

ATOZ ALERT

Court decision on Belgian withholding tax and US investment funds

25 November 2022

On 14 November, several decisions were issued by the Brussels' Tax Court of First Instance ("**the Court**") in which the Court confirmed the right of reimbursement of withholding tax ("**WHT**") to US investment funds. The decisions are the first of their kind and follow months of pleadings led by Taxand and our partner Lydian.

Background

As of financial year 2013, the WHT levied on Belgian sourced dividends paid to Belgian regulated investment companies is no longer creditable, nor refundable. The amendment of the applicable legislation was made on 30 July 2013 and aimed at eliminating the existing discrimination between Belgian and foreign investment companies and therefore aligned the Belgian legislation with the EU case law and in particular with Art. 63 of the Treaty of the Functioning of the European Union.

As a result, for dividends received after 1 January 2013, there are no longer grounds for reclaims based on discrimination for foreign investment funds.

For the claims filed for years prior to 2013, the Belgian tax authorities issued Circular Letter Ci.RH.233/623.711 (AGFisc 11/2013), dated 4 March 4 2013. According to this Circular, a foreign investment company claiming a refund of WHT is required to prove that:

- There is no possibility to use the Belgian WHT to reduce the payable tax in the state of residence of the foreign investment company (i.e. no credit available in its state of residence); or that
- Due to a liquidation or negative result, it has not been able to use the WHT in its state of residence to reduce the payable tax and no possibility exists to carry forward this amount; or that

- Due to an insufficient result or insufficient corporate income tax due (or a similar tax), it has not been able to fully use the WHT in the state of residence and no possibility exists to carry forward the remaining amount; or that
- It has not received any reimbursement of the WHT in its state of residence.

Only the WHT or its part that has not been effectively used to reduce the tax payable or that has not been effectively reimbursed in its state of residence is eligible to be repaid in Belgium.

The Belgian tax authorities have drafted certificates to evidence the above-mentioned conditions and require them to be certified by the foreign tax authorities. In the US, since the Internal Revenue Service is not willing to sign such documents and the Belgian tax authorities would not accept the documents certified by the taxpayers themselves, the outstanding claims remained unsolved.

Judicial proceedings

Considering that the claims would most probably not have been resolved in foreseeable future, the Taxand Network and our partner Lydian decided to bring few of the higher value claims to the Court on behalf of some of our US RIC clients.

The claims were the first ones filed with the Courts on behalf of US RICs in Belgium (for 7 US RICs in total). Previous Court cases only involved admissibility issues and did not get to the merits of the cases at hand. Therefore, the decisions recently taken are a milestone in this area.

In its decisions of 14 November, the Court ruled positively on the right of reimbursement of the WHT suffered by our clients. The Court furthermore decided that the European case law does not in any way impose a requirement of comparability of foreign investment companies with European investment companies as defined in directive 85/611/EG (Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities, “UCITS”). As far as necessary, the Court however also confirmed the equivalency of our clients with investment companies that fall under the European directives.

The decisions cover the income received from Belgian securities paid after 1 January 2011. For income paid prior to this date, the Court accepted the position of the Belgian tax authorities on the applicable statute of limitations and rejected the claims.

We believe that this statute of limitations position clearly violates the European Law and is in contradiction with recent jurisprudence of the Belgian Supreme Court.

Impact on reclaim process

Although further proceedings will be required with regards to the applicable statute of limitations, the decisions confirms the overall right of WHT refunds for years prior to 2013 and the comparability of US RICs with Belgian investment funds in this matter.

We encourage foreign investment funds with pending WHT claims in Belgium to investigate in more details the potential opportunities for those claims.

ATOZ, Taxand and Lydian’s tax experts are available to assist in addressing any questions you may have regarding the decisions.

Do you have further questions?



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