

Can non-EU portfolio investors benefit from the free movement of capital rules in the EU?

An important development...

For some time there has been a debate on whether non-EU residents can benefit from the free movement of capital principle in Article 63 of the EU Treaty. This is virtually the only section where non-EU residents have specific rights under the treaty. Based on recent developments, there now appears to be acknowledgement of this right in the Netherlands. Other EU member states are expected to follow suit.

European Union ("EU") law and more specifically the EU principle of free movement of capital (Article 63 of the Treaty on the functioning of the European Union ("TFEU"), formerly article 56 EC), specifically provides an avenue for investors to reclaim dividend withholding tax if there is a discrimination between the withholding tax treatment for residents and non-residents.

Such discrimination arises where a resident investor is entitled to a (partial) refund of dividend withholding tax, while a comparable non-resident investor is not and therefore is subject to full dividend withholding tax. Discrimination also arises when non-residents are subject to tax where residents are not. In an effort to make their legislation 'EU-compliant', several EU member states have already made their reclaim procedure accessible to residents from both EU and EEA member states in recent years.

The Netherlands is now the first EU member state proposing to extend the dividend withholding tax refund procedure to investors outside the EU and EEA. It is expected that other EU member states will follow the Netherlands in the coming years.

Under the proposed Dutch 2012 Tax Package the scope of the refund scheme of the Dutch dividend withholding tax rules will be extended to qualifying investors from countries outside the EU and the EEA (so-called *third countries*), with which an (bilateral or multilateral) agreement on exchange of information has been concluded. With this extension, The Netherlands, (the first EU member state to do so), now appear to acknowledge that the EU principle of free movement of capital should also apply to portfolio investors in countries outside the EU and EEA.

For the moment, the proposed extension of the refund scheme will only apply to portfolio investments by exempted pension funds, charities and sovereign wealth funds. Based on recent EU case law, other portfolio investors such as investment funds, insurance companies and banks may also be entitled to a refund of Dutch dividend withholding tax.

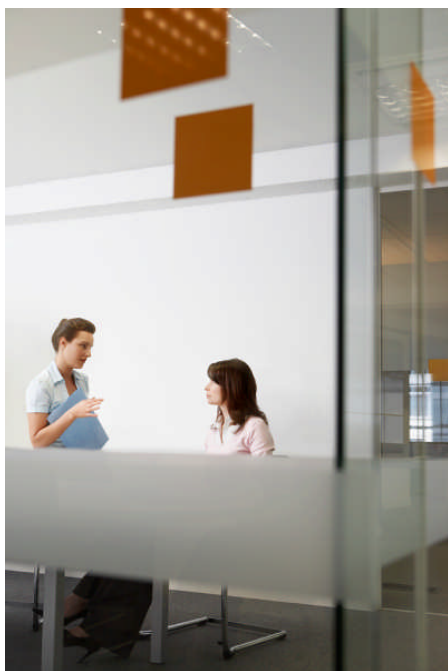
The Dutch government have yet to determine which *third countries* will be considered to qualify for tax refund. As The Netherlands has concluded many double tax treaties and exchange of information agreements, it is likely that this list will be significant.

What should investors do?

Investors in *third countries* that have received portfolio dividends on which dividend withholding tax was withheld and who cannot credit this dividend withholding tax in their country of residence should review their position and explore the avenues available to them. In order to safeguard the right to a (potential) refund of dividend withholding tax, it is imperative that refund claims are filed within the applicable statute of limitation.

The statute of limitations for filing dividend withholding tax claims in The Netherlands is still debated. In principle, the statutory limitation is 3 years as from the end of the financial year in which the dividend was received. However, based on the decree of the State Secretary of Finance, under certain circumstances, the statute of limitation may be extended to five years. To ensure that the rights to a refund are safeguarded, investors may wish to file refund claims within this 3 year timeframe, if possible.

Clients that have portfolio investments in other EU member states should contact PwC to see what the applicable statute of limitation is. In order to include as many years as possible, it is advisable to take action before 31 December 2011.



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