

Newsalert: Banking and Capital Market

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Federal Administrative Court decision on beneficial ownership in equity finance transactions

This Newsalert draws your attention to the third Federal Administrative Court decision related to the definition of beneficial ownership from a Swiss withholding tax perspective in the case of derivative transactions. After two previous cases relating to Danish claimants, the latest decision refers to a Swiss domestic case and denies not only beneficial ownership but also qualifies the transaction as abusive.

Case under scrutiny

In the case under scrutiny a Swiss bank bought several long positions in Swiss equities immediately after the announcement of the proposed dividend. Although the long position in Swiss equities was sourced via UK-based brokers the selling counterparties' names were known to the Swiss bank as their names had been disclosed to the bank by the brokers. Simultaneously with the purchase of the Swiss equities, the Swiss bank sold matching cash settled EUREX OTC Block Trade single stock futures with a maturity shortly after the dividend ex date of the long position. The counterparties of these single stock futures were the same counterparties who had sold the Swiss equities to the Swiss bank. In addition, the overall duration of the transactions under scrutiny is being seen as short term (the lead transaction that the Federal Administrative Court utilises for the analysis of the claim had a duration of 15 days from the purchase of the long position to the unwinding of the single stock future and the long position).

The main argument was that the purchase of the shares with an immediate sale of matching single stock futures among the same known parties did not lead to a transfer of beneficial ownership from the vendor of the Swiss equities to the Swiss bank. The purchase of Swiss equities from and the corresponding sale of single stock futures to the same counterparty must be regarded as one overall arrangement. Therefore, the beneficial ownership remained fully with the vendor of the Swiss equities. In addition, since the dividend amount was almost certain when the trade was executed, none of the parties were bearing a relevant risk under the transaction.

In addition to denying the beneficial ownership, the Federal Administrative Court also qualified the transaction as abusive. The Court relies on the argument that the only purpose of the transaction was the refund of Swiss withholding tax since there is no other economic justification for the trade given the predefined redelivery of the equities under a short term arrangement between the very same parties.

Arguments used by the Federal Administrative Court

This latest decision differs from the two previous cases since it refers to the refund of Swiss withholding tax in a Swiss domestic context as opposed to double tax treaty relief. However, similar to the previous cases, the focus was on the beneficial ownership test as well as on the anti-abuse test.

The Federal Administrative Court came to the conclusion that the Swiss claimant should not be regarded as the beneficial owner of the Swiss equities that generated the dividends during the term of the future contracts.

Appraisal of the court decision / Recommendation

This first court decision in a Swiss domestic case is led by the fact that the involved counterparties knew each other and acted in a coordinated and bespoken way. It is doubtful whether the Federal Administrative Court would have decided similarly were the parties not known to each other and could it have been proven that the sourcing of the long position was made anonymously from a source different from the counterparty to the derivative hedge.

We do expect the Swiss bank to lodge an appeal against the decision of the Federal Administrative Court especially in view of the expected final decision of the Federal Supreme Court on the pending two Danish cases. The decision of the Swiss Supreme Court is expected in the second half of this year.

We advise clients with pending claims to carefully assess their position from a statute of limitation perspective.

New claims that are based on equity finance transactions need to be carefully assessed on a case by case basis in view of fulfilling the requirements defined in the Federal Administrative Court's practice.

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