In case no. 6238-24, the **Swedish Tax Agency** (Appellant) v. **AA** (Respondent), the Supreme Administrative Court delivered the following judgment on 19 June 2025.

RULING OF THE SUPREME ADMINISTRATIVE COURT

The Supreme Administrative Court affirms the advance ruling of the Board for Advance Tax Rulings.

BACKGROUND

1. This case concerns the manner in which a certain distribution of profits in a private equity fund is to be treated for tax purposes. Private equity funds invest in unlisted companies. The capital of the funds primarily comes from, for example, pension funds and other institutional investors. The investments made by the private equity funds are often made with a certain time horizon in mind, meaning that the portfolio companies are disposed of once they have expanded and developed their profitability.

2. External investors in a private equity fund expect the manager of the fund to co-invest in the fund. The terms and conditions of such co-investments are often asymmetrical, meaning that the manager of the fund – or a company associated with the manager – receives a greater share of the profit relative to his or her share of invested capital, conditioned on the fund’s return exceeding a certain level. Such a profit distribution is regularly referred to by the English expression, “carried interest”.

3. AA is employed by a company, Nordic Capital Investment Advisory AB (“Advisory”), that provides investment advice to a manager of a private equity fund. He applied for an advance ruling in order to obtain clarity on certain tax issues. The following is set forth in the application.

4. The fund was established in accordance with the legislation of Luxembourg and most closely resembles a Swedish limited partnership, but is not a legal person according to the company legislation in Luxembourg. The founders of

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the fund are Nordic Capital Europe GP S.à r.l. ("GP") and NC Europe ILP S.à r.l. ("ILP"). Both companies are domiciled in Luxembourg. The fund will be a so-called alternative investment fund in accordance with Directive 2011/61/EU on Alternative Investment Fund Managers.

5. GP is general partner of the fund, i.e. unlimitedly liable, as well as its manager. For managing the fund, GP receives a management fee subject to market terms. For advising the manager, Advisory receives an advisory fee which is also subject to market terms.

6. The company through which the fund's founders have made their co-investment in the fund is ILP. The co-investment amounts to 2 per cent of the fund's capital. ILP is a limited partner in the fund, i.e. limitedly liable. Other investors in the fund, primarily institutional investors, are also limited partners.

7. According to the fund agreement, the profits of the fund are, in somewhat simplified terms, to be distributed between the external investors in the fund and ILP in the following manner. Firstly, 100 per cent goes to the investors until they recover the capital they have invested in the fund. Thereafter, 100 per cent goes to the investors until they have received 8 per cent interest on invested capital. Finally, 80 per cent goes to the investors and 20 per cent to ILP (i.e. the special profit share or carried interest).

8. AA has been afforded the opportunity to purchase shares in NC Europe Holding S.à r.l. ("Holding"), which owns all shares in GP and ILP. The shares in Holding are subject to certain restrictions on disposal, some that are linked to AA's employment with Advisory. He intends to purchase his shares through a close corporation wholly owned by him. According to the facts submitted in the application, the shares of the close company will constitute qualifying shares since he will be active to a substantial extent in GP. By virtue of his shares in Holding, he will be entitled to a part of the special profit share that ILP might receive.

9. AA applied for an advance ruling in order to obtain clarity as to whether he will be taxed for the special profit share to be paid out by the fund to ILP, or

for dividends from ILP to Holding, as income from employment (question 1). He also inquired as to whether he will be taxed on dividends from Holding to the close company as employment income (question 2).

10. The Board for Advance Tax Rulings responded to both questions, stating that the income will not be taxed in the employment income category. According to the Board, there is nothing to suggest that AA is able to dispose of the income covered by question 1 before the close company receives the funds in the form of dividends from Holding or as capital gains on the shares in Holding. As regards question 2, the Board stated that it must be considered that the income constitutes a dividend for the purposes of company law. The fact that the compensation in the form of carried interest is destined for ILP and not the manager was deemed to have no relevance, as the question regards funds being reallocated within a wholly owned corporate group. It was also deemed that there was no direct and decisive connection between the work performed by AA and the dividend from Holding. According to the Board, the restrictions on disposal pursuant to the shareholders agreement did not alter this assessment.

CLAIMS, ETC.

11. *The Swedish Tax Agency* claims that the advance ruling is to be affirmed.

12. *AA* is also of the opinion that the advance ruling is to be affirmed.

REASONS FOR THE RULING

Legislation, etc.

13. Through Chapter 10, section 1 and Chapter 11, section 1 of the Income Tax Act (1999:1229), it is provided that salaries and other income received on the basis of employment are to be taxed as income in the employment income category.

14. Through Chapter 41, section 1 and Chapter 42, section 1 of the Income Tax Act, it is provided that dividends owing to the holding of assets are to be taxed as income in the capital income category.

15. Physical persons are taxed on dividends from qualifying shares in close companies in accordance with the provisions of Chapter 57 of the Income Tax Act. According to section 2, such dividends are, to a certain extent, to be taxed in the employment income category.

The Court's assessment

16. The question in the case is whether the distribution of profit in the fund is to be disregarded for tax purposes. More specifically, the question pertains to whether the special profit share that ILP might receive is to instead be attributed to the external investors or to GP and, in such case, what tax effects this may have for AA. AA is of the opinion that the agreed upon profit distribution is not to be disregarded, while the Swedish Tax Agency contends that the special profit share is to be attributed to GP for tax purposes. As ILP and GP are part of the same corporate group, the Swedish Tax Agency does, however, consider that this does not give rise to any tax consequences for AA.

17. The fund essentially corresponds to a Swedish limited partnership. Generally, the profit of a limited partnership is distributed on the basis of the partnership agreement, or on whatever has otherwise been agreed between the partners. The agreed distribution, however, may be disregarded for tax purposes if it entails an undue transfer of income or appears unreasonable and substantially motivated by reasons related to taxation (see, for example, RÅ 2002 reported cases no. 115 I and II).

18. The partners of the fund are GP, ILP and the external investors. GP and ILP are associated companies, while the external investors are independent in relation to GP and ILP. Between independent parties, there is generally no basis to disregard the agreed distribution of profits for tax purposes. The distribution between GP and ILP on the one hand and the external investors on the other is thus to be accepted.

19. That being the case, it remains to be determined if either the agreed profit distribution entails an undue transfer of income from GP to ILP or the fact that

GP is not entitled to the special profit share leads to the conclusion that the distribution is deemed motivated by reasons related to taxation.

20. ILP has undertaken to invest 2 per cent of the fund's capital. AA has stated that there are commercial reasons why it is ILP, and not GP, that has undertaken to do so. One such reason is that ILP, as opposed to GP, is liable only for the fund's obligations up to invested capital. AA has further stated that it is generally accepted in the private equity industry that the party who has undertaken to invest also is given right to the special profit share. The fact that ILP and GP as founders of the fund have chosen to not have GP undertake to invest in it and thereby retain the special profit share cannot, in light of this, be said to merit either the conclusion that an undue transfer of income has taken place from GP to ILP or that the profit distribution can be deemed motivated by reasons related to taxation.

21. The Supreme Administrative Court notes in summary that it is ILP that is entitled to the special profit share and that this constitutes a return on the investment that ILP made in the fund. The income covered by the application for an advance ruling thus does not give rise to any tax consequences for AA. The restrictions on disposal pursuant to the shareholder agreement between the owners of Holding do not alter this assessment.

22. The advance ruling of the Board for Advance Tax Rulings shall be affirmed.

Justices Henrik Jermsten (dissenting opinion), Margit Knutsson, Inga-Lill Askersjö (dissenting opinion), Martin Nilsson and Mikael Westberg have participated in the ruling.

Judge Referee: Gustav Granholm.

DISSENTING OPINION

Justices Henrik Jermsten and Inga-Lill Askersjö dissent with regard to the stated grounds for the ruling and are of the position that the judgment commencing from paragraph 1 shall read as follows.

Background

1. This case concerns the manner in which income derived from a special profit share in a fund, carried interest, in a certain situation is to be treated for tax purposes. Carried interest is compensation to a fund's founders in accordance with a model within the private equity industry for profit distribution between external investors in the fund and the fund's founders. In the event the return in the fund exceeds a certain level, the founders obtain a greater share of the profit than that corresponding to their invested capital.

2. The relevant private equity fund has been established in accordance with the legislation in Luxembourg and most closely resembles a Swedish limited partnership, but is not a legal person in Luxembourg. The fund was established through Nordic Capital Europe GP S.à r.l. ("GP") and NC Europe ILP S.à r.l. ("ILP") entering into this kind of partnership. Both companies, which are Luxembourgian equivalents to Swedish limited companies, are 100 per cent owned by NC Europe Holding S.à r.l. ("Holding") which also corresponds to a Swedish limited company. The fund will be considered a so-called alternative investment fund in accordance with Directive 2011/61/EU on Alternative Investment Fund Managers ("AIFM Directive").

3. GP is general partner, i.e. unlimitedly liable for the fund's obligations and is the manager of the fund (AIF manager). For its management of the fund, GP receives a fixed fee from the fund to cover the costs of ongoing management. ILP is a limited partner in the fund, i.e. limitedly liable, and has, pursuant to the fund agreement, undertaken to invest not less than 2 per cent of the capital. ILP is entitled to two types of return: return on invested capital subject to equivalent terms and conditions as the external investors in the fund and return in the form of carried interest.

4. AA is employed by a company, Nordic Capital Investment Advisory AB ("Advisory"), that provides investment advice to GP. He has been offered the opportunity to buy Class B shares in Holding. He intends to purchase the shares through a close company wholly owned by him, Marat Vardanyan Invest AB ("Marat AB").

5. According to the facts submitted in the application, the shares in Marat AB will be qualifying shares owing to AA being active to a substantial extent in GP, him indirectly being a partner in GP by virtue of the purchase of the shares, and GP not having any outside owners. By virtue of his shares in Holding, he will be partially entitled to the special profit share which ILP might receive.

6. AA applied for an advance ruling in order to obtain clarity as to whether he will be taxed on the carried interest paid out by the fund to ILP, or for dividends from ILP to Holding, in accordance with Chapter 11 of the Income Tax Act (1999:1229) (question 1). He also inquired as to whether he will be taxed for dividends from Holding to Marat AB in accordance with Chapter 11 of the Income Tax Act (question 2).

7. The Board for Advance Tax Rulings found that the income will not be taxed as employment income.

8. As regards question 1, the Board for Advance Tax Rulings considered that the question in this respect pertains to the taxation of income derived from the type of profit share typical of private equity funds and whether the applicant can be taxed for it as employment income. The compensation to which the inquiry pertains consists both of funds paid from the fund to ILP and of dividends from ILP to Holding.

9. The Board for Advance Tax Rulings shared the applicant's position that, irrespective of the manner in which this income is classified for tax purposes, there is nothing to suggest that he is able to dispose of the income before Marat AB receives the funds as dividends or as capital gains on the shares in Holding (*cf*. RÅ 2008 reported case no. 66). Since the point of taxation has not

occurred, this in itself precludes the possibility of taxing the income as employment income.

10. As regards question 2, the Board stated its reasons for the response as follows.

11. Based on the definition of the term carried interest according to the AIFM Directive, this type of income consists of compensation for work performance accrued to the AIF manager for managing a fund. However, it cannot be determined exclusively on the basis of this definition whether the dividend on the applicant's indirectly owned Class B shares in Holding paid to Marat AB is to be taxed as employment income or in some other manner.

12. It is also the case that, as a consequence of the agreements forming the basis of the fund's structure, the compensation in the form of carried interest may be said to be derived from someone other than the manager of the fund. The fact that the compensation has been destined in this way for ILP has no relevance when it comes to answering the posed question, as the funds are being reallocated within a wholly owned corporate group. This does not affect the applicant's situation for tax purposes.

13. In making the assessment, consideration must be given to the fact that the income in question is comprised of funds which, according to decisions taken at general meetings, are to be paid out to the shareholders as a dividend. Furthermore, according to the facts given, all Class B shareholders will be entitled to the same right to dividends, i.e. no holder of Class B shares will receive a larger dividend per share than any other. The circumstances thus do not give rise to such a distinctive, as pertains to company law, situation as justifies a departure from the aforementioned general rule regarding the manner in which compensation is to be classified. It is true that, according to the facts given, the number of Class B shares offered to the employees for acquisition is based, to a certain extent, on the recipient's role and seniority within Nordic Capital. These circumstances cannot be equated with those in HFD 2019 reported case no. 52, where the conditions in practice could give rise to a substantial degree of differentiation of dividends on shares of the same type. There is, as far as the applicant is concerned, no direct and decisive connection

comparable to that in the case between the work he is going to perform within the fund structure and the dividend he will receive through his company.

14. Considering the above, the Board for Advance Tax Rulings held that there was no reason to assess the question posed differently than the parties did, meaning that the applicant is not to be taxed on the dividend on his Class B shares from Holding to Marat AB in accordance with the provisions of Chapter 11 of the Income Tax Act. The restrictions on disposition for the applicant pursuant to the shareholder agreement between the owners of Holding did not alter this assessment (*cf.* for example, RÅ 2009, case notice no. 2006 and RÅ 2010 case notice no. 129).

Claims, etc.

15. *The Swedish Tax Agency* claims that the advance ruling is to be affirmed.

16. *AA* is also of the opinion that the advance ruling is to be affirmed.

Reasons for the ruling

Legislation, etc.

17. Pursuant to Chapter 11, section 1 of the Income Tax Act, salaries, fees, and other income received in connection with employment are to be taxed as income.

18. According to Chapter 10, section 1, income and expenses arising from employment are classified as employment income to the extent they are not classified as business income or capital income. According to section 8, income is to be taxed in the tax year in which it becomes available or otherwise accrues to the taxpayer.

19. Through Chapter 41, section 1 and Chapter 42, section 1, it is provided that dividends from holding assets shall be taxed as capital income.

20. Article 4 (d) of the AIFM Directive defines carried interest as a share in profits of the AIF accrued to the AIFM as compensation for the management of the

AIF and excluding any share in the profits of the AIF accrued to the AIFM as a return on any investment by the AIFM into the AIF.

The Court's assessment

21. The Supreme Administrative Court makes the same assessment as the Board for Advance Tax Rulings. Thus, the advance ruling is to be affirmed.