France issues guidance for foreign investment funds to reclaim withholding taxes

Global FS Tax Newsflash

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On May 2012 the European Court of Justice ("ECJ") rendered another landmark judgment in relation to discriminatory French tax withheld on dividend payments made to foreign investment funds. The Santander case involved ten investment funds resident in Belgium, Germany, Spain and the United States that had received dividends from their French equity portfolios and had been subject to French dividend withholding tax (hereafter "WHT"). These funds disputed the French tax rules on the basis that the levy of WHT was in breach of the free movement of capital guaranteed by EU law. The ECJ ruled that the levying of French WHT on dividend payments made to foreign investment funds was in breach of the free movement of capital because WHT was not levied on French investment funds. The French Government has taken a number of actions to respond to the Santander Case including publication of detailed guidance on how foreign investment funds can reclaim previously withheld taxes

The Model File: Detailed guidance on refund of WHT

The guidance provides details on how foreign investment funds can obtain refunds of French WHT, makes it clear that there are two conditions that must be satisfied:

1st condition: the investment fund is comparable to a French UCITS fund

a. European funds approved under the Directive 2009/65/CE (the UCITS Directive)

A European fund which provides evidence that it is regulated as a UCITS under Directive 2009/65/CE dated July 13th 2009 will be regarded as objectively comparable to a French UCITS.

b. European funds not approved under the Directive 2009/65/CE (the UCITS Directive)

Any European fund which is not approved as a UCITS can still justify that it is comparable to a French UCITS if it demonstrates that it complies with the requirements of the Directive. The fund can demonstrate this either by providing a statement on the information document provided to the investors; or providing a description of objective facts (depositary, manager with separate roles, information process towards investors, risk diversification, no loan financing, repurchase of shares/units on request by investors, etc ...)

c. *Non European funds*

The non-EU fund must also demonstrate that it is objectively comparable with a French UCITS as approved under the Directive 2009/65/CE dated 13th July, 2009. The demonstration can be based on the same criteria as those described above in respect of EU non-UCITS funds .

2nd condition: evidence of the amount of withholding tax paid

The French tax authorities recommend providing supporting documentation in electronic format (CSV, XLS or ODS for the spreadsheet and XML or PDF for certificates) on magnetic media (CD ROM, USB Key). Otherwise, these documents can be sent in paper format:

- Name and address of the fund
- Prospectus of the fund
- Dividend / WHT spreadsheet: the spreadsheet must at least disclose the following information: name of the French securities, payment date of the dividend, gross amount of dividend paid, percentage of WHT, amount of WHT levied, net amount of dividend paid, amount of foreign tax credit (if any) ;
- 2777 or 2779 references
- Dividend vouchers, if the name of the claimant is not mentioned in the 2777 or 2779 references
- Documents issued by any intermediary between the French paying agent and the custodian (e.g. central depository or ADR issuer /sponsor)
- For UCITS funds: proof of the registration of the fund (copy of the registration or registration number, e.g. copy of Articles of the company or prospectus/ KIID)
- For non-UCITS (EU or non-EU), copies of the Articles of the fund and /or prospectus /KIID (if any) should be provided in order to assess the comparability with a French fund: e.g. custodian's appointment, management company, investment advisor, investor information, regular reporting, risk spreading, shares redemption, etc.
- If the fund could benefit from the reduced rate provided by the double tax treaty, the French paying agent must be able to provide a certificate stating that no refund has been granted on the double tax treaty basis.
- If a partial refund has been granted, the paying agent must provide a table mentioning the refunds and the references to the 2777 references.
- Payment instructions (IBAN, BIC, SWIFT). If payment is made to the custodian then it is necessary that a warrant is signed and attached to the claim.

The requirements are broadly consistent with what we have been advising our investment fund clients, since 2005, however, the requirement of requiring the the custodian to sign a warrant to the claim to certify the bank account is new.

Late payment of interest

Pursuant to the provisions of Article L208 of the "*Livre des procedures fiscales*", the reimbursement of the WHT by the French Treasury will be automatically accompanied by late payment interests at the monthly rate of 0.4% since 1 January 2006. The rates are 2,05% for FY2005, 2,27% for FY2004 and 3,29% for FY2003. For these investment funds that made the first claims in 2005, for FY2003, the interest will be of a significant amount.

What actions should investment funds take to recover French taxes?

Foreign investment funds that have previously filed claims

Funds will need to review each previously filed claim to ensure that their files are complete and in line with the new requirements and regularise their position via electronic communication with the French Tax Administration.

Foreign investment funds that have not previously filed claims

The decision rendered on 10 May extends the period to introduce claims for past years and as a consequence, the deadline for filing a claim for 2009, 2010, 2011 and 2012 is **31, December 2014.** Foreign investment funds that have not previously filed claims should review the French WHT they have suffered since 1 January 2009, gather the information outlined above and seek to file claims.

What do these developments mean for investment funds investing into Europe?

The Court ruling on the position of foreign investment funds investing into European companies will be welcome news for both EU and non-EU investment funds that have been subjected to discriminatory withholding taxes on dividends from EU Member States.

For French sourced dividend to be paid in the future, both EU and non EU funds should clarify whether they can be treated as comparable to a French fund and can be granted upfront the benefit of withholding tax exemption provided under French new tax rules.

A number of other key EU countries including Austria, Belgium, Denmark, Finland, Germany, Italy, Spain, and Sweden have similarly subjected foreign investment funds to discriminatory dividend withholding taxes. PwC has assisted investment funds in obtaining refunds in most of these countries and there is a clear opportunity for funds to safeguard their rights and file refund claims within the applicable local statutory time limitations ranging from 1 year to 5 years.

PwC contacts

If you would like further advice or information in relation to the issues outlined above, please call your local PwC contact or any of the individuals listed below:

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