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In case no. 2858-18, **AXA Rosenberg Management Ireland Ltd for AXA Rosenberg Equity Alpha Trust** (Appellant) v. **the Swedish Tax Agency** (Respondent), the Supreme Administrative Court delivered the following judgment on 12 June 2020.

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## **RULING OF THE SUPREME ADMINISTRATIVE COURT**

The Supreme Administrative Court declares that a common fund organised in the form of a unit trust is entitled to the dividend when applying the provisions of the Coupon Tax Act regarding refunds of coupon tax.

The Supreme Administrative Court otherwise grants leave to appeal in the case and sets aside the decisions of the lower courts and remands the case to the Swedish Tax Agency for determination of whether the conditions for refunding the withheld tax are satisfied.

The Supreme Administrative Court grants the appellant compensation for costs incurred in the Supreme Administrative Court and in the lower courts in a total amount of SEK 200,000.

## **BACKGROUND**

1. The main rule is that coupon tax is to be paid on dividends on shares in Swedish limited companies if the person entitled to the dividend is a non-resident natural or legal person. Person entitled to the dividend means the party who is entitled to receive dividends for their own benefit upon distribution.
2. There are exceptions to the levy of the tax. In 2011, a provision was implemented excepting common funds resident in a state within the EEA. Prior to the entry into force of said regulation, a comparable exception was possible under Union law

only if taxing the fund would have entailed a detrimental difference in treatment relative to the manner in which a Swedish common fund was thereupon taxed.

3. Coupon tax is levied at a rate of thirty per cent of the gross amount of the dividend. The right to a reduction or waiver of coupon tax may be available pursuant to international tax agreements.
4. As regards dividends in CSD-registered companies, the party paying the dividend must withhold the coupon tax where it is not apparent from available information whether the person entitled to the dividend is not liable to coupon tax. In the event excessive tax is withheld, the person entitled to the dividend is entitled to a refund of the surplus.
5. The fund, AXA Rosenberg Equity Alpha Trust, is resident in Ireland and is organised in the form of a so-called unit trust. It is covered by Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (the UCITS Directive). The fund was established by means of an agreement, a so-called trust deed, between a trustee and a manager. The fund is not a legal person, and it is the trustee who formally holds title to the assets included in the fund. Administration of the fund is performed by the manager.
6. In 2006-2011, the trustee received dividends on behalf of the fund from Swedish limited companies. Coupon tax of slightly more than SEK 10 million was withheld on such dividends. The fund's manager applied to the Swedish Tax Agency on behalf of the fund for a refund of coupon tax.
7. As a basis for a refund, it was asserted that the fund is not a foreign legal person, as a consequence of which it is not liable to tax and the imposition of coupon tax was in contravention of the provisions of the free movement of capital in the TFEU. In the alternative, a reduction of the tax was requested from 30 to 15 per cent in accordance with the tax agreement between Sweden and Ireland.

8. The Swedish Tax Agency rejected the application on the basis that the fund was not the person entitled to the dividend since it was not a legal person and accordingly could not have held title to the shares or collected dividends on its own behalf.
9. Both the Administrative Court in Falun and the Administrative Court of Appeal in Sundsvall found that the application for reimbursement was inadmissible and rejected the appeal and motion for compensation for costs. The administrative court of appeal was of the opinion that the trustee, as formal owner of the assets of the fund, was entitled to the dividends. Since the application pertained to the fund and was signed by the manager, it could not be deemed to apply to the person who was actually entitled to the dividend.

#### **CLAIMS, ETC.**

10. *AXA Rosenberg Management Ireland Ltd* requests that the fund be granted a full refund of coupon tax withheld for the years 2006-2011 or, in the alternative, a reduction of the tax from 30 to 15 per cent in accordance with the tax agreement between Sweden and Ireland and asserts the following. The trustee's rights are limited to holding the assets in question. The assets are separate from the trustee's other assets, and the trust deed provides that the trustee is not the actual owner. The assets belong to the fund which is also to be regarded as the person entitled to the dividend. In addition, compensation is requested for costs incurred in the administrative court in the amount of SEK 102,870, SEK 144,238 in the administrative court of appeal, and SEK 640,439 incurred in the Supreme Administrative Court.
11. *The Swedish Tax Agency* is of the position that the appeal should be refused but stipulates that compensation is to be granted for costs in all instances in a total amount of SEK 200,000.

## **REASONS FOR THE RULING**

### **The question in the case**

12. The Supreme Administrative Court has granted leave to appeal regarding the question of whether a common fund which is organised in the form of a unit trust is entitled to the dividend in accordance with the Coupon Tax Act (1970:624). The issue regarding leave to appeal concerning the remainder of the case has been declared stayed.

### **Legislation, etc.**

13. Pursuant to section 4, first paragraph of the Coupon Tax Act, a person entitled to the dividend is liable to tax if that subject is a natural person who has limited tax liability, is a decedent's estate of such person or a foreign legal person and the dividend does not relate to income from business activities conducted from a permanent place of establishment in Sweden.
14. Pursuant to section 2, person entitled to the dividend means the person who, for their own part, is entitled to collect the dividend at the time of distribution.
15. The preparatory works provide that the term, person entitled to the dividend, was adopted in the rules and regulations in conjunction with the implementation of legislation regarding simplified share administration. By virtue of the new administration scheme, distributions of share dividends were effected by means of registration of the person entitled to the dividend in a share register or special list in lieu of the previous use of coupons. Instead of the beneficial owner, a manager could be entered as entitled to the dividend. The manager was thereupon deemed entitled to receive dividends. In the event it was revealed following distribution of the dividend that the registered party was not entitled to the dividend, the company paying the dividend was nonetheless deemed to have performed its payment obligation. (Government Bill 1970:134, p. 42.)

16. In conjunction with distribution of dividends in CSD-registered companies, the central securities depository which distributes the dividend is to withhold dividend withholding tax provided it is not apparent from available information regarding the person entitled to the dividend that such recipient is not liable to tax (section 7, first paragraph).
17. Section 27, first paragraph provides that the person entitled to the dividend is entitled to repayment in the event coupon tax is withheld in respect of someone who has not been liable to tax or in an amount in excess of that to be paid in accordance with an agreement for the avoidance of double taxation.
18. In connection with the cessation of the imposition of the then income tax on Swedish common funds in 2011, an exemption was implemented in section 4, ninth paragraph for, among other things, common funds, which applied in respect of dividends following the expiry of 2011. Pursuant to this provision, there is no liability to tax for UCITS in accordance with Chapter 1, section 1, first paragraph of the Securities Funds Act (2004:46) resident in a state within the EEA or in a state with which Sweden has entered into a tax agreement containing an article regarding information exchange or an agreement regarding information exchange in tax matters.
19. In the Securities Funds Act, a foreign UCITS means a foreign company authorised to conduct operations the sole purpose of which is to carry out collective investments in certain types of assets with capital from the public or from a specifically identified and limited group of investors and applies the principle of risk spreading and the units of which may, on request by the holders, be repurchased or redeemed with funds from the undertaking's assets. This definition is formulated based on Article 1.2 of the UCITS Directive (Government Bill 2002/03:150, p. 296). The Directive provides that a UCITS may be constituted in accordance with contract law, in accordance with trust law (as a unit trust) or statute. In conjunction with the application of the Directive, common funds shall also include unit trusts (Article 1.3).

**The Court's assessment**

20. The fund, which is resident in Ireland and is covered by the UCITS Directive, was constituted by means of a written agreement, a trust deed, between a manager and a trustee. The trust deed regulates, inter alia, the allocation of work duties between the parties. Formally, the assets of the fund are owned and held by the trustee. The fund's assets may not, however, be co-mingled with the trustee's own assets or be included on the trustee's balance sheet. The manager manages the assets and carries out the general administration of the fund. The fund is not a legal person.
21. In HFD 2018 reported case no. 11, which pertained, inter alia, to coupon tax on dividends on shares which had been transferred to a trust, the Supreme Administrative Court noted that it was the beneficial owner of the shares who was to be taxed. Taking into account, inter alia, his possibilities to dispose of the property and the yields thereon, the party who had established the trust and who was the primary beneficiary was regarded as not having dispossessed himself of the property. Accordingly, he was deemed to be entitled to dividends in accordance with the Coupon Tax Act.
22. The situation is otherwise as regards a common fund organised in the form of a unit trust. Such a fund is – like other forms of UCITS funds – in principle open to all who desire to invest in it. The right of a unit holder is limited to redeeming his or her units in the fund and, where applicable, receiving dividends. An individual unit holder accordingly does not dispose of the assets of the fund or the yields thereon, and they thus cannot be deemed to be the entitled to the dividend in accordance with the Coupon Tax Act. The issue is thus whether the fund is to be deemed to be entitled to the dividend notwithstanding that the trustee, in the capacity of registered owner of the assets, is authorised to receive the dividend.
23. A contractual common fund does not constitute a legal person but, rather, is deemed to have a special legal construction. The assets are managed by a fund undertaking and a custodian institution holds the assets. The obligation to act on

behalf of the fund rests either with the fund undertaking or the custodian institution. They are to act exclusively in the interests of the unit holders in consideration of compensation paid from the assets of the fund. The assets enjoy property-law protection relative to creditors of both parties. By virtue of this construction, actual title to the fund assets is deemed to be separated from both management and possession of the assets. This means that the unit holders as a collective own the assets of the fund and have the right to yields thereon (cf. Government Bill 1989/90:153, p. 55 and Government Bill 2002/03:150, pp. 115 f and 131 f). A contractual common fund – constituted in accordance with the UCITS Directive – should, in this light, be considered to be entitled to the dividend.

24. The fact that common funds – irrespective of the organisational form – are to be regarded as entitled to the dividend further appears to have been the starting point when the exception in section 4, ninth paragraph of the Coupon Tax Act from tax liability for certain foreign investment companies was implemented in 2011. Taxing foreign funds was thus deemed to be at risk of constituting a restriction on the freedom of establishment or free movement of capital and thereby incompatible with Union law (Government Bill 2011/12:1, pp. 409 and 530).
25. A unit trust fund is – like a contractual fund – not a legal subject on its own. The various types of funds also display substantial similarities as regards management and holding of the fund assets. What distinguishes a unit trust fund from a contractual fund is that the trustee formally owns the assets held. This distinction should, in the view of the Supreme Administrative Court, not entail that a unit trust fund is to be treated differently than a contractual fund in the respect now at issue.
26. The issue in respect of which the Supreme Administrative Court has granted leave to appeal shall accordingly be answered such that a common fund which is organised in the form of a unit trust is entitled to the dividend when applying the provisions of the Coupon Tax Act regarding repayment of coupon tax.

*The continued handling of the case*

27. In light of the answer to the precedential issue, leave to appeal should be otherwise granted in the case. What remains to be determined is whether the conditions subsist for refunding the withheld coupon tax. It is not incumbent on the Supreme Administrative Court to determine this issue as the court of first instance. Accordingly, the judgments of the lower courts are set aside and the case is remanded to the Swedish Tax Agency for continued handling.

*Compensation for costs*

28. The Appellant has succeeded in its action and, in that respect to which leave to appeal has been granted, the case pertains to an issue which is of importance for the application of law. Therefore, the conditions are present for granting compensation for costs.
29. The documentation provided does not meet the requirements established for itemisation of costs (cf. HFD 2019 reported case no. 16). Neither the work activity performed nor the hourly rate is apparent. Furthermore, the identity of the person who has performed the various work activities is not apparent. An overall reasonableness assessment of all of the work performed must thus be carried out. In this assessment, the Supreme Administrative Court finds that compensation should be granted in the total amount of SEK 200,000 for the proceedings in all instances.

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Justices Helena Jäderblom, Margit Knutsson, Mahmut Baran and Leif Gäverth have participated in the ruling.

Judge Referee: Lena Åberg.