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By PwC Deutschland | 02 May 2018

# Federal Ministry of Finance amends earlier circular on treaty-shopping rules

**On 20 December 2017 the European Court of Justice (ECJ) took the view that Section 50d (3) Income Tax Act prohibiting certain intermediary foreign companies from (full or partial) refund of German withholding tax was incompatible with both the Parent-Subsidiary Directive and the freedom of establishment. The German Tax Authorities have recently issued a circular on its application of the rules.**

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The ECJ decision related to the so-called anti-treaty shopping regulation in Section 50d (3) Income Tax Act (ITA) in the version of the 2007 Finance Act (*old version*), according to which a foreign company - under specific circumstances and scenarios - was refused relief under a directive or tax treaty to the extent that persons had holdings in it who would not be entitled to the relief if they earned the income directly. Further information and details of the ECJ judgment can be found in our ***Tax & Legal Newsflash*** of 21 December 2017.

The Federal Ministry of Finance has now published a circular of their view on how the ECJ judgment should be applied in practice, but only insofar as refund claims under the Parent-Subsidiary Directive are concerned (the circular therefore does **not** refer to third-country cases). The current administrative decree on Sec. 50d (3) ITA partially changes the preceding Finance Ministry's Decree of 24 January 2015 dealing with the general application of various aspects of the new version of § 50d ITA as applicable from 2012.

**Old version of Section 50d (3) ITA**

With respect to the full or partial refund claims the rules of Section 50d (3) ITA in the version of the 2007 Finance Act (*old version*) are no longer to be applied.

**Current version of Sec. 50d (3) ITA (applicable from 2012)**

Here the tax administration takes a more moderate attitude on selected points. For example, there are certain modifications on the requirement of substance with respect to *economic or other substantial reasons* for the involvement of the foreign company and on the interpretation of the term "*taking part in active business*".

*Corporate group structure:* Sect. 50d (3) sentence 2 ITA under which the eligibility-test is to be measured solely against the criteria of the foreign company (and organizational, business or other relevant interests of related companies are to be ignored) is dropped altogether.

The current circular is applicable in all open cases.

**Source:** Circular of the Ministry of Finance dated 4 April 2018

***Note:*** The ECJ meanwhile has held that also the ***current version*** of Section 50d (3) ITA (applicable from 2012) is in violation of EU-law. The case is **C-440/17, GS**.

**Keywords**

Parent/Subsidiary Directive, anti-treaty shopping rule, group structure, refund claim