

THE ASSOCIATION OF GLOBAL CUSTODIANS

THE BANK OF NEW YORK MELLON
BROWN BROTHERS HARRIMAN
CITIBANK, N.A.
DEUTSCHE BANK
HSBC SECURITIES SERVICES
J.P. MORGAN
NORTHERN TRUST
RBC DEXIA INVESTOR SERVICES
SKANDINAVISKA ENSKILDA BANKEN
STANDARD CHARTERED BANK
STATE STREET BANK AND TRUST COMPANY

COUNSEL AND SECRETARIAT TO THE ASSOCIATION:

BAKER & MCKENZIE LLP

EUROPE
ATT: ARUN SRIVASTAVA
100 NEW BRIDGE STREET
LONDON EC4V 6JA, ENGLAND
INT'L TEL: 44 20 7919 1000

GLOBAL
ATT: ROBIN TRUESDALE
815 CONNECTICUT AVENUE, N.W.
WASHINGTON, D.C. 20006
TEL: 202 452 7000
FAX: 202 452 7074

WWW.THEAGC.COM

11 April 2011

Via electronic submission: Federica.LIBERATORE@ec.europa.eu

Frederica Liberatore
European Commission
Brussels
Belgium

**Re: Custodian Working Group Executive Briefing Paper:
Outstanding Italian Tax Refunds -- Points for Discussion**

Dear Ms. Liberatore:

We write on behalf of the members of the Association of Global Custodians¹ (the "Association" or "AGC") to set out members' views concerning chronic Italian withholding tax reclaim and relief issues that affect members and their institutional, cross-border investor-clients. Specifically, we wish to provide you with: an overview of the current tax reclaim and relief at source process available to eligible European-resident beneficiaries seeking to claim relief from Italian withholding tax under an applicable double taxation treaty ("Treaty"); a summary of the barriers to obtaining such relief; and a description of the attempts made by the Association over the past several years to seek repayment of long outstanding treaty claims on behalf of Association members.

AGC members have outstanding unpaid withholding tax reclaims from 1991 (and for some members prior years), the aggregate value of which for EU-resident investors

¹ The Association is an informal group of 11 member banks, listed on the letterhead above, that provide securities safekeeping and asset-servicing functions to cross-border institutional investors worldwide. Members provide custody-related services to most types of institutional investors, including investment funds, pension funds, and insurance companies. Members' clients include European-based funds and investors, and members play a substantial role in European markets.

Frederica Liberatore

11 April 2011

Page 2

as at the end of 2010 is more than EUR 168.5 Million. This aggregate reflects the amounts identified for only 8 of the 11 AGC members, and does not take into account periods before a nation joined the European Union. Finally, for the avoidance of doubt these figures are restricted to withholding tax deducted from payments of Italian dividends and bond interest.

I. Background: Italian taxation and the treaty relief processes

According to Italian tax law income deriving from shares in entities subject to IRES (Italian corporate income tax) is treated as dividends. The standard rate applicable to these dividend distributions made to non-residents is 27% and can be reduced either at source i.e. point of payment, or reclaim under an applicable Treaty. Historically, a partial refund of the Italian tax credit attached to the dividend has also been available to French and UK residents.

Dividends paid on Italian shares deposited with the centralized deposit system managed by Monte Titoli S.p.A are subject to a “substitute tax” instead of the usual withholding tax. The substitute tax is levied by resident intermediaries admitted to the centralized deposit system or non-resident intermediaries admitted to a foreign centralized deposit system. Italian withholding tax at a current rate of 12.5% has also extended to actual and accrued interest on Italian bonds. This may be relieved, at source or by means of a tax reclaim, under Treaty or Italian domestic tax law provisions.

Non-resident intermediaries can assume the role of withholding tax agents for Italian tax purposes, whether they are admitted to the central depository systems managed by Monte Titoli S.p.A or a foreign central deposit system. However a non-resident intermediary must appoint a fiscal representative, such as a resident bank or a brokerage company, or a permanent establishment of a non-resident bank or Brokerage Company, or a centralized deposit company authorized to operate in Italy.

The fiscal representative must withhold and pay the tax, to the Italian Revenue Agency (“IRA”). In addition, they are also required to obtain documentation and information relating to the beneficial owners of income and communicate the beneficial owner data to the IRA. Finally they must provide, on request, information and documentation as requested by the IRA.

Non-resident investors are able to obtain tax relief at source; however, certain documentation must be provided prior to income pay-date. The IRA have approved forms for this purpose. Although their use is not compulsory, generally most Italian

THE ASSOCIATION OF GLOBAL CUSTODIANS

Frederica Liberatore

11 April 2011

Page 3

withholding agents require the following documents: an annual declaration detailing beneficial ownership information, i.e. name, address, tax identification number issued by the beneficial owner's source country and confirmation of treaty entitlement. The document must be accompanied by a certificate of tax residence ("CoTR"). The CoTR is valid until the 31st March of the year following the year of issue.

Retrospective withholding tax reclaims are possible but the requirements as outlined in this letter further below are generally seen as prohibitive. In any event certain custodian banks, AGC members included, have suspended reclaims pending clarification of the new requirements. Refund requests must be made within 48 months of the payment of the tax. Interest on refunds is recognized, currently at a rate of 1% per annum.

II. Association Efforts to obtain refunds

In May 2004 the AGC wrote to the IRA concerning non-payment of aged Italian tax reclaims. These claims had been made for tax years back to 1991 by member banks for and on behalf of treaty eligible beneficiaries. This letter asked the IRA to explain the reason for the delay and requested that payment be made in respect of those claims. Following that initial correspondence, AGC members were informed by local Italian custodian banks that the relevant department of the Ministry of Finance would commence paying tax reclaims, including interest; however, no formal response was ever received from the IRA and few or no payments were made. Members have been informally told that all claims have been frozen.

Thereafter, on 18 September 2009, the AGC wrote to officials in Rome to reiterate members' concern over extended delays. By that date, outstanding claims submitted by AGC members covering income years 1991 to 2009 amounted to €159 million in the aggregate. It should be noted that while the AGC focused on claims covering the period 1991 to 2009, substantial additional claims also remain outstanding for earlier years.

In January 2010, the AGC received a written message from Szanto Fausto on behalf of the Pescara Office Director, Gabriele Chiacchiaretta. The Pescara Office is responsible for processing withholding tax treaty refund claims, and the Office's message was sent in response to the September 2009 AGC letter. The Pescara office requested additional information before being able to reply to the AGC payment request. Following message exchanges that led to some further clarification, the AGC was informed that the Pescara Office required further details of the pending claims, in

THE ASSOCIATION OF GLOBAL CUSTODIANS

Frederica Liberatore

11 April 2011

Page 4

order to enable Pescara to “link” this information to the existing data in its hands. Most AGC members agreed to provide the required information, seeking in return an acknowledgement of receipt of the information and an indication of refund payment timelines. The information was supplied through the AGC Secretariat as a conduit to the Pescara Office. The details provided in the subsequent information included the name of the applicant; submission date; amount claimed; type of refund (withholding/tax credit); beneficial owner; and the name of Issuing Company.

The Pescara Office also requested that each bank identify an individual to contact for questions or follow up. As of today, no AGC member has received an acknowledgement of receipt from the Pescara Office or any information as to whether or when claims will be paid. Many members have also undertaken individual direct efforts to seek refund payments on behalf of customers, including meetings in Rome and Pescara.

III. Change of reclaim processes

In April 2010 the Pescara Office announced that it would no longer honour pending or newly submitted tax reclaim applications unless an Italian Fiscal Code (“IFC”) of the beneficiary and or its respective legal representative, if any, is included in the tax reclaim application. We also understand that the Pescara Office has escalated its so-called “diniego” questionnaire procedure. This questionnaire is issued in Italian and requires a response, directly from the claimant, in Italian, within 60 days of receipt. Failure to respond within the time period set will result in the reclaim being finally cancelled. Furthermore we understand a penalty fine may be imposed in the event that missing, false or incomplete information is supplied. The fine can vary ranging from EUR 258 to EUR 2065.

Following this announcement of new procedures, AGC members have been working with industry participants, including the Association of Foreign Banks in Italy (“AIBE”), to obtain clarifications with respect to these requirements and the impact on non-resident investors. We understand, based on discussions with local withholding agents, that Pescara has informally agreed to the following:

a) Claims filed before December 31, 2009

The IFC is not required. However, the following information will be required by Pescara:

THE ASSOCIATION OF GLOBAL CUSTODIANS

Frederica Liberatore

11 April 2011

Page 5

- Beneficial owner's full name and address (as stated on the reclaim application);
- Beneficial owner's Tax ID Number ("TIN") issued by the beneficial owner's local tax office in their country of tax residence;
- Legal representative's full name, address, date and place of birth;
- TIN issued to the legal representative by the tax office in their country of tax residence and;
- Where the beneficial owner's legal representative is not a private individual, it is necessary to provide the above information in the name of the private individual who signs for the legal representative.

b) Claims filed after December 31, 2009 up to August 2, 2010

- The Pescara Office will automatically, based on the information provided in the withholding tax reclaim form, assign an IFC to both the beneficial owner and its legal representative. Potentially this extends to an individual signing on behalf of the legal representative as in most cases an individual will be signing on behalf of the legal representative;
- The beneficial owner and their legal representative must also provide the same information as set out, above, for the requirements for claims filed up to December 31, 2009.

c) Claims filed after August 3, 2010

- An IFC will be assigned to both the beneficial owner and its legal representative upon specific request to Pescara by the beneficial owner (form AA4/7 for individuals and form AA5/6 for non-individuals) and their legal representative (form AA4/7) if an IFC has not already been allocated for claims filed after December 31, 2009 up to August 2, 2010. Potentially this extends to an individual signing on behalf of the legal representative, which is the typical signing arrangement;
- The beneficial owner and their legal representative must also provide the same information as set out above for the requirements for claims filed up to December 31, 2009 in forms AA4/7 and AA5/6.

The "diniego" questionnaire

The information required in the questionnaire is very detailed and is specific to the transaction activity undertaken by the claimant. It also seeks confirmation regarding the claimant's legal and tax status, in particular copies of founding documents and financial reports. The questionnaire does make reference to the fiscal code of the

Frederica Liberatore

11 April 2011

Page 6

beneficiary/signatory of the reclaim, but the information sought pertains to the TIN and not the IFC. For a claimant, the process to collate these data is likely to be time consuming, and non-resident investors may well not meet the 60 day deadline, although an extension may be requested.

The IFC

The requirements for the provision of an IFC remain unclear, including notably:

- whether an IFC is definitely required for both the beneficial owner and the legal representative;
- how Pescara will notify the beneficial owner, the legal representative or any individual signing on behalf of the legal representative that an IFC has been granted;
- the timeframe by which the IFC will be assigned;
- how personal information in respect of the legal representative should be communicated to Pescara, in respect of pending claims;
- alternative solutions where the legal representative is no longer available; and
- guidance for completion of certain aspects of forms MOD AA5/6 and MOD AA 4/7 used to apply for the IFC.

IV. Summary and Requests

The Association's primary concern is the issue of aged unpaid claims. Given the introduction of the new procedures, it seems nearly impossible that a reclaim will be finally honored. Indeed, the new procedures appear to run contrary to practices operative in other countries. We do not understand how, as the IRA have suggested, the TIN of the individual signing the claim will enable the IRA to validate the accuracy of the claim under a treaty since the individual signing the claim is typically not the beneficial owner of the income and therefore not the one seeking the treaty refunds.

Members respectfully request you to consider whether the requirement to obtain an IFC contravenes the proportionality principle. The Italian Tax Authorities should have recourse to the Mutual Assistance Directive, and accordingly a home state tax identification number should be sufficient to identify the non-resident taxpayer via the Mutual Assistance Directive. Members believe that the IFC requirement is an unnecessary burden that restricts free movement of capital principles.

The Association also wishes to highlight the so-called "dead issue", i.e. instances in which the representative that signed the original claim no longer works for the legal representative or is deceased. This contingency is realistic and pertinent, given that the

THE ASSOCIATION OF GLOBAL CUSTODIANS

Frederica Liberatore

11 April 2011

Page 7

new procedures extend to many claims that are over 10 years old and may be beyond the normal statute period.

The imposition of the IFC requirement does, in members' opinion, appear to be an abuse of process that introduces substantial administrative burdens. These burdens are exacerbated by the number and age of outstanding reclaims. Had the refund claims been paid within a reasonable time, the requirements now being imposed would entail reduced administrative impact.

As a final note, members are currently reviewing whether the requirements for an intermediary and or an underlying signatory to obtain an IFC is justified under Italian law. When this review is completed AGC members will provide more information.

* * * *

The Association appreciates the opportunity to summarize members' concerns on the foregoing matters. Members would welcome an opportunity to discuss these concerns with you further. For additional information or to initiate such as discussion, please contact the undersigned.

Sincerely yours on behalf of the Association,



Dan W. Schneider
Baker & McKenzie LLP
Secretariat and Counsel to the Association

CC: Niamh.Carmody@ec.europa.eu