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'Tate & Lyle' circular published

Further to Belgium's conviction in ECJ case C-384/11 ('Tate & Lyle') of 12 July 2012, the Belgian tax authorities issued a circular dated 28 June 2013 dealing with **refunds of withholding tax** on Belgian source dividends to non-resident entities subject to a foreign corporate income tax regime (" **foreign companies**").

The circular outlines the conditions under which a foreign company can reclaim a refund of withholding tax in relation to Belgian source dividends which did not qualify for withholding tax exemption under the (extended) Belgian implementation of the EU Parent-Subsidiary Directive. It also provides for some additional clarification in relation to the previously issued circular regarding withholding tax refund claims on behalf of regulated investment companies (see **Corporate Tax Alert of 19 March 2013**).

Although the circular provides useful guidance on certain technical and procedural aspects, it unfortunately also includes a questionable and restrictive interpretation on certain technical elements (e.g. in relation to applicable statutes and qualifying beneficiaries). Moreover, it only addresses the specific 'Tate & Lyle' cases and as such does not address other cases of Belgian discrimination in relation to Belgian (interest and dividend) withholding tax, e.g. in relation to insurance companies following the Commission v Finland ECJ case.

General conditions

Other than what relates to regulated investment companies, the main general conditions for foreign companies to introduce Belgian dividend withholding tax refund claims can be summarised as follows :

- Qualifying beneficiaries: any foreign company which does not have a Belgian permanent establishment to which the qualifying shareholding is attributable. This includes non-EEA resident companies, provided the double tax treaty with the relevant country contains an 'exchange of information' clause;

- Qualifying dividend: Belgian-source dividend that would have qualified for the Belgian participation exemption (Dividend Received Deduction regime) if the foreign company had been taxable in Belgium on such dividend. This, in substance, boils down to the foreign company having held, for an uninterrupted 1-year period and in full ownership, Belgian shares representing less than 10% of the Belgian company's issued capital but having an acquisition value of at least EUR 2.5 million (or EUR 1.2 million EUR before 1/1/2010).

Companies resident of non-EEA countries

The circular limits refund claims to foreign companies resident in either in the E.E.A. or in 'Third Countries' with whom Belgium has concluded a Double Tax Treaty containing an exchange of information clause. The same limitation now also applies to regulated investment companies.

This condition's relevance is technically debatable and may be inclined to exclude companies which are resident in so called 'tax havens'.

Refund limited in case of home state credit or refund

The circular provides that the level of refund in Belgium is limited to the Belgian source dividend withholding tax reduced by (i) the hypothetical Belgian tax suffered (i.e. the tax on the 5% taxable dividend portion under the Dividend Received Deduction regime) and (ii) any (full or partial) credit or refund obtained in the residency state.

This position triggers a practical issue in relation to foreign companies which are resident in a country where domestic tax law only provides for a credit in case all source country withholding tax reduction or exemption means have been exhausted.

Five year statute

The Belgian Tax Authorities confirm in this circular letter that a 5-year statute applies for aforementioned refund claims. Also, this position is technically debatable and good arguments are available to support a 10-year statute. If a five year statute of limitations is applied, a reclaim can be filed in 2013 for withholding tax on dividends paid as from 1 January 2009.

No guidance for 'net taxation' cases …

As indicated, the circular only deals with shareholdings which would have qualified for the Belgian Dividend Received Deduction, if taxable in Belgium. It does not deal with the so-called 'net-taxation' discrimination cases as recently confirmed in the ECJ decision C-342/10 (*Commission v. Finland*) for example.

This is highly unfortunate, especially for the **insurance industry**. Indeed, numerous foreign insurance companies have suffered significant Belgian withholding tax exceeding the Belgian tax that would have been due in case they would have been taxable in Belgium, particularly because of the deductibility of technical or mathematical reserves against the Belgian source dividend income.

Practical impact

Other than confirming certain general conditions and the Tax Authorities' confirmation of priority handling of refund claims meeting such conditions, the circular unfortunately includes a number of technically debatable positions and leaves the 'net taxation' discrimination cases specific to the insurance industry unaddressed.

Clients should review their pending withholding tax refund claims. For claims meeting the conditions imposed in the circular, it is recommended, where relevant or appropriate, to complement such claims in function of the procedural aspects included in the aforementioned circular and/or new ECJ case law. As per the Tax Authorities, these refund claims should then be treated with priority.

For claims not meeting the conditions included in the circular (e.g. beneficiary location, statute applied, etc.), it is recommend to consider initiating legal proceedings where possible and feasible.

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