

# GERMAN WITHHOLDING TAX SOFTWARE DEVELOPMENT SERVICES

Letter of the Federal Ministry of Finance dated  
August 2, 2022



## BACKGROUND OF THE LETTER

In the letter dated August 2, 2022, the German Federal Ministry of Finance (BMF) commented on the tax treatment of remuneration in connection with software development services. The background to this is the reform of copyright law (UrhG) as of June 7, 2021, whereby in particular the changes to the copyright provisions for computer programs with regard to the author's right to subsequent remuneration as well as the right of recall in the event of non-exercise have a direct impact on the German withholding tax treatment of transfers of rights.



## KEY MESSAGE AND CRITERIA

Pursuant to Section 50a (1) no. 3 ITA, income resulting from the international temporary transfer of rights (et al. software) is generally subject to German withholding tax. This also applies in case of uncertainties regarding the final ending point of the transfer at the date the agreement is concluded. This is to be distinguished from the case of a purchase of rights, in which there is generally no obligation to deduct tax at source. A purchase of rights is to be assumed if the usage right remains with the beneficial owner finally by virtue of the contract or if a reversion is excluded explicitly. Thus, the classification must be made based on the contract and the circumstances at the time the contract was concluded, provided that the actual performance corresponds to what was contractually agreed.

Against the background of the amendment to the copyright provisions, in the opinion of the BMF a final economic transfer of a copyright and thus a classification as a purchase of rights not subject to German withholding tax is possible for the first time, even if a transfer under civil law continues to be excluded. The prerequisite for this is that the author is completely excluded from the exploitation of fruits for the ordinary useful life. The cumulative criteria for this are the contractual granting of comprehensive, exclusive, and irrevocable rights of use and exploitation to the software for an unlimited period. If the author or other foreign persons contractually retain rights that arise from copyright and have an economic value, this precludes the qualification as an economic purchase of rights.

It should be emphasized that in its letter, the BMF expressly demands a deduction of the German withholding tax to avoid liability risks insofar as there are doubts regarding the qualification as an economic purchase of rights or a temporary transfer subject to German withholding tax.



## MULTI-LEVEL CONTRACTUAL RELATIONSHIPS

In the case of multi-level contractual relationships, the BMF states that it must be examined at each level whether an economic purchase of rights exists. If this is not the case at one level, there is no economic purchase of rights for all subsequent levels.

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## TEMPORAL APPLICATION

The letter is to be applied to all open cases under which the contract for the development of software was concluded after June 6, 2021, as well as to circumstances that arose or arise after this date. The BMF also includes in the scope of application all payments whose taxable inflow date is after June 6, 2021.

## NEED FOR ACTION

Against the background of the BMF's comments, companies should examine possible tax implications. This includes, on the one hand, the inventory and review of existing software development contracts and, on the other hand, the tax analysis of newly concluded software development contracts.

## EFFECTIVE SUPPORT FROM BDO

Please feel free to contact your BDO representative in order to identify the need for action. We will be happy to support you in the tax-efficient drafting of contracts as well as in any necessary exemption applications, tax filings and refund applications.

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