Recent development of CJEU case law supports eligibility of financial services entities for refund of German withholding tax

Executive summary

The recent positive evolvement of the Court of Justice of the European Union (CJEU) case law during 2014 provides stronger arguments for EU and non-EU investment funds, pension funds, life and health insurance companies as well as broker/dealers to invoke the EU freedom of capital movement principle and claim a full refund of German tax withheld on dividends from their German portfolio shareholdings.

Due to lack of official guidance, the above entities may want to consider filing these withholding tax (WHT) refund claims on an annual basis to prevent potential application of the statute of limitations.

Detailed discussion

2014 CJEU case law supports foreign funds’ claims

Under the German domestic tax law, German investment funds are effectively not taxed on German dividends from their portfolio investments. In contrast, non-German investment funds in a comparable situation are subject to a final German WHT (the concrete amount depending on e.g., treaty eligibility). This different treatment of German and non-German funds under the German tax law may likely constitute a discrimination of foreign funds under the EU law.
The recent judgments of the CJEU appear to support the foreign funds’ claim.

In particular, the CJEU highlighted that when determining a discriminatory nature of domestic tax law, only the taxation of the investment vehicle as such is taken into consideration, but not the combined tax result at the investment vehicle and the shareholder level (CJEU judgment dated 11 September 2014, C-47/12, Kronos). Therefore, the German tax authorities’ position of the need to also consider the taxation at the shareholder level is likely to be rejected by the CJEU.

Furthermore, the CJEU confirmed that the freedom of movement of capital as laid down in Article 63 of the EU Treaty equally protects EU investment funds and non EU-investment funds (CJEU judgment dated 10 April 2014, C-190/12, Emerging Markets Series of DFA Investment Trust Company). Hence, e.g., US investment funds or Canadian investment funds but also certain investment funds from other countries outside the EU should also be able to make respective claims on the same grounds as their non-German peers from EU member states.

Finally, even though not directly related to EU-WHT refund claims, the very recent CJEU decision from 9 October 2014 on the German “punitive” taxation of German investors with respect to their distributed and deemed distributed income from foreign investment funds which did not provide German fund tax reporting (CJEU judgment C326/12 Finanzgericht Düsseldorf), also bears evidence of the CJEU’s very broad view on what may constitute discrimination under EU law and hence further supports the generally positive market view on the expected further evolvement of the CJEU case law.

**EU and non-EU investment funds**

In addition to EU-investment funds, eligible claimants should include those non-EU investment funds resident in a country where a convention on mutual administrative assistance is applicable which enables the German tax authorities to verify any information which may be transmitted by the investment fund. This should be the case with all significant global investment fund locations.

Moreover, if such funds are regulated investment funds, the Emerging Markets judgment should provide a reliable basis for EU-WHT refund claims.

The opportunity for claiming EU-WHT refunds should also be available to foreign pension funds, life and health insurance companies and broker/dealers

In addition to EU and non-EU investment funds, foreign pension funds as well as life and health insurance companies should also be eligible claimants as their German equivalents may benefit from a rule under which dividends received are effectively partially or almost fully exempt from income tax. This arises as a result of the tax deductible reserves created in order to meet their obligations against their pension/insurance holders. The discrimination of such tax provision which is only available for resident corporations has been confirmed by the CJEU judgment dated 8 November 2012, C-342/10, European Commission/Finland. Non-German broker/dealers also should have a good basis to claim EU-WHT refunds given that dividends held in the trading book of a German broker/dealer are effectively only taxed at a margin, e.g., after deduction of refinancing costs or manufactured dividends paid, whereas for foreign broker/dealers the German dividend WHT is levied on the gross dividend.

**Applicable statute of limitations**

German tax law does not provide for a statute of limitations rule for claims based on EU law. In absence of any specific rule, the majority of German tax commentators view the statute of limitations applicable to double tax treaty refund claims (and further other refund claims granted to non-German corporate taxpayers under national German tax law) as applicable to EU-WHT refund claims as well. Consequently, the prevailing view in the German market is that the EU-WHT refund claims should be filed with the competent German
tax office at the latest by the end of the fourth year following the year the German dividend payment was received. However, other statute of limitations rules may also be applicable.

As no definitive guidance can be given in this respect, there is a position to be taken that EU-WHT refund claims may be filed for a significantly longer period than the commonly mentioned four years, but it can also not be entirely excluded that the filing period may be significantly shorter, e.g., one year after the end of the calendar year in which the dividend payments were received.

To ensure that the EU-WHT refund claims cannot be rejected on this formal ground of the statute of limitations only, taxpayers should consider filing the claims on an annual basis directly during the year following the dividend payment.

**Formal requirements for EU-WHT refund claims**

Similar to the applicable statute of limitations, the formal requirements for completeness of the EU-WHT refund claims are not clear. In addition to a substantiated application providing the EU law arguments for these claims, the claimant should also file further supporting documents, in particular (i) a certificate of residence for the year of receipt of the dividend payment and (ii) the German official tax vouchers (Steuerbescheinigung) certifying the amounts of dividends received and German tax withheld.

The latter at least is advisable for German dividends received as of 1 January 2012 as since then such official tax certificates are also required by law for refund claims under applicable double tax treaties (and the other claims granted to non-German corporate taxpayers under the national German tax law). Should such official tax vouchers no longer be available to the taxpayer because e.g., the fund has already filed withholding claims based on an applicable double tax treaty, taxpayers should attach copies of the official tax certificates or other dividend vouchers issued by the custodian bank ideally together with the reference to the double tax treaty claims made, if available.
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