

Information on withholding and refunding capital gains tax on dividends paid by listed stock corporations to taxpayers that are subject to limited tax liability

When refunding capital gains tax (*Kapitalertragsteuer* – KESt) on dividends paid by Austrian companies, especially when based on [Section 94, para. 2](#) of the Austrian Income Tax Act (*Einkommensteuergesetz* 1988 – EStG), [Section 6 of the Austrian Corporation Tax Act](#) (*Körperschaftsteuergesetz* – KStG), [Section 21 para. 1 \(1a\) KStG](#) or a double taxation agreement, it is important to consider the conditions that must be satisfied before a refund can be issued. In this regard, the question of the attribution of dividends for income tax purposes is particularly relevant, as this determines who is the debtor of the capital gains tax and therefore entitled to apply for a refund. The previous information issued on this topic (BMF-010203/0314-VI/1/2014 of 18 September 2014) has been withdrawn in light of current case law from the Supreme Administrative Court (VwGH), and is replaced by the present information.

The principles of the income attribution theory (market income theory) are applied in order to determine to whom a dividend should be attributed for tax purposes. Specifically, a dividend is attributed solely to the party recognised as the beneficial owner of the respective shares in the issuing company on the day on which the relevant resolution (i.e., the resolution on the distribution of profits) is adopted (VwGH of 28 June 2022, Ro 2022/13/0002). Beneficial ownership of shares that have been securitised and are being held in a custody account can, as a rule, only be attributed to the party to whose custody account the securities (shares) have been booked. In addition, the other conditions necessary for beneficial ownership must also be satisfied.

According to established stock exchange practice, shares are traded with dividend rights (cum-dividend) up to a certain day. As a rule, the applicable date is the date on which the relevant transaction (*Verpflichtungsgeschäft*) is considered to be completed according to civil law. Shares purchased as of the following day (ex-date) no longer confer dividend rights (i.e., they are ex-dividend), and the share price generally declines to reflect this. Dividends are then paid to the party to whose account the shares are booked at the record date at the latest (i.e., the first day following the ex-day).

However, in the opinion of the Supreme Administrative Court (see VwGH of 28 June 2022, Ro 2022/13/0002) the beneficial ownership of the shares at the time when the resolution on the distribution of profits is adopted is defined as the decisive factor for tax purposes. For a purchaser to be recognised as the beneficial owner, the acquired shares must be credited to the taxpayer's (i.e., the client's) custody account before the date on which the resolution regarding the distribution of profits is adopted (i.e., before the annual general meeting). This means that the decision criterion for tax purposes is the balance of the deposit as of the end of the day before the annual general meeting (AGM-date minus one). As a rule, the posting date is the date on which the purchase contract is executed. This means that the party disposing of the shares is assumed to still be beneficial owner of the

shares for tax purposes, if the shares have not been posted to the purchaser's account by the end of the last trading day prior to the annual general meeting (AGM-date minus one).

It has to be noted that the attribution of the dividends is not only decisive for capital gains tax refunds (see (1) below), but also for tax relief at source by the corporation issuing the dividend (see (2) below) and for income tax purposes in general.

General provisions of Austrian and international law to prevent fraudulent use remain applicable.

1. Refunds

As part of the obligation to cooperate ("Mitwirkungspflicht") in connection with refund applications, applicants must prove that the conditions set out above are met. In this regard, evidence of when relevant transactions have been posted to the account concerned must be provided through corresponding confirmation from the bank (and in particular in the form of annual statements of the account showing incoming and outgoing transactions in a journal-like format). The tax office reserves the right to check the authenticity of this evidence by use of administrative assistance if deemed necessary) and/or to demand further documentary evidence (such as agreements regarding the sale, acquisition and loan of securities). For acquisitions, the documents provided must show both the date on which the contract was concluded and the date on which the transaction was actually posted. If the payment of the dividend cannot be evidenced because the shares have already been disposed of after the day of the annual general meeting, this does not affect the entitlement to a refund.

If, in exceptional cases, a situation arises in which, as a result of technical problems with processing the transaction and posting it to the relevant account, neither the party disposing of the shares nor the party acquiring them is in a position to obtain a refund, evidence of beneficial ownership may be provided on an individual basis alongside evidence of the technical difficulties in processing the transaction.

Applications must be made using the web-based form ZS-RD-DIAG. Section 240a Federal Fiscal Code (*Bundesabgabenordnung – BAO*) states that an advance notification has to be submitted electronically prior to the application. The actual application must then be submitted exclusively in print, consisting of the advance notice to the competent tax office including a proof of transmission, a signature, and a certificate of the tax residence issued by the foreign tax administration.

Where capital gains tax has previously been refunded based on the securities account's balance at the end of the cum-date, the refund decision may be rescinded and reissued within one year of the date on which the original decision was issued (see Section 299 para 1 Federal Fiscal Code) in order to take into account the case law of the Supreme Administrative Court that has intermediately emerged.

Apart from that, already legally binding refund procedures can only be amended where the requirements for a resumption are met (see Section 303 para. 1 (1) (b) Federal Fiscal Code).

It is only conceivable that a resumption is possible if, at the time at which the original decision was made, the competent tax authority did not know whether the applicant was the beneficial owner of the shares on the day on which the resolution regarding the distribution of profits was adopted (i.e., on the date of the annual general meeting). Under such circumstances, the authorities will not have known whether the dividend should have been attributed to the applicant, whether they were the subject of the dividend payment and, subsequently, whether they were the debtor in respect of the refunded capital gains tax. The amount of the refund, the risk of a double refund and the question whether, in the specific case concerned, the taxpayer had a legitimate expectation (e.g., not in cases of fraud) given the administrative practice at the time have to be taken into consideration when using discretionary powers.

2. Tax relief at source

Following the jurisdiction of the Supreme Administrative Court, the identity of the beneficial owner on the day the resolution regarding the distribution of profits is adopted, is also decisive for purposes of tax relief at source in the course of capital gains tax levied by the distributing company. This means that, to qualify for an exemption from capital gains deductions at source pursuant to Section 94 (2) (6) and (12) of the Austrian Income Tax Act 1988 and on the basis of commitments under international law in respect of future dividend payments, the conditions for the exception must be fulfilled by the end of the last trading day before the annual general meeting.

Therefore, in future, if the company distributing the dividends cannot provide evidence that the requirements for tax relief at source have been met, it may be considered liable for the capital gains tax pursuant to Section 95 para. 1 of the Austrian Income Tax Act 1988.