The following provides a brief summary on the significant recent developments in various countries in relation to the European discrimination against foreign investment funds.

**Sweden**

The Administrative Court of Appeals (“the Court”) in Sweden has in recent days announced in a series of judgments that the Swedish dividend withholding tax rules that existed prior to 1 January 2012, discriminated against investment funds domiciled in other European countries. Consequently, the Court has instructed the Swedish Tax Agency (STA) to refund taxes that have been withheld from dividend payments to European investment funds. In coming to its decisions, the Court relied on the precedent set in recent dividend withholding tax cases decided at the European Court of Justice.

In a parallel development, in 2009, PwC assisted investment funds in preparing a complaint to the European Commission about the discriminatory nature of the Swedish dividend withholding tax rules. In response, the Swedish Government has changed the dividend withholding tax law with effect from 1 January 2012. The new law makes it clear that all foreign investment funds should be exempt from dividend withholding taxes, and in our view this should include funds resident in the United States. The STA have advised that a foreign investment fund registered by the Swedish Financial Services Authority (“FSA”) should be considered as equivalent to a Swedish investment fund. Such a fund will be entitled to a tax exemption if established in the European Economic Area (“EEA”) or in a country with which Sweden has signed either a Double Taxation Agreement including an article regarding exchange of tax information or a Tax Information Exchange Agreement. Foreign funds not registered with the FSA may still be eligible for exemption, but the exact eligibility criteria remain undefined. On this basis, US Regulated Investment Companies should give consideration to either registering with the Swedish FSA or discussing with their custodian the documentary evidence that will be required for such funds to establish their exemption from tax.

**Netherlands**

Since 2005, PwC has been assisting foreign investment funds file protective claims with the Dutch Tax Authority (DTA) on the basis that they have been discriminated against by suffering dividend withholding taxes, which are refunded to comparable Dutch investment funds. To date, the DTA has not responded to any of the refund requests filed by foreign investment funds. Last year, PwC held informal meetings with the DTA to discuss their position with respect to the dividend refund claims submitted by PwC’s clients. During those meetings, the DTA shared that they would await further EU case law before taking additional steps.

However, in an apparent change of policy, in recent weeks, the DTA has sent tax returns to foreign investment funds that have previously made timely requests. Such tax returns are required to be completed to establish a proper claim for a refund of withholding tax. In our subsequent discussions with the DTA, they have indicated that the fact that they started to provide tax returns to foreign investment funds does not mean that they view that a foreign investment fund should be entitled to a refund of Dutch dividend withholding tax.

We understand that the DTA have not yet performed an analysis whether, in their view, a foreign fund is sufficiently comparable to a Dutch entity which qualifies for the Dutch Investment Institution regime (which is the basis to request for a refund of Dutch dividend withholding tax). However, based on a revised internal policy, the
DTA have decided to start providing a tax return to foreign entities who have requested such tax return. We assume that after the tax return is filed, the DTA will look into the details of the claim and presumably request further information to establish authenticity of the claim.

France

The European Court of Justice has been asked he French Tribunal of Montreuil to answer a prejudicial request which includes two questions:

1. What is the appropriate level of comparability (i.e., is it necessary to take into account the situation of the fund and investor or only the situation of the fund to assess whether there is a difference in the treatment provided for by the French tax legislation)?

2. If the answer is that the situation of the investor must be taken into account: What are the conditions under which a difference would be assessed and, further, could be justified?

PwC’s correspondent law firm in France, Landwell, are one of the five Counsels representing foreign investment funds. The Counsels’ pleading was aimed at demonstrating that in response to the first question, when examining the potential existence of discrimination, the comparison should be made only at the level of the funds themselves. The European Commission, who held the same view as us, suggested that the ECJ need only reply to the first question. It is worth noting that the French government mentioned two interesting points in its pleading to the ECJ:

(i) To some extent, they recognized that there could be a distinction between distributing and capitalizing (roll over) funds. It remains to be seen whether the ECJ is favorable to such a distinction given that in the case of capitalizing funds, no possibility of credit exists at the level of the investor since the income is not distributed. Therefore, the withholding tax directly reduces the value of the units held in the fund and constitutes a disadvantage compared to the same unitholders investing in a French investment fund, and benefiting from an exemption from French dividend withholding tax.

(ii) The French Government asked that, in case its arguments are not accepted, the impact of the ECJ’s decision be limited in time. If this was accepted by the ECJ and such decision is taken, this could mean that no claim can be filed after the date set by the Court or even after the date of the decision.

The ECJ has decided that there is no new point of law to be established and therefore it does not need the opinion of an Advocate General. It is clear that the ECJ believes that with precedent cases such as Denkavit (C-170/05), Amurta (C-379/05), and Aberdeen (C-303/07), all of which were decided in favour of the foreign shareholder, there is an established view on the discriminatory tax treatment of outbound dividend distributions to foreign shareholders. Consequently, we expect the ECJ to deliver its judgment in the next 2-3 months.

What do these developments mean for US investment funds?

These developments will be welcome news for US investment funds that have been subjected to discriminatory withholding taxes on dividends from EU/EEA member states and mark a significant step forward.

US investment funds that have received EU portfolio dividends subjected to withholding tax should contact PwC to explore the possibilities of recovering this tax before the statute of limitations expires for these jurisdictions. With respect to France, such funds may wish to consider filing protective claims for dividends received in 2010 and 2011, prior to the ECJ’s decision being delivered in the next 2 to 3 months.
Contacts

We hope the above update has been useful, but please do not hesitate to contact your usual PwC contact or feel free to contact us at any of the numbers below:

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