

Germany and Ireland Double Tax Treaty: Asset Management Perspective

Germany and Ireland signed an updated Double Taxation Treaty on Wednesday 30 March 2011. A Protocol to the Double Taxation Treaty and a Joint Declaration were also signed which are of significance to the Irish funds industry.

Amongst the new provisions contained with the Protocol to the Treaty and the Joint Declaration, the following three key points should be noted:

- 1) An Irish UCITS fund, either a company or a unit trust, can benefit from the Treaty if 95% of the investors are Irish residents or residents of states that have a treaty with Germany. It is not clear how compliance with the “good ownership” 95% test will be evidenced.

Comment – this provision is in line with the recommendation of the OECD report on granting treaty benefits to collective investment vehicles. We understand that the German authorities may be prepared to accept statistical sampling as a means of establishing “good ownership”.

- 2) A Common Contractual Fund (CCF) established in Ireland shall not be regarded as a resident of Ireland and shall be treated as fiscally transparent for the purposes of granting tax treaty benefits.

Comment – this provision reflects the OECD guidelines and is important not only in the German context but as a precedent for other civil code jurisdictions.

- 3) Any Irish company is theoretically capable of benefitting from tax treaty benefits. However, a corporate entity would only be authorised to claim Double Taxation Treaty benefits if it complies with German anti-treaty shopping rules. A protocol to the treaty provides that a company is not entitled to full or partial relief from withholding taxes to the extent it has shareholders who would not be entitled to the same relief if they received the income of the foreign company directly, and

- there are no economic or other significant non-tax reasons for the interposition of the foreign company; or
- the foreign company does not derive more than 10% of its gross income from its own commercial activities (this does not include income that the foreign company generates from the administration of its own assets, such as shareholdings, nor does it include activities that have been outsourced to other parties); or
- the foreign company does not have its own business infrastructure (e.g. office communication framework, employees) enabling it to participate in the business community.

The anti-treaty shopping rules do not apply to entities qualifying as investment funds under the German Investment Act.

Comment – it is not yet clear how the anti-treaty shopping protocol will be applied but it is likely to eliminate any opportunity for using mere conduits to access the treaty.

The legal procedures to bring the Double Taxation Treaty, Protocol to the Treaty and Joint Declaration into force are currently being followed. We have not yet received an indication of when the agreements will become effective.

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