



ECJ *Aberdeen Property Fininvest Alpha* case (C-303/07) – decision

Finnish corporate income taxation – withholding tax on dividends paid to a Luxembourg tax-exempt SICAV – compatibility with EC Treaty – freedom of establishment

On June 18, 2009, the European Court of Justice (ECJ) issued a decision in the case between Aberdeen Property Fininvest Alpha Oy and the Finnish tax authorities.

The ECJ decided that dividends paid by a Finnish company to a Luxembourg SICAV should not be subject to Finnish withholding tax (WHT), if dividends paid to a Finnish company are tax exempt. Otherwise, the Finnish legislation would contravene the EU freedoms. This is in line with the principles previously set out by the ECJ in the *Denkavit* (C-170/05) and the *Amurta* (C-379/05) cases.

The decision opens possibilities for Luxembourg SICAVs and tax-exempt corporate investment funds in other EU Member States to claim WHT refunds in the Member States where they make investments. It also contains arguments which may support transparent mutual funds in claiming non-discriminatory treatment in those source States. Non-EU/EEA investment funds, particularly those resident in countries that have a double tax treaty with the EU/EEA source State concerned, may find additional arguments in the recent ECJ decisions in the *EU Commission v Netherlands* case (C-521/07, see Euro Tax Flash 115) and the joint cases *KBC Bank* and *Beleggen, Risicokapitaal, Beheer NV* (C-439 and 499/07, see Euro Tax Flash 118).

Facts and legislative background

Prior to January 1, 2009, dividend payments from one Finnish company to another Finnish company were, apart from certain exceptions, tax exempt. Dividend payments to a foreign company, however, were subject to WHT. In accordance with the EU Parent Subsidiary Directive, the WHT was not levied if the recipient of the dividends was a company established in another EU Member State that holds the minimum participation and is mentioned in the Annex to the Directive. Some double tax treaties provide for a reduced rate.

The present case concerns the Finnish company Aberdeen Property Fininvest Alpha Oy (Aberdeen), which is a wholly owned subsidiary of a Luxembourg SICAV, an open-ended investment company. Aberdeen requested an exemption from Finnish WHT for its dividend payments to the SICAV, but the Finnish tax authorities declined this request.

The ECJ decision

The freedom of establishment applies

The ECJ first observed that the Parent Subsidiary Directive is not applicable in the present case since a SICAV is not mentioned in the list of companies referred to in Article 2(a) of the Directive and is exempted from taxation in Luxembourg.

Further, the ECJ noted that the Finnish rules on WHT on dividends may come under both the freedom of establishment and the free movement of capital. Though, since the present case concerned dividends paid by a wholly owned subsidiary of a Luxembourg SICAV, which could, therefore, clearly exercise a definite and decisive influence over the subsidiary's decisions, the ECJ decided that this case relates exclusively to the freedom of establishment. Any effects on the free movement of capital would be an unavoidable consequence of an obstacle to the freedom of establishment.

The Finnish rules constituted a restriction on the freedom of establishment

Referring essentially to the *Denkavit* and *Amurta* cases, the ECJ recalled that if a Member State has chosen to eliminate the taxation of dividends in the hands of resident shareholders, it must apply the same treatment to non-resident shareholders, since the situations of resident and non-resident shareholders are in that respect comparable.

Since Finland exempted resident companies from taxation on dividends, the levy of a WHT on dividends paid to a Luxembourg SICAV constituted a restriction on the freedom of establishment. In that respect, the ECJ stated that the following elements are irrelevant:

- That, in Finnish law, there is no company type with a legal form identical to that of a SICAV, since EU Member States' company law has not been fully harmonized at EU level and the freedom of establishment would otherwise be deprived of all effectiveness;
- That the SICAV's income is not taxed in Luxembourg; and
- That the taxation of the dividends would rather take place at the level of the SICAV's shareholders.

In addition to comparing a Luxembourg SICAV with a Finnish company, the ECJ found that there was no further need to examine the relevance of differences that may exist between a Luxembourg SICAV and a Finnish investment fund.

The restriction was not justified

Finally, the ECJ rejected the Finnish government's attempts to justify the restriction:

- The Finnish rules do not specifically target wholly artificial arrangements designed to circumvent national legislation and cannot, therefore, be justified by the need to prevent tax avoidance;
- Since Finland does not tax Finnish companies on dividends, it cannot justify the taxation of EU companies on such income by a need to safeguard the balanced allocation between Member States of the power to tax; and
- The exemption from WHT of dividends in a purely Finnish context is not subject to the condition that the dividends received are distributed onward and taxed in the hands of the shareholders of the recipient company. Therefore, there is no direct link between a tax advantage and the offsetting of that advantage by a particular tax levy, which is required for a restriction to be justified by the need to preserve the coherence of a Member State's tax system.

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