Recent Developments Regarding Holding Companies in Germany

This article examines recent tax law developments in Germany. The primary focus is on court decisions, which are particularly relevant in connection with the activities of holding companies in Germany. Potential legislative developments in this area are also selectively addressed.

1. Introduction

It is common to use holding companies in international tax planning with the objective of optimizing group structures. The scope of functions of holding companies can vary. For example, activities may involve financing, shareholder activities and the provision of services. From a tax perspective, this gives rise to opportunities to arrange matters such that income and expenses accrue either at the level of the parent company, the holding company or the operative unit. On the one hand, establishing a holding company adds a level of taxation, which gives rise to a risk of additional tax liabilities. On the other hand, there is broad agreement that globally active enterprises can significantly reduce their effective tax burden at a group level by using suitable holding structures.

2. Selecting a Location for Holding Companies

Aside from business factors, which include economic conditions, infrastructure, foreign exchange risks and inflation, tax implications are among the most important criteria when it comes to selecting a suitable location for a holding company. Table 1 summarizes the basic taxation criteria in choosing a location for holding companies with regard to current conditions in Germany.

Table 1: Holding companies and Germany

<table>
<thead>
<tr>
<th>Criteria</th>
<th>Conditions in Germany</th>
</tr>
</thead>
<tbody>
<tr>
<td>Participation exemption</td>
<td>Section 8b(l) of the KStG (minimum shareholding of 10%, section 8(IV) of the KStG) and 5% of the gross dividend is treated as a non-deductible expense2</td>
</tr>
<tr>
<td>Capital gains exemption</td>
<td>Section 8b(l) of the KStG (no minimum shareholding) and 5% of the gross capital gain is treated as a non-deductible expense</td>
</tr>
<tr>
<td>Withholding taxes</td>
<td>In general, no withholding taxes on interest and royalties</td>
</tr>
<tr>
<td>Deductibility of expenses and losses</td>
<td>Minimum taxation scheme (section 10d of the ESTG); with turnover of more than EUR 1 million, only 60% of the remaining losses are deductible4</td>
</tr>
<tr>
<td>Opportunities for group relief</td>
<td>Organschaft (fiscal unity), in section 14 of the KStG1</td>
</tr>
<tr>
<td>Thin capitalization rules</td>
<td>Zinsschranke (fiscal unity), in section 14 of the KStG1</td>
</tr>
<tr>
<td>Controlled foreign company (CFC) rules</td>
<td>Section 8 of the AStG; the low-taxed (25%) passive income of a CFC is taxed in Germany</td>
</tr>
<tr>
<td>General anti-avoidance rules (GAARs) and anti-treaty-shopping rules</td>
<td>Section 42 of the AO5 (GAAR) and section 50d of the ESTG (countering treaty shopping)9</td>
</tr>
</tbody>
</table>

1. DE: Körperschaftsteuergesetz (Corporate Income Tax Law, KStG).
2. For an overview; see T. Hagemann & C. Kahlenberg, Tax Liability on Dividends from Portfolio Investments: Amendments under the Act on the Implementation of the ECJ Decision in Case C-284/09, 53 Eur. Taxn. 11 (2013), Journals IBFD.
7. DE: Außenzinsschranke (Foreign Tax Law, AStG).
8. Section 8 of the AStG;7 the low-taxed (25%) passive income of a CFC is taxed in Germany.

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Due to the comprehensive provisions to counter profit shifting, i.e., controlled foreign company (CFC), anti-treaty-shopping and thin capitalization rules, it initially appears that Germany is not an ideal location for holding companies. However, recent decisions by the German Bundesfinanzhof (Federal Fiscal Court, BFH) have made Germany a more attractive location fiscally (see sections 3 to 5).

3. **German CFC Rules and the Trade Tax Consequences**

3.1. **Background**

The German CFC rules are principally intended to counter the transfer of the tax basis to foreign companies in low-tax jurisdictions. The CFC rules only apply if the following four conditions are cumulatively satisfied:

1. a foreign corporation is controlled by domestic taxpayers;
2. the CFC generates passive income;
3. there is a low effective tax rate below the threshold of 25%;
4. the exempt amount of EUR 80,000 and the quantum of “passive income” of 10% are exceeded.

European Union (EU) and European Economic Area (EEA) companies can undertake a “substance verification.” This arose as a result of the judgement of the Court of Justice of the European Union (ECJ) in Cadbury Schweppes (Case C-196/04). In this case, the ECJ held that CFC rules are only justified and proportionate as an anti-abuse measure to the extent that they exclusively target artificial or abusive constructs. Consequently, according to the ECJ, a taxpayer should have an opportunity to furnish appropriate proof to counter the presumption of abuse. As a result, the CFC rules have no legal effect if an EU or an EEA company is engaged in an economic activity. According to the wording of the decision, which is broadly unequivocal, this exception does not yet apply to fact patterns involving non-EU and EEA Member states. However, at the time of the writing of this article, two BFH rulings were pending that would question any limitation of the substance verification to EU and EEA-related facts.

As a legal consequence of the CFC rules, revenue transferred to a foreign company is attributed as deemed dividends to the downstream (domestic) taxpayer. This, however, undermines capital structures. The shareholder in a CFC must then add back these deemed dividends for the purpose of regular income tax. To date, it has, however, been unclear whether the trade tax was subject to such an add-back.

3.2. **The facts of the case**

A German GmbH was the sole shareholder of Singapore-based A Ltd. During the year in question, A Ltd. derived revenue from passive activities, i.e., interest and foreign exchange gains, which were added back to the income of the GmbH on the basis of provisions of the German CFC rules. For the purposes of determining the trade earnings, the German tax authorities disallowed a deduction of the add-back amount from profits, arguing that the revenue had not accrued to a foreign permanent establishment (PE) of the GmbH. See, in general, Diagram 1.

![Diagram 1](image-url)

**Diagram 1**

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GmbH

Germany

100%

Singapore

A Ltd.

add-back amount according to sec. 10 of the AStG
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3.3. **Reasoning behind the decision**

In the opinion of the BFH, the preconditions for the add-back were met. Consequently, the profit of the domestic enterprise had to be reduced by the amount that could be allocated to a domestic PE for purposes of determining the trade tax base (trade income). It was irrelevant to whom the PE belonged. What mattered was whether a foreign PE existed to which the revenue, including the add-back, could be allocated. In this context, the fictitious reclassification of the add-back as revenue from capital assets (dividends) also had no significance. In addition, a different result would have undermined the strictly domestic nexus.

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2. DE: Aufsteuersteuergesetz (Foreign Tax Law, AStG), secs. 7(1) and (2).
3. Id., at sec. 8(1). Section 8(1) of the AStG contains a list of types of 'active income.' Consequently, 'passive incomes' is arises if the relevant income is not covered in this exhaustive list.
4. Id., at sec. 8(3).
5. Id., at sec. 9. For more details, see M. Weiss, Recent Developments in the German Tax Treatment of CFCs, 55 Eur. Taxn. 9, sec. 2.1 (2015), Journals IBFD.
7. UK: ECJ, 12 Sept. 2006, Case C-196/04, Cadbury Schweppes plc and Cadbury Schweppes Overseas Ltd v. Commissioners of Inland Revenue, ECJ Case Law IBFD.
8. Id., at para. 65, for example. See also UK: ECJ, 12 Dec. 2006, Case C-446/04, Test Claimants in the FII Group Litigation v. Commissioners of Inland Revenue, para. 92, ECJ Case Law IBFD and PT. ECJ, 3 Oct. 2013, Case C-282/12, Fazenda Publica v. Itelcar – Automóveis de Aquecer, Ltda, para. 44, ECJ Case Law IBFD.
10. Sec. 10(2) AStG.
11. For the different methods regarding the taxation of dividends at the shareholder level, see M. Weiss, The Tax Treatment of Shareholder Loans in Germany, 55 Eur. Taxn. 5 (2015), Journals IBFD.
12. DE: Gewerbesteuergesetz (Trade Tax Law, GewStG), sec. 9, No. 3, sent. 1.
14. Sec. 9, No. 3, sent. 1 GewStG.
of trade taxes. Furthermore, a different result would have raised the issue of double taxation, as there was no provision permitting a foreign tax credit against trade tax.\textsuperscript{15}

3.4. Consequences for holding companies

With its decision to apply section 9, no. 3, sentence 1 of the \textit{Gewerbesteuergesetz} (Trade Tax Law, GewStG) to the add-back under section 10(1), sentence 1 of the \textit{Außensteuergesetz} (Foreign Tax Law, AStG), the BFH confirmed the clearly prevailing view regarding this provision in the literature.\textsuperscript{16} This means that, with regard to domestic companies with shares in a CFC, the add-back is only subject to 15\% corporate income tax plus the solidarity surcharge. In this respect, section 12(1) of the AStG provides that, on request, the foreign tax paid by the CFC may be credited against German corporate income tax. Consequently, the add-back is unencumbered with an additional tax liability as long as the foreign tax rate is at least 15\%. If, on the other hand, the foreign tax rate is less than 15\%, the overall tax liability imposed by the CFC rules can increase to up to 15\% after deduction of foreign taxes. Table 2 illustrates the practical consequences of the decision.\textsuperscript{17}

The tax authorities responded to the BFH’s decision by issuing a non-application decree.\textsuperscript{18} This means that the principles that are to be found in the judgement do not apply beyond the individual case in question. As a result, the tax authorities are maintaining the position that trade tax must be levied on the add-back. Therefore, taxpayers who are affected by this will have to resort to the courts to remove the additional burden of the trade tax on such add-backs.

4. “\textit{Organschaft}” (Fiscal Unity) for Trade Tax Purposes

4.1. Background

In Germany, dividends paid between companies are tax exempt as long as the minimum ownership threshold of 10\% is satisfied.\textsuperscript{19} Only 5\% of the gross dividends are subject to corporate income tax as non-deductible operating expenses.\textsuperscript{20} The tax exemption also applies for purposes of trade taxes as long as the minimum ownership requirements, i.e. 10\% in EU and EEA cases, otherwise 15\%, as well as the activity requirements in respect of non-EU and EEA Member States are satisfied.\textsuperscript{21} With regard to the trade tax, however, the adding back of non-deductible operating expenses of 5\% generally remains in place.\textsuperscript{22}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|}
\hline
 & \textbf{Scenario A} & \textbf{Scenario B} & \textbf{Scenario C} \\
 & \textbf{Tax authorities view} & \textbf{Tax authorities view} & \textbf{Tax authorities view} \\
\hline
\textbf{Passive income of the CFC} & 1,000,000 & 1,000,000 & 1,000,000 & 1,000,000 & 1,000,000 \\
\hline
\textbf{Foreign corporate tax} & 150,000 & 150,000 & 240,000 & 240,000 & 50,000 \\
\hline
\textbf{CFC income of the domestic corporation} & 1,000,000 & 1,000,000 & 1,000,000 & 1,000,000 & 1,000,000 \\
\hline
\textbf{German corporate tax (15\%)} & 150,000 & 150,000 & 150,000 & 150,000 & 150,000 \\
\hline
\textbf{Foreign tax credit}\textsuperscript{1} & /./ 150,000 & /./ 150,000 & /./ 240,000 & /./ 240,000 & /./ 50,000 \\
\hline
\textbf{Remaining German corporate tax} & 0 & 0 & 0 & 0 & 100,000 \\
\hline
\textbf{German trade tax (14\%)} & & & & & \\
\hline
\textbf{Overall tax burden} & 150,000 & 290,000 & 240,000 & 380,000 & 150,000 \\
\hline
\textbf{Effective tax burden} & 15\% & 29\% & 24\% & 38\% & 15\% \\
\hline
\end{tabular}
\end{table}

\textsuperscript{1} Without refunding the foreign tax.
Fiscal unity for trade tax purposes is the German form of group taxation and primarily has the effect that the fiscal result of one or several subsidiaries, i.e. “Organisationsgesellschaften” (controlled entities within the fiscal unity), is attributed to the parent company in its capacity of the controlling entity, where it is subject to regular income tax. Companies and other business entities, i.e. sole proprietorships or partnerships, can act as controlling entities of a fiscal unity. However, only companies can be controlled entities. In order to counter fiscal distortions in the treatment of income from shareholder income, section 15, sentence 1, no. 2 of the Körperschaftsteuergesetz (Corporate Income Tax Law, KStG) provides that the dividends earned by the controlled entity are attributed as a gross amount to the controlling entity, where they are subject to regular taxation.

With regard to tax-exempt participation dividends,23 the controlling entity only has to pay tax on 5% of the gross dividend as non-deductible operating expense.24 To what extent such cases also give rise to trade tax is considered in section 4.2.25

4.2. The facts of the case

The plaintiff, i.e. the controlling entity, was a fiscal unity for income tax purposes together with Y GmbH, i.e. the controlled entity. Y GmbH, in turn, held shares in the Italian-based Y S.p.A., i.e. a controlled entity, in respect of which it received a dividend in the year in question (see Diagram 2).

Diagram 2

Under section 7, sentence 1 of the GewStG, in conjunction with section 15, sentence 1, no. 2 of the KStG, Y GmbH accounted for the dividends initially as gain before removing the dividends.26 In doing so, Y GmbH did not add back non-deductible operating expenses at 5% of the gross dividend.27 The gain of Y GmbH, which the plaintiff realized through the fiscal unity, was used for purposes of determining the trade income. This occurred without adding non-deductible operating expenses in respect of the dividend involved. The tax authorities did not agree with this treatment.

4.3. Reasoning behind the decision

The BFH took the position that, within the scope of a fiscal unity for trade tax purposes, the independence of the business enterprises was intact. Consequently, the determination of the income for trade tax purposes had to be undertaken separately. As a result, the first step required the identification of the trade income of Y GmbH.28 At that level, the “gross method” is used, i.e. the tax exemption under section 8b(1) of the KStG does not apply. Next, a complete reduction in the gross dividend must occur at the level of that controlled entity to the extent29 that the requirements are met, i.e. the minimum ownership threshold. The effect of this was a complete exclusion of the dividend paid by Y S.p.A. from the trade income. Only then, in a second step, is the trade income earned by the controlled entity, i.e. Y GmbH, attributed to the controlling entity, i.e. the plaintiff. However, as the dividend was no longer contained in allocable trade income, the adding back of the 5% relating to non-deductible operating expenses30 for trade tax purposes also failed at the level of the controlling entity.

4.4. Consequences for holding companies

This decision indicates that the fiscal unity for income tax purposes favours trade tax-related participation dividends, as 5% of the gross dividend (being non-deductible operating expenses) is, in no event, subject to trade tax. Such a situation is due to the “gross method”,31 according to which tax exemption32 at the level of the fiscal unity does not apply, whereas the gross dividend is included in the trade income. This is where the trade tax reduction under section 9, no. 7 of the GewStG takes place, as long as the minimum ownership requirements, i.e. 10% in EU and EEA cases, otherwise 15%, and the activity requirements in respect of non-EU and EEA Member States are met. Ultimately, the structure of a fiscal unity is fiscally more advantageous than direct ownership.

Assuming that a controlled entity within the fiscal unity only receives dividends up to a maximum of EUR 1 million, with a shareholding of 10%, Table 3 illustrates the tax effects of the decision.33

Gains from sales are different, as, in this case, German trade tax law does not provide for a corresponding reduc-

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23. Sec. 8b(1) KStG.
24. Id. at sec. 8b(5).
26. Sec. 9, no. 7, sent. 1 GewStG.
27. Sec. 9, no. 7, sentence 3 GewStG in conjunction with sec. 8b(5) KStG.
29. Sec: 9, no. 7 GewStG.
30. Sec. 8b(1) KStG.
31. Id. at sec. 15, sent. 1, no. 2.
32. Id. at sec. 8b(1).
33. For German trade tax purposes, a municipal authority of 400% is assumed.
Consequently, the trade tax on 5% of sales profit applies, even where a fiscal unity is involved. It remains to be seen whether this favourable trade tax treatment of shareholder income within the fiscal unity is long lived. In this context, the Bundesrat (Federal Council) of Germany has already submitted a formal request for clarification. At the time of the writing of this article, no specific (amending) legislation had been proposed.

5. Unilateral Treaty Override under Section 50d(9) of the Einkommensteuergesetz (Income Tax Law)

5.1. Background

The application of tax treaties can result in double non-taxation or under-taxation, which was supposed to be resolved for treaty law-induced classification conflicts by adding article 23(4) of the OECD Model. States can also resort to unilateral subject-to-tax clauses that have comparable regulatory effects.

In Germany, section 50d(9) of the Einkommensteuergesetz (Income Tax Law, EStG) contains a unilateral switch-over clause to avoid double non-taxation when the exemption method is used. In this context, double non-taxation can arise, for example, if the application of a tax treaty results in a classification or attribution conflict or the relevant income is not taxed by the other contracting state due to national provisions. The following two conditions must be cumulatively satisfied for section 50d(9) of the EStG to apply:

1. there must be unlimited taxability, i.e. only in outbound cases; and
2. the income must be exempt under a tax treaty.

The switch-over clause is also divided into two alternatives: On the one hand, it only applies when the other contracting state adopts a divergent classification under the tax treaty with the result of no, or only a limited, claim to tax revenue. On the other hand, the provision applies if the other contracting state is prevented from levying tax as a result of its own domestic tax law.

Recently, the provision has been subject to several court decisions, all of which involved the taxation of flight personnel with regard to international activities. All of these

<table>
<thead>
<tr>
<th>Table 3</th>
<th>Scenario A (before the decision)</th>
<th>Scenario B (after the decision)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dividends earned by the controlled entity</td>
<td>1,000,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td>Expenses due to profit transfer agreement (Gewinnabführungsvertrag)</td>
<td>/1,000,000</td>
<td>/1,000,000</td>
</tr>
<tr>
<td>Income of the controlled entity</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Income of the parent company</td>
<td>1,000,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td>Tax exempted for corporate tax purposes</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>– 5% non-deductible operating expenses</td>
<td>50,000</td>
<td>50,000</td>
</tr>
<tr>
<td>German corporate tax (15%)</td>
<td>7,500</td>
<td>7,500</td>
</tr>
<tr>
<td>Trade income of the controlled entity</td>
<td>1,000,000</td>
<td>1,000,000</td>
</tr>
<tr>
<td>– Reduction for dividends</td>
<td>/1,000,000</td>
<td>/1,000,000</td>
</tr>
<tr>
<td>Trade income of the parent company</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>– Inclusion of 5% non-deductible operating expenses</td>
<td>0</td>
<td>50,000</td>
</tr>
<tr>
<td>German trade tax (14%)</td>
<td>0</td>
<td>7,000</td>
</tr>
<tr>
<td>Overall tax burden</td>
<td>7,500</td>
<td>14,500</td>
</tr>
<tr>
<td>Effective tax burden</td>
<td>0.75%</td>
<td>1.45%</td>
</tr>
</tbody>
</table>

36. Most recently, OECD Model Tax Convention on Income and on Capital (26 July 2015), Models IBFD.
37. With regard to general tax exemptions, however, DE: Einkommensteuer - gesetz (Income Tax Law, EStG), sec. 50d(9), sent. 1, no 2 of the EStG does not apply. The provision also has no effect on dividends, unless the dis tribution was deducted at the level of the distributing company. For more detail, see C. Kahlenberg, German Treaty Overriding Violates Constitutional Law, 68 Bull. Intl. Taxn. 9 (2014), Journals IBFD, with further references.
With a different outcome, see DE: FG Berlin-Brandenburg, 29 Apr. 2014, 3 K 3227/13, EFG, p. 1278 (2014), with reversion to the BFH pending at the time of the writing of this article under DE: BFH, I R 41/14.)
decisions dealt with comparable fact patterns, so that the judgements can be described in a summarizing form.

5.2. The facts of the case
The plaintiffs lived in Germany and received income from employment as pilots from foreign airline companies. Due to special domestic provisions, the tax on these amounts, which was withheld by the employers and paid to the tax authorities, was partially refunded on request by the plaintiffs. In the United Kingdom, for example, only those portions of the salary that had a local nexus to the state involved were taxable.

To the extent that activities as an employee occur in another contracting state, Germany grants tax exemption on the basis of the relevant tax treaty. In these cases, this resulted in the risk of double non-taxation. Consequently, the German tax authorities denied exemption in respect of the income, in relying on section 50d(9), sentence 1, no. 2 of the EStG. The court cases that opposed the application of this provision were successful.

5.3. Reasoning behind the decision
In the opinion of the BFH, the tax exemption provided for under treaty law should not be suspended in Germany as a result of unilateral recovery of taxation, which overwrites the tax treaty. Section 50d(9), sentence 1, no. 2 of the EStG only applies if the other states, in absence of unlimited tax liability, do not make use of their right to tax, which they are afforded under treaty law. However, the income in question was taxed, so that the factual characteristics were not present in that case. While there was only partial taxation in respect of the activities with a specific nexus to the source state, i.e. take-offs and landings in Ireland and the United Kingdom, the recovery of taxation only occurs “if”, but not “to the extent” that, there was no taxation. The relevant criteria are the types of income for the purposes of distribution standards. To achieve a different result would require a subject-to-tax clause under treaty law and based on the German negotiation rules, or “quantitative” conditioning, i.e. “to the extent” of the regulation.

5.4. Consequences for holding companies
The decisions are no longer relevant except with regard to the taxation of international flight personnel in old assessment periods, as the states affected, i.e. Ireland and the United Kingdom, have amended their regulations relating to the resulting under-taxation. The reasoning, however, is of interest beyond the cases in question.

Broadly, it should first be noted that the recovery of taxation under section 50d(9) of the EStG only applies if the source state does not tax, or only taxes to a limited extent, “all” of the revenue from a given type of income under treaty law. If only parts of this income type are subject to regular taxation in the source state, the factual conditions under section 50d(9) of the EStG are not satisfied. In adopting this stance, the BFH significantly curtails the reach of the switch-over clause or the subject-to-tax clause. In this context, see Examples 1 and 2.

Example 1
A domestic shareholder of a foreign partnership in a treaty state licenses a patent to that partnership for adequate remuneration. Under domestic law, the licence fees are a special remuneration, which, due to section 50d(10) of the EStG, is deemed to be “enterprise profits” within the meaning of the OECD Model at the level of a tax treaty. The portion of the partnership profit allocable to the shareholder is also deemed to be “enterprise profit”, again under article 7 of the OECD Model, and is tax-exempt in Germany, under a tax treaty. To the extent that the other state, in following an interpretation in a tax treaty as being autonomous, has no or only limited rights to withholding tax on the payment of licence fees, the recovery of taxation under section 50d(9) of the EStG fails if the ordinary portion of the profit is subject to regular taxation abroad.

Example 2
A domestic individual receives income from a PE from treaty State B, which is tax exempt in Germany under the Germany-State B Tax Treaty. Some of the income is interest. From a German perspective, interest falls under article 11(4) of the OECD Model. However, State B assumes, as an exception, that the income is generated from asset management activities that cannot be taxed, as it cannot be attributed or effectively connected to the PE. Provided that other parts of the profit derived from the PE are subject to regular tax, the facts at hand again result in the non-application of section 50d(9) of the EStG, due to the qualitative conditioning. Germany exempts all of the income in following article 7 of the OECD Model. If the interest is not taxed in State B and if the Germany-State B Tax Treaty does not contain a switch-over clause that is quantitative-conditional in nature, the non-taxation is not resolved.

Finally, it should be noted that the BFH has submitted the regulation of section 50d(9), sentence 1, no. 2 of the EStG to the Bundesverfassungsgericht (Federal Constitutional Court, BVerfG) to review its constitutionality, as the BFH considers that the treaty override is unconstitutional. Consequently, it remains to be seen whether the BVerfG will find reasons to justify the provision or whether it will deem the treaty override to be illegitimate on constitutional grounds. The latter would have far-reaching con-

39. Sec. 50d(9), sent. 1, no. 2 EStG.
40. Id. at sec. 50d(9), sent. 1, no. 2.
41. Arts. 6-21 OECD Model (2014).
42. See sec. 22(1)(e) of the German Verhandlungsgarantie für Doppelbesteuerungsabkommen (Negotiation Basis for Double Taxation Agreements in the Area of Income and Capital (see Federal Finance Ministry, 17 Apr. 2013, IV B 2 – S 1301/10/10022-32, 22 Internationales Steuerrecht 10 10, p. 46 et seq. (2013)). For an overview of this law, see M. Lipp, Germany’s Tax Treaty Negotiation Policy, 54 Eur. Tax. 7 (2014), Journals IBFD.
43. Arts. 6-21 OECD Model (2014).
45. Sec. 15(1), no. 2 EStG.
sequences for German legislature, as Germany has several regulations that “override” the legal consequences of tax treaties in this way.\footnote{Kahlenberg, supra n. 37.}

6. Tax Liability of Capital Gains Realized outside Qualified Participations

In the course of reforming German investment tax law, the taxation of gains on the sale of widely held stock, i.e. in respect of ownership of less than 10%, has again been demanded, in an analogous way to the taxation of dividends received from investment funds.\footnote{T. Hagemann & C. Kahlenberg, Tax Liability on Dividends from Portfolio Investments: Amendments under the Act on the Implementation of the ECJ Decision in Case C-284/09, 53 Eur. Taxn. 11 (2013), Journals IBFD.} The Bundesministerium der Finanzen (Federal Ministry of Finance, BMF) has now ended this discussion through the draft bill on investment tax reform, which was submitted on 17 December 2015. Specifically, the taxation of gains from the sale of widely held stock, which was still in the planning phase during the development of the reform,\footnote{C. Kahlenberg, Recent Developments Regarding German International Tax Law, 69 Bull. Intl. Taxn. 6/7 (2015), Journals IBFD.} is now no longer to be found in the current draft bill. The federal government has also already indicated its unwillingness to change the law to this effect. It is, therefore, reasonably safe to assume that any such reform has now been shelved.

7. Conclusions

German tax law includes a wide array of regulations to counter international profit shifting. These regulations, however, compromise the attractiveness of Germany as a location for holding companies. However, more recent decisions of the BFH have ameliorated the fiscal effects of certain provisions.

The overall development of the law can, therefore, be summarized as follows:

- Within the scope of the CFC rules, the imposition of the trade tax has been removed. Consequently, the regulations only have material legal consequences if the effective foreign tax rate is less than 15%. However, the tax authorities do not apply the principles of this judgement.
- By establishing a fiscal unity, it is possible to circumvent the trade tax in the form of 5% of the gross dividend as non-deductible operating expenses in respect of dividends derived by a controlled entity.
- The switch-over clause or subject-to-tax clause in section 50d(9) of the EStG only applies if the tax conflict affects different types of treaty income. The clauses do not apply if one type of income is already taxed in part.
- It is very likely that the introduction of taxation on gains from the sale of widely held stock, i.e. ownership of less than 10%, will not be implemented.

Finally, it should be noted that Germany will most likely enact a comprehensive package of tax regulations before the end of 2016, which will incorporate the results of the final reports of the OECD Base Erosion and Profit Shifting (BEPS) initiative. However, no specific draft bills have, as yet, been prepared.