THE CORPORATE TAX PLANNING LAW REVIEW

Second Edition

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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SECOND EDITION

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For further information please contact Nick.Barette@thelawreviews.co.uk

Editors
Jodi J Schwartz and Swift S O Edgar

THE LAWREVIEWS

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PREFACE

We are pleased to present the second edition of *The Corporate Tax Planning Review*. This volume contains 22 chapters, each devoted to a different country and each providing expert analysis by leading practitioners of the most important aspects of tax planning for multinational corporate groups in that country, with a particular focus on recent developments.

The jurisdictions represented in this volume are diverse and include established major economies (e.g., the United States, Germany, Korea, etc.); EU countries both that have become popular destinations for new business organisations and those where multinationals tend to form entities to facilitate local operations or investments; the city states of Singapore and Monaco; and several nations in the Global South (Colombia, Venezuela, Malaysia and more). Echoing this geographical variety, *The Corporate Tax Planning Review* describes tax developments worldwide that respond to different challenges in different places. At the same time, many countries share goals of preventing jurisdiction-shopping, protecting against erosion of the tax base, promoting local investment and raising revenues. These complex and at times conflicting goals present opportunities for the well advised and traps for the unwary.

While each chapter discusses issues at the cutting edge of tax law, the authors have contextualised their analyses with sufficient background information to make this volume accessible and useful to generalists and to tax practitioners outside each particular jurisdiction. Although *The Corporate Tax Planning Review* is by its nature an abbreviated overview, we hope it will at least serve as a workable compass to in-house counsel and outside advisers as they attempt to navigate their clients through the unsteady and at times uncharted waters of contemporary corporate tax planning.

We are extremely grateful to the contributors who have assiduously distilled a wealth of expertise to create this volume and to Nick Barette, Gavin Jordan, Tommy Lawson and Adam Myers at Law Business Research Limited for their editorial acumen and dedication to this project.

Jodi J Schwartz
Swift S O Edgar
Wachtell, Lipton, Rosen & Katz
New York, NY
April 2020

Chapter 5

FINLAND

Heikki Vesikansa and Stefan Stellato[1]

I INTRODUCTION

Finland joined the Organisation for Economic Cooperation and Development (OECD) in 1969 and the European Union (EU) in 1995. Membership of the OECD and the EU has significantly shaped Finland's tax system with respect to, for example, transfer pricing, value added taxation (VAT), tax-neutral corporate restructurings and tax-exempt dividend distributions between parents and subsidiaries. This, together with early adoption of the euro in 1999, has made cross-border business easier.

Perhaps as a backlash to undesirable phenomena in the international tax environment, Finland has introduced additional measures to target international tax avoidance. In general, attitudes towards tax avoidance and tax planning are becoming increasingly negative or even angry.

The Tax Administration is questioning more broadly arrangements that have previously been widely considered acceptable or, if not acceptable, at least common. The Tax Administration more frequently challenges, for example, debt push-down arrangements and transfer pricing models. Even though these challenges may lose in court, the increasing risk of challenge reduces legal certainty.

Overall, Finland is still a very good place for international business from both tax and other perspectives. The Finnish corporate income tax rate of 20 per cent is reasonably attractive in an international comparison. Finland is a stable democracy and one of the safest and least corrupt countries in the world, with high levels of public trust and a highly skilled workforce.[2]

II LOCAL DEVELOPMENTS

i Entity selection and business operations

Finland has a residence-based tax system: Finnish tax residents are subject to Finnish taxation on their worldwide income, whereas Finnish non-tax residents are subject to Finnish taxation only on their Finnish-source income (as defined in national law). Currently, legal persons are

1 Heikki Vesikansa is a partner and Stefan Stellato is an associate in the tax group of Hannes Snellman Attorneys Ltd in Helsinki.

2 As an example, Finland ranked second in The Global Human Capital Report 2017 of the World Economic Forum.

Finnish tax residents only if they are registered in Finland or if they are established under Finnish laws. However, the government plans to make legal persons tax residents also if their place of effective management is in Finland.

Taxable income for all entity types is assessed separately under three different acts, depending on if the source of the income is business, farming or other activities. Losses from one source of income may not be offset against another source of income, apart from rare exceptions. However, most corporations have been taxed exclusively under the business income source as of tax year 2020, which simplified the system somewhat.

Generally, the provisions applicable to the entity type at hand are decisive and there are very limited possibilities for a taxpayer to choose how it is taxed (e.g., check the box). There is just one clear exception – the housing real estate investment trust (REIT) regime. There are also no patent boxes or other similar tax regimes, except for a temporary regime which allows accelerated depreciation on machinery and equipment in tax years 2020–2023. Instead, the comparatively modest corporate income tax rate is Finland's straightforward advantage in terms of international tax competition.

The most common entity type is the corporation. Corporations are legal persons and tax subjects, meaning that they are subject to corporate income tax on their profits. Upon distribution of such profits, there is another band of taxation on the shareholder level. Significant advantages of corporations include, subject to additional requirements, availability of group contribution (a form of group taxation) and participation exemption on capital gains.[3]

The mutual real estate company (MREC) is a corporation, whose purpose is to own a building and whose shares give its shareholders the right to possess its building. As the right of possession is with the shareholders, the shareholders sign the rental agreements with tenants and the tenants pay rent directly to the shareholders. The articles of association require shareholders to pay maintenance and other fees to the MREC to cover the MREC's costs. The fees are typically set to a level, which leaves the MREC with either no profit or modest profit, which is subject to normal corporate income tax. The MREC is a deviation of the fundamental principle that transactions between a corporation and its shareholders be at arm's length. It also seems to be quite distinctive for Finland.

Branches (permanent establishments) lack legal personality, but they are subject to Finnish corporate income tax on their profits. The calculation of these profits requires attribution of income and expenses to the branch, which may increase administrative burden and the risk of double taxation, as it is possible that tax authorities disagree on the attribution. In practice, branches are mostly used for regulatory reasons, for example, within the financial sector.

Limited partnerships are legal persons. They are not tax subjects, meaning that no income tax is payable on the limited partnership level. The taxable profit is calculated on the limited partnership level and then apportioned to be taxed on the partner level in accordance with the limited partnership agreement. Hence, limited partnerships are frequently used

3 For example, insurance and pension institutions are often corporations. They are, however, on many points subject to special rules, which is why they are not discussed in this text.

by private equity fund investors and in other circumstances where flow-through taxation is desirable, for example, because different kinds of investors are subject to different kinds of taxation (corporation, pension fund, private person, etc.).[4]

A curiosity within the Finnish fund environment is the housing REIT regime. This regime has since 2009 given Finnish corporations the possibility to elect exemption from corporate income tax. However, exemption comes with a handful of requirements including that the corporation must, for example, be publicly listed, invest in housing and distribute almost all of its realised profits annually. It could be said that the Finnish REIT regime has been a failure, because only one REIT has ever existed and even that has given up its tax exemption. In practice, investments in real estate are made through other vehicles such as tax-exempt investment funds, unlisted or listed corporations or limited partnerships, which are more flexible.

Finnish investment funds are contractual and may be divided into normal and special investment funds.[5] Investment funds lack legal personality and their activities are carried out by a separate management company. As of tax year 2020, investment funds have been required to meet certain conditions related to, for example, a minimum number of unit holders and open-endedness to be tax exempt.

Finnish courts have struggled to treat foreign funds in a non-discriminative manner as compared to Finnish funds.[6] This is largely because Finland does not have corporate funds and the Finnish tax model builds on income tax exemption on the investment fund level. A legislative change of 2020 set out precise criteria for when foreign funds are granted the same tax treatment as Finnish funds. Unfortunately, there are doubts as to whether or not the criteria are compliant with the EU freedoms especially, as all foreign corporate funds are subject to tax based on their legal form even if they were functionally similar to Finnish tax-exempt (contractual) funds.

ii Common ownership: group structures and intercompany transactions

There is, as such, no tax consolidation in Finland, and even if a corporation belongs to a group, it is taxed as a separate entity. Pricing between related parties should be at arm's length, both in a national and an international setting.

Group contribution – a tax-deductible expense for the payer and taxable income for the payee – is the Finnish instrument that most closely resembles tax consolidation. A traditional

4 On a related note, investment by foreign investors in Finnish limited partnership funds lost its attractiveness in 2002, when the Supreme Administrative Court concluded that a Finnish limited partnership fund created a permanent establishment. Luckily, this tax neutrality problem between direct and indirect investment could in many cases be mended by using a foreign limited partnership. After a few years the legislator stepped in with a special provision, which provided that, subject to certain conditions, foreign partners are taxed on their income from a limited partnership fund as if they were direct shareholders in the Finnish target companies. The provision was broadened as of tax year 2019 to cover certain fund of funds structures to which the original provision did not apply.

5 The main difference is that the investment policy of a 'normal' investment fund is in line with the EU Directive on undertakings for collective investment in transferable securities (UCITS), whereas that of a special investment fund deviates from the Directive, for example, with regard to diversification. The introduction of corporate funds, such as SICAVs, which already exist in many other countries, has not advanced despite suggestions to that end.

6 The EU free movement of capital prohibits discrimination even in relation to non-EU and non-EEA countries.

requirement of group contribution has been that both corporations are taxed under the business income source, which has, in practice, ruled most mutual real estate companies, real estate holding companies and personal holding companies out of its scope. The scope of potential uses broadened significantly as of tax year 2020, when most corporations started to be taxed under the business income source.

Additional requirements of group contribution include that both the payer and the payee are Finnish corporations with at least 90 per cent direct or indirect ownership.[7] The availability of group contribution may be uncertain where this ownership requirement is met through a common foreign parent company. Hence, it could make sense to plan for the common parent company to be Finnish or to make one Finnish corporation the parent of the other.

As for cross-border group contribution, there is one Supreme Administrative Court ruling from 2007 where a Finnish company was not allowed to pay deductible group contribution to its foreign sister company with final tax losses.[8] A 2013 ruling allowed cross-border transfer of final tax losses to Finland in a cross-border merger. Overall, the legal situation is uncertain, but arguably cross-border utilisation of tax losses should be allowed either through group contribution or merger, provided that the losses are final.[9] In fact, in February 2019 the Commission sent a letter of formal notice to Finland, urging it to align its rules on group contribution with EU law. A working group is now investigating a broader reform of the Finnish group taxation system and is anticipated to release its report in 2021.

Dividends between Finnish unlisted corporations are generally exempt without minimum holding requirements. Also dividends received by a Finnish corporation from an unlisted corporation within the EU or EEA may benefit from a dividend participation exemption without a minimum holding requirement, if the dividend-distributing corporation is liable to pay at least 10 per cent tax on its profits or its corporate form is one intended in the EU Parent-Subsidiary Directive. In practice, most Finnish tax treaties exempt dividends from treaty countries, provided that the Finnish recipient company has at least 10 per cent of the payer company's votes. Overall, Finnish dividend taxation is very complex.

There is a participation exemption also on gains on sales of shares, which belong to the selling company's capital assets of the business income source and of which the selling company has owned at least 10 per cent for an uninterrupted period of at least one year. The participation exemption is not available to private equity investors or if the sold company has substantial real estate holdings or is located in certain, mainly non-treaty, countries. Groups would typically plan to take advantage of the participation exemption upon a potential exit.

However, in the case of a capital loss, it would be more beneficial not to meet the criteria for participation exemption, because a loss on a sale that would have qualified for exemption is non-deductible. In addition, if the shares are capital assets but the other requirements for exemption are not met, a loss would be deductible only against taxable gains on capital asset shares and only in the following five tax years (ring-fencing).

7 Furthermore, the ownership requirement must be met uninterruptedly throughout the entire financial period and the financial periods of the corporations must end simultaneously, which may lead to quite complex considerations especially in connection with tax-neutral restructurings such as demergers.

8 The Supreme Administrative Court denied payment of deductible group contribution also in another 2007 ruling where the recipient was the payer's parent company with no final tax losses.

9 See, e.g., *Marks & Spencer* (C-446/03) of the European Court of Justice.

In some cases, share ownership has been structured to benefit from a foreign participation exemption regime that is broader than the Finnish one. This could potentially also give rise to transfer tax savings if the future buyer is not tax resident in Finland. However, this strategy has pitfalls, especially in cases involving Finnish real estate.

Finland prevents tax avoidance with a variety of anti-avoidance rules. These include the interest deduction limitation rule, the controlled foreign company (CFC) rule, the general anti-abuse rule (GAAR) and, in a sense, the arm's-length principle.

As a general rule for outbound dividends, withholding tax rates are higher for recipients in non-EEA and non-treaty jurisdictions. In this regard, it has been a simple strategy to repatriate profits to a non-EEA (ultimate) parent company through an intermediate EU or EEA holding company. This has required that the country of the EU or EEA holding company does not levy withholding tax on dividends paid to the non-EEA country of the (ultimate) parent company, and that the dividend distribution from the Finnish company to the EU or EEA holding company can be made exempt from tax. However, this kind of arrangement will likely be challenged more frequently based on recent EU law developments and the principal purpose test, at least if the substance of the EU or EEA holding company is light.

What is quite noteworthy is that Finland does not, as a matter of national law, currently levy withholding tax on most kinds of interest payments to non-residents. Finland also does not have express capitalisation requirements. However, the opportunities to push down debt to Finland, especially in connection with intra-group transactions, are very limited, and Finland has already since tax year 2014 applied an interest deduction limitation rule to, among others, Finnish corporations, branches and limited partnerships. The interest deduction limitation rule had to be broadened to cover external loans and all income sources as of tax year 2019 because of the EU Anti-Tax Avoidance Directive (ATAD) I.

The current interest deduction limitation is astonishingly complex. As a brief introduction, deductions for net interest expenses paid to associated group entities are capped at €500,000 or, if the total net interest expenses (to associated group entities and external parties) exceed €500,000, up to 25 per cent of tax EBITD (also for the part not exceeding €500,000). Net interest expenses paid to external parties are deductible up to €3 million (safe harbour), even in cases where the 25 per cent of tax EBITD rule would mean a lower deduction or the total net interest expenses would exceed €3 million. Net interest expenses may also be deducted for the part exceeding the limit of €3 million within the 25 per cent of tax EBITD rule. Net interest expenses paid to associated group entities are deducted after any net interest expenses paid to external parties.

External loans may in some situations be treated as loans taken from associated group entities, causing them to be subject to stricter limitations. This tainting may occur, for example, in back-to-back financing through an external lender or where a related party has given its receivable as security for an external loan. In practice, it may be quite difficult for a debtor to reach an agreement with a financier to carve out related party receivables from the security package.

Groups could multiply the mentioned thresholds by allocating debt to multiple group companies as the limitation applies on the entity, not group, level. Alternatively, they could attempt to benefit from the balance sheet test, according to which the limitation does not apply at all if the taxpayer's equity to total balance sheet ratio is higher than or equal to the

equivalent consolidated balance sheet ratio. It is also worth noting that net interest expenses for which deductions have been denied under the interest deduction limitation rule may be carried forward indefinitely and deducted within the limit of each year.

Finland introduced a CFC rule in 1995. It has thereafter been amended numerous times, mainly because it has been in conflict with EU law. The most recent amendment was implemented because of the ATAD I as of tax year 2019. In practice, very few foreign entities are subject to CFC taxation, which is well in line with the rule's express objective – prevention.

Under the current CFC rule, Finland taxes the income of a foreign entity if a Finnish taxpayer, either alone or together with its related parties, has, directly or indirectly, at least 25 per cent of votes, ownership, right to capital or right to profits or assets, and the foreign entity's effective tax rate is less than three-fifths of that calculated under the Finnish rules. An entity within the EEA may escape the CFC rule if it carries out actual economic activities. An entity outside the EEA may also escape the CFC rule, but it must meet more criteria.

Strictly speaking, Finnish tax law rarely makes a difference between intra-group transactions and third-party transactions. Hence, for example, a tax-deductible loss may equally be incurred between external or related parties. However, intra-group transactions are, in practice, subject to closer scrutiny than transactions between unrelated parties and more likely to be found artificial or abusive and, therefore, disregarded under the GAAR. Alternatively, their price could be found against the arm's-length principle.

The Tax Administration may make a transfer pricing adjustment if related parties (roughly defined as over 50 per cent ownership or votes, etc., or actual control) deviate from arm's-length pricing and the deviation leads to lower taxable income or higher loss in Finland. The Supreme Administrative Court has concluded in its 2009 ruling that no transfer pricing adjustment can be made on an underpriced sale of shares within the group, if the participation exemption is applicable (leading to exempt gain or non-deductible loss).

iii Third-party transactions

The differences in tax treatment between share deals and asset deals are often an important consideration in structuring third-party transactions even if in practice most deals are carried out as share deals. To name a few differences, only share deals may benefit from the participation exemption discussed above. Transfer tax is typically payable in share deals, whereas transfer tax is payable in asset deals only if the sold assets include shares or real estate. Deductible goodwill may be achieved only in asset deals.

Finland has rules stemming from the EU merger directive on tax-neutral mergers, demergers, partial demergers, transfers of assets and exchanges of shares. These may be carried out intra-group, for example, to simplify the group structure, or as third-party transactions if it is commercially feasible that the counterparty remains a shareholder after the arrangement. The main benefit is deferral of direct income tax consequences until the next non-tax neutral disposal.

Tax neutrality is subject to multiple conditions, one of them being that the recipient corporation gives its newly issued or treasury shares as consideration for the transferred assets or liabilities. In mergers, demergers, partial demergers and exchanges of shares, cash consideration is allowed for up to 10 per cent of the nominal value of the consideration shares or, if the shares have no nominal value, of the amount recorded in the share capital for the consideration shares. The arrangement is always treated as a taxable transaction for a shareholder to the extent that the shareholder receives cash consideration.

In a tax-neutral merger, the merging company's assets and liabilities transfer to the receiving company and the merging company ceases to exist. There are also combination mergers, which is essentially two companies merging to a newly established company.

In a tax-neutral demerger, the demerging company transfers all its assets and liabilities to two or more existing or newly established companies and the demerging company ceases to exist. In a tax-neutral partial demerger, the demerging company transfers an independent business[10] to an existing or newly established company and the demerging company continues to exist with at least one independent business. In practice, a demerger may be easier to implement than a partial demerger because there is no independent business requirement, which is subject to interpretation and should, therefore, be separately confirmed with the tax authorities.

In a tax-neutral transfer of business, the transferring company transfers an independent business to an existing or newly established company. An advantage compared to a partial demerger is that there is no requirement to leave an independent business in the transferring company. The general difference between partial demerger (or demerger) and transfer of business is that in a transfer of business the transferee company will be owned by the transferring company but in a partial demerger by the demerging company's shareholders.

In an exchange of shares, a company acquires an amount of shares that entitles it to a majority of the votes in the target company or, if the acquiring company already has a majority of the votes, increases its ownership. An exchange of shares is the only tax-neutral arrangement where the acquiring company can receive a step-up in tax basis. Downsides of an exchange of shares include transfer tax of 1.6 per cent or 2 per cent on the value of the shares and an exit tax for natural persons.

As a general rule, a corporation may carry forward its tax losses for 10 years. However, this right may be lost under one of the two Finnish tax loss forfeiture rules.

Under the first general rule, applicable among others to share sales, tax losses carried forward are forfeited if more than half of the shares have changed owners during or after the loss year. If such a change of ownership has occurred in an entity that holds at least 20 per cent of the owner of the loss-making company, then all the shares of the owner of the loss-making company are deemed to have changed owner. Ownership changes on higher levels in the ownership structure do not forfeit the right to utilise tax losses, which may present a structuring opportunity. There is no exemption for intra-group transactions.

A dispensation may be sought from the Tax Administration, either before or after the change of control, to retain the right to utilise the tax losses that would otherwise be forfeited. In practice, a dispensation can usually be obtained where the losses are needed to continue the business and the transaction is not motivated by the tax losses.

The second tax loss forfeiture rule applies to losses of merging and demerging companies.[11] Upon a merger or demerger, the recipient company may deduct the merging or demerging company's tax losses if the recipient company or its shareholders have held at least 50 per cent of the shares of the merging or demerging company as of the beginning of the

10 All assets and liabilities pertaining to the business and required for it to work on a stand-alone basis.

11 Even if the two rules are separate from each other, they may in some circumstances be applied simultaneously. For example, the survival of a merging company's losses is determined under the second rule. However, if the recipient company also has losses and the issuance of new shares by the recipient company as consideration to the merging company's shareholders leads to an ownership change in the recipient company, then the first rule will also be applicable.

loss year. There is no possibility to apply for dispensation. There is also, as such, no exemption for intra-group transactions, although the ownership criterion for survival of losses clearly has similar elements.

iv Indirect taxes

Transfer tax is generally payable on Finnish shares if at least one of the parties to the transfer (seller or buyer) is a Finnish tax resident (or, more rarely, a local branch of a foreign financial institution). If the target of the transfer is Finnish real estate or shares of certain real estate companies, the transfer is subject to transfer tax even if neither of the parties is Finnish tax resident. Transfer tax may also be payable on foreign securities if more than half of the company's assets, directly or indirectly, comprise Finnish real estate and if at least one of the parties to the transfer (seller or buyer) is a Finnish tax resident. No transfer tax is payable on listed shares if the transaction meets requirements such as being conducted via securities brokers.

The applicable tax rates are 1.6 per cent for securities, 2 per cent for shares in certain real estate companies and 4 per cent for real estate. The tax is generally calculated on the purchase price and the value of any other consideration, but also on certain other payments and liabilities as quite ambiguously defined in the Transfer Tax Act. In 2019, the Supreme Administrative Court ruled, for example, that shareholder loans are not included in the transfer tax base when they are purchased together with the debtor company's shares. The transfer tax must as a general rule be reported and paid by the buyer, although the Finnish-resident seller may have a liability to report and withhold the tax when the buyer is non-resident.

As an EU Member State, Finland levies VAT on the sale of most goods or services. The general rate is 24 per cent. In addition, there is a reduced rate of 14 per cent on, for example, groceries and restaurant services, and another reduced rate of 10 per cent on, for example, books, pharmaceutical products and passenger transport. Finland applies an insurance premium tax of 24 per cent on certain insurance premiums. Finland also has various excise duties on, for example, electricity, cars, fuels, soft drinks, alcohol and tobacco.

Sales of shares are exempt from VAT and exemption is usually achievable in asset deals. Even if exempt from VAT, there may be, depending on the circumstances, possibilities to deduct VAT on transaction costs.

III INTERNATIONAL DEVELOPMENTS AND LOCAL RESPONSES

Finland already had an interest deduction limitation rule, a CFC rule and a GAAR before the start of the OECD Base Erosion and Profit Shifting (BEPS) project. The EU Commission has declared its preference for coordinated implementation of BEPS recommendations through directives as opposed to unilateral implementation by single Member States. In fact, many BEPS actions have reached Finland indirectly through EU Directives.

The general atmosphere has been welcoming towards implementation of BEPS recommendations and corresponding EU directives. Besides concerns about increasing administrative burden and decreasing legal certainty, there have been concerns about the quality of legislation considering the ambitious number of measures and their implementation timetables.

An amendment to the EU Mutual Assistance Directive brought country-by-country reporting to Finland as of tax year 2016. Another amendment to the same directive brought mandatory disclosure for tax advisers, but in certain situations also to groups themselves, as

of 2020. It is noteworthy that reportable arrangements include arrangements whose first step has been taken on or after 25 June 2018. Finland is bound by the European Human Rights Convention to maintain prerequisites for fair trial, including the attorney–client privilege. The EU Mutual Assistance Directive recognises that tax advisers that are attorneys are not subject to mandatory disclosure requirements where legal privilege becomes applicable in mandatory law in force in a Member State. In fact, the reporting requirements for tax advisers that are attorneys are limited in the implementing legislation.

As of tax year 2019, Finland has been required to comply with the ATAD I interest deduction limitation rule, CFC rule and GAAR. As of July 2019, Finland has been required to comply with the EU Directive on tax dispute resolution mechanisms, whose principal aims include broader scope and higher effectiveness for tax dispute resolution mechanisms. As of 2020, Finland has been required to comply with ATAD I and II exit tax provisions and a variety of anti-hybrid rules targeted against hybrid permanent establishments, hybrid transfers, imported mismatches and dual resident mismatches. As of 2022, Finland must comply with ATAD II rules on reverse mismatches.

Finland has opposed the EU's 2018 proposals on taxation of the digital economy. An apparent reason is that the proposals would likely be disadvantageous for Finland, which has a small population and a blossoming virtual gaming industry. Finland has also called for a global solution to tax problems related to the digital economy.

Finland has a network of some 80 tax treaties. Finnish tax treaties typically follow the OECD Model closely, and almost all of them provide for double taxation relief through the credit method. However, many treaties include a participation exemption under which Finland must exempt dividends paid from the other state to a Finnish company with at least 10 per cent of the other company's votes. Many treaties extend Finland's source state taxation rights to gains from sales of MRECs.

Most recently, Finland has signed a tax treaty with Hong Kong, which entered into force on 1 January 2019. Finland has recently also renegotiated its outdated tax treaties with Sri Lanka, Germany, Spain and Portugal. The new treaty with Germany has been applied since 2018 and those with Sri Lanka and Spain since 2019.[12] However, the process with Portugal was so slow that the Finnish government decided to terminate the tax treaty, which is why Portugal has been a non-treaty country as of 1 January 2019.

Finland is a signatory of the Nordic Multilateral Tax Treaty, which is a multilateral double taxation convention largely based on the OECD Model Tax Convention. Finland is also among the countries that signed the OECD Multilateral Instrument (MLI) in June 2017. Finland included most of its tax treaties as covered agreements, but made broad reservations to the applicable provisions. Consequently, it is expected that the most important practical effects of the MLI will be the principal purpose test and the mandatory arbitration procedure. Application of the MLI started in 2020.

12 Renegotiation of the treaties with Spain and Portugal was spurred by increasing media attention and political resentment towards high-income individuals moving to Spain or Portugal to avoid tax on their private-sector pensions, as the old treaty did not allow Finland to tax these pensions.

IV RECENT CASES

The Finnish Supreme Administrative Court took a negative stand against debt push-downs in two high-profile rulings in 2016. Under the circumstances of the cases, the shares of the target company were acquired from a third-party seller and then transferred through several internal transactions within the group to the Finnish branch of a foreign group company. In both cases, the Finnish branch had very limited activities and was established only shortly before the sale and was almost entirely or entirely financed with debt. One of the rulings was decided based on allocation (i.e., the interest expenses could not be attributed to the Finnish branch) and the other was based on the GAAR.

Shortly after the rulings, the Tax Administration published a bulletin in which it construed the rulings as applying not only to debt push-down arrangements carried out using branches but also to those carried out using special purpose vehicles (corporations). There is now uncertainty about the acceptability of debt push-down arrangements. As far as is known, companies have after the rulings refrained from at least group-internal debt push-downs.

Transfer pricing is another area that has seen significant developments over the past few years. Under the circumstances of a Supreme Administrative Court 2014 landmark ruling, a Finnish corporation had taken on an IFRS hybrid loan from its Luxembourgian shareholder because of an external bank's request that the debtor take on financing with secondary right of repayment, which would be recorded as equity under IFRS. The loan could be repaid only on the debtor's request and the 30 per cent interest was capitalised annually. The loan was classified as debt for tax purposes. The Supreme Administrative Court concluded that the transfer pricing adjustment provision in Finnish national law does not allow the Tax Administration to recharacterise the instrument as equity. Instead, the arm's-length nature should be analysed within the legal form decided by the taxpayer (i.e., debt).

The Tax Administration has, despite the 2014 ruling, continued to challenge the legal form in high-profile transfer pricing cases. The Tax Administration has, for example, argued that, where a Finnish company had financed the group's Belgian financing company almost entirely with equity (to benefit from Belgian notional interest deduction on equity), a part of the Belgian financing company's profits should be allocated to the Finnish company as deemed interest payments. The Tax Administration's argumentation in this specific case was dismissed, in a final manner, by an Administrative Court ruling of 2016.

The Supreme Administrative Court gave another positive ruling for the taxpayer in 2018. In the circumstances at hand, the licence payments by group manufacturing companies to the Finnish group parent company had been determined using the comparable uncontrolled price (CUP) method and the price for the finished products using the resale price method (RPM). The Tax Administration disregarded the methods chosen by the taxpayer, arguing that the most suitable method was the profit-split method.

The Supreme Administrative Court dismissed the Tax Administration's stand, among others, on the basis that the scope of the profit split method had broadened only in the 2010 OECD transfer pricing guidelines, but the case at hand concerned an earlier tax year (2009). Hence, the Tax Administration should have relied on the 1995 OECD transfer pricing guidelines, which had a clear preference for traditional methods such as the CUP and the RPM. Shortly after the ruling, the Tax Administration published a bulletin in which it brought forward that guidelines published after the tax year in question may be utilised as long as they specify earlier rules and do not materially alter earlier rules or create new rules.

Broadly speaking, the Tax Administration has been keen to replace transfer pricing methods chosen by the taxpayer with the profit-split method, especially where the group

parent entity is a Finnish company. Conversely, where a group has had loss-making Finnish subsidiaries, the Tax Administration has argued that the subsidiaries have a low risk profile and therefore losses are against the arm's-length principle.

In 2019, the Tax Administration launched a new control project targeting arrangements where publicly listed shares have been transferred to a tax treaty resident owner for the dividend payment date only to be returned to the original owner afterwards with a compensation for the dividend paid to the interim owner. It is understood that the new control project will especially target some types of share lending arrangements and seeks to challenge reduced dividend withholding taxes applied under tax treaties.

V OUTLOOK AND CONCLUSIONS

Advance tax rulings and preliminary discussions with the tax authorities are often workable tools to gain tax comfort. These tools should increase in importance, considering the unprecedented pace of new tax legislation and that new legislation is bound to have a higher degree of uncertainty until case law has had time to develop. The Tax Administration has also demonstrated an increasing appetite for challenge. For groups, both the level of tax risk and compliance burden are likely to continue their increase. The Tax Administration has recently introduced an ADR procedure, which aims to identify the disputed and undisputed facts before the case goes to the courts.

Transfer pricing has been a particularly hot topic over the past years. It is likely to remain one. The question of beneficial ownership in arrangements with share-lending is becoming a centre of increasing attention with the new Tax Administration control project as of 2019.

Appendix 1

ABOUT THE AUTHORS

HEIKKI VESIKANSA

Hannes Snellman Attorneys Ltd

Heikki Vesikansa is a partner and heads Hannes Snellman's tax practice in Helsinki. He advises clients in tax structuring of major transactions as well as in complex tax litigation engagements, often involving cross-border elements and leading into significant legal precedents for Finnish tax law. Heikki is also a board member in the Association for Finnish Tax Professionals, a member of the taxes committee of the Finnish Bar Association, as well as a member of the legal and taxes committees of the Finnish Venture Capital Association, and participates in these roles in the consultations with the Ministry of Finance for new tax legislation and with the Finnish Tax Administration for their updated guidelines for the interpretation of Finnish tax laws.

STEFAN STELLATO

Hannes Snellman Attorneys Ltd

Stefan Stellato is an associate in the Hannes Snellman tax group. Before graduating from the University of Helsinki, he spent a semester studying at a university in New York. Besides his master of laws degree, he holds a master of science (economics and business administration) degree from Hanken School of Economics in Helsinki.

HANNES SNELLMAN ATTORNEYS LTD

Eteläesplanadi 20
00130 Helsinki
Finland
Tel: +358 9 228 841
Fax: +358 9 177 393
heikki.vesikansa@hannessnellman.com
stefan.stellato@hannessnellman.com
www.hannessnellman.com

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