

CJEU Rules That Swedish Withholding Tax on Dividends to Foreign Public Pension Institutions Is Contrary to EU Law

On 29 July 2024, the Court of Justice of the European Union (CJEU) rendered its judgment in the case *Keva, Landskapet Ålands pensionsfond and Kyrkans Centralfond versus Skatteverket* ([C-39/23](#)). The case concerned the Swedish withholding tax treatment of dividends distributed by Swedish companies to Finnish pension funds governed by public law. As no Swedish tax is levied on dividends to Swedish pension funds governed by public law, the question was whether this was compatible with the free movement of capital under Article 63 of the Treaty on the Functioning of the European Union (TFEU). The CJEU decided that Article 63 TFEU must be interpreted as precluding legislation of a Member State under which dividends distributed by resident companies to non-resident pension institutions governed by public law are subject to a withholding tax, whereas dividends distributed to resident pension funds governed by public law are exempt from such tax. The Swedish legislation was thus considered to be in conflict with EU law and it must be possible for non-resident pension funds governed by public law to request a full refund of withheld tax or receive dividends from Swedish companies without withholding tax.

Background and facts

Swedish pension funds governed by public law are part of the Swedish state and thus tax exempt. Other Member States' pension funds which are also governed by public law are however required to pay tax, in this case withholding tax on dividends. The applicants, three Finnish pension funds, are not taxed on dividends in Finland and could thus not deduct the Swedish tax as provided for in the Nordic Tax Convention. The Finnish pension funds applied to the Swedish Tax Agency (STA) for a refund of the tax on dividends, supported by a claim that such tax treatment is contrary to the free movement of capital. The applications were rejected by the STA on the ground that the situation of the applicants was not objectively comparable to that of pension funds governed by Swedish public law. After the applicants first brought an action through the Swedish courts, the Supreme Administrative Court (SAC) granted the applicants leave to appeal and requested a preliminary ruling from the CJEU.

The CJEU's judgment

Firstly, the CJEU observed that the differential tax treatment of resident versus non-resident pension funds governed by public law was a restriction on the free movement of capital. The CJEU thus disregarded the Swedish government's argument, based on the OECD Model Tax Convention, that a state is not required to grant to public bodies of another state the same advantages which it grants its public bodies. Furthermore, the CJEU dismissed the Swedish government's argument that Member States are allowed to organise their own social security systems, stating that they must comply with EU law when doing so.

Secondly, the CJEU assessed if the domestic situation was objectively comparable to the cross-border situation. The objectives of the exemption which the resident pension funds are granted are to avoid a circular flow of public resources as well as to promote the stability and viability of the Swedish pension scheme. The CJEU found that the circumstances of a Swedish pension fund do not necessarily put it in a different situation than a non-resident pension fund. The CJEU also stated that the objectives could also be achieved by granting non-resident pension funds the same benefit. The relevant distinguishing criteria between resident and non-resident pension funds i.e. the place of residence of the funds, and aspects such as the collection of pension contributions, the payment of pensions and the legal form of the fund concerned did not appear to have a direct link with the tax treatment of the dividends received from Swedish companies. Thus, the CJEU found that the pension funds are objectively comparable.

Lastly, the CJEU examined whether there is an overriding reason in the public interest which could justify the restriction on the free movement of capital in this situation. The Swedish government contended that the state tax exemption is intended to prevent an excessively costly circular movement of public funds and to uphold Swedish social policy objectives. Nevertheless, the CJEU determined that administrative drawbacks alone do not justify a restriction. Moreover, the necessity to maintain a balanced allocation of taxing rights among Member States cannot be used as a justification when, as in this

instance, the Member State has opted not to tax its own resources. The Swedish legislation was therefore found to be incompatible with the free movement of capital.

Takeaway

Earlier Swedish jurisprudence needs to be reevaluated in light of the CJEU's judgment. Since the Swedish state exemption covers more than just pension funds, the effects of the judgment could potentially extend to other types of state and municipal investors. The case has now been referred back to the SAC for a final ruling. Following this ruling, it is reasonable to expect that Sweden will make its legislation EU compatible. Meanwhile, foreign pension funds governed by public law and other state and municipal investors could consider applying for a withholding tax refund based on the principles established by the CJEU's judgment. The statute of limitations for withholding tax reclaims is five years following the year when the withholding tax was paid. Therefore, withholding tax paid in 2019 must be reclaimed no later than 31 December 2024.

Let's talk

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