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Germany plans to introduce refund procedure for dividend withholding tax on portfolio dividends

http://www.bepartners.pro/documents/2012-10-31-FormulierungshilfeEuGHDivUmsG.pdf

In reaction to the ECJ sentence dated 20 October 2011, the German parliament published on 31 October 2012 a draft law according to which EU and EEA corporations are allowed to apply for a refund of the German dividend withholding tax on portfolio dividends under certain conditions. The refund procedure should generally apply for dividends received in 2013 and future periods but also retroactively for fiscal year 2012 or earlier if the claims do not yet fall under the statute of limitations.

On 20 October 2011 the ECJ ruled in case C-284/09 that Germany violates the principle of free movement of capital when Germany taxes dividends paid to a company resident in an EU or EEA State at a rate higher than dividends paid to a German resident company (see beinformed dated 20 October 2011). Contrary to the earlier initiative of the Federal States which would like to eliminate such violation by abolishing the tax exemption for portfolio dividends received by both, German and foreign corporations (see beinformed dated 29 June 2012), the German parliament now plans to introduce an official refund procedure for German dividend withholding tax on such dividends paid to foreign corporations. According to the draft law, the refund should only be possible if several conditions are met:

Regarding the dividend receiving corporation:

- It qualifies as a foreign corporation within the meaning of Sec. 2 No. 1 of the German Corporate Income Tax Act;
- it is registered and has its place of management in an EU or EEA country (not necessarily in the same country);
- it pays taxes in the EU or EEA country where it has its place of management; and
- the foreign corporation directly owns shares in the dividend distributing German corporation below the 10% shareholding threshold of the EU Parent-Subsidiary-Directive.

Further requirements for refund procedure:

- The refund must not be possible according to another rule.
- The dividends would be tax free if so received by a German corporation.
- The recipient foreign corporation must be regarded as the beneficial owner of the dividend income under foreign law.
- The anti-treaty shopping rule set forth in Sec. 50d (3) of the German Income Tax Act applies accordingly (see beinformed dated 5 October 2012).
- The foreign corporation or its shareholders can neither credit nor deduct the German dividend withholding tax.

The foreign corporation has to initiate the refund procedure by providing evidence that the requirements are met. A residence certificate has to be enclosed to the application, which in particular includes a confirmation by the tax authority of the EU/EEA residence state that the foreign corporation cannot credit or deduct the German dividend withholding tax. Additionally, the German dividend withholding tax certificates will have to be enclosed to the application. The refund shall then be granted on the basis of a zero tax assessment notice within the meaning of Sec. 155 (1) sent. 3 of the General Tax Code.

The hurdles to receive the dividend withholding tax refund are high for foreign corporations. In particular, the formal proceedings a foreign corporation has to undergo leave still some uncertainties. In cases, where the foreign corporation owns a broad portfolio of shares, the draft law does not clarify with which German local tax office the applications have to be filed. Moreover, foreign funds are generally excluded from such refund proceedings, as they will not qualify as corporation in many cases. To exclude the funds from the refund proceedings again will be an infringement of the free movement of capital considering the ECJ decision in "Aberdeen Property Fininvest Alpha Oy" (C-303/07). Foreign corporation resident in non-EU/EEA countries are also not in the scope of the draft law although the ECJ generally held in its decision dated 20 October 2011 a breach of the free movement of capital with regard to the German dividend withholding tax rules, which should generally also apply in relation to non-EU/ EEA countries.

It is expected that the law will not pass the next legislative step without further discussions. Nonetheless, the legislative procedure shall be finished by the end of this year. The next weeks will become exciting. We will keep you informed.

be in touch: If you have any questions, please do not hesitate to contact us!

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