

## GERMAN TAX ON ROYALTIES AND GAINS IN THE CASE OF INTANGIBLES REGISTERED IN GERMANY

Since last year, the German tax authorities have rather unfortunately decided to impose tax on royalty payments made between non-German-resident taxpayers for licenses granted for intangibles registered with the German Patent and Trademark Office in Munich (*Deutsches Patent- und Markenamt*) or, according to the view of the German tax authorities, which are entered in the domestic register on the basis of an application made to the European Patent and Trademark Office under the European Patent Convention. They have been doing so irrespective of whether there is any other German nexus in addition to such registration.

Although the provisions of the German Income Tax Act (section 49 para 1 no. 2f, no. 6) on which this is based have existed for almost a century, the German tax authorities only started interpreting these provisions in this very broad way last year (i.e. that registration of an intangible at the German Patent and Trademark Office or the European Patent Office is enough to establish a German taxation right).

In a draft bill published at the end of last year, it was initially proposed to annul the relevant provision in the German Income Tax Act. This provision had not been interpreted in such a broad way in practice until a year ago (the general understanding had instead been that either the licensee would need to be a German resident or the intangible would need to be used in a German permanent establishment).

A more recent version of that bill no longer includes this annulment, however, and it would increasingly appear that the German legislator will not intervene.

This might affect any non-German person or entity which

- has, for example, registered a patent in Germany (apart from its registration in many other countries) and derives (actual or deemed) income from licensing such protected intangibles to other (intra or extra-group) licensees, or
- has been, or is, the licensee of an intangible (also) registered in Germany.

As mentioned above, even if both the licensor of the intangible and the licensee are resident outside of Germany and make use of the intangible only outside of Germany, the German tax authorities claim a German taxation right, subject to tax treaty protection. It is not relevant whether the licensor and the licensee are members of the same group or unrelated parties.

### Key issues

- Registration of intangibles at the German Patent and Trademark Office or the European Patent Office pursuant to the German tax authorities' view is sufficient to establish a German taxation right on royalties
- Place of residence of licensor and licensee is irrelevant
- Licensees are obliged to withhold and pay German withholding tax on royalties
- Simplified procedure to obtain exemption certificate for royalties paid until 30 September 2021 where such a certificate is applied for by the end of 2021
- Exemption certificates should be applied for as soon as possible, including for royalties arising after September 2021
- Where such intangibles are sold, 'zero tax returns' are accepted in cases involving 'obvious' tax treaty protection and disclosure of contractual arrangements

Many (but not all) of the double taxation treaties concluded by Germany prohibit it from imposing tax on such royalty payments made by non-German licensees (subject to a case-by-case analysis). Where a licensor is protected by such a tax treaty, German withholding tax still needs to be withheld and paid to the German revenue, unless an "exemption certificate" (*Freistellungsbescheinigung*) has been applied for and issued by the German Federal Tax Office.

This exemption certificate can generally only be applied for in respect of future royalty payments (starting as of the application date). As a temporary measure, the German Federal Ministry of Finance, however, allows for a simplified application procedure where, in the event that royalty payments have been made or will be made up to 30 September 2021 and the exemption certificate is applied for by no later than the end of December 2021. This would mean that, if the German Federal Tax Office issues the certificate, both future and past royalty payments would be exempt from German withholding tax (during the period covered by the exemption certificate).

This simplified procedure is available in cases in which the licensor has "obvious" treaty protection. In terms of royalty payments which have been, or will be, made up to 30 September 2021, no withholding tax would need to be levied and paid to the German revenue if the following conditions are met:

- The licensee is not tax-resident in Germany at the time of making the royalty payment (i.e. in the case of individuals, neither their domicile nor their habitual place of residence is in Germany; in the case of a corporation, neither its place of management nor its registered office is in Germany).
- The licensor is "obviously" benefiting from tax treaty protection, i.e. it is resident in a jurisdiction with which Germany has concluded a double tax treaty under which Germany is not entitled to impose tax on such royalty payments, and all of the requirements to invoke such treaty protection have been met (such as the requirement that the facts of the case do not leave any room for the application of an abuse-of-legal-forms provision).
- The licensor, or in specific cases the licensee, applies to the German Federal Tax Office for an exemption certificate by 31 December 2021 at the latest; such application must indicate the contractual relationships which form the basis for the royalty payments (and include a translation of the relevant sections of those contractual agreements).

In the event that the German Federal Tax Office refuses to issue the exemption certificate, German taxes need to be declared and paid within one month of such refusal, in principle also in case an objection is filed against the refusal.

In terms of royalty payments to be made after 30 September 2021, the normal German withholding tax procedure will apply, which means that exemption certificates should be applied for as soon as possible in the relevant cases, as the exemption certificate can only be applied for in respect of royalty payments after the application is received by the German Federal Tax Office.

In order to determine the basis for German (withholding) tax if, for example, the contract covers a large number of rights or rights are registered in several countries, the German Federal Ministry of Finance takes the view that the overall royalty payment needs to be allocated to the intangibles registered in

Germany in proportion to the protected intangibles registered outside of Germany. The rules for the determination of the tax base are the subject of much debate and there is considerable legal uncertainty in this respect.

In the event of the sale and transfer of such protected intangibles, the sale and transfer would not be subject to withholding tax. However, the German Federal Ministry of Finance takes the view that a tax return needs to be filed by the seller even if the seller is protected by a tax treaty. The filing of a "zero return" is accepted, provided the licensor is "obviously" entitled to invoke tax treaty protection and the facts and the contractual arrangements underlying the sale are disclosed.

Non-German persons or entities (irrespective of whether they are a licensor or a licensee) who might be subject to this German limited corporate income tax liability should thoroughly analyse their contractual arrangements concerning intangible property registered in Germany and, where appropriate, should prepare the disclosure and filing of an application for an exemption certificate in the simplified procedure permitted by the German tax authorities until the end of December 2021.

## CONTACTS



**Dr. Stefan Behrens**  
Partner

**T** +49 69 7199 1666  
**E** stefan.behrens  
@cliffordchance.com



**Dr. Felix Mühlhäuser**  
Head of Tax, Germany

**T** +49 69 7199 1051  
**E** felix.muehlhaeuser  
@cliffordchance.com



**Dr. Claudia Milbradt**  
Partner

**T** +49 211 4355 5962  
**E** claudia.milbradt  
@cliffordchance.com



**Olaf Mertgen**  
Partner

**T** +49 69 7199 1691  
**E** olaf.mertgen  
@cliffordchance.com



**Dr. Michael Bohnhardt**  
Counsel

**T** +49 69 7199 1623  
**E** michael.bohnhardt  
@cliffordchance.com



**Ernst Witzani**  
Of Counsel

**T** +49 69 7199 1612  
**E** ernst.witzani  
@cliffordchance.com



**Jutta Aichele**  
Partner

**T** +49 69 7199 1651  
**E** jutta.aichele  
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. If you would like to know more about the subjects covered in this publication or our services, please contact the authors or your usual contact at Clifford Chance.

[www.cliffordchance.com](http://www.cliffordchance.com)

Clifford Chance, Junghofstraße 14, 60311  
Frankfurt am Main, Germany

© Clifford Chance 2021

Clifford Chance Partnerschaft mit  
beschränkter Berufshaftung von  
Rechtsanwälten, Steuerberatern und Solicitors  
· Sitz: Frankfurt am Main · AG Frankfurt am  
Main PR 2669

Regulatory information pursuant to Sec. 5  
TMG and 2, 3 DL-InfoV:

[www.cliffordchance.com/deuregulatory](http://www.cliffordchance.com/deuregulatory)

Abu Dhabi • Amsterdam • Barcelona • Beijing •  
Brussels • Bucharest • Casablanca • Delhi •  
Dubai • Düsseldorf • Frankfurt • Hong Kong •  
Istanbul • London • Luxembourg • Madrid •  
Milan • Moscow • Munich • Newcastle • New  
York • Paris • Perth • Prague • Rome • São  
Paulo • Seoul • Shanghai • Singapore •  
Sydney • Tokyo • Warsaw • Washington, D.C.

Clifford Chance has a co-operation agreement  
with Abuhimed Alsheikh Alhagbani Law Firm  
in Riyadh.

Clifford Chance has a best friends relationship  
with Redcliffe Partners in Ukraine.