Client Alert

January 21, 2016

Qualifying Private Placement Exemption

Overview

The qualifying private placement exemption, which became available on 1 January 2016, makes interest on privately placed notes and/or bilateral loans exempt from United Kingdom withholding tax in certain circumstances where the creditor is resident in a treaty jurisdiction.

This exemption is the latest move by HMRC to simplify and streamline the system of withholding tax exemptions, following on from the introduction of the DTT passport scheme in 2010. It supplements, rather than replaces, the existing exemptions, such as the quoted Eurobond exemption (which applies to listed debt securities) and treaty exemptions granted under the DTT passport scheme and Form DT Company routes.

In many cases, the new exemption will cut down on formalities, since, in contrast to the treaty exemption, debtors self-assess their eligibility, and there is no requirement to apply to HMRC for authorisation not to withhold. The treatment of investors in some jurisdictions under this exemption may also be more favourable than under a treaty: in those cases where a United Kingdom treaty currently provides for a reduced rate of withholding tax rather than a full exemption (such as for Australia and China, where the general treaty rate is 10 percent), investors will now potentially benefit from a 0 percent rate.

General conditions for the exemption

- The creditor must:
  - be resident in a qualifying territory (defined to include the United Kingdom and, broadly, any other territory that has a double taxation treaty with the United Kingdom that includes a non-discrimination provision – but does not require a 0 percent treaty rate on interest)
  - be beneficially entitled to the interest on the security "for genuine commercial reasons and not as part of a tax advantage scheme".
- The security must:
  - represent a debtor loan relationship of a company (which will almost always be the case in the private placement context)
  - not be listed on a recognised stock exchange
  - have a term of not more than 50 years
  - **either** have had a minimum value of £10 million at the time it was entered into or have been comprised in a single tranche of relevant securities with a minimum collective value of £10 million at the time they were entered into – note that a security that is repaid over the term of

the instrument will not cease to qualify when its value (or the collective value of the entire placement) falls below the £10 million threshold.

- The debtor must:
    - hold a creditor certificate (see below) that has not been cancelled or withdrawn with respect to each creditor
    - have entered into the security “for genuine commercial reasons and not as part of a tax advantage scheme”
    - reasonably believe that each creditor is not a connected person of the debtor, connection being determined, broadly, on the basis of common economic control.
- The exemption will apply if the necessary conditions are met on or after 1 January 2016, regardless of when the security was entered into.

Formalities

- For the exemption to apply, the creditor must provide a written statement confirming that the creditor conditions described above are met, known as a “creditor certificate”.
- There is no requirement for the debtor to apply to HMRC for the exemption to be granted: according to a participant in the consultation process, “HMRC is adamant that it does not want to be embroiled in administering the application of the exemption, meaning that HMRC will not be operating a clearance mechanism or issuing directions to debtors”. However, HMRC may require the debtor to produce a creditor certificate with respect to each creditor at any time.
- A creditor must notify the debtor as soon as practicable after it becomes aware that the confirmation given in a creditor certificate has ceased to apply.

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