



# Euro Tax Flash from KPMG's EU Tax Centre



## Background

### The CJEU's decision in the PMT case

### The Swedish Supreme Administrative Court decision in the PMT case

### The Swedish Supreme Administrative Court decision in the Veritas case

### EU Tax Centre comment

## **Swedish court rulings in the Pensioenfonds Metaal en Techniek and Veritas test cases about dividend withholding tax reclaims of foreign pension funds**

### **Free movement of capital – Taxation of income of pension funds – Withholding Tax – Whether discriminatory – Comparability – Deductibility of expenses - Net Taxation**

On February 22, 2017 the Swedish Supreme Administrative Court ('Supreme Administrative Court' or 'SAC') issued its decisions in the Pensioenfonds Metaal en Techniek ('PMT') and the Pensionsförsäkringsaktiebolaget Veritas ('Veritas') cases. These two cases concern foreign pension funds reclaiming Swedish withholding tax based on discrimination under EU law. The repayment claims were rejected by the SAC on grounds of non-comparability, but at the same time it stated that there is a possibility to deduct certain expenses related to the receipt of dividend income.

## **Background**

A lot of foreign pension fund withholding tax reclaims have been put on hold pending the outcome of the above-mentioned test cases. Unlike the

Veritas case, the PMT case was previously referred to the Court of Justice of the European Union ('CJEU'), which rendered its preliminary ruling on June 2, 2016. The SAC largely followed the conclusions made by the CJEU in the PMT case, using also some findings made in the Miljoen CJEU case. (see [ETF 287](#))



### **The CJEU's decision in the PMT case**

The first case concerned a Dutch pension fund (PMT), which claimed that the Swedish withholding tax rules are discriminating towards foreign pension funds. According to the Swedish national rules foreign pension funds are subject to a 15 percent withholding tax on their gross dividend income, whereas the Swedish pension funds pay a 15% tax on a deemed capital net income ('yield tax'). This tax is intended to achieve neutrality from the point of view of different pension products and assets subject to changing economic conditions, and presupposes that Swedish pension funds are taxed on deemed income from their worldwide assets.

In its preliminary ruling the CJEU found that the objective of neutrality could not be achieved in the case of non-resident funds, given that the latter were only taxed on their Swedish source income, and therefore concluded that a non-resident pension fund is not comparable to that of a resident pension fund, which pays the 'yield tax' on a worldwide basis. As a consequence, the CJEU ruled that the potentially higher tax burden of non-resident pension funds did not constitute an infringement of the free movement of capital. Referencing the Miljoen case, however, the CJEU held that even if the different taxation methods could be justified by the difference in situation of resident and non-resident pension funds, non-resident pension funds were entitled to take into account any business expenses directly linked to the receipt of dividends, if resident pension funds are allowed to take them into account. It was the responsibility of the national court, in this case the SAC, to decide.



### **The SAC's decision in the PMT case**

In line with the PMT preliminary ruling the SAC held that PMT was not comparable to Swedish pension foundations or life assurance companies so there was no restriction on the free movement of capital. The SAC also rejected PMT's second claim, that non-resident pension funds were comparable to the tax exempt Swedish governmental pension funds ('AP-funds'), on the grounds that organizationally as well as regards function and purpose, the AP-funds and PMT operate under different conditions. As a consequence the SAC did not grant the repayment of withholding tax to PMT.

In relation to the deduction of business expenses directly linked to the receipt of dividends, the SAC came to the conclusion that in general such deductions should be allowed in line with the CJEU's ruling in the Miljoen case. In the SAC's view, however, expenses related to acquisition, financing or management of shares are not deductible expenses, as they are not directly linked to the receipt of dividends. The question whether

there were in fact any such directly linked expenses was referred back to the Swedish Tax Agency.



### **The SAC's decision in the Veritas case**

The other test case concerned a Finnish pension insurance company (Veritas), which was engaged in compulsory employment pension insurance. Veritas primarily claimed discrimination in relation to the tax exempt Swedish AP- funds and secondly in relation to Swedish pension foundations.

Notwithstanding similarities between the Finnish compulsory employment pension insurance and the Swedish income-based retirement pension business, e.g. that both involve managing funded capital, the SAC pointed out significant differences between the businesses that Veritas and the AP-funds conduct, e.g. the latter work as stabilization funds for the pension system without direct connection to pension commitments. Hence, the SAC came to the conclusion that Veritas and the AP- funds operate under different conditions organizationally as well as with regard to function and purpose, and are therefore not in objectively comparable situations.

Furthermore, based on the ruling in the PMT case the SAC found that Veritas was also not comparable to Swedish pension foundations or life assurance companies.

As a consequence of the above, the SAC did not grant repayment of withholding tax to Veritas. However, in line with the CJEU decision in the Miljoen case, the SAC stated that Veritas should be given the opportunity to claim deduction for any business expenses directly linked to the receipt of dividends. Again, the question whether there were in fact any such directly linked expenses was referred back to the Swedish Tax Agency.



### **EU Tax Centre comment**

With regards to the outcome in relation to the comparability of the two funds with Swedish pension foundations, the decision of the SAC is not surprising, given what the CJEU said in the PMT case. It should be noted, however, that the comparability with Swedish AP- funds was not at all covered by the CJEU in that case. Given the similarities between Veritas and the Swedish AP- funds, which the SAC acknowledges, one may wonder what degree of similarity will be required for other taxpayers. For example, pension funds of foreign municipalities have claimed to be comparable to Swedish municipalities, which are also exempt from tax. This has not been tested by the SAC.

The taxpayers in the cases that were put on hold pending the outcome of the test cases will likely now be given an opportunity to give comments on the cases to the SAC. Consideration should be given in appropriate cases to the (limited) possibility of claiming a deduction for directly linked expenses.

From a Swedish withholding tax perspective these cases are only relevant for foreign pension funds and life assurance companies. Reclaims of Swedish withholding tax for e.g. investment funds has not been affected. For many types of investment funds there is established case law to support full reclaims of Swedish withholding tax.

Should you have any queries, please do not hesitate to contact [KPMG's EU Tax Centre](#), or, as appropriate, your local KPMG tax advisor.



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