



Withholding taxation and EU/EEA based insurance companies providing unit-linked products

Updated case law regarding the application of Article 63 TFEU

A recent decision of the Supreme Administrative Court deals with withholding taxation of dividends paid to a Luxembourg based insurance company providing unit-linked insurance policies to Finnish insurance companies.

KHO 2016:77, 23 May 2016

The Court held that it was in breach of Article 63 TFEU, free movement of capital, to charge withholding tax from dividends received by a non-resident Luxembourgian life insurance company from Finnish companies whose shares the said life insurance company owned in connection with unit-linked insurance policies, when the aforementioned dividends, paying regard to the costs regarding the dividends charged from the subscribers of the insurance policies, have increased the company's future liability. A withholding tax of 15% had been withheld from the dividends in line with the Finland-Luxembourg DTC.

Under Finnish legislation, the appreciation of and income from a unit-linked insurance policy is taxable income of a resident life insurance company. However, resident life insurance companies must, in order to cover their future liabilities, make a statutory reservation, which in effect is tax deductible. Given that the reservation may grow by dividends, which are received from shareholdings related to unit-linked insurance policies the tax consequence of the dividends remains neutral for a resident life insurance company. In Luxembourg, the situation is analogical, due to which the tax withheld in Finland was not creditable in Luxembourg although it was deductible as a cost.

Influence of C-342/10, *Commission v Finland*

In context of pension funds, it was declared earlier by the European Court of Justice in C-342/10, *Commission v Finland*, that it was discriminatory to charge withholding tax from dividends received by a non-resident pension fund where the domestic pension funds were allowed to make similar reservation based deduction as explained above and which consequently leads to neutral tax consequences. Accordingly, this was in breach of Article 63 TFEU since resident and non-resident pension funds were put in different tax paying positions. As a result of the decision, the respective Finnish legislation allowing the reservation based deduction was amended to cover certain non-resident pension funds as well.

Judgment

On the basis of the above and inter alia, the Supreme Administrative Court of Finland held that the tax treatment of life insurance companies was comparable to the tax treatment of pension funds and overall in breach of Article 63 TFEU since resident and non-resident life insurance companies were put in different tax paying positions.



Conclusion

In line with the decision, at least EU/EEA based insurance companies providing unit-link products have good possibilities to reclaim WHT levied on Finnish-source dividends and possibly avoid WHT in the first place by providing adequate information to the withholding agent on the effects of the dividends on the company's future liability. The position of third country claimants should be reviewed separately.

Should you have any questions or comments about the new ruling or other WHT issues, please do not hesitate to contact us.

Kind regards

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