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

Treatment of hybrid entities within tax treaties is still unsolved \(\Rightarrow\) 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

BUT: treaty shopping is likely
- Participation exemption may be applicable for third-country nationals
- National anti-abuse rules are applicable, but not effective

Clarification of the treaty entitlement

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.

Maria Reinert, Research Assistant at the Institute for Finance- and Tax-Law, University of Osnabrück, Germany
Contact: maria.reinert@web.de