

Guidance notice

on applications under Section 50c para. 2 sentence 1 no. 1 of the German Income Tax Act (ITA) for a certificate of exemption or under Section 50c para. 3 ITA for a certificate of refund of German Withholding Tax pursuant to Section 50a ITA on the basis of Double Taxation Agreements (DTA) for Remuneration paid to supervisory board and advisory board members

The following principles apply to relief from German withholding tax pursuant to Section 50a para. 1 no. 4 of the German Income Tax Act (ITA).

1. Tax liability pursuant to the German ITA
 - a. Income subject to limited tax liability in accordance with Sections 49 para. 1 no. 3 ITA, 50a para. 1 no. 4 ITA

Remuneration that a domestic stock corporation partnership limited by shares, mining union, limited liability company or other corporation, cooperative or association of persons in line with civil or public law in which the shareholders are not to be regarded as entrepreneurs (partners) grants to a non-resident member of the supervisory or advisory board for monitoring the management is subject to limited tax liability as income from self-employment in accordance with Section 18 para. 1 no. 3 and Section 49 para. 1 no. 3 ITA.

The tax is levied by means of tax deduction and amounts to 30% of the remuneration in accordance with Section 50a para. 2 second half of Sentence 1 ITA. Information and forms, instruction sheets, etc. on this tax deduction can be found [here](#).

b. Responsibilities

The Federal Central Tax Office (FCTO) is responsible for relief (exemption or refund) from withholding tax within the meaning of Section 50a para. 1 ITA, on the basis of Section 50g ITA or DTA (Section 4 para. 2 and Section 5 para. 1 no. 2 of the German Fiscal Administration Act (FVG) in conjunction with Section 50c ITA).

The FCTO is also responsible for establishing whether domestic income is subject to limited tax liability pursuant to Section 49 para. 1 ITA and whether tax is to be withheld from such income and remitted pursuant to Section 50a para. 1 ITA. If there is any doubt concerning the limited tax liability or the obligation to withhold tax, before an application is filed the matter should be clarified with the Deduction Division (Abzugsbereich) of Department St II 9 at the FCTO (Abzugsteuer@bzst.bund.de).

2. Restrictions on the right to tax on the basis of DTA

The DTA currently in force can be found [here](#) (in German).

a. General

If there is an applicable DTA in force, the relevant provisions of that DTA must be consulted to ascertain whether the income subject to the withholding of tax may indeed be taxed in Germany.

b. Allocation of the right of taxation to the company's country of residence

In accordance with the regulation in Art. 16 of the OECD Model Tax Convention (OECD MTC), almost all currently applicable DTAs allocate the right of taxation for supervisory board and advisory board remuneration to the country in which the paying company is domiciled. In this case, relief from German tax deduction for foreign supervisory board or advisory board members is not possible.

In order to avoid double taxation of the income, the supervisory board or advisory board member's country of residence either does not tax the remuneration in question (exemption method) or offsets the tax paid in Germany (offsetting method). The method to be used depends on the respective DTA and the tax regulations of the country of residence.

Information on evidence of withholding tax paid in Germany to be submitted to foreign tax authorities can be found [here](#).

c. Deviations from the OECD MTC

Not all DTAs correspond exactly to the OECD MTC. For example, a number of agreements extend the regulation in Art. 16 OECD MTC to include a company's executive bodies.

Another deviation from the Model Tax Convention is contained in **Art. 16 of the DTA with the US**. Contrary to Art. 16 of the OECD MTC, this stipulates that the source country does not have a comprehensive right of taxation to remuneration for work as a supervisory or advisory board member; it can tax this only to the extent that the taxpayer actually performs this work in the source country. Relief from German tax deduction is therefore permitted only for the remuneration paid for supervisory board or advisory board activities performed abroad. A breakdown must therefore be shown in the refund application.

Art. 11 of the DTA with France is formulated very differently. This is the only DTA in which the right of taxation is allocated not to the source country, but to the payment recipient's country of residence. However, the German right to levy withholding tax on the basis of Art. 11 para. 2 of the DTA with France remains unaffected. Full relief from the taxes levied by way of deduction is possible.

In the DTA with Moldova (Moldavia), there is no specific regulation on supervisory board or advisory board remuneration. The right of taxation is therefore based on **Art. 17 of the DTA with Moldova** and is allocated to the payment recipient's country of residence. In this case, full relief is also possible.

3. Relief procedures

Relief from German Withholding Tax may be obtained either by applying for a refund of tax already remitted (Section 50c para. 3 ITA) or – before payment is made to the remuneration creditor – by applying for a certificate of exemption (Section 50c para. 2 sentence 1 no. 1 ITA).

Since 1 January 2023, applications for a certificate of exemption or refund must be submitted to the FCTO in accordance with the officially prescribed data set via the officially specified interface, i.e. by means of the corresponding application via the BZSt online portal (BOP) (Section 50c para. 5 sentence 1 ITA). Further information on registration and application can be found [here](#).

As **Art. 16 of the DTA with the US** stipulates that a breakdown must be prepared based on where the supervisory board or advisory board activity was performed, **only** a refund application pursuant to Section 50c (3) ITA can be made in these cases.

a. Exemption procedure under Section 50c para. 2 sentence 1 no. 1 ITA (certificate of exemption)

On application, full or partial exemption from the withholding of tax pursuant to Section 50a para. 1 ITA will be certified. If the remuneration creditor is granted a certificate of exemption at his/her request, the remuneration debtor is authorized to refrain from withholding and paying the withholding tax. However, the remuneration debtor must also submit a tax declaration in this case. The procedure for issuing certificates of exemption is governed by Section 50c para. 2, from sentence 4 and para. 5 ITA. Please note the following:

- The certificate of exemption was issued upon written application on an officially prescribed form (if the application was received by 31.12.2022; for applications from Switzerland until 30.11.2023). For applications submitted after 31.12.2022, electronic transmission via BOP is mandatory. To avoid undue hardship, the FCTO may waive electronic transmission upon request (Section 50c para. 5 sentences 1 and 3 ITA).
- The application must be filed by the supervisory board or advisory board member. It may also be filed by the company for which the board member works or by a tax consultant if a written power of attorney is presented.
- The period of validity of the certificate of exemption begins at the earliest on the day on which the application is received by the BZSt. The issuance of retroactive exemption certificates is not possible.
- The prerequisite for exemption from tax withholding is that an exemption certificate has been issued at the time of payment. The application should therefore be filed in good time before the start of the period for which exemption is required. The processing time is approximately three months once all the necessary documents have been submitted. The order of processing is based on the receipt of applications or requested documents.
- The supervisory or advisory board member must prove that he/she is resident in his/her country of residence by way of a confirmation from the responsible tax authority of the country of residence (Section 50c para. 5 Sentence 2 ITA).

b. Refund procedure under Section 50c para 3 ITA (certificate of refund)

If a DTA stipulates that the income subject to the withholding tax may not be taxed or may be taxed only at a lower rate, the full or partial refund of tax withheld and remitted may be applied for pursuant to Section 50c para. 3 ITA. Please note the following:

- The certificate of refund was issued upon written application on an officially prescribed form (see above Point 3 a). For applications submitted after 31.12.2022, electronic transmission via the BOP is mandatory. To avoid undue hardship, the FCTO may waive electronic transmission upon request (Section 50c para. 5 sentences 1 and 3 ITA).
- The application must be filed by the supervisory or advisory board member. It may also be filed by the company for which the board member works or by a tax consultant if a written power of attorney is presented.
- The remuneration debtor's tax certificate must be appended to the application for refund (Section 50c para. 3 sentence 3 ITA). In accordance with Section 50a para. 5, sentence 7 ITA, the remuneration debtor is obliged to certify the necessary particulars upon request by the remuneration creditor subject to limited tax liability.
- The payment of the tax withholding amounts is an indispensable prerequisite for a refund.
- Under tax law the refunded amount is assigned to the supervisory or advisory board member. Payment can be made to a third party only if a corresponding power of collection or a declaration of assignment has been submitted to the FCTO.
- The supervisory or advisory board member must prove that he/she is resident in his/her country of residence by way of a confirmation from the responsible tax authority of the country of residence (Section 50c para. 5 Sentence 2 ITA).

Exception USA:

Applicants resident in the USA may state their social security number instead of their Taxpayer Identification Number. The US Internal Revenue Service issues certificates of residence for income tax purposes, which must be attached to the application for exemption (Form 6166). Notes to the issuance of certificates of residency are available from the US tax authorities in the "Instructions for Forms 8802".

Deadline for applications

An application for refund must be submitted within a period of four years after the end of the calendar year in which the remuneration was paid. The period ends not less than a year after the date on which the tax was paid (Section 50c para. 3 sentence 2 ITA).