

Information on Capital Yields Tax Refunds for Dividends Received by Taxpayers with Limited Tax Liability (Non-Resident Taxpayers)

When refunding capital yields tax (Kapitalertragsteuer – KESt) on dividends paid by Austrian companies on the basis of sec. 94 para. 2 of the Austrian Income Tax Act (Einkommensteuergesetz 1988 – EStG), sec. 6 of the Austrian Corporation Tax Act (Körperschaftsteuergesetz – KStG), sec. 21 para. 1 subpara. 1a KStG or on a double tax convention, it is important to consider the conditions that must be satisfied in order for a refund to take place. Thereby, determining whom a dividend is attributable for tax purposes is particularly important.

The principles of the income attribution theory (market income theory) determine the party to whom a dividend should be attributed for tax purposes. According to these principles, a dividend is only attributable to the beneficial owner of the shares in question of the distributing company on the date the dividend resolution (profit distribution resolution) is adopted. This principle is also anchored in the Austrian Corporation Tax Guidelines (Körperschaftsteuerrichtlinien – KStR), marginal number 1168, and is specified more precisely in the proceedings of the 2013 Salzburg Tax Dialogue (Salzburger Steuerdialog). Beneficial ownership of shares that have been securitised and are being held in safekeeping in a securities account can, as a rule, only be attributed to the party to whose securities account the securities (shares) have been booked. Additionally, the other conditions necessary for beneficial ownership must be satisfied too.

In contrast, when the new capital yields tax regime entered into force, “old” and “new” capital holdings, for reasons of simplicity, were distinguished solely based on the date of contract closing according to civil law (*Verpflichtungsgeschäft*) (Austrian Income Tax Guidelines (Einkommensteuerrichtlinien – EStR), marginal number 6103a), with passing of beneficial ownership assumed to take place on the “trading date” (in banking terminology, the date on which an offer is accepted on the stock exchange). This deviation from the previously mentioned principle does not, however, have any effect beyond the mentioned case.

Under established stock exchange practice, shares are traded with dividend rights (cum-dividend) up to a certain day, with the applicable date being, as a rule, the date of contract closing according to civil law (*Verpflichtungsgeschäft*). Shares purchased on the following day (ex-date) no longer convey dividend rights (ex-dividend) and the share price generally experiences a corresponding decline. The party purchasing the shares on or before the final day before the ex-date (cum-date) is therefore entitled to receive the dividend, with the actual date of delivery generally playing no role.

Tax attribution of the dividend payment, on the other hand, requires the shares to be in the securities account of the taxpayer (client) before the ex-date (no later than the cum-date), i.e. attribution is based on securities account holdings at the end of the cum-date. The date of delivery is generally the date on

which the buy order is executed. If this condition is satisfied, for practical purposes and based on established stock exchange practice no concerns arise even if the shares were purchased after the dividend resolution date. This is not the case, however, if the dividend is a conditional dividend as explicitly mentioned in KStR, marginal number 1168.

If, as a result, the purchased shares are not delivered to the securities account by the cum-date at the latest, it is assumed that the seller of the shares still has beneficial ownership and the capital yields tax that has been withheld cannot be refunded to the buyer. It is possible to provide proof of beneficial ownership in exceptional cases where technical performance of delivery to the securities account leads to a situation in which neither the seller nor the buyer can obtain a refund.

As part of its obligation to cooperate, the applicant requesting a refund must provide proof that the conditions above are satisfied when the application is made. Bank confirmations (in particular annual securities account statements showing additions and disposals similar to a journal) must be provided as proof of the date of delivery. The tax administration reserves the right to examine these documents for authenticity (including by means of administrative assistance) and to request further documents (e.g. purchase and sale agreements and securities lending agreements).

The application must be filed using Form ZS-RE1, together with Sheet A-Dividends (2014 version for both). These forms can also be used to answer requests for clarification that have been received.

This information is concerned solely with the transfer of beneficial ownership in case of disposals with cum/ex-aspects and does not concern the other principles for determining beneficial ownership of shares and the income received from them. Similarly, the general anti-abuse provisions of national and international tax law continue to apply.