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Recent Developments in International Taxation

Finland

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Parliamentary election and government programme

The programme of the new Finnish Government (the 'Government'), led by the Social Democratic Party, bears the title 'Inclusive and Competent Finland – a socially, economically and ecologically sustainable society'. The programme underlines the role of taxation as a tool to reach socially and economically sustainable goals, and includes an entire appendix on measures to combat international tax evasion and aggressive tax planning. The Government plans to introduce, for example, the concept of an economic employer, as well as revise the group contribution system to determine when utilisation of foreign final losses is allowed.

Up to this point, the Ministry of Finance has recommended in its report that an exit tax for private persons concerning capital gains tax should not be introduced due to the challenges involved. An exit tax concerning gift and inheritance tax will be discussed in a separate report that is to be published during 2020–2021.

Additionally, a working committee has been set up to reform the national transfer pricing adjustment provision so that it can be applied to the same extent that as given in the Organisation for Economic Co-operation and Development (OECD) transfer pricing guidelines. The scope of the current transfer pricing adjustment provision has been narrow due to a 2014 ruling of the Supreme Administrative Court, which essentially prohibited recharacterisation (eg, from debt to equity) and limited adjustments to applied pricing within the legal form chosen by the taxpayer. The same ruling also limits the practical effects of the 2020 OECD guidance on transfer pricing of financial transactions.

Tax reform of investment funds and other investments products

Significant reforms were introduced as of tax year 2020 to better align the taxation of different kinds of investments.

Investment funds

To be tax exempt, investment funds must now meet certain conditions related to, for example, a minimum number of unit holders, distribution and open-endedness. In general, the requirements are stricter for closely held funds, real estate funds and funds located outside the European Economic Area (EEA). Before the reform, investment funds were automatically tax exempt.

The reform also sets out criteria for when foreign funds are granted the same tax treatment as Finnish funds. All foreign corporate funds are subject to tax based on their legal form, even if they are functionally similar to Finnish tax-exempt (contractual) funds, which raises doubts about compatibility with European Union freedoms.

Insurance wrappers

The attractiveness of insurance wrappers has reduced because of, for example, the abolition of the possibility to withdraw invested capital without triggering taxation.

In addition, tax deferral – until the withdrawal of funds from the wrapper – is completely forfeited under a new rule if the policy owner's control over the underlying assets is too close. For instance, the explicit or implicit possibility to, for example, exercise voting rights in the underlying investment object or bypass the insurance company when giving purchase and sell orders (so-called 'self-management') causes complete forfeiture of the tax deferral.

Share savings account

A share savings account has been introduced, allowing private persons to invest a maximum of €50,000 in listed shares and to benefit from tax deferral – until the withdrawal of funds from the account – on dividend income and capital gains. The adopted model seems quite narrow when compared with that of certain other countries.

In practice, the adopted model discourages investment in foreign shares because no credit for foreign withholding tax is available as such foreign-source income is tax exempt in Finland (until withdrawn from the account). To date, there is no legal practice regarding when foreign share savings accounts could obtain exemption from Finnish dividend withholding tax based on EU freedoms.

Implementation of EU directives

Hybrid mismatch rules

As of tax year 2020, as required by EU Anti-Tax Avoidance Directives (ATADs) 2016/1164 and 2017/952, ('ATAD I and II'), Finland has applied an extensive array of rules to counter hybrid mismatches relating to, among others, financial instruments, hybrid transfers, permanent establishments, tax residence and imported mismatches. The rules are aimed at tackling deduction-no inclusion and double deduction outcomes resulting from characterisation discrepancies between two jurisdictions.

Before the implementation, Finland only had one hybrid mismatch provision, which targeted tax-deductible dividends and had its origins in Directive 2014/86 amending the Parent-Subsidiary Directive.

The ambiguity of the concept of 'structured arrangement', which causes the mismatch rules to apply even if the usual control thresholds are not met, causes uncertainty despite the Federal Tax Authority's (FTA's) guidance on the new law.

Exit tax for companies

As of tax year 2020, as required by ATAD I and II, Finland applies an extensive array of exit tax rules for companies. Under the rules, Finland taxes unrealised gains where Finland's taxing rights cease, for example, due to the transfer of residence or transfer of assets to a foreign permanent establishment.

Prior to the reform, Finland already had exit tax rules for companies applicable to cross-border corporate rearrangements, transfers of assets from a Finnish permanent establishment and transfer of the registered domicile of a *societas europaea* (SE). Some of the old rules have conflicted with EU basic freedoms and have therefore not been fully applied in practice.

Currently, companies are Finnish tax residents only if they are registered in Finland or if they are established under Finnish law, meaning that it should not be possible for a foreign company's tax treaty country of residence to shift to Finland. However, the Government plans to broaden the national tax residence concept by including the place of effective management.

Mandatory disclosure regime

Rules concerning mandatory disclosure and exchange of cross-border tax arrangements based on Directive 2018/822 ('DAC 6') impose an obligation on taxpayers and intermediaries to report certain tax-related cross-border arrangements to the Tax Administration. Particular intermediaries, for example, attorneys, are exempt from the reporting obligation based on national legal professional privilege.

Arrangements implemented between 25 June 2018 and 30 June 2020 have to be reported by 31 August 2020, that is, Finland has not decided to utilise the option to postpone reporting by six months due to the Covid-19 pandemic.

International tax dispute resolution

Legislation implementing Directive 2017/1852 regarding international tax dispute resolution entered into force on 30 June 2019. Generally, applications must be filed as of 1 July 2019, and they must concern tax years commenced on or after 1 January 2018 to fall within the scope of the legislation. The legislation, for example, extended the binding arbitration process from transfer pricing disputes to all types of double taxation disputes between EU countries.

Tax treaties

The application of the OECD Multilateral Instrument (MLI) started with some countries, for example, the Netherlands and Belgium, as of tax year 2020. Finland made very broad reservations to the MLI, which is why the most important practical effects of the MLI are expected to be the principal purpose test and the mandatory arbitration procedure.

Amendments to the Nordic multilateral tax treaty, which is excluded from the MLI, apply as of tax year 2020. The amendments aim to satisfy the minimum standards for tax treaties agreed in the OECD's Base Erosion and Profit Shifting (BEPS) Project.

There is still no valid tax treaty between Finland and Portugal after the old treaty was terminated by Finland with effect as of 1 January 2019.

Case law

Transfer taxation

The Finnish transfer tax (levied on transfers of shares and real estate at rates of 1.6 to four per cent) is generally calculated on the purchase price and the value of any other consideration, but also on certain other payments and liabilities as defined in the Transfer Tax Act. The ambiguous definition of the transfer tax base has caused extensive tax controversy, especially concerning commercial real estate transactions, where the euro amounts are often significant.

The Supreme Administrative Court has, inter alia, concluded that the following items are not included in the transfer tax base:

- shareholder loan receivables sold in connection with the sale of shares in an ordinary company (SAC 2019:121);
- the buyer's commitment to pay the target housing company's future liabilities arising from the housing company's construction agreement with the seller (SAC 2019:122); and
- repayment of the target non-mutual real estate company's loan from an independent bank using funds from the buyer's equity injection into the target company (SAC 2019:136).

Deductibility of foreign final losses

The Supreme Administrative Court viewed, in a number of cases (eg, SAC 2020:51), that the tax losses of a foreign subsidiary would not transfer to the Finnish recipient company in a cross-border merger. The taxpayer had not sufficiently established that the tax losses were final, as required by case law of the Court of Justice of the EU (CJEU), because it was, in theory, possible that the foreign subsidiary's tax losses could be utilised if the subsidiary was sold to a third company, even if there were domestic limitations on the utilisation of tax losses upon changes of control, or that the foreign subsidiary would receive minor financial or other income.

The rulings reflect Finland's generally strict line towards the cross-border utilisation of tax losses, as evidenced by the EU Commission's May 2020 reasoned opinion that urged Finland to allow cross-border group contribution (otherwise Finland may face a procedure at the CJEU).

CFC taxation

Finland tightened its CFC rule as of tax year 2019 due to the ATAD. The reform abolished the old exemption, according to which entities in tax treaty countries were usually exempt from CFC taxation, and introduced a requirement to carry out actual economic activity (for entities within the EEA) in order to be exempt.

The Central Tax Board concluded in its final ruling (CTB 2019:35) that a Luxembourg investment company did not carry out actual economic activity because it did not have its own premises, equipment or staff managing day-to-day operations independently in Luxembourg.