

The 11/26 refund and the 1.2 per cent rate

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Two features of Italian domestic law complicate the picture. First, a non-resident recipient of Italian dividends may claim a refund of up to eleven twenty-sixths of the Italian withholding tax if he proves that he has paid final tax on the dividend abroad.¹ For a Swiss resident this route produces a final Italian tax of 15 per cent, which equals the treaty rate, and it is used where the treaty forms cannot be completed. Second, Italian law grants a reduced withholding tax of 1.2 per cent on dividends paid to companies resident in a Member State of the European Union or of the European Economic Area that allows an adequate exchange of information.² Swiss companies are excluded from this reduced rate, because Switzerland is neither a Member State nor a party to the EEA Agreement. A Lugano holding company that does not meet the 25 per cent and two-year conditions of Article 9 of the agreement therefore bears 15 per cent, while a holding company in Luxembourg or the Netherlands would bear 1.2 per cent. Whether this difference is compatible with the free movement of capital, which under Article 63 of the Treaty on the Functioning of the European Union protects third-country investors as well, although the Court of Justice accepts justifications in relations with third countries more readily, has been discussed in Italian literature but not decided by the courts in a case concerning Switzerland.³

1 The fiduciary and the bank as intermediaries

Much of the Italian wealth held in Lugano is administered through Italian fiduciary companies, which act as nominal holders of the accounts of their Italian clients. Chapter E.II describes how this structure developed after the tax shields of 2001 and 2009. The fiduciary acts as withholding agent for the Italian tax on the income of the accounts it administers. It applies the Italian 26 per cent tax on the income from the Swiss accounts and files the refund claims for Swiss withholding tax on behalf of its clients. Form R/CH-I/1b, which the Federal Tax Administration publishes for dividends

from Italian shares held through a fiduciary, reflects the parallel situation in the opposite direction.⁴ For Swiss withholding tax the Federal Tax Administration grants the refund to the beneficial owner, so that the Italian fiduciary must disclose the identity of its client and prove that the client is resident in Italy. The fiduciary's role as nominal holder does not affect the analysis under Article 4 paragraph 5 lit. a, because the client is the beneficial owner and the fiduciary only the apparent one.

2 Notes

1. Migliorini, "Dividendi percepiti da soggetti non residenti" (above) (refund of 11/26). ↩
2. Migliorini, "Dividendi percepiti da soggetti non residenti" (above) (1.2 per cent under Art. 27 para. 3-ter). ↩
3. Treaty on the Functioning of the European Union, Art. 63 para. 1; CJEU (Grand Chamber), judgment of 18 December 2007, C-101/05, *Skatteverket v A*, ECLI:EU:C:2007:804, summary in vLex, <https://eu.vlex.com/vid/838566049> (the free movement of capital applies to movements with third countries, but a restriction may be justified by the need for effective fiscal supervision where information cannot be obtained from the third country). ↩
4. ESTV, "Italia" (above) (Form R/CH-I/1b for Italian shares held through a fiduciary). ↩

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