

Finnish and Swedish court decisions affirm US investment funds should recover withholding tax (WHT)

Good news for WHT reclaims by non-EU funds in Finland and Sweden



On January 13, 2015, the Finnish Supreme Administrative Court (SAC) ruled that a US regulated investment company (RIC) can be comparable to a Finnish publicly listed limited liability company.

The claimant involved in the case is a single closed-end US RIC the listed on the New York Stock Exchange. The SAC held that despite having certain characteristics typical to Finnish investment funds, the claimant is more closely comparable to a publicly traded Finnish limited liability company carrying out investment activities. Dividends paid by a publicly listed Finnish company to another publicly listed company in Finland are tax exempt. Consequently the US RIC is, pursuant to the decision, entitled to receive dividends from Finnish listed companies exempt from the Finnish WHT based on the EU principle of Free Movement of Capital (Art. 63 of the TFEU). As the SAC is the highest court in Finland dealing with these types of claims, this case is final and cannot be appealed.

The court is scheduled to issue another decision in a separate case involving WHT reclaims made by a Massachusetts series trust. We will certainly provide more information on the holding of that case once it is published.

In December 2014, the Administrative Appeal Court in Sundsvall issued three judgments confirming that US RICs can be comparable to Swedish investment funds. As a consequence, the taxpayers in question are eligible for a repayment of WHT remitted on Swedish sourced dividends.

Two of the cases relate to retail mutual funds and confirmed a lower court's decision stating that the claimants are comparable to Swedish investment funds. In short, this means that they are eligible for repayment of WHT based on Free Movement of Capital.

The third judgment differs from the other two in that the fund in question is only open to investment by certain groups of investors. In particular it involved a variable life/annuity product as opposed to a retail fund like the RIC in the first two cases.

We understand that no final repayments of WHT to the US fund claimants in these cases have been made. However, this could change if the Swedish Tax Agency (STA) does not appeal the judgments by mid-February 2015.

The courts are clear in these cases that the burden of proof is on the fund claiming repayment. There are still several more cases in the Swedish courts involving US funds that are awaiting judgment. The STA may wait for these decisions before making a principal decision on how to handle claims from US regulated funds.

Last year, the same court in Sundsvall delivered rulings establishing claimants' right to interest on WHT repayments. We will advise when the STA provides more guidance.

Recommended actions

Given these developments in both Finland and Sweden, it is likely significant repayments to US funds should be forthcoming - probably during the course of 2015. As such, funds may want to consider their position in regards to both the recognition of claims made in accounts, the US tax treatment of any repayments received and the ability going forward to claim or flow through WHT where no claims have been made for certain markets, to investors.

It is anticipated that each claim made will be considered on a case by case basis in both Finland and Sweden based upon comparability guidelines used by the authorities in their assessment of the current cases. Deloitte recommends the following action:

- Taxpayers that have made claims in Finland or Sweden - confirm that any protective claims are now reconciled and regularized to determine that the tax authorities have a full case file when the claims are considered. This would include a full technical position stating why the taxpayer is comparable to the relevant local entity.
- Taxpayers that have not made claims in Finland or Sweden - given the movement in these countries it is recommended that non-EU funds that have remitted irrevocable WHT on Finnish and Swedish sourced dividends should submit WHT reclaims. Claims made in the course of 2015 can seek to recover Finnish and Swedish WHT paid from January 1, 2010.

Contacts

If you have any questions regarding these Finnish and Swedish developments or would like to discuss potential implications for your investment funds, please contact us.

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