

Reclaiming withholding tax in France

Operational difficulties

Pascal Koenig

Partner
Consulting
Deloitte

Etienne Genot

Partner
Tax
Taj*

Helene Alston

Director
Tax
Taj*

Continuing along the same lines of the Aberdeen case law, the Court of Justice of the European Union (CJEU) confirmed on 10 May 2012 in their Santander decision that withholding tax levied in France on dividends paid to non-French investment funds was discriminatory¹. This was the main piece of good tax news in France in 2012!

This means, of course, that asset managers have an opportunity to reclaim tax overpaid in France and throughout Europe. Although statutes of limitation may vary among member states, several years of overpaid withholding tax can still be claimed in about 13 countries across Europe for both European and non-European funds.

In France, withholding tax levied since 1 January 2009 can potentially be reclaimed. It is, of course, important that all reclaims are filed with the French tax authorities before this window of opportunity closes.

Further to the Santander case, the legislation was amended so that dividends paid to non-French investment funds after 17 August 2012 would be exempt.

France is now compliant. Or at least its legislation is. A practical problem remains: how do you actually apply the exemption and how do you reclaim?

The 'exemption at source' process has not been updated and therefore administrators and custodians are at a loss in terms of putting in place a process that would allow them to pay their investors the full French dividend. Regarding the reclaims, there was no

¹ See Performance issue 9

* Taj is a member of the Deloitte Touche Tohmatsu Limited



information on what type of evidence and documents would be required by the tax authorities in order to process the claims. Or rather, that is until now. A few days ago, the French tax authorities communicated information on the reclaim process through a letter sent to some non-French investment funds that have already filed reclaims, and their French tax advisers. These elements should soon be issued as official administrative guidelines (not published as we go to print).

In the meantime, a quick overview of what the tax authorities would be looking for in order to support the reclaims is set out below. The paperwork and administrative burden of the reclaim may prove great. There is no doubt that the format of the reclaims will be as important as their substance. The tax authorities appear keen to reject any claims that do not meet the very prescriptive formal requirements.

In this unofficial communication, the French Tax Authorities (FTA) have provided guidance on the information and documentation required to support withholding tax reclaims:

- Relatively vague comments on elements supporting the comparability of foreign investment funds with similar French UCITS-compliant funds
- Very detailed information on documentation (on both the content and format of the documents) evidencing payment of the withholding taxes for which a refund is being reclaimed

Elements supporting the comparability

The situation of EU UCITS and non-UCITS, as well as non-EU investment funds is addressed with examples of acceptable documentation to support the comparability.

EU UCITS should be considered comparable as long as a proof of authorisation can be provided (certificate from the regulatory authority or stamped prospectus).

Non-authorized EU UCITS should also be treated as comparable if it can be proved that they are structured in a similar way to a UCITS IV compliant fund.



This can be evidenced through a number of factors (e.g. use of a custodian, manager, investor information and communication, risk spreading, no debt financing, redemption of units, etc.).

Non-EU funds also have to demonstrate that they are similar to a French investment fund. The same criteria as listed above can be used.

The lack of clear elements allowing objective comparability (as stated in the French Tax Authorities' document) is disappointing. Comparability is fundamentally the key factor in assessing whether a fund is entitled to a reclaim or not and in turn whether the reclaim may be viable.

France is now compliant. Or at least its legislation is. A practical problem remains: how do you actually apply the exemption and how do you reclaim?

The amended Law that provides for the exemption of dividends paid to foreign investment funds is just as vague with relatively loose criteria to follow. It will therefore be the responsibility of asset managers and advisers to gather as many comparable elements and present them in a way that demonstrates the comparability. This is certainly a flexible solution that may potentially allow a wider range of funds to apply. Nevertheless, some uncertainty remains regarding what will be accepted by the tax authorities and ultimately the French courts.

Evidence of payment

Once comparability is established, the funds need to produce proof of payment of the dividends and of the withholding tax and this is where the practical aspects of the reclaims may become tricky.

Supporting documentation may be needed from three main parties:

- The paying agent
- The (global) custodian
- The fund reclaiming the withholding tax

The type of documents needed may vary depending on the chain of intermediaries for each investment. However, the tax authorities consider the following scenario in their document:



Paying agent

A summary table or tax vouchers issued and stamped by the French paying agent must be provided.

This summary table should provide details on the dividend and withholding tax, including, *inter alia*, the name of the paying agent, the name of the beneficiary, the name of the distributing company, the gross and net amount of dividends, the rate of withholding tax, the total amount of withholding tax paid and a reference to form 2777 (potentially to be provided on a monthly basis).

Moreover, a document should be provided from the local paying agent confirming the net payment made to the global custodian and proving the filing of form 2777.

Global custodian/local custodian

In the event that the documents issued by the paying agent do not refer to the beneficiary, but to the global custodian, the global custodian will be required to produce documents to allow the tax authorities to reconcile the data provided by the paying agent in order to support the reclaims. In addition, payment advice to the beneficiary should also be produced.

Funds reclaiming the withholding tax

A summary table of the amounts reclaimed with relevant information on the dividends and any potential treaty reclaims already filed should be produced, as well as the information enabling the refund (e.g. bank details, etc.).

The tax authorities mentioned in their letter that a claim that does not include all of the necessary elements may be rejected.

Non-EU funds also have to demonstrate that they are similar to a French investment fund

Conclusion

According to this communication, the documents to be provided to the tax authorities will have to follow a very specific standardised format (some models provided by the tax authorities) and must be provided in electronic format, where possible.

It is clear from the approach adopted by the tax authorities that they will place an emphasis on the importance of the format of the reclaims and that they will use this as grounds to reject claims that do not meet the standards they have set. They will, however, need to ensure that the conditions they stipulate are not too stringent, as it could contravene the tax payer's rights under EU law and case law.

Finally, we also hope that in the official guidelines, guidance will be provided on the application of the 'exemption at source', otherwise the lack of efficient procedures in order to apply the law may be in breach of the EU principles.

To the Point:

- France has finally recognised that withholding tax (WHT) charged to foreign investment funds comparable to French investment funds was discriminatory
- Funds are entitled to 0% WHT since 17 August 2012
- The tax authorities are yet to issue official guidelines but have communicated further details on the supporting documentation required to process a WHT reclaim to a group of investors and their advisers
- The comparability test is still very vague which does not give much certainty to foreign funds that have or want to file a claim
- On the other hand, the tax authorities have been very specific on the documents they require to support the claim (in the content, origin and format). The volume of paperwork and administrative complications is not for the faint hearted, but should be worth it in the end
- Process to apply exemption at source that should have been applied from 17 August 2012 is still to be issued, which causes questions for custodians under pressure from their investors and asset managers' clients

