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Recent Developments in German Business Taxation

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Sale of dividend claims to third parties by non-resident taxpayers

Federal Ministry of Finance: If the capital gain is not taxable in Germany, the correspondent dividends are taxed.

With its circular letter dated 26 July 2013, the Federal Ministry of Finance comments on the tax consequences of a sale of dividend claims to third parties by non-resident taxpayers.

The following factual background shall be taken as the starting point for purposes of this article: Prior to the shareholders' meeting of a German stock corporation (*Aktiengesellschaft*), a non-resident taxpayer who is a shareholder of such corporation sells his claim for a (future) dividend to a third party while remaining shareholder of the corporation (i.e. the shareholder does not sell his shares in the corporation). After having received the dividend, the shareholder passes on the dividend to the purchaser of the dividend claim.

The Federal Ministry of Finance points out that a (separate) sale of dividend claims is generally possible. In particular, according to the Federal Ministry of Finance, it is possible to sell the dividend claim before such claim has come into existence, i.e. before the distribution of profits has been resolved upon by the shareholders' meeting. The Federal Ministry of Finance – in line with the German Federal Fiscal Court – qualifies the income from such sale as capital gains within the meaning of Sec. 20 para. 2 no. 2 of the German Income Tax Act (*Einkommensteuergesetz*). Under the aforementioned provisions, the

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capital gains from the sale of dividend claims are taxed *instead* of the dividend itself. Hence, the dividend as such is not taxed (so-called “barrier effect”).

This is where, according to the Federal Ministry of Finance, the problem starts: As Sec. 49 of the German Income Tax Act does not provide for a limited tax liability in Germany for capital gains from the sale of dividend claims, the gains from a sale of dividend claims by a non-resident taxpayer are not taxable in Germany. In addition, the dividend itself cannot be taxed due to the above mentioned barrier effect.

With the circular letter dated 26 July 2013 the Federal Ministry of Finance now tries to avoid the aforementioned consequence. According to the circular letter, the taxation of the dividend itself, including withholding tax (*Kapitalertragsteuer*), shall not be barred if the capital gain from the sale of the dividend claim is not taxed in Germany.

The reasoning behind this interpretation is, however, highly controversial: In particular, there is no applicable subject-to-tax-clause which sets aside the barrier effect mentioned above. In fact, there is a gap in the law and it is questionable if it can be filled by way of an administrative directive. Hence, it remains to be seen whether the Ministry’s opinion will be held up by the Federal Fiscal Court.