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By PwC Deutschland | 08. Februar 2026

Foreign tax credit also for trade tax? - Part 2

The Berlin-Brandenburg Tax Court decided that the relevant double tax agreement with the US requires US withholding tax on dividends to be credited against German trade tax even though the Trade Tax Act does not contain any provisions equivalent to the tax credit rules for corporation tax. It is interesting to note that the Hesse Tax Court had already decided likewise in a decision from February 2021.

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Background

The plaintiff is a German limited liability company (GmbH) which acquired a 26% stake in a corporation under the laws of the US state of Delaware in November 2020. In December 2020, it received a dividend from the US corporation from which 5% withholding tax was retained in accordance with Art. 10 (2) sentence 1 letter a of the double tax agreement between Germany and the USA (DTA) and paid to the US tax authorities. The intercompany privilege (exemption for dividends in case of qualified participation according to Section 9 No. 7 Trade Tax Act) did not apply because the shareholding did not exist yet at the beginning of the assessment period. The dividend was therefore subject to trade tax in full. The plaintiff requested that the US withholding tax be credited which the tax office refused.

Decision

The Berlin-Brandenburg Tax Court upheld the appeal and decided that the US withholding tax must be credited in the tax assessment in question. The plaintiff's claim to this effect was justified based on Art. 23 (3) (b) (aa) in conjunction with Art. 10 DTA in connection with the corresponding application of Section 26 (1) sentence 1 no. 1 Corporation Tax Act (CTA) and § 34c (6) sentence 2 Income Tax Act (ITA).

According to Art. 23(3)(b)(aa) DTA, the US tax paid shall be credited against the German income tax provided the US tax was paid in accordance with US law and in accordance with the DTA. According to the tax court, Art. 23(1) sentence 2 DTA conveys that German trade tax is considered as German tax on income. This must also be taken into account by Germany in case of a tax credit pursuant to Art. 23(3) DTA.

The discrepancy that there are no “provisions of German tax law on the crediting of foreign taxes” also for trade tax (taking account of Art. 23(3)(b)(aa) DTA) must be resolved by judicial development of the law. This ensures the corresponding application of Section 26(1) sentence 1 no. 1 CTA and Section 34c(6) sentence 2 ITA for trade tax purposes. Section 34c (1) to (3) and (5) to (7) ITA and Section 26 (1) sentence 1 no. 1 CTA are to be applied analogously to the credit of US withholding tax against German trade tax whereby the practical difficulties of the different credit limitations provided for in § 34c ITA did not arise in the case in dispute because the plaintiff's business income for 2020 was almost exclusively made up of the US dividend.

There was virtually no potential for credit against corporate income tax since the dividend was exempt from corporate tax pursuant to Section 8b (1) CTA nor were there any other foreign taxes to be credited.

Source:

Tax Court of Berlin-Brandenburg, decision of 14 January 2026 (10 K 10106/23). The tax court allowed an appeal due to the fundamental significance of the case; the period for appeal (of one month) is still running.

Note: The Tax Court of the state of Hesse reached the same conclusion in its decision of 19 February 2021 regarding the DTA with Canada. Here, the Supreme Tax Court had dismissed the tax office's appeal. The court considered the appeal inadmissible and consequently made no comments on the substantive issue as to whether the domestic plaintiff (a GmbH) was entitled to credit the Canadian withholding tax paid against

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the German trade tax (and how, if relevant, such claim should be enforced under procedural law). The former decision 8 K 1860/16 of the Hessian Tax Court thus became final and legally binding. – More details to be found in our **blog post of 3 June 2022**).

Schlagwörter

foreign tax credit, trade tax