

Investment Management

Norway refund WHT to UCITS – Latest Developments

Investment funds across the EU who are challenging unlawful application of withholding taxes levied on dividends can expect refunds of millions of Euros following the Norwegian Government's decision this week to refund withholding taxes to a Luxembourg SICAV.

BACKGROUND

Previously, PwC has successfully argued that UK OIECs are comprised by the Norwegian tax exemption method ("TEM") and thus entitled to a refund of withholding tax imposed in violation of the EEA Agreement. Over the last years, the Norwegian tax authorities have interpreted the TEM narrowly. As a result, several non-resident tax payers have been excluded from its scope of application.

In the Aberdeen case PwC successfully assisted a Luxembourg SICAV in claiming back Finnish withholding tax. Following these developments, the Norwegian Ministry of Finance conceded in December 2009 that foreign investors have been taxed in violation of EC Law and that it would start granting dividend withholding tax refunds.

However, the Norwegian tax authorities have been reluctant to grant actual refunds to investment funds. Therefore, PwC is pleased to have successfully assisted a Luxembourg SICAV in obtaining a withholding tax refund in Norway. A settlement was signed on January 25, 2010 in this respect.

THE CASE

The case concerned a Luxembourg SICAV which was an umbrella fund. In the period 2002 to 2005, over NOK 100 million in withholding taxes was withheld on dividend distributions to the Luxembourg fund.

PwC Norway, assisted by PwC UK, filed a refund application in December 2005 based on EEA law arguments. The Central Office – Foreign Tax Affairs ("COFTA") denied refund in a decision in 2006. This decision was appealed to the tax appeal board at COFTA. The appeal board upheld the decision in 2008. A summons was submitted in July 2009 resulting in the settlement of January 25.

This case shows the importance of safeguarding potential refund claims by submitting applications and appealing against incorrect decisions by the tax office.

THE EFFECT FOR OTHER NORWEGIAN CASES

The current case should have a positive effect on pending and new refund cases before the Norwegian tax authorities.

Similar refund claims that have been filed were put on hold pending the underlying case. Given the positive outcome of the underlying case, it is expected that the Norwegian tax authorities will also proceed with the re-payment of withholding tax in these cases.

EU/EEA investment funds which have not yet filed refund claims should still consider doing so. In principle, refund claims should be filed within 3 years starting at the end of the financial year in which the dividend was paid. Pending the outcome of a case with the Norwegian Supreme Court, it may however be possible to claim back for as far as 10 years.

Even though the underlying case specifically relates to EU/EEA investment funds, it should also have a positive effect for other EU/EEA based portfolio investors such as pension funds. Therefore, we advise such portfolio investors that have not yet filed refund request in Norway to consider this possibility.

SUMMARY

Both the Aberdeen ECJ ruling and this settlement with the Luxembourg SICAV will have a significant impact on the current withholding tax on dividends regimes applied in EU and EEA jurisdictions, ensuring a level playing field for all funds. UCITS managers should keep on monitoring their portfolios to identify opportunities for filing for reclaims of European withholding taxes.

IMPLICATIONS FOR PORTFOLIO INVESTORS

To safeguard their rights for previous and future years, EU based investment funds should consider filing requests and protective claims taking into account local statutory time limitations which differ per Member State, ranging from 3 months to 5 years after payment of the dividend.

Non-EU based investment funds e.g. from Australia, Canada, Mexico, Switzerland or the United States, could also consider filing protective claims since Article 56 EC may also apply to third countries.

The Commission believes that third country portfolio investors from outside the EU may in many cases have strong arguments. Although the Commission's focus remains on intra-EU situations, it recently started to pursue the first discrimination complaints filed by third country investors against EU States based on Article 56 EC.

PwC are advising a great number of investment funds and, being the pioneers in this field, we have built up extensive experience in filing refund requests across Europe and facing the local tax authorities on behalf of our clients for the purpose of re-claiming withholding tax on dividends levied in past years. PwC also have an excellent relationship with the Commission.

Our client servicing teams are a mix of dedicated Financial Services professionals and leading EC Law specialists who are able to determine the possibilities based on the actual facts and circumstances that will be an essential element in preparing the cost benefit analysis that should be the starting point for any investor that has suffered withholding tax on EU source dividends.

CONTACTS

If you would like further advice in relation to the issues outlined above, please contact your local PwC contact or alternatively any of the following:

Patrick Wall	+ 353 1 792 8602	patrick.wall@ie.pwc.com
Pat Convery	+ 353 1 792 8687	pat.convery@ie.pwc.com
Niall Flanagan	+ 353 1 792 6098	niall.flanagan@ie.pwc.com