



Finnish Supreme Administrative Court decision restricts refund opportunities for portfolio dividends received by non-listed SICAVs

In a decision dated 19 December 2016, the Supreme Administrative Court (SAC) of Finland has confirmed that portfolio dividends paid by Finnish publicly listed companies to a Maltese non-listed SICAV 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 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 fund, established as an open-ended collective investment scheme (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 was also 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 its 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 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 ruled the fund to be 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 earlier findings and held that the fund is not objectively comparable to a tax-exempt Finnish investment fund, but instead is 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 non-resident 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 functional setup through the management company etc.), although the court 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 opportunities, if any, 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, as the weight was given 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.

For further information, please contact:

Pia Stubb
Tel. +358 (0)40 534 3636
pia.stubb@deloitte.fi

Salla Holma
Tel. + 358 (0)50 584 6308
salla.holma@deloitte.fi



Get in touch



Deloitte Finland
Porkkalankatu 24
00180 Helsinki

Lähde: Deloitteen osoiterekisteri

Deloitte refers to one or more of Deloitte Touche Tohmatsu Limited, a UK private company limited by guarantee ("DTTL"), its network of member firms, and their related entities. DTTL and each of its member firms are legally separate and independent entities. DTTL (also referred to as "Deloitte Global") does not provide services to clients. Please see www.deloitte.com/about for a more detailed description of DTTL and its member firms.

This communication contains general information only, and none of Deloitte Touche Tohmatsu Limited, its member firms, or their related entities (collectively, the "Deloitte Network") is, by means of this communication, rendering professional advice or services. No entity in the Deloitte network shall be responsible for any loss whatsoever sustained by any person who relies on this communication.

© 2017 Deloitte & Touche Oy, Group of Companies

To no longer receive emails about this topic please send a return email to the sender with the word "Unsubscribe" in the subject line.