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Newsalert

EU Direct Tax Group

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EU Direct Tax Group

The EUDTG is one of PwC's Thought Leadership Initiatives and embedded in the International Tax Services Network. The EUDTG is a pan-European network of EU tax law experts and provides assistance to organizations, companies and private persons to help them to fully benefit from their rights under EU law.

Dutch Tax Authorities to reimburse Dutch dividend withholding tax to EU based pension funds

The Dutch Tax Authorities (DTA) have decided to start processing refund claims filed by EU based pension funds regarding withholding tax levied on outbound dividends for the years 2003 and 2006 (inclusive). Earlier years would not be considered for the time being. However there has not been an official announcement so far from the DTA. The DTA have confirmed to PwC that they, together with the Ministry of Finance, have agreed to start the processing of all the foreign refund claims for years 2003-2006. Depending on the actual situation, claimants will either be informed that their claim has been accepted and that they will be reimbursed, or they will receive a request for additional information or a rejection. The DTA will look closely whether the claims were filed in a timely and correct manner and whether the foreign pension fund can be considered to be equivalent to a pension fund in the Netherlands.

The DTA have informed PwC that the processing of the refund claims is being effected on a case by case basis. They have indicated that they have reviewed a limited number of cases in more detail and based on this limited number of cases, they decided to agree on the principle that EU based pension funds should be entitled to a refund of withholding taxes provided they have made appropriate claims within the relevant time limits. However, the DTA have said that no formal decision has been sent out to any single EU based pension fund at this point in time. The DTA expects that the first decisions will be sent out in the coming 2 to 3 weeks.

Contrary to a report in the leading Dutch business newspaper, the Netherlands is not the first country but the fourth country in Europe, after Austria and Norway and Finland (the latter two countries in relation to UCITS funds), which is ready to take this step, which involves the repayment of hundreds of millions of Euros. The trend set by these 4 countries is very promising for similar requests for refunds filed by foreign investors in other European countries.

Prior to 1 January 2007, dividends paid by companies residing in the Netherlands for tax purposes were subject to withholding tax at a rate of 25%. Dutch pension funds and charities were entitled to a refund of the tax withheld on dividends received from companies residing in the Netherlands. However, foreign investors such as pension funds based in the EU and EEA countries were not entitled to a refund of the tax withheld on dividends received from companies residing in the Netherlands until the law was changed on 1 January 2007 (except for Liechtenstein).

The decision to reimburse Dutch dividend withholding tax to EU based pension funds was triggered by the combined pressure from the European Commission, recent case law from the European Court of Justice (ECJ) and decisions by the Dutch Supreme Court, which have all concluded that the detrimental tax treatment of foreign investors is unacceptable. In particular, the ECJ confirmed in the *Denkavit* case (C-170/05) the principle that outbound dividends cannot be subject to higher taxation in the source State than domestic dividends. The Dutch Supreme Court followed this decision by the ECJ in case 42 679 in 2007.

At the heart of this process was a study by PricewaterhouseCoopers' EU Direct Tax Group based on which the European Federation for Retirement Provision (EFRP) and

PwC jointly lodged a complaint with the European Commission in December 2005 against 18 EU Member States, including the Netherlands, for their alleged discriminatory taxation of dividend and interest payments to foreign EU pension funds.

The European Commission agreed with the analysis of EFRP and PwC and started infringement procedures against the Member States concerned based on Article 226 of the EC Treaty. The Netherlands was one of the first countries to amend its legislation in line with EC law for EU based pension funds. The Commission's action against a number of other EU Member States is continuing and is a clear sign that the Commission is convinced that the legislation in the relevant EU Member States is not in line with EC Law.

The decision now taken by the DTA is good news for the European pensions industry and also strengthens the position of claims that have been filed by other investors such as charities, insurance companies and investment companies although each situation has its own specifics.

PwC are advising a great number of pension funds, as well as investment funds, insurance companies, charities, government-owned organisations, etc., in the EU and EEA countries. PwC has also initiated legal proceedings in the Netherlands on behalf of a number of UK pension funds with the purpose to re-claim withholding tax on dividends levied as far back as 2002.

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