

Regional tax office clarifies conditions for tax-free repayment of capital by EU subsidiaries

Clarification of MoF decree that was issued in April 2022.

In a decree dated 28 November 2022 (and published in January 2023), the Frankfurt regional tax office clarified that the option to prove through certain specified documentation the tax-free repayment of capital by an EEA subsidiary to a German corporate shareholder (as set forth in a Ministry of Finance (MOF) decree dated 21 April 2022) is not available to EU subsidiaries. The Frankfurt regional tax office decree explains that even though every EU member state is at the same time a member of the EEA, the reference to EEA subsidiaries as used in the MOF decree applies only to subsidiaries that are resident in EEA countries that are not at the same time EU member states (i.e., Iceland, Liechtenstein, and Norway).

The Frankfurt regional tax office decree further clarified that in order for a payment by an EU subsidiary to a German shareholder to be treated as a tax-free repayment of capital, the EU subsidiary's only option is to follow the formal application procedure pursuant to section 27(8) CITC as provided in the MOF decree. If such approval is granted and the German corporate shareholder is in possession of the relevant approval certificate, the payment will be treated as a tax-free repayment of capital.

In cases where the repayment of capital cannot be proven or an approval certificate is not obtained, then the payment would be deemed a taxable dividend and subject to tax at the level of the German corporate shareholder under the "5% add-back rule," which would result in an effective tax rate of approximately 1.5%.

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