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German Tax and Legal News

Final decree issued on WHT on outbound payments for software and database usage

The enhanced guidance aims to clarify areas of uncertainty.

Germany's Ministry of Finance (MOF) issued a final decree on 27 October 2017 regarding the withholding tax treatment of payments made to nonresidents under software, cloud and/or database licensing arrangements. The final decree is based on a draft decree published on 17 May 2017 (see [GTLN dated 6 June 2017](#)).

The final decree confirms that outbound payments for the use of software are royalties subject to German withholding tax only where the user obtains a comprehensive right to economically exploit the software under the arrangement. No withholding tax should be triggered if the arrangement for which the payment is made focuses only on the designated or intended use of the software. The final decree contains 16 examples that describe circumstances where payments for the use of software would and would not be subject to German withholding tax.

The final decree includes three additional examples—one in a new section on payments for the use of databases by universities and public libraries—and some clarifications. No further significant changes have been made compared to the draft version. The three new examples are as follows:

- New Example 1 involves a situation where a German company receives the right to distribute, copy, publish and modify graphics software from a Singapore entity. The German company adapts the software to the German market and distributes it as part of a graphic software package. The payments to the Singapore entity trigger withholding tax since the German company is exploiting the software and in a manner that goes beyond the mere use of the software.
- New Example 3 describes a situation where a German company receives standard software for internal company-wide use from a US software provider. There are certain interfaces to integrate the software into the company's ERP system, but alterations to the software's functionality are not permitted. The German company has the right to use 5,000 copies for internal use and to make changes to the software so that it can be integrated into the ERP system. The decree confirms that no withholding tax should apply in this situation because the payment is made solely for the intended use of the software and no comprehensive right to exploit the software is granted.
- New Example 16 involves a university using a database of a US service provider in return for the payment of license fees. The use of the database by students and employees of the university is free, but non-members have to pay a nominal, cost-based fee to the university. The decree confirms that in this case no withholding tax is due on the payments from the university because the university is not exploiting the right to use the database, since it grants access either free of charge or on a cost-based fee.

Comments

The final decree provides welcome clarifications regarding the withholding tax treatment of outbound payments for the use of software and databases, and should help increase certainty in this area. The guidance should allow taxpayers to avoid the lengthy and burdensome process necessary to obtain a withholding tax exemption certificate where one is not required, by making clear those situations in which German withholding tax will apply to software and database usage payments.

However, the guidance does not apply to other forms of digital transactions, such as the streaming of content. Uncertainties relating to these types of transaction remain and, where there is any doubt, a royalty withholding tax exemption certificate should be obtained.

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