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German Tax and Legal News

German draft law centralizes responsibility for EU law based WHT claims

The draft law on the modernization of the withholding tax relief law (AbzStEntModG) clarifies responsibility for Denkavit / Fokus bank claims.

The draft law is focused on the streamlining and digitalization of the existing procedures for the relief from withholding tax on dividends and royalties for foreign taxpayers but also includes other elements, namely proposed changes to the German anti-treaty-shopping rule (see GTLN dated 24 November 2020) and rules changing the taxation of non-residents with German-registered rights (see GTLN dated 23 November 2020).

In addition to that, the draft act would centralize all withholding tax relief procedures with the Federal Tax Office (Bundeszentralamt für Steuern, BZSt), which would have significant impact on reclaims filed by foreign recipients of German dividends claiming that the withholding tax violated the fundamental freedoms: In the last decade the Court of Justice of the European Union (CJEU) established in more than a handful of cases (e.g. in the Denkavit, Amurta, Aberdeen Property and Santander cases) a European case law that tax rules, pursuant to which a withholding tax is levied on dividends paid to non-resident entities when similar resident entities benefit from are exemption, are in fact contrary to the EU law principles. 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 (TFEU) when such dividends would not be taxed when paid to a comparable domestic entity.

Despite the settled case law, many EU member states have refused to grant refunds or have imposed burdensome formalities that make a successful refund claim difficult. In Germany, reclaiming the WHT was extremely burdensome as there was no clear competency assigned within the tax authorities, so usually reclaims were filed with the local tax offices responsible for the taxation of distributing entities as well as the BZSt, resulting in a huge number of parallel reclaims filed, especially for institutional investors. Within the draft law Germany will centralize the responsibility also for EU law based withholding tax reimbursement claims in respect of dividend distributions to all types of nonresident investors (pension funds, insurance companies, etc.) to the Federal Central Tax Office (BZSt).

The draft law would therefore clarify the responsibility and would force the tax authorities to process the pending reimbursement claims, as long as they initially had been filed with a competent tax office. Based on recent case law EU based WHT refunds should bear interest (0.5% for each month) since the date of application. Nonresident taxpayers that suffered withholding tax should monitor developments and check their past filings to prepare for potential discussion with tax authorities on additional documentation and evidence.

Source
Bundesfinanzministerium, Referentenentwurf eines Gesetzes zur Modernisierung der Entlastung von Abzugsteuern und der Bescheinigung von Kapitalertragsteuer dated 19 November 2020

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