

WTS Global Financial Services Infoletter

Editorial

Tax developments affecting the international Financial Services industry

Dear Madam/Sir,

We hope you may find interesting the latest version of the WTS Global Financial Services Newsletter presenting taxation related news from thirteen countries with a focus on the international Financial Services industry¹.

The following participants in the WTS Global network are contributing with a diverse range of FS tax topics, e.g. the possibility for non-resident investment funds to reclaim Belgian source tax (incl. WHT) in Belgium, the new recent Finnish case law considering the tax (WHT) exemption of foreign investment funds in Finland or the reference for preliminary ruling on Polish CIT exemption for self-managed foreign investment funds in Poland:

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Thank you very much for your interest.

Frankfurt, 15 March 2023

With best regards,

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Hot Topic**Foreign investors in US real property interest –
Final regulations on FIRPTA tax exemption for Qualified
Foreign Pension Funds (QFPF) issued**

The disposition of a U.S. real property interest (USRPI) by a foreign person (the transferor) is subject to the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) income tax withholding. FIRPTA authorizes the United States to tax foreign persons on dispositions of U.S. real property interests. The FIRPTA tax is enforced by requiring the purchaser (or other transferee) of a USRPI from a foreign person to withhold an applicable percentage (baseline 15%) of the gross proceeds and remit such proceeds to the Internal Revenue Service (IRS). The disposition of a USRPI results in the gain being treated as effectively connected with the conduct of a U.S. trade or business (ECI) by such foreign person.

The IRS and the Treasury issued proposed regulations (Proposed Regulations) on Section 897(l) Internal Revenue Code (IRC) during 2019 that provide an exemption from the FIRPTA tax for Qualified Foreign Pension Funds (QFPFs) attributable to dispositions of USRPI.

Three years later in December 2022, the IRS and Treasury finalized the Proposed Regulations (Final Regulations) and kept the general approach and structure of the Proposed Regulations. The Final Regulations specifically provide guidance relating to:

- › Exception under Section 897(l)(1) IRC
- › Eligibility requirements for treatment as a QFPF per Section 897(l)(2) IRC including
- › Rules surrounding withholding exemptions for Sections 1445 IRC as well as Sections 1446 IRC.

Observations

The Final Regulations provide helpful clarifications for foreign pension funds and their investment vehicles to qualify for the FIRPTA exemption under Section 897(l) IRC. Not all comments received by the IRS and Treasury in response to the Proposed Regulations are adopted in the Final regulations. However, the clarifications and alternatives could help alleviate specific restrictions and clarify certain ambiguity under the Proposed Regulations.

Among these are the requirements for the benefits to be provided by the pension fund, the "retirement or pension benefits", which must account for at least 85% of the value of the expected future benefits, and the so-called "ancillary benefits" permitted are additionally clarified.

Retirement or pension benefits do not require a specific type or frequency of payment, but can cover both one-time payments and regular payments. Ancillary benefits are explicitly described as a subordinated category, i.e., if benefits are already included as retirement or pension benefits, they do not have to be counted towards the 15 % threshold of permissible ancillary benefits. Additionally there are now non-ancillary benefits allowed, which do not constitute retirement benefits or ancillary benefits, but which may be permissibly provided by the pension fund under national law, but may not exceed 5%.

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In the case of Qualified Controlled Entity (QCE) minority or de-minimis ownership by any non-QFPF may not qualify as a QCE under the ownership approach per Final Regulations. Non-QFPF owners or an owner's loss of QFPF status would frustrate QCE status. Pooling of different pension funds into one corporate investment vehicle may therefore not be practical given the aforementioned tainting rules.

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Austria



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YOUR GLOBAL TAXPERTS

Married couples are not entitled to apply jointly for refund of capital gains taxes

A married couple resident in Switzerland, which was subject to limited tax liability in Austria, filed an application for reimbursement of the Austrian capital gains tax withheld on their capital income held in a jointly held securities portfolio. The Austrian tax office rejected the application and held that a joint application of several persons was not permissible under Austrian Income Tax Law. Although the capital gains tax was refunded by the tax office after subsequent applications filed by the individuals, the couple filed an appeal with the Austrian Federal Fiscal Court to achieve legal certainty for the future.

The Austrian Federal Fiscal Court ("BFG") upheld the appeal and found that the spouses had been entitled to file a joint tax assessment and jointly apply for refund of Austrian capital gains taxes. According to Article 2 of the agreement between Austria and Switzerland concerning the implementation of withholding tax relief on dividends, interest and royalties, the recipient of dividends is entitled to a tax relief if he is the beneficial owner of capital assets. In this case it was evident from the securities account statements and the joint account, as well as the joint application, that the spouses could be entitled to apply for refund on a joint basis. According to the Federal Fiscal Court's opinion an application for refund of withholding taxes could be dealt with independently notwithstanding the fact, that individual income tax assessments in Austria have to be filed on an individual basis.

The tax office filed an extraordinary appeal with the Administrative Court, which considered the appeal to be admissible and justified and repealed the lower court's decision. In view of the subsidiarity of a declaratory judgment, a finding on the eligibility to file an application is inadmissible. Therefore, there was no legal basis for the Federal Fiscal Court's finding.

In its decision of 28/6/2022, Ra 2020/13/0053 (European Case Law Identifier ECLI:AT:VwGH:2022:RA2020130053.L00) the Federal Fiscal Court further concluded, that the lower court did not deal with the issue whether the couple as such was subject to unlimited tax liability in Switzerland which according to Art. 4 of the Austrian-Swiss double taxation agreement ("DTA") would have been a prerequisite for eligibility for the application of the DTA. Therefore, there is no indication that an application for refund of the capital gains tax imposed on the capital gains commonly received by the spouses, who in any case are not a tax subject under Austrian law and who are not liable to income tax, would be permissible.

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Possibility for non-resident investment funds to reclaim Belgian source tax (incl. WHT)

In recent years, several cases were brought before the European Court of Justice ("ECJ") by non-resident investment funds challenging the conformity with EU law of the tax rules of the investment state. Most of these cases resulted in a positive decision for the fund, for instance quite recently in "AllianzGI AEVN" (March 17, 2022) and "A SCPI" (April 7, 2022).

Certain Belgian source taxation rules could also be challenged based on this case law (and some already were). We focus on the rules applicable to non-resident corporate/statutory investment funds with legal personality. Contractual funds without legal personality are in principle considered tax transparent, so that the Belgian source taxation regime rather depends on the characteristics of the investors.

Dividends

Participation of at least 10% in a Belgian investee company

As a general rule, a 30% WHT has to be levied on dividends distributed by Belgian companies. However, a WHT exemption can be claimed at source if the recipient company holds at least 10% of the shares of the distributing company for at least 1 year. For cross-border dividends paid to non-residents, this exemption only applies if the recipient is subject to corporate tax in its resident state without benefitting from a tax regime more advantageous than the "standard" regime. Corporate investment funds are often (partially or totally) exempted from corporate tax in their resident state. Hence, even if a foreign fund holds a participation of 10% in the Belgian company for 1 year, it will usually not meet the "subject-to-tax" condition and can therefore not invoke the WHT exemption.

The "subject-to-tax" requirement does not apply if the recipient is a Belgian entity. This means that regulated Belgian corporate investment funds can rely on the WHT-exemption, even if they benefit from the special Belgian fund tax regime ("185bis regime") and their investment income is not included in their corporate tax base. In the "Wereldhave" decision of March 12, 2019, the Brussels Court of Appeal decided that the Belgian rules resulted in an unequal treatment of foreign corporate funds and violated EU law.

As a result, non-resident corporate funds established in the EU and holding at least 10% of the shares of the Belgian company for 1 year (e.g. private equity funds) can reclaim Belgian WHT on these dividends. WHT can be reclaimed for a period of 5 years starting from January 1st of the year in which the dividend was distributed. Non-EU funds might, under certain circumstances, also be able to reclaim WHT (i.e. if they do not exercise a definite influence over the investee company).

Portfolio dividends (participation below 10% and/or held for less than 1 year)

Less strict participation exemption regime for "investment companies"

Belgian sourced portfolio dividends (participation below 10%² and/or held for less than 1 year) are generally subject to 30% WHT³, irrespective of whether the recipient is a Belgian or foreign resident.

² For participations with an acquisition value of at least 2,5 Million EUR, Belgian legislation also provides an exemption of WHT (under certain conditions). This is the result of the ECJ's "Tate & Lyle" case (C-384/11, July 12th, 2012).

³ With some notable domestic law exceptions, e.g. certain pension funds. The double tax conventions also have to be taken into account.

As a general rule, Belgian corporate funds are subject to corporate tax. A corporate taxpayer must declare the received dividends in its corporate tax return. In principle, the WHT levied by the distributing company can be credited against the final corporate income tax due by the recipient (and the excess can be refunded). The corporate tax due by the recipient company on received dividends has to be calculated by taking into account the "participation exemption" regime.

Interestingly, for Belgian recipient entities qualifying as "investment companies", the participation exemption regime is less strict. Dividends received by these "investment companies" are exempted even if the minimum participation requirements (10% or 2,5M EUR) and minimum holding period requirement (1 year) are not met (certain taxation requirements still apply). Consequently, due to the possibility to recover the Belgian WHT via the tax return, a Belgian resident "investment company" is, at the end of the day, not subject to taxation on a qualifying portfolio dividend.

"Investment company" is autonomously defined in Belgian tax legislation. The definition is broad, as it covers all corporate investment structures meant to collectively invest the assets of investors. As a result, almost all collectively held corporate/statutory investment funds qualify as "investment companies" (UCITS and AIF). Although non-resident "investment companies" are technically not excluded from the definition, they are not subject to Belgian corporate income tax (unless they have a Belgian PE). This means that they cannot recover the Belgian WHT on portfolio dividends, unlike Belgian resident "investment companies".

If we would stop our analysis here, it is quite clear that non-resident corporate funds are unequally treated compared to their Belgian counterparts.

Comparability of foreign funds with Belgian funds and unequal treatment

However, Belgian tax law also provides for a special investment fund regime for certain specific Belgian "investment companies" (listed in "article 185bis BITC"). The original objective of this regime is to make sure that these funds remain a tax neutral intermediary level between investor and investment. For that purpose, the investment income of these "185bis"- funds is not included in their corporate income tax base (although they are principally subject to corporate tax). With regard to dividends, the aforementioned participation exemption regime does not apply, simply because it is not necessary as dividends are not included in the tax base.

Belgian portfolio dividends distributed to these funds are still subject to WHT. Before 2013, these "185bis" corporate funds could also recover the Belgian WHT via their tax return. This meant that they were, in the end, not subject to taxation on the dividend. The European Court of Justice decided on October 25, 2012, that these Belgian rules violated EU law because foreign funds could not recover the Belgian WHT. The Belgian legislator "solved" this discrimination in a disadvantageous manner for the Belgian fund industry: as from 2013, Belgian "185bis- funds" can no longer recover the 30% Belgian WHT on dividends. They are, therefore, no longer tax neutral, contrary to the original objective of the Belgian legislator.

The entities that fall within the scope of the "185bis regime" are, amongst others, certain domestic Belgian UCITS and AIF funds subject to Belgian country-specific regulations at fund, investor and/or management level.⁴ It is, however, under certain

⁴ For Belgian UCITS funds: Public Sicav and Public company for investment in debt receivables. For Belgian AIF funds: Public Sicav and Sicafi, Institutional Sicav and Sicafi and the Private Privak. Belgian ELTIFs are also in scope.

circumstances, possible to establish a Belgian (alternative) investment fund without choosing one of the forms referred to in article 185bis. Although some regulatory (AIFM) obligations can still apply at fund level or at management level, this fund will usually be a "standard" company subject to "normal" corporate tax. Nonetheless, because it can still qualify as an "investment company" (see above), it can benefit from the less strict participation exemption regime on portfolio dividends and recover the levied Belgian WHT (see above). Paradoxically, this means that Belgian funds that do not benefit from the special fund tax regime ("185bis") are not subject to taxation on Belgian portfolio dividends, whereas "185bis"- funds suffer 30% Belgian WHT on these dividends.

Taking into account this dispersed and non-balanced Belgian fund tax regime, the question arises as to how to determine which foreign funds are unequally treated. According to ECJ case law, there can only be discrimination of a non-resident fund (and grounds for reclaiming WHT) if that fund is in a comparable situation to a resident fund. Depending on the characteristics of the foreign fund, the Belgian tax administration might try to claim that the foreign fund must be compared to one of the typical Belgian "185bis" funds which are also not able to recover Belgian WHT (instead of making a comparison with non- "185bis" funds which are able to recover WHT). For instance, because the foreign fund is also subject to a special fund tax regime in its resident state (more or less similar to 185bis) and/or because it is a fund type that is broadly similar from a financial law perspective to one of the Belgian "185bis" funds.

In our view, however, it can be argued – amongst others on the basis of the ECJ's case law in "A SCPI" – that collectively held foreign corporate funds are unequally treated irrespective (to a certain extent) of the tax regime in their resident state or their financial law form. The discrimination is even more obvious – and the chances of success of a reclaim higher – if the foreign fund is subject to the standard income tax regime in its resident state, and is not similar to a Belgian "185bis" fund from a financial law perspective.

We therefore recommend foreign corporate/statutory funds to analyze whether a reclaim of Belgian WHT on portfolio dividends is possible. WHT can be reclaimed for a period of 5 years starting from January 1st of the year in which the dividend was distributed. Non-EU funds should also be able to reclaim WHT on portfolio dividends.

Interest payments

Belgian WHT is in principle levied on interest payments at a 30% rate. For interest (and royalty) payments made to corporate investment funds, a very broad domestic WHT- exemption exists. It applies to certain Belgian specific fund types (UCITS and AIF) regulated under Belgium financial law and to *similar* foreign funds. However, not all Belgian regulated funds benefit from the exemption (e.g. Belgian Institutional Sicavs and Sicafris), so that foreign funds similar to these excluded funds are also out of scope. Moreover, it might be difficult to determine which characteristics of foreign funds are to be considered when analyzing the "similarity" with in or out of scope Belgian funds.

In our experience, this often leads to WHT issues for foreign institutional debt funds (structured e.g. as Luxemburg Sicav-SIF), especially if they cannot invoke a double tax convention. If WHT has been withheld, it can still be possible to rely on EU law to reclaim the tax. Especially for interest payments on *ordinary loans* (non-securitized) the discrimination is quite clear: a domestic law WHT exemption exists for payments to Belgian enterprises/corporations. This exemption applies even if the interest is not included in the Belgian tax base because it is paid to Belgian corporate funds benefiting from the specific investment fund tax regime including Belgian institutional funds ("article 185bis BITC", see above). This exemption cannot be invoked by similar non-resident debt funds. This is, in our view, a violation of EU law. For all other types of debt-instruments (e.g. bonds), received by non-resident funds falling out of scope of the abovementioned exemption, the ECJ's A SCPI decision could still provide certain grounds for a reclaim.

We therefore recommend foreign corporate/statutory funds to analyze whether a reclaim of Belgian WHT on interest is possible. WHT can be reclaimed for a period of 5 years starting from January 1st of the year in which the interest became due. Non-EU funds should also be able to reclaim WHT on interest payments.

Belgian real estate income

Foreign corporate real estate funds are subject to non-resident corporate tax at a 25% rate on their net income from real estate located in Belgium (i.e. from direct investments in Belgian real estate without intermediary companies).

Certain qualifying Belgian real estate funds (the "regulated real estate company" and the "specialized real estate investment fund") are not subject to taxation on that income if they respect financial law requirements (including a 80% distribution obligation). In our view, the fact that foreign real estate funds cannot rely on this exemption can be discriminatory and in violation with EU law (in principle both for EU and non-EU funds). Foreign funds might thus be able to reclaim the Belgian income tax on Belgian real estate income if they are comparable to these Belgian funds. If these funds have filed a non-resident corporate income tax return in Belgium, the reclaim procedure should be filed within 1 year after receiving the assessment notice (for assessment notices received before January 1st, 2023, a 6-month period might apply).

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LUNDGREN S

Danish Supreme Court (Højesteret) issues final judgement in the beneficial owner cases on dividends

The beneficial owner case complex consisted of six cases; two on dividends and the remaining four on interest. The two rulings from the Danish Supreme Court are known as the TDC case (C-116/16) and the NetApp Case (C-117/16) and concern the question of beneficial ownership on dividend payments.

Following the Court of Justice of the European Union preliminary rulings from February 2019 and the Danish High Court judgement of 3 May 2021, the Danish Supreme Court delivered judgment in the two cases on 9 January 2023. This is the first rulings from the Danish Supreme Court in the beneficial case complex. More will come as all rulings on interest delivered by the two High Courts in Denmark are appealed to the Supreme Court.

TDC case (C-116/16)

The TDC case concerned who should be regarded as the beneficial owner of a dividend distribution in 2011 made from the Danish company, TDC A/S, to its Luxembourg parent company.

In August 2011 a dividend of MDKK 1,050 was distributed from TDC A/S up the ownership chain through its Luxembourg holding companies and ultimately on to the private equity funds.

TDC A/S argued that the Luxembourg company receiving the distribution from TDC A/S had its own separate management and a decision to pay a dividend could only be made by the management for which reason the company was the beneficial owner of the dividend.

The Supreme Court agreed with the High Court and held that the Luxembourg holding companies were not the beneficial owners of the dividend payment as they merely redistributed the payments further up the ownership chain to the private equity fund.

Subsequently, TDC A/S could not claim tax exemption according to the Parent-Subsidiary Directive or the LUX-DK DTT.

NetApp case (C-117/16)

The NetApp case concerned two dividend distributions made from NetApp Denmark ApS to its Cyprus parent company. The first distribution was made in 2005 of MDKK 566 and the other was made in 2006 of MDKK 92.

The Cyprus parent company subsequently used the dividend to pay principal and interest to its Bermuda parent company. The Bermuda parent company then used the proceeds to pay dividend to its US parent company.

The Supreme Court agreed with the High Court and held that the Cyprus company was not the beneficial owner of the dividends and that neither the CY-DK DTT nor the Parent-Subsidiary Directive offered protection in this case.

The Supreme Court accepted the so-called look-through approach where the Danish dividend WHT may be eliminated under a DTT with the resident country of the beneficial owner even if the first receiver of the dividend (not being the beneficial owner) is not protected.

In respect of the first distribution of MDKK 566, and contrary to the High Court, the Supreme Court held that NetApp Denmark ApS was obligated to withhold tax on the dividend distribution. It was decisive that the dividend remained in Bermuda for five months where it was reinvested in bonds before it was redistributed to the US group parent company. The Supreme Court found that during this period, it could have been decided to use the dividend differently than paying it as dividend to the US parent company. On these grounds the Supreme Court found that the US company was not the beneficial owner and therefore no protection from the US-DK DTT was given and the dividend was taxable. The Supreme Court did not conclude whether the Bermuda parent company was the beneficial owner.

In respect of the second distribution of MDKK 92 the Supreme Court held that NetApp Denmark ApS had proven that the dividend was included in a larger dividend distribution made from the Bermuda parent company to the US parent company, and that the US parent company was the beneficial owner of this dividend. Therefore, the second dividend distribution of MDKK 92 was not taxable and did not trigger Danish withholding tax due to the US-DK DTT and the so-called look-through approach.

Now what?

The so-called look-through approach has now been approved by the Supreme Court. As the NetApp case shows, it is however important to be able to demonstrate that the dividend has actually been distributed to the beneficial owner. This shows the importance of keeping proper records and documentation.

Furthermore, the ruling shows that the tax authorities are not obliged to determine who is in fact the beneficial owner as it is sufficient to determine that the relevant company that could be protected by the Parent-Subsidiary Directive or relevant DTT is not the beneficial owner.

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Finland



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Recent Finnish case law considering the tax (WHT) exemption of foreign investment funds

The Supreme Administrative Court of Finland (SAC), the highest tax court of Finland, has recently issued three rulings concerning the tax exemption regime of investment funds in Section 20a of the Income Tax Act (ITA). The judgments of December 2022 are based on a ruling (C-342/20) by the Court of Justice of the European Union (CJEU) issued in spring 2022, in which the CJEU ruled that Section 20a ITA conflicted with EU law. You may read more about that CJEU case [here](#).

The tax (WHT) exemption provision of Section 20a ITA entered into force in 2020. Thus, the exemption concerns WHT suffered on Finnish dividends after 1 Jan 2020. In addition, the same provision is applicable to the taxation of income derived from real property; i.e. the exemption provision is not limited to mere WHT.

The reasoning behind the 2020 legislative change was to include the qualifying criteria for a tax-exempt investment fund in tax law. The provision states that to meet the tax exemption criteria a foreign fund must be contractual, open-ended and open to the public as well as have at least 30 investors. In addition, alternative investment funds (AIF) are still deemed tax exempt if their capital value is at least 2 MEUR, their investors are professional or equivalent, and they distribute at least $\frac{3}{4}$ of their annual profits to the investors. AIFs that invest mainly in real estate assets are required to distribute at least $\frac{3}{4}$ of their annual profits. The provision is based on the assumption that funds which are established under Finnish law automatically fulfil the criteria named.

After the CJEU's ruling in the spring of 2022, it has already been established that also other than contractual funds may be deemed tax exempt in Finland (i.e. funds in corporate legal form), if such fund is otherwise comparable to a Finnish tax-exempt investment fund.

New Case Law – SAC 2022:139

The first Finnish ruling, SAC 2022:139, was issued on 12 December 2022. In the case, a Luxembourg FCP, a contractual umbrella fund, has a sub-fund A investing mainly in real estate assets. The fund, and therefore also sub-fund A, had only one direct unitholder.

Section 20a (4) ITA refers to the Alternative Investment Fund Managers Act, Chapter 16a (4) which provides that a special investment fund investing in real estate should have at least ten unitholders. The question before the SAC was therefore whether the sub-fund A fulfils the conditions for tax ex-emption, even though it had only one direct unitholder.

The specific characteristic of the case at hand is that the only direct unitholder of Lux. sub-fund A was a Lux. FCP, which in turn had only one direct unitholder, a German contractual investment fund with several German pension funds as its investors.

In its ruling the SAC stated that, considering the wording of Section 20a (4) ITA and its Government Proposal, as well as the principle of legality in taxation, the tax exemption in this case is only conditional on the profit distribution criteria included in the wording of Section 20a ITA. Consequently, the provision was not deemed to establish any other conditions for the tax exemption.

New Case Law – SAC 2022:142

The second Finnish ruling, SAC 2022:142, was issued on 14 December 2022. The case concerned the comparability of a French AIF fund to a Finnish tax exempt investment fund under section 20 ITA for the tax year 2019 and to an alternative investment fund under section 20a ITA for the tax year 2020. The relevant factor in this case was also the number of unitholders.

The fund in question was a French FPCI, a contractual alternative investment fund, which had 33 external investors in total. However, of these investors 18 belonged to a group consisting of regional banks and their group companies. In its preliminary ruling, the Central Tax Board had considered that the group was a single entity and therefore, the total number of unitholders would be below the required 30 meaning that the fund would not meet the criteria for tax exemption under Section 20a ITA.

In its ruling, the SAC held that the investor group was not to be considered as a single entity. Therefore, the fund had more than 30 unitholders, and fulfilled the conditions for tax exemption in this respect. For the tax year 2020, the SAC stated that, as a closed fund, to qualify for the tax exemption under Article 20a (3) ITA, the fund must also fulfil the profit distribution criteria.

New Case Law – SAC 2022:138

The third recent ruling of the SAC issued on 12 December 2022 concerns a sub-fund of a Luxembourg alternative investment fund established as an FCP. The fund invested mainly into real estate assets.

The case focuses on the question whether it is relevant for the comparability analysis that the fund had invested more than 1/5 of its assets to construction/development projects, which is not allowed for Finnish tax-exempt real estate funds. Even though the requirement is not said in the tax exemption provision 20a ITA, the SAC concluded that since more than 1/5 of the fund's assets were invested in development projects, the fund did not qualify for the tax exemption. The court noted that the Finnish tax exemption regime for real estate investments to development projects is capped at 1/5. Therefore, SAC stated that even if the requirement on the nature of the real estate investments may restrict the free movement of capital it is acceptable as the fund, based on its investment structure, is not objectively comparable to a Finnish real estate fund.

Conclusions

These three recent decisions were expected after the judgment of the CJEU. After the rulings, it is becoming even more clear that the exemption rules of Section 20a ITA must be interpreted taking into account the requirement of objective comparability that has been emphasized in CJEU case law. The rulings provide certainty to non-resident funds considering investments in Finland.

For the time being, the brief conclusion is our recommendation: the non-Finnish investment fund should pursue its tax (WHT) exemption / its reclaim of WHT in Finland, even if such fund should have less than 30 (securities fund) or less than 10 (real estate fund) fund investors.

The Statute of Limitations in Finland for such applications is 3 years.

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France

An opportunity of tax refund for foreign life insurance companies receiving French source dividends

According to article 119 bis of the French tax code, French source dividends paid to foreign insurance companies are subject to a WHT of 25% (reduced to 15% according to most of DTTs concluded by France).

French WHT is assessed on the gross amount of dividends paid. These companies are often unable to offset most of this WHT as a tax credit because their tax capacity is limited by the amount of the technical reserves they have to book in their accounts in order to reflect the contractual commitments they have towards their policyholders.

By comparison, French life insurance companies which receive French source dividends do not pay the corporate income tax on the basis of their gross amount but are entitled to deduct from their taxable income the amount of the technical reserves they have to accrue.

This difference of tax treatment creates a discrimination which may be challenged on the basis of the EU treaty. This was confirmed by the French supreme tax court in a decision dated May 11, 2021 regarding a UK life insurance company proposing unit-linked policies. On February 9th 2023, in a case defended by Fidal, an Italian life insurance company proposing "gestione separata" policies was held allowed to get the refund of most of the WHT it paid in respect of French source dividends by the administrative Court of appeal of Versailles which provides, in its decision, interesting details about the nature of the evidence which needs to be brought in order to establish there is effectively a discrimination. This is a nice occasion to make a status update about this opportunity of tax refund which should also apply in many EU Member States.

Which companies?

Only life insurance companies are entitled to such a refund to the extent that they commit themselves to allocate to their policyholders a certain yield on their investments including the French equities as to which the dividends are received and the WHT paid. The fundamental freedom at stake is the free movement of capital, which means that the life insurance companies established outside the EU may also be entitled to the refund of WHT. This is however a little bit more difficult because the technical reserves mentioned above are, to a certain extent, regulated by EU Directives which do not apply to non EU life insurance companies. For the latter, it is necessary to appreciate whether their local regulations are comparable to the EU/French one.

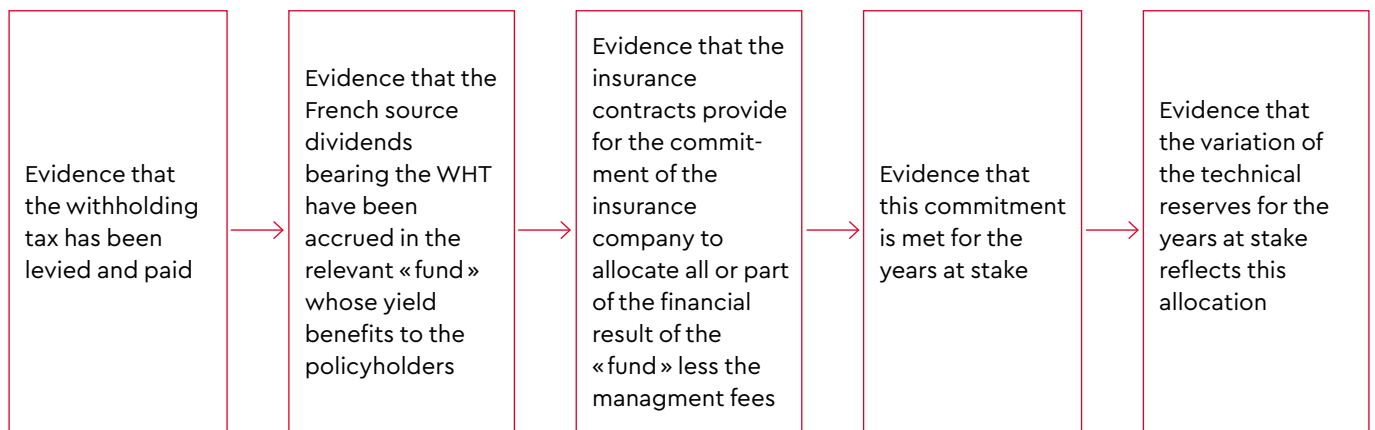
Which policies?

The decisions rendered so far concern unit-linked policies and "contractual funds" policies. For the first ones, the audit track between the dividends received and the variation of the technical reserves is very easy to evidence since the "losses and profits" of the investments benefit to the policyholders. For the second ones, this track is more indirect : the dividends are part of the income received with respect to a basket of investments which constitutes a "contractual fund", whose yield is allocated, less a management fee, to the policyholders who have decided to invest their monies on this "contractual fund".

This indirect link also exists for the policies based on the yield of all the investments of the life insurance company or for pension contracts for example whereby the insurance company commits itself to serve a pension to the policyholder based on the premiums which have been paid + a yield coming from the investment of these premiums in various assets. By the way, most of the ECJ decisions to which the French courts refer in the decisions mentioned above are insurance companies serving pensions or pension funds.

What needs to be evidenced?

As was highlighted by the administrative Court of appeal of Versailles on February 9th, the key thing is for the life insurance company to evidence the connection between the dividends received on the one hand and the variation of the technical reserves of the company on the other hand which reflects its own commitment towards the policyholders. This is a matter of facts and every case is specific. But as a principle, this audit track may be summarized as follows:



Is this specific to France?

No. Any Member State where such discrimination exists between national life insurance companies (taxed on a net income taking into account the technical reserves) and foreign insurance companies (taxed at source on a gross income) is likely to be concerned.

What is the deadline to ask for the refund of the WHT?

For French source dividends having suffered WHT paid in 2021, the claim should be filed with the French tax authorities before December 31, 2023.

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Quick insight into key VAT measures expected for 2023 and 2024

Each year the French Tax bill changes provisions of the French Tax Code. The Bill voted for 2023 contains a lot of provisions regarding VAT effective either as from 2023 or 2024. Here below a summary of the most relevant for the FS sector:

Rules governing transfer of going concern (Article 257 bis of the French Tax Code "FTC"), have aligned with the EU Directive

New version of Article 257 bis will expressly provide (as from 1st January 2023) that neither a supply of goods nor a provision of services is deemed to take place when a transfer of a going concern intervenes between two entities which are liable for VAT. Such a wording is now fully in line with the corresponding EU provisions (Articles 19 and 29 of the VAT Directive). This amendment is highly welcomed after the last French Highest Court "Conseil d'Etat" decision (CE n° 451379 of 31/05/2022) where it was held that Article 257 bis (under its former version) could only apply to transactions subject to VAT. As a result, both exempt and out of the scope transactions, taking place within a transfer of going concern, were to be excluded and could not benefit from this provision.

As the new law is effective as from 1st January 2023, we highly recommend reviewing the VAT regime of prior transactions within the statute of limitation.

New obligations for suppliers of payment services as from 2024

As from 1st January 2024 payment services providers will have to comply with the obligation to keep a registry of both international payments and payment beneficiaries. Provisions in this respect notably states that the obligation:

- › is only to be satisfied when the provider has carried out, for the same beneficiary, more than 25 payments in a three-month period;
- › only concerns international payments, i.e. when the paying party is in one EU Member State (MS) and the beneficiary is in another EU MS or in a third country;
- › only concerns services corresponding to the payment services as listed by the French Monetary Code.

According to these new provisions the registry will have to be provided to the Tax Authorities within one month following the three-month period concerned. Any failure to provide the registry or any incorrect information could lead to a penalty of 15€ up to a maximum of € 500,000.

In addition to the above, some relevant updates on incoming or recently adopted regimes include:

French VAT Group

The regime has now been up and running since 1st January 2023, for those which decided to go for it (option was required by October 2022).

The long awaited official comments on VAT deduction within a VAT Group have also been released from the Tax Authorities and require VAT Groups to set-up their VAT deduction rights following a few rules, depending on both the nature and use of their flows.

Entities willing to set up a new VAT Group as from 1st January 2024 will have to opt at the latest by 31 October 2023.

E-invoicing and E-reporting as from 1st July 2024

On 1st July 2024 new rules requiring e-invoicing and e-reporting will be effective. As a result, not only invoices will have to be e-filed and e-received according to specific rules and IT format, but a few data will also have to be regularly reported to the Tax Authorities. The FS sector is mostly disregarded by these new obligations with regards to outbound flows as long as exempted transactions are not concerned. However, FS entities will have to comply with the obligation to receive e-invoices from their suppliers. Consequently, the help of a dedicated platform as well as an audit to identify possible changes that might be necessary to their IT systems are highly recommended.

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Germany



wts

International Private Equity funds, the return of capital and German fund investors

Recently, German tax law regarding esp. Private Equity funds and the repayment of capital from EEA or third-country corporations has been revised with immediate effect. In a nutshell, the return of capital could be treated as fully taxable (instead of tax-neutral) on the level of the German fund investor, unless certain procedural prerequisites are met.

This change concerns in particular German corporate investors in international closed-end funds with a focus on private equity, but also in infrastructure, private debt or real estate, which invest in corporations domiciled in non-EU-countries.

The revision was introduced by the German Annual Tax Act 2022, issued on December 16, 2022. Among other items, the scope of application of the provision of Sec. 27 para. 8 of the German Corporate Income Tax Act (*Körperschaftsteuergesetz, KStG*) was significantly extended via this act. Essentially, the provision named regulates the formal tax law procedure for the assessment of tax-neutral capital returns from foreign corporations to their German investors.

The amendments in the provision are:

- › The inclusion of non-EU (third-country) corporations into the scope of application.
- › The inclusion of the repayment of nominal (statutory) capital.
- › In the future, the 12-month period for filing applications for the determination of a capital return is to be determined on the basis of the fiscal year of the repaying company rather than on the basis of the calendar year.

The revised version of Sec. 27 para. 8 KStG applies to the return of nominal (statutory) capital (RoC) paid after December 31, 2022.

Implications of the revision

For German corporate investors of (esp.) Private Equity funds, the revision has significant implications.

If the company making the capital repayment (RoC) does not submit a formal application in due time or if the required evidence cannot be provided, the return of capital will not be recognized as tax-neutral by the German fiscal authorities. In this case, the payment is deemed to be taxable income on German corporate investor level, irrespective of its economic character, Sec. 27 para. 8 Sent. 9 KStG. On the other hand, corresponding reductions of a later capital gain will be tax exempt and therefore disregarded in the case of many corporate investors. Thus, a taxation of the capital substance is looming on the level of the German investor of said fund types.

For German non-corporate investors and certain financial and insurance institutions, the amendments will lead to a forward shifting of taxable income – however, in these cases, the subsequent reversal effect should also have a tax impact, so that the overall effect would only be temporary.

Challenges of the new regulation

It can be assumed that the procedure of applying for an assessment of capital repayment in accordance with Sec. 27 para. 8 KStG will be a challenge for non-EU corporations and their German investors. The procedure will be successful only if the foreign company is prepared to submit a corresponding application in time and to provide the necessary evidence. This procedure might fail in particular if the required evidence is simply not available at the foreign company.

In any case, German fund investors will in future be dependent on the cooperation of the foreign companies they invest in (e.g. via international private equity funds) with regards to the new application procedure. In order to be able to meet the application deadline, it is also important that the German investors know the financial years of the companies concerned.

Action to be considered

In perspective, it could be worth considering whether an investment via a blocker structure is preferable compared to the (direct) investment, usually in a transparent partnership with a downstream investment set-up. In particular, structures with corporate holding companies and where capital gains are regularly realized at the downstream level, such consideration could make sense from a German investor taxation perspective. However, there are of course non-tax aspects to be considered, including regulatory conditions, structuring cost, administration aspects. Ultimately, structuring decisions will have to take into account the tax position of the types of German investors.

The new provision and the Free Movement of Capital

In principle, it is to be welcomed that the possibility for non-EU corporations to make a tax-neutral return of capital is now legally regulated.

De facto, however, the new provision leads to a disadvantage for German investors with regard to their investments in non-EU corporations compared to the situation before the recent Act. This is because, according to established case law of the

German Federal Fiscal Court, tax-neutral capital repayments from non-EU corporations to their German investors were already possible prior to the amendment, even without a formal and deadline-bound procedure pursuant to Secs. 27 et seq. KStG.⁵ The past case law was officially accepted by the German tax authorities.⁶ In essence, it was only required to verify and prove that the payment was a return of capital on the basis of the Financial Statements of the distributing corporation, applying the mandatory distribution order of Sec. 27 KStG.

In its decision of May 4, 2021 (VIII R 14/20), the German Federal Fiscal Court (*Bundesfinanzhof*, BFH) already expressed doubts as to the conformity with EU law of the old version of Sec. 27 para. 8 Sent. 9 KStG. Essentially, this doubt is based on the fact that the past rules did not foresee the possibility for individual shareholder of an EU-corporation to prove that a payment was a return of capital within the assessment procedure. The recent extension of the formal application procedure for capital repayments to non-EU corporations – to which the EU freedom of the free movement of capital also applies – further increases the relevance of this potential EU-law infringement.

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It remains to be seen whether the (German) courts will comment on the EU-law conformity of the old provision and when they will have the opportunity to decide on the new 2023 regulation.

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India



Key tax proposals arising from the Union Budget

On February 1, 2023, the Indian Finance Minister presented the Union Budget ("Budget") of India for the financial year ("FY") 2023–24. The Budget focuses on the Governments' focus towards simplification, tax certainty and reduction in litigation. The highlights of the key tax proposals concerning Financial Services in the Budget are set out below:

1. Exclusion of Non-Banking Financial companies ('NBFCs') from thin capitalization norms

With a view to check upon excess deductions claimed by way of higher interest payments to foreign associated enterprises, thin capitalization norms were introduced in the Indian domestic tax laws in 2017. Consequently, the amount of deduction an Indian company or a permanent establishment ('PE') of a foreign company can claim in respect of payment of interest to a foreign lender (which is also AE of the borrower) is capped at 30% of the EBITDA. Such restriction is not applicable to borrowers engaged in banking or insurance business.

The Budget now proposes to exclude certain categories of NBFC's with effect from 1 April 2023 from the applicability of thin capitalization norms. The proposed amendment is a welcome move for the NBFCs' as it provides for a level-playing field to the NBFC's who are also engaged in the business of financing and their functions are similar to borrowers engaged in the banking business.

⁵ Judgments of the German Federal Fiscal Court, dated July 13, 2016 (VIII R 47/13) and April 10, 2019 (I R 15/16).

⁶ See Federal Ministry of Finance (BMF) circular dated 21.04.2022.

2. Taxation of distributions by business trusts – Real Estate Investment Trust ('REIT') and Infrastructure Investment Trust ('InvIT') to its unitholders

REIT and InvIT (collectively referred to as 'Business Trusts') typically make huge debt investments and the distributions by Business Trusts to its unit holders are generally structured in the form of dividend payment, interest, rental income, and debt repayment/ proceeds from amortization of debt. The Indian domestic tax laws contain special provisions for taxation which, inter-alia, provides a pass-through status to Business Trusts in respect of (a) interest income, dividend income received by the Business Trust from a special purpose vehicle ("SPV") and (b) rental income in case of a REIT. Any other distributions i.e. debt repayment received by the unit holders from a Business Trust are not taxable in hands of such unit holders.

It is now proposed in the Budget to also tax distributions in the nature of repayment of debt by the business trusts in the hands of the unitholders on the grounds that the said amount is exempt in the hands of the business trust as well as the unitholders leading to double non-taxation.

This change is likely to have a huge impact on unit holders of Business Trust. Further, the proposed amendment has not taken into consideration whether repayment of debt (being capital in nature) should be considered as taxable in the first place. Various representations have been made in this regard to the relevant authorities in India to reconsider the proposed amendment.

3. Gift tax provisions in relation to issue of shares to non-residents

Under the existing provisions, where a closely held company receives any consideration from any person being a resident (subject to certain exceptions), for issue of shares which exceeds the fair market value of such shares, the difference is chargeable to tax.

The Budget now proposes to include the consideration received from 'non-residents' as well within the ambit of the above provisions. While this is another step by the government to prevent generation and circulation of unaccounted money through share premium receipts, the contrary effect of driving away foreign investment from India cannot be ruled out.

4. Taxation on transfer of Market Linked Debenture ('MLD')

Currently, the domestic tax laws do not provide for a specific tax regime to tax gains arising on MLDs (which are typically listed securities that combine features of plain vanilla debt securities and exchange traded derivatives) and were typically taxed as long-term capital gains (subject to period of holding) at 10% plus applicable surcharge and cess.

The Budget now proposes to codify the taxability of MLDs. It has been proposed to tax the gains arising from transfer of MLDs as short-term capital gains at normal applicable rates. While the budget provides guidance and clarity of taxation, however, the same shall result in higher tax outflow.

5. Exemption of income received by a non-resident on Offshore Derivative Instruments ('ODI')

Currently, income of a non-resident from only transfer of *inter-alia* ODI entered into with IFSC Banking Unit ('IBU') is exempt. No exemption is provided on the distribution

of income to the non-resident ODI holders- hence the distributed income is taxed twice in India i.e. first when received by the IBU and second, when the same income is distributed to non-resident ODI holders..

The Budget proposes to do away with the double taxation by providing an exemption in respect of income distributed to non-residents on ODI entered into with an IBU provided such exempted income has been charged to tax in the hands of the IBU.

6. Withholding tax on payment of interest on listed securities to a person resident in India

As per the existing provisions of the Indian domestic tax laws, no tax is required to be deducted on interest income payable to Indian residents on listed dematerialized securities. The Budget now proposes to withdraw the said exemption in light of under reporting of such income by the recipient.

While the proposed amendment aims at reducing tax evasion, the amendment does not address various practical difficulties such as – the provisions require withholding of tax on *inter-alia* interest accrued but not due, however, it fails to appreciate that in case of listed dematerialized securities the payee may be identified only when the interest is due for payment and not when such interest accrues.

7. Withholding tax on certain payments to non-residents with respect to Mutual Fund units

As per the existing Indian domestic tax laws, tax is required to be withheld at 20% by Mutual Funds on income distributed to non-residents. A welcome change is proposed in the Budget, whereby taxes may be withheld at the lower rate of 20% or the rate mentioned in the relevant tax treaty entered into by India with the home country of the non-resident subject to furnishing of certain documents.

8. Other Comments

The Indian domestic tax laws provides for lower withholding at the rate of 5% on interest payable to any non-resident in respect of *inter-alia* monies borrowed in foreign currency under a loan agreement at any time between 1 July 2012 to 1 July 2023 and subject to such other conditions as prescribed therein.

Similarly, a lower withholding at the rate of 5% has been provided in the Indian domestic tax laws on interest payable to any foreign institutional investor ('FII') or qualified foreign investor ('QFI') at any time between 1 July 2013 to 1 July 2023 and subject to such other conditions prescribed therein.

It is imperative to note that the aforesaid sunset clause has been increased from time-to-time in the past, however, the Budget has not proposed any extension on the aforesaid date i.e. 1 July 2023. Where no extension is announced, the same will discourage the foreign borrowings and investments by FII/ QFI in India.

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Italy



The Italian Investment Management Exemption: a new safe harbor for asset manager of foreign investment vehicles

The 2023 Budget Law amended the Italian rules on permanent establishment (article 162 of Presidential Decree No. 917 of December 22, 1986 ("TUIR")), introducing the so-called Investment Management Exemption.

It should be noted that according to paragraph 7 of Article 162 TUIR, a person who operates in the territory of the State on behalf of a nonresident company and carries out its activities as an independent agent and acts for the company as part of its ordinary business does not constitute the existence of a permanent establishment in Italy. However, when a person operates exclusively or almost exclusively on behalf of one or more enterprises to which he is closely related, that person is not considered an independent agent, within the meaning of the same paragraph, in relation to each of those enterprises.

The new para.7-ter of Art. 162 introduces within the framework of the rules on personal PE, the presumption of independence -of the asset manager from the nonresident investment vehicle, whether a resident entity or the Italian PE of a nonresident entity, which in the name or on behalf of the said vehicle or its subsidiaries, direct or indirect, *"and even if with discretionary powers, habitually enters into purchase agreements, sale or trading, or otherwise contributes, including through preliminary or ancillary transactions, to the purchase, sale or trading of financial instruments, including derivatives and including equity or asset holdings, and receivables"*.

The "presupposed" independence of the agent, implies *ex lege* the absence of a permanent establishment in Italy, under the following conditions

1. the foreign investment vehicle and its non-Italian tax resident controlled companies are resident or established in States that allow for an adequate exchange of information with the Italian authorities, included in a specific list;
2. the foreign investment vehicle meets the independence requirements that will be established by a Decree of the Minister of Economy and Finance;
3. the asset/investment manager who performs activities within the Italian territory, (i) must not hold any directorship or managing office in the corporate bodies of the foreign investment vehicle and its controlled companies, and (ii) must not be entitled to more than 25% of the profits of the foreign investment vehicle (also considering profit entitlements held by other entities of the group). A Ministerial Decree will determine the profit entitlements that shall be considered for verifying compliance with the threshold under (ii) above;
4. the Italian tax resident asset/investment manager, or the PE of the non-Italian tax resident entity, has received a remuneration that is supported by adequate transfer pricing documentation.

Furthermore, the 2023 Budget law amended art.162 TUIR preventing not only the agency PE but also a material permanent establishment of the nonresident investment vehicle in Italy from being identified as a result of the existence of a fixed place of

business of the investment manager. Specifically, the new co. 9-bis provides that, if the conditions listed above are met, the fixed place of business where a resident enterprise carries out its activities is not considered to be at the disposal of the vehicle merely because the activity carried out by the enterprise benefits the vehicle itself. The Illustrative Report to the Budget Law 2023 clarifies that, this provision applies when the resident enterprise and the foreign vehicle belong to the same group of companies.

As noted in the cited Report, "the change to the domestic notion of permanent establishment responds to the need to mitigate this risk" that "could have strongly deterrent effects with respect to the decision to locate 'asset managers' in Italy".

This new legislative background increases Italy's attractiveness to foreign investors, granting them the opportunity to locate asset managers, as well as their employees and/or collaborators, in Italy without the risk of creating a permanent establishment.

We now await the ministerial decree implementing the legislation above discussed and the Revenue Agency guidelines in order to analyze further application elements of this important opportunity.

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Philippines



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WHT on Income of Foreign Investors in Philippine Securities

Income derived from sources within the Philippines are generally subject to Philippine income taxes. And this includes income derived by non-residents from their investments in securities in the country.

The tax rates on income earned by non-Filipino residents from their investment in Philippine securities vary depending on the classification of the investor and the type of the investment. In any case, non-residents are not required to register as taxpayers in the Philippines for purposes of paying their taxes. Their taxes are paid through the withholding tax system. Under the said system, the income taxes due from the non-residents are collected in advance at source, that is, from the investee/payors of the income who are constituted as the withholding tax agents. These withholding taxes are considered final and the investors are not required to separately report the income.

Interest in Debt Instruments

Interest income derived by foreign individuals, who are non-residents and not engaged in trade or business within the Philippines, is subject to the 25% final withholding taxes. For non-resident foreign corporations (NRFCs), the final withholding tax rate is 20% of the amount of interest earned.

Dividend from Equity Securities

Dividends earned by foreign individuals not engaged in trade or business in the Philippines on their investments in shares of domestic companies are subject to the 25% final withholding tax rate. For NRFCs, the final withholding tax rate on dividends used to be 30%. However, with the amendments in the Tax Code which took effect in 2021,

reducing the corporate income tax rate to 25%, the final withholding tax on dividends was correspondingly reduced to 25%.

The local tax law contains a tax sparing credit provision, which applies to NRFCs. Under this rule, the 25% tax rate can be reduced to 15%, on the condition that the country in which the non-resident foreign corporation is domiciled allows a credit against the tax due from the non-resident foreign corporation taxes deemed to have been paid in the Philippines equivalent to 10%. This deemed paid tax credit is the difference between the regular tax rate of 25% and the 15% reduced tax rate. This 15% reduced rate of may also apply if the country of residence of the corporate stockholder exempts from tax the dividends derived from the Philippines.

Availment of the Provisions of Tax Treaties

Should there be an existing tax treaty between the Philippines and the country of residence of the investor, the preferential tax rates or exemption provided in the respective treaty may be availed. However, there are a number of requirements to be accomplished for the taxpayer to fully enjoy the tax treaty benefits. And this covers all types of income entitled to preferential tax rates or exemption, including dividends and interests.

The availment of tax treaty benefits previously required a mere submission of a proof of residence of the income recipient. However, a 2021 issuance by the tax authority returned the requirement for an application for tax treaty relief, to be filed with the tax office. This has to be done by the recipient of the income or through its representative. Alternatively, the tax rate provided in the treaty may be used by the investee as the withholding tax rate. However, it has to file a subsequent application for confirmation of the propriety of the withholding tax rate applied.

Proposed Revision of the Final Withholding Tax Rates

Part of the government's tax reform program includes a reform in the taxation of the financial sector. A proposed law seeks to reform the taxation of capital income and financial services in the country, by redesigning the financial sector taxation into simpler, fairer and more efficient tax system.

Among the objectives of the proposed law is to promote and develop a tax system that provides neutrality in the tax treatment across financial institutions and financial instruments. This includes harmonization of the rates, such that the rates would be the same regardless of who the investor is and regardless of the nature of the investment instruments. With respect to the interests and dividends, the proposed law fixes the rate at 15% – and this rate applies to both foreign individuals and corporations and to both the dividends and interests.

The current disparities in tax treatment among the difference investment instruments distort investment decisions as the differences in tax rates usually overshadow all other considerations. Should the law be passed, this would minimize the practice of relying on the tax treatment as basis for making investment decision. The passage of the law would also place the country at par with its neighbors in terms of competitive advantage.

Poland



wts saja

1. Reference for preliminary ruling on Polish CIT exemption for self-managed foreign investment funds

A Foreign investment funds qualify for the corporate income tax (CIT) exemption in Poland if they satisfy a set of statutory requirements. The exemption and its conditions were originally introduced in the CIT Act in 2011. They are based on the characteristics of Polish investment funds so that any potential exemption case needs to be viewed through the lens of comparability between foreign funds and Polish exempt funds.

One of the exemption conditions for foreign EU and EEA funds is that they must be managed by entities authorised by competent financial supervision authorities of their home countries.

Ever since that law was introduced, Polish tax authorities have denied the exemption to self-managed foreign investment funds.

In a series of cases resolved by lower-level administrative courts (see, e.g., cases III SA/Wa 237/18, III SA/Wa 728/17, III SA/Wa 1571/18) it was held that self-managed investment funds cannot be considered comparable to Polish investment funds. The argument used by those courts boiled down to the claim that the internal management of a fund is not "as such" authorised by competent financial supervision authorities. Consequently, since such a fund is managed by an entity that is not authorised by financial supervision authorities, the fund is not comparable to Polish investment funds. The reason is that, under Polish law, an investment fund may only be set up via a fund management entity called *towarzystwo funduszy inwestycyjnych* ("TFI" for short), which is the Polish counterpart of the management company. An investment fund and its managing TFI are bound by a special legal relationship focusing on the separation between fund's assets and fund manager's assets as it translates directly into a separation of investment risks and management-related business risks. Therefore, Polish lawmakers had every right to impose a specific fund management set-up as one of the exemption conditions. As their management set-ups differ, there is no comparability between foreign self-managed funds and their Polish counterparts, and the exemption is not available.

However, that interpretation was contested by the Supreme Administrative Court (SAC) in case number II FSK 1866/18 (judgment of 18 November 2020), which involved the question of exemption for a self-managed Luxembourg-based UCITS fund operating in the form of a SICAV. SAC made a point of noting the need to consider the purpose for which and the circumstances in which the exemption was implemented in Polish law, i.e. to end discrimination of foreign investment funds. The court said that there is no duty under UCITS Directive for an investment fund to have a management company. UCITS Directive (Article 29) expressly allows Member States to authorise funds operating as investment companies that have not designated a management company, provided such companies meet the additional criteria laid down in this Article, including a minimum level of initial capital, disclosure of organisational structure and special qualifications of company directors. Therefore, investment funds of this kind may and do exist in other Member States and should not, by reason merely of such an institutional set-up, be discriminated against in any respect in other Member States.

Importantly, SAC held that *"it was obvious that all funds operating under the UCITS Directive must be considered comparable because any interpretation to the contrary would contradict EU legislation as a whole and its purpose, leading to a conclusion that the extension of the principle of free movement of capital onto third country funds is illusory. For those reasons, the requirement of having a management company cannot be considered a dominant or necessary feature used to conclusively establish comparability between investment funds from different countries."*

SAC ruled along these lines also in subsequent cases: II FSK 699/19 (judgment of 2 December 2021), II FSK 2965/18 (judgment of 1 December 2021), and II FSK 2663/18 (judgment of 29 January 2021). Despite that favourable line of authority, the Provincial Administrative Court in Gliwice made an order on 28 November 2022 in case number I SA/GI 942/22 to issue a reference for a preliminary ruling to the Court of Justice of the European Union in the case of a Luxembourg-based company that operates as a specialist investment fund (SIF-SICAV). The Polish court seeks a resolution under Community law to the issue of whether the national law governing the applicability of exemption to self-managed foreign funds is compatible with the UCITS Directive, including especially its Article 29(1).

The legal issue in the main case is whether the UCITS Directive, including in particular its Article 29(1) read in conjunction with Articles 18, 49 and 63 of the Treaty on the Functioning of the European Union, should be interpreted as precluding national legislation from imposing formal (*sine qua non*) requirements for EU or EEA investments funds to enjoy income tax exemptions, specifically the requirement for such a fund to be externally managed by an entity authorised by the competent financial supervision authority in its home country.

The referring court is inclined to conclude that the UCITS Directive should be interpreted as precluding national legislation from imposing formal requirements for EU or EEA investments funds to enjoy income tax exemptions, specifically the requirement for such a fund to be externally managed by an entity authorised by the competent financial supervision authority in its home country.

The outcome of this case will be of fundamental importance for all self-managed funds operating as investment companies, including primarily for Luxembourgian SICAVs.

2. Finance Minister's public tax ruling on disclosure duties of real estate companies

Polish corporate income tax law contains special regulations on real estate companies. A "real estate company" means any entity, other than a natural person, which is required under accounting law to prepare a balance sheet and:

- › if the entity is a start-up, then, as at the first day of the tax year (or financial year), at least 50% of the market value of its assets is represented directly or indirectly by the market value of real properties situated in Poland or rights thereto and the value of such real properties is more than PLN 10 million;
- › if the entity is not a start-up, then:

- as at the last day of the year preceding the tax year (or financial year), at least 50% of the carrying value of its assets is represented directly or indirectly by the carrying value of real properties situated in Poland or rights thereto; and
- the carrying value of such real properties is more than PLN 10 million; and
- in the year preceding the tax year (or financial year), at least 60% of total taxable gross income or accounting revenue underlying its net profit/loss was represented by income from leases, tenancies, sub-leases, sub-tenancies, leasing or contracts of similar nature, or from transfers of title, all involving real properties or rights thereto, or from shares in other real estate companies.

Polish law imposes a number of duties on real estate companies, including the duty to disclose entities which directly or indirectly hold shares, interests, participation units or similar rights in them, and the number of such rights held by each of such entity.

Also, shareholders and partners of real estate companies must disclose the number of shares, interests, participation units or similar rights they hold directly or indirectly in each real estate company.

By its definition (which in Polish uses the general term "spółka", as in the Latin *societas*), a real estate company includes not only a company (corporation) proper but also any other entity, other than a natural person, which is required to prepare a balance sheet. This may mean an unincorporated entity liable to income tax or a partnership not liable to this tax.

Regulations on real estate companies raised a number of concerns, and as a consequence the Finance Minister issued public tax ruling no. DD5.8203.7.2022 on 28 February 2023 concerning the disclosure duties of real estate companies and taxpayers who hold shares in such companies. The ruling makes it clear that:

- › real estate companies must report the following:
 - any entities whose direct or indirect holdings in those companies are:
 - shares, partnership interests, participation units or similar rights conferring at least 5% of total votes, or
 - partnership interests conferring the right to at least 5% of profits, or
 - at least 5% of total participation units or similar rights; and
 - the number of shares, units, rights or interests held by each such entity;
- › any taxpayers holding the following in any real estate company, whether directly or indirectly:
 - shares conferring at least 5% of total votes, or
 - partnership interests conferring the right to at least 5% of profits, or
 - at least 5% of total participation units or similar rights,

must report the number of such shares, interests, participation units or similar rights, whether held directly or indirectly in that company.

Those disclosure duties apply to both Polish tax residents and non-residents.

The disclosures must be current as at the last day of the real estate company's tax year (or financial year if the company is not liable to corporate income tax).

In that context, please note that 31 March 2023 is the due date:

- › for a real estate company to disclose entities having rights or interests in it (form CIT-N1),
- › for taxpayers holding shares, interests or rights in a real estate company to disclose those shares, interests and rights and any intermediary entities (form CIT-N2).

Given the structure of form CIT-N2, non-residents must have Polish tax IDs (NIP) in order to be able to comply with the above disclosure duty.

The ruling also clearly confirms that the disclosure duty arises due to the mere fact of having a direct or indirect holding in a real estate company. As such, the duty does not depend on whether or not the holding has generated any income during the given tax year.

The disclosure duties apply to both real estate companies (including potentially also entities that are unincorporated or are not liable to income tax) and holders of shares or interests in them (shareholders, partners). As such, the real estate company legislation and the related disclosure duties have relevance also for foreign real estate funds operating in Poland and for other entities engaged in investing in Poland (e.g. investment funds, holdings, foundations).

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Please note that, last year, the due date for making real estate company disclosures was deferred. This year however, at least for now, the reporting deadline has not been postponed.

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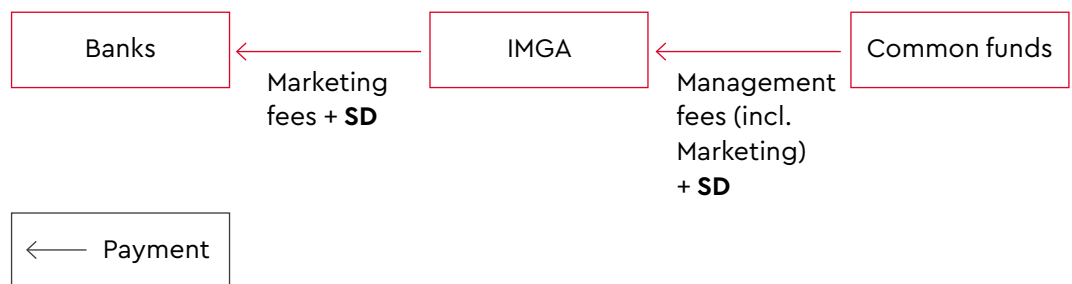


ECJ rules that marketing of shares in common funds falls within the scope of the Council Directive concerning indirect taxes on the raising of capital (Case C-656/21)

On 22 December 2022, the European Court of Justice ("ECJ") issued a ruling on Case C-656/21, stating that article 5(2)(a) of the Council Directive concerning indirect taxes on the raising of capital ("Directive 2008/7/EC") *"must be interpreted as precluding national legislation which provides for the imposition of stamp duty on, first, the remuneration received by a financial institution from a common fund management company for the supply of marketing services for the purposes of new capital contributions aimed at the subscription of newly issued shares in funds and, second, the amounts which that management company receives from common funds in so far as those amounts include the remuneration which that management company has paid to financial institutions in respect of those marketing services"*.

The claimant – IM Gestão de Ativos ("IMGA") – is an asset manager in the fund management industry in Portugal. IMGA held a portfolio of 31 common funds traded through a network of financial institutions, that marketed the shares issued by the common funds, with the aim of raising new capital contributions.

Under Portuguese tax law, stamp duty ("SD") is levied, at a rate of 4%, over commissions charged by financial institutions as consideration for financial services. Thus, for the provision of the services above the banks charged fees to IMGA (as fund manager), accrued with Portuguese SD. The amount incurred with marketing fees was then included in the amount of management fees charged by IMGA to the common funds. This commissions' structure may be illustrated as follows:



The case was filed in Portugal by IMGA based on two main grounds:

- (i) Double taxation of a single supply of services on the part of the fee charged by IMGA to the common funds that reflects the marketing fees; and
- (ii) Fees charged for the marketing of new subscriptions for shares in common funds should not be subject to any form of indirect tax, pursuant to article 5(2)(a) of Directive 2008/7/CE.

The first plea was denied by the Portuguese Arbitration Court. With regards to plea (ii) above, the Arbitration Court referred two questions to the ECJ, asking whether article

5(2) of Directive 2008/7/CE precludes a national legislation that (i) imposes SD is levied on fees charged by banks to fund management companies for gaining new subscriptions for shares and (ii) imposes SD is levied on fees charged by fund management companies to the common funds in the part where these include the fees charged by the banks to the fund management companies.

In this judgement, the ECJ underlines that Directive 2008/7/EC firstly implies an assessment on whether the services relate to the substance of the raising of capital. The ECJ concludes that services relating to the marketing of new subscriptions for shares in common funds do meet that requirement. Although this is not specifically mentioned in the decision, the reasoning of the ECJ was impacted by the fact that the marketing was for the subscription of shares. Rather than stating that marketing fees that are embedded in global fees cascading towards common funds shall not be subject to multiple layers of taxation (SD), ECJ's view is focused on an objective analysis – the services being connected with the raising of capital.

The ECJ clearly states that, in light of the objectives pursued by Directive 2008/7/EC, a broad interpretation of article 5 is required, as to ensure the practical effects aimed by the prohibitions it lays down are achieved. Thus, the prohibition to tax shall apply whenever taxation is imposed on a transaction forming part of another overall transaction that relates to the raising of capital even if the underlying transaction itself would not be (at least directly) covered as it is not expressly mentioned in the Directive.

In our view this decision is an important landmark on the application in Portugal of the prohibition of taxation of transactions for the raising of capital within the European Union and should allow other management companies to claim a refund of SD paid in Portugal over the past 4 years on fees charged by banks for the marketing of new subscriptions for shares in common funds, as well as management fees charged to its portfolio of funds where they reflect such marketing fees.

It is interesting that, whilst the case brought before the Portuguese Arbitration Court was partially based on (inadmissible?) economic double taxation, this was not the focal point of the ECJ's decision and ultimately double taxation was not even deemed incompatible with Portuguese or EU law. Differently, the Portuguese Arbitration Court was led to conclude that SD should not apply in this case, as the fees would indirectly relate to the raising of funds.

The ECJ ruling also creates leeway for the discussion on whether SD levied on other commissions that are part of transactions to raise capital (e.g., commissions charged by financial institutions in the context of issuance of bonds) fall within the scope of the prohibition laid down in article 5(2) of Directive 2008/7/CE.

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Three Finnish public sector pension institutions may be comparable with the Swedish AP funds and be granted a refund of WHT levied on dividend income

The Supreme Administrative Court in Sweden (SAC) decided on January 24, 2023 to request a preliminary ruling from the Court of Justice of the European Union (CJEU), regarding whether the Swedish tax treatment of foreign public pension institutions is in conflict with the free movement of capital under the Treaty on the Functioning of the European Union (TFEU).

The ruling concerns three Finnish public sector pension institutions subject to withholding tax on dividend income derived from shares in Swedish limited liability companies. The pension institutions have requested a refund of the withholding tax, claiming that they should be seen as comparable to the Swedish AP funds (Allmänna pensionsfonder), which are part of the Swedish state and therefore exempt from tax. The requests have been denied by the lower administrative courts. However, after the European Commission initiated an infringement procedure against Sweden, SAC has requested CJEU to issue a preliminary ruling on this matter.

Under this ruling on whether the Swedish tax treatment is discriminatory or not, the CJEU is to take a position on whether the Finnish public sector pension institutions are in an objectively comparable situation with the Swedish AP funds, which is an assessment that potentially may be interesting for other non-Swedish pension funds/investors as well.

Comparable situations?

It is the Finnish pension funds' position that Finnish and Swedish pension systems have the same type of legal structure, are financed in the same way and have the same societal function and purpose. Even the respective pension system institutions work in almost the same way. Two of the three Finnish pension funds are – in the same way as the Swedish AP funds are part of the Swedish state – part of the Finnish public administration. Furthermore, the Finnish pension funds declares that both the AP funds and the Finnish pension institutions are among the largest asset managers in their respective countries and conduct very extensive capital investment activities. In addition, the AP funds and the public Finnish pension institutions are both exempt from income tax in their respective home countries.

In the context of the infringement procedure, the Commission has argued that the Swedish legislation treats public pension institutions from other Member States less favorably than the Swedish AP funds, regardless of their activities and objectives or how they are regulated, organized, and financed. It is the SAC's interpretation that these circumstances then may be circumstances that should be taken into consideration under the assessment. SAC has within the scope of the preliminary ruling for instance requested whether it is these and/or other criteria that should be decisive under the assessment, whether the comparison should be made with the Swedish state as such or only with the AP funds themselves and if it is to any significance that the Finnish pension institutions also fulfill certain other tasks than those performed by the AP funds.

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United Kingdom UK IME Investment Transactions List updated with crypto assets



Hansuke

The 2022 Consultation

Following a consultation in 2022, HMRC has now extended the scope of the UK Investment Manager Exemption (UK IME) to include direct crypto asset transactions.

UK IME was previously introduced to protect the UK-funds management industry; to ensure that a non-UK fund vehicle would not be subject to tax when transactions are conducted on its behalf by a UK resident investment manager. However, prior to the 2022 consultation, 'the whitelist/investment transactions list' (ITL) which sets out the 'investment transactions' that UK IME is applied to, did not expressly include crypto assets. Due to the lack of clarity over how the IME applied to crypto-asset trading, UK investment managers were unable to provide discretionary investment management services to offshore fund vehicle trading direct crypto assets. This limited UK investment managers' crypto asset trading to futures and options contracts as given in the ITL, or otherwise structuring arrangements for their investment management to occur outside the UK. In the initial consultation HMRC had proposed to only include assets utilising cryptography and distributed ledger technology to validate transactions.

The 2023 Update

Following the conclusion of this consultation, UK IME has been updated to introduce regulation on certain crypto assets as 'investment transactions', from the accounting periods from 19 December 2022 onwards for corporate entities. UK investment managers can now trade in crypto assets directly, without the risk of the non-UK entity or arrangement being subject to UK tax due to these transactions. This extension only applies to UK IME, despite HMRC inviting stakeholders to comment on whether the proposal should be carried over to other UK tax legislation that references ITL, such as exempt unauthorised unit trusts, approved investment trusts and diversely owned reporting offshore funds. At the moment there is insufficient demand for such an extension as institutional investor interest is primarily in equity issued by crypto asset market platforms more so than crypto assets themselves.

This is in keeping with other recent Government consultations being updated for crypto assets including updates to the Financial Services and Markets Act (FSMA) requiring crypto asset financial promotions to comply with Financial Conduct Authority (FCA) rules. This update also contains a degree of 'future-proofing', by remaining relevant to likely upcoming developments and innovation in crypto asset trading and investment management.

Definitions of crypto assets in the UK IME

The definition of crypto assets in the UK IME update is taken in part from the Crypto-Asset Reporting Framework (CARF), published last year by the OECD. What follows is an umbrella definition: "a Crypto asset is a digital representation of value that relies on a cryptographically secured distributed ledger or a similar technology to validate and secure transactions". 'Closed-loop crypto assets' are included, alongside more accepted terms such as 'exchange tokens', 'non-fungible tokens (NFTs)' and 'stablecoins'.

A crypto asset is not 'designated' under UK IME if the crypto assets represents rights in, or in respect of:

1. Transactions which would not fall within the existing investment transactions list; or
2. Property from a transaction (other than another designated crypto asset) which would not fall within the existing investment transactions list; or
3. The provision of services (if those rights are exercised in the period whilst the crypto assets is held by the offshore fund).

If a designated crypto asset was created or issued by the non-UK resident, an investment manager or parties connected to them, it is excluded from the ITL.

HMRC is set to publish further guidance to assist with the interpretation of these new guidelines.

OECD MDR regulations to be implemented from March 2023

On 17 January 2023, the International Tax Enforcement Disclosable Arrangements Regulations 2023 (the Regulations) were laid before the House of Commons. These regulations implement the OECD's Mandatory Disclosure Regime (MDR) rules and will come into force on 28 March 2023. Simultaneously, EU DAC 6, through SI 2020/25, will be entirely repealed in the UK from that date.

Compliance with these rules may present difficulties to those not regularly reporting information to HMRC already, such as under the Common Reporting Standard (CRS). In the wake of Brexit and the Covid-19 pandemic, the UK announced that instead of implementing fully the MDR rules as intended initially, only hallmark D from the EU DAC6 reporting regime would continue to apply. Hallmark D constitutes the use of opaque offshore structures (OOS) and CRS avoidance arrangements, applying to intermediaries that design or market OOS and CRS avoidance arrangements. HMRC has confirmed that the updated UK Regulations will no longer necessitate backdated reporting of pre-existing arrangements dating before 25 June 2018.

Intermediaries must report within 30 days of making a CRS avoidance arrangement, making an OOS available or providing related services to either arrangement. These requirements are retrospective in so far that they only apply to intermediaries that are 'promoters' and not 'service-providers', with the distinction between the two provided in the Regulations. Unlike the DAC6 rules, the Regulations do not require arrangements to be 'cross-border' i.e. in concerning at least one EU member state or the UK, to be reportable to the UK. Arrangements may also need to be reportable to both the UK and in other jurisdiction if that another jurisdiction operates similar rules.

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