Finland:
Refund opportunities for portfolio dividends received by non-listed SICAVs limited

In a decision dated 19 December 2016, Finland's Supreme Administrative Court (SAC) confirmed that portfolio dividends paid by Finnish publicly listed companies to a Maltese non-listed SICAV (i.e. an open-ended collective investment scheme with variable capital) are subject to Finnish withholding tax.

Background

The case before the SAC involved a Maltese multi-fund investment company (fund) that was planning to invest in Finnish publicly traded companies and that sought an advance ruling from Finland's Central Tax Board (CTB) on whether it could be deemed comparable to a tax-exempt Finnish investment fund. If comparable to a Finnish investment fund, the Maltese fund could receive portfolio dividends from Finnish listed companies free from Finnish withholding tax. (Portfolio dividends are those earned on investments of less than 10% in the capital of the distributing company.)

The Maltese fund, established as a SICAV with variable capital, was a non-listed, public limited liability company and a separate legal person. The fund was not an investment company as defined under the EU undertakings for collective investment in transferable securities (UCITS) directive. The fund also was licensed and supervised by the Malta financial services authority. The fund had a separate management company, and the assets of its sub-fund were held by an appointed custodian or a prime broker.

The fund was entitled to benefits under Malta's tax treaties, including the treaty with Finland, based on a tax residence certificate issued by the Maltese tax authorities. Under Maltese tax rules, the fund was not required to pay Malta income tax (or other direct taxes) on the dividends derived from the investments in the Finnish publicly listed companies because of its status as a "non-prescribed fund" under the Maltese Collective Investment Schemes (Investment Income) Regulations, 2001. Thus, there was no tax in Malta against which the Finnish withholding tax could be credited.

The CTB took the position that the fund was comparable to a *Finnish limited liability company* and, as such, subject to Finnish withholding tax on portfolio dividends from Finnish publicly listed companies. The fund appealed this decision to the SAC, arguing that the Finnish rules violate the free movement of capital principle in EU law.

SAC decision

The SAC agreed with the CTB's findings and held that the fund was not objectively comparable to a tax-exempt Finnish investment fund, but instead was comparable to a Finnish limited liability company, which is taxable in Finland. In making its decision, the SAC reasoned that, unlike a Finnish investment fund, whose investments are collectively owned by its investors, the Maltese SICAV is a separate legal person that owns the investment assets it holds.

As a result, the SAC found that because the portfolio dividends from Finnish publicly listed companies would be fully taxable in Finland if received by a non-listed Finnish limited liability company, Finland's rules that tax portfolio dividends paid to a comparable nonresident fund cannot be deemed incompatible with the free movement of capital under EU law.

Comments

The SAC decision is final and cannot be appealed. In finding that the fund was comparable to a Finnish limited liability company, the SAC gave the legal characteristics of the fund (separate legal personality and ownership of the underlying investment assets) more weight than its functional features (investment fund/collective investment scheme activities and the setup through the management company, etc.), although the SAC also stated that the fund was not directly comparable to any Finnish entity.

As a result of this decision, non-listed SICAVs now have very limited (if any) opportunities to obtain a full exemption from Finnish withholding tax on portfolio dividends, unless a tax treaty applies to reduce or eliminate the tax. Although the decision concerned a non-UCITS SICAV, potential UCITS status is not expected to change the result of the decision, since the court gave weight to legal personality and not functional features. However, because the decision specifically concerned a non-listed SICAV, refund opportunities still may exist for listed SICAVs.

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