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DIRECTORATE-GENERAL TAXATION AND CUSTOMS UNION

Direct taxation, Tax Coordination, Economic Analysis and Evaluation
Direct Tax Policy & Cooperation

Code of Conduct on Withholding Tax

This code is a non-binding document which calls for voluntary commitments by Member States and should be considered as a compilation of approaches to improve the efficiency of current withholding tax (WHT) procedures, in particular for refunds of WHT to which Member States can add or adapt elements to meet national needs or contexts.

The information and views set out in this code do not necessarily reflect the official opinion of the EU, the European Commission or the EU Member States and should be considered as not having any implication when it comes to the respect of tax laws, data protection regulations and any other legal requirements governing WHT procedures.

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1 DISCLAIMER

The code is an initiative of the European Commission to improve the efficiency of withholding tax (WHT) procedures which benefited from the input of a Fiscalis project group (FPG) of Member States' tax experts, which met five times during March – June 2017. Afterwards, the Commission consulted tax experts from all EU Member States at the Direct Taxes (WP IV) Commission expert group. Member States do not have formally adopted the code.

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The information and views set out in this code do not necessarily reflect the official opinion of the EU, the European Commission or the EU Member States and should be considered as not having any implication when it comes to the respect of tax laws, data protection regulations and any other legal requirements governing WHT procedures.

It should be noted that the code only applies to compliant taxpayers as it assumes compliance by taxpayers and correct reporting and should not be construed as hampering nor lowering Member States' capacity to implement and introduce measures and safeguards to protect against tax abuse as they see fit.

For a list of key terms, readers are invited to refer to the definitions listed in the Commission Recommendation of 19 October 2009 on withholding tax relief procedures.¹

2 INTRODUCTION

2.1 Nature and scope of the Code

This code provides a set of pragmatic approaches to improve the efficiency of current WHT procedures in particular for refunds but also including procedures for relief at source.

- Entitlement to submit refund claims or apply for relief
- Efficient and user-friendly digital WHT procedures
- Efficient Internal IT Systems
- Effective reliefs and provision of refunds in a short period
- User-friendly forms
- User-friendly documentation requirements
- Set up a single point of contact
- Relief at source

It should be noted that whereas some of the suggestions may be carried out relatively quickly and cheaply, others may take longer and involve substantial investments, in particular when it comes to IT systems.

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1494239071940&uri=CELEX:32009H0784>

The code is envisaged to apply to WHT procedures on cross-border passive income (mainly dividends, interests and royalties), that is sourced in an EU Member State, and that is paid to EU residents and to non-residents.

Securities income covered within the scope of Union legislation² does not fall within the scope of this code.

It should be noted as well that some of the suggestions requiring the assumption of important responsibilities and obligations by financial intermediaries may lead to liability for failures to comply with such obligations.

2.2 Background and context

WHT are a source of income for Member States and raise revenues used to fund public expenditures. However, burdensome procedures for WHT reliefs and refunds have long been identified as a barrier to a well-functioning capital market.

They hinder cross-border investment, disrupt financial processes such as clearing and settlement, increase the cost of cross-border trading and are a barrier to achieve a single European securities market. They are particularly burdensome for individual and small investors. The resulting misallocation of financial resources undermines investment within the EU.

This code comes as a response to the September 2015 Commission's initiative to build a Capital Markets Union (CMU), which proposed to draft a Code of Conduct on WHT as one of its main deliverables and the work of the EU Commission Expert Group on barriers to free movement of capital (composed mostly of non-tax experts).

Based on the work of the group, in March 2017 the Commission adopted a report on national barriers to capital flows (2017 Report), where inefficiency in cross-border WHT reliefs and refunds procedures has been identified, among others, as one of the biggest barriers to an effective capital market.

In particular, the 2017 Report identified a series of best practices on WHT recovery proceedings (in addition to relief at source) and reiterated, as way forward, the need to work together with national tax experts on a Code of Conduct.

The Report stresses that existing WHT procedures can be generally demanding, resource-intensive and costly for investors. The end result is that many individuals simply forego their right to claim back WHT.

Member States have already taken important steps and made significant investments in upgrading their WHT systems. The report by the Expert Group on barriers to free movement of capital is one in a long series of initiatives undertaken at the EU level to make WHT procedures more efficient. The report published in 2017 by this expert group still considers

² Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States

WHT procedures as a current barrier in post-trading environment and recommends making WHT procedures more efficient.³

Recently, as committed in the CMU Action Plan, the Commission set up the European Post Trade Forum (EPTF), an expert group tasked "to undertake a broader review on progress in removing Giovannini barriers, including WHT, after the recent legislation and market infrastructure developments".

3 ENTITLEMENT TO SUBMIT REFUND CLAIMS OR APPLY FOR RELIEF

3.1 Description

Possibility of beneficial owners,⁴ non-resident financial institutions and other representatives submitting refund claims or applying for relief.

For instance, beneficial owners, including those with a low value portfolio, are able to claim refund or apply for relief on their own behalf, without any intermediary; non-resident intermediaries are allowed to claim refund and apply for relief on behalf of their clients in a non-discriminatory manner.

3.1 Problems it can address

- Economic impossibility for beneficial owners with a low value portfolio to obtain the refund or apply for the relief to which they are legally entitled.
- Limits to competition between financial intermediaries.
- Lack of level playing-field between resident and non-resident intermediaries due to barriers, such as the mandatory requirement for a resident representative.
- Additional costs for non-resident intermediaries to provide WHT services.

3.1 Possible ways to get there

- Tax administrations allow non-resident beneficial owners to submit claims or apply for relief on their own behalf.
- Tax administrations allow non-resident financial institutions or other representatives of the beneficial owners, within the limits of what is currently allowed by law,⁵ to claim relief on behalf of their customers.
- Tax administrations do not require non-resident beneficial owners, institutions or other representatives to maintain a resident fiscal agent and/or representative or to use resident tax advisory firms to claim relief, within the limits of what is currently allowed by law.

³ Among others, the following should be mentioned: Giovannini reports (2001-2003); Fiscal Compliance Experts Group (FISCO) reports (2006 and 2007); Commission's Recommendation (2009) on simplified WHT procedures; Tax barriers Advisory Group (T-BAG) report (2013); ECB T2S Survey (2013-2016).

⁴ The term beneficial owner is used here in the sense of 'investor who receives the securities income for his own benefit' as per the definitions listed in the Commission Recommendation of 19 October 2009 on withholding tax relief procedures.

⁵ Under the assumption of compliance of national laws with the EU Treaties.

4 EFFICIENT AND USER-FRIENDLY DIGITAL WHT PROCEDURES

4.1 Description

Digitalisation of the reclaim process; digitalisation can be defined as the adoption or increase in use of digital or computer technology by an organization. It takes time, demands resources and can be carried out with various degrees of maturity (in the case of WHT processes, it can range from using emails and /or publishing forms online to full online processes).

4.2 Problems it can address

- High compliance costs for taxpayers and administrative costs.
- Unnecessary in-person / by phone contacts.
- Delays in processing of claims for refund or applications for relief.

4.3 Possible ways to get there

- Tax administrations identify which forms need to be filled in and publish them online.
- The whole reclaim process can be completed online through a user-friendly portal. To ease the submission of supporting documents, tax administrations allow file upload easily.
- Permits global custodians and other financial institutions to submit claim in respect of multiple beneficial owners at once.
- To receive data quickly and efficiently, tax administrations implement a system to system option for qualified intermediaries.
- Tax administrations ensure that the external IT systems (i.e. the approach described in this section) are connected to their internal IT systems (described in the following section).

5 EFFICIENT INTERNAL IT SYSTEMS

5.1 Description

Tax administrations use IT systems for efficiently processing reclaims and refunds, as well as, when applicable, a relief at source system.

5.2 Problems it can address

- Administrative burden of paper-based procedures;
- Delays in processing claims for refund or applications for relief due to time-consuming and lengthy administrative procedures;
- Inefficient work process when information from different sources has to be gathered manually.
- Risk of fraudulent behaviour such as, double refund applications and unjustified reclaims or application for relief.

5.3 Possible ways to get there

The IT systems would be:

- effective and make the best possible use of data, allowing tax administrations to easily retrieve, cross-check and match data gathered from various sources and those already available to the tax administrations;
- connected to the online e-filing system used by beneficial owners and/or financial intermediaries to reclaim WHT;
- smart in the sense that automatically alert tax administrations of possible risks in the refund claims, to minimize the likelihood of fake or fraudulent claims being processed;
- able to keep its data secure;
- able to allow tax administrations to simply and rapidly create statistical reports on claims processing;
- cost effective.

6 EFFECTIVE RELIEFS AND PROVISION OF REFUNDS IN A SHORT PERIOD

6.1 Description

Provide relief and refunds in an appropriate period of time and normally within 6 months of receipt of a fully documented and valid claim for refund or application for relief by the relevant tax authority. The assumption is that taxpayers truthfully submit refund claims and supporting documentations to tax administrations, respecting deadlines, and in accordance with the law.

6.2 Problems it can address

- Monetary disadvantages for the beneficial owner or payor, i.e. high opportunity costs.
- Difficulties in finding the facts due to the amount of time passed.
- Legal uncertainty, also in respect of further similar transactions.

6.3 Possible ways to get there

- Tax administrations publish on their websites documentation requirements, description of the law and the deadlines, if any, that taxpayers need to respect for submitting their claims.
- Effective IT systems (described in the previous section) available to taxpayers and tax administrations.
- Tailored forms, easy to fill in on-line.

7 USER-FRIENDLY FORMS

7.1 Description

The tax administrations make the forms for the submission of refund claims or application for relief as user-friendly as possible.

7.2 Problems it can address

- Difficulties in completing forms, particularly for non-resident beneficial owners or financial intermediaries that may not be familiar with local language or tax administration.

- Administration costs and barriers which prevent claiming refunds or applying for relief.

7.3 Possible ways to get there

To ease the submission of documentation, yet within the limits of what is currently allowed by law and in particular tax treaties, tax administrations:

- strive to provide electronic forms, which are tailor-made, interactive, comprehensive and self-explanatory;
- provide pro-active, transparent and comprehensive guidance to different types of taxpayers (small retail investors, pension funds, insurance groups, transparent funds and their investors etc.) on different incomes (dividends, interests etc.) or key definitions (beneficial owner etc.) and communicate in a tailored-made way (considering for instance the applicable tax treaties) to meet the needs of these target groups, so that taxpayers can quickly find the forms they need to fill in and reduce mistakes in doing so;
- make forms and guidance available in addition to the national language in at least one foreign language customary in the sphere of international finance;
- ensure guidance is kept up to date as treaties and domestic law changes; and
- the European Commission provides and keeps up to date a single webpage listing all links to national websites where forms and guidance can be found.⁶

8 USER-FRIENDLY DOCUMENTATION REQUIREMENTS

8.1 Description

Tax administrations provide clear requirements in relation to which supporting documents taxpayers have to provide in order to substantiate their claims for refund or applications for relief vis à vis tax administrations; document requirements are published online in at least one language customary to the sphere of international finance; documents requested are relevant and necessary.

8.2 Problems it can address

- Time and cost for taxpayers in fulfilling their reporting responsibilities.
- Lack of clarity regarding the requirements that beneficial owners and financial institutions have to fulfil in order to effectively prepare claims for refund and applications for relief.
- Financial institutions having to ask their clients multiple times for supporting documents.

8.3 Possible ways to get there

To simplify documentation requirements, yet within the limits of what is currently allowed by law and in particular tax treaties, tax administrations:

- publish online clear and comprehensive documentation requirements for different entity and income types, when applicable;
- when appropriate, simplify documentation requirements for cases of minor risk;

⁶ Example: https://ec.europa.eu/taxation_customs/national-tax-websites_en

- allow supporting documents in electronic formats, as far as legally possible;
- avoid requesting excessive information from taxpayers;
- avoid requesting documents that it is not possible for the taxpayer to obtain with reasonable effort;
- avoid excessive, ad hoc, non-standardised requests to taxpayers for information, unless necessary for compliance, relying on risk assessment;
- avoid recurrent documentation requirements, if information is already available to tax administration;
- accept certain valid documentation to support a series of different claims, when appropriate;
- accept tax residence certificates in the format provided by the residence country of the beneficial owners as proof of their tax residence;
- allow proofs of the beneficial owners' entitlement to treaty benefits other than tax residence certificates in relation to the amount(s) in question issued by the residence country, for example such as:
 - allowing claimants to use self-certification of tax residence, where enough information is available possibly in combination with
 - allowing claimants to rely on financial institutions' "know your customer" (KYC) procedures to certify tax residence;
- set up a central information platform (example: the European TIN Portal)⁷ which provides information about WHT reclaim and refund procedures and on the different formats used for tax residence certificates in the EU.

9 SET UP A SINGLE POINT OF CONTACT

9.1 Description

Tax administrations have a single point of contact for all aspects concerning the WHT procedures. The single point of contact can be easily found, i.e. on the website of the tax administration.

9.2 Problems it can address

- Taxpayers' compliance burdens.
- Dispersion of expertise on WHT procedures within tax administrations.

9.3 Possible ways to get there

- Identify a single point of contact for refund claims and applications for relief.
- Single point of contact is the point of reference for providing easy to understand and accessible guidance to taxpayers, also in one additional foreign language customary in the sphere of international finance.
- Single points of contact are easy to find on the websites of the tax administrations.
- The European Commission provides and maintains a single webpage listing all links to Member States' single points of contact.

⁷ https://ec.europa.eu/taxation_customs/tin/

10 RELIEF AT SOURCE

10.1 Description

Relief at source is a category of WHT procedures in which treaty entitlements or exemptions are already applied when the underlying payment is made, provided all necessary information is available. No WHT – or less WHT – has to be paid to the tax administration by the withholding agent or distributing paying agents. Relief at source is not necessarily always the best practice and, in some cases, a relief at source simply is not possible. In some cases improving withholding tax procedures by making WHT relief by refund quicker and more efficient can be more appropriate. Carrying out relief at source requires the assumption of important responsibilities and obligations by financial intermediaries which can be held liable for failures to comply with their obligations.

10.2 Problems it can address

- Some risks of errors and fraud, including multiple refunds for the same underlying claim.
- Opportunity costs and delays in receiving the refund.
- Costs beneficial owners and financial intermediaries face in processing refund claims.
- Administrative costs involved in processing refund applications.

10.3 Possible ways to get there

- Tax administrations try to carry out tax relief at source systems in the least burdensome manner for investors and financial intermediaries, balancing however the need for simplification with the necessity of ensuring compliance.
- For example, tax administrations may grant WHT relief at source relying on a system of authorised information agents and withholding agents, in which the information agent closest to the beneficial owner:
 - verifies whether the beneficial owner is entitled to tax relief;
 - passes to the next information agent in the custody chain pooled WHT rate information;
 - reports investor-specific information to the source Member State when needed;
 - and the withholding agent applies WHT relief at source on the basis of pooled WHT rate information.
- Another way to grant relief at source is a system where the tax authorities verify whether the beneficial owner is entitled to tax relief:
 - The beneficial owner applies for full or partial exemption from WHT before the underlying payments are made;
 - If the conditions are met, the tax authorities issue a certificate of exemption;
 - The beneficial owner hands this certificate to the payor and the latter applies WHT relief at source accordingly.
- Tax administrations cooperate to ensure that information agents and withholding agents comply with their obligations.

11 FOLLOW UP

Member States are encouraged to commit to the code and to follow it to improve the status quo by 2019.

With a view at arriving at a comprehensive EU wide review of developments in line with the code, Member States are encouraged to collect information about progress achieved and to share this information and best practices with the Commission and with each other.

To keep each other informed of progress achieved and of possible obstacles encountered, Member States' tax experts will meet at least twice in 2018.

After 2019, the code of conduct could be reviewed to take into account any significant change. The need for such a review will be considered regularly.