



Guidance notes

on applications under Section 50d of the Income Tax Act for a certificate of exemption and/or refund of German withholding tax on the basis of Double Taxation Agreements

Remuneration paid to supervisory board and advisory board members

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

1. Tax liability pursuant to the EStG

1.1 Income subject to non-resident tax liability pursuant Section 49 (1) No. 3 EStG, 50a (1) No. 4 EStG

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 (1) No. 3 and Section 49 (1) No. 3 EStG.

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

If there are reasonable doubts with regard to the limited income tax liability or the tax deduction obligation, these matters must be clarified before applying for a refund.

1.2 Responsibilities

Responsibility for determining whether there is limited tax liability of domestic income pursuant to Section 49 (1) EStG and whether withholding tax is to be deducted and transferred for this income pursuant to Section 50a (1) EStG lies with the German Federal Central Tax Office (Section 5 (1) No. 12 of the German Tax Administration Act).

The Federal Central Tax Office is also responsible for relief from withholding tax under Section 50a (1) EStG on the basis of DTAs (Section 5 (1) No. 2 of the Tax Administration Act in conjunction with Section 50d EStG).

2. Restrictions of the right of taxation on the basis of double taxation agreements (DTAs)

[Overview of the currently applicable DTAs](#)

2.1 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](#).

2.2 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 (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 procedure

Relief from German tax deduction is provided either by refunding tax amounts already paid (Section 50d (1) EStG) or – before the remuneration is paid to the creditor – by issuing a certificate of exemption (Section 50d (2) EStG).

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 50d (1) EStG can be made in these cases.

[Application forms](#) are provided on the Federal Central Tax Office website at www.bzst.de.

3.1 Exemption procedure pursuant to Section 50d (2) EStG (certificate of exemption)

On application, full or partial relief from tax deduction is certified pursuant to Section 50a (1) EStG. The procedure for issuing a certificate of exemption is regulated in Section 50d (2) EStG. The following should be noted:

- The certificate of exemption is issued only on written application using the [officially prescribed form](#).
- The application is to be made by the supervisory board or advisory board member. It can also be made by the company for which the board member works or by a tax consultant if a written power of attorney is presented.
- At the earliest, the period of validity of the certificate of exemption begins on the day on which the application is received by the Federal Central Tax Office. It is not possible to issue retroactive certificates of exemptions.
- The exemption from the tax deduction is granted on the condition that the certificate of exemption is available to the company for which the board member works at the time of the payment. The application should therefore be made in good time before the start of the exemption period applied for. Once all necessary documents have been provided, the processing time is around three months. Applications are processed in the order in which they are received.
- 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 50d (4) EStG). To ensure that the tax authority of the supervisory or advisory board member is aware of the application and the income declared in it from the Federal Republic of Germany, this confirmation must be provided on the reverse side. Confirmations on a separate sheet or from a city or municipal authority (registration office, city or municipal treasury) cannot be acknowledged.

Exception:

Applicants resident in the US indicate their social security number and the US tax authority to which their most recent US income tax return was submitted. The US tax authority IRS issues certificates of residence, the original version of which is to be enclosed with the exemption application. Instructions regarding the issuance of the certificate of residence have been published by the US tax authority in the information document "Instructions for Form 8802."

3.2 Exemption procedure pursuant to Section 50d (1) EStG (refund)

If a DTA stipulates that income subject to tax deduction cannot be taxed, or can only be taxed at a lower rate, then pursuant to Section 50d (1) EStG a full or partial refund of the taxes deducted and transferred can be claimed. The following should be noted:

- The refund is granted only on written application using the [officially prescribed form](#). The refund application can be combined with the application for issuance of a certificate of exemption for future payments. In this case, the official form for applying for a certificate of exemption is to be supplemented with the tax amount to be paid and the provision of bank details.
- The application is to be made by the supervisory board or advisory board member. It can also be made by the company for which the board member works or by a tax consultant if a written [power of attorney](#) is presented.
- Under tax law, the refund amount is owed to the supervisory or advisory board member as the person liable for payment of the tax. Payment to third parties is possible only if a corresponding power of collection or a formal declaration of assignment is submitted in the original version.
- A certificate regarding the taxes transferred ([tax certificate](#)), to be issued by the company pursuant to Section 50a (5) Sentence 6 EStG, must be enclosed with the refund application.
- Prior transfer of the tax is an essential prerequisite for a subsequent refund.

Deadline for submitting an application

The deadline for applying for a refund is four years after the end of the calendar year in which the payments were received. The deadline does not end before six months have passed since the time the tax was paid (Section 50d (1) Sentences 9 and 10 EStG).