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Operational Tax News

EU update

EU update – Dividend Withholding tax changes in Finland, France and Sweden

Finland

On 13th January 2015, the Supreme Administrative Court of Finland (SAC) ruled in the case of KHO 2015 9, that dividends paid to a US listed closed-ended investment fund should be exempt from WHT in Finland.

The decision of the Supreme Administrative Court of Finland

The decision concerned a US resident Delaware Statutory Trust which was subject to limited tax liability in Finland. In this case, it was held that the taxpayer corresponded more to a listed Finnish limited liability company than a Finnish investment fund. As Finnish publically traded companies are tax exempt in respect of listed dividends, it would be a breach of Art. 63 TFEU to apply a dissimilar treatment in that situation. As part of the SAC reasoning, the CJEU decision DFA - Emerging Markets Series case (C-190/12) was also taken into account in the context of the Free Movement of Capital.

Please note that in addition to the above described case, the SAC also ruled in another case related to an US Regulated Investment Company (RIC) on 13th January 2015 (SAC 2015 t 61). The US RIC was part of a series fund and the units of the fund were listed on the New York Stock Exchange. The RIC was not a separate legal entity but it was treated as a tax subject and the beneficial owner of the investment income for the US federal tax purposes. The SAC held in its ruling that, considering the legal and functional / operative characteristics of the RIC (i.e. the sub-fund of the Massachusetts Business Trust) as a whole, the RIC was considered comparable to a Finnish investment fund. Consequently, as dividends paid by a Finnish publicly listed company to a Finnish investment fund are tax exempt, the RIC was entitled to receive dividends from Finland exempt from the Finnish WHT.

The decision was based on the EU Free Movement of Capital (Art. 63 of the TFEU). The case is not published by the SAC, which means that the SAC considers that it cannot be used as a general guidance to other similar US RICs. As such, the tax authorities are not automatically obliged to follow the decision in their practice. However, we believe that in practice also other US RICs (open-ended) should have good chances to succeed in their WHT reclaims provided that the circumstances are similar.

WHT withheld in 2010 and onwards can be requested to be refunded.

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French tax amendment

The new Finance Bill voted at the end of 2014, clarifies the exemption from WHT on distributions made to non-resident collective investment funds. This should be of particular interest to non-EU funds reclaiming WHT in France (or considering to reclaim).

The Second French Amended Finance Law for 2012 ended the difference in treatment resulting from the application of WHT on French source dividends received by non-resident collective investment funds where these entities were tax exempt on this same income. Since 2012 and based on the French Tax Code, collective investment funds established in another EU Member State, or elsewhere in the EEA, as well as those headquartered in States having signed an Administrative Assistance Convention with France, should be exempt of WHT on dividends, as long as they carry out their activities in conditions comparable to those required for such entities resident in France.

In light of recent European case law (CJEU, Emerging Markets, C-190/12, 10 April 2014), the Administration must be able to verify the genuineness and reliability of justifications provided by the investment fund to claim the exemption. This should be done through the administrative assistance process, under a convention, signed by France and the State of residence of the foreign entity.

The amendments introduced by the Finance Bill expressly highlight that the mere existence of an Administrative Assistance Convention is not itself sufficient to automatically apply the exemption, which can only be granted if the Convention effectively allows the exchange of information and administrative assistance.

As a consequence and based on the law, in order to claim WHT successfully, a non-EU foreign fund will have to be deemed comparable to a French fund and located in a country having an effective Administrative Assistance Convention with France.

Although this adds to the initial requirements and is subject to the interpretation of the tax authorities and ultimately interpretation of the Courts, it seems to suggest that non EU funds cannot be simply excluded from the comparability analysis contrary to the current Statement of Practice of the tax authorities. This may have a positive impact on reclaims filed by US funds (RICs in particular).

Swedish Administrative Court of Appeal rules on US mutual fund comparability

Background

On 15th December 2014, the Administrative Court of Appeal, in Sundsvall (“ACA”) ruled positively in the case of a US mutual fund that suffered Swedish WHT on dividends. The ACA stated that the mutual fund was comparable to Swedish investment funds and as a result the US mutual fund should be entitled to a refund of unduly withheld tax.

The decision of the Administrative Court of Appeal

The decision provides an insight into the documentation requirements to be provided by third country investment funds in order to support their application for repayment of WHT. According to the judgment, this includes information on the fund’s authorization and supervision process, eligible assets for investment, investor restrictions, risk spreading, provision of information, and management company/depositary requirements. Applying the information provided by the fund allowed the ACA (in comparison with the UCITS regime), to draw the conclusion that the US mutual fund was comparable to a Swedish investment fund and therefore the difference in treatment between Swedish and foreign investment funds constituted a restriction on the free movement of capital.

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It was also stated by the ACA that the burden of proof for providing the required documentation lies with the fund, which must prove that it can be regarded as being comparable to a Swedish investment fund.

The ACA has confirmed that, to the extent there is a double tax treaty in place between Sweden and the US that foresees an exchange of information clause, the Swedish Tax Agency ("STA") should consider the possibility of checking the information the fund provided. This approach is consistent with the ECJ's ruling in the DFA - Emerging Markets Series case (C-190/12).

The STA has until mid-February to appeal this judgment.

This case provides an indication, as to the type of information that may be required for non-EU investment funds to benefit from the domestic WHT exemption. We will advise further if the STA provides more guidance.

Non-EU investment funds should file reclaims in Sweden in order to protect their interests and ensure that no WHT is lost due to time limitations. Reclaims can be made until the end of fifth year after the year in which the dividend that was subject to WHT was paid.

We will keep you updated in respect of the STA decision to appeal or not, in addition to updates on similar cases that will be heard this year.

Impact / Opportunities

Following the above decisions and amendments in legislation, there is a higher likelihood for non-EU funds (in particular, US RICs) who have suffered WHT in these jurisdictions to reclaim unduly withheld taxes.

We recommend that non-EU funds, who are considering to file WHT reclaims, to do so in the light of these developments in order to take advantage of the current statute of limitations in these three jurisdictions.

Should you wish to discuss these developments, please do not hesitate to contact our operational tax contacts who would be happy to assist.

Your contacts

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