

# TAX INFO

*Aktuelle Entwicklungen im deutschen Unternehmenssteuerrecht*

Recent Developments in German Business Taxation



No. 25 | January 08, 2014

## Federal Ministry of Finance publishes model for future double tax treaties

**Germany provides insight into its tax treaty negotiation policy.**

The German Federal Ministry of Finance has followed the lead of the United States, Austria and Belgium and has published a model double tax treaty for future treaty negotiations. For the first time, the tax authorities phrase their ideas of a double tax treaty, thereby providing insight into the German negotiation policy on double tax treaty matters. Although the contents of each future double tax treaty will substantially be derived from specific negotiations, the model tax treaty gives reasons to hope for a higher level of planning certainty in an international context.

The new basis for negotiations mainly follows the OECD's Model Tax Convention, but nevertheless contains several interesting aspects. Thus, it does not only identify the avoidance of double taxation as major goal of a tax treaty, but also that of double non-taxation. The integration of traditionally unilaterally used anti-abuse provisions within the treaty itself reflects the latter. E.g., dividends of German REITs or Investment Funds are to be excluded from concessions under a tax treaty with respect to dividends from a company in which another company holds a certain percentage (participation exemption, *Schachtelprivileg*). In the past, this exclusion was achieved by an unilateral treaty override within the provisions of the REIT Act. From a practitioner's perspective, explicit treaty provisions are to be preferred over treaty overriding rules, their conformity with constitutional and international public law being highly contested.

### LW.com

Should further analysis or explanation of the subject matter be required, please contact a member of our Tax team or the lawyer with whom you normally consult.

#### Düsseldorf

Latham & Watkins LLP  
Königsallee 92a  
40212 Düsseldorf  
Germany  
Tel +49.211.8828.4600  
Fax +49.211.8828.4699

#### Frankfurt

Latham & Watkins LLP  
Reuterweg 20  
60323 Frankfurt am Main  
Germany  
Tel +49.69.6062.6000  
Fax +49.69.6062.6700

#### Hamburg

Latham & Watkins LLP  
Warburgstraße 50  
20354 Hamburg  
Germany  
Tel +49.40.4140.30  
Fax +49.40.4140.3130

#### Munich

Latham & Watkins LLP  
Maximilianstraße 11  
80539 Munich  
Germany  
Tel +49.89.2080.3.8000  
Fax +49.89.2080.3.8080

Apart from the general decision to avoid double taxation by means of the exemption method, the model contains a remarkable number of provisions according to which the foreign tax is credited against the German tax on income. This applies for example to dividends not subject to the participation exemption, capital gains from the disposal of shares deriving their value from immovable property and director's fees and similar payments. The usual activity restriction is reflected in a list of income deemed "active" for the purpose of the tax treaty. This is a welcome change from the recent practice of a mere reference to sec. 8 para. 1 of the German Foreign Tax Act (*Außensteuergesetz, AStG*) and adds to the clarity of the differentiation. The same is true for the suspension of the exemption method only "to the extent" the income is "passive". The list, however, is far from sufficient and could lead to inadequate results.

The following must also be critically evaluated:

- No binding obligation of the state where the parent company resides to adjust the taxation correspondingly if the company's permanent establishment's profits were later taxed in the other contracting state; the current "endeavour to eliminate any double taxation" bears the risk of a double taxation and refers the taxpayer to mutual agreements and arbitration proceedings (if the tax convention in question provides for such methods), which could require an excessive amount of time and money.
- No express rules regarding the treatment of partnerships, the profits of which are taxed only at the level of the partners in Germany (transparency principle) whereas in other jurisdictions, the partnership is perceived as distinct tax subject. The solution of this conflict is left to the individual tax treaty.
- Still no clarity as to the point of reference of the valuation in the context of the taxation of capital gains from the disposal of companies holding real estate.
- No specification of "lower taxation" in a contracting state, which gives reasons to "switch over" to the credit method.

From a practitioner's point of view, it can be stated that the publication of the model as a basis for negotiation is all in all a positive development. The German tax treaty policy can only profit from the now ongoing public professional debate about fundamental principles and detailed provisions. Although the model offers no direct advantages for the taxpayer at the moment and still leaves enough room for improvement, it constitutes a welcome first step towards more user-friendliness as well as planning and legal certainty in the area of double tax treaty law.