NZSUPERFUND
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By online submission

Directorate-General for Taxation and Customs Union
European Commission
1049 Bruxelles
Belgium

18 September 2023

Dear Sir/Madam

Submission on the European Commission: Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes.

We refer to the European Commission's Proposal for a Council Directive on Faster and Safer Relief of Excess Withholding Taxes (the Proposal) released on 19 June 2023 which proposes new rules in relation to withholding tax procedures.

Background on the New Zealand Superannuation Fund

The New Zealand Superannuation Fund (the Fund or NZSF) was established in 2001 to help provide for the future funding of retirement benefits paid by the New Zealand Government which are guaranteed to all New Zealanders aged 65 and older.

NZSF is a long-term, growth-oriented, global investment fund that is funded by the New Zealand Government. The Fund's organisational purpose is: "Sustainable investment delivering strong returns for all New Zealanders". While our focus is on maximising risk-adjusted returns and growing the size of the Fund, we believe it is important to achieve those financial returns in a sustainable way.

NZSF is not an entity but rather it is a collection of assets wholly owned by the New Zealand Government. NZSF is a tax resident of New Zealand, which is not a Member State of the European Union (EU).

Further background information on NZSF is contained on our website: www.nzsuperfund.nz

Current challenges

NZSF is invested in diversified assets throughout the world, including the EU. As at 30 June 2023, 18% of the Fund is invested in Europe and over 44% of the Fund is invested in global equities. NZSF is therefore subject to varying withholding tax rates at source on income from listed equities (and also bonds) within the EU.

New Zealand is a signatory to bilateral double tax treaties (DTT) with a number of EU Member States and in some circumstances, is eligible for tax exemption (i.e 0% withholding) either by virtue of a DTT or domestic law exemption - for example on account of being a Sovereign Wealth Fund and therefore eligible for sovereign immunity. NZSF is often subject to withholding tax at a rate that deviates from the treaty rate (or exemption) at source and thereby engages in the process of recovering over-witheld tax via reclaim application. In our experience, we concur that the reclaim process can often be a "burdensome, costly and lengthy" exercise as described in the explanatory memorandum.

In certain instances, the reclaim process is managed by NZSF's Global Master Custodian, or their appointed sub-custodian. Nevertheless, there are some instances where NZSF must enlist the assistance of a specialist local tax agent to pursue reclaims, at an additional cost. On occasion, NZSF does not pursue reclaims as it is not financially viable.

Years can elapse between the payment of the income/withholding of the tax and receipt of the withholding tax refund following a successful reclaim. This is due to a combination of the time taken to prepare the documentation required to submit the reclaim, and for tax administrations to assess and process the reclaim.

As a global institutional investor into various EU Member States, and in consideration of the challenges outlined above, NZSF supports the Proposal's objectives to:

i. facilitate cross-border investment in the EU by giving taxpayers proper and effective access to tax benefits arising from double tax treaties and EU Directives;
ii. prevent tax abuse in the field of withholding tax; and
iii. provide economic benefits.

Key submission points

We have set out our submissions on the Proposal in the Appendix and summarise these below:

- The Proposal should apply equally to EU and non-EU investors.
- We support the establishment of a common digital tax residence certificate (eTRC), that can be valid for more than 1 year.
- A digital tax residence certificate of a tax resident in a non Member State should be recognised as a valid eTRC.
- We support the requirement for Member States to establish and maintain a national register of Certified Financial Intermediaries (CFI's) that is publicly accessible.
- We support the obligation on CFI's to provide reporting under the standardised reporting framework, however the ability of Member States to impose unique reporting requirements will diminish the efficiencies sought to be gained from a universal reporting approach.
- The Directive's current wording would require CFI's to report all transactions, even those where relief is not sought, potentially imposing burdensome filing obligations.
- Divergent interpretations of "beneficial ownership" across Member States may hinder the Proposal's effectiveness.
- We support the ability for CFI's to include a risk assessment that takes into account the credit risk and fraud risk of the registered owner, particularly in respect of sovereign investors.
- We support the two proposed systems of relief, noting that a relief at source system is the optimal relief procedure of NZSF.
- The ability of sovereign investors such as NZSF to access relief at source in Member States, would bring the EU into alignment with other jurisdictions that offer relief at source for sovereign investors.

- We support the requirement for Member States to apply interest at the prescribed rates in order to incentivise the timely processing of reclaim applications by Member States.
- We support the retention of a standard refund system in unique circumstances where the conditions of the Directive cannot be met.
- The Proposal is set to take effect on 1 January 2027 after adoption, but clear guidance is necessary for handling pending reclaim applications in the meantime.
- The Proposal should be extended to include non-listed equities for low risk investors such as NZSF.
- The European Commission should oversee the adoption of the Directive in Member States, with a mechanism for investors to appeal to the Commission if a Member State incorrectly denies relief under the quick refund procedures.

We acknowledge the need to prevent fraud and abuse in the withholding tax process.

We are grateful for the opportunity to contribute to the public consultation and are happy to respond to any questions the Commission may have in relation to our submission.

Please contact me (jpayne@nzsuperfund.co.nz or +64 9 373 8964) or Mikaila Harris (mharris@nzsuperfund.co.nz or +64 9 922 0325) if you have any questions or require any further clarification.

Yours sincerely

John Payne

Head of Tax

Appendix - Submission

We have commented on the specific Chapters (and Articles) of the Proposal that are of relevance to NZSF below.

General comment: Eligibility of non-residents to access relief under the Proposal

As a tax resident of New Zealand, NZSF is not a resident of a Member State. Through-out the Proposal, it is suggested that residents of non-Member States may be eligible for relief under the Directive however this is not explicit in the Proposal.

The measures proposed in the Directive should apply equally to EU and non-EU investors in order to achieve the objective of facilitating cross-border investment and to prevent discrimination against non-EU resident investors. This is consistent with article 63 of the Treaty in the Function of the European Union and the Emerging Markets case (C-190/12) which state that the free movement of capital also applies to third country investors.

Chapter II: Common EU digital tax residence certificate

We support the establishment of a common digital tax residence certificate (eTRC) and we consider this will help reduce the administrative and paper-based process of demonstrating tax residency.

However, as a tax resident of New Zealand, NZSF is not a resident of a Member State. Currently, the Fund is required to produce a physical certificate of tax residence issued by the New Zealand tax administration (Inland Revenue) in order to pursue reclaims in each Member State. Where reclaims cover several years, a tax residency certificate can also be required to support each reclaim year notwithstanding there has been no change in tax residency status.

Consistent with our initial submission point, we consider that Member State's should be required to recognise a digital certificate of tax residence that is issued by a non-Member State (such as the New Zealand Inland Revenue) and meets the requirements of paragraph 2, Article 4 (with the exception of the requirement to provide the European Unique Identifier number – EUID) as a valid eTRC. This is consistent with paragraph 2, Article 11 which allows proof of tax residence in a third country to be provided as part of the registered owners eligibility verification process.

Alternatively, a template digital tax residence certificate for non-residents of member states could be developed and included in the Directive, that is recognised as an eTRC.

We support the ability for eTRC's to be valid for periods longer than a year, particularly for investors such as NZSF whose tax residency status is unlikely to change over the long term.

Chapter III: Withholding tax relief procedure

1) Certified Financial Intermediaries (CFI) and registration

We support the requirement for Member States to establish and maintain a national register of certified financial intermediaries (CFI) that is publicly accessible.

We expect the Global Master Custodian of NZSF (and its sub-custodian network within the EU) will be eligible to, and will register as a CFI in each Member State. However, NZSF does not currently have the ability to determine with certainty whether this will occur, and therefore we defer comment on this aspect of the Proposal other than to note that the ability of NZSF to benefit from the Directive appears to be contingent on the profile and actions of its third party Global Master Custodian.

2) Reporting

We support the obligation on CFI's to provide reporting under the standardised reporting framework.

Enabling CFI's to transmit information directly to the local tax administration will:

i) reduce the number of participants in the reclaim process and manual handling of documentation (thereby reducing compliance costs for investors);
ii) simplify the preparation and collation of documentation by CFI's; and
iii) provide the tax administration with sufficient information regarding the underlying security to protect against fraud and abuse.

However, these efficiencies could be diminished if Member States impose unique reporting requirements in addition to those set out in Article 9 (and by extension, Annex II). Maintaining universal reporting information requirements across all Member States will help manage the reporting burden that is placed on CFI's under the Proposal.

The current wording of the Directive would require CFI's to report on all transactions (including those upon which relief is not being requested). We believe that this requirement would result in onerous filing obligations for CFIs.

3) Request for relief and due diligence of register owners eligibility

We support the ability for CFI's to include a risk assessment that takes into account the credit risk and fraud risk of the registered owner receiving dividends or interest (paragraph 1, Article 10).

Sovereign investors such as NZSF are under legal obligation not to bring their respective countries into disrepute.[1] Such investors are therefore ideal candidates to benefit from a relief at source system as there is no risk of such organisations engaging in tax abuse.

Additionally, we consider that the de minimis threshold outlined in paragraph 2, Article 9 could be increased for specific categories of investor such as sovereign investors including NZSF.

Given the differences in interpretation across Member States of the concept of "beneficial ownership", the requirements in paragraph 1(b), Article 10 for CFIs to obtain a declaration of beneficial ownership from investors may inhibit the Proposal from meeting its objectives. Definitive methods of satisfying the 'beneficial ownership' requirement are necessary.

4) Systems of relief – relief at source or quick refund

We support the ability of Member States to elect a 'fast track' relief procedure from the following[2]:

i) Relief at source: whereby the withholding tax rate applicable under a DTT is applied at payment;
ii) Quick refund: whereby tax is withheld at the full rate but is refunded down to the treaty rate (within 25 days of the application); or
iii) A combination of the two systems.

We consider that a relief at source system is more likely to meet the objectives of the Proposal and Member States should be incentivised to offer this system of relief over a quick refund process. In any

[1] Refer to section 58(2)(c) of the New Zealand Superannuation and Retirement and Income Act 2001 which establishes the NZSF and the Guardians – the manager and administrator of the NZSF.

[2] With a strong preference for relief at source.

event, a universal withholding tax relief system (whether relief at source or via reclaim) would significantly reduce the compliance costs for investors and accelerate the refund of over-withheld tax.

Relief at source is the preferred relief system for NZSF as this reduces the administrative burden and compliance cost of pursuing reclaims, but also increases the funds that NZSF can retain to carry out its purpose of funding future retirement benefits in New Zealand.

The ability for sovereign investors such as NZSF to access relief at source in Member States would align the EU with most other jurisdictions that offer relief at source, for example[3]:

- United States: Income that foreign sovereigns receive from their investments in US equity, debt and other financial securities are exempt to the extent that this is not derived from commercial activities or controlled entities.
- Australia: income that foreign sovereigns receive from portfolio investments in Australian companies, where the sovereign has no control or direction over the operations of the companies invested in, are exempt.

The process and documentation required to support relief at source in these jurisdictions is relatively uncomplicated.

5) Late payment interest

As noted, it can be several years before a withholding tax reclaim is processed and a refund ensues.

We support the requirement for Member States to apply interest at the prescribed rates in order to incentivise the timely processing of reclaim applications by Member States.

In our experience however, Member States may refuse to pay interest, and a taxpayers only ability to recover such interest is to engage in public litigation (at significant cost to the taxpayer). An appeal mechanism is therefore necessary.

6) Standard refund system

We support the retention of a standard refund system in unique circumstances where the conditions of the Directive cannot be met. However, defaulting to the standard refund system should occur only in exceptional circumstances.

Chapter IV: Final Provisions

1) Entry into force

Once adopted by Member States, we understand the Proposal is expected to come into force on 1 January 2027 (following a transposition period).

Clear guidance is needed on how tax administrations of Member States must address growing backlogs of unprocessed reclaim applications in the interim.

[3] Other larger jurisdictions that offer relief at source include Canada, UK and parts of Asia.

Other factors for consideration:

1) Investments into unlisted securities

Pursuant to Article 3, the application of the Proposal is limited to 'publicly traded share(s)' and therefore non-listed equities are out of scope.

We consider that for low risk investors such as NZSF, the systems of relief should be available for non-listed equities, similar to the option for the systems of relief to be made available in relation to withholding tax on interest payments on publicly traded bonds.

Without the ability to access relief in respect of privately held shares, global investors will continue to suffer the ongoing challenges faced within the standard refund system that the Proposal seeks to overcome.

2) Ability to appeal declined applications under FASTER relief systems

While the proper implementation and enforcement of the Proposal in Member States will be monitored by the European Commission, there should be an established mechanism that is cost efficient and accessible for investors to have the ability to raise an appeal to the Commission where a Member State refuses to grant relief under the quick refund procedures.