual from a Luxemburg based SICAV
- CJEU: the income received from a foreign corporate form fund should not be treated differently from the income received from Finnish contractual fund, because the funds were in a comparable position despite their legal forms

• A SCPI v. Veronsaajien oikeudenvallontayksikkö

- Taxation of French corporate form fund in Finland
- Arts. 63 and 65 TFEU must be interpreted as precluding national legislation which, by limiting entitlement to the exemption of rental income and of profits from the disposal of immovable property or shares in companies owning immovable property solely to investment funds constituted in accordance with contract law, excludes from entitlement to that exemption a non-resident alternative investment fund constituted in accordance with statute, even though that fund, which benefits from a system of tax transparency in the MS in which it is established, is not subject to income tax in that latter MS

• Revision of Sec. 20 a of the Income Tax Act?

- Similar treatment of contractual and corporate form funds
- Trusts?
- Amount of investors?
 - Less > 30?
 - Obligation to distribute profits

Finnish public pension funds

- Belong to mandatory employment pension insurance scheme
- Exempted from tax in the Income Tax Act
- Subject to double tax treaty benefits
- Keva = legal person under public law, participates in the payment process of the pensions
- Landskapet Ålands pensionsfond = a part of autonomous Åland Islands local government, outsourced payment process
- Kyrkans Centralfond = a part of Lutheran Church, outsourced payment process
- All governed by special statutes
- Purpose to manage benchmarked pension funds

Swedish AP-funds (*Allmänna pensionsfonder*)

- The AP funds are government agencies
- The funds are a part of the Swedish state
- Outsourced payment process to Pensionsmyndigheten
- The AP funds are governed by law. The Law regulates the division of responsibilities between the funds ' boards and the government
- Exempted from tax
- Subject to double tax treaty benefits
- The public pension is financed by mandatory pension contributions paid by both the employer and employee and administrated by the Första, Andra, Tredje, Fjärde and Sjätte AP funds. The premium pension is administrated by the Sjunde AP fund

Steps taken before the referral to the CJEU

- Skatteverket rejected all WHT reclaims filed by Finnish pension funds. First decisions early 2010's
- First contact with DG for Taxation and Customs in 2013
- The ECJ's ruling in C-252/14, PMT issued on 2 June 2016
- Recontacted DG for Taxation and Customs in 2019
- Complaint filed January 2020
- Formal notice February 2021
- Reasoned opinion December 2021
- Obtained leaves-to-appeal from the Supreme Administrative Court of Sweden June 2022

Request for a preliminary ruling lodged on 26 January 2023

- **Referring court**

- Högsta förvaltningsdomstolen

- **Parties to the main proceedings**

- *Applicants:* Keva, Landskapet Ålands pensionsfond and Kyrkans Centralfond

- *Respondent:* Skatteverket

- **Questions referred**

- Does the fact that dividends paid by domestic companies to foreign public pension institutions are subject to withholding tax, whereas the corresponding dividends are not taxed if they accrue to the own State through its general pension funds, constitute such negative differential treatment that it entails a restriction of the free movement of capital prohibited, in principle, by Article 63 TFEU?

- If Question 1 is answered in the affirmative, what are the criteria that should be taken into account when assessing whether a foreign public pension institution is in a situation which is objectively comparable to that of the own State and its general pension funds?

- Can a possible restriction be regarded as being justified by overriding reasons of public interest?

Tack!