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WTS Global Financial Services Infoletter

Editorial

Europe – WHT developments affecting the international FS industry

Dear Madam / Dear Sir,

we hope you may find interesting the latest version of the WTS Global Financial Services Info Letter presenting news from nine European countries, covering especially WHT topics related to the international Financial Services industry with a focus on, but not limited to, investment funds, pension funds and insurance companies:

- Denmark – Lundgrens
- Finland – Castrén & Snellmann
- France – FIDAL
- Germany – WTS
- Italy – WTS R&A and Studio Biscozzi Nobili Piazza
- Netherlands – WTS B.V.
- Portugal – Vieira de Almeida (VdA)
- Spain – ARCO Abogados y Asesores Tributarios
- United Kingdom – Hansuke Consulting

Thank you very much for your interest.

Frankfurt, 15 March 2021

With best regards,

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Content

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Denmark

New model for dividend taxation in Denmark

Following the withholding tax issues in Denmark where approx. DKK 12bn of Danish WHT was wrongfully reclaimed, the Danish Ministry of Taxation has worked on preparing a new model for dividend taxation in Denmark.

During 2020, it was announced that the Danish Ministry of Taxation had reached an agreement with Finans Danmark (the Danish Financial Sector Organization), certain banks and VP Securities (the Danish Central Securities Depositary) on a new model on relief at source, contrary to the current reclaim at source model.

During 2020, a draft bill was presented, which is currently subject to public hearing. If passed, the general expectation is that the rules will enter into force during 2023 at the earliest.

Current rules

Under the current rules, 27% WHT is levied on dividend payments to foreign shareholders. However, under most double-tax treaties the WHT rate may be reduced.
Shareholders entitled to a lower rate than 27% may submit to the Danish Tax Agency an application for a refund (in Danish: *Skattestyrelsen*).

New model

The proposed new model introduces a relief at source of Danish WHT rather than a refund.

In order to apply for relief at source, the foreign shareholder will be required to register with the Danish Tax Agency with their identity and other information required. The registration shall be made by the shareholder's custodian bank.

Shareholders such as foreign pension funds or states who may be entitled to a lower tax rate (typically 0%) must be pre-approved in advance by the Danish Tax Agency.

Once the required information has been received, the DTA issues an identification number.

Based on the registration of the shareholder, the correct WHT amount is deducted on the dividend payment when paid to the shareholder. Accordingly, the shareholder will receive a net dividend payment at the correct WHT rate.

To the extent that a correction of the WHT deducted is required, this may be done for a specified period subject to adjusted information provided.

Objective liability for the banks

Under the new model, the custodian banks assume objective liability.

After the payment of dividend tax, the Danish Tax Agency may carry out spot checks. If too little WHT was levied on the dividend payments, the custodian bank shall be objectively liable for the correct payment of WHT to the Danish Tax Agency.

The custodian bank's objective liability comprises situations where errors have been revealed in spot checks, e.g. when applying the wrong tax rate or if the recipient is not the beneficial owner of the dividend. However, the objective liability does not apply to institutional shareholders who must be pre-approved by the Danish tax authorities.

The banks' participation in the new model is conditioned upon the banks being able to recover any losses from the foreign banks, i.e. the foreign banks must choose to join the model as well.

Beneficial owner

It is a requirement for applying a reduced double tax treaty rate that a beneficial owner statement has been signed by the shareholder. The beneficial owner statement contains a description of the circumstances in which the immediate recipient of the dividend payment should not be considered the beneficial owner according to Danish law.

Mark-to-market taxation of real estate

On 10 October 2020, the Danish government announced that it expects to introduce a mark-to-market taxation of the value of real estate owned by Danish and foreign real estate companies exceeding a holding threshold of DKK 100,000,000.

Mark-to-market taxation changes the current legislation, whereby the taxation of gains from the sale of real estate can be avoided by transferring the properties by way of a tax exempt transfer of shares. Under the proposed new rules, the gain would be calculated as the difference between the value of a property at the end of the income year and the value at the beginning of the income year.

Furthermore, mark-to-market taxation also provides for taxation at an earlier stage, i.e. before realization of the gain.

At present, a draft bill is yet to be presented. Accordingly, we cannot present details of the envisaged rules yet. However, it is expected that a threshold of DKK 100,000,000 will be introduced, so that groups holding minor property portfolios are exempt from the new mark-to-market taxation.

Based on information from the Danish Ministry of Taxation, it is expected that the properties in question will receive a step-up in their tax basis equal to the fair market value of the properties on 1 January 2023, or an alternative date on which the rules will enter into force. Accordingly, only gains arising after that date will be subject to this taxation.

New initiatives to combat use of non-cooperative jurisdictions

On 25 February 2021, the Danish Ministry of Taxation issued a statement on the combat against the use of companies resident in jurisdictions on the EU list of non-cooperative jurisdictions (the "EU Blacklist"), which is updated twice per year.

The statement addresses two specific measures to be adopted. Firstly, Danish companies will not be able to deduct payments made to group companies resident in jurisdictions on the EU blacklist. Secondly, dividends paid from a Danish company to a parent company/ultimate owner resident in an EU blacklist jurisdiction will be subject to a 44% WHT in Denmark, as opposed to the current standard WHT rate of 27% (22% subject to reclaim).

On 27 January 2021, a draft bill was presented implementing the rules above and is currently subject to public hearing. If passed, the bill is intended to enter into force on 1 July 2021. Accordingly, payments made on or after this date will be subject to the new rules.

Furthermore, the Danish Ministry of Taxation issued a statement on 25 February of its intention to terminate the double tax treaty with Trinidad and Tobago as the country is listed on the EU blacklist.

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Finland

Changes to legislation regarding nominee-registered shares

New WHT rules are applied to dividends paid as of the beginning of 2021.

With the legislation change, amendments were made to the Act on the Taxation of Non-resident Income (*Laki rajoitetusti verovelvollisen tulon verottamisesta*, 627/1978).

Registration as an Authorised Intermediary – Register open as of 1 January 2021

With the legislative change, Finland implements the OECD TRACE model (Treaty Relief and Compliance Enhancement model) by including direct TRACE reporting to the Finnish Tax Administration as well as the adoption of the Investor Self Declaration procedure.

The public Register of Authorised Intermediaries started operating on 1 January 2021. The new register replaces the former Custodian Register. It is not mandatory to register into the new register, but Authorised Intermediaries have certain benefits in comparison to non-registered intermediaries. Registered intermediaries can for example directly report dividend beneficiary information to the Tax Administration without having to send client information through the custody chain to other intermediaries.

After the legislative change, the issuer is still considered as the WHT agent and the issuer is responsible for the withholding. However, after the change, the responsibilities of the issuer depend on the following:

- if there is an Authorised Intermediary in the custody chain, the issuer is allowed to rely on the information provided by the Authorised Intermediary concerning the applicability of the double tax treaty; and
- in case there is no Authorised Intermediary in the chain, the issuer has the sole responsibility to levy the correct amount of WHT and collect the necessary information concerning the beneficial owner.

A corporation that operates custodial activities can submit an application for entry in the Register of Authorised Intermediaries. Generally, entities that are considered to be engaged in custodial activities include credit institutions, investment service companies and central securities depositories.

Application for registration to the Register of Authorised Intermediaries has been possible since July 2020. The Registered Authorised Intermediaries can be found on the Tax Administration's website: Public Register of Authorised Intermediaries.

Obligations related to the registration

The obligations of an Authorised Intermediary include e.g.:

- investigating and ascertaining the beneficiary's right to tax treaty benefits, when tax treaty benefits are granted to the beneficiary;
- submitting an annual return on the information of the beneficial owners;
- the tax liability for (partly or fully) unpaid WHT on dividends for which it has assumed responsibility; and
- potential responsibility for providing necessary information and tax liability on behalf of unregistered custodians.

Amendments to WHT amounts

The tax treatment of nominee-registered shares was amended as of 1 January 2021. The statutory rates applicable to individuals and corporate entities remain the same. Identified corporate entities are still subject to 20% WHT at source and identified individuals are still subject to 30% WHT at source. The change will not affect tax rates agreed upon via double tax treaties.

However, there are certain changes regarding the tax rates applied to nominee-registered shares.

For nominee-registered shares the current applicable WHT at source rate has been 30%, if the dividend beneficiary was unidentified at the time of payment. As of 1 January 2021, unidentified dividend beneficiaries will be subject to 35% WHT at source, if there is no knowledge of the applicable country of tax residence. The 30% WHT at source rate can still be applied, if the dividend distributing entity is a listed company or a registered Authorised Intermediary that has duly investigated the state of residency of the dividend receiver and the applicability of a double tax treaty as meant in the Act on the Taxation of Non-residents' Income. In addition, the dividend distributing listed company and the registered Authorised Intermediary must provide the Tax Administration with specific identification information on the dividend recipient.

If a double tax treaty is not applicable, but the dividend distributing listed company or the registered Authorised Intermediary has the necessary identification information, the dividend is taxed pursuant to the normal WHT at source rate of 30%. If sufficient identification information is not provided to the Tax Administration, the dividend paid to nominee-registered shares is subject to WHT at source at the rate of 35%. In this case, the recipient of the dividend can apply for a WHT refund from the Tax Administration, if entitled.

Further, dividends paid to nominee-registered shares held by a Finnish tax resident are subject to a 50% WHT, if information on the dividend beneficiary is not given to the Tax Administration.

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France

French WHT on dividends paid to foreign investment funds

France has provided for an exemption of French withholding tax on dividends paid to foreign investment funds since 17 August 2012 which is applicable to all dividends paid after that date. To benefit from this exemption, the investment fund must be located in an EU Member State or in a State or territory that has entered into an administrative assistance agreement with France in view of fighting against tax fraud and evasion and must meet the following two conditions:

- the investment fund raises capital from a certain number of investors, with a view to invest in accordance with a defined investment policy for the benefit of those investors.
- (ii) the investment fund shows characteristics similar to those of the following French Undertakings for Collective Investment (UCIs): OPCs (Sicav and FCP), OPCIs (Sippicav and FPI) and SICAFs.

A tax guideline was issued relating to the WHT exemption, amended several times.

French WHT on dividends paid to non EU/EEA investment funds

The above cited tax guideline indicates that UCIs located outside the EU/EEA would not be allowed to benefit from the immediate exemption but would need to file a claim and provide the French Tax Authorities with appropriate documentation evidencing their comparability to French UCIs.

In August 2020, the guideline has been once again amended; it now details the list of the documents required for establishing the comparability.

In August 2020, we obtained the first refunds from the French Tax Authorities for US RICs. The FTA now request the following documents, i.e. the Form N-CEN, the Form N-1A including the prospectus and the statement of additional information, the declaration of trust, the articles of association, the by-Laws, the registration number with the SEC, the investment advisory and service agreement, the custody agreement, the identity information of the custodian, the registration number of the management company and the name of the auditor.

Sofina case law: French WHT on income paid to foreign loss making companies

Further to the Sofina decision of the European Court of Justice, the French law has been amended. Foreign companies in a tax loss position may obtain the temporary restitution of WHT. This restitution is subject to a tax deferral which ends if the company returns to a profitable situation (article 235 quater of the FTC).

For the tax reclaims filed on the basis of Sofina, questions have been raised by the French Tax Authorities about the proof of the tax loss position. Difficulties arose for German loss making companies that cannot produce their final and approved version of their CIT returns.

French procedure applicable to WHT tax reclaims

According to the Administrative Court of Appeal of Versailles dated 27 February 2020 (n°19VE00738), a distinction according to the author of the claim should be made – a two-year time limit applies when claims are filed by the paying agent whereas the one-year time limit applies when the claim is filed by the beneficiary of the distribution.

The Conseil d'Etat rendered an opinion on 21 October 2020 (n°443327) by ruling that there is no reasonable time limit to respect for bringing the case before the court in presence of an implicit rejection from the FTA.

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European commission asks France to change its WHT rules on dividends to insurance companies in other EEA Member States

The Commission has sent a letter of formal notice to France requesting a revision of its WHT rules on dividends paid to "Unit Linked insurance" companies established in other European Economic Area (EEA) Member States. Such insurance companies established in EEA Member States are required to pay a final WHT on French dividends received.

However, Unit Linked insurance companies established in France either pay no WHT on these dividends or can credit the WHT paid against their French corporation tax. This is because the dividends received constitute deductible provisions or technical reserves. The Commission deems that the rules applicable to foreign insurance companies infringe on the free movement of capital (Article 63 (1) of the TFEU and Article 40 of the EEA Agreement). France has two months to reply to the arguments raised by the Commission. Otherwise, the Commission may decide to send a reasoned opinion.

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Germany

Digitalization of tax law and tightening of WHT process[1]

Germany keeps pursuing the route towards tax transparency and digitalization of tax law, just like several other EU member states. In addition, a tightening of the possibility to reclaim German WHT, e.g. by fund vehicles, is on the way.

The international financial services industry, including mutual, hedge and private equity funds, ought to prepare.

Background

- Data privacy protection, the Holy Grail of German government attitude supported by Constitutional Court decisions over many years, is on the retreat, at least: in the context of tax law.
- Germany witnessed several tax scandals over the last years, most prominently the Cum-Ex issue: a diffuse WHT reclaim process was abused for obtaining multiple tax refunds of WHT which had only been levied once. Several legislative changes were

1 The authors would very much like to thank their colleague **Amelie Inselmann** for her valuable support.

enacted since and the legislator continuously aims at preventing tax fraud, occasionally overshooting the mark.

- Both houses of the German parliament recently decided to make use of the individual's tax identification number as a general "Citizen-ID" in several contexts, e.g. for purposes of the population register, the register of driving licenses or the weapon register. This step is expected to significantly ease the digitalization of administrative tasks of numerous kinds. The law will come into effect soon.

Next steps – draft bill

One of the next steps recently announced by the German government, presented in the form of a draft bill and declared as motivated by the tax fraud prevention strategy, is related to German WHT on dividends.

The draft bill effectively aims at a complete overhaul of the German WHT system. The revised process is not limited to the retroactive WHT reclaim procedure as such, it also covers the stage of the original deduction of German WHT by the German paying agent of the dividend.

The revised rules also target mutual, hedge and private equity funds suffering German WHT on dividend income and their (often) multi-tiered custodians. Thus, the draft bill will have an – at least: operational tax – impact on the administrators and custody banks of international fund vehicles.

The plan is to enhance tax transparency via centrally collecting tax relevant data in combination with the digitalization of the WHT deduction and the refund process. The implementation of additional reporting obligations for WHT payers as well as parties involved in the process of distributing capital income and levying WHT, such as custodians or clearing houses, is generally in line with international developments such as the EU's Anti Tax Avoidance Directive, the implementation of DAC6[2] (soon to be followed by DAC7) and the OECD's Inclusive Framework on Pillar One and Two.

The draft bill has entered the parliamentary process; the specific rules described above are intended to become effective in 2024.

Without going into the detail of the 180-degree-turn in German WHT policy, we would like to highlight the following:

- For the first time, a central data base related to WHT will be kept on the level of the German Federal Office of Finance ("BZSt"). The intent is not limited to collecting the data necessary to match the amount of WHT levied with the amount of the claim for a refund; also the identity of the recipient of the dividend subject to WHT shall be reported, so as to be able to match the WHT refund claim with the original recipient of the dividend.
- As part of centralizing the WHT refund decision competence, all applications for WHT relief at source or retroactive refund launched by non-German tax payers will have to be filed with the BZSt, regardless of whether the application is due to German national law, or to a benefit under a double tax treaty (DTT) or is based on the argument of discriminatory treatment according to EU law (the case law of the European Court of Justice related to the free movement of capital).

2 see WTS Global Financial Service Client Letter # 19-2020, dated 4 Jan. 2021.

Additionally, non-German investment funds will no longer be able to receive a reimbursement of WHT from the original paying agent of the specific income stream, but all of the investment fund's reclaims will have to be filed centrally with the BZSt. Please note that the change in centralized competence of the BZSt will become effective with the adoption of the draft bill (not: in 2024, like the other revisions described).

- → Foreign payers of WHT will have to instruct the paying agent of the dividend to report to the German tax authority in electronic format their relevant data, i.e. the current paper based process will be replaced by an electronic reporting.
- → The paying agent only reports to the tax authorities if so instructed by the tax payer; the report has to be filed immediately after every inflow of income; it is thus advisable for many non-German tax payers to give the paying agent a general instruction to report (not: a consent on a case to case basis).
- → The before described report replaces the tax certificate in cases where an investment fund with limited tax liability applies for a relief from WHT with the BZSt; which means that less paperwork has to be filed and forwarded to the German tax authority.
- → The additional reporting obligations are accompanied by an increase of liability of the paying agent. The agent will be liable for WHT which was levied incorrectly and for incorrect reporting of data. Additionally, in the case of intent or gross negligence, the agent might face a penalty of up to 20.000 EUR per case.

Besides the medium-term development depicted above, there is a further noteworthy development, which will be implemented soon, so the expectation.

At present, foreign (incorporated) investment funds are exempt from specific German national anti-treaty-shopping (LOB) rules, according to which - in a nutshell - the applicability of a treaty benefit is rejected, if the beneficial owner of the entity claiming the benefit is not entitled to the benefit himself and if the relevant income is not related to an own economic activity of the entity. These current rules have come under scrutiny by the European Court of Justice.

In the future, based on the draft bill, the current exemption applicable to non-German investment funds shall be deleted. Thus, if a fund vehicle will seek WHT relief under a DTT to less than the rate of 15%, the new anti-treaty-shopping rules will gain importance.

The good news is that many foreign investment funds qualify for and have already received the so-called Statusbescheinigung (acc. to § 7 Abs. 1 InvStG), to be passed to the German paying agent of the dividend. The effect of the named certificate is a reduction of the German WHT at source from the standard national rate of 26,375% to 15%.

CJEU case "CPP" - C-641/17

In our last client letter (# 19-2021), we introduced the impact of the European Court of Justice case C-641/17 - "College Pension Plan of British Columbia" (CPP case, covering the years 2007-2010), according to which a tax rule preventing a Canadian pension fund from reclaiming WHT on German dividends is contrary to the free movement of capital because a resident pension fund is allowed to credit / receive a reimbursement of such WHT. The specialty of the CPP case is the look-through-approach applied by the CJEU: the Canadian pension fund did not invest directly into German equity assets, but via a pooled investment portfolio. The CJEU disregarded this fund structure in the context of determining the comparability.

In our last client letter, we described the possible impact of this look-through-approach for pension funds on WHT reclaims based on a discriminatory treatment in different EU jurisdictions.

As a follow-up, we would like to emphasize the importance of the timing aspect for WHT reclaims based on the CPP case in Germany, in comparison to WHT reclaims based on other CJEU cases applicable to investment funds, such as C-480/16 - Fidelity Funds and C-156/17 - Koeln Aktienfonds Deka - ("Investment Fund Reclaims").

The discriminatory treatment of non-German investment funds with regards to WHT ended with effect from 1 January 2018; Investment Fund Reclaims for WHT suffered on German dividends in 2017 can be filed until December 2021.

In comparison, the discriminatory German legislation which gave rise to the CPP case has not been changed yet. The discrimination against non-resident pension funds - structurally comparable to resident pension funds - therefore continues.

Thus, reclaims for WHT suffered on German dividends based on the CPP case can be filed not only for the year 2017 but also for subsequent years. As the general statute of limitations in Germany is 4 years, for example, a claim for the refund of WHT suffered in 2018 can be filed until the end of December 2022.

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Italy

WHT exemption on interest paid to UK [mutual] investment funds (after Brexit): Italian Revenue Agency Ruling n. 125, 24 February 2021

Background

Investment funds not authorized to carry out regulated activities, but which are managed by intermediaries subject to regulatory supervision, have to be considered as "institutional investors" and - if established in countries allowing an adequate exchange of information - can enjoy the exemption from the Italian withholding tax provided for by article 26, paragraph 5-bis, of Presidential Decree 600/1973 on interest deriving from medium and long-term loans granted to Italian companies. These conclusions are reached by the Italian Revenue Agency in Ruling 125 dated 24 February 2021 regarding the exemption from the Italian 26% WHT (granted by article 26, paragraph 5-bis of Presidential Decree 600/73) on "outgoing interests" which are paid to investment funds resident in the United Kingdom.

According to the law mentioned, the outgoing WHT does not apply to interests deriving from medium and long-term loans (i.e. over 18 months) granted to Italian companies, commercial entities and individual entrepreneurs, as well as permanent establishments in Italy of non-resident companies, by: a) credit institutions established in EU Member States;

b) insurance companies established and authorized pursuant to regulations issued by EU Member States c) foreign institutional investors subject to the regulatory supervision in the foreign countries in which they are established.

Foreign institutional investors

The Italian Tax Authority refers to its circular 23 / E of 2002, confirming that "foreign institutional investor" means an entity that, regardless of the legal status and tax treatment to which the related income is subjected in the country in which it is established, makes and manages investments on its own or on behalf of third parties. This definition also includes entities "without tax liability" such as mutual investment funds, SICAVs, pension funds, asset management companies, specifically included among the "qualified" investors referred to in article 1, paragraph 1, letter h), of the decree of the Minister of the Treasury of 24 May 1999 n. 228, as they are subject to forms of regulatory supervision in the foreign countries in which they are established, as long as such states and territories allow for an adequate exchange of information (white list countries, ministerial decree of 4 September 1996 and subsequent updates). It should be noted that even after Brexit, the United Kingdom is still considered as a "cooperative" country for exchange of information purposes.

Prudential supervision

The Italian Revenue Agency clarifies that the fund under analysis complies with the requirements as it is established in a country that allows an adequate exchange of information and, although not directly authorized to carry out any regulated activity based on the UK financial services and market act 2000 (Fsma), is managed by a subject authorized by the Financial Conduct Authority (FCA). As confirmed by the Circulars n.2 dated 15 February 2012 and n. 19 dated 4 June 2013, supervision must be alternatively verified with reference to either the investor or the management company, in the light of the prudential supervision model adopted in the country where the undertaking is established.

Beneficial owner

Finally, it should be noted that the Revenue Agency confirms that article 26, paragraph 5-bis, of Presidential Decree 600/73 does not provide for the "beneficial owner" condition, but rather applies only to subjects [i.e. institutional investors] having the requirements indicated by the law. Therefore, it is not possible to apply the exemption regime to the beneficiaries of the interest payments [i.e. the fund's investors or members] that are not "also" the direct recipients.

New rules on taxation of Italian-sourced dividends and capital gains derived by foreign UCIs: update

We make reference to the last WTS Global Financial Services Info Letter[3] to confirm the final approval of the 2021 Italian Budget Law, providing for a new set of rules applicable to foreign UCIs. Such UCIs are no longer subject to Italian WHT (26%) on either dividends or on capital gains derived from Italian shareholdings (or comparable instruments).

As said, the discrimination compared to Italian funds is only abolished for EU funds. Consequently, non-EU funds are still at a disadvantage.

3 see WTS Global Financial Service Client Letter # 19-2020, dated 4 Jan. 2021.

The new rules are applicable with respect to distributions of profits and capital gains realized from 1 January 2021. However, the principles of entrusting and effectiveness should justify the retroactive implementation of the new provision.

In the light of the above, the right of taxpayers to apply for refund of Italian WHT levied in breach of EU principles (i.e. exclusion of non-EU funds and the non-retroactive effect) can be still exercised, if the statute of limitations has not expired yet.

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Netherlands

Developments regarding WHT on portfolio dividends

The past year showed some interesting developments with respect to Dutch WHT on dividends ('dividend tax') on portfolio dividends received by foreign investment funds.

Dutch Supreme Court sheds light on transparency of single investor funds

On 24 January and 18 December 2020, the Dutch Supreme Court answered questions posed by a lower Appeals Court with respect to single investor funds. The questions concerned the same case as had already been subject to questions answered by the European Court of Justice in the "A-Fund" case (CJEU case C-598/17). The Netherlands knows the 'FGR' (or 'Fonds voor Gemene Rekening'), which translates as 'Mutual Investment Fund' and is a contractual investment fund. In the case at hand, it concerned a German contractual fund (Sondervermoegen) which is deemed similar to a Dutch FGR. The fund had only one investor, which gave rise to the thought that the fund may be disregarded for dividend tax purposes as a transparent fund.

The Supreme Court gave a clear answer in that respect: a fund is only an FGR if it intends to invest for the joint account of two or more participants and if the fund actually has more than one investor. However, the Court added that an investment fund does not lose its character as a mutual fund if it has only one participant for a short period of time. Whether a fund is indeed a mutual fund requires an analysis based on all facts and circumstances of the case, viewed in conjunction with each other. This analysis must include not only the wording of the agreements governing the establishment and functioning of the investment fund, but also the intention of the founder(s) of the investment fund and the actual situation.

This means that the qualification of a fund vehicle - as either a mutual (FGR-type) fund or as a 'private' fund - is a matter of fact and not a matter of law which requires examination of all the facts in conjunction with each other; in principle each case has to be examined separately. However, if a fund has had the same single investor since its formation for years, and there is no proof that it was intended for other investors to join the fund, it can be expected that the fund is regarded as transparent.

Practical implications and consequences for single investor fund cases

The transparency of a single investor fund means that any Dutch dividend tax suffered by the fund can be reclaimed only by the single investor of the fund, and not on the level of the fund. Single investor funds should therefore be vigilant in this respect.

In certain jurisdictions, like France, contractual fund forms exist that require at least two participants. In order to meet this requirement, but still have in fact the same effect as a private fund, it is then common practice for the intended single investor to find a second investor which participates for a small part, like 0.5%. Maybe, the doctrine of the Dutch Supreme Court regarding private funds also extends to such cases, where it is really the intention to create a private fund and not a collective investment vehicle.

It may therefore be prudent to consider filing dividend tax reclaims at both fund level and the level of the 'virtual' single investor, instead of only at fund level.

In that respect, we would like to mention that many (life) insurance companies, in particular in Germany, invest via single investor funds that can be deemed 'private' (and therefore transparent) funds for Dutch tax purposes. In such cases, it can be argued that the investment income of the fund is almost exclusively for the account of the insurer's clients (the insured persons), it may be worthwhile for the insurance company / single fund investor to consider filing a dividend tax refund claim based on a reasoning similar to the so-called CPP case (CJEU case C-641/17, College Pension Plan of British Columbia). The argument would be that Dutch insurance companies get a full credit for Dutch dividend tax, even if they hardly make any profit or if they even incur a loss, so that in fact they only pay tax on a small amount of income, which virtually amounts to an exemption. It can be expected that the Dutch tax authorities will contest this reasoning.

WTS Netherlands specializes in preparing, filing and defending dividend tax refund claims. WTS Netherlands is currently involved in numerous cases that cover the entire palette of complexity and argumentation found in this field of tax law.

Dutch Supreme Court ruling concerning the Deka case (CJEU case C-156/17)

Koeln-Aktienfonds Deka, a German Sondervermoegen, comparable to a Dutch contractual fund, suffered Dutch dividend WHT on its equity investments and filed a refund claim for that tax. The case concerned a period before 2008, when Dutch mutual funds - that profited from a special regime ('FBI'-regime or *Fiscale beleggings Instelling* regime) in fact fully exempting the funds from tax - would get a refund for Dutch dividend WHT. The German fund requested equal treatment and, when its claim was rejected by the Dutch tax authorities, filed a law suit. The lower court posed a a request for a preliminary judgement to the Dutch Supreme Court, which in turn asked questions of the European Court of Justice ("CJEU"). On 30 January 2020, the CJEU ruled in this case and on 23 October 2020 the Dutch Supreme Court ruled by answering the questions posed by the lower court. The case at hand concerns the legislation as it stood before 2008, which considerably differs from the current legislation.

In a nutshell, the interesting take-away is as follows.

First of all, the Supreme Court recognizes that Dutch and foreign funds suffering Dutch dividend tax are in a comparable situation. The Supreme Court therefore creates a possibility for foreign funds to claim a refund. However, to be eligible, the foreign fund must first accept that it must make a 'replacing payment' that tries to capture the dividend tax that the fund should have paid on the profits distributed to its investors if it would have been a Dutch fund, so the Supreme Court. If the concept of the replacing payment is accepted by the foreign fund, no actual payment is necessary, it just needs to be calculated and then subtracted from the dividend tax that was actually suffered in the book year concerned. If, in the end, a positive amount remains, this amount must be refunded to the foreign fund. The replacing payment is in principle calculated as 15% of the fund's annual profit according to Dutch standards, minus certain adjustments to provide relief from non-Dutch withholding tax suffered by the fund.

On top of that, a foreign fund must still prove that it meets the shareholder requirements for 'FBI'-status as well as the annual profit distribution requirement, where the latter can also be met if there is no actual distribution but a deemed distribution in the country of residence of the foreign fund. A complication in that respect is that the (deemed) distribution must be equal to the profit amount determined according to Dutch standards, which may pose a distinct hurdle that cannot be overcome in many cases. In that respect, it seems that the shareholder requirements may be the less complicated hurdle, provided that funds can prove that the composition of their shareholders / investors stays within the bounds of the FBI-regime. For UCITS funds who have only small investors, this prerequisite should not be an issue.

Anyway, it seems that the Supreme Court tried to create a WHT refund system that in practice aims to protect the Dutch Treasury from any substantial 'bloodletting'.

An interesting question is what the Supreme Court will decide in a case under current law, where Dutch funds can deduct their Dutch and foreign WHT suffered on income from the dividend tax they have to withhold and pay to the Dutch Treasury on profits distributed to investors. In the former system until 2008, the fund must claim a refund, while in the current system the refund is packaged as a credit against dividend tax payable. The refund is then - by definition - either equal or less than the WHT on the annual profit distribution. Should a similar solution be proposed as for the old years (pre 2008), then again by definition the replacing payment (in fact the WHT on the annual profit) would either be equal or bigger than the WHT suffered by the fund. This Supreme Court judgement means that it would be impossible for a fund to actually obtain a refund.

We would like to add some remarks to the creative 'solution' invented by the Supreme Court. First of all, it appears that this solution may have the outcome that in practice it will be impossible for any foreign fund to get even one euro refunded. The question arises if a solution with many hurdles that in practice cannot be overcome, is acceptable for the CJEU. Under the current rules, the Supreme Court judgement cannot even theoretically lead to a refund.

Furthermore, the essence of the Dutch FBI-regime is that the fund is in fact tax-free because the taxation of its profit is pushed to the level of its investors. The judgement of the Supreme Court disregards this aspect. The fund is charged with the tax that normally should be borne by the fund's investors, but this taxation is then not pushed to the level of the investors, for example by granting the investors a tax credit that they can offset against the income tax they pay in their country of residence.

The Netherlands creates possibility for dividend WHT refund in 'Sofina' cases

On 22 November 2018, the CJEU ruled in the Sofina case (CJEU case C-575/17) that French dividend tax legislation is in breach of EU law, because (French) dividend tax is levied on dividends received by a non-resident company, while dividends received by a resident company at the end of the financial year in which they are received are taxed only if the resident entity has been profitable in that financial year. This case concerned loss-making portfolio shareholders based in Belgium who received dividends from France.

On 4 December 2020, the Dutch Ministry of Finance published a Decree acknowledging that in certain cases the Dutch dividend WHT legislation would not be in accordance with EU law, based on the Sofina case.

This new development is of interest for foreign entities, resident in the European Economic Area or a cooperative third country that applies the international standard of information exchange, provided such entity would have been eligible for a dividend tax refund in case it would have been a Dutch resident entity.

Refund requests can be filed up to three years after the book year concerned.

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Portugal

Tax litigation associated with WHT on dividends obtained by EU pension funds

Background information

On 6 October 2011, the CJEU concluded that the taxation of dividends distributed by companies established in Portugal on shares held by EU-based pension funds for more than one year constitutes a restriction on the principle of free movement of capital. As a result of the CJEU decision, the Portuguese tax law was amended on 1 January 2012.

Following these amendments, income obtained in Portugal by resident EU/EEA pension funds (subject to administrative cooperation on tax matters) is exempt from corporate income tax, provided that certain conditions are met. It is inter alia required that the recipient is an institution for occupational retirement provisions within the meaning of Directive 2003/41/EC. Furthermore, a minimum holding period of one year applies. Based on the above, it is recommended meeting the requirements summarized above so that an exemption can be applied immediately. In case the exemption has not been applied, we recommend filing a request for a refund. The statute of limitation of filing a claim in Portugal is two years after the date of the dividend payment.

Requirements

For purposes of application of the Corporate Income Tax WHT exemption in Portugal on dividends, the following requirements should be met:

- The foreign pension fund exclusively assures the payment of retirement pensions granted from elderly, handicapped, surviving, pre-retired, health, post-employment benefits and death benefits;
- The pension fund is managed by an entity covered by the Directive 2003/41/EC, of 3 June 2003;
- The pension fund qualifies as the effective beneficiary of the income; and
- The share participation is held for more than one year.

Documents / Information

For purposes of benefiting from the exemption or claiming a tax refund, and as a general rule, the following information should be obtained:

- Dividend vouchers containing the information of the dividends payments and the amounts of tax withheld;
- Overview of all dividend distributions including: total number of relevant shares; beneficial owner; gross amount of the dividend; WHT levied; any prior refund of the WHT through a bilateral tax treaty / convention;
- Detailed information about the fund and its features
- Tax residency certificate
- Statement of the entity responsible for the supervision of the fund attesting the fulfilment of the requirements set forth in Portuguese law.

Deadline

For purposes of claiming WHT refunds on these grounds, taxpayers should file an administrative claim (this first step is mandatory) within a two-year deadline counting from the legal deadline to deliver the WHT to the Portuguese tax authorities.

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Spain

Resolutions of Central Economic Administrative Court, of 8 October 2019

The Spanish Central Economic Administrative Court issued two resolutions in October 2019 regarding the concept of beneficial ownership.

The background of the first case is a Spanish entity paying interest to its Dutch holding, which is controlled by an entity located on the Caribbean Island of Curacao, which in turn is controlled by an entity of Andorra, owned by a person that is also resident in Andorra. Article 14.1.c) of the Non-Resident Income Tax Law establishes that residents in another EU state are exempt from Non-Resident Income Tax. Therefore, the Spanish entity did not withhold tax. However, the Spanish Tax Authorities considered that, since the beneficial owner was not resident in an EU Member State, this exemption could not be applied. In particular, the tax authorities based their decision on the application of Directive 2003/49/

CE related to payments of interests and royalties between entities of different Member States, which includes the concept of the "beneficial owner".

This interpretation was not shared by the entities, who filed a claim against the Spanish Tax Authorities' resolution arguing that the clause of beneficial ownership is not foreseen by the Non-Resident Income Tax Law in these cases. Therefore, considering that the beneficial ownership is not specifically regulated in the Spanish national law, it cannot be applied through a Directive that has not been transposed.

Nevertheless, the Central Economic Administrative Court agreed with the criteria applied by the Spanish Tax Authorities and concluded that, in accordance with the criteria established by the EU Court of Justice in "The Danish cases", the clause of beneficial ownership established by the directive is a valid legal source in relation to the purposes of the EU policies. Consequently, as the EU regulation sets up the prohibition of abusive practices, such clause should be applicable even when the directive has not been transposed.

In a comparable context, the Central Economic Administrative Court issued a second resolution about a case where the Spanish Tax Authorities had denied the application of the exemption of Non-Resident Income Tax to a non-resident entity (here: resident in Luxembourg) that had received dividends from its Spanish subsidiary pleading the clause of beneficial ownership. In particular, the Spanish Tax Authorities considered that, as the beneficial owner of the Luxembourg entity was tax resident in Qatar, the exemption established by the Non-Resident Income Tax for the dividends paid to entities resident in an EU Member State was not applicable.

In this regard, it is important to bear in mind that, regarding the payment of dividends, the Non-Resident Income Tax does set out an anti-abuse clause, which states that the exemption does not apply when most of the voting rights of the parent company are owned by a non-EU resident person or entity. According to the wording of the Non-Resident Income Tax Law in force in 2012, the anti-abuse clause cannot be applied if the parent company can prove any of the three following circumstances:

- That its activity is related to the activity carried out by the Spanish subsidiary;
- That it runs and manages the subsidiary by means of the appropriate human and material resources; or
- That it has been set up for valid economic reasons and not merely to take advantage of the tax regime.

In the case at hand, the Central Economic Administrative Court not only concluded that none of the three aforementioned circumstances had been proved but also that the Luxembourg parent entity had been set up for the sole reason of taking advantage of the tax exemption. Consequently, the court considered that the Spanish entity was obliged to withhold the Non-Resident Income Tax, regardless of the fact that the Directive 90/435/CEE – parent subsidiary directive – does not foresee such clause of beneficial ownership. In this sense, the Court considered that the application of the anti-abuse clause could not mean a wrong transposition of the Directive as their criteria was following the EU principles, despite the impact that this could have on the European Union rights such freedom of movement and establishment.

Supreme Court case, of 23 September 2020

Contrary to the criteria applied by the Central Economic Administrative Court in its resolutions of 8th October 2019, the Supreme Court has recently ruled a case stating a different approach on the application of the beneficial ownership.

In this case, the Spanish Tax Authorities had denied the application of the exemption on the payment of royalties between entities resident in Switzerland and Spain (established in article 12 of the Double Taxation Agreement between Switzerland and Spain) arguing that the beneficial owner is not the Swiss parent company but is actually the shareholder of the Swiss entity which is resident in another country.

According to the Supreme Court, the main issue is to determine whether the clause of beneficial ownership is applicable despite the fact that the Double Taxation Agreement (hereinafter: "DTA") does not expressly set out such anti-abuse rule. In this regard, it should be highlighted that none of the revisions of the DTA between Switzerland and Spain has ever included such clause when it refers to the payment of royalties, while other articles of the DTA – related to payment of interests and dividends – have. However, the Spanish Tax Authorities considered that the limitation of the beneficial ownership could be inherent in the interpretation of the DTA within the principles of the EU tax regulations and would be aligned with the Comments published regarding the OECD Model Convention, which are considered soft law.

In this sense, the Supreme Court states that soft law is an instrument that can help to interpret the regulation, but cannot be used to extend the scope of the regulation if such regulation does not expressly rule on certain matter. For this reason, if the DTA between Switzerland and Spain does not set out the clause of beneficial ownership on the payment of royalties, the clause cannot prevail due to the Comments on the OECD Model Convention and the dynamic interpretation of the treaties. Moreover, the Spanish Tax Authorities should have taken into account that such anti-abuse clause could lead to a double taxation if the income was also taxed in Switzerland, contrary to the main purpose of the treaty.

Consequently, the Supreme Court rules that the beneficial ownership cannot be applied, if it is not expressly included in the wording of the applicable law.

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United Kingdom

UK's funds regime to be overhauled

Following Brexit, the UK government has committed to a 'root-and-branch' review of the financial services industry. In January 2021, HM Treasury announced a broad consultation on boosting the international competitiveness of the UK's asset management industry. Whilst the UK's expertise in portfolio management is already well-recognized, the UK has not remained a favored jurisdiction for fund location and administration. Fund domicile will form part of the review. The wide-ranging regulatory and taxation review shall shortly assess the VAT treatment of fund management fees.

wts global

UK stock market set to attract tech and SPACs

It is recognized that there is an increasing shift towards fast-growth technology, e-commerce and science companies coming onto public markets, versus more traditional industries. Lord Jonathan Hill, the erstwhile European Commissioner for Financial Stability, Financial Services and Capital Markets Union, has carried out a systematic review and proposed reforms to the UK listings regime, designed to attract the most innovative and successful firms and help companies finance their growth.

The final findings of Lord Hill's review are be reported to HM Treasury in early 2021, after gathering evidence from a wide set of stakeholders. The key recommendations have been welcomed and are expected to be acted upon speedily. The recommendations include:

- → Allowing dual-class share structures (DCSS) that give more powers to founders, a practice pioneered by Google which is now commonplace in US equity markets;
- → Lowering free float requirements from 25% to 15%, to enable companies to offer smaller chunks of their business for sale in initial public offerings; and
- → Liberalizing of the listing rules for special purpose acquisition companies (SPACs) such that the UK can tap into the recent global boom in this market.

In the last year, SPACs have exploded in popularity in the US. SPAC deal volume grew sixfold in 2020 and has been identified as 'a major area of growth'. SPACs are shell companies that raise money through an initial public offering to fund an acquisition of a private company. These deals are designed to make it easier for private companies to go public, while SPACs offer investors access to private businesses at an attractive price.

Enforcement powers

HMRC has been granted additional powers, such as their new ability to issue targeted Financial Institution Notices (FINs) to obtain customer information from financial institutions (including banks and fund managers). The new FINs obviate the need for the financial institution to seek the consent of the taxpayer who is the subject of the information request, or the prior approval of a tax tribunal upon application.

Capital Gains Tax (CGT)

Despite much speculation that CGT rates would be upwardly aligned with income tax rates in the March 2021 Budget, investors have been spared for now. There has been considerable activity to realize gains ahead of the widely-anticipated rate hike.

There were no changes announced in the Budget to the rates of CGT, with the higher rate remaining at 20% and the basic rate at 10%. The 28% and 18% rates continue to apply to chargeable gains made on the disposals of residential property. Where CGT treatment applies in respect of carried interest, the flat 28% rate continues to be applicable.

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About WTS Global

With a representation in over 100 countries, WTS Global is one of the leading global tax practices offering the full range of tax services without the constraints of a global audit firm. WTS Global deliberately refrains from conducting annual audits in order to avoid any conflicts of interest and to be the long-term trusted advisor for its international clients.

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The member firms of WTS Global are strong players in their home market being united by the ambition of building the tax firm of the future. WTS Global effectively combines senior tax expertise from different cultures and backgrounds be it in-house, advisory, regulatory or digital.

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