



January 2018

# Decision of European Court of Justice concerning § 50d (3) EStG

## – Abolishment of Anti-Treaty-Shopping rules -

European Court of Justice combined the two cases Deister Holding (C 504/16) and Juhler Holding (C 613/16) and declared in its decision of December 20, 2017 that § 50d (3) EStG (Income Tax Code) is not conform to European principle of freedom of establishment and the parent-subsiary directive.

The decision applies to § 50d (3) EStG in the Version of 2007 which was amended by 2012. However, it is likely that Court decision will also affect the current version which is as well pending with European Court of Justice (C-440/17).

In both proceedings corporations domiciled in EU member states applied for reimbursement of German withholding tax for distributions from its German subsidiaries. In both cases it was unclear whether the Anti-Treaty Shopping rule of § 50d (3) EStG (2007) was applicable.

In the Deister Holding as well as in the Juhler Holding case BZSt (German Federal Central Tax Office) refused the refund of withholding tax as holding companies did not carry out their own economic activity in the sense of § 50d (3) EStG.

European Court of Justice pointed out that the Parent-Subsidiary Directive postulates that profits distributed by a subsidiary established in one Member State of the EU to its parent company, established in another Member State, may not be subject to withholding tax.

Any deviation from the Parent-Subsidiary Directive is only allowed if it is “required” and “proportionate”. Therefore, overall assumptions that structures were established for tax evasion or abuse purposes cannot justify any disregard of EU law. European Court of Justice requires national tax authorities to „individually” review group structure and group processes as a whole. In order to identify abuse tax authorities need to review the specific situation within the group, such as the organizational, economic or other significant characteristics of the group structure and group strategies. In addition, national tax authorities are supposed to implement the possibility to prove existence of economic reasons for certain group structures (counter-evidence).

§ 50d (3) EStG was also examined with regard to its compatibility with freedom of establishment. As the regulations are only applicable to non-resident parent companies, these companies may be discouraged from getting economically active in Germany through a subsidiary. This might be qualified as restriction of freedom of establishment which is not justifiable for the reasons stated above.

The decision directly only affects the version of § 50d (3) EStG which was applicable until 2011. However, argumentation can be easily applied to the current version so that it is likely that pending cases are open for counter-evidence.

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