By PwC Deutschland | 08. Oktober 2014

Schematic sale and return of securities cum and ex div fails

The Supreme Tax Court has rejected a scheme involving the sale of securities cum div and their immediate return to the seller by way of loan in such a manner that both parties can claim credit for the dividend withholding tax.

A bank arranged a scheme for its customers to buy quoted shares in German companies on the day before the dividend cut-off date (*cum* div) and to lend them back to the seller on the following day. They would then be sold back to the seller immediately after the dividend payment (*ex* div). The shares were held by other German banks under a complicated series of custodial and sub-custodial agreements. The economic risks were borne by the seller. The actual dividends were paid to the seller as the economic holder of the securities on the day of payment; the seller paid a compensating payment to the buyer as the legal owner of the shares (referred to as a “manufactured dividend”) and both parties claimed a credit for the withholding tax on the dividend received.

The Supreme Tax Court has reacted by re-qualifying the “manufactured dividend” as trading income. The recipient was the legal owner of the shares on the dividend payment date but at no time bore any risks, or enjoyed any rights, associated with ownership. Rather, the economic ownership lay at all times with the seller. Since the customer was not the economic owner of the shares, it could not receive a dividend on its own behalf. Without dividend income it could not claim a credit for dividend withholding tax. The “manufactured dividend”, as trading income, was not a substitute.

Supreme Tax Court judgment I R 2/12 of April 16, 2014 published on October 8

Schlagwörter

cum div, ex div, quoted shares