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Direct taxation: The European Commission refers the case of Finnish taxation of dividends distributed to pension funds to the Court of Justice

The European Commission has decided to refer the case of Finnish taxation of dividends distributed to pension funds to the Court of Justice. The Commission considers the Finnish provisions to be incompatible with the free movement of capital.

According to the Finnish legislation, dividends paid by a company which is resident in Finland for tax purposes to a non-resident pension fund, are subject to a withholding tax on gross income at a rate of 19,5%.

Finnish pension funds on the other hand are taxed under a special regime: There is no withholding tax, but 75% of dividend income on investment assets is subject to corporation tax. Since the nominal corporate income tax rate is 26%, the resulting tax rate for dividends paid to Finnish pension funds is 19,5%. However, tax is calculated on their net income, i.e. after deduction of costs as well as current pension liabilities. In practice, the effective tax rate on dividend income paid to a Finnish pension fund is therefore lower than 19,5%.

The difference in treatment between foreign and domestic pension funds amounts to an obstacle to the free movement of capital within the meaning of Articles 63 TFEU and 40 EEA. The effect of the legislation is to make cross-border transfer of capital less attractive by de facto taxing dividends transferred to foreign pension funds at a higher rate. The difference in treatment constitutes an arbitrary discrimination which cannot be justified on the grounds provided under Article 65 TFEU.

The Commission's opinion is based on the Treaty as interpreted by the Court of Justice of the European Union in the judgements in *Amurta*, Case C-379/05, of 8 November 2007, and in *Manninen*, Case C-319/02, of 7 September 2004.

It follows from the case-law that the Member States have to refrain from treating dividends distributed to non-resident entities different from dividends distributed to resident entities.

The Commission has already referred cases concerning similar tax provisions in Portugal and Spain to the Court of Justice (IP/08/1817) and sent reasoned opinions to Denmark (IP/09/1018) and Germany (IP/09/1640).

Background

The incriminated provisions are the following:

Section 7 of the Withholding Tax Act (627/1978); Sections 6a, 7, 8(10) and 11 of the Business Income Tax Act (360/1968).

The Commission's case reference number is 2006/4096.

For press releases on infringement cases in the taxation or customs field see:

http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/index_en.htm

For the latest general information on infringement measures against Member States see:

http://ec.europa.eu/community_law/index_en.htm