

ATOZ ALERT

Comparability of Investment Funds – another Finnish referral to the Court of Justice of the European Union – another positive signal

22 October 2021

Recently, an Advocate General's opinion (the "Opinion") on Finnish CJEU case C-342/20 (the "Case") has been published.

The Opinion is very interesting as the Case reviews the comparability of a foreign investment fund to Finnish funds and, consequently, the possibility for a foreign investment fund to obtain a withholding tax ("WHT") exemption in Finland.

The Case concerns the WHT treatment of a foreign corporate based investment fund, in this case a French Real Estate Investment Company. The essence of this Case is, however, related to the question whether the new Finnish tax regime applicable from the beginning of 2020 – allowing tax exemption only for foreign contractual based investment funds – is in line with the EU law. Although this Case concerns a French corporate based fund, the Finnish Supreme Court has decided to postpone their decisions on several cases related to US investment funds and wait for the C-342/20 CJEU decision.

According to the Advocate General's opinion, the new Finnish tax legislation concerning the tax exemption of foreign investment funds contains a restriction of the free movement of capital enshrined in the Treaty on the Functioning of the European Union ("TFEU"). The opinion of the Advocate General states clearly that different treatment based solely on the legal form of the foreign investment fund is against the principle of free movement of capital.

The Opinion is in line with the previous CJEU judgment related to Finland, which was published this spring (C-480/19), and we would expect that also the actual decision of the CJEU in case C-342/20 will follow this trend.

As we informed you in our [ATOZ Alert](#) dated 26 June 2019, case C-480/19 concerned a UCITS fund incorporated as a Luxembourg corporate-type investment fund (SICAV) and the taxation of a Finnish natural person who has invested in this type of fund.

In the decision published, the CJEU ruled that treating income differently based solely on the legal form of the paying entity is against the principle of free movement of capital as provided by TFEU.

Although the C-480/19 case concerns the tax treatment of a Finnish individual, this decision is very relevant also when considering comparability of foreign investment funds and Finnish investment funds, as the CJEU states

clearly in its decision that rejecting the comparability based on the legal form is not acceptable. It should be noted that this case concerns the years when the previous Finnish law was applied.

We would expect that after the decision on case C-342/20 is issued – provided that the CJEU’s judgement is aligned with the opinion of Advocate General – the Finnish courts and the Finnish Tax Authorities cannot treat US trust and corporate based investment funds in a restrictive manner based on the new Finnish Income Tax Act.

In practice, if the CJEU judgment on this case follows the Opinion, we would expect that US trust and corporate based investment funds (both listed and non-listed) should be able to apply for WHT exemption cards after a few years break. It is worth recalling that after the new Finnish tax regime became applicable in 2020, listed trust type funds, i.e., Exchange Traded Funds (“ETF”) under the form of a Delaware Statutory Trust, were considered not comparable to Finnish contractual-based investment funds, although the same funds were treated as tax-exempt when the previous tax law was in place. Similarly, a 20% WHT has been applied to non-listed trust type funds (i.e., a US mutual fund under the form of a Delaware Statutory Trust) since 2020.

Also pending WHT reclaims of US trust and corporate based investment funds from 2020-2021 are expected to be resolved in favour of the taxpayers if the CJEU’s decision in case C-342/20 is positive. Depending on the specific wording used by the CJEU, even cases in other jurisdictions could be impacted (reserved for the actual comparison in each Jurisdiction).

We will watch out for the decision issued by the CJEU in the coming months.

Can we help? Do you have further questions?



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