Case C-342/20

Request for a preliminary ruling

Date lodged:

23 July 2020

Referring court:

Helsingin hallinto-oikeus (Finland)

Date of the decision to refer:

9 July 2020

Applicant:

‘A’ SCPI

HELSINGIN HALLINTO-OIKEUS (ADMINISTRATIVE COURT, HELSINKI)	9 July 2020	**INTERIM ORDER** Lodgment number 04255/19/8108 Finlex

Subject matter	Request to the Court of Justice of the European Union for a preliminary ruling pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU)
Applicant	'A' SCPI Legal representative: Asianajaja Mikko Larvala
Other parties	Veronsaajien oikeudenvalontayksikkö 'A' SCPI
Contested decision	Order No P0069824222 of the Verohallinto of 13 June 2019 concerning a preliminary decision on income tax

Subject matter of the proceedings

1. The Laki verotusmenettelystä (Law on the taxation procedure) allows the Verohallinto ('the Tax Authority') to issue binding preliminary tax decisions at the taxpayer's request. In the application for a preliminary decision the taxpayer must set out the information necessary for a decision to be made.

2. The Tax Authority must, at the applicant's request, abide by a preliminary decision, which became final, in the taxation procedure. An action may be lodged before the Hallinto-oikeus (Administrative Court, Finland) against a preliminary decision issued by the Tax Authority. An action against that judgment may only be lodged by leave of the Korkein Hallinto-oikeus (Supreme Administrative Court, Finland).

3. In the main proceedings pending, 'A' SCPI (also 'the applicant') applied to the Tax Authority for a preliminary decision for the tax years 2019 and 2020, as

explained below. The applicant lodged an action with the Administrative Court against the preliminary decision of the Tax Authority for the 2020 tax year.

4. The case involves the interpretation of Articles 49, 63 and 65 of the Treaty on the Functioning of the European Union (TFEU).

Application to the Tax Authority for a preliminary decision and preliminary decision of the Tax Authority

Application to the Tax Authority for a preliminary decision

5. The applicant is an investment fund constituted under French law in the form of a *société civile de placement immobilier à capital variable* (open-ended real estate investment fund) which invests in real estate located in France or in the euro area. The investment properties are let to commercial tenants. At the end of 2017, **[Or. 2]** the investment fund was valued at approximately EUR 32 million. The company held investments in four properties in four different countries in the euro area. At the end of 2017, the fund had 926 unit holders.

6. The applicant is a legal entity under French law; however, only one company, registered as 'A' SAS ('A' Asset Management, Société par actions simplifiée), a simplified joint stock company which also manages the fund, represents it and passes all the resolutions required by law and the company's memorandum and articles of association. The applicant itself cannot conduct any legal transactions. The applicant is subject to supervision by the French financial supervisory authority (Autorité des Marchés Financiers, 'the AMF') and is an alternative investment fund within the meaning of Directive 2011/61/EU.

7. Investors invest by subscribing to units in the applicant. Investors are also able to use their units to conduct transactions with each other. The company can also redeem units, but as a rule only for the part that corresponds to new subscriptions. Otherwise, the redemption price is substantially lower.

8. The annual return on investors' units is equal to the net earnings achieved by the applicant from rents and other financial income. Earnings are distributed by resolution of the general meeting of shareholders. Although the company is liable towards third parties for its liabilities, investors bear secondary liability for the company's liabilities.

9. The applicant is not subject to income tax in France and is a transparent unit for tax purposes. Investors are liable for tax on the income from their units and on any profit from the sale or redemption of units.

10. In June 2019, the applicant planned to sign a contract for the purchase of shares in two Finnish mutual real estate share companies. Those mutual real estate share companies own properties used as retail outlets. Upon conclusion of the transaction, the applicant wishes to let real estate in Finland controlled by it via its

shareholding in the mutual real estate share company. The applicant is also considering making further real estate investments in Finland, either by acquiring shares in other mutual real estate share companies or by investing directly in real estate. All the applicant's investments are long-term investments, as it must retain ownership of the real estate for at least five years, after which the applicant can sell the Finnish real estate and the shares in the real estate share company in order to generate capital gains.

11. The applicant and the company responsible for its resolutions ('A' SAS) have head offices in Paris and branches elsewhere in central Europe; however, neither company has business premises or any other establishment in Finland from which any of the Finnish property investments were managed or resolutions concerning them passed. 'A' SAS manages all the Finnish investments from France. 'A' SAS has retained BDO to take care of its value added tax affairs in Finland.

12. It is clear from the Finnish Tuloverolaki (Law on income tax, 'the TVL') and the Franco-Finnish double taxation agreement that the applicant is in principle liable in Finland for tax on rental income generated in Finland both from real estate owned directly by it and from premises controlled through shares held in the mutual real estate share company. As a Finnish investment fund is a corporation for income tax purposes and is exempt from income tax, it is necessary to decide in this case, in the light of the principle of the free movement of capital enacted in the TFEU and the EEA Agreement, whether the tax exemption **[Or. 3]** should not also apply to foreign funds which are comparable to Finnish investment funds. The provisions of the TVL draw a distinction for tax purposes between Finnish and French investment funds based solely on the country of residence of the investment fund.

13. The applicant argues that it is an operator comparable to a Finnish investment fund which is exempt in Finland from tax on rental income or capital gains. Objectively speaking and based on the case-law of the Court, the applicant is essentially comparable in terms of its characteristics to a Finnish investment fund.

The questions referred in the application for a preliminary decision

14. Is the applicant, in the circumstances described in the application, to be regarded as comparable to a Finnish investment fund within the meaning of Paragraph 3 of the Law on income tax and as a fund exempt from income tax pursuant to Paragraph 20 of the Law on income tax?

15. Is the applicant liable in Finland for tax on its rental income and on its capital gains from the sale of real estate and shares in real estate share companies in Finland?

Order of the Tax Authority of 13 June 2019 concerning a preliminary decision for the tax years 2019 and 2020

16. The Tax Authority has shown, by way of a preliminary decision issued for the tax year 2019, that it can be assumed that the applicant, in the circumstances described in the application, is comparable to a Finnish investment fund within the meaning of Paragraph 3(4) of the Law on income tax in terms of its essential characteristics, that the applicant can be regarded as being exempt from income tax pursuant to Paragraph 20(1) of the Law on income tax and that the applicant is not liable in Finland for tax on its rental income or on its capital gains from the sale of real estate and shares in real estate share companies in Finland.

17. The Tax Authority has established, in that regard, that it can be assumed based on the tax law in force in the tax year 2019 that, in the circumstances described in the application, A SCPI is comparable to an investment fund within the meaning of Paragraph 3(4) of the Law on income tax, if account is taken of Articles 49 and 63 of the Treaty on the Functioning of the European Union and the related EU and national case-law, and that the applicant's rental income and its capital gains from the sale of real estate and shares in real estate share companies in Finland in the tax year 2019 are therefore exempt from tax pursuant to Paragraph 20(1), point 2, of the Law on income tax.

18. The Tax Authority has shown, by way of a preliminary decision issued for the tax year 2020, that it is to be assumed that the applicant, in the circumstances described in the application, is comparable to a Finnish corporation within the meaning of Paragraph 3(4) of the Law on income tax, that the applicant is liable for tax on its income pursuant to Paragraph 20a(1) of the Law on income tax and that the applicant is liable in Finland for tax on its rental income and capital gains from the sale of real estate and shares in real estate share companies in Finland.

19. With regard to the preliminary decision issued for the tax year 2020 and contested by the applicant, the Tax Authority found that it also follows from the fund prospectus annexed to the application that the applicant is comparable to a domestic share company; that the fund's earnings are only distributed to unit holders by resolution of the general meeting of shareholders; and that, as the applicant **[Or.** 4] is an open-ended investment firm, it is not a special fund constituted by contract, which is the legal form required under Paragraph 20a(4) of the Law on income tax.

20. It therefore found that the applicant's rental income and its capital gains from the sale of real estate and shares in real estate share companies in Finland in the tax year 2020 are taxable income in Finland pursuant to Paragraph 10(1), (6) and (10) of the Law on income tax.

Summary of the essential arguments of the parties

21. The applicant argues that Paragraph 20a of the Law on income tax infringes EU law, as only funds constituted by contract with their head office in the EU are recognised as special funds. As described in the application for a preliminary decision, the applicant is an operator comparable in every regard to a Finnish investment fund, the only difference being that the applicant was constituted as a company, as required under French law, whereas investment funds under the Finnish law on investment funds are constituted by contract.

22. It contends that, as stated in the decision of the Tax Authority for 2019, the applicant is comparable to a Finnish investment fund in terms of its functional characteristics and that the fact that the Law on income tax has been amended does not change that.

23. The applicant considers that Paragraph 20a of the Law on income tax constitutes prohibited State aid for Finnish funds, because they are constituted by contract and thus qualify for tax exemption, whereas foreign funds in the form of a company or trust are liable for income tax in Finland, regardless of the fact that, objectively speaking, the funds are the same.

24. The Veronsaajien oikeudenvalvontayksikkö (Tax Recipients Legal Services Unit, Finland) argues that it is the settled case-law of the Court that, although direct taxation falls within their competence, the Member States must nonetheless exercise that competence consistently with EU law (see, for example, the judgment in Case C-632/13, paragraph 28); that, as there are no harmonised rules on the form of mutual investment activities and taxation of their income at EU level, the Member States are entitled to impose different national requirements depending on the form of the mutual investment activity and how it functions; that the Member States are also entitled to tax different forms of mutual investment activities in different ways; and that the applicant does not fulfil the conditions for tax exemption for special funds constituted by contract laid down in Paragraph 20a(4) of the Law on income tax.

Provisions of national law cited and legislative material

National legislation applicable in the tax year 2020

25. According to Paragraph 3(4) of the Law on income tax, in the version of Amending Law No 528/2019, corporations within the meaning of that law include share companies, investment funds and special funds. **[Or. 5]**

26. According to Paragraph 9(1), point 2, of the Law on income tax, persons who were not resident in Finland in the tax year and foreign corporations are liable for income tax on their income in Finland (limited tax liability).

27. According to Paragraph 10(1) of the Law on income tax, income generated in Finland includes income from real estate located in Finland or from premises owned through shares in a Finnish housing or other share company or membership of a housing or other cooperative.

28. According to Paragraph 10(6) of the Law on income tax, income generated in Finland includes dividends, surpluses generated by a cooperative and other comparable income from a Finnish share company, cooperative or other corporation, as well as shares in the income of a Finnish group.

29. According to Paragraph 10(10) of the Law on income tax, income generated in Finland includes capital gains from the sale of real estate located in Finland or of shares or units in a Finnish housing share company, other share company or cooperative, over 50 percent of the total assets of which comprise one or more properties located in Finland.

30. According to the version of Paragraph 20a(1) of the Law on income tax that entered into force at the beginning of 2020 (in the version of Amending Law No 528/2019), investment funds within the meaning of Paragraph 2(1), point 2, in Chapter 1 of the Sijoitusrahastolaki 213/2019 (Law on investment funds No 213/2019) or comparable foreign open-ended investment funds constituted by contract with a minimum of 30 unit holders are exempt from income tax.

31. According to Paragraph 20a(2) of the Law on income tax, the provisions of the first paragraph governing the exemption from tax for investment funds also apply to special funds within the meaning of Paragraph 1(2) in Chapter 2 of the Laki vaihtoehtorahastojen hoitajista 162/2014 (Law on alternative investment fund managers No 162/2014) and comparable foreign special funds constituted by contract, provided the fund is open-ended and has a minimum of 30 unit holders.

32. According to Paragraph 20a(4) of the Law on income tax, the condition for tax exemption for a special fund within the meaning of Paragraph 1(2) in Chapter 2 of the Law on alternative investment fund managers or for a comparable foreign special fund constituted by contract which invests its funds primarily in real estate and real estate securities in the way referred to in Paragraph 4 in Chapter 16a of that law is that it must distribute at least three-quarters of the profit for the financial year, disregarding unrealised capital gains, to its unit holders every year.

33. According to Paragraph 20a(7) of the Law on income tax, where an investment fund or a special fund comprises one or more sub-funds, the provisions governing investment funds or special finds apply to the sub-fund(s).

Legislative material on Paragraph 20a of the Law on income tax

34. The provisions governing the conditions for tax exemption for investment funds and special funds are detailed in government exhibit HE 304/2018. The provisions

governing tax exemptions were enacted later, in Paragraph 20a of the Law on income tax in the version of Amending Law No 528/2019. **[Or. 6]**

35. Section 2.3.2 of the government exhibit states that, prior to the Amending Law, the tax treatment of foreign investment funds was not addressed anywhere in the Law on income tax or in the Lähdeverolaki (Law on withholding tax); that their tax treatment was decided case by case by interpreting the principle of the free movement of capital in the EU and the circumstances that need to be taken into account for the purpose of regarding foreign operators as equivalent to domestic operators; that the tax treatment of investment funds was regulated only marginally in domestic law, which may be why foreign funds were very widely regarded as equivalent to domestic investment funds; that it would appear, based on EU case-law, that only the grounds for differentiation regulated in national tax legislation were taken into account when considering different tax treatment, meaning that the characteristics of an investment fund or of a special fund regulated in national legislation on investment funds, for example, were irrelevant when it came to assessing their comparability; that, however, it was not clear from national case-law and the case-law of the Court what circumstances have to be taken into account when judging comparability; that, based on the case-law of the Court, however, it would appear that minor differences in legal form or differences in tax treatment in the state of establishment of a foreign investment fund do not amount to an objective difference for the purpose of judging comparability; and that the case-law expressly focuses on the tax treatment of investment funds, not on the tax treatment of investors.

36. Section 3.2 states that the government proposal aims to take account of the need to amend tax legislation that follows from the proposed amendments to the legislation on investment funds, and that the purpose of the government proposal is to bring clarity to situations in which a foreign investment fund is regarded as equivalent to a tax-exempt Finnish investment fund or special fund for tax purposes, thereby making their tax treatment more predictable, improving legal certainty and reducing bureaucratic expenditure.

37. It states that, as the applicable Law on income tax does not define investment funds, comparability criteria have had to be established in taxation practice and case-law; that, as the current national tax legislation is generally complied with, foreign funds have been readily regarded as equivalent to Finnish investment funds; that Finnish investment funds or special funds are not necessarily treated similarly abroad or may otherwise be subject to stricter regulation than foreign funds, which could be regarded as problematic in terms of competitive neutrality; and that the government proposal was designed to put domestic and foreign funds on an equal footing in that regard.

38. It states that one starting point that must generally be taken into account for tax purposes in Finland is that tax treatment depends on the legal form of the investment instrument; that the proposal is not intended to change those premises; and that Finnish investment funds and special funds are constructs constituted by

contract and the purpose of the government proposal is to clarify the tax legislation solely with regard to domestic and foreign funds constituted by contract.

39. Section 3.3 states that the purpose of the provision is not to derogate from the general premises governing taxation in Finland, that is that tax treatment depends on legal form, and that, as the intention is not to extend the tax exemption to instruments for mutual investments in securities established in a different form **[Or. 7]**, it is not proposed to apply the provision in question to instruments for mutual investments in securities other than those constituted by contract, to which it applies, moreover, only if the conditions are fulfilled.

40. It states that the principle of the free movement of capital enacted in the TFEU prevents domestic and foreign investment funds from being treated differently for tax purposes; that the dividends paid by a foreign investment fund in the same situation as that in which a domestic investment fund is exempt from tax should not be subject to withholding tax; that, however, the tax rules for investment funds need to be clarified, taking account of the need for interpretation and the resultant bureaucratic expenditure in equivalence cases; that this will also clarify the situation in which a foreign fund can be regarded as equivalent to a Finnish investment fund or special fund; and that the applications for withholding tax refunds would also have fiscal implications.

41. It states that taxation in Finland depends on the legal form of the investment instrument; that Finnish investment funds are constructs constituted by contract with no legal personality of their own regarded as a set of assets exempted from tax under special rules; and that, based on their legal form, foreign investment funds can be treated as equivalent to Finnish share companies for tax purposes.

42. Report VAVM 34/2018 of the Committee on Financial Affairs states that the committee noted that the government proposal disregards foreign investment funds within the meaning of the Investment Funds Directive and funds in the form of a trust; that the tax exemption was tailored exclusively to investment and special funds constituted by contract, as all funds established in Finland must be constructs constituted by contract; and that an interpretation of EU law is still required for the purposes of the tax treatment of investment firms and funds in the form of a trust.

43. However, the committee considered the government proposal to be well-founded, even in that regard, as the proposed amendments would adjust Finnish tax legislation so that it could be assumed to comply with the requirements imposed under the previous case-law of the Court in connection with the tax treatment of foreign funds to be regarded as equivalent to Finnish investment or special funds, and that it was also important that the basis for taxation in Finland should not be narrowed unnecessarily in cross-border situations.

Relevant EU law:

Treaty on the Functioning of the European Union

44. According to Article 49(1) TFEU, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State in the territory of any Member State.

45. According to Article 63(1) TFEU, within the framework of the provisions set out in this Chapter, all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited. **[Or. 8]**

46. According to Article 65(1)(a) TFEU, the provisions of Article 63 shall be without prejudice to the right of the Member States to apply the relevant provisions of their tax law which distinguish between taxpayers who are not in the same situation with regard to their place of residence or with regard to the place where their capital is invested.

47. According to Article 65(3) TFEU, the measures and procedures referred to in paragraphs 1 and 2 shall not constitute a means of arbitrary discrimination or a disguised restriction on the free movement of capital and payments as defined in Article 63.

Case-law of the Court of Justice

48. The judgment of the Court in Case C-303/07, *Aberdeen Property Fininvest Alpha Oy*, concerned freedom of establishment within the meaning of Article 43 EC (now Article 49). By its question, the referring court wished to clarify whether Articles 43 and 48 EC and Articles 56 and 58 EC are to be interpreted as meaning that, in order to safeguard the fundamental freedoms set out therein, a share company or investment fund constituted under Finnish law and a SICAV constituted under Luxembourg law must be regarded as comparable, despite the fact that a form of company entirely comparable to the SICAV is not recognised in Finnish law, having regard, first, to the fact that the SICAV, which is a company under Luxembourg law, is not mentioned in the list of companies referred to in Article 2(a) of Directive 90/435, with which the Finnish withholding tax legislation applicable in the present case is consistent, and, second, to the fact that the SICAV is exempt from income tax under the domestic tax legislation of the Grand Duchy of Luxembourg. In these circumstances, is it contrary to the above articles of the EC Treaty for the Luxembourg-based SICAV as the recipient of dividends in Finland not to be exempt from the withholding tax to be paid on the dividends?

49. The Court held at paragraph 50 of its judgment that, in the first place, the circumstance that in Finnish law there was no type of company with a legal form

identical to that of a SICAV governed by Luxembourg law could not in itself justify a difference in treatment, since, as the company law of the Member States had not been fully harmonised at Community level, that would deprive the freedom of establishment of all effectiveness.

50. The Court found at paragraph 55 of its judgment that, in those circumstances, the differences between a SICAV governed by Luxembourg law and a share company governed by Finnish law, relied on by the Finnish and Italian Governments, were not sufficient to create an objective distinction with respect to exemption from withholding tax on dividends received. Consequently, there was no further need to examine to what extent the differences between a SICAV governed by Luxembourg law and an investment fund governed by Finnish law, said to exist by those governments, were relevant for establishing such an objective difference in situation.

51. The Court further held at paragraph 56 of its judgment that it followed that the difference in treatment between non-resident SICAVs and resident share companies **[Or. 9]** with respect to the exemption from withholding tax on dividends distributed to them by resident companies constitutes a restriction of freedom of establishment, prohibited in principle by Articles 43 EC and 48 EC.

52. Both in joined Cases C-338/11 to C-347/11, *Santander Asset Management*, concerning French withholding tax, and in Case C-190/12, *Emerging Markets Series of DFA Investment Trust Company*, concerning Polish withholding tax, the Court held that withholding tax on dividends in the source country infringed Article 63 TFEU, as the foreign investment companies in a comparable situation received less favourable tax treatment than domestic investment funds.

53. However, in Case C-156/17, *Köln-Aktienfonds Deka*, concerning the refund of Dutch dividend tax, the Court held at paragraph 55 of its judgment that national legislation which applies without distinction to resident and non-resident operators may constitute a restriction on the free movement of capital and that it follows from the Court's case-law that even a differentiation based on objective criteria may de facto disadvantage cross-border situations. The Court added at paragraph 56 that that is the case where national legislation which applies without distinction to resident and non-resident operators reserves a tax advantage in situations in which an operator complies with conditions or obligations which are, by their nature or in fact, specific to the national market, in such a way that only operators present on the national market are capable of complying with those conditions or obligations, and non-resident operators which are comparable do not generally comply with those conditions or obligations.

54. The referring court believes that neither the above nor any other judgments of the Court provide a direct answer to the question in this case.

The need for the preliminary ruling

55. The Administrative Court is required to decide whether the applicant is to be regarded for tax purposes as equivalent to a Finnish investment fund exempt from income tax for the tax year 2020, such that it is not liable for tax on rental income and capital gains in Finland, or whether it has to pay withholding tax on that income.

56. According to the preliminary decision issued by the Tax Authority, the applicant, which is to be regarded for tax purposes as equivalent to a Finnish investment fund exempt from income tax for the tax year 2019, cannot be regarded as an investment fund exempt from income tax following the entry into force of Paragraph 20a of the Law on income tax at the beginning of 2020 and must therefore pay withholding tax on its income in Finland.

57. Interpretation is required in this case to establish whether the national provision in Paragraph 20a of the Law on income tax infringes Articles 49, 63 and 65 TFEU, as, according to that provision of law, only foreign open-ended investment funds constituted by contract are regarded as equivalent to Finnish investment funds exempt from income tax, meaning that, now that the law has been amended, investment funds in the form of a company like the applicant, for example, **[Or. 10]** can no longer be regarded as equivalent to a Finnish tax-exempt investment fund. According to the Finnish legislation governing investment funds, investment funds must be constituted by contract.

58. The Administrative Court is not aware of any preliminary ruling of the Court of Justice on the interpretation of Articles 49, 63 and 65 TFEU on the matter described above.

59. 'A' SCPI and the Tax Recipients Legal Services Unit have been granted a right to be heard with a view to requesting a preliminary ruling from the Court of Justice.

Interim order of the Helsingin hallinto-oikeus (Administrative Court, Helsinki, Finland) on a reference to the Court of Justice of the European Union for a preliminary ruling

60. The Administrative Court has decided to stay the proceedings and to request a preliminary ruling from the Court of Justice of the European Union pursuant to Article 267 of the Treaty on the Functioning of the European Union (TFEU) concerning the interpretation of Articles 49, 63 and 65. A preliminary ruling is necessary for the resolution of the dispute pending before the Administrative Court.

Question referred

Are Articles 49, 63 and 65 TFEU to be interpreted as meaning that they preclude national legislation under which only foreign open-ended investment funds constituted by contract can be regarded as equivalent to Finnish investment funds exempt from income tax, meaning that foreign investment funds established in a legal form other than by contract are subject to withholding tax in Finland, even though there are otherwise no significant objective differences between their situation and that of Finnish investment funds?

Once it has received a preliminary ruling from the Court of Justice on the question set out above, the Administrative Court will give a final decision in the case.

Appeal

According to Paragraph 108 of the Oikeudenkäynnistä hallintoasioissa annettu laki (Rules of procedure of the administrative courts), this order is not open to separate appeal. **[Or. 11]**

[not translated] **[Or. 12]** [not translated]