# Withholding tax relief and recovery: The key to enhancing operational alpha?

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**Abstract**

*The evolving international tax landscape continues to provide complexities for investors, creating operational challenges, often eroding investment returns. This paper unpacks the withholding tax process along with the key hurdles that investors have to overcome when recovering taxes. While these hurdles have been expanded upon, an effort to quantify the effect on investment performance has been made to help investors understand the true cost of tax inefficiencies. The paper thereafter dives into emerging international tax trends, risk management considerations, and concludes with an analysis of solutions that investors can utilise to enhance their international tax relief and recovery process.*

*Keywords: withholding tax, international tax, tax recovery, tax reclaims, dividends, foreign tax recovery*

## INTRODUCTION

Withholding tax levied on foreign investment income is a nuanced and highly complex area that has become a thorn in many an asset manager's and asset owner's side. Global tax authorities are facing new challenges due to the increased scale of international trade, the movement of capital and rapid digitalisation.[1] These factors have not only drastically increased the volume of transactions that tax authorities need to consider, but also forced tax authorities to rethink the way in which withholding tax relief is granted. To ensure that tax relief is correctly availed to investors, tax authorities often require international investors to complete high volumes of cumbersome documents, in foreign languages, with questions that require significant judgment.

This makes it difficult for investors to gain comfort over their compliance status and whether they are maximising their entitlements to relief. These difficulties are further exacerbated by the nature of cross-border investing where the number of parties in the income payment chain is significant. This affects the tax relief and recovery process, which ultimately results in little transparency for the end investors and challenges in pinpointing exactly where inefficiencies exist, which could result in withholding tax leakage.

The purpose of this paper is to unpack the withholding tax function in detail, outline some of the key challenges with securing withholding tax relief, quantify the cost of withholding tax leakage on investments returns, and consider whether an outsourced model for managing withholding tax relief can be beneficial.

## DETAILED OVERVIEW OF THE WITHHOLDING TAX FUNCTION AND LANDSCAPE

A withholding of tax occurs when tax payable is withheld (deducted) from the income by the payer at source and directly paid to the government before the income is transferred to the recipient. When investing into foreign jurisdictions, investors will generally be subject to tax on the investment returns according to the laws and regulations of the foreign jurisdiction. Broadly speaking, foreign governments will ensure tax collection on investment returns through the levy of a withholding tax on dividends and interest. Withholding tax is imposed in line with the domestic legislation of each investment jurisdiction and typically ranges between rates of 25–35 per cent but can often be reduced.

### Legal basis for withholding tax relief

In most cases the statutory withholding tax rate imposed on dividends and interest can be reduced by using one or more of the following methods.

#### *Double tax treaties*

To avoid double taxation many countries have signed a double tax treaty. A withholding tax relief/recovery opportunity exists when there is a differential between the investment country's statutory (withholding) tax rate and the maximum tax rate agreed upon between the two countries in their double tax agreement. By leveraging the double tax treaty, non-resident investors can benefit from a lower rate of withholding tax or be entitled to an exemption from withholding tax.

For example, when a Swiss company pays a dividend to a person resident in the US, the Swiss tax authorities will withhold tax at a rate of 35 per cent on the dividend according to their statutory legislation. As a result, the US-resident investor receives a net dividend of 65 per cent.

A double taxation agreement exists, however, between the US and Switzerland and a refund opportunity may exist. For instance, the double tax treaty between the two countries prescribes a maximum withholding tax rate of 15 per cent on dividends. Therefore, the US-resident investor should be entitled to a refund of the excess tax (20 per cent) that was withheld initially.

Double tax agreements may even prescribe a tax rate of 0 per cent, which often applies to tax-exempt entities such as pension funds or not-for-profit organisations. In this case, these entities may be entitled to a full refund of the 35 per cent withheld.

#### *Domestic tax exemptions*

An opportunity to recover withholding tax also exists where an investment country's domestic tax legislation dictates a full or partial exemption from taxes under certain conditions. Certain countries afford particular groups of taxpayers (investors), such as pension funds or investment funds,

more favourable tax treatment. Domestic withholding tax exemptions are common throughout the European Union (EU) and are often the result of the legislative changes these countries are required to make to align their legislation with EU law.

### *European Court of Justice (ECJ) claims*

Various withholding tax recovery mechanisms have emerged over the years; however, the most technically complex claims are EU or ECJ reclaims, also commonly referred to as Santander[2] or Aberdeen[3] claims (being the names of two prominent court cases in this regard). These claims revolve around the concept of discrimination and the free movement of capital.

The basis for these claims is the legal precedent set through several court cases heard and decided upon by the ECJ. Article 63 of the Treaty on the Functioning of the European Union prohibits capital movement restrictions within the EU and with third-party countries.[4] On this legal premise the ECJ has consistently ruled that where foreign domiciled investment funds can be compared to domestic investment funds and are essentially similar, treating foreign funds differently from a withholding tax perspective would be discriminatory and in most cases this discrimination cannot be justified.

For example, in the Santander[5] case, the court ruled that French legislation which imposes withholding tax on French-sourced dividends earned by non-French investment funds was discriminatory. Discriminatory treatment is contrary to the principle of the free movement of capital as per Article 63 of the Treaty on the Functioning of the European Union

As such, where foreign entities, typically investment funds and pension funds, can prove comparability to similar EU domiciled entities, which are treated more favourably in their country of residence as far as withholding tax is concerned, there is a case for withholding tax recovery. To file such a claim, one must inherently understand the legislation providing for the more favourable withholding tax treatment in the investment country as well as the characteristics of both domestic and foreign entities to demonstrate the comparability between the entities. Once the comparability is proven, one must still demonstrate that the claimant is the beneficial owner of the income. As a result, these technically supported claims are highly onerous and are typically pursued by withholding tax experts.

### *Withholding tax relief and reclaim mechanisms*

To benefit from these reduced rates of withholding, investors can either provide the required documentation to the paying agent ahead of the income event to ensure the correct amount of tax is withheld, or alternatively recover any over-withheld tax at a later stage by applying for a refund with the foreign tax authorities.

Additional details about the tax relief and reclaim mechanisms are set out as follows.

## Relief at source (RaS)

Withholding tax relief at source allows investors to benefit from the most advantageous rate of tax at the time of the dividend or interest payment. While this is the most economical form of withholding tax relief, securing it can, however, be challenging.

First, investors need to complete onerous paperwork prescribed by tax authorities (and in some cases the financial intermediaries entrusted with facilitating relief at source) and secondly, investors also need to ensure the paperwork reaches the withholding agent within the specified time frames before the income event payment date. In many cases, the paperwork is in a foreign language and requires an in-depth technical understanding of tax regulations

across various jurisdictions, making it difficult for investors who do not have the expertise to complete forms correctly. This complexity can lead to errors or delays, resulting in many investors not receiving the correct (or any) tax relief according to their beneficial ownership status. To add further frustration, the volume of paperwork makes it difficult for investors to know which forms should be prioritised, ie what tax savings can be attributed to which document?

Furthermore, some markets require tax authority pre-approval before relief at source can be granted. For example, in Germany investment funds must apply for a status certificate from the German tax authorities every three years to prove that they are eligible for a reduced rate of withholding tax at source. Given the voluminous nature of documents and the level of complexity, many investors forgo relief at source or rely on external advisers to help them complete the paperwork and track the success of relief at source thereafter. It is worth noting that not every investment market offers relief at source as a relief mechanism for withholding taxes. The Swiss market, for example, only allows investors to recover the excess withholding tax after the income event has occurred by applying for a refund directly with the Swiss tax authorities.

### Standard or long form claims and quick refunds

In the event that the foreign investment jurisdiction does not offer a mechanism for withholding tax relief at source, or relief at source is not successful (eg the documents submitted are not accepted or documents are provided after the applicable deadline), the investor will likely be subject to the statutory withholding tax rate.

Quick refunds are offered in some investment markets and allow the investor the opportunity to recover the withholding tax shortly after withholding. Typically, the withholding agent will refund the excess tax in the window between withholding and remitting tax to the foreign tax authority. Standard or long form claims occur in situations where the investor has missed the quick refund deadline or quick refund is not available and the investor (through intermediaries) approaches the foreign tax authority for a refund.

Each market has a prescribed statute of limitation indicating the time frame within which claims need to be filed to prevent losing the right to reclaim. For example, in France, the statute of limitation is two years from the end of the year of dividend payment and therefore should a claim for income paid in 2021 not be filed by the end of 2023, the recovery opportunity is lost.

Recovering withholding tax via a standard reclaim or quick refund presents investors with similar challenges (ie high-volume, onerous and complex paperwork) compared to those experienced with relief at source.

In the traditional process, the above tax relief and reclaim processes are facilitated by the custodian of the investor (and its global custody network). The custodian will usually notify the investor of potential tax relief opportunities along with the information that is required from the investors, typically consisting of tax questionnaires and supporting documents. The investor is required to determine the applicability of various forms of relief and complete the associated forms. The investor returns these forms to the custodian, who typically passes these on through the custody chain for processing by the withholding agent, or the custodian confirms the rate to be withheld by the withholding agent. If the relief is missed and the tax is withheld, the custodian will typically support investors' tax reclaims in the majority of investment markets where double taxation treaty and domestic tax exemptions exist. While the

custodian facilitates the reclaim process, the ultimate responsibility for correct documentation completion, compliance and timely submission rests with the investor.

### *Domestic tax exemptions*

These claims follow a similar process to standard or long form reclaims described above; however, there can be additional documentary evidence required to prove eligibility for recovery.

### *European Court of Justice (ECJ) claims*

As mentioned above, comparability analyses and detailed substantiating arguments are required to file these claims hence these always take the form of a retrospective reclaim which is typically handled by withholding tax experts.

## SPECIFIC CHALLENGES FACING INVESTORS

### Proving beneficial ownership

The first consideration in the entire process is the concept of beneficial ownership. Tax authorities want to ensure that only the 'beneficial owner' is claiming tax relief and, as a result, the process to secure relief at source and recovery has become increasingly complex. It is important to note that the beneficial owner may not always be the same as the legal owner when it comes to withholding tax relief.

The challenge is that this important concept is not specifically defined in the double taxation agreements which form the basis of most forms of withholding tax relief. This has resulted in inconsistent views of who constitutes the beneficial owner. In terms of the OECD (Organisation for Economic Co-operation and Development) Model Tax Convention on Income and on Capital Article 3(2),[6] any term which is not defined shall 'have the meaning that it has at that time under the law of that State for the purposes of the taxes to which the Convention applies, any meaning under the applicable tax laws of that State prevailing over a meaning given to the term under other laws of that State'.

Typically, the concept of beneficial ownership is not defined in domestic legislation and courts around the world have adopted different approaches in various settings. Some of the most common court cases have described the beneficial owner of income as follows:

> 'Full privilege to directly benefit from income.' (Indofood[7])

> 'The person who receives the dividends for his or her own use and enjoyment and assumes the risk and control of the dividend he or she received.' (Prevost[8])

It is clear that there is no exact definition of this term, and, in practice, various jurisdictions have different approaches to assess beneficial ownership. In considering withholding tax relief entitlements, the claimant needs to assess their own status (including trades around income events) and ensure they have documentary evidence for their entitlement which matches the claim country's position on beneficial ownership.

The onus of proving beneficial ownership rests with the investor, and under the traditional process the custodian bank will provide documents to the investor along with OECD definitions and the investor will have to make the selection. For common investment vehicles, this process may provide limited complexity; however, this election may become highly judgmental with more complex structures.

### Transparent structures

Investment vehicles can be structured to be opaque or transparent for tax purposes. A transparent investment vehicle is not seen as a separate entity for tax purposes and therefore all income and consequently the

tax burden flows through the entity to the underlying investors. This is commonly seen with partnership structures where income and expenses flow through to underlying partners and accordingly withholding tax relief entitlement rests with the underlying partners. Given the fact that tax reclaims are based on the entitlement of the individual investors in a transparent fund, there is significant administrative burden associated with collecting each investor's documents. In contrast, opaque investment vehicles are typically taxed in their own right and are generally viewed as the beneficial owner for withholding tax claims.

In terms of withholding tax relief, most investment countries follow the opaque versus transparent treatment as followed by each resident country locally; however, this concept can be complicated when different countries view the same investor differently. For example, Rev. Ruling 81-100 Group Trust structures are opaque entities for US tax purposes. These US tax-exempt entities are formed to pool assets for other entities which provide retirement or similar benefits. These trusts have grown in popularity as they protect the tax status of the underlying retirement plans but provide the benefits traditionally associated with pooling of assets. In the US they are viewed as separate entities that are able to secure a certificate of residence. Many foreign tax authorities, however, have taken the view that treaty relief cannot be granted at the trust level and instead must be claimed at the level of the underlying retirement plans. Given this difference in treatment, the local administrators for these group trusts typically struggle to provide the investor level documentation to fulfil the foreign tax office requirements in providing a tax refund.

Furthermore, some tax authorities require opaque investment vehicles to provide breakdowns of investor ownership percentages by country of residence to prove eligibility for treaty benefits.

## Tax office queries

With the rise of tax fraud, treaty shopping and other complex schemes to evade tax, tax authorities have drastically increased their scrutiny of withholding tax claims. The cum-ex and cum-cum scandals as investigated in the CumEx-Files[9] revealed that more than €150bn of taxes were incorrectly claimed across various EU Member States. This was the result of multiple parties effectively claiming withholding tax from the government on the exact same income event, resulting in the tax authorities paying out significantly more than they had collected in revenue on these income events.

As a result, tax authorities have been forced to tighten controls and enhance documentary support required to prove entitlement to relief. Most tax authorities now require proof of payment throughout the custody chain so they can trace the payment all the way to the end beneficial owner. Furthermore, tax authorities are asking more questions around reasons for investment, confirmation that the claimant has the right to use, enjoy and control their investments as well as further scrutiny of trades in securities around security ex and pay dates. The challenges surrounding these queries are also underpinned by tax authorities shortening the response periods in which investors may provide feedback and supporting information.

## Complex transactions

Complex transactions have been a long-standing challenge for investors when obtaining withholding tax relief and recovery. The treatment of these transactions and the uniqueness of each event require careful consideration by tax teams.

Spin-offs and share buy back transactions introduce unique tax consequences and as a result, some industry participants refuse to offer relief or reclaims on these events. For these transactions, distributions in kind are often treated as dividends and suffer tax at the standard dividend withholding tax rate.

The coding of these transactions on custodian systems sometimes means, however, that recovery opportunities cannot be easily detected or are not pursued due to additional complexity.

Cross-border transactions involve the listing of a company's stocks on an exchange other than the local exchange in the country of establishment. With these transactions, the need to deal with different intermediaries who are not always familiar with documents required for reclaims often results in excess withholding taxes going unclaimed.

Furthermore, certain emerging markets attract great complexity and risk from a withholding tax relief and reclaim perspective and as such many traditional custodian banks may exclude these markets from their service offering. This results in investors losing out on tax recovery opportunities due to unique transactions or investments into complex tax markets.

## HIDDEN COST OF TAX INEFFICIENCIES

Completing tax documentation to support the tax relief and recovery process typically provides operational challenges for investment operations teams. Quantifying the effect of this operational drag is difficult; however, specific tax losses due to other factors are easier to quantity. These are shown in Table 1.

As can be seen from Table 1, it is easy for withholding tax to considerably erode investment returns. This is why this niche area of tax has received more focus over the last decade and why investors need to

**Table 1: Tax inefficiencies**

| Factor | Explanation | Effect on investment performance* |
|---|---|---|
| Missed tax relief | As outlined above, relief at source documentation is required to be in place ahead of the income event. Given the tight deadlines, as well as the fact that a number of intermediaries support the tax relief process, breakdowns in the process regularly occur. Once tax relief is missed, investors will need to institute a tax reclaim which can take 2–3 years until a refund is paid due to documents required and statutory waiting periods. | 5.3–12.4 bps |
| Claiming at end of statute of limitations | The majority of participants will prioritise tax reclaims that are close to expiry. In most cases, the withholding tax reclaim will only be instituted 2–5 years from the date that the withholding tax was initially suffered. | 5.3–19.2 bps |
| Queries and objections | Due to the complexities in completing international tax documentation, many foreign tax offices reject reclaims or raise queries. While a window exists to dispute the rejections or respond to the queries, this process is time-consuming and complex to navigate without being an international tax specialist. Rejections and queries typically lengthen the reclaim process by 2–3 years. | 5.3–12.4 bps |
| Claim coverage | Without utilising specialist providers, investment managers are unable to utilise legal reclaim mechanisms as well as perform tax recoveries in certain emerging markets where custodian banks do not offer reclaim capabilities. | 37.5–60 bps |
| Missed claims | Missed claims relating to incomplete documentation, human error and other factors outside the control of the investor. | 3.8–6 bps |

* The calculation above assumes a dividend yield of 2.5–4 per cent p.a., double taxation treaty rate of 15 per cent and a discount rate of 8 per cent

seriously consider what can be done to ensure all recovery and relief opportunities are maximised.

## INDUSTRY TRENDS

Of course, the withholding tax landscape is ever-changing and although the move towards digitalisation has been slower than most would have hoped for, it is starting to happen. Many tax authorities are moving towards the adoption of electronic documents, acceptance of e-signatures, as well as moving towards the adoption of technologically enhanced identifiers — for example, the Spanish tax authority using quick response (QR) codes on their tax residency certification.

Many tax authorities have also launched portals for online reclaim submission which hopefully will ease the burden of manual claim submission in time. As with all new technology, challenges may arise. Most recently, the launch of the German tax authority portal had a lack of functionality to cater for bulk reclaim submission, which has resulted in the industry lobbying with the German tax authority to allow a longer transition period from manual submission. Automation and portal integration specialists are being used throughout the industry to help allow for smoother transition for users of the portal.

With the introduction of the OECD's Treaty Relief and Compliance Enhancement (TRACE)[10] programme and its adoption in Finland in January 2021,[11] authorities around the world are thinking about how to hold parties in the payment chain more accountable for transactions and the associated relief being granted. In Finland, the TRACE programme requires intermediaries to register as authorised intermediaries (AIs) and to file certain annual information returns. This coupled with an investor self-declaration process resulted in a new way for documenting and providing relief. The AI assumes the tax liability and can be held responsible for any under-withholding. The adoption of TRACE in Finland has had its challenges and for many intermediaries there are concerns around additional risk and liability should they become AIs. TRACE's mere implementation in Finland, however, suggests big shifts in processes for relief going forward — ones which investors and custodian banks will need to monitor closely.

The EU Commission ran a public consultation from April to June 2022 on a new initiative called Faster and Safer Tax Excess Refund (FASTER)[12] to introduce an EU-wide system for withholding tax on dividend and interest payments which more efficiently caters for tax relief and refund and reduces the risk of tax fraud. This initiative is expected to result in significant changes in the industry and market participants await an EU Directive from this.

## RISK MANAGEMENT AND FIDUCIARY DUTY

Withholding tax and its drag on investment performance has gained greater attention and focus over the last few years for investment managers and asset owners alike. Many in the industry are starting to track withholding tax leakage, recovery timelines and are monitoring their custodian banks and service providers in this regard. Investors are demanding more of their managers, custodians and administrators, and are often considering withholding tax monitoring as part of their fiduciary duties. Given the above trends, service providers are being asked to opine more regularly on the likelihood and timelines for successful withholding tax recovery.

On the other hand, custodian banks and recovery specialists are considering the risks associated with withholding tax-related services, including taking tax positions on behalf of clients and offering tax advice. While some are choosing to amend product scope to narrow the scope of services, others are choosing to see this as an opportunity to work with investors on a broader scale.

## HOW SHOULD ONE KNOW HOW TO IMPROVE AND WHAT TO OUTSOURCE?

The first step for any investor is to assess the current status quo. This involves analysing income reports and custodian reclaim reports retrospectively to identify:

(1) Whether relief at source is being applied in the markets where it is available;
(2) Where relief at source is not available or has not been applied, ensuring that a reclaim is created for the income event, with quick refund as the first preference where available and then standard claim;
(3) Following the reclaims through the process to ensure they ultimately result in refunds;
(4) Reviewing the administrative workload associated with the tax relief and recovery process.

Many investors utilise third-party specialists to conduct these 'health checks' and identify areas for improvement.

Consequently, there may be a need to appoint a provider to assist with paperwork on a go-forward basis and to monitor the success of relief at source. It may also be worthwhile utilising an expert in the field to file reclaims in markets not covered by the custodian offering or to supplement the current process with ECJ claim filings.

For some investors it may make sense to outsource the entire process to a third party who can control and monitor this area on behalf of the investor and work to minimise

**Table 2: Benefits and disadvantages of outsourcing**

| Internal | | Partial outsourcing | | Full outsourcing | |
|---|---|---|---|---|---|
| **Pros** | **Cons** | **Pros** | **Cons** | **Pros** | **Cons** |
| Investor maintains full control of the process | Risk of missed relief opportunities resulting in the need for reclaim which could take many years | Experts track relief opportunities and assist with paperwork and tracking to ensure opportunities are maximised | Investor does not have complete control of the process | Experts track relief opportunities and assist with paperwork and tracking to ensure opportunities are maximised | Fully dependent on external entities to fulfil tasks with no internal capacity |
| Potential cost savings as fees are not paid externally | Risk of missed reclaim opportunities resulting in unnecessary tax exposure | Experts fill any 'gaps' in recovery to ensure complete coverage | External service providers charge high fees (these are typically much less than the additional benefits) | Experts handle the entire process ensuring complete coverage | Outsourcing may have a negative impact on staff |
| | Immense administrative burden on employees to maintain withholding tax related paperwork at custodian | Reduces administrative burden to some extent | Problems replacing external service provider in the event of poor performance | Removes administrative burden from employees thereby freeing up capacity for other initiatives | Problems replacing external service provider in the event of poor performance |
| | Risk of incorrectly interpreting or applying tax laws resulting in non-compliance | Less infrastructure required to facilitate the process | | Less infrastructure required to facilitate the process | |

leakage at all times. There is not one approach that fits all investors; however, the benefits of focusing on this area and working out where supplementary services are required cannot be underestimated.

Table 2 summarises the benefits and disadvantages of outsourcing this space.

## CONCLUSION

While the withholding tax space is filled with complexity, it also presents opportunity for efficiency and savings where managed correctly. The function requires diligence and constant focus in a landscape which is changing all the time. Utilising external resources to relieve pain points and reduce withholding tax leakage is becoming more common and the concept of outsourcing the process in its entirety or particular segments is gaining increased focus. In a world where taxes are a certainty, making sure one pays attention is of utmost importance.

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