

IRS Hot Topics

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German pension funds may claim refunds for overwithheld US tax

This alert summarizes an important opportunity for certain German residents to file refund claims with the IRS for overwithheld taxes with respect to the receipt of certain US source dividends. The US and German Competent Authorities recently reached an agreement not to tax, pursuant to Article 10(3)(b) of the 1989 United States-Germany Tax Treaty, as amended by the 2006 Protocol (the Treaty), dividends from investments made by certain US or German pension funds specifically listed in the Competent Authority Agreement (as explained in PwC's May 3, 2012 *US Tax Treaty Alert* ([US-German Competent Authority Agreement addresses characterization of foreign pension funds](#))).

The Agreement clarifies the meaning of the term 'pension fund', as defined in Article 10(11) of the Treaty, and applies to all open tax years to which the Treaty applies (as discussed in PwC's May 3, 2012 alert).

PwC observation

Certain German pension funds that have been subject to US federal income tax withheld at source may be eligible to file a claim for refund for tax years 2008, 2009, 2010 and 2011. **With respect to US federal income tax withheld during the 2008 tax year, provided certain requirements are satisfied, a German taxpayer may file a timely and effective refund claim filed on Form 1120-F on or before June 15, 2012.**



German residents eligible to file a US federal tax refund claim

The Agreement clarifies that in the case of Germany, an employer that establishes a contractual trust arrangement (CTA) to hold assets to fund the employer's simple employer sponsored pension plan (SESP) may claim the benefits of Article 10(3)(b) of the Treaty, provided (i) the SESP meets all of the requirements of section 6a of the German Income Tax Act, (ii) the assets of the CTA are treated as owned by the employer under section 39 of the German Fiscal Code, and (iii) all other requirements of the Treaty are satisfied (for example, the Limitation on Benefits Article). Additionally, the Agreement clarifies that a special German investment fund to which the provisions of the German Investment Act (*Investmentgesetz*) apply and which was established exclusively to hold the assets of a German pension fund or a CTA, is a 'pension fund' within the meaning of Article 10(11) of the Treaty and is entitled to a reduced rate of tax on US source dividends. Such an investment fund is treated as if it were the beneficial owner of the dividends, although the fund's investment management company (*Kapitalanlagegesellschaft*) makes the claim for treaty benefits on behalf of the investment fund.

The discussion below is relevant to persons entitled to file refund claims for overwithheld tax, although it would first be necessary to determine which person (e.g., the employer or pension fund) is a German resident that is liable for tax and satisfies the requirements of the Treaty, and therefore is eligible to claim the exemption from US tax on US source dividends.

Considerations in filing a claim for refund of overwithheld tax

In determining whether and when to file refund claims for overwithheld tax, German residents should keep in mind the below.

The only way a German resident who is entitled to a refund of overwithheld tax can obtain such a refund is by filing a refund claim with the IRS. In that regard, an original tax return (including a late-filed return) can constitute a claim for refund. Refunds of overwithheld tax may not be obtained directly from the withholding agents that withheld 30% from US source dividends during calendar years because Treasury Regulation Section 1461 prohibits withholding agents from making refunds to beneficial owners after March 15 of the following calendar year in which the withholding occurred.

To be effective, a refund claim filed by a German resident for overwithheld

tax must satisfy both the “timeliness” and “amount refundable” requirements of Section 6511 of the Internal Revenue Code. Generally, under Section 6511(a), a refund claim is timely if it is filed within three years from the date the tax return was filed with the IRS, or two years from the time the tax was paid, whichever period is later. However, Section 6511(b)(2)(A) limits the amount that is refundable to “the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to 3 years plus the period of any extension of time for filing return.” This limitation often is referred to as the ‘3-year lookback rule.’

Pursuant to this three-year lookback rule, you start on the day the refund claim was filed and go back three years (plus the period of any extension for filing the return), and any amounts paid within that time period are refundable. In that regard, Section 6513(b)(3) provides that any tax withheld at the source under Chapter 3 of the Internal Revenue Code, which includes Section 1441, will be deemed to have been paid by the beneficial owner on the unextended due date of

the return with respect to which such tax is allowed as a credit under IRC Section 1462 (e.g., the beneficial owner’s Form 1120-F, *US Income Tax Return of a Foreign Corporation*, which has an unextended due date of the 15th day of the third month following the close of the taxable year if the foreign corporation has an office or place of business within the United States, or the fifteenth day of the sixth month if it does not).

For example, a refund claim filed by a German resident on a calendar year Form 1120-F on or before March 15, 2013, will be effective to obtain a refund of tax withheld at source for the 2009 tax year, which tax is deemed paid as of either March 15 or June 15, 2010 (the unextended due date of the resident’s 2009 Form 1120-F).

Similarly, in the case of a foreign corporation that does not have an office or place of business in the United States, a timely and effective refund claim filed on Form 1120-F for tax withheld at source for the 2008 tax year could be filed on or before June 15, 2012, since such tax is deemed to have been paid on June 15, 2009.

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