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Hybrid entities within the new DTT Germany-Netherlands – treatment and impact

Treatment of hybrid entities within tax treaties is still unsolved → supports abusive constructions, which lead to white income

Discussed solution by OECD, already implemented in DTT GER-NL

Prot. No. I para. 2 DTT GER-NL:
In the case of an item of income, profit or gain through a person that is fiscally transparent under the laws of either Contracting State, such 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.

Hypothesis:
Merely expands the scope of the application of the DTT. Especially no binding effect of the qualification by the State of origin on the source state

Some Arguments:

- Wording
- Existence of Prot. No. XIX para .1 lit. a) DTT GER-NL
- BFH judgement concerning Art. 1 para. 7 DTT GER-USA (BFH judgement of 26 June 2013)
- In comparison with sec. 50d para. 1 s. 11 EStG

→ Clarification of the treaty entitlement →

BUT:
treaty shopping is likely

- Participation exemption may be applicable for third-country nationals
- National anti-abuse rules are applicable, but not effective

Temporary Results:

- Eliminates obscurities regarding the scope of application of the convention, but treaty shopping is likely.
- Solution has to be found within one DTT, but this will mean a high level of legislative complexity to the contracting states.

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