



March 4, 2013

Germany introduces refund procedure for dividend withholding tax on portfolio dividends

In reaction to the ECJ's judgment of 20 October 2011, on 1 March 2013 Germany passed a 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 to dividends received in 2013 and future periods but also retroactively to dividends received during the 2012 fiscal year or earlier, provided the statute of limitations has not yet lapsed.

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 Member State at a rate higher than dividends paid to a German resident company (see [beinformed](#) dated 20 October 2011). In passing the new law, it becomes evident that Germany's measures to eliminate such violation are twofold.

On the one hand, as of 1 March 2013 Germany abolishes the current tax exemption for portfolio dividends in the event the recipient owns less than 10% of the dividend-distributing company, irrespective of whether the recipient is a German resident or non-resident corporation.

On the other hand, Germany now introduces an official refund procedure for German dividend withholding tax on such dividends paid to foreign corporations. The refund should generally apply to dividends received in 2013 and future periods but also retroactively to dividends received during the 2012 fiscal year or earlier, provided the statute of limitations has not yet lapsed. As a result of simultaneously abolishing the current tax exemption of portfolio dividends for resident corporations instead of extending the exemption to non-resident recipients, the refund procedure is therefore only of benefit for dividends received by foreign recipients in the past when German dividend recipients enjoyed a tax exemption on the same dividends. As of today, portfolio dividends received by German and foreign corporations are taxed equally and thus the refund procedure has no effect.

The hurdles to receive the dividend withholding tax refund are

high for foreign corporations as the application can only be filed under certain conditions and requires evidence of foreign residency and confirmation that the foreign corporation is not tax-exempt and can neither credit nor deduct the German dividend withholding tax (for details please see [beinformed](#) dated 7 November 2012). It is important to note that in contrast to the first draft dated November 2012, the final law now clearly stipulates that the applications must be filed with the German Federal Tax Office (Bundeszentralamt für Steuern). Even in cases of broadly diversified portfolios, the Federal Tax Office shall now be the competent tax office for the entire portfolio. The currently existing uncertainties in the formal proceedings when determining the competent German local tax offices should thereby be resolved. Applications filed in the past with the German local tax offices will also be handled by the German Federal Tax Office as of 1 March 2013 by automatic transfer from the German local tax offices to the German Federal Tax Office.

While the refund proceedings now seem to be clarified for foreign corporations, foreign funds are still generally excluded from such refund proceedings as they will not qualify as corporations 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 ruling in "Aberdeen Property Fininvest Alpha Oy" (C-303/07). Foreign companies resident in non-EU/EEA countries are also not within the scope of the law although the ECJ generally held in its decision dated 20 October 2011 that there is a breach of the free movement of capital with regard to the German dividend withholding tax rules. The free movement of capital should generally also apply in relation to non-EU/EEA countries. For foreign funds and corporations resident in non-EU/EEA countries the message is: same old, same old. They must continue to file applications without a standard refund procedure. In particular, the formal proceedings a foreign fund or non-EU/EEA corporation have to undergo still leave uncertainties although there is now a strong indication that the German Federal Tax Office will likely be the competent tax office for those claims as well.



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



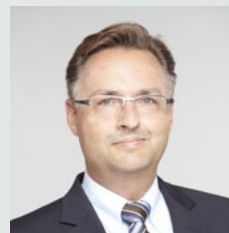
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