

THE ASSOCIATION OF GLOBAL CUSTODIANS

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23 July 2014

VIA E-MAIL

Ms. Judith Herdin-Winter
Federal Ministry of Finance
Deputy Head of Division
Division VI/8 – International Tax Law
Johannesgasse 5, 1010 Vienna
Austria

Re: Tax Reclaim Services on Austrian Dividend Payments

Dear Judith,

The member banks of the Association of Global Custodians (“AGC” or “Association”)¹ would like to take this opportunity to communicate to you certain concerns we have about recent developments in the procedures for claiming treaty relief from Austria with respect to withholding tax on cross-border investment flows. Specifically, we refer to the “questionnaire” which all treaty claimants must now file to obtain treaty reclaims.

In providing global custody services, AGC members routinely seek appropriate withholding tax relief on behalf of custody clients. We typically process millions of such relief claims in the aggregate each year, affecting substantial amounts of cross-border portfolio investment flows in and out of countries worldwide, including Austria. As such, we experience on a daily basis the costs, inefficiencies, and excessive withholding that arises when the procedures for claiming lawful relief are unduly burdensome or complicated for the investors involved. The Association makes every effort to work with tax authorities around the world to identify and find ways to minimize problems arising from unduly complex withholding tax relief procedures.

It is in that context that we wish to express our concerns about the recently introduced questionnaire procedure. We are aware that you have received a detailed letter

¹ The Association is an informal group of 11 member banks that provide securities safekeeping and asset serving 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.

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on this topic dated 11 June 2014 from the British Bankers' Association (BBA).² The AGC fully endorses the views expressed in the BBA letter. We share their concern that the questionnaire procedure is a disproportionate response to the admittedly legitimate desire of the Austrian tax authorities to ensure that treaty benefits are given only to properly entitled investors. We respectfully urge you to give full consideration to the various suggestions made by the BBA to modify the current procedures in a way that will make them much less onerous and costly to the investors involved and also much better targeted to the Austrian Government's concerns from a risk management perspective. We note that the BBA has also strongly encouraged the Austrian Ministry of Finance to adopt the OECD's TRACE (Treaty Relief and Compliance Enhancement) system as a way of significantly improving the procedures for claiming treaty relief while robustly protecting the compliance interests of tax authorities. The AGC likewise fully supports the TRACE proposals and urges the Ministry of Finance to consider their early adoption.

* * * * *

The Association members appreciate your willingness to consider the views expressed in this letter. We would be pleased to provide further information upon request in relation to the concerns we have raised.

Sincerely yours on behalf of the Association,



Mary C. Bennett
Baker & McKenzie LLP
Counsel to the Association

cc: Dr. Heinz Jirousek, Head of the Division VI/8 for International Tax Law
Dr. Herwig Heller, Head of the Anti-Fraud Division IV/3 of the Ministry

² Publicly available at <https://www.bba.org.uk/policy/financial-and-risk-policy/taxation/international-custody-tax-issues/bba-submission-to-austrian-ministry-of-finance-on-the-reclaim-process-for-treaty-relief/> (copy attached).

Judith Herdin-Winter
Federal Ministry of Finance
Deputy Head of Division
Division VI/8 – International Tax Law
Johannesgasse 5, 1010 Vienna

CC Dr. Heinz Jirousek, Head of the Division VI/8 for International Tax Law
Dr. Herwig Heller, Head of the Anti-Fraud Division IV/3 of the Ministry

11 June 2014

Dear Judith

Tax Reclaim Services on Austrian Dividend Payments

The British Bankers' Association's ('BBA') membership includes 240 organisations, of which more than 170 are banks and 70 are providers of professional services. Our member banks make up the world's largest international banking cluster, operating 150 million accounts for UK customers and contributing over £50 billion annually to UK economic growth.

The BBA's International Custody Tax Liaison Group (ICTLG) is the principal forum for custody tax practitioners operating out of the United Kingdom. In providing global custody services¹, members routinely seek appropriate tax relief on behalf of their custody clients. The group also works with overseas tax authorities to ensure the smooth operation of procedures for dealing with withholding tax and to eliminate or minimise existing discrepancies in the current tax relief processes and regimes from jurisdiction to jurisdiction.

We are writing to you regarding recent developments in respect of claims for the repayment of Austrian Withholding Tax (AWT) under double tax treaties concluded by Austria. We are aware that the Austrian Ministry of Finance (MOF) has recently introduced measures to require all claimants with filed, but as yet unpaid, reclaims, as well as all future applications for a tax refund, to provide a 'questionnaire' with supporting documentation before the refund request will be considered.

Custodian banks processing claims on behalf of their clients would make the following immediate observations about this development:

- The questionnaire is in German and we understand that all responses must be provided in German. We note that the three month timeframe for responding to the information request is relatively short.
- We also understand that the MOF may be investigating previously granted refunds, and may also be reviewing these claims to identify beneficial ownership of specific structures that may have been used in withholding tax structuring.
- We understand the MOF is also requesting evidence on beneficial ownership on the respective securities and are investigating abusive withholding tax structuring.

¹ Global custody services essentially comprise the settlement and maintenance of securities assets, the handling of post-settlement events such as income payments and corporate reorganisations and associated cash management. In order to provide such services, our members will normally appoint a bank established in the country of investment to facilitate settlement of securities assets and provide post-settlement asset servicing. These banks are referred to as sub-custodians. The global custodians' clients will not be direct clients of the sub-custodian and will look to the global custodian to service their requirements. Such clients may be entitled to the application of lower rates of withholding tax on income events pursuant to a relevant double taxation treaty (DTT) or under domestic law. A global custodian will normally facilitate access to such lower rates of withholding tax – typically by submitting relevant information or documentation to the local sub-custodian or paying agent.

As a result of these changes to the reclaim of AWT, custodian banks have received several thousand requests for additional information related to all pending refund requests.

BBA members appreciate that tax authorities have a legitimate right to validate entitlement to any refund claim before it is honoured. We are, however, concerned that the volume of data required and the ability of all parties to deal with this information will have a detrimental effect to the tax relief system in Austria and may not be proportionate to addressing the policy concerns the MOF has identified.

We elaborate on these concerns below together with what we hope, are useful suggestions to assist the MOF in reviewing the claims in proportion to the policy concerns it has identified. Our comments also draw on our experiences when assisting other tax authorities (notably Germany and Switzerland) when similar measures were introduced.

1. Format and content of the questionnaire

We enclose a translation of the questionnaire as provided by the local custodian banks which we believe accurately reflect the MOFs requirements. We would ask that MOF clarify whether this translation accurately reflects their requirements.

Defined Terms

The questionnaire asks a series of questions that could be confusing to the claimant. We believe that this may arise as the questionnaire may be seeking to address two different objectives. For example, the first question asks for confirmation of the beneficial owner at the time of the dividend distribution (ex-date) and the actual payment (pay-date) of the dividends. The second question, however, asks if the holder was the permanent holder of the security and when/how a transfer of rights occurred.

We note that some debate continues amongst tax authorities and investors alike regarding “beneficial ownership”. The term beneficial owner is usually found in the dividend and interest articles of a tax treaty and generally means the recipient of the income has the right to enjoy the full privilege to benefit from the income and must not be bound (in legal, commercial or practical terms) to pass on the income. These articles provide for a reduced rate if the beneficial owner is a resident of the state is a party to the treaty. This language was introduced to counter treaty shopping by the channelling of the relevant income through a resident of a state with a suitable attractive treaty provision.

It would be helpful if the MOF could outline the current legislation applicable in Austria for determining beneficial ownership. Specifically, with respect to the trading activity, whether the trade date is the date on which beneficial ownership is transferred for the purposes of obtaining tax treaty relief, or whether another rule applies?

Information provision

In this respect we suggest that the questionnaire is amended such that the claimant can confirm its position as beneficial owner, subject to the clarity suggested above, and can provide additional information to describe investment guidelines or the local regulatory guidelines under which it must operate. This could then be used to clarify where an investor is prohibited from undertaking the type of activity the MOF is investigating. This approach would result in the reduction of large volumes of paperwork for the MOF to review and further eliminate the need for the claimant to provide unnecessary information that may be otherwise expensive and costly to produce and would not

seem proportionate to the purpose of the MOFs enquiry. Furthermore we would suggest that if the claimant provides this clarification, the additional information as requested in the existing questionnaire should not be required.

We understand that where the claimant is unable to provide any confirmation or clarity in respect of identification of beneficial owner they would be required to provide additional information. In these instances we would suggest that information on transactional data should be sufficient to satisfy the requirements of the MOF.

We note the questionnaire currently requires the claimant to provide appropriate documents relating to the stock transactions for the year of the payment of the dividend. Our understanding of this requirement is that this means that the MOF requires a statement of all transactions in the security for the relevant year to which the claim relates to.

We would suggest however that the period to which the data refers is targeted to periods consistent with the rules relating to the transfer of ownership, or no longer than one month before and after the dividend payment date. This approach would result in the reduction of large volumes of paperwork for the MOF to review and further eliminate the need for the claimant to provide unnecessary information that may be otherwise expensive and costly to produce and would not seem proportional to the purpose of the MOFs enquiry.

Part B of the form

It is probably not possible to obtain all of the data requested in this part of the form as it may have been destroyed (under usual data retention requirements/laws). This would be of particular concern for any aged items. Furthermore, if the MOF is potentially investigating previously refunded claims it may be necessary to consider alternative forms of proof to review these claims. We would suggest that where possible an investor could refer back to the investment guidelines to clarify its position with respect to such types of transactions.

Part C of the form

We don't believe it will be possible for investors to obtain this because the voucher will be issued in omnibus form by the paying company's 'joint stock company'.

Typically dividend and coupon payments from Austrian joint stock companies are credited to the global custodians account with its local custodian bank in Austria. These payments are then reconciled to the global custodian's records and distributed to each underlying clients as reflected on the global custodians systems. Custodians systems accrue income entitlements for their clients based on the number of shares held by each client on ex-date and the rate of dividend declared. Specific checks are in place to ensure the client's income entitlement is correct, and the amount of income accrued is received.

Hence a voucher issued by a paying company will not directly correspond to the income payment actually received by the claimant.

This requirement cannot therefore be satisfied without the provision multiple forms of information from various intermediaries, which would necessitate a detailed reconciliation between the joint stock companies, local banks, the global custodian and the end investor. Governments seeking to

address similar concerns under their own regimes recognised this limitation and did not demand provision of tax vouchers when undertaking these enquiries and instead were able to validate the entitlements by reference the transaction history in the securities concerned.

Finally we would suggest that the MOF please publish an official translation of the questionnaire together with an outline of the terminology used. We would also suggest responses need not be in German. The translation costs for investors is seen as prohibitive where there are lower claim values which will result in investors foregoing due entitlements.

2. Focussing efforts on risks

We understand that there in excess of 15,000 outstanding refund requests which will not be reviewed until the questionnaire is provided, and that if the information requests are not provided within the three month timeline, the claim may be rejected.

This suggests that a large volume of data will be submitted to the MOF and tracking this data may be challenging. Recognising the limitations to collect, submit and review this data it would therefore seem prudent to identify claims that are of a higher value. For example we estimate that 0.005% of the total outstanding claims are worth more than EUR 50,000, and 60% are worth less than a EUR 1,000. This assumes that claims are reviewed on a per security basis and not by reference to the total claim submitted, which we understand could comprise of up to 10 different securities and pay dates.

Governments seeking to address similar concerns under their own regimes recognised this limitation and we note the German Tax Authorities (GTA) and Swiss Tax Authorities (STA) focussed enquiries on higher value tax reclaim amounts. In Switzerland these were generally for amounts over EUR 100,000 and Germany it was for amounts over Euro 25,000. Similar to Austria both countries reclaim forms provide for multiple income events per form and both sought information on a specific dividend payment and not by reference to the entire reclaim form/amount. We believe that if the MOF adopt a similar approach this would be a more proportionate approach than the current system.

3. The timeline for provision of the required information

We would ask the MOF for clarity in respect of the rejection and appeals process. We believe that the current requirement for recipients of rejection notices to file protective appeals within three months (if they are not in a position to provide the additional information within that time) results in an unnecessary administrative burden for the recipient and a flood of additional paperwork for the MOF.

The BBA recognises that governments have a right to validate any refund claim before it can be paid however we also consider that eligible claimants have an unconditional right to repayment under treaty and that domestic tax provisions should not obstruct treaty relief entitlements, provided the claim for treaty relief is filed within the relevant statute of limitations. Further, as a practical matter, the requirement for foreign claimants and/or their competent tax authorities to respond within the three month period is impractical given common industry processes.

We would therefore suggest that the timelines to provide information are automatically extended until end of 2014. This will allow more time for a suitable process to be developed and ensure that neither the MOF nor claimants are inadvertently disadvantaged. If a formal extension request is required

under Austrian tax laws, we would like to suggest that a 'bulk' extension request can be submitted by the clients agent, for example the global custodian.

4. Possible solutions

We would respectfully ask that the MOF considers the suggestions below which we believe offer a viable solution to the issues we have described.

Intermediary

The current reclaim form applies a self-certification approach and it is apparent that this is not considered sufficient by the MOF. We believe that sufficient oversight (i.e. ensuring that the amount of tax reclaimed and refunded does not exceed the amount of tax deposited by the joint stock company) could be provided by an intermediary along the lines of the systems utilised by other tax authorities in Germany and Switzerland.

Move Paying of Tax from Corporation to Paying Agent (local bank)

As discussed above, tax vouchers in Austria are currently issued in omnibus form from the joint stock company and we believe that it will be difficult for investors to provide this information. The BBA's experience with the system introduced in Germany in 2012, where the obligation of withholding moved from the issuing company to the paying agent, suggests that this type of change in procedure could be a viable solution. This approach ensures that the entity issuing the tax certificate, for the purposes of refunding or crediting of the tax withheld, is the same entity which effectively withholds the tax. This should prevent any situations where tax vouchers or tax certificates are issued for tax which has not been withheld.

The BBA appreciate that this solution may pose implementation challenges, however, we would be happy to discuss this with the MOF or share any additional information if required.

5. TRACE

The BBA is aware that Austria has been an active participant in the OECD's Treaty Relief and Compliance Enhancement (TRACE) project. BBA members have also been active in this project through the business industry advisory group (BIAC) and fully support its goals.

The BBA believes that many of the issues described above would be eliminated by the adoption of the OECD's proposed Authorised Intermediary (AI) regime. In particular, this would reduce paper based reclaim filing and demands on investors to regularly renew documentation. Additional benefits of the AI regime would be:

Reporting

The proposed system allows a foreign financial intermediary AI to claim treaty benefits on behalf of its customers by entering into an agreement with a source country. Among others things the AI must obtain from its customer an investor self-declaration (ISD), perform the necessary validation checks, and finally report to the source country tax administrators, annually, investor-specific information regarding the beneficial owners of the income for which a claim is sought.

When fully implemented, the system would provide a robust process by which both source and residence countries could determine whether income for which treaty benefits are being claimed is in fact eligible for such benefits and also whether it is being taken into account by the investor when it prepares its residence country tax returns.

Client entitlement checks

Under the proposed system the AI has an obligation to review KYC documentation and other information available to determine whether the ISD provided by its customer is unreliable or incorrect.

As a result, AIs are in a better position to verify, upfront, the treaty entitlement of the investor both because of the customer relationship and the obligation to verify claims made against KYC documentation. It would appear that the intermediary can undertake these checks in a more efficient and timely manner than the MOF.

Documentation

Helpfully, under the proposed system, the ISD form will be valid for five years. We also note that provisions are made for investment funds. Crucially the form simplifies the methods by which funds can claim treaty benefits and reduces the frequency of percentage tests and provision upstream of this information.

The BBA considers that the documentation requirements under the proposed system would greatly reduce the existing administrative burdens and reduce the various ad-hoc document requests.

The benefits of using a standardised form result in a greater degree of clarity around eligibility and reduce costs of compliance. For Governments, the simplification of the claim process may lead to increased capital inflow where investors, previously unable to obtain tax relief on portfolio income, may make investment decisions based on an increased post tax yield.

The BBA recognises that some of the issues the MOF are trying to address when validating DTT claims may not be fully resolved by the proposed AI system. However we consider that countries that receive investor-specific information by means of improved reporting would have the tools necessary to focus their further inquiries on the specific taxpayers that may present issues. Enabling source countries to concentrate resources on compliance would also substantially reduce the administrative costs arising associated with the current system.

The BBA strongly supports the work done by the TRACE Group and believes that this is well-designed to improve the procedures for claiming treaty benefits on cross-border portfolio investment income and thereby eliminate unjustifiable hurdles to legitimate claims for treaty relief. We would strongly encourage the MOF to consider adoption.

Again we thank the MOF for its willingness to engage with industry on such matters and we would be happy to discuss of the points raised further should clarification be required.

British Bankers' Association
11th June 2014