

Denial of Refund Can Be Appealed Directly to Swiss Tribunal

by Marcus Desax and Martin Busenhart

Reprinted from *Tax Notes Int'l*, February 14, 2011, p. 493

COUNTRY DIGEST

Denial of Refund Can Be Appealed Directly to Swiss Tribunal

The Swiss Federal Administrative Tribunal, in interim decision A-6537/2010 of January 11, held that denials by the Swiss Federal Tax Administration (SFTA) of refund claims under the Denmark-Switzerland tax treaty can be appealed directly to the tribunal and need not go through opposition proceedings. (For the Denmark-Switzerland treaty, see *Doc 95-30393* or *95 TNI 174-40*.) The authors represented the petitioner before the SFTA.

Although not yet final, the tribunal's decision is likely to change how the SFTA handles requests for refunds of withholding tax under tax treaties. This could be important to many non-Swiss parties reclaiming Swiss withholding tax on dividend payments from Swiss listed companies. Financial institutions in particular have found themselves deadlocked with the SFTA over the last two years regarding refund claims. The SFTA has most often qualified these claims as abusive with the dividend stripping argument, and denied them only after a long and burdensome administrative procedure.

Opposition Proceedings

The Federal Withholding Tax Act prescribes the opposition proceedings for refunds of withholding tax in a domestic tax situation. Under the procedure, a request is made for mandatory reconsideration by the same authority that issued the denial. The authority will examine the opponent's arguments and issue a second decision (a decision on opposition), which is then subject to judicial appeal. The opposition procedure is free and allows the authorities to reexamine their decision informally without losing face.

The SFTA has consistently instructed petitioners whose requests for refunds under a tax treaty have been denied to seek remedy through the opposition procedure. Even in cases when extensive correspondence was exchanged between the petitioner, its adviser, and the SFTA before the denial, this time-consuming "second loop" has been required. In practice, the SFTA is unlikely to reverse its decision. It

is much more likely that after a petitioner formally files an opposition procedure that points out the factual or legal deficiencies of the decision, the SFTA will confirm its decision before it can be appealed to the courts.

Until now, petitioners haven't challenged the SFTA's practice, although they complained about the time taken up by the opposition proceedings (a decision on opposition could take 18 months or longer). The procedure is even more burdensome considering that, at least under Swiss domestic law, no interest is due on late withholding tax refunds.

Before the Tribunal

After a long exchange of correspondence, the SFTA denied a Danish bank's refund claim and indicated in its decision — as it is required to do — that the appropriate remedy was the opposition proceedings. The petitioner appealed directly to the tribunal.

In its interim decision, 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 refund claims under the Denmark-Switzerland tax treaty can be appealed directly to the tribunal without the need to go through opposition proceedings.

A Swiss federal government ordinance regulates the procedure for refund of withholding tax under the Denmark-Switzerland tax treaty. Similar ordinances exist for treaties with the United States and Germany but not for other treaties. This ordinance was amended when the tribunal was established on January 1, 2007. While the original 1974 ordinance provided for opposition proceedings, the current version states, "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 that provision excludes the opposition proceedings because it identifies both 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 stated, "opposition filed with the SFTA").

The decision has not yet been published online (<http://www.bvger.ch>). The SFTA has until February 21 to appeal to the Swiss Federal Supreme Court.

Possible Treaty Implications

The SFTA argued before the tribunal that under its current structure, requests for refunds under tax treaties are handled by its Refund Division, whose officers usually have no legal background. Only once an opposition procedure is filed is the matter passed on to the Law Division to be handled by lawyers. The tribunal rejected that argument:

Hence, in the 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 tribunal's decision is limited to the Denmark-Switzerland tax treaty. However, the implementing ordinances for Switzerland's treaties with the United States and Germany were subject to exactly the same amendment. If the Supreme Court confirms the tribunal's decision, the tribunal will almost certainly also allow refund petitioners residing in the United States and Germany to skip the opposition proceedings.

This raises the question of whether denials of refunds under other treaties that have no federal government implementing ordinance can also be appealed directly to the tribunal. That issue will be decided soon; the authors have just received a denial of a refund under a treaty without an implementing ordinance and will again appeal directly to the tribunal. ◆

◆ *Marcus Desax, attorney and partner, and Martin Busenhart, certified tax expert and partner, Walder Wyss & Partners Ltd., Zurich*