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By advance email

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SUBJECT **Refunding withholding tax pursuant to Income Tax Act § 44a and § 50d for shares acquired after the key-date for dividend payments to non-residents**

REF. **IV B 3 - S 2411/07/10015-14**

DOC. **2011/0259303**

(please quote REF. and DOC. on reply)

In a number of circulars¹, the Federal Ministry of Finance has already stated its position on the issue of unjustified demands for withholding tax to be credited or refunded that has been levied in connection with shares acquired after the key-date for dividend payments.

In this same context, in cases where shares are acquired by a resident, if any agreements have been reached between the short-seller and the buyer of the shares that indicate some economic link between the short sale and the purchase, the buyer knows that he has been issued a tax certificate although the withholding tax specified in it has neither been levied or paid. In any such case, the withholding tax stated in the certificate may not be credited because it has not been levied, and the requirements for withholding tax to be refunded pursuant to Income Tax Act § 44a (7) and (8) and Investment Tax Act § 11 (2) have not been met.

In comparable cases, a refund of withholding tax pursuant to Income Tax Act § 44a (9) and § 50d (1) shall not therefore be made if the shares have been acquired by a non-resident.

¹ Circular dated 5 May 2009, IV C 1 - S 2252/09/10003 (2009/0288260), Federal Tax Gazette I p. 631, Circular dated 21 September 2010, IV C 1 - S 2252/09/10003 :004 (2010/0730678), Federal Tax Gazette I p. 753, and Circular dated 3 March 2011, IV C 1 - S 2252/09/10003 :005 (2011/0010699)

In order to avoid any unjustified refunds being made, claims for refunds pursuant to Income Tax Act § 44a (9) and § 50d (1) are now to be processed as follows with immediate effect:

1. At the request of the Federal Central Tax Office, non-residents must document when they acquired the shares.
2. If the shares were acquired on the final date – namely on the date of the general meeting that adopts a resolution on payment of a dividend, or on the day preceding that date – a refund may only be made provided the requesting party, or a foreign banking institution authorised in accordance with section 4 (12a) Tax Consultancy Act, submits written confirmation that has been issued by a professional consultant within the meaning of section 3 and section 3a Tax Consultancy Act, stating as follows:

“To the extent to which I have been able to gain an insight into key business issues, and having questioned the taxpayer, I have no indication of any agreements having been reached by the taxpayer regarding the acquisition of the shares after the key-date for dividend payments, or of any short-selling to the same effect in which the agency actually carrying out the sell order is not located in Germany.”

If such confirmation is issued by a professional consultant based abroad, proof must be furnished that he or she has registered as required under the section 3a (2) Tax Consultancy Act.

3. Particular attention must be paid to any claims to refunds that are made by foreign funds. Such claims are to be reported to the Federal Ministry of Finance, broken down into the specific countries where the respective funds have been set up.

You are kindly requested to publish these instructions on your homepage.

By Order

Dr. Selling

Certified:
