



# Taxation of IP registered in Germany

German Federal Ministry of Finance (BMF) circular of February 11, 2021

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*Do foreign licensees have to withhold tax on German IP licensed from another non-German person, and pay it to German fiscal authorities? Yes, if the IP is registered in a German register! With circular of February 11, 2021 issued by the German Federal Ministry of Finance (Bundesministerium der Finanzen (BMF)) this taxation link is brought into the focus. Primarily affected should be company groups with foreign IP holding companies.*

## Underlying issue

Let us consider the following example: A US company (licensor) grants another company in the Netherlands (licensee) rights to use a trademark registered in Germany for an agreed remuneration. Although both companies are not resident in Germany, the US company has a limited tax liability in Germany with the license fee due to the registration of the licensed IP in a German register. The Dutch company must withhold the tax payable (here: 15 % plus solidarity surcharge) from the licence remuneration, pay it to the German tax authorities and file a corresponding tax declaration. Similar obligations arise in the case of the sale of rights: In this case the seller has to file a tax return; the tax withholding procedure does not apply. Even if Germany has no taxation right under the applicable double taxation agreement (DTA) between Germany and the country of the taxpayer (here: US), these obligations must be complied with. The withheld tax can only be refunded ex post or an ex-ante exemption certificate needs to be applied for before the licence fee is paid.

Such foreign cases, where German taxation is only linked to the registration of the IP in a domestic register, have not been in focus for a long time, probably because the outcome often is an tax exemption of the licence proceeds in Germany due to applicable double taxation agreements (DTA) - nevertheless the initial obligations to withhold taxes and file a declaration still need to be adhered to! This is also emphasised in the recent administrative circular which as well provides simplifications for past transactions.

## Simplifications for payments until September 30, 2021



The circular contains a simplification for the past and for payments until September 30, 2021, according to which the tax deduction, payment and declaration can be omitted. This simplification applies if the following conditions are met cumulatively:

**Foreign licensee:** At the time of the license payment, the licensee must neither have its domicile nor habitual residence or neither management nor registered office in Germany.

**DTA must be applied:** When the remuneration is received, the licensor must be entitled to use the advantages of a double taxation agreement without any doubt and the agreement must provide for an tax exemption of the payment in Germany.

**Application for exemption:** The licensor must submit an application for exemption from tax deduction to the German Federal Central Tax Office (Bundeszentralamt für Steuern (BZSt)) by December 31, 2021.

**Disclosure of contractual relationships:** The contractual relationships must be disclosed to the German fiscal authority with the application for exemption.

For remuneration received after September 30, 2021, the simplifications do not apply, which means licensors and licensees have to adhere to general statutory regulations in the same way as they also apply to domestic licensees with payments to foreign licensors: The licensee must declare the tax. If Germany is not allowed to tax this royalty payment or is only allowed to tax it at a lower rate under a supranational agreement (e.g. DTA), the licensor can apply to the BZSt for a withholding tax refund (application after payment) or for future exemption from tax deduction (application before payment).

### **Determination of the tax basis**

In addition, the circular explains how to determine the license fee subject to German tax. The starting point is the total remuneration for the licence (top-down approach). If the IP is registered in several (foreign and German) registers or if the fee is paid for several rights (licence bundles), the remuneration that is allocated to the German IP for tax purposes needs to be determined according to economic reasoning. However, the circular does not elaborate this in detail but adds, that if the tax authorities cannot determine the tax base, e.g. in case of non-cooperation of the taxpayer, they will estimate the royalty income for German taxation purposes.

### **Conclusion**

The BMF circular of February 11, 2021 simplifies the procedure for tax deduction, tax withholding and tax declaration in DTA cases for remuneration that flows between foreign licensors and foreign licensees up to and including September 30, 2021 und relates to IP



that is registered in Germany. The procedure to withhold, pay and declare related German income tax poses administrative challenges for foreign licensees and licensors/ foreign buyers and sellers in any case. On the one hand, this concerns the elaborate procedure of applying for exemption and the associated expense for the taxpayer. On the other hand, the precise determination of the tax base, especially when licence bundles are transferred or licensed, is unclear and therefore may be subject to dispute with the German fiscal authorities.

Foreign taxpayers which have licensed or transferred German IP – e. g. between foreign group companies to a license holding –and have not declared this so far should now take urgent action to avoid penalties.