Deloitte.

URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/lower-tax-court-denies-full-participation-exemption-for-dividends-under-tax-treaty.html

15.09.2015

German Tax and Legal News

Lower tax court denies full participation exemption for dividends under tax treaty

Lower tax court confirms the tax authorities approach of only granting a 95% participation exemption for dividends under a DTT

The lower tax court of Saarland issued a decision dated 24 March 2015, in which it confirmed the position of the German tax authorities that, where a German corporation receives dividends from a foreign subsidiary and an applicable tax treaty provides that the dividends are tax-exempt at the level of the German recipient, 5% of the dividends are deemed to be nondeductible business expenses under domestic rules and can be added back to taxable income. As a result, dividends paid to a German corporate shareholder are only 95% exempt.

In the case decided by the lower tax court, a German corporation received dividends from its subsidiaries in China and Turkey and it treated the dividends as 100% tax exempt in its German corporate income tax return. The German taxpayer argued that a full exemption applied to the dividends under the treaties, and that the domestic 5% add-back should not apply because this effectively would constitute an override of the treaties and would contradict the treaty provisions. A treaty override would violate German constitutional principles. The taxpayer also argued that a treaty has priority where domestic tax law contains contradicting provisions.

The lower tax court disagreed and upheld the position of the tax authorities. The tax court argued that the 5% addback of deemed nondeductible business expenses does not constitute a treaty override. Technically, the full participation exemption, as provided in a treaty, is not affected or changed by the addback. The 100% exemption and the 5% addback are effected in two separate steps, and the 5% addback has to be considered separately. The 5% addback is a standard rule that clarifies the general principle in German income tax law that business expenses related to tax-exempt income cannot be deducted for tax purposes. The lower tax court also rejected the arguments that the addback violates constitutional principles.

The decision of the lower tax court of Saarland is not surprising, even though the issue is interesting from a theoretical perspective.

The taxpayer has appealed the decision to the federal tax court, where it currently is pending.

www.deloitte-tax-news.de

Diese Mandanteninformation enthält ausschließlich allgemeine Informationen, die nicht geeignet sind, den besonderen Umständen eines Einzelfalles gerecht zu werden. Sie hat nicht den Sinn, Grundlage für wirtschaftliche oder sonstige Entscheidungen jedweder Art zu sein. Sie stellt keine Beratung, Auskunft oder ein rechtsverbindliches Angebot dar und ist auch nicht geeignet, eine persönliche Beratung zu ersetzen. Sollte jemand Entscheidungen jedweder Art auf Inhalte dieser Mandanteninformation oder Teile davon stützen, handelt dieser ausschließlich auf eigenes Risiko. Deloitte GmbH übernimmt keinerlei Garantie oder Gewährleistung noch haftet sie in irgendeiner anderen Weise für den Inhalt dieser Mandanteninformation. Aus diesem Grunde empfehlen wir stets, eine persönliche Beratung einzuholen.

This client information exclusively contains general information not suitable for addressing the particular circumstances of any individual case. Its purpose is not to be used as a basis for commercial decisions or decisions of any other kind. This client information does neither constitute any advice nor any legally binding information or offer and shall not be deemed suitable for substituting personal advice under any circumstances. Should you base decisions of any kind on the contents of this client information or extracts therefrom, you act solely at your own risk. Deloitte GmbH will not assume any guarantee nor warranty and will not be liable in any other form for the content of this client information. Therefore, we always recommend to obtain personal advice.