



## Guidance Notice

on the entitlement to relief pursuant 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

### General

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

oder

- 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 if none of the aforementioned conditions are met.

## 1. Ownership Test (Section 50d para. 3 sentence 1 no. 1 ITA)

The applicant is entitled to relief insofar as its shareholders would be entitled to relief under the same legal basis (cf. explanatory memorandum to the AbzStEntModG, p. 66). Thus, the Ownership Test can only be passed if the shareholders of the applicant are resident in the same country as the applicant itself. In the case of indirect participation, all intermediary participants must also be resident in the applicant's state of domicile. If the shareholders are also corporations, associations of persons or estates, Section 50d para. 3 ITA must also be taken into account when examining their entitlement to relief.

## 2. Company and Earnings/Substance Test (Section 50d para. 3 sentence 1 no. 2 ITA)

The Company and Earnings/Substance Test is passed insofar as the source of income (i.e. the license right for which the license fee underlying the application is paid) is substantially related to an economic activity of the applicant. According to the wording of the law, merely generating the income and passing it on to participating or beneficiary persons does not constitute an economic activity. The same applies to activities insofar as they are not carried out with a business operation appropriately set up for the business purpose.

A substantial connection exists if the holding of the license right by the applicant fulfills, has fulfilled or results from an economic function in relation to its other activities. This function must not only be of minor importance. It must be economically comprehensible why the applicant in particular holds the license right (cf. explanatory memorandum to the AbzStEntModG, pp. 67 and 68).

Insofar as the applicant claims entitlement to relief pursuant to the Company and Earnings/Substance Test, it has to prove that it carries out its activities with a business operation that is appropriately set up for the business purpose. This requires evidence with regard to the existence of qualified personnel, business premises and technical means of communication (cf. BFH of March 20, 2002 - I R 38/00 -, BStBl II 2002, pp. 819, 822).

## 3. Obtaining a tax benefit must not be a principle purpose for the applicant's involvement (Section 50d para. 3 sentence 2 half-sentence 1 ITA)

If the conditions set out in sentence 1 no. 1 and no. 2 are not met, there is a rebuttable presumption of abuse of tax arrangements (cf. Explanatory Memorandum to the AbzStEntModG, p. 68).

The applicant can rebut this presumption by proving that none of the principle purposes of its involvement is to obtain a tax advantage. In this context, all tax reasons as well as non-tax reasons must be taken into account. Tax advantages may also result from the tax law of the country of residence of the shareholders.

Whether the attainment of a tax advantage is a principle purpose must be decided in the light of all the circumstances of the individual case. According to the wording of the law, the burden of proof that obtaining a tax advantage is not a principle purpose for the involvement of the applicant lies expressly with the applicant.

#### 4. Stock Exchange Clause (Section 50d para. 3 sentence 2 half-sentence 2 ITA)

The misuse of the arrangement, which is to be assumed in principle in the absence of the requirements of sentence 1 no. 1 and no. 2, shall also be deemed to be rebutted if substantial and regular trading takes place on a recognized stock exchange with the main class of shares in the applicant.

This also applies if the applicant is directly or indirectly wholly owned by a company whose main class of shares is regularly and substantially traded on a recognized stock exchange and which is domiciled in the applicant's country of domicile. A prerequisite for this is, however, that in the case of indirect participation, all intermediary companies are also domiciled in the same country as the applicant.