Deloitte.

URL: http://www.deloitte-tax-news.de/german-tax-legal-news/decree-on-application-of-domestic-anti-treaty-shopping-rules-responds-to-cjeu-decisions.html

11.04.2018

German Tax and Legal News

Decree on application of domestic anti-treaty shopping rules responds to CJEU decisions

Tax authorities respond to recent CJEU decisions and provide guidance how to apply German anti-treaty shopping rules in line with EU law

Germany's tax authorities issued a decree on 4 April 2018 that sets out their views on how to apply the domestic anti-treaty shopping rules in line with EU law. The decree responds to two decisions of the Court of Justice of the European Union (CJEU) that were published on 20 December 2017 (see GTLN dated 27 December 2017), in which the CJEU concluded that Germany's anti-treaty shopping rule set out in section 50d (3) of the pre-2012 version of the Income Tax Code (ITC) violates EU law (combined cases C-504/16 and C-613/16). The CJEU held that the rules violate both the EU parent-subsidiary directive (PSD) and the freedom of establishment principle in article 49 of the Treaty on the Functioning of the European Union (TFEU).

Although the CJEU decision only addresses dividend payments made by a German entity to its EU parent company for periods before 2012, commentators have suggested that the court's reasoning also could be applied to the post-2012 version of the rule, and a case already is pending before the CJEU regarding the post-2012 version (C-440/17, GS, see GTLN dated 31 July 2017). The new decree indicates that the tax authorities agree with this interpretation of the CJEU decision.

The decree states that the anti-treaty shopping rule in the pre-2012 version of the ITC no longer is applicable to situations where relief from withholding tax is sought based on the PSD (as implemented into German law in section 43b ITC). Applications for dividend withholding tax relief that are based on a tax treaty between Germany and an EU/EEA member state are not covered by the decree, nor are applications for relief from royalty withholding tax based on a tax treaty or the EU interest and royalties directive (IRD). These distinctions are somewhat surprising since there is no obvious reason why the principles of the CJEU decision should not apply in these situations and why the anti-treaty shopping rules should be treated differently under EU law principles in this area.

The decree also limits the application of the post-2012 version of anti-treaty shopping rule to cases that are based on the PSD, but no limit is imposed on claims based on an applicable tax treaty or the IRD.

For claims that are based only on the PSD, the decree provides that only section 50d (3) sentence 2 should no longer be applied. This section states that when analyzing the conditions under the German anti-treaty shopping rules, the analysis must focus exclusively on the substance and activities of the company that receives the payment and that the substance and activities of other group companies in the same country as the recipient company are not to be taken into account. It is not entirely clear whether this means that it now is possible to rely in each case on substance and activities available at the level of group companies that are resident in the same country as the shareholder of the German entity (where no substance is available/activities are performed) is located. The wording of the decree seems to imply that the tax authorities intend to apply this approach in a very restrictive manner, but it seems questionable as to whether this approach will be sufficient to bring the post-2012 version of the German anti-treaty shopping rule in line with EU law.

The decree also refers to guidance issued by the tax authorities in 2012 regarding the interpretation of the anti-treaty shopping rules (see GTLN dated 6 February 2012) and provides that certain points (recitals 5.2 and 7) in this guidance must be interpreted differently and others (recital 6 and 8) may no longer be applied. In particular, the decree now states that mere asset-managing activities should qualify as business activities if the company actually exercises its shareholder rights (i.e. resolves shareholder resolutions, holds shareholder meetings, etc.), and that adequate business substance in terms of section 50d (3) No. 2 does not necessarily require that the company employs management and other personnel on a permanent basis in its country of residence. It seems however to

be doubtful that this amended interpretation leads to a significant relaxation of the rule. The new decree only refers to section 50d (3) No. 1 and 2, not to the more general condition of the active business test provided in section 50d (3) sentence1.

From an overall perspective, it seems questionable whether the measures described in the decree will be sufficient to bring the post-2012 version of the German anti-treaty shopping rule in line with EU law and to follow the principles described in the 2017 CJEU decision. The decree may provide limited relief for claims for a 0% dividend withholding tax based on the PSD, but it remains to be seen how the federal tax office will apply the principles outlined in the decree. Applications that were put on hold by the federal tax office after the CJEU decision was published in December 2017 now will be processed. The outcome and position of the federal tax office should be carefully analyzed for each application and, if required, an appeal with reference to the still pending CJEU procedure for the post-2012 rules (see GTLN dated 31 July 2017) may need to be filed. Refund applications and applications for a withholding tax exemption certificate that were rejected and still can be appealed should be revisited in light of the new decree. Finally, affected taxpayers should analyze whether interest on the refund amount in the particular case can be claimed based on general EU law principles.