



Guidance Notice

on the entitlement to relief pursuant to Art. 21 of the Double Taxation Agreement between Germany and Japan (DTA Japan) and to Section 50d para. 3 of the German Income Tax Act (ITA) in the case of applications pursuant to Section 50c para. 2 sentence 1 no. 1 (exemption) and para. 3 (refund) ITA for relief from German withholding tax pursuant to Section 50a ITA

1. Certificate of exemption or refund

A certificate of exemption or refund will only be issued if the applicant is both entitled to an exemption under Art. 21 DTA Japan and entitled to relief under Sec. 50d (3) ITA. If one of these requirements is not met, the corresponding application will be rejected.

2. Entitlement to benefits pursuant to Art. 21 DTA Japan

Pursuant to **Art. 21 para. 1 DTA Japan**, subject to the further paragraphs of Art. 21, only qualified persons within the meaning of Art. 21, para. 2 DTA Japan are entitled to the benefits of the DTA Japan.

Qualified persons within the meaning of **Art. 21 para. 2 DTA Japan** are the following persons resident in a Contracting State (Germany or Japan):

- Individuals (para. 2 letter a),
- a qualified governmental entity as defined in Art. 21 para. 7 letter a (para. 2 letter b),
- a company, if its principal class of shares is listed or registered and is regularly traded on one or more recognised stock exchanges (para. 2 letter c),
- a pension fund or pension scheme, provided that, as of the end of the prior taxable year, more than 50% of the beneficiaries, members or participants of that pension fund or pension scheme are individuals who are residents of either Contracting State (para. 2 letter d),
- a person established under the laws of that Contracting State and operated exclusively for a religious, charitable, educational, scientific, artistic, cultural or public purpose, only if all or part of its income may be exempt from tax under the laws of that Contracting State (para. 2 letter e),
- a person other than an individual, if at least 65% of the voting shares or other beneficial interests of the person are owned, directly or indirectly, by residents of that Contracting State that are qualified persons by reasons of para. a to e (para. 2 letter f).

Notwithstanding that a company that is a resident of a Contracting State may not be a qualified person, pursuant to **Art. 21, para. 3, DTA Japan** it shall be entitled to all benefits under this Convention in respect to an item of income if that resident satisfies any other specified conditions in the relevant provisions of the Convention for the obtaining of such benefits, and if

- at least 65% of the voting shares or other beneficial interests of the person are owned, directly or indirectly, by persons who, if they had derived the item of income directly, would, under the Agreement, be entitled to equivalent or more favourable benefits; or
- at least 90% of the voting shares or other beneficial interests of the person are owned, directly or indirectly, by persons who, if they had derived the item of income directly, would, under the Agreement or an agreement that the Contracting State from which the item of income arise has concluded with another State, be entitled to equivalent or more favourable benefits.

This is the case in particular if the double taxation agreement concluded between the respective state of residence of the persons or companies involved in the applicant and Germany assigns the exclusive right of taxation to the state of residence with respect to the income generated and Germany is thus not entitled to any right of taxation.

Pursuant to **Art. 21, para. 4, letter a DTA Japan**, an entitlement to the benefits of the Convention in the cases of Art. 21, para. 2, letter f and para. 3 DTA Japan only exists if the conditions have already been fulfilled for twelve months before payment of the remuneration.

Pursuant to **Art. 21, para. 5 DTA Japan**, companies resident in Japan are entitled to the treaty benefits for income derived from Germany if they are engaged in the active conduct of a trade or business in Japan, the income derived from Germany is derived in connection with, or is incidental to, that trade or business and that resident satisfies any other specified conditions for the obtaining of such benefits. The active conduct of a trade or business also includes the business conducted by partnerships in which that person is a partner, and the business conducted by connected persons, if both persons are engaged in the same or complementary lines of business (cf. Art. 21, para. 5 letter c DTA Japan).

3. Entlastungsberechtigung nach § 50d Abs. 3 EStG

Während Art. 21 DBA Japan bestimmt, welche Personen abkommensberechtigt sind, schränkt § 50d Abs. 3 EStG nach innerstaatlichem Recht die Entlastungsberechtigung einer antragstellenden Person in bestimmten Fällen trotz grundsätzlich bestehender Abkommensberechtigung nach Art. 21 DBA Japan ein. Nach Art. 21 Abs. 9 DBA Japan steht Deutschland die Anwendung des § 50d Abs. 3 EStG als Rechtsvorschrift zur Verhinderung der Steuerumgehung oder -verkürzung ausdrücklich zu.

4. Entitlement to relief pursuant to Section 50d Abs. 3 ITA

While Art. 21 DTA Japan determines which persons can claim treaty benefits, Sec. 50d (3) ITA restricts the relief entitlement of an applicant under domestic law in certain cases despite claims under Art. 21 DTA Japan that exist in principle. Pursuant to Art. 21 para. 9 DTA Japan, Germany is expressly entitled to apply Section 50d para. 3 ITA as a legal provision to prevent tax avoidance or tax evasion.

Pursuant to Sec. 50d para. 3 ITA, a corporation, association of persons or estate (or similar organization subject to corporate tax; hereinafter: applicant) is entitled to full or partial relief from withholding tax as far as

- persons have an interest in it or are beneficiaries under its articles of association, foundation business or other constitution who would be entitled to tax relief if they generated the income directly (Ownership Test)

or

- they pass the Company and Earnings/Substance Test

or

- if none of the principle purposes of its involvement is to obtain a tax advantage

or

- if there is substantial and regular trading on a recognized stock exchange in the main class of shares held by the applicant itself or by a company in which it holds a 100% interest (stock exchange clause). In the second case, this only applies if all companies directly and indirectly involved are domiciled in the applicant's country of residence.

Pursuant to Section 50d para. 3 ITA, tax relief is excluded insofar as the aforementioned conditions are met.

Details on the entitlement to relief under Section 50d (3) ITA can be found in the guidance notice on Section 50d (3) ITA published on the website of the Federal Central Tax Office.