



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF THE CHIEF COUNSEL

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Dear _____ :

This letter responds to your request for information, _____, that was recently received by the IRS Office of Associate Chief Counsel International ("ACCI").¹ The information request raises various issues related to the 1989 U.S.-Germany income tax treaty (the "Treaty"),² including the requirements that must be satisfied to obtain relief under Article 25 (Mutual Agreement Procedure) from the U.S. and German competent authorities.

A taxpayer may generally invoke the mutual agreement procedure provisions of a U.S. income tax treaty when taxation that is not in accordance with the treaty occurs, including certain circumstances where a resident of one Contracting State is taxed by the other Contract State in excess of the maximum rate applicable under the treaty. For example, in the case of dividends, Article 10(2)(b) (Dividends) of the Treaty³ limits the maximum rate of tax that the source State may impose to fifteen percent of the gross amount of the dividend payment, if such dividends are paid to an individual who is a resident of the other State, and the individual satisfies the requirements to claim Treaty benefits.

² The Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital and to Certain Other Taxes, Signed on August 29, 1989, as amended by Protocol, Signed at Berlin on June 1, 2006

³ All "Article" references are to the Treaty.

In that circumstance, if source-based taxation were imposed through withholding in excess of the fifteen percent limitation, competent authority assistance may be available under Article 25 (Mutual Agreement Procedure). However, the right to competent authority assistance is not absolute, and certain requirements must be satisfied before the competent authorities may accept a case and commence bilateral negotiations.

Prior to accepting a case, the competent authorities must first determine whether the objections presented in the competent authority submission are justified. This determination comprises a number of steps, including an analysis of whether all of the preconditions necessary for competent authority assistance have occurred: Notably, Article 29 envisages specific preconditions that apply when withholding has occurred in excess of the applicable Treaty limitation (illustrated by the above example).

Paragraph 1 of Article 29 provides that if one of the Contracting States imposes tax through withholding at source on items of income (e.g., dividends) “then the right to apply the withholding of tax at the rate provided for under the domestic law of that State is not affected by the provisions of [the Treaty],” while paragraph 2 states that “the tax so withheld at source shall be refunded on application to the extent that its levying is limited by [the Treaty].”

Therefore, the Treaty permits the Contracting States to withhold tax at source at the applicable domestic rates and allows taxpayers to request Treaty benefits through claims for refund. However, Article 29 does not prescribe comprehensive procedures to implement this refund mechanism. Instead, paragraph 5 of Article 29 requires the competent authorities to implement the procedures specified in paragraphs 1 through 4 of that article under the mutual agreement provisions of Article 25.

Taken together, the foregoing Treaty provisions authorize the U.S. and German competent authorities to identify and, if necessary, resolve any interaction between Articles 25 and 29, including in circumstances where the domestic law of one Contracting State requires withholding at its statutory rate of tax on items of income (e.g., dividends) paid to a resident of the other Contracting State, and such rate is purportedly in excess of the prescribed Treaty rate. Accordingly, the Treaty permits the competent authorities to determine whether taxpayers in such circumstances are required to file a refund claim with the IRS or German tax authority before they are eligible to file a competent authority submission under Article 25.

If the applicable refund claim were not filed on a timely basis, the competent authorities would be empowered to determine that the objections presented in the submission were not justified. Moreover, they may advise the relevant taxpayer of that determination in a closing letter, and they may also specify what actions must be undertaken before competent authority assistance could be provided (such as the requirement to first file a timely refund claim).

The above analysis is generally consistent with the U.S. competent authority's directive to determine if competent authority submissions made pursuant to a U.S. income tax treaty are filed at the proper time and in the appropriate manner. This directive is confirmed by Sec. 7.03 of Rev. Proc. 2015-40, 2015-35 I.R.B. 236 (Aug. 31, 2015) (Procedures for Requesting Competent Authority Assistance under Tax Treaties), which explains that "[t]he U.S. competent authority's decision as to whether a competent request is complete, or to deny, suspend, or terminate assistance, is final and not subject to administrative review."

This letter has called your attention to certain general principles of the current income tax law. It is intended for informational purposes only and does not constitute a ruling. See sec. 2.04 of Rev. Proc. 2024-1, 2024-1 I.R.B. 1 (Jan. 2, 2024).

If you have any additional questions, please contact _____ at _____.

Sincerely,

Greg A. Texley

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