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Austria alert

Dividend withholding tax refund may be possible for EU/EEA entities

The general five-year statute of limitations will expire at the end of 2017 for corporate taxpayers resident in the EU/EEA to file refund claims on tax withheld on dividends based on a special reimbursement procedure in Austrian tax law. These refund claims can go back as far as 2012.

The refund possibility arises from a series of decisions issued by the Court of Justice of the European Union (CJEU) (e.g. in the *Denkavit*, *Amurta*, *Aberdeen Property* and *Santander* cases). The CJEU ruled that the levy of a withholding tax on dividends paid to foreign shareholders is a restriction of the fundamental freedoms in the Treaty on the Functioning of the European Union when such dividends would not be taxed when paid to a comparable domestic entity.

- In *Denkavit,* the CJEU held that taxing dividends distributed to a foreign shareholder of a French company more heavily than dividends distributed to a French shareholder violates the freedom of establishment principle, but suggested there would not be discriminatory taxation if the tax withheld resulted in a tax credit in the shareholder's country of residence.
- The court held in *Amurta* that the Dutch withholding tax on dividends paid by a Dutch company to a Portuguese shareholder that held 14% of the shares of the Dutch company, in a situation where the withholding tax would not have been levied on dividends paid to a Dutch resident shareholder, was a restriction on the free movement of capital.
- In *Aberdeen,* the CJEU concluded that the Finnish tax regime, which taxes dividends paid to Luxembourg SICAVS, but not

similar payments made to Finnish parent companies or funds, is discriminatory.

- In *Santander*, the CJEU held that the French withholding tax levied on dividends paid by French companies to nonresident investment vehicles is incompatible with EU law and, therefore, the nonresident funds were entitled to a full refund of the French tax withheld on French-source portfolio dividends.

Despite the above settled case law, many EU member states have refused to grant refunds or have imposed burdensome formalities that make a successful refund claim difficult.

Austria is one of the few member states that has introduced a statutory basis for EU/"*Denkavit*" withholding tax reimbursement claims in respect of dividend distributions to all types of nonresident investors (pension funds, insurance companies, etc.).

Under the special procedure in Austrian tax law, a corporate taxpayer subject to limited tax liability in Austria and resident in an EU/EEA member state (the latter, provided a comprehensive information and recovery assistance agreement has been concluded with Austria) may request a refund of Austrian withholding tax on dividends if it can show that withholding tax is not creditable in whole or in part (e.g. due to a restriction on the creditable amount because of a tax loss, tax exemption, etc.) in its country of residence. The nonresident company also must include supporting documentation in the refund application showing that it is comparable to an Austrian corporate taxpayer (e.g. bank, insurance company, pension fund, etc.) because mere “investment vehicles” may not qualify as valid applicants under the “look-through” principle of Austrian tax law. If the EU/EEA company meets these requirements, the Austrian tax authorities will refund the withholding tax within a reasonable period (generally about one year) and with minimal administrative formalities.

The statute of limitations in Austria generally is five years from the end of the year in which the tax was withheld. Therefore, the deadline for submitting a refund application for tax withheld in 2012 is 31 December 2017.

The free movement of capital principle in the EU treaty also prohibits discriminatory treatment of dividends. This freedom is broader than the other freedoms under the EU treaty because it prohibits restrictions between EU member states, as well as restrictions between EU member states and third countries. Although it could be argued that corporate taxpayers outside the EU/EEA should be entitled to receive refunds in certain circumstances, the special procedure in Austrian tax legislation does not extend to non-EU/EEA claims, so the chances of a successful claim by third country applicants are lower.

Contacts

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