Qualification of taxable entities and treaty protection

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Summary and conclusions

In Germany, corporations (domestic or foreign) are treated as taxpayers for corporate income tax. Partnerships are treated as flow-throughs, i.e. the income is allocated to the partners and taxed in their hands. However, partnerships are subject to trade income tax.

An entity is regarded as domestic where it has its place of management and control or its seat in Germany.

German tax law provides a list of entities that are subject to resident taxation if they have their seat or their place of management and control in Germany. The list is exclusive with respect to corporations established under German law. Of relevance for the classification is solely the legal form. Typical taxable entities are e.g. a GmbH (Gesellschaft mit beschränkter Haftung, limited liability company) and an AG (Aktiengesellschaft, stock corporation). Flow-throughs for corporate income tax purposes are e.g. an OHG (Offene Handelsgesellschaft, general partnership) and a KG (Kommanditgesellschaft, limited partnership) mostly set up with a company in the legal form of a GmbH as general partner (so-called GmbH & Co. KG). No option system is available in Germany.

An entity is regarded as foreign if it has been organized under non-German law. Moreover, an entity is regarded as foreign if it has both seat as well as place of management and control outside Germany.

When classifying a foreign entity for German taxes, the principles of the two-step entity comparison method developed by the Reich Tax Court (Reichsfinanzhof (RFH)) and the Federal Tax Court must be applied. This method asks whether an entity organized under foreign law is comparable to a German domestic entity within the meaning of §1(1)(1) Corporate Income Tax Act or to another legal person referred to in §1(1)(4) Corporate Income Tax Act. Under this approach, a foreign entity is classified as a corporate entity where an overall analysis of the applicable provisions of foreign law and the agreement reached concerning the entity’s organization and structure show this entity to be legally and economically comparable to a domestic corporate entity or to another legal person. For the purposes of the comparison, all elements that represent the material structural characteristics of a corporate entity under German law must be taken into consideration. Such structural elements for classifying foreign entities include the criteria (a) centralized management and representation; (b) limited liability; (c) free transferability of interests; (d) allocation of profits; (e) provision of capital; (f) perpetual duration of the
entity; (g) profit distribution; (h) formal requirements for organization and (i) others.

However, when analysing a foreign legal entity for German tax purposes, one would look at the following lists: (a) for international entities (excluding Eastern Europe): annex I, table 1 to the German Ministry of Finance circular on the principles of tax administration for the examination of income allocation with respect to the permanent establishments (PEs) of multinational enterprises of 24 December 1999 as amended on 29 September 2004; (b) for legal forms of Eastern European enterprises: annex I, table 2 of the circular; and (c) for entities of the European Union: annex I, part A, list of companies referred to in article 2(a)(i) of the EU Parent–Subsidiary Directive. The treatment of the entity abroad under civil law or under tax law is irrelevant for German tax purposes. If a classification of a foreign entity is not free of doubt (e.g. the foreign entity is not included on one of the lists mentioned) one can request a binding ruling from the German tax authorities. If one cannot achieve the required certainty, the ruling process is common. In such a ruling request, the taxpayer must state the question as well as his interpretation, i.e. the classification the taxpayer thinks applies together with a detailed analysis of the decisive factors.

In a cross-border context, the German Ministry of Finance has issued a circular on the application of double tax treaties (DTTs) to partnerships on 16 April 2010 which generally follows the 1999 OECD Partnership Report.

Moreover, the German Ministry of Finance has issued a “Basis for negotiation for agreements for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and on capital” (German model treaty) on 17 April 2013. An official English translation was uploaded to the website of the ministry in May 2013 (current status as of 22 August 2013). Contrary to a large number of DTTs signed by Germany and the reservation of Germany in the OECD model convention (MC) commentary (note 32 to article 4 OECD MC), the German model treaty does not include a provision for the different classification of entities in the two contracting states. In German DTT practice, two ways for resolving the conflict have been followed: either via a deemed residence of the partnership1 or via a deemed allocation of the income to a resident person, where at least one contracting state classifies the person by or through whom the income is derived as fiscally transparent.2

1. Entity qualification in domestic tax laws

1.1. Domestic entities

1.1.1. Entities as taxpayers of income taxes

In Germany, corporations (domestic or foreign) are treated as taxpayers for corporate income tax. Partnerships are treated as flow-throughs, i.e. the income is allocated

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1 DTTs signed with Albania, Algeria, Syria, Chinese Taipei and Uruguay.
2 DTT signed with the United States.
to the partners and taxed in their hands. However, partnerships are subject to trade income tax.

1.1.2. “Domestic” nature of an entity

An entity is regarded as domestic when it has its place of management and control or its seat in Germany. If an entity has been incorporated abroad but has its place of management and control in Germany, this entity is regarded as domestic and is, thus, subject to German tax on its worldwide income. Certain provisions, such as the Organschaft (tax group) regime, have been recently amended in order for dual resident companies within the EU/EEA to benefit from certain tax rules (e.g. in order to benefit from the German tax group regime).

1.1.3. Key factors for classifying an entity as taxable

In §1(1) of the Corporate Income Tax Act, German tax law provides a list of entities that are subject to resident taxation if they have their seat or their place of management and control in Germany. The list is exclusive with respect to corporations established under German law. §1(1) of the Corporate Income Tax Act includes (a) corporations (in particular, European companies, stock corporations, limited joint stock partnerships, limited liability companies); (b) cooperatives including the European cooperative society; (c) mutual insurance and pension fund associations; (d) other legal persons governed by private law; (e) unincorporated associations, institutions, foundations and other special purpose reserves under private law; (f) commercial businesses of legal persons under public law.

1.1.4. Relevance of corporate law status

Of relevance for the classification under the list ((a)–(f) above under section 1.1.3) is solely the legal form. Thus, (a) to (d) tie in with civil law. As such, the activity of such an entity is not relevant. A reclassification for mere tax reasons cannot be done.

1.1.5. General reference to corporate law or list/catalogue approach

See section 1.1.3. The list is comprehensive for domestic entities.

1.1.6. Typical taxable entities

These are:
- **GmbH (Gesellschaft mit beschränkter Haftung, limited liability company)**;
- **AG (Aktiengesellschaft, stock corporation)**.

Flow-throughs for corporate income tax:
- **OHG (Offene Handelsgesellschaft, general partnership)**;
- **KG (Kommanditgesellschaft, limited partnership)**; mostly set up with a company in the legal form of a GmbH as general partner (so-called GmbH & Co. KG).
1.1.7. Mandatory or optional classification

No option system is available in Germany.

1.1.8. Varying tax status of an entity

There are no variations in Germany.

1.1.9. Fictional taxable entities

Fictional taxable entities exist in Germany. Legal persons under public law are only subject to corporate income tax to the extent they conduct a commercial business. If the commercial business is carried out in the legal form of a limited liability company (GmbH), for example, the public services of a municipality, the taxation follows the provisions applicable to the respective legal form.

1.1.10. Registration with tax administration or other approvals

All domestic entities (taxable and non-taxable) must file for registration with the German tax administration. If an entity has its seat or its place of management and control in Germany and has a legal form that is listed in §1(1) of the German Corporate Income Tax Act, then the entity is a taxable entity. No discretion or type of approval from the German tax administration is necessary.

In addition, non-taxable entities (partnership, branches) must file a registration form with the German tax authorities.

1.1.11. Timing dimensions

Status as a taxable entity for corporate income tax starts for a legal person under private law (e.g. GmbH or AG) with its registration with the local commercial register.

Before this registration, two stages are to be distinguished: (a) the vehicle before the conclusion of the articles of association and (b) the vehicle from the conclusion of the articles of association until registration with the local commercial register.

The vehicle before the conclusion of the articles is generally a partnership under civil law (Gesellschaft bürgerlichen Rechts (GbR)) or, if a trade is already being carried on, a general partnership (OHG) or a sole proprietorship (Einzelschäftung). The vehicle is not identical to the vehicle after conclusion of the articles of association of the later legal entity. Therefore, the vehicle existing until the conclusion of the articles of association is not a taxable entity; the income derived by such a vehicle is taxable in the hands of its partner(s). A contractual retroactive effect of the formation of a corporation is generally not accepted for tax purposes, unless the retroactive effect comprises a short time period and its acknowledgement appears acceptable.\(^4\)

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\(^4\) See BFH of 28 February 1990, I R 52/89, BFH/NV 91, 564 regarding a period of two months.
The vehicle from the conclusion of the articles until the registration with the local commercial register is deemed identical to the later legal entity and as such is a taxable entity for corporate income tax. However, according to jurisprudence of the German Federal Tax Court (Bundesfinanzhof (BFH)), this is only if no significant hurdles in obtaining legal capacity exist, the registration happens within a short time frame, business property exists and the vehicle has started a business activity vis-à-vis third parties.

If the registration fails, then the vehicle is not treated as a taxable entity for corporate income tax but instead as a partnership or sole proprietorship.

The status as a taxable entity for corporate income tax does not end with the dissolution and liquidation of the legal entity or with the cancellation in the local commercial register. The status ends only after the actual and valid close of the liquidation, i.e. where no realizable assets exist, no more tax obligations are to be fulfilled and no administrative or legal proceedings exist.

In the case of restructuring under the German Reorganization Tax Act (Umwandlungssteuergesetz (UmwStG)), status as a taxable entity ends with a merger or conversion into a partnership after the transfer of the assets and, thus, without a liquidation. In the case of a conversion from a corporate body (say, GmbH) to another corporate body (say, AG), the identity of the taxable entity is kept; only the legal form is changed.

1.1.12. All or nothing vs. partial

In general, Germany follows the all or nothing principle.

However, two exceptions apply: first, for legal persons under public law that are only subject to corporate income tax to the extent that they conduct a commercial business (see section 1.1.9). Second, a limited joint stock partnership (KGaA (Kommanditgesellschaft auf Aktien)) is a kind of hybrid. As a corporate body it is subject to corporate income tax. However, the part of the profit that is allocated to the general partner on his excess contribution or as management remuneration (bonus) is tax deductible at the level of the KGaA. The general partner is subject to tax on such income as income from a trade or business (and not on income from employment or capital).

1.1.13. Effect of tax exemptions

The status of being exempt from taxation does not impact the status as a taxable entity. Contrarily the status of a taxable entity impacts the entitlement to tax exemptions. This is because only taxable entities (that are subject to German resident tax) can benefit from tax exemptions.

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9 See BFH of 8 October 2008, I R 3/06, BStBl. 2010 II, 186.
taxation or German source taxation while being established in the EU or EEA) are entitled to tax exemptions under §5 of the German Corporate Income Tax Act.

1.1.14. Group taxation

The taxable entity status is not affected if the entity is part of the German Organ-schaft (tax group). The effects of the German group tax regime only extend to the transfer of the income from the subsidiary to the parent of the tax group.10

1.2. Foreign entities

1.2.1. “Foreign” nature of an entity

An entity is regarded as foreign if it has been organized under non-German law. Moreover, an entity is regarded as foreign if it has both its seat and place of management and control outside Germany.

Thus, dual resident companies that have been formed under foreign law would be referred to as foreign.

1.2.2. Key criteria for classifying foreign entities as taxable

In Germany, the principles of the two-step entity comparison method developed by the RFH and the BFH must be applied when classifying a foreign entity. This method asks whether an entity organized under foreign law is comparable to a German domestic entity within the meaning of §1(1)(1) Corporate Income Tax Act or to another legal person referred to in §1(1)(4) Corporate Income Tax Act.11

Under this approach, a foreign entity is classified as a corporate entity where an overall analysis of the applicable provisions of foreign law and the agreement reached concerning the entity’s organization and structure show this entity to be legally and economically comparable to a domestic corporate entity or to another legal person. For purposes of the comparison, all elements that represent material structural characteristics of a corporate entity under German law must be taken into consideration.

1.2.3. List of foreign legal forms

There is no all-binding, exclusive, official list in Germany. However, when analysing a foreign legal entity for German tax purposes, one would look at the following lists:

(a) for international entities (excluding Eastern Europe): annex I, table 1 to the principles of the tax administration for the examination of income allocation

with respect to the permanent establishments of multinational enterprises (PE regulations);\textsuperscript{12}

(b) for legal forms of Eastern European enterprises: annex I, table 2 to the PE regulations;

(c) for entities of the European Union: annex I, part A, list of companies referred to in article 2(a)(i) of the EU Parent–Subsidiary Directive.\textsuperscript{13}

\textbf{1.2.4. Comparability test}

The following criteria may be distilled from the case law on the entity comparison method and are decisive for comparison purposes.\textsuperscript{14}

\textbf{1.2.4.1. Centralized management and representation}

One characteristic of a corporation is centralized management and representation. This is present where one or more persons, but not all members, have exclusive ongoing authority to make the decisions necessary for carrying out the company’s business purpose without the approval of all (or the remaining) members.

This is the case where the company’s management and its representation in outside dealings is vested in third parties or in an independent body (board of managers), to which both members and non-members may belong (third party management).\textsuperscript{15}

By contrast, there is no centralized management where the members manage the company’s business themselves and have the sole right to represent it in outside dealings (member management and representation).\textsuperscript{16} Centralized management is lacking in all cases in which management and representation are vested in all members. The fact that some of the members are excluded from the management of the business is not inconsistent with decentralized member management where the company – similar to a German limited partnership (KG) – is managed by managing members acting solely in their capacity as members and not by appointed or elected managers. Centralized management may exist even where the company’s governing instruments require the appointed and elected managers to be members of the company. This is not the case, however, where only members in whom management authority is already vested by law are eligible for appointment or election. If one or more of the members with authority to manage (and represent) the company is itself a corporate entity, and non-shareholders can be members of its managing bodies (e.g. its board of directors), centralized management shall be presumed to exist.

\textsuperscript{12} 24 December 1999, BStBl. 1999 I, 1076 as amended on 29 September 2004, BStBl. 2004 I, 917.


\textsuperscript{14} See circular of the federal Ministry of Finance of 19 March 2004, BStBl. 2004 I, 411 under IV.

\textsuperscript{15} See e.g. §§ 76–78 AktG, §§ 6, 35 GmbHG.

\textsuperscript{16} See §§114, 125 HGB.
1.2.4.2. Limited liability

The limited liability that is typical of a corporate entity is present where none of the members is personally liable with his own property for the company’s debts or for claims against the company.

1.2.4.3. Free transferability of interests

The free transferability of interests in the company to non-investors\(^\text{\textsuperscript{17}}\) is a material characteristic of a corporate entity. By contrast, interests in partnerships are as a rule not transferable or transferable only subject to limitations or only with the consent of the (other) partners. Free transferability of interests exists where, under applicable law or the agreement, the economic and membership rights conferred by the membership interest may be transferred to third parties without the consent of the other investors, such that the transferee gains all of the transferor’s membership rights. Conversely, free transferability does not exist where transfer is contingent on the consent of all investors or certain investors.

1.2.4.4. Allocation of profits

In a corporate entity, the allotment of a share of profits to a shareholder is determined by a shareholder resolution that is adopted once annually. In the case of partnerships, no distribution resolution is generally required in order for a partner to dispose over its share of partnership profits.

1.2.4.5. Provision of capital

The shareholders of a corporate entity are required to provide the company with capital in the form of contributions. By contrast, there is no statutory requirement that a partnership be provided with equity capital. If the agreement dispenses with capital contributions or permits these to take the form of services, this is indicative of a partnership.

1.2.4.6. Perpetual duration of the entity

A material characteristic of a corporate entity is in principle its perpetual duration, i.e. duration independent of the composition of its shareholders. Since the entry into force of the Commercial Law Reform Act of 22 June 1998 (BGBl. 1998 I, 1474), the death, withdrawal, or insolvency of a partner in a commercial partnership no longer results in the dissolution of the partnership, but rather in the partner’s dissociation from the partnership.\(^\text{\textsuperscript{18}}\) The utility of this criterion for classification purposes is thus limited for cases in which duration is limited under foreign law or under the agreement, or where the company in question is not a commercial partnership. The entity shall be presumed to have perpetual duration even though applicable foreign law provides for dissolution of the entity for the aforementioned

\(^{17}\) See e.g. § 15 GmbHG, § 68 AktG.

\(^{18}\) See §131 HGB.
reasons or similar reasons, but the investors, despite the occurrence of an event of dissolution, may agree to continue the entity and the agreement unconditionally provides for such continuation in advance. In order to conclude that the duration is limited, the entity must be dissolved upon the occurrence of certain events without further action by the investors. Duration shall, therefore, be presumed to be limited where, after the occurrence of an event of dissolution, the continuation of the entity with the remaining investors depends on adoption of a separate investor resolution. The fact that foreign law or the (operating) agreement identifies even just one event as an event of dissolution is a sufficient basis on which to conclude that the duration is limited. If, however, the occurrence of such an event cannot realistically be expected, it will be disregarded as an event of dissolution.

1.2.4.7. Profit distribution

For corporate entities, a shareholder’s profit share is determined by the par values of the stock19 or by the ownership interests.20 For partnerships, distribution is as a rule proportionate to contributions and otherwise per capita (§§121, 168 HGB). The ability to distribute a portion of profits without regard to contributions takes into account the individual efforts of a partner in a partnership, whereas for corporate entities the shareholder’s role as a provider of capital is of primary importance.

1.2.4.8. Formal requirements for organization

Entry into the local German commercial register is a condition precedent to the existence of German stock corporations, partnerships limited by shares, and limited liability companies. Entry takes place only after verification that the organization and registration are in order. Consequently, in order to form a corporate entity, a public body must confirm the acceptability of its articles of incorporation.21 It is thus not enough merely to enter into a shareholder agreement.

By contrast, commercial partnerships come into existence upon conclusion of a partnership agreement. Entry into the local German commercial register is relevant only with respect to validity with regard to third parties.

1.2.4.9. Other criteria

The foreign entity’s legal capacity or lack thereof in the foreign jurisdiction plays no decisive role for classification purposes in addition to the characteristics mentioned above. Similarly, the number of investors is also not a suitable criterion for distinguishing between corporations and partnerships.

The classification of a foreign entity depends on whether the overall pattern of the characteristics possessed by the foreign entity is more typical of a corporate entity or of a partnership. Therefore, the individual characteristics must be weighted for purposes of the classification. Decisive importance cannot be attributed to any single characteristic in this analysis. Where the evaluation in a specific case does

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19 See for stock corporations §60(1) AktG.
20 See for limited liability companies §29(3) GmbHG.
not reveal a clear overall pattern, the entity should be classified as a corporate entity if it possesses a majority of the criteria indicative of a corporate entity (sections 1.2.4.1–1.2.4.5 above). The criterion of perpetual duration (section 1.2.4.6) will only be considered in certain cases.

1.2.5. Relevance of foreign tax treatment

The treatment of the entity abroad under civil law or under tax law is irrelevant for German tax purposes.  

1.2.6. Option system

There is no option system available in Germany. Allowing partnerships to opt for taxation as corporations was once discussed but the proposal did not go through. Since then no further proposal or attempt has been made.

1.2.7. Advance clarification

In case a classification of a foreign entity is not free of doubt (i.e. the foreign entity is not included on one of the lists mentioned under section 1.2.3), one can seek to obtain a binding ruling from the German tax authorities. If the required certainty cannot be achieved, the ruling process is common. In such a ruling request, the taxpayer must state the question as well as his interpretation, i.e. the classification the taxpayer thinks applies together with a detailed analysis of the decisive factors.

2. Case studies on tax treaty entity qualification issues

The German Ministry of Finance issued the German model treaty on 17 April 2013. An official English translation was uploaded to the website in May 2013 and can be found at http://www.bundesfinanzministerium.de/Content/DE/Downloads/BMF_Schreiben/Internationales_Steuerrecht/Allgemeine_Informationen/2013-08-22-Verhandlungsgrundlage-DBA-englisch.pdf?_blob=publicationFile&v=5 (status as of 22 August 2013).

The German model treaty can be amended or supplemented if needed.

The following case studies are resolved based on the German interpretation of the OECD MC. Reference is also made to the German model treaty. Further, if the German model treaty includes a special provision to a specific case, then this

22 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 1.2.
23 Draft of the Government of Germany of 9 February 2000, BT-Drucksache 14/2683, Gesetz zur Senkung und zur Reform der Unternehmensbesteuerung (Steuersenkungsgesetz (StSenkG)), § 4a KStG.
24 For further details on all case studies, please refer to the General Report.
provision is introduced. If a tax treaty concluded by Germany contains a special provision applicable to the case, a respective reference is made.

Further, the German Ministry of Finance has issued a circular on the application of DTTs to partnerships on 16 April 2010\textsuperscript{25} which generally follows the 1999 OECD Partnership Report.

Moreover, it is assumed that an entity regarded as a partnership for German tax purposes is not solely engaged in asset management (\textit{Vermögensverwaltung}) and such asset management entities will be disregarded for German tax purposes. The partners would be taxed directly pro rata (§39(2)(2) German General Tax Act).

\section*{2.1. Treaty entitlement}

\subsection*{2.1.1. Case A}

(a) Germany as state S: where German source interest/royalties are paid to an entity that is qualified as a taxable entity from a German point of view as well as from the point of view of the country of residence of the entity, then the DTT between Germany and state P would apply.

(b) Germany as state R: from a German perspective, one would need to analyse first whether the foreign entity has a PE in state P.

If the foreign entity has a PE, the loan/knowhow would need to actually form assets of the PE, i.e. a functional link between the PE and the respective assets\textsuperscript{26} would need to exist.\textsuperscript{27} That requires that the assets are actually used by the PE and contribute to the profits of the PE\textsuperscript{28} (note: the authorized OECD approach (AOA) as enacted in article 7(2) of the 2010 OECD MC might lead to a different allocation given the significant people function to be considered).\textsuperscript{29} Rights, such as royalties, may only be attributed to a PE where the assets are used directly more than 50 per cent in the PE.\textsuperscript{30}

If it is agreed that the loan/knowhow forms part of the assets of the PE, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation, provided that the activity clause, if any, is met. The German model treaty includes in article 22(1)(4) an activity clause for income within the meaning of article 7 (business profits) which includes the items of income or profits derived from the production, processing, working or assembling of goods, merchandise, the exploration and extraction of natural resources, banking and insurance, trade and the rendering of services.

\begin{footnotesize}
\begin{itemize}
\item[25] BStBl. 2010 I, 354.
\item[27] See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 with 4.1.1 and 2.2.4.
\item[28] See \textit{ibid.}, under 4.1.4.1 with 4.1.1 and 2.2.4, 2.2.4.1; Kaeser, ISR 2012, 65.
\item[29] See Kaeser, ISR 2012, 66.
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Thus, if the activity clause is met, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation. However, Germany has the right to take into account in the determination of its rate of tax the items of income which under the provisions of the applicable DTT are exempt from German tax (article 22(1)(2) of the German model treaty).

If the foreign entity has a PE, but the loan/knowhow could not be allocated to the PE, the activity clause of article 7 is not met or no PE exists abroad, then Germany taxes its residents on the interest/royalties received. In such a case, the withholding taxes imposed in state S can be credited in Germany under the DTT concluded between state S and state R (Germany).31

2.1.2. Case B

(a) Germany as state S: given that state P treats the entity as transparent, the interest/royalty income is not subject to tax as income of a resident person in state P.32 Therefore, no reduction of German withholding taxes applies under the treaty between Germany and state P.

Given that the investors are resident in a third country (state R), the treaty entitlement and, thus, the reduction from German withholding tax (on the royalty income; under German domestic tax law, no withholding taxes on plain vanilla loans) is subject to the tax treaty concluded between state S and state R.33

(b) Germany as state P: see comments under case A(b) in section 2.1.1 above regarding the allocation of the interest/knowhow to the PE.

Based on German domestic law (§50(3) of the German Income Tax Act), Germany provides for a credit of the withholding tax deducted at source or an optional deduction of the foreign tax paid. The (credit) provision applies only to income from agriculture and forestry, trade (commercial business activity), or independent personal services for which a place of business is maintained in Germany, to the extent that such income includes no income from a foreign jurisdiction with respect to which the non-resident taxpayer is liable to tax on income in that country equivalent to that of a resident tax liability. The credit is, however, limited to the equivalent German tax, whereby Germany provides for a per-country limitation (§50(3) in connection with §34c(1) sentences 2–4 of the German Income Tax Act). Alternatively, a deduction of the foreign tax withheld (actually paid) from the German tax base can be sought.

2.1.3. Case C

(a) Germany as state S: same answer as B(a) in section 2.1.2 above. Given that the foreign entity is treated as transparent in state P and, hence, not subject to tax

31 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 with 4.1.1.2.
33 Ibid.
on its worldwide income, and the investors are resident in a third country (state R), the treaty entitlement and, thus, the reduction from German withholding tax (on the royalty income; under German domestic tax law, no withholding taxes on plain vanilla loans) is subject to the tax treaty concluded between state S and state R.34

(b) Germany as state P: see comments under case A(b) in section 2.1.1 above regarding the allocation of the interest/knowhow to the PE. Given that Germany is state P, the taxing right for the interest/royalty income would be assigned to Germany under article 7(1), article 5, article 11(4), and article 12(3) of the OECD MC.

Irrespective of the entity status in state R (transparent or opaque), Germany provides for a credit of the withholding tax deducted at source or an optional deduction of the foreign tax paid (§50(3) of the German Income Tax Act).35 The (credit) provision applies only to income from agriculture and forestry, trade (commercial business activity), or independent personal services for which a place of business is maintained in Germany, to the extent such income includes no income from a foreign jurisdiction with respect to which the non-resident taxpayer is liable to tax on income in that country in a scope to that of a resident tax liability. The credit is, however, limited to the equivalent German tax, whereby Germany provides for a per-country limitation (§50(3) in connection with §34c(1) sentences 2–4 of the German Income Tax Act). Alternatively, a deduction of the foreign tax withheld (actually paid) from the German tax base can be sought.

(c) Germany as state R: from a German perspective, it is necessary to analyse whether the foreign entity has a PE in state P.

If the foreign entity has a PE, the loan/knowhow would need to actually form assets of the PE, i.e. a functional link between the PE and the respective assets36 would need to exist.37 That requires that the assets are actually used by the PE and contribute to its profits38 (note: the AOA as enacted in article 7(2) of the 2010 OECD MC might lead to a different allocation given the significant people function to be considered).39 Rights, such as royalties, may only be attributed to a PE where the assets are used directly more than 50 per cent in the PE.40

If it is agreed that the loan/knowhow forms part of the PE in state P, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation, provided that the activity clause, if any, is met. The German model treaty includes in article 22(1)(4) an activity clause for income within the meaning of article 7 (business profits) which includes the items of income or profits derived from the production,

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34 Ibid.
35 Same as in case B(b) in section 2.1.2.
37 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 with 4.1.1 and 2.2.4.
38 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 with 4.1.1 and 2.2.4, 2.2.4.1; Kaeser, ISR 2012, 65.
39 See Kaeser, ISR 2012, 66.
40 See Hruschka, DStR 2010, 1361.
processing, working or assembling of goods, merchandise, the exploration and extraction of natural resources, banking and insurance, trade and the rendering of services.

Thus, if the activity clause is met, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation. However, Germany has the right to take into account in the determination of its rate of tax the items of income which under the provisions of the applicable DTT are exempt from German tax (article 22(1)(2) of the German model treaty). Moreover, some DTTs as well as German domestic law provide for a subject-to-tax clause.

If the foreign entity has a PE, but the loan/knowhow could not be allocated to the PE, the activity clause of article 7 is not met or no PE exists abroad, then Germany taxes its residents on the interest/royalties received. In such a case, the withholding taxes imposed in state S can be credited in Germany under the DTT concluded between state S and state R (Germany).

2.1.4. Case D

(a) Germany as state S: although Germany qualifies the foreign entity as transparent, Germany grants a reduction from domestic withholding taxes on royalties paid to state P based on the DTT between Germany and state P, irrespective of whether the investors are resident in state P as well. It is only required that the foreign entity is treated as a corporation (taxable entity) in its resident state; it is not required that the income subject to German withholding tax is actually subject to tax in state P.

(b) Germany as state P: this case is not addressed in the circular on the application of DTTs to partnerships of 16 April 2010.

The taxes paid in state S could be credited in Germany, as Germany views its domestic entity as a taxable entity with residence in Germany. The entity would be subject to tax on its worldwide income in Germany.

However, if the concept of flow-through entity was applied correctly from the reporter’s point of view (such as in article 1(7) of the 2006 DTT between the USA and Germany), Germany would not apply the treaty between state S and state P but instead the treaty between state S and state R. Article 1(7) of the 2006 DTT between the USA and Germany reads:

“In the case of an item of income, profit or gain derived by or through a person that is fiscally transparent under the laws of either Contracting State, such

Italy, USA, Denmark, New Zealand, Norway and Sweden.

See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.1.2.3.

Ibid., under 4.1.4.1 with 4.1.1.2.


See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 2.1.2 4th sentence.

Convention between the Federal Republic of Germany and the United States of America for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes of income and capital and to certain other taxes in consideration of the protocol amending the convention
item shall be considered to be derived by a resident of a State to the extent that the item is treated for the purposes of the taxation law of such State as the income, profit or gain of a resident.”

Thus, the rule applies if either of the two contracting states views an entity as fiscally transparent.

2.1.5. Case E

(a) Germany as state S: given that state P also treats the entity as transparent, the interest/royalty income is not subject to tax in state P as income of a resident person. Therefore, no reduction of withholding taxes applies under the treaty between Germany and state P.47

Given that the investors are resident in a third country (state R), the treaty entitlement and, thus, the reduction from German withholding tax (on the royalty income; under German domestic tax law no withholding taxes on plain vanilla loans) is subject to the tax treaty concluded between state S (here: Germany) and state R.48

However, as state R treats the foreign entity as a taxable entity, state R only taxes the royalties/interest once the income is “distributed” to the investors in state R.49 Thus, Germany might not reduce the German withholding taxes based on the DTT between Germany and state R, as the income is allocated to the PE in state P and is subject to tax in state P.50

(b) Germany as state R: if the foreign entity is transparent in state P, the German resident investors would be subject to tax on their profit share in state P. The German resident investors would only be subject to tax in Germany once they received profit distributions.51 Thus, Germany would not provide for a credit for the withholding taxes imposed in state S.52

2.1.6. Case F

(a) Germany as state S: same answer as in case D(a) in section 2.1.4 above. Germany grants a reduction from domestic withholding taxes on royalties paid to state P based on the DTT between Germany and state P.

(b) Germany as state P: for German resident taxpayers who derive foreign-source income and are liable in the country in which the income arises to a tax that is equivalent to the German income tax, the foreign tax that has been assessed, paid and reduced by any claim for relief that has arisen can be credited against the German income tax that is allocable to the income from this country.

47 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 2.1.2 4th sentence.
48 Ibid., 3rd sentence.
49 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 2.1.2.
51 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.2.
52 See Frotscher, in Frotscher and Maas, KStG, §26, note 33.
Therefore, it is also a condition that the taxpayer is identical and the foreign tax paid equals the German tax. In the case at hand, state S and state P (here: Germany) regard two different persons as the taxpayer: state S views the entity in state P as transparent and imposes on the individuals resident in state R individual income tax. On the other hand, Germany (state P) qualifies the entity as a taxable entity and imposes German corporate income tax. Therefore, at first sight one might be of the view that at least two of the conditions required for receiving a tax credit under German domestic law might not be met, given the view of two different taxpayers and of two different kinds of taxes imposed.

Due to the view of German tax commentaries, the tax imposed abroad should be regarded as a tax of the taxable entity, as the income received would be regarded as income in Germany irrespective of the domestic law of state S. Thus, the tax withheld in state S can be credited in Germany under the tax treaty between state S and Germany.

If the applicable tax treaty between state S and Germany (as state P) contains a specific clause on the allocation of income (such as in article 1(7) of the 2006 DTT between Germany and the USA), then the allocation as under the treaty is decisive and, therefore, overrides the domestic law allocation. In such a case, the question of whether a tax credit would be granted in Germany depends on the specific terms of the applicable tax treaty.

2.1.7. Case G

(a) Germany as state P: Germany would regard this as a merely domestic situation with the result of exclusive taxation in Germany according to article 21 OECD MC/article 20 German model treaty.

Under specific tax treaties concluded by Germany, such as under article 1(7) of the 2006 DTT between Germany and the USA, the allocation might be deferred.

(b) Germany as state R: even though state P regards the entity as a taxable one, Germany would analyse the treaty entitlement based on its own rules and, thus, would not be bound by the classification of the entity in state P. This is even the case where the foreign entity (partnership) is defined as a person entitled to treaty benefits in a tax treaty.

From a German perspective, it is necessary to analyse whether the foreign entity has a PE in state P.

If the foreign entity has a PE, the loan/knowhow would need to actually form part of the assets of the PE.

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53 See Wagner, in Blümich, EStG, §34c, note 36; Buciek, in Blümich, KStG, §26, note 25; Frotscher, op.cit.
54 See Wagner, in Blümich, EStG, §34c, note 36.
55 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 and 2.1.1.
56 See DTT Belgium (art. 4(1) in conjunction with art. 3(1)(c)); Finland (art. 4(4)); Greece (art. II(1)(4(c)); Iceland (art. 4(4)); Japan (art. 7(VII)); Portugal (art. 4(4)); Romania (art. 3(1)(c)); Spain (art. 4(1) in conjunction with art. 3(1)(c), (f); Tunisia (art. 4(1) in conjunction with art. 3(1)(b), (c); Roser, in Gosch, Körperschaftsteuergesetz, 2009, §6, note 30.
57 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.1 and 2.2.4, 2.2.3.
If it is agreed that the loan/knowhow forms part of the PE in state P, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation, provided that the activity clause, if any, is met. The German model treaty includes in article 22(1)(4) an activity clause for income within the meaning of article 7 (business profits) which includes the items of income or profits derived from the production, processing, working or assembling of goods, merchandise, the exploration and extraction of natural resources, banking and insurance, trade and the rendering of services.

Thus, if the activity clause is met, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation. However, Germany has the right to take into account in the determination of its rate of tax the items of income which under the provisions of the applicable DTT are exempt from German tax (article 22(1)(2) of the German model treaty). Moreover, some DTTs\textsuperscript{58} as well as German domestic law provide for a subject-to-tax clause.\textsuperscript{59}

If the foreign entity has a PE, but the loan/knowhow could not be allocated to the PE, the activity clause of article 7 is not met or no PE exists abroad, then Germany taxes its residents on the interest/royalties received. In such a case, the withholding taxes imposed in state P can be credited in Germany under the DTT concluded between state R (Germany) and state P.\textsuperscript{60}

2.1.8. Case H

(a) Germany as state P: from a German point of view, the royalties would be allocated to the German taxable entity. State R would need to reduce the domestic withholding tax rate according to the DTT between state R and state P. Given that state R might not reduce its domestic withholding tax rate due to its view of a mere domestic case, Germany would avoid the double taxation by means of the mutual agreement procedure (article 24 of the German model treaty) and regularly provide for a tax credit.\textsuperscript{61}

If a tax treaty concluded by Germany has a specific clause on hybrid entities, such as the 2006 DTT between Germany and the USA (article 1(7)), the allocation might differ, i.e. an allocation would be made to the individual resident in state R. In this case, the income from sources in state R would be treated as being received by a resident in state R (no cross-border case).

(b) Germany as state R: from a German point of view, the royalties/interest would be allocated to the individuals residing in Germany. Germany would not grant the foreign entity which is regarded as a corporation in state P a reduction from German withholding taxes on royalties\textsuperscript{62} to the extent of German resident investors.\textsuperscript{63} Even though a tax treaty would bind Germany to the entity classification in state P, the German withholding taxes would

\textsuperscript{58} Italy, USA, Denmark, New Zealand, Norway and Sweden
\textsuperscript{59} See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.1.2.3.
\textsuperscript{60} \textit{Ibid.}, under 4.1.4.1 with 4.1.1.2.
\textsuperscript{61} \textit{Ibid.}, under 4.1.3.1.
\textsuperscript{62} Germany does not impose withholding taxes on interest on plain vanilla loans.
\textsuperscript{63} See federal Ministry of Finance, circular of 24 January 2012, BStBl. 2012 I, 171, under 4.1.
not be reduced or eliminated under the tax treaty between Germany and state P because the German anti-treaty shopping rule of §50d(3) of the German Income Tax Act would not be met. A reduction or elimination of German withholding taxes could only be achieved if – among other conditions – the shareholders of the foreign taxable entity are not German residents.

2.2. Distributive rules

2.2.1. Article 10 – dividends

2.2.1.1. Case A

(a) Germany as state R: the withholding taxes imposed in state S on the “distributions” to the German residents cannot be credited in Germany.64

(b) Germany as state R: Germany would not tax the foreign entities’ income in the hands of its German resident investors if the foreign entity has a PE in state S and the assets from which the income is derived actually form assets of the PE, i.e. a functional link between the PE and the respective assets would need to exist.65 That requires that the assets are actually used by the PE and contribute to the profits of the PE66 (note: the AOA as enacted in article 7(2) of the 2010 OECD MC might lead to a different allocation given the significant people function to be considered).67

Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation under article 7 in connection with article 5 of the German model treaty, provided that the activity clause, if any, is met. The German model treaty includes in article 22(1)(4) an activity clause for income within the meaning of article 7 (business profits) which includes the items of income or profits derived from the production, processing, working or assembling of goods, merchandise, the exploration and extraction of natural resources, banking and insurance, trade and the rendering of services.

Thus, if the activity clause is met, Germany would generally exempt the income of the foreign entity allocated to German residents from German taxation. However, Germany has the right to take into account in the determination of its rate of tax the items of income which under the provisions of the applicable DTT are exempt from German tax (article 22(1)(2) of the German model treaty).

64 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 4th sentence.
66 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 with 4.1.1 and 2.2.4.
67 Ibid., under 4.1.4.1 with 4.1.1 and 2.2.4, 2.2.4.1; Kaeser, ISR 2012, 65.
68 See Kaeser, ISR 2012, 66.
(c) Germany as state R: Germany would tax the foreign entities’ income in the hands of its German resident investors, if the foreign entity has a PE in state S but the assets from which the income is derived do not actually form assets of the PE, the activity clause is not met or no PE exists abroad. In such a case, the withholding taxes imposed in state S can be credited in Germany under the DTT concluded between state S and state R (Germany).  

2.2.1.2. Case B

(a) Germany as state R: Germany would only tax the German resident investors once they receive a “dividend” from the foreign entity. The distributions are classified as other income under article 21(1) OECD MC/article 20(1) German model treaty, as the foreign entity is not a company resident in the other state.  
(b) Germany as state R: given that Germany would apply article 21(1) OECD MC/article 20(1) German model treaty instead, articles 10 and 6 would, therefore, not apply.

2.2.2. Article 11 – interest

It is assumed throughout the case that company X has no PE outside its resident state to which the loan can be allocated.

2.2.2.1. Case A

(a) Germany as state A: from a German perspective, the interest payment would be sourced in Germany. Please note that Germany generally does not impose withholding tax under domestic tax law. In certain cases, where taxes on interest payments would be withheld, Germany would apply the treaty between state C and state A (Germany) and reduce the interest withholding taxes accordingly.  
   Please note that the German model treaty only provides for taxation in the resident state (article 11(1)).
(b) Germany as state B: from a German perspective, the interest payment would be sourced in Germany. Please note that Germany generally does not impose withholding tax under domestic law. In certain cases, where taxes on interest payments would be withheld, Germany would apply the treaty between state C and state B (Germany) and reduce the interest withholding taxes accordingly.
(c) Germany as state C: from a German perspective, the interest payment would be sourced in state A. Thus, Germany would apply the treaty between state A and state C (Germany).

69 See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.4.1 with 4.1.1.2.
70 Ibid., under 4.1.4.2 3rd sentence; art. 4(1), 10(1) OECD MC; BFH of 20 August 2008, I R 34/08, BStBl. 2009 II, 263.
2.2.2.2. Case B

(a) Germany as state A: see comments under case A(a) in section 2.2.2.1.
(b) Germany as state B: if Germany were state B, it would view the interest sourced in state B, apply the DTT between states B and C and reduce the interest withholding taxes, if any, accordingly.
(c) Germany as state C: from a German perspective, the interest payment would be sourced in state B. Thus, Germany would apply the treaty between state B and state C (Germany).

2.2.2.3. Case C

(a) Germany as state A: from a German perspective, the interest payment would be sourced in state B. Thus, Germany would apply the treaty between state B and state C. No German withholding case.
(b) Germany as state B: from a German perspective, the interest payment would be sourced in state A. Thus, Germany would apply the treaty between state A and state C. No German withholding case.
(c) Germany as state C: if Germany were state C, it would view the interest sourced in state A, apply the DTT between states A and C and provide for a credit of the taxes withheld on the interest, if any, accordingly.

2.2.2.4. Case D

(a) Germany as state A: same as for case C(a) in section 2.2.2.3.
(b) Germany as state B: same as for case C(b) in section 2.2.2.3.
(c) Germany as state C: if Germany were state C, it would view the interest sourced in state B, apply the DTT between state B and state C (Germany) and provide for a credit of the taxes withheld on the interest, if any, accordingly.

2.2.2.5. Case E

(a) Germany as state C: in case of Germany as the resident state of the investors of the hybrid entity paying the interest, Germany would regard Germany as the source state. See comments for case A(a) under section 2.2.2.1.

2.2.3. Article 13(4) – capital gains

2.2.3.1. Case A

(a) Germany as state R: from a German perspective, it needs to be analysed whether the foreign entity is regarded as (a) a commercial or (b) a deemed commercial partnership. Either will be assumed.

Given that Germany qualifies the foreign entity as a non-taxable entity, Germany would regard the sale of the interest in the entity by John as a sale of the single (pro-rata) assets of the entity and not as a sale of shares.\textsuperscript{71}

\textsuperscript{71} See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.2.1 2nd sentence.
If the foreign entity has a PE in state P (or state S), Germany would generally exempt the income from the sale from German taxation (articles 13(1) and 22(1)(a) German model treaty). However, Germany has the right to take into account in the determination of its rate of tax the items of income which under the provisions of the applicable DTT are exempt from German tax (article 22(1)(2) of the German model treaty). Moreover, some DTTs\textsuperscript{72} as well as German domestic law provide for a subject-to-tax clause.\textsuperscript{73}

If the foreign entity has a PE, but the immovable property could not be allocated to the PE or no PE exists abroad, then Germany taxes its residents on the gain from the sale. In this case, double taxation might occur and Germany would initiate a mutual agreement procedure and where double taxation remained, Germany would provide for a tax credit.\textsuperscript{74}

(b) Germany as state S: Germany would, as the source state, apply article 13(4) OECD MC (German model treaty) between state R and state S.

2.2.3.2. Case B

(a) Germany as state R: same answer as under case A(a) in section 2.2.3.1.
(b) Germany as state S: same answer as under case A(b) in section 2.2.3.1.

2.2.3.3. Case C

(a) Germany as state R: given that Germany qualifies the foreign entity as a taxable entity, Germany would apply article 13(4) OECD MC (German model treaty) between Germany and state S.
(b) Germany as state S: if Germany views the foreign entity in which the interest is sold as a non-taxable entity, Germany would apply article 13(1) of the OECD MC (German model treaty) between state R and Germany.

2.2.3.4. Case D

(a) Germany as state R: same answer as for case C(a) in section 2.2.3.3.
(b) Germany as state S: same answer as for case C(b) in section 2.2.3.3.

2.2.4. Article 15 (2) – income from employment

2.2.4.1. Case A

(a) Germany as state R: Germany would regard the entity, which it also regards as a taxable entity, as the employer.\textsuperscript{75}

Given that the entity would not be subject to resident taxation in either state, the residency terms of article 4(1) OECD MC would not be met. Thus,

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\textsuperscript{72} Italy, USA, Denmark, New Zealand, Norway and Sweden.

\textsuperscript{73} See federal Ministry of Finance, circular of 16 April 2010, BStBl. 2010 I, 354, under 4.1.1.2.3.

\textsuperscript{74} Ibid., under 4.1.3.3.1.

\textsuperscript{75} See Wassermeyer and Schwenke, in Debatin and Wassermeyer, Doppelbesteuerung, art. 15 MA, note 114.
the employer would not be a resident of state R. From a German perspective, it is unclear whether the wording of the provision will imply that it is not required that the employer would need to be a resident person after all (resident state of the employee or a third state). In such a case, article 15(2)(b) (article 14(2)(c) German model treaty) would be fulfilled.

If the wording of the provision implies that it is required that the employer is a resident person after all (resident state of the employee or a third state), then article 15(2)(b) (article 14(2)(c) German model treaty) would not be fulfilled.76

(b) Germany as state P: Germany would regard the entity, which it also regards as a non-taxable entity, as the employer.77

From a German perspective it is unclear whether the wording of article 15(2)(b) OECD MC implies that it is not required that the employer would need to be a resident person outside the state in which the work is performed (resident state of the employee or a third state). In such a case, article 15(2)(b) (article 14(2)(c) German model treaty) would be fulfilled.

If the wording of the provision implies that it is required that the employer is a resident person after all outside the state of work (resident state of the employee or a third state), then article 15(2)(b) (article 14(2)(c) German model treaty) would not be fulfilled.78

2.2.4.2. Case B

(a) Germany as state R: Germany would regard the entity, which it also regards as a non-taxable entity, as the employer.79

The entity would be subject to resident taxation in state P. Thus, the residency terms of article 4(1) OECD MC would be met. Thus, article 15(2)(b) (article 14(2)(c) German model treaty) would be fulfilled. Only the perspective of state P would matter.

(b) Germany as state P: Germany would regard the entity, which it also regards as a taxable entity, as the employer.80

The entity would be subject to resident taxation in state P (Germany). Thus, the residency terms of article 4(1) OECD MC would be met. Thus, article 15(2)(b) (article 14(2)(c) German model treaty) would be fulfilled. Only the perspective of state P would matter.

2.2.5. Article 16 – directors’ fees

2.2.5.1. Case A

(a) Germany as state R: due to the qualification as a non-taxable entity from a German perspective, Germany would regard the foreign entity as a company not within the meaning of article 3(1)(b) OECD MC (article 15, 3(1)(c)

76 Ibid., note 121.
77 Ibid., note 114a.
78 Ibid., note 121.
79 Ibid., note 114a.
80 Ibid.

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German model treaty), given that it would not view the entity as a body
corporate or an entity that is treated as a body corporate for tax purposes. Therefore, article 16 OECD MC would not be applicable to the directors’ fees paid to John.

(b) Germany as state S: due to the qualification as a taxable entity from a German perspective, Germany would regard the entity as a company within the meaning of article 3(1)(b) OECD MC (article 15, 3(1)(c) German model treaty), given that it would view the entity as a body corporate or an entity that is treated as a body corporate for tax purposes. As the entity would be subject to resident tax in Germany, Germany would regard the entity as a resident (article 4(1) OECD MC). Thus, Germany would apply article 16 OECD MC to the directors’ fees paid to John.

2.2.5.2. case B

(a) Germany as state R: due to the qualification as a taxable entity from a German perspective, Germany would regard the entity as a company within the meaning of article 3(1)(b) OECD MC (article 15, 3(1)(c) German model treaty), given that it would view the entity as a body corporate or an entity that is treated as a body corporate for tax purposes. However, the entity would not be subject to resident tax in state S, and, therefore, not be a resident company (article 4(1) OECD MC). Thus, Germany would not recognize a taxing right to state S.

(b) Germany as state S: due to the qualification as a non-taxable entity from a German perspective, Germany would regard the entity as a company not within the meaning of article 3(1)(b) OECD MC (article 15, 3(1)(c) German model treaty), given that it would not view the entity as a body corporate or an entity that is treated as a body corporate for tax purposes. Therefore, article 16 OECD MC would not be applicable to the directors’ fees paid to John.

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81 Ibid., art. 16 MA, note 25.
82 Ibid.