

Withholding Tax Refunds: No Second Bite at the Cherry for Swiss Federal Tax Administration!

Marcus Desax*, Martin Busenhart**

A most recent final decision of the Swiss Federal Administrative Tribunal ("Tribunal") is likely to change the way the Swiss Federal Tax Administration ("SFTA") handles requests for refund of withholding tax under tax treaties.

This can be of importance for a large number of non-Swiss parties reclaiming Swiss withholding tax on dividend payments from Swiss listed companies. Especially financial institutions have over the last two years been trapped in a dead-lock situation on their refund claims. The SFTA has most often qualified such refund claims as abusive with the "dividend stripping" argument and only after a lengthy and burdensome two-step administrative procedure denied the claims.

Opposition proceedings before SFTA for domestic refunds ...

For refunds of withholding tax by Swiss residents, the Federal Withholding Tax Act expressly prescribes the opposition proceedings (G: "Einsprache"; F: "réclamation"). The remedy of opposition is a request for mandatory reconsideration by the same authority of a negative decision. The authority examines the arguments of the opponent and issues a second decision (a "decision on opposition") which is then subject to appeal to the courts.



Marcus Desax



Martin Busenhart

* Marcus Desax, Partner of Walder Wyss AG, Zurich, Switzerland (www.walderwyss.com).

** Martin Busenhart, Partner of Walder Wyss AG, Zurich, Switzerland (www.walderwyss.com).

They represented the petitioner before the Swiss Federal Administrative Tribunal.

The opposition is free of charge and allows the authorities to re-examine their decision in an informal way without loss of face.

... also required by SFTA for refunds under tax treaties

The SFTA has consistently instructed petitioners whose requests for refunds under a tax treaty are denied that the appropriate remedy is the opposition. Even in situations where, before issuance of the negative decision, extensive correspondence has been exchanged between the petitioner, respectively his adviser, and the SFTA, this time-consuming “second loop” has been required. In practice, a change of mind of the SFTA is unlikely; to the contrary, after the filing of the opposition pointing to factual or legal deficiencies of the decision, the SFTA is able to touch up its decision and confirm it before it can be appealed to the courts.

Until now, this practice of the SFTA was never challenged by petitioners, although they complained about the loss of time caused by the opposition proceedings (a decision on opposition may take until a year-and-a half, sometimes even longer). This is even more burdensome as there is at least according to Swiss domestic law no interest due on late withholding tax refunds.

Tribunal holds that under Swiss-Danish tax treaty opposition proceedings need not to be conducted

After a lengthy exchange of correspondence, the SFTA denied the claim for refund of a Danish bank and indicated in the decision (as it is required to do) that the appropriate remedy is the opposition to the SFTA. The petitioner disregarded the indication of remedy and appealed directly to the Tribunal.

In its interim decision A-6537/2010 of 11 January, 2011, the Tribunal decided to limit the proceedings, for the time being, to the issue of jurisdiction. It found for the petitioner and held that denials of claims for refund under the Swiss-Danish tax treaty by the SFTA can be appealed directly to the Tribunal and need not go through opposition proceedings.

For the Swiss-Danish tax treaty, there is an ordinance of the Swiss Federal Government regulating the procedure of refund. Similar ordinances exist only for the treaties with the United States and Germany, but not for other treaties. This ordinance was amended when the Tribunal was established on 1 January, 2007. While the original ordinance of 1974 expressly provided for opposition proceedings, the current version states that “*Decisions of the SFTA shall be subject to appeal in accordance with the general provisions governing the administration of the Federal Judiciary.*” The Tribunal held that this provision excluded the opposition proceedings as it clearly identifies, on one hand, the impugnable decision (“*decisions of the SFTA*”) and no longer “*decisions on opposition of the SFTA*”) and the appropriate remedy (“*appeal*”) and not as previously “*opposition filed with the SFTA*”).

The decision has not yet been published on the internet (www.bvger.ch). The SFTA has not appealed the decision to the Swiss Federal Supreme Court.

Implications for the Swiss-U.S. and Swiss-German treaties and possibly others

The SFTA argued before the Tribunal that, under its present structure, requests for refund under tax treaties are handled by its Refund Division whose officers usually do not have a legal background. Only once an opposition is filed is the matter passed on to the Law Division to be handled by lawyers. The Tribunal considered this argument but rejected it:

Hence, in future the SFTA will have to deal with an application for refund of withholding tax once and once only. There is no apparent reason why (and nor has it been claimed that) this shorter process for challenging decisions should give rise to insurmountable organisational problems as compared with the practice hitherto, whereby applications for reimbursement of withholding tax were dealt with first and then, if challenged, examined again in closer detail.

The decision of the Tribunal is limited to the tax treaty of Switzerland with Denmark. However, as mentioned, the implementing ordinances under the treaties with the United States and Germany underwent exactly the same amendment. If the Supreme Court confirms the Tribunal's decision, it is almost certain that the Tribunal will also allow petitioners for refund residing in the United States and Germany to skip the opposition proceedings.

This raises the interesting question whether denials of refunds under other treaties that do not have an implementing ordinance of the Federal Government can also be appealed directly to the Tribunal. The issue will be decided shortly: the authors had received a refusal of refund under a treaty without an implementing ordinance and appealed directly to the Tribunal.



www.taxmann.com

ROUND THE CLOCK REPORTING *Plus* COMPLETE DATABASE

ON

DIRECT TAX LAWS | CORPORATE LAWS | SERVICE TAX

ALWAYS UPDATED STATUTES & CASE LAW

72000* JUDGMENTS | 160* ACTS | 350* RULES

8000* CIRCULARS | 13000* NOTIFICATIONS | 9350* ARTICLES

Annual Subscription ₹ 12500[†]

No
Restriction as
to number of
hours usage

[†]Inclusive of all taxes * Approx