

Recent Circular of the Federal Ministry of Finance on the European Courts of Justice decision that Section 50d (3) German Income Tax Act in the version of 2007 violates European Law

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In our **beinformed** dated February 14, 2018, we presented a decision of the European Court of Justice (joint cases C 504/16 „Deister Holding“ and C 613/16 „Juhler Holding“) stating that the German anti-abuse rule of Section 50d (3) of the German Income Tax Act in the version of 2007, which denies refunds on withholding tax on dividends to European parent companies, violates European law. Specifically, the provision violates both the Parent-Subsidiary Directive and the freedom of establishment. Even though the decision immediately affects only assessment years until 2011, it further strengthens the already existing doubts that the current version of the German Income Tax Act is in line with European law. The German financial authorities have reacted to this decision and published a new Circular on April 4, 2018, according to which Section 50d (3) of the German Income Tax Act in the version of 2007 is no longer applicable. The Circular also softens the impact of the current version of the provision.

Section 50d (3) of the German Income Tax Act is an anti-abuse rule that sets forth several prerequisites for a refund of withholding tax on dividends to European parent companies. If these are not met, the benefits of the Parent-Subsidiary Directive will not be granted.

However, the European Court of Justice has already decided in connection with the (by and large) similar French anti-abuse rule (“Egiom and Enka” judgement of September 7th, 2017, C-6/16) that the provisions to determine that an arrangement is wholly artificial should not be on a simple general basis so that even non-abusive arrangements fall under the scope

of this rule. In contrast, the arrangements have to be assessed on a case-by-case basis based on certain factors, such as the organizational, economic or substantial features of the group of companies to which the parent corporation in question belongs. Accordingly, the German provision in the version of 2007 also failed to meet the required case-by-case approach as it

also constituted a general abuse assumption. Consequently, the European Court of Justice ruled that also the German anti-abuse rule (in the version of 2007) violates European law (i.e. it violates both the Parent-Subsidiary Directive and the freedom of establishment). As



Documents to beinformed:

- [beinformed](#) of February 14, 2018
- [Circular of April 4, 2018 \(in German\)](#)



a result, the German fiscal authorities were forced to publish new administrative orders on the application of Section 50d (3) of the German Income Tax Act.

The Circular of the Federal Ministry of Finance was published on April 4, 2018, and states that Section 50d (3) of the German Income Tax Act in the version of 2007 no longer applies to open cases under the Parent-Subsidiary Directive (Section 43b of the German Income Tax Act).

Furthermore, the current version of the provision will be defused.

First, the Circular states that an assessment according to Section 50d (3) of the German Income Tax Act stating that an economic structure is missing economical or other considerable reasons can only be taken if, on a case-by-case approach, the only motive of the economic structure is in achieving a tax benefit. The wording in favor of the “case-by-case” approach reflects the opinion of the European Courts of Justice which – as mentioned earlier – rejects a general abuse assumption and demands an individual approach for each case.

Second, the stand-alone clause of Section 50d (3) Sent. 2 of the German Income Tax Act is no longer applicable. According to this provision the corporate group structure of the company at issue has to be ignored. The Circular abandons this concept so that a broader picture of the whole group structure now has to be considered.

Third, the business activity of holding companies is now deemed to be a participation in the open market when the company utilizes its shareholder rights in the subsidiary. In the old Circular on Section 50d (3) of the German Income Tax Act, holding companies had to have had a managing influence on the subsidiary. In this respect, the new Circular also clarifies that a holding activity does not require management or other personnel.

The new provisions of the Circular are immediately effective and are applicable to all open cases under Section 50d (3) of the German Income Tax Act.

After the considerably unambiguous decision of the European Court of Justice stating that Section 50d (3) of the German Income Tax Act in the version of 2007 violates European law, it is widely expected that the current version will also fail to meet European law. This question is indeed already being addressed by the European Court of Justice (ECJ C-440/17). Therefore, it is not surprising that the German financial authorities have already tried to defuse several aspects of the current provision. Firstly, we would like to point out that the trend in the Circular towards a case-by-case evaluation instead of on a more general basis is significant. A reaction to the judgement of the European Court of Justice is evident. Further, the clarification that mere holding activities can still be a participation in the open market was long overdue.

Overview on the most important aspects

- Sec. 50d (3) German Income Tax Act in the version of 2007 no longer applicable
- Impact of Sec. 50d (3) German Income Tax Act in the current version is softened:
 - Case-by-case approach instead of general abuse assumption
 - Corporate group structure no longer neglected
 - Activities of holding companies normally no longer harmful



As a result, we expect that a lot of the cases, in which a refund of withholding tax was denied with reference to Section 50d (3) of the German Income Tax Act, will be decided in favor of the taxpayer under the new Circular.

The tax authorities can be the bearer of good news from time to time.



be in touch: Any questions? Please do not hesitate to contact us!



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