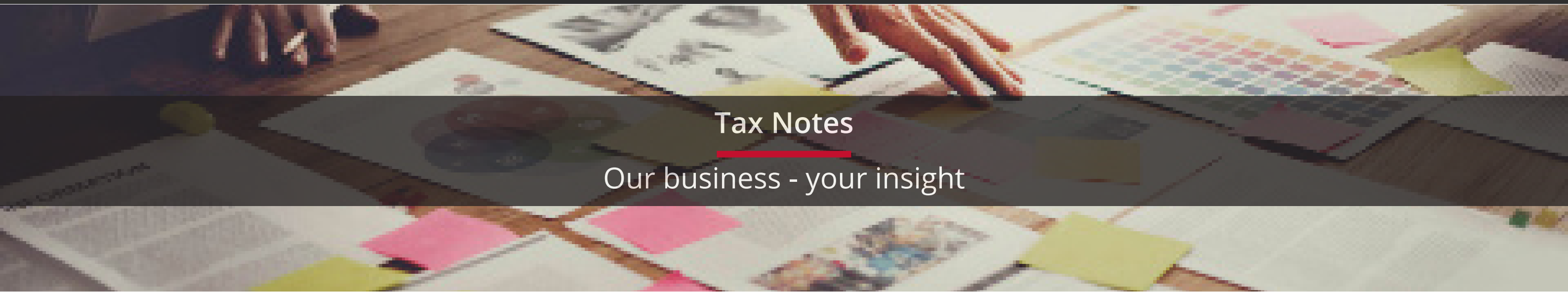

Tax Notes

Our business - your insight

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The question of the reimbursement of withholding tax remains a topical issue. The periodic checks of the Swiss Federal Tax Administration that as of late are carried out merely by correspondence raise various questions in this respect.

Periodic withholding tax checks

The Swiss Federal Tax Administration (SFTA) is increasingly carrying out periodic withholding tax checks by correspondence. All Swiss companies which are not obligated under Art. 21 of the Withholding Tax Regulation (VStV) to automatically submit a withholding tax declaration to the SFTA on an annual basis (Form 103 or 110) may be affected by this. In the context of the checks, information on deemed dividends from past fiscal years may be required, for example.

All open or hidden profit distributions are considered deemed dividends. Benefits provided by a legal person to shareholders or related persons without commensurate return and which in the same circumstances would not have been granted to an uninvolved, independent third party or not to the same extent are considered to be a hidden profit distribution.

Deemed dividends are subject to withholding tax of 35% (VSt). The VSt is a self-declaration tax. Its collection is carried out as part of the self-assessment process. This means that the tax subject must automatically submit the prescribed statement of accounts with accompanying documents to the SFTA and at the same time pay the tax or report it accordingly. The tax subject has to determine the tax liability himself. This is also the case for deemed dividends. The tax subject's duty of disclosure is also obvious in connection with self-declaration. The information required by the SFTA should make it possible for it to verify the accuracy, completeness and reliability of the self-declarations submitted by the tax subject. The submission of incorrect information is punishable by law.

In a purely domestic relationship, the VSt is primary a so-called security tax. When income is properly declared and taxed, the VSt is refunded or credited. If reimbursement or crediting is denied due to the lack of proper declaration, however, the VSt becomes a definitive tax and loses its character as a security tax.

Individuals must have declared deemed dividends by the date on which their tax assessment becomes final at the latest. Legal persons must have entered income exposed to VSt properly in the books as earnings. Otherwise, the VSt refund claim expires. In any case, this expires 3 years after the end of the calendar year in which the claim arose. This is a forfeiture period in this case.

But how exactly should a company now deal with a periodic withholding tax check by correspondence?

No known deemed dividends

Even if no deemed dividends are known to the company, it is still possible that the SFTA will come to a different opinion in a subsequent inspection of the accounts. For this reason, it is recommended that the question on deemed dividends is not answered in the periodic checks conducted by correspondence with a simple "no" because theoretically this could be considered as false information. Rather, it is recommended that a formulation should be chosen which specifies that the person providing the information is not aware of any deemed dividends to the best of their knowledge and that all performance relationships with related parties have been settled at arm's length in the opinion of the company.

Known deemed dividends

1. Subsequent declaration

Because the withholding tax claim only expires 5 years after it arises, a situation can occur whereby the 3-year refund period is already forfeit at the date of the subsequent demand. The Withholding Tax law (VStG) thus stipulates that a new 60-day period for submission of a refund application begins after expiry of the 3 years, if the VSt is paid and passed on based on an objection by the SFTA. Likewise, the law foresees the possibility of reporting the VSt instead of paying it, when the tax claimed on the occasion of an official check concerns performance that had become due in a previous year.

Because of its purpose, the 60-day period should also apply for withholding tax claims, in our opinion, which the SFTA determines based on a subsequent declaration in the context of a periodic check by correspondence. However, it should be noted for one thing that this concerns only the temporal dimension of the refund. All other conditions for reimbursement including the declaration and accounting clause must also be fulfilled for successful reimbursement or reporting. For another, there are still no official statements by the SFTA on the effective application of the grace period in the case of a subsequent declaration in the context of a periodic check by correspondence, which is why it is recommended that a tax expert is consulted upon receipt of such correspondence and if there are grounds for suspecting the existence of nonmonetary benefits. Furthermore, it should be noted in this regard that the declaration clause is to be relaxed a little in the future for individuals.

2. Non-declaration

If deemed dividends were paid out in the years included in the periodic check by correspondence but were omitted from a subsequent declaration and the question by the SFTA either unanswered or answered with "no", the question of the relevance under criminal tax law of such conduct arises. The VStG criminalises in particular tax evasion and tax endangerment. As already mentioned, such an unlawful action is in the realm of tax endangerment, particularly also in the breach of information duties. These include, for example, the exhaustive and accurate completion of the SFTA's questionnaire. It can therefore not be ruled out that the deliberate concealment or inaccurate response to the question regarding nonmonetary benefits leads to consequences under criminal tax law. If nonmonetary benefits are known, the situation should definitely be analysed together with a tax expert before replying to the correspondence.

Conclusion

In our opinion, there are various ambiguities and uncertainties about how the SFTA deals with the information obtained by means of the periodic checks in the correspondence procedures. The financial ramifications in connection with deemed dividends could be significant. For this reason, we recommend having the facts checked over by a tax expert even before arranging potential deemed dividends. But at the latest upon receipt of such correspondence, a tax expert should be engaged to analyse the situation in detail.

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