

INTERNATIONAL TAX SERVICES

WITHHOLDING TAX RELIEF MODERNIZATION ACT

Selected Topics: Procedure of relief from capital gains tax (sec. 50c ITA) as well as restructuring of sec. 50d (3) ITG

The Withholding Tax Relief Modernization Act was announced in the Federal Law Gazette on June 8th, 2021. The aim of the law is to simplify and accelerate the complex and often lengthy procedure of exemption from withholding tax or its refund and at the same time to counteract abusive arrangements for obtaining tax benefits.

THE NEW SEC. 50C ITA: SUBSTANTIVE LEGAL CHANGES

The rules of procedure of the old sec. 50d (1) and (2) Income Tax Act (ITA), which affect the process of relief from withholding tax and the tax deduction according to sec. 50a ITA on the basis of sec. 43b and 50g ITA (EU Parent Subsidiary Directive / EU Interest and License Directive) or a double taxation treaty (DTT), is transferred into sec. 50c ITA. According to the law, in 2023 there will be a fully digitalized application process for exemption and refund from withholding tax, an electronic processing of those applications on behalf of the Federal Central Tax Office and an electronic retrieval of notices.

Additionally, two aspects are regulated, which enable the debtor of capital gains or remuneration to renounce from withholding or paying capital gains tax or the tax according to sec. 50a ITA. Firstly, this is the case when the debtor has an exemption certificate issued by the Federal Central Tax Office. Secondly, the new regulation specifies a minimum limit for income according to sec. 50a (1) No. 3 ITA (licensing or comparable cases) of EUR 5,000 per calendar year. If the remuneration paid by the debtor to the same person with limited tax liability does not exceed this limit, the debtor may refrain from withholding and paying the tax. This is limited to cases of relief based on a DTT. The obligation to file a tax return remains in both cases.

In cases where the existence of a tax withholding obligation is uncertain, it should be possible in the future to issue an exemption certificate without first having to obtain legal clarification of the withholding tax obligation.

Contrary to the draft version, the adopted wording of sec. 50c ITA continues to allow exemption certificates to be issued from the date of receipt of the application by the Federal Central Tax Office. However, a minimum validity of one year, which was previously required, is no longer stipulated. This allows taxpayers to apply for the exemption certificate even if the requirements are only met for a short period of time.

Finally, it should be noted that the submission of a certificate pursuant to sec. 45a (2) ITA is an indispensable prerequisite for the purpose of the reimbursement of capital gains tax. According to the new regulation, it will not be possible for the Federal Central Tax Office to waive this requirement.



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SEC. 50D (3) ITA: REVISION OF THE NATIONAL ANTI-TREATY SHOPPING RULE

In principle, sec. 50d (3) ITA has a two-step structure, which will be presented in the following:

In a first step, the basic suspicion of an abusive structure is defined: This abusive structure exists if, i) the shareholder (new: or the beneficiaries) cannot claim relief under the same provision and ii) if the company does not generate the income, which is subject to withholding tax in connection with its own economic activity. The generation and forwarding of income to shareholders or beneficiaries is not considered as own economic activity. Activities, which are not performed with an appropriately equipped business establishment are also not considered as own economic activities (so-called "passing-through structures"). Shareholders in the sense of the new wording "beneficiaries" are now not only shareholders according to civil law but also persons who fulfill the same function for tax purposes.

If there is a suspicion of abuse, this might be refuted in the second step in some individual cases, if the main purpose of the arrangement was not to obtain a tax advantage. Therefore, the shareholders' relief entitlements under other provisions (sec. 43b ITA or DTT) only apply within the scope of this counterevidence, according to the new regulation.

In contrast to the previous version of sec. 50d (3) ITA, according to the announced new regulation, all non-tax reasons, including those arising from a group relationship, must be taken into account. The exception of sec. 50d (3) ITA in the form of the stock exchange clause continues to apply to the foreign corporation if a significant and regular trade is taking place at the stock exchange. A restriction to the previous version applies in cases where only the shareholders of the foreign corporation are listed on the stock exchange. If in these cases, there is no personal entitlement to relief pursuant to sec. 50d (3) sent. 1 no. 1 ITA, the exemption rule can't be used in the future.

APPRAISAL OF THE AMENDMENTS TO SECTION 50D (3) ITA

While the logic of the previous version of sec. 50d (3) ITA was maintained in sec. 50d (3) ITA, the new provision, as described above, contains both intensifications and facilitations at the same time: On the one hand, the first requirement of (3) tightens the anti-treaty-shopping rule, as the basic suspicion against the foreign shareholders is fulfilled even if they had a comparable claim to relief based on another provision. On the other hand, the possibility to prove the contrary represents a possible relief and is certainly welcomed.

ENTERING INTO FORCE

The aforementioned electronic application and assessment procedure is supposed to come into force from the year 2023 onwards, as the necessary technical requirements still have to be implemented.

The applicability of the new sec. 50d (3) ITA is generally intended for all cases that are still open. In order to avoid an inadmissible retroactive effect, the law provides for a more favorable test, as long as the flow of investment income or remuneration took place before the new version came into force.

NEED FOR ACTION

Against the background of the revision of sec. 50d (3) ITA, it is advisable to analyze at an early stage whether the substance requirements are met in each individual case.

EFFECTIVE SUPPORT BY BDO

Please feel free to contact your BDO contact person in order to identify the need for action. We will be happy to work out an individual recommendation for you. If necessary, we will work with our colleagues from our respective BDO Member Firms from our international network in more than 167 countries.