Executive summary

In the current fall session of the Swiss Parliament, the Council of States (20 September 2016) and the National Council (22 September 2016) reconciled their differences and agreed on an amendment to the Swiss Withholding Tax Act in connection with the application of the dividend notification procedure (withholding tax relief at source). Formal adoption of the legislative change by final vote of both chambers of the Swiss Parliament is scheduled to take place on 30 September 2016. If no referendum for a public vote is invoked, the Swiss Government will determine the date of entry into force of the amendments by early 2017.

Under the revised law, application of the dividend notification procedure remains possible even if the 30-day filing period is not observed. As a consequence, late filing of the dividend notification forms no longer results in a denial of the notification procedure and no longer has default interest consequences. The legislative change will apply with full retroactive effect. Thus, the new provisions will also apply to dividends that occurred before the effective date of the amended law, unless the dividend withholding tax liability or the default interest claims became time-barred or legally effective before 1 January 2011. As a consequence, companies required to pay default interest due to non-compliance with the 30-day filing period may be entitled to reclaim the default interest paid.
Detailed discussion

Notification procedure

A Swiss company is generally required to deduct and remit a 35% withholding tax on dividend payments. The shareholder may request partial or full refund of the withholding tax based on Swiss domestic law or the applicable double tax treaty. Relief at source is available for intra-group dividends through the dividend notification procedure. Under this procedure, the Swiss company may fulfill its withholding tax obligation by way of notifying the Swiss Federal Tax Administration of the dividend distribution instead of withholding and remitting the full dividend withholding tax. In summary, the following compliance duties must be fulfilled in order to apply the dividend notification procedure:

- The withholding tax declaration form (Form 102, 103 or 110) must be duly filed with the Swiss Federal Tax Administration (regardless of whether the notification or the remittance and refund procedure applies).
- The dividend payment must be notified to the Swiss Federal Tax Administration by additional filing of either Form 106 (for dividends to Swiss recipients) or Form 108 (for dividends to foreign recipients) together with the withholding tax declaration form.
- Both the declaration and the notification form must be filed within 30 days of the dividend due date. If no specific due date is set for the dividend, it is assumed that the dividend becomes due on the date of the shareholders’ meeting.
- Furthermore, in the case of dividends paid to a foreign parent company, the Swiss company must formally request permission to apply the notification procedure by filing Form 823, 823B or 823C (application for the international notification procedure) with the Swiss Federal Tax Administration before the dividend becomes due.

Court decisions

In a landmark decision of the Swiss Federal Supreme Court issued on 19 January 2011, the court held that the 30-day filing period is a forfeiture deadline and that, if the 30-day declaration deadline is not complied with, the right to apply the notification procedure is definitely forfeited. This judgment has since then been followed and confirmed in other recent court cases.

Following the initial court ruling, the Swiss Federal Tax Administration adopted a very restrictive practice and requested the remittance of the full Swiss withholding tax of 35% plus levied interest for late payment (5% per annum) if the Swiss dividend payer failed to file the declaration and notification forms within the 30-day period. The Swiss withholding tax was then partly or fully recoverable by the shareholder in the course of the ordinary refund procedure, however, the interest for late payment constituted a final cost for the Swiss taxpayer.

New regulations

The restrictive practice of the Swiss Federal Tax Administration led to strong opposition and to a political discussion resulting in the proposal of a legislative change in order to clarify the formalities in connection with the application of the dividend notification procedure.

The National Council approved the proposed changes in June 2015 and was followed by the Council of States, which approved most of the proposed changes in September 2015. Because the two chambers did not reach consent on the retroactive effect of the amendment as well as on the sanctioning mechanism in the case of non-compliance, a procedure for reconciliation of the differences was initiated. Based thereon, the National Council (7 December 2015) as well as the Council of States (20 September 2016) eventually approved the retroactive effect of the new provisions.

Furthermore, the two chambers finally also agreed that companies, that do not comply with the 30-day filing period, should be sanctioned by means of an administrative fine instead of a criminal sanction procedure.

Following the final vote by both chambers, which is scheduled to take place on 30 September 2016, the revision of the Swiss Withholding Tax Act is expected to enter into force in 2017. It should be noted that the legislative change is subject to a referendum, which would have to be invoked during a 100-day period following the publication of the new law in the Official Gazette.
The revised regulations include the following easing for Swiss corporate taxpayers:

- The 30-day period is redefined as an administrative deadline, i.e., the application of the notification procedure remains possible even if the dividend is notified after the 30-day period provided the substantive conditions are fulfilled. As a consequence, non-compliance with the 30-day filing requirement by a Swiss taxpayer qualifying for the notification procedure no longer leads to a denial of the notification procedure.

- No interest for late payment applies as long as the substantive requirements for the notification procedure are met and the dividend is declared and notified to the Swiss Federal Tax Administration (regardless of the 30-day period).

- Late filing of the declaration and notification forms is sanctioned by means of a commensurate administrative fine which is limited to CHF5,000.

- Once entered into force, the new law will apply with retroactive effect to all cases where the claims for tax and/or interest for late payment have not passed the statute of limitation or have become legally effective prior to 1 January 2011.

Assessment

With this taxpayer-friendly and well-received legislative change, the Swiss Parliament has rectified the recent case law of Swiss courts that was broadly perceived as incorrect and resulted in a rather restrictive practice of the Swiss Federal Tax Administration with adverse impact on Swiss corporations. The new guidelines are in line with the traditionally business-friendly mindset of the Swiss legislative body and will ensure a smooth and efficient handling of the notification procedure for intra-group dividends. In addition, it demonstrates well that negative developments will be countered by the political bodies and that the Swiss Parliament is committed to strengthening legal certainty and maintaining a business-friendly environment in Switzerland.

Implications

Action is required for Swiss companies adversely impacted by the restrictive practice of the Swiss Federal Tax Administration imposing interest charges on late payment related to Swiss dividend withholding taxes. Provided the withholding tax or the interest has not become time-barred or legally effective already before 1 January 2011, the company may be able to reclaim interest payments made. Businesses should analyze whether a reclaim may be justified under the new law and, where appropriate, file respective refund claims. Once the new regulations enter into force, the refund claims must be filed with the Swiss Federal Tax Administration within one year.
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