SOME REFLECTIONS ON THE CJEU CASE *PENSIOENFONDS METAAL EN TECHNIEK V SKATTEVERKET* AND THE TAX SITUATION OF FOREIGN PENSION FUNDS IN SWEDEN

Per Gyllenstierna*

Introduction

This article focuses on the EU law issues raised in relation to the Swedish treatment of funds, especially the levy of a withholding tax on dividends distributed to foreign pension funds. In short, Swedish pension funds are not subjected to income tax but to a specific tax paid on a notionally calculated yield, based on the government borrowing rate and the value of the funds' assets after deduction of financial costs. In the case of foreign pensions funds, a 30 % withholding tax is levied on the gross-amount of dividends paid to the fund with no deduction for costs allowed. Does this system comply with EU law, especially the free movement of capital? This question subsequently led to a referral to the CJEU in a case concerning the fund *Pensioenfonds Metaal en Techniek* (PMT).[1]

Background

In March 2007, the Commission issued a letter of formal notice regarding the Swedish regulations for taxation of dividends to foreign pension funds. The Commission claimed that foreign pension funds receiving dividends from Swedish

* jur. kand. Per Gyllenstierna, LL.M (Tax) is an independent tax adviser focusing on the tax situation of multi-national groups. He can be contacted at per.gylllenstierna@hotmail.com. Comments on this article are welcome.

1 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT")*, Case C-252/14, ECLI:EU:C:2016:402

companies might be subject to more onerous taxation than Swedish pension funds. In the Commission´s opinion, the Swedish levy of withholding tax discriminated against foreign pension funds by making them less attractive for Swedish investors. Hence, according to the Commission, the Swedish rules were contrary to the free movement of capital.

Sweden defended its legislation. Hence, the Commission in a reasoned opinion asked Sweden to bring these rules into compliance with EU law and subsequently, initiated an infringement procedure.

Initially, in a series of cases, the Swedish Tax Authority (STA) denied foreign pension funds reimbursement of paid withholding taxes. These decisions have been appealed to the courts.[2] The argument put forward by the funds is that in light of the established case law from the Court of Justice of the European Union (CJEU), Swedish and foreign pension funds are in a comparable situation regarding the taxation of dividends. Although the use of different techniques for taxing domestic and foreign pension funds based on the domicile of the fund is not in itself contrary to EU law, the fact that the outcome might differ is arguably discriminatory. The outcome of the different techniques might be difficult to predict exactly and in addition the outcome will vary from year to year. However, does the fact that foreign pension funds *might* be treated less favorably than comparable Swedish pension funds amount to a restriction on the free movement of capital that cannot be justified?

This article examines some of the issues being discussed in Sweden in this respect and some of the arguments that have been put forward.

Outline of the national rules

According to the Swedish Income Tax Act (SITA)[3] as it stood at the time, pension funds were exempt from income taxation by the application of the SITA. Instead, Swedish pension funds and foreign funds with permanent establishments in Sweden are taxed on their investment income under the Act on Yield Tax on Pension Funds[4]. Foreign legal persons that receive dividends on shares in Swedish companies pay tax in Sweden in the form of withholding tax in accordance with the Withholding Tax Act[5]. The Swedish funds are taxed by a flat tax of 15% on a

2 Cejie, Katia; *Begäran om förhandsavgörande eller en fördragsbrottstalan: Beskattning av utländska pensionsstiftelser – ett fall för EU-domstolen*. Skattenytt, 2012, 850-866s.

3 Inkomstskattelagen (1999:1229), Chapter 7, section 2, para. 3.

4 Lag (1990:661) om avkastningsskatt på pensionsmedel.

5 Kupongskattelagen (1970:624).

fictitious yield while foreign funds are taxed on the distribution without any deductions at a rate of up to 30%. In the case of Pensioenfonds Metaal en Techniek (PMT) the tax levied was 15% after the application of the DTC with the Netherlands.

Restriction and comparability

In a case regarding a Luxembourg SICAV (*Luxembourg SICAV case*),[6] the Administrative Court of Dalecarlia denied a claim for refund of a substantial amount of withholding tax. The fund, appealed to the Administrative Court of Appeal in Sundsvall[7] (the ACA) and argued that the higher amount of tax payable for the foreign fund compared to a Swedish fund that is in practice tax exempt amounts to a restriction of the free movement of capital. According to the fund, it is Sweden in its capacity as the source state, that is obliged to mitigate a series of charges to taxation or economic double taxation. The total tax burden is more onerous for a foreign investment fund than for a Swedish investment fund, the fund argued.

The STA considered that the appeal should be denied based on the argument that a Swedish investment fund and a Luxembourg SICAV are not comparable since the Swedish investment fund is formed on a contractual basis and the foreign fund is formed on the basis of Luxembourg company law. Hence, it can be questioned whether the funds are similar or in a comparable situation. Sweden and Luxembourg have agreed that a SICAV is not covered by the Sweden-Luxembourg double tax convention (DTC). Hence, Sweden's taxing right is not limited in that respect. Furthermore, it was arguable that it was the Swedish funds that were discriminated against since they have their dividend income taxed, while foreign funds can capitalize their dividend income to generate further income for the fund, according to the STA.

It should be noted that in the *Luxembourg SICAV case*, the aspect of the legal form of the fund is raised as an argument in the comparability analysis and as an argument for non-comparability between resident and non-resident funds.

The request from both the claimant and the STA that the ACA should request a preliminary ruling from the CJEU was dismissed by the ACA on the basis that the case law in this field is well-established.

---

6 Adminstrative Court of Falun judgement on November 8, 2012 in case no 2465-11 re Fidelity Funds SICAV, Luxembourg. (Luxembourg SICAV case).

7 Administrative Court of Appeal judgement on February 15, 2012 in case no 27-10 re Fidelity Funds SICAV.

First, the ACA accepted the finding of the lower court that the Luxembourg SICAV qualified as a foreign legal person that is entitled to receive the payment of dividends, and, thus, to be considered as a taxable person under the withholding tax law. According to the ACA, a Member State must exercise its competence in the field of direct taxation in compliance with EU law. It then follows that the correct comparable for the tax treatment of the foreign fund must be the tax treatment of a Swedish investment fund in a similar situation.

The ACA concluded that these provisions entail that Sweden in fact treats investment funds established outside of Sweden in a manner that might deter investment funds established in other EU Member States from investing in Sweden. These circumstances amount to a restriction of the free movement of capital which is prohibited. The ACA referred to the CJEU ruling in *Amurta*[8] as the basis for this finding.

It seems that the risk of different treatment which might deter investment is accepted as constituting a restriction.

Restitution of withholding tax granted due to lack of justification

A subsequent question is whether this restriction can be justified with respect to the provisions of the Treaty on the Functioning of the European Union (TFEU). This can be the case if either the difference in treatment concerns situations that are not objectively comparable or the difference can be justified by overriding reasons in the general interest.

Whether the foreign and domestic funds are in a comparable situation has to be examined against the backdrop of the purpose of the national legislation.[9] The ACA stated that the aim of the 1990 reform of the Swedish rules in question was to ensure neutrality between indirect and direct ownership.

The ACA further noted that the CJEU has stated that when a Member State enacts rules to mitigate a series of charges to tax, or economic double taxation of profits, which a company of that Member State distributes as dividends, a shareholder that is resident in that Member State, that receives such dividends, is not necessarily in a comparable situation to a shareholder resident in another Member State[10].

8 *Amurta SGPS v Inspecteur van de Belastingdienst/Amsterdam ("Amurta"),* Case C-379/05, ECLI:EU:C:2007:655.

9 *European Commission v. Kingdom of Spain,* Case C-487/08, ECLI:EU:C:2010:310, p. 48.

10 *Aberdeen Property Fininvest Alpha Oy ("Aberdeen"),* Case C-303/07, ECLI:EU:C:2009:377, p. 42.

However, from the point when the origin Member State single handedly or in a double tax convention (DTC) prescribes that not only resident but also non-resident shareholders are subject to tax in respect of dividends received from a resident company, the situation of the resident and the non-resident shareholder is comparable[11].

The ACA noted that both Swedish and foreign investment funds were subject to tax for dividends distributed from Swedish companies. The circumstances indicate that they are in comparable situations. Swedish internal rules allow for a deduction for dividends distributed which gives the Swedish funds an incentive to distribute their profits to reduce their tax base. According to the ACA, a foreign fund is subject to withholding tax without the possibility of such a deduction, and hence, such a fund is treated less favorably than a Swedish fund in a comparable situation.

This difference in treatment is not offset by the application of the Swedish-Luxembourg double tax convention (DTC) since the SICAV is explicitly not covered by the DTC.

Thus, the ACA found that the difference in treatment was not justified by a need to safeguard the cohesion of the tax system because the Swedish rules lacked the direct link between the tax advantage concerned and the offsetting of that advantage by a particular tax levy.[12]

The fact that Sweden lacks taxing jurisdiction over the income that is transferred to the owner in the foreign jurisdiction did not alter this finding. The ACA ruled that the difference in treatment could not be justified.

A factual analysis of the operation of the Swedish rules seems to have led the ACA to the conclusion that the situations of the foreign and domestic funds were comparable.

Classification of foreign funds

As seen above, a SICAV is considered an alternative investment fund i.e., an investment fund in the form of a legal person. A fund that is a special purpose

11 *Aberdeen Property Fininvest Alpha Oy ("Aberdeen"),* Case C-303/07, ECLI:EU:C:2009:377, p. 43.

12 Compare *Aberdeen Property Fininvest Alpha Oy ("Aberdeen"),* Case C-303/07, ECLI:EU:C:2009:377, p. 73-74.

fund is not covered by the scope of the UCITS directive[13], and hence, the material rules applicable to the fund are not harmonized at an EU level. For funds that fall within the scope of the AIFM-directive[14], there are no EU harmonized rules regarding such funds, only regarding their managers.

One line of argumentation regarding comparability, as seen in the cases mentioned above, is based on the legal form of the fund in question. A Swedish fund is, according to domestic law, not a legal person but considered to be a contractual arrangement. Even though not a legal person, a fund at that time was considered to be a taxable person, according to the Swedish Income Tax Act (SITA). When applying the SITA to a fund, the rules apply equally to "comparable foreign arrangements"[15] unless otherwise stated. The question then, for example, is how to treat a SICAV that, according to the legal system where it was created, is considered to be a legal person. From a Swedish civil law perspective, a fund can be either of a contractual nature, a trust or a legal person. According to a Legal Opinion from the STA[16] released after a reform of the taxation of funds and stakeholders in 2012, the STA argues that the purpose and functioning of the fund should be the basis for classification rather than the legal form of a fund.

This argument based on the legal form of the fund was dealt with by the Supreme Administrative Court (SAC) in a recent case[17] which has caused some debate. In this recent case, the Supreme Administrative Court (SAC) held that a foreign fund, which is a legal person, cannot be considered to be a "comparable foreign arrangement" to a Swedish special purpose fund in respect of the tax treatment according to domestic legislation. In the *Luxembourg SICAV* case, mentioned above, restitution of paid withholding tax was granted regardless of the fact that the foreign investment fund in question was a legal person. Similarly, in the CJEU case, *Aberdeen*[18] which is often cited in these matters, the Finnish taxation at

13 Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS) as Regards Depositary Functions, Remuneration Policies and Sanctions. L:2014:257:TOC.

14 Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers (AIFM). L:2011:174:TOC.

15 SITA Ch. 2, Sec 2.

16 23 maj 2012 - "*Vad avses med utländska investeringsfonder vid tillämpning av inkomstskattelagen, lagen om investeringssparkonto och kupongskattelagen?*" (dnr 131 128777-12/111).

17 Supreme Administrative Court ruling in Case No 4530-15 (HFD 2016 ref. 22).

18 *Aberdeen Property Fininvest Alpha Oy ("Aberdeen"),* Case C-303/07, ECLI:EU:C:2009:377.

source, levied in respect of a foreign investment fund was under scrutiny. Finland argued that the foreign fund was not in a comparable situation due to the fact that the foreign fund was a different type of vehicle and, in principle, was tax exempt in Luxembourg. The CJEU found that the situations were comparable and the fact that the legal form of the Luxembourgish investment vehicle had no comparable in Finland had no bearing on the outcome.[19] The approach taken by the SAC seems to be a deviation from the previous STA view which up until this case were that the legal form of the fund did not have a decisive role but rather the purpose and functioning of the fund, thus equating contractual funds with trusts and funds that are in the form of legal persons for the application of the Swedish tax rules. Consequently, the previous legal opinion from the STA has been replaced.[20]

Reference for a preliminary ruling

Taxpayers called for a referral to the CJEU and it came in a case concerning Pensioenfonds Metaal en Techniek (PMT), a Dutch pension fund that received dividends from Swedish companies.[21] The fund was subject to withholding tax in Sweden on these distributions. PMT applied for the restitution of the withholding tax on the basis that the levy of this tax violated the EU rules on free movement of capital, since this fund was comparable to a Swedish pension fund, and hence, should be taxed in accordance with the Act on Yield Tax on Pension Funds. The application was denied by the Tax Authority as was PMT's appeal to the Administrative Court and the Administrative Court of Appeal.

PMT then appealed to the Supreme Administrative Court[22] that granted leave to appeal, stayed the proceedings and referred a question for preliminary ruling[23] to the CJEU: Does Article 63 TFEU preclude national legislation under which dividends paid by a domestic corporation is taxed by withholding tax if the shareholder is resident in another state while the dividend - if it accrues to

19 *Aberdeen Property Fininvest Alpha Oy ("Aberdeen"),* Case C-303/07, ECLI:EU:C:2009:377, p. 42-43, 45 and 55-56.

20 The Legal Opinion of 23 maj 2012 has been revoked and replaced by 22 mars 2017 (dnr 131 103422-17/111) based on the ruling of the SAC in Case No 4530-15 (HFD 2016 ref. 22).

21 *Pensioenfonds Metaal en Techniek v Skatteverket* ("PMT"), Case C-252/14, ECLI:EU:C:2016:402.

22 Supreme Administrative Court Case No 2868-12.

23 "Utgör artikel 63 FEUF hinder för en nationell lagstiftning enligt vilken utdelning från ett inhemskt bolag beskattas med källskatt om aktieägaren har hemvist i en annan stat medan utdelningen – om den tillfaller en inhemsk aktieägare – omfattas av en schablonmässigt bestämd skatt beräknad på en fiktiv avkastning, som sett över tid är avsedd att motsvara den ordinarie beskattningen av all kapitalavkastning?"

domestic shareholders - are covered by a flat-rate tax, calculated on a notional yield that, as seen over time, is intended to correspond to the ordinary taxation of all investment income?

It should be recalled that a Swedish special purpose fund is not considered under domestic law to be a legal person but a contractual arrangement. The question is then whether a foreign fund created as a legal person is comparable to a Swedish special purpose fund. Can there be a difference in the treatment of foreign funds depending on whether they are characterized as contractual arrangements, trusts or legal persons?

No Comparability - The Opinion of the AG in *Pensioenfonds Metaal en Techniek v. Skatteverket*

The opinion of the Advocate General (AG),[24] starts from the point of view that the situations of residents and non-residents are not, as a rule, comparable.[25] It is agreed that foreign pension funds are treated differently from domestic pension funds. However, it is disputed whether this difference in treatment constitutes a disadvantage for the foreign pension fund in respect of the actual level of taxation.[26] According to PMT this constitutes an unjustified restriction on the free movement of capital. The AG then notes that the CJEU as a general rule will first consider whether the situations are comparable after having concluded the presence of a restriction.[27] Ultimately, the AG considers this course of action as inappropriate in the case at hand.[28]

The AG then continues to examine first whether the situations are objectively comparable before determining whether a restriction exists. According to the AG,

---

24 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571.

25 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571, para. 2.

26 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571, para.17 with further references.

27 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571, para. 21.

28 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571, para 21.

Sweden in its written submissions, gives the impression of perceiving the tax payable by the domestic pension funds more as a wealth tax rather than an income tax. The AG disagrees with the perception and concludes that the national rule implies that dividends distributed to pension funds resident in Sweden are taxed with other investment income by a complex calculation of the tax base, while dividends distributed to non-resident pension funds are taxed directly by applying the withholding tax method. According to the written submissions, the purpose of the national rule was to obtain neutrality between pension funds and other forms of pension savings with respect to both investment type (shares, bonds, treasury bills etc.) as well as the economic cycle.[29] From the point of view of the Swedish government, the situations of resident and non-resident pension funds are not comparable.[30] Applying the same system of taxation would then defeat the purpose of the system.

According to established case law following the *Avoir Fiscal* case[31], a Member State that provides for measures to prevent economic double taxation of dividends in the domestic situation must provide similar treatment for comparable cross-border situations. If the national legislation aims at preventing double taxation of dividend distributions from resident companies "the State in which the company making the distribution is resident is obliged to ensure that, under the procedures laid down by its national law in order to prevent or mitigate a series of liabilities to tax or economic double taxation, non-resident shareholder companies are subject to the same treatment as resident shareholder companies"[32]. However, the AG notes that this is not the purpose of the national legislation in question.[33]

Furthermore, it should be noted in this connection that neither the TFEU nor the case-law requires that Member States, including Member States in which dividend-paying companies are domiciled, to prevent or mitigate economic double taxation of such dividends. Such an obligation would mean that the State in question must

---

29 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571, para. 30.

30 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2015:571, para. 34.

31 *Commission of the European Communities v. French Republic* ("Avoir Fiscal"), Case C-270/83, ECLI:EU:C:1986:37.

32 Case C-170/05 *Denkavit Internationaal BV and Denkavit France SARL v Ministre de l'Économie, des Finances et de l'Industrie ("Denkavit"*), ECLI:EU:C:2006:783, para. 34.

33 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT")* Case C-252/14, ECLI:EU:C:2015:571, para. 45.

refrain from taxing the income generated in an economic activity carried out within its territory.[34]

After distinguishing the present situation from that in the cases *Santander Asset Management*,[35] *Truck Center*[36] and subsequently *Commission v. Finland,*[37] the AG concluded that there is no comparability between the situation of the resident pension fund and that of the non-resident pension fund.

The AG went on to discuss whether non-resident pension funds suffered a less favorable treatment and concluded that the factual examination must however be carried out by the referring court and not by the CJEU.

Could the Swedish system be justified?

Subsequently, if the Court should find that the resident and the non-resident are in objectively comparable situations and, furthermore, that the non-resident pension fund suffered a less favourable treatment, the question is whether the justification of balanced allocation of taxing rights put forward by the Swedish government or the effectiveness of tax collection put forward by the German government can be upheld. The AG determined that these justifications would not be applicable in the current situation. Since the AG did not consider a restriction to be present, he concluded that Article 63(1) TFEU compared with Article 65(1)(a) TFEU did not preclude national legislation such as that at issue in the case.

34 Opinion of the Advocate General Maciej Szpunar delivered on 10 September 2015 in *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT")* Case C-252/14, ECLI:EU:C:2015:571, para 46.

35 *Santander Asset Management SGIIC SA, on behalf of FIM Santander Top 25 Euro Fi (C-338/11) v Directeur des résidents à l'étranger et des services généraux and Santander Asset Management SGIIC SA, on behalf of Cartera Mobiliaria SA SICAV (C-339/11 to C-347/11) and Others v Ministre du Budget, des Comptes publics, de la Fonction publique et de la Réforme de l'État*, ("*Santander Asset Management et al.*"), Case C-338/11 -- C-347/11, ECLI:EU:C:2012:286.

36 *Belgian State - SPF Finances v Truck Center SA ("Truck Center"),* Case C-282/07, ECLI:EU:C:2008:762.

37 *European Commission v Republic of Finland* ("Commission v. Finland"), Case C-342/10, ECLI:EU:C:2012:688.

Ruling of the CJEU

The CJEU stated that:

> "It follows from settled case law that the measures prohibited by Article 63(1) TFEU, as restrictions on the movement of capital, include those that are such as to discourage non-residents from making investments in a Member State or discourage that Member state's residents from doing so in other States.[…] Specifically, the less favourable treatment by a Member State of dividends paid to non-resident pension funds, compared to the treatment of dividends paid to resident pension funds, is liable to deter companies established in a Member State other than that first Member State from pursuing investments in that same first Member State and, consequently, amount to a restriction of the free movement of capital, prohibited, in principle, under Article 63 TFEU".[38]

After analyzing the two different techniques used by Sweden to tax resident and non-resident funds the CJEU concluded:

> "Since the difference in treatment established by the tax laws of a Member State, such as that at issue in the man proceedings, regarding the taxation of dividends paid to resident pension funds and the taxation of similar dividends paid to non-resident pension funds, is capable of resulting in the dividends paid to those latter funds bearing a heavier tax burden in comparison to that borne by resident pension funds, such a difference in treatment is liable to deter such non-resident pension funds from making investments in that Member State and, consequently, amount to a restriction of the free movement of capital prohibited, in principle, by Article 63 TFEU".[39]

Furthermore, the aim pursued by the national legislation at issue in the main proceedings, cannot be attained in respect of non-resident pension funds.[40] Hence, the CJEU determined that the non-resident and resident pension funds were not in a comparable situation.[41]

---

38 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT")*, Case C-252/14, ECLI:EU:C:2016:402, paras 27-28.

39 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2016:402, para. 44.

40 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2016:402, paras 59-62. The CJEU in papagraph 52 of the judgement noted that the taxation affecting resident pension funds has a different purpose from that applied to non-resident funds.

41 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT")*, Case C-252/14, ECLI:EU:C:2016:402, para. 63.

Finally, in the case before the Supreme Administrative Court, PMT had argued that the fund should be given the same tax treatment as a comparable Swedish tax subject in respect of deduction of costs incurred to generate the dividends from Sweden on which the fund had paid withholding tax. In relation to these professional expenses, the CJEU with reference to *Miljoen and Others*[42] stated that:

> "[I]t is important, moreover, to observe that, if the application of two different taxation methods to resident and non-resident pension funds is in this instance justified by the difference in situation of these two categories of taxpayers, the Court has previously held that, in relation to professional expenses directly linked to an activity that has generated taxable income in a Member State, residents and non-residents of that State are in a comparable situation",[43]

and that such expenses should be taken into consideration in respect of non-resident pension funds if the system applied to resident funds allowed for such a deduction.[44]

After the ruling of the CJEU, the Commission closed the proceedings against Sweden.[45]

The National Court

Taking the judgment of the CJEU in *PMT* into account, the SAC found, in the case before the national court, that PMT was not in a comparable situation to a Swedish pension fund, and hence, it is not contrary to the free movement of capital to tax PMT and Swedish resident funds according to different techniques. Furthermore, in the national court's interpretation of the preliminary ruling, the SAC had to assess whether the calculation of the yield tax provided scope for taking into account any costs directly linked to the payment of dividends. However, the taxation method does not entail that it is the actual income and expense of the business that is the basis for the tax levy, but tax is calculated at a fixed rate on a lump sum yield. The SAC concluded that neither acquisition costs, financing costs

---

42 *J.B.G.T. Miljoen and Others v Staatssecretaris van Financiën* ("*Miljoen and Others"),* Case C-10/14, C-14/14 and C17/14, ECLI:EU:C:2015:608, para. 57.

43 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT")*, Case C-252/14, ECLI:EU:C:2016:402, para. 64.

44 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"*), Case C-252/14, ECLI:EU:C:2016:402, para. 65.

45 Case No 2006/4107 Proceedings against Sweden closed on 22/07/2016 after an EU Court of Justice Ruling.

nor management costs can be considered to be directly linked to the receipt of dividends but that did not preclude professional costs that might meet the requirement of such direct link. However, it was a matter for the taxpayer to establish that a right to such a deduction existed and this matter should be handled firstly by the STA.

The SAC did not address the matter whether the system led to the foreign fund being subject to more onerous taxation than a resident fund.

Final comments

At the time of the referral to the CJEU on the compatibility of the Swedish system[46] with EU law, the Commission proceedings had not been concluded. Worth noting is that after the CJEU issued its judgement in *PMT*, the Commission closed the infringement proceedings against Sweden. Notably, there is no procedural regulation in the TFEU by which the Commission procedure and the referral for a preliminary ruling could have been united in the proceedings before the CJEU, although dealing with the same issues.

The outcome of the different techniques used by Sweden regarding resident and non-resident pension funds might be difficult to determine exactly and also the difference in effective taxation will vary over time. However, it is now clear that the fact that the system is capable of treating foreign pension funds less favorably than their Swedish counterparts amounts to a restriction of the free movement of capital. The CJEU then finds that the non-resident fund and the resident fund are not in a comparable situation. In finding so, the CJEU does not make any reference to the legal form of the funds compared, but to the aim of the national rules which presupposed the taxation of the whole of the taxpayer's invested capital in order to achieve the purpose of the national legislation.

One argument put forward in defence of the Swedish position is that the issue of difference in treatment relates to the length of the period on which the comparison between the resident and non-resident is based in order to determine a restriction[47]. According to the Swedish government the system will ensure that the final outcome of the accrued pension rights will be neutral seen over the working life of the retirees. It seems that this argument was considered in taking the purpose of the national rules into account. But, from the horizon of a foreign fund looking to invest its capital the Swedish system, such rules might still deter that taxpayer

46 Withholding Tax Act No. 624 of 1970 and Income Tax Act on Pension Funds (1990:661).

47 Brokelind, Cécile; *Three New Swedish Direct Taxation Cases on Their Way to the CJEU*; European Taxation, IBFD September 2014, pp. 385- 391 at p. 390.

from investing since the system is capable of treating the foreign investor less favourably. From an interpretation of CJEU case law, it seems clear that a potentially less favourable treatment of dividends distributed to non-resident pension funds during one tax year cannot be compensated by their potentially favourable treatment during other tax years.[48] Neither is there any mechanism in the national legislation at stake to ensure such an effect, which the CJEU also points out.

After finding that the non-resident and resident funds were not in a comparable situation in relation to the aim of the national tax rules, the CJEU stated that in relation to professional expenses, residents and non-residents are in a comparable situation. It has been a matter for discussion how this paragraph should be interpreted.[49]

In an earlier case concerning another aspect of the Swedish Withholding Tax Act, *Bouanich*[50], the CJEU held that:

> "It is therefore a matter for the national court to determine in the proceedings before it whether the fact that non-resident shareholders are permitted to deduct the nominal value and are liable to a maximum tax rate of 15% amounts to treatment that is no less favourable than that afforded to resident shareholders, who have the right to deduct the cost of acquisition and are taxed at a rate of 30%."

In *Bouanich,* the deduction of costs directly linked to the taxable income is suggested to form part of the calculation of tax base for the national court to compare the ultimate tax burden of the non-resident and resident taxpayer. Sweden had to ensure that the non-resident is afforded national treatment since the CJEU had determined that Ms Bouanich was in a comparable situation to a resident investor.

In PMT the CJEU treats the assessment of tax burden early in the judgement as part of the restriction analysis and concludes that it is for the referring court to assess whether PMT is bearing heavier tax burdens in Sweden than those borne by

48 *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2016:402, para. 39.

49 See for example Vermeulen, Hein: "*Pensioenfonds Metaal en Techniek. Tax on dividends paid by Pensioenfonds Metaal en Techniek in Sweden not in breach with EU law.*": Court of Justice 2 June 2016, no. C-252/14; Highlights & Insights on European Taxation (H&I) 2016/285.

50 *Margaretha Bouanich v Skatteverket ("Bouanich")*, Case C-265/04, ECLI:EU:C:2006:51, para. 55.

resident pensions funds.[51] In *PMT,* Sweden also acts as the host state, as in *Bouanich,* then, this would oblige Sweden to afford PMT national treatment in respect of the Swedish source income.

One difference in *PMT* compared to previous dividend source taxation cases is that the aim of the national rules in question were not enacted directly to mitigate a risk of double taxation. Source taxation of dividend distributions can often have the effect of including the non-resident tax payer in a domestic tax system in a way that equates the situation of the non-resident and resident tax payer. The aim of the legislation in question here was to achieve neutrality in the taxation of different types of pension savings schemes and that the system should be indifferent towards changes in the economic cycles. However, the fact remains that, as the CJEU found, the system gives rise to a restriction that might deter foreign funds from investing in Sweden. One argument that can be raised is that the effect in practice of the Swedish system on the tax situation of foreign funds is perhaps not the same as the purpose of the national rules in question.

However, the general rule is that Member States have the right to distinguish in their tax law between residents and non-residents since these subjects are, per se, not in a comparable situation. As seen from the cases mentioned above, much of the complexity in assessing whether legislation is contrary to EU law depends on whether the resident and non-resident are in comparable situations. Adding to this, the complexity starts already in how a foreign entity should be classified under national law for the instances where there is no harmonization on EU level, a fact that in an EU-law setting might have limited impact on the comparability question as seen in *Aberdeen* where the CJEU found that the situations were comparable and the fact that the legal form of the Luxembourg investment vehicle had no comparable in Finland had no bearing on the outcome.

If the argument that the yield tax system has a different purpose than to mitigate double taxation had not been accepted, both Swedish and foreign investment funds could be considered to be subject to tax on dividends distributed from Swedish companies. That circumstance would indicate that they are in a comparable situation. This has opened the door for criticism along the line that legislation restricting the freedoms can be accepted as long as the purpose of the legislation is not easily applied to foreign entities.

The legal and factual background in the *PMT* case are very particular which makes any far-reaching conclusions difficult. The withholding tax at stake concerned tax

51 See *Pensioenfonds Metaal en Techniek v Skatteverket ("PMT"),* Case C-252/14, ECLI:EU:C:2016:402, para. 34.

years prior to a 2012 review of the national rules that have not been taken into account in this article.

Worth noting is that at that time, the law providing for the yield tax did not apply to non-Swedish pension funds unless they had a permanent establishment (PE) in Sweden. With both case law and legislation regarding what constitutes a PE evolving rapidly, the occurrence of an accidental PE might have consequences that are difficult to foresee.

The *PMT* case, apart from the question regarding the tax situation of pension funds investing in Sweden, also addresses interesting questions regarding the wider discussion of how to structure source and residence taxation in the EU context and also plays a role in the discussion regarding effective tax burden.