



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.10.2009
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COMMISSION RECOMMENDATION

of 19.10.2009

on withholding tax relief procedures

(Text with EEA relevance)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community, and in particular to the second indent of Article 211 thereof,

Whereas:

- (1) Many Member States apply withholding tax on securities income. The withholding tax is deducted either by the issuer of the securities or by a financial intermediary that is involved in the payment of the income.
- (2) In many cases taxing rights are shared between the source state and the state of residence and therefore non-resident investors may be entitled to a lower withholding tax rate or exemption in the source state pursuant to conventions for the avoidance of double taxation or to domestic law, but the procedures to reduce the withholding tax rates at source or to claim refunds of tax withheld are often complicated, and vary considerably among Member States.
- (3) Many Member States restrict withholding agent services to financial intermediaries that are established within their own jurisdictions.
- (4) The complexity resulting from this situation hinders the functioning of the capital markets and raises the costs of cross-border settlement. The Giovannini reports "*Cross-border clearing and settlement arrangements in the European Union*"¹ of 2001 and "*Second Report on EU Clearing and Settlement*"² of 2003 identified this as a barrier to efficient cross-border investments in securities.
- (5) Two reports of the Fiscal Compliance Experts' Group (FISCO)³ - a "*Fact-Finding Study on Fiscal Compliance Procedures Related to Clearing and Settlement within the EU*" of 2006 and a second report of 2007 on "*Solutions to Fiscal Compliance Barriers Related to Post-Trading within the EU*" - have investigated the existing withholding tax relief procedures and suggested ways to make them work more efficiently.
- (6) As indicated in those reports, the granting of withholding tax relief at source rather than through a refund procedure would be a major step towards simplification of withholding tax procedures.
- (7) Securities income which falls within the scope of other Community legislation, namely Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States⁴ and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States⁵, should not be covered by those

¹ http://ec.europa.eu/internal_market/financial-markets/docs/clearing/first_giovannini_report_en.pdf

² http://ec.europa.eu/internal_market/financial-markets/docs/clearing/second_giovannini_report_en.pdf

³ http://ec.europa.eu/internal_market/financial-markets/clearing/compliance_fr.htm#reports

⁴ OJ L 225, 20.8.1990, p. 6.

⁵ OJ L 157, 26.6.2003, p. 49.

simplification procedures. Nor is any simplification required for the withholding tax which is levied by some Member States in lieu of information exchange during the transitional period under Article 11 of Council Directive 2003/48/EC of 3 June 2003 on taxation of savings income in the form of interest payments⁶.

- (8) Where in exceptional cases tax relief at source is not feasible, source Member States could also improve the current situation by establishing a quick refund procedure.
- (9) In order to ensure neutral conditions of competition between Community financial intermediaries, it is appropriate to allow financial intermediaries located in Member States other than the source Member States that are interposed between the issuer of the securities and the beneficial owner to participate in withholding tax procedures as information agents or as withholding agents.
- (10) Financial intermediaries that are established in EFTA countries should be treated in the same way as financial intermediaries established in the Member States to the extent that these countries provide for a level of administrative assistance equivalent to that provided under Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation,⁷ and Council Directive 2008/55/EC of 26 May 2008 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures⁸.
- (11) Member States have a legitimate right to protect their tax revenues and should, therefore, be allowed to require financial intermediaries to obtain prior authorisation or approval to act as an information agent or a withholding agent.
- (12) Allowing financial intermediaries to pass on only pooled withholding tax rate information to the next financial intermediary in a custody chain would lead to important savings for all parties concerned and would eliminate data protection and competition concerns about the transmission of client information between financial intermediaries.
- (13) Simplification could be furthered by allowing alternative proofs of the entitlement of investors to tax relief, besides certificates of residence, such as self-certification and the identification information held by financial intermediaries under the duties set by Council Directive 2004/39/EC of 21 April 2004 on markets in financial instruments⁹.
- (14) In order to reduce the administrative burden, financial intermediaries should be allowed to archive documentation in electronic form.
- (15) Member States should avail of the possibilities of information exchange under Community legislation and bilateral tax arrangements and engage in joint or individual controls in order to verify financial intermediaries' compliance with their obligations. They should also make use of Directive 2008/55/EC and any future equivalent

⁶ OJ L 157, 26.6.2003, p. 38.

⁷ OJ L 336, 27.12.1977, p. 15-20.

⁸ OJ L 150, 10.06.2008, p.28.

⁹ OJ L 145, 30.04.2004, p.1

instruments for the recovery of tax receipts from another Member State or from an EFTA country.

- (16) Member States' representatives in the Commission's Working Party IV on Direct Taxation and in the European Securities Committee have discussed this matter in detail. Parallel work on withholding tax relief procedures is also taking place at the Organisation for Economic Co-operation and Development (OECD).

HEREBY RECOMMENDS:

1. Subject matter and scope
 - 1.1. This Recommendation concerns improvements to the procedures of the Member States for granting withholding tax relief on cross-border securities income earned by investors who are resident in the Community, pursuant to conventions for the avoidance of double taxation or to provisions of domestic law.
 - 1.2. This Recommendation applies to securities income sourced in a Member State and paid via one or more financial intermediaries established in the Community, or in EFTA countries that provide for a level of administrative assistance equivalent to that provided under Directive 77/799/EEC and Directive 2008/55/EC.
 - 1.3. This Recommendation does not apply to securities income which falls within the scope of Directive 90/435/EEC or Directive 2003/49/EC or to the withholding tax levied by some Member States during the transitional period in accordance with Article 11 of Directive 2003/48/EC.
2. Definitions

For the purpose of this Recommendation the following definitions apply:

- (a) "securities income" means the dividend, interest or other income that securities may generate and that is subject to withholding tax in the source Member State;
- (b) "source Member State" means the Member State where the issuer of the securities generating income is resident for tax purposes;
- (c) "residence Member State" means the Member State where the beneficial owner of the securities income is resident for tax purposes;
- (d) "financial intermediary" means a Central Securities Depository, credit institution or any other authorised or supervised economic entity in the custody chain between the issuer of the securities and the beneficial owner;
- (e) "beneficial owner" means the investor who receives the securities income for his own benefit;
- (f) "information agent" means a financial intermediary that has been authorised by the source Member State to assume responsibility for the verification of the investor's entitlement to tax relief and

communication of this information to the next financial intermediary in the custody chain so as ultimately to reach the withholding agent;

- (g) "withholding agent" means an information agent that has also been authorised by the source Member State to assume responsibility for the deduction of tax at source at the appropriate rate and the payment of the tax deducted to the relevant tax authority of the source Member State
- (h) "pooled withholding tax rate information" means information provided in a format which groups securities income according to the withholding tax rate applicable without identifying the owners of the securities.

3. Tax relief at source

Source Member States are invited to grant withholding tax relief at source at the time of payment of the securities income provided that all necessary information is available.

4. Standardised and quick refund procedures

Where in exceptional cases tax relief at source is not feasible, source Member States are invited to set up standardised and quick refund procedures. Such procedures should comprise the following:

- (a) permission for information agents or withholding agents to submit refund applications to the tax authorities of the source Member State on behalf of the investors;
- (b) use of a single contact point for the introduction and handling of all the refund applications and publication of the relevant information on refund procedures on a website, in at least one language customary in the sphere of international finance;
- (c) use of common formats for refund applications which would be able to be filed electronically;
- (d) refunding in a reasonable period of time and normally, at least, within 6 months of receipt of the refund application by the relevant tax authority, provided that all necessary information is available.

5. Role of information and withholding agents

5.1. The information agent closest to the investor should normally be best placed to act also as withholding agent.

5.2. Where that is not the case, and there is a custody chain involving several information agents:

- (a) the information agent closest to the investor should verify whether the investor is entitled to tax relief and should store the documentation received;
- (b) the information agent closest to the investor should report investor-specific information to the source Member State either on an annual basis or upon request;
- (c) each information agent in the custody chain should pass pooled withholding tax rate information to the next information agent in the chain so as to reach the withholding agent; and
- (d) the withholding agent should apply withholding tax relief at source on the basis of the pooled withholding tax rate information received.

6. Conditions for financial intermediaries

- 6.1. Source Member States are invited to lay down proportionate and non-discriminatory conditions and obligations in order for a financial intermediary to be authorised to act as an information agent or withholding agent.
- 6.2. Source Member States are invited to withdraw the authorisation granted in a case where an information agent or a withholding agent does not comply with its conditions and obligations.
7. Documentation proving entitlement to tax relief
 - 7.1. Source Member States are invited to allow alternative proofs of the investor's entitlement to tax relief to certificates of residence issued by the residence Member State. Those alternative proofs could include self-certification by the beneficial owner and documentation gathered by information agents under the duties set by Directive 2004/39/EC on markets in financial instruments.
 - 7.2. When establishing alternative proofs as referred to in point 7.1., source Member States may take into account the level of risk involved by, for example, setting less onerous rules in the case of claims below 1000 EUR.
8. Information and documentation in electronic format

Source Member States are invited to allow information agents and withholding agents to transmit and archive information and documentation by electronic means.
9. Supervision

Member States are invited to set up procedures to investigate the compliance of information agents and withholding agents with obligations created in accordance with this recommendation. This could include single or joint audits by the tax authority of the source Member State, the tax authority of the Member State where the information or withholding agent is established or by external auditors.
10. Follow-up
 - 10.1. Member States are encouraged to adopt more flexible rules than those provided by this Recommendation concerning the simplification of procedures for granting withholding tax relief on cross-border securities income.
 - 10.2. Member States are invited to explore the scope offered by this recommendation for implementing new, non-burdensome, channels of information exchange aimed at providing both the source Member States and the residence Member States with investor-specific information. This could be modelled on procedures drawn up under Community legislation, particularly Directive 2003/48/EC.
 - 10.3. Member States are invited to explore the possibility and the conditions for allowing withholding agents to set off tax amounts to be refunded against taxes to be remitted to the tax authorities of the source Member State.
 - 10.4. Member States are invited to develop common conditions and obligations governing the approval of financial intermediaries for the purposes of this recommendation.

10.5. Member States are invited to continue working on possible ways to improve withholding tax relief procedures in the appropriate Commission Working Groups and to adopt a coordinated position in the corresponding discussions at the OECD.

11. Addressees

This recommendation is addressed to the Member States.

Done at Brussels, 19.10.2009

*For the Commission
Charlie MCCREEVY
Member of the Commission*

CERTIFIED COPY
For the Secretary - General

Jordi AYET PUIGARNAU
Director of the Registry