



Guidance Notice

on the entitlement to relief pursuant to Art. 28 of the Double Taxation Agreement between Germany and the United States of America (DTA USA) 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. Limitation on benefits pursuant to Art. 28 DTA USA

Pursuant to Art. 28, para. 1 DTA USA, subject to the further paragraphs of Art. 28, only qualified persons within the meaning of Art. 28, para. 2 DTA USA are entitled to the benefits of the DTA USA.

Qualified persons within the meaning of **Art. 28, para. 2 DTA USA** are the following persons resident in a Contracting State (Germany or USA):

- Individuals (para. 2 letter a).
- Contracting States (Germany or USA), political subdivisions or local authorities thereof (para. 2 letter b).
- Companies whose main class of shares is listed or registered on one or more recognized stock exchanges (Art. 28 para. 8 letter a) and regularly traded there (para. 2 letter c double letter aa).
- Companies in which at least 50% of the shares are held directly or indirectly by no more than five companies entitled to benefits under para. 2 letter c, double letter aa, provided that each intermediary person or company is a resident of one of the Contracting States (para. 2 letter c double letter bb).
- An entity organized under the laws of one of the Contracting States and established and maintained in that Contracting State exclusively for a religious, charitable, educational, scientific, or other similar purpose (para. 2 letter d);
- An entity organized under the laws of one of the Contracting States and established and maintained in that Contracting State to provide, pursuant to a plan, pensions or other similar benefits to employed and self-employed persons, provided that more than 50% of the entity's beneficiaries, members or participants are individuals resident in either Contracting State, or the organization sponsoring such person is entitled to the benefits of DTA USA pursuant to Art. 28 para. 2 DTA USA (para. 2 letter e).
- a person other than an individual, if
 - on at least half the days of the taxable year at least 50% of each class of shares or other beneficial interests in the person is owned, directly or indirectly, by residents of that Contracting State that are entitled to the benefits of DTA USA under

- letter a
- letter b
- letter c double letter aa)
- letter d or
- letter e

and

- they pass the Base Erosion Test (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. 28, para. 3, DTA USA** it shall be entitled to all benefits under this Convention otherwise accorded to residents of a Contracting State with respect to an item of income if it satisfies any other specified conditions for the obtaining of such benefits, and

- shares representing **at least 95%** of the total voting rights and value (and at least 50% of all classes of preferred stock) of the company are held directly or indirectly by **seven or fewer persons** who are **equivalent beneficiaries** within the meaning of Art. 28 para. 8 letter e DTA USA

and

- they pass the Base Erosion Test.

Pursuant to **Art. 28, para. 4 DTA USA**, companies resident in the USA 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 the USA, 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 activities of connected persons (cf. Art. 28, para. 4 letter c DTA USA).

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

While Art. 28 DTA USA 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. 28 DTA USA that exist in principle.

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.

3. 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. 28 DTA USA and entitled to relief under Sec. 50d (3) ITA. If one of these requirements is not met, the corresponding application will be rejected.