

Direct taxation: The European Commission formally requests Germany to amend its anti-treaty and directive shopping provision

The European Commission has formally requested Germany to change its anti-treaty and directive shopping provision provided for in Article 50d(3) of the Income Tax Code (EStG). According to this provision, a withholding tax relief for a foreign company has to be refused if it is owned by persons who themselves would not be entitled to the relief if they received the income directly and provided they do not pursue genuine economic activities. It should be underlined that the Commission does not criticize the aim of the anti-abuse measure but solely the disproportionate requirements imposed on foreign companies in order to prove the existence of a "genuine economic activity".

As Article 50d (3) EStG does not require a substantial shareholding in the foreign company, the case was assessed under Article 63 TFEU. As far as situations are concerned which fall under the Parent-Subsidiary-Directive (PSD), Art. 1(2) PSD is concerned.

The aim of Section 50d EStG is to prevent third parties who are not entitled to do so from obtaining a withholding tax relief (exemption or refund) through the interposition of a foreign company with the sole purpose of obtaining this exemption or refund. For this purpose, the measure refuses the relief if

1. there are no economic or other relevant reasons to establish the foreign company
or
2. the foreign company does not earn more than 10 % of its gross income from
own economic activity or
3. the foreign company has no adequate business premises for its activities.

The above conditions are listed as alternatives. This means that if just one of the three alternatives exists, no withholding tax relief is possible.

The disproportionate character of the contested measure relates in particular to the requirement of Article 50d(3) clause 2 EStG, where the possibility to produce proof of the contrary does not exist. Therefore, the German measure goes beyond what is necessary to attain its objective of preventing tax evasion.

Background:

The request takes the form of a reasoned opinion (the second step of the infringement procedure provided for by Article 258 of the Treaty on the Functioning of the EU (TFEU)). If there is no satisfactory reaction to the reasoned opinion within two months, the Commission may decide to refer the matter to the Court of Justice of the European Union.

The Commission's case reference number is 2007/4435.

For press releases on infringement cases in the taxation or customs field, see:

http://ec.europa.eu/taxation_customs/common/infringements/infringement_cases/index_en.htm

For the latest general information on infringement measures against Member States see:

http://ec.europa.eu/community_law/index_en.htm