

Client Briefing

May 2025

Interest on Withholding Tax under EU Law

Refund amounts for withholding tax must be subject to interest under Union law if a foreign shareholder is denied exemption or refund of withholding taxes in violation of Union law.

Under national law, interest on withholding and source taxes, such as withholding tax on profit distributions, is generally excluded. The Federal Fiscal Court (BFH, VIII R 32/21) has now confirmed that, based on Union law, interest on refund amounts for withholding tax can also be claimed in refund proceedings. This applies to profit distributions to foreign shareholders for which an exemption certificate was wrongly not issued or the refund was not paid out more than three months after the application was submitted. The interest rate is 6% p.a.

I. Facts of the Case

The plaintiff, an Austrian capital company, was a shareholder in a German AG, which withheld and paid withholding tax on several profit distributions between 2007 and 2011. The issuance of an exemption certificate was initially refused to the plaintiff. The appeals lodged against this were suspended until the conclusion of the model proceedings before the European Court of Justice (ECJ, Deister Holding C-504/16 et al.).

After the decisions were issued in December 2017, the BZSt (Federal Tax Office "Bundeszentralamt für Steuern") refunded the withholding tax. The plaintiff's application for the assessment of interest was rejected by the BZSt by notice in October 2018, referring to ongoing discussions at the federal-state level on this topic.

In July 2020, the plaintiff filed an action for failure to act, seeking the annulment of the rejection notice and an order requiring the BZSt to assess refund interest. The Fiscal Court largely upheld the claim. In the appeal proceedings, the BFH granted a further-reaching entitlement to interest based on Union law.

Due to the clear legal situation under Union law, based on the ECJ's case law, the BFH did not consider it necessary to refer the matter to the ECJ under Article 267(3) TFEU.

II. Requirements for the Application of the Interest Claim under Union Law

In addition to the basic requirement of a liquidity disadvantage suffered in violation of Union law, the further requirements for determining the specific interest claim are governed by national tax law.

However, the Union law principles of equivalence and effectiveness must be observed.

1. Legal Basics

The legal basis is the Union law principle that amounts to be refunded as a result of a breach of Union law must be subject to interest, a principle that the ECJ has shaped and developed in several decisions (see ECJ, judgment of 18 January 2017, C-365/15 – Wortmann).

A breach of Union law also exists in the case of a (simple) violation of valid Union law provisions by an administrative authority. This violation does not only exist after it is established that a national provision must be disregarded due to a breach of Union law

2. Interest Period

The interest period begins from the date the refund application is received, plus a standard processing period of three months (analogous to § 50d (2) sentences 6, 7 EStG old version; now: § 50c (2) sentence 6 EStG). The ECJ has ruled that, depending on the circumstances, the entire period between the day the tax was paid and the day of the refund must be subject to interest (ECJ, 28.4.2022 – C-415/20).

Therefore, it is advisable to keep this period as short as possible and to submit the refund application immediately. The liquidity disadvantage suffered between the withholding of the tax and the date of the application cannot, however, be causally attributed to a breach of Union law and is therefore not eligible for compensation.

The interest period only begins upon receipt of the refund application—not already with the withholding of the tax. The refund application should therefore be submitted immediately after the withholding tax is paid.

The duration of the interest period is to be determined on a daily basis; not only full interest months are to be considered.

3. Applicable Interest Rate

The interest rate is determined according to § 238 (1) sentence 1 AO and is currently 0.5% per month (6% p.a.).

4. Procedure for Asserting the Interest Claim

It is not necessary to pursue this claim through litigation. The defense against the Union law violation in the context of an objection procedure is also sufficient. Nevertheless, there is an increasing need to file an action for failure to act due to the excessively long processing times at the BZSt.

The prevailing two-stage procedure of withholding tax in the first step and the subsequent application for a refund is in conformity with Union law: The initial payment of the withholding tax established the legal basis for the further retention of the tax amounts; only the exemption notice aimed at the refund removes this legal basis again.

5. Deadline for Asserting the Claim

The refund application must be submitted within four years (§ 50c (3) sentence 2 EStG). The period begins at the end of the calendar year in which the capital income or remuneration was received and does not end before the expiry of one year from the date the tax was paid and not before the expiry of the period provided for in the relevant double taxation agreement. Therefore, as of today, refund applications are still permissible for profit distributions received since 1 January 2021.

Refund applications must generally be submitted before the expiry of the four-year period. In 2025, applications for the refund of withholding tax and interest thereon are still possible with respect to profit distributions received since 1 January 2021.

III. Application to Hidden Profit Distributions

In cross-border cases, withholding taxes are also due in the case of hidden profit distributions

and are assessed upon discovery during a tax audit. If the requirements of the Parent-Subsidiary Directive or the relevant double taxation agreement for (partial) refund are met, this withholding tax will be refunded upon corresponding application. The national anti-treaty-shopping provisions under § 50d (3) EStG must be observed. Any resulting refund claim is also eligible for interest, as with open profit distributions.

Claims for the refund of withholding tax in respect of hidden profit distributions are also eligible for interest.

IV. Application to EU and Non-EU Companies

If the violation concerns Union law provisions that also apply to third-country companies, in particular violations of the free movement of capital (Art. 63 TFEU), non-EU companies can also assert claims for the refund of withholding tax.

V. Current Processing Times at the BZSt

On 2 April 2024, the Bundestag published the German government's response to a minor inquiry from the CDU/CSU parliamentary group, including the current processing times at the BZSt in the relief procedure for withholding taxes (BT-Drs 20/10898). In the exemption procedure, the average processing time is 480 days, while in the refund procedure it is 615 days. The processing time in the refund procedure is likely to increase further, as in the years 2020 to 2023, the number of new refund applications received each year was significantly higher than the number of cases completed (e.g., in 2023: 35,411 applications received, 13,818 completed).

VI. Summary and Recommendation

The Union law interest claim is intended as compensation for the unavailability of an amount of money and is thus meant to offset a liquidity disadvantage suffered as a result of a breach of Union law.

All applications for refunds in respect of profit distributions received by a foreign company from a domestic company since 1 January 2021 should be reviewed.

In addition, all assessments of withholding tax on hidden profit distributions by domestic companies to foreign shareholders should be identified. Applications for the refund of these withheld withholding taxes, including an application for interest, should then be submitted.

If the processing and payment of the requested refund takes place within three months of the application being submitted, no interest is due.

For processing times exceeding this, the interest period is calculated on a daily basis up to the day of actual payment, applying an interest rate of 6% p.a.

This client information contains only a non-binding overview of the subject area addressed in it. It does not replace legal advice. Please do not hesitate to contact us for this client information and for advice:



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