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Special Reports

Closer to Haven? New German Tax Planning Opportunities

by Wolfgang Kessler and Rolf Eicke

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Table of Contents

Time and again, a decision of the German Federal Tax Court (*Bundesfinanzhof*, or BFH) makes an international tax planner's heart beat faster. Such a cause for celebration occurred on May 31, 2005, when the BFH repealed its strict view on the German anti-treaty-shopping rule in the landmark *Hilversum II* decision. (For prior coverage, see "German Tax Court Revamps Treaty Shopping Law," *Tax Notes Int'l*, Oct. 10, 2005, p. 122, and "German Tax Authorities Disregard *Hilversum II* Ruling," *Tax Notes Int'l*, Feb. 27, 2006, p. 677.) From a tax planner's point of view, the decision creates more legal security and additional planning opportunities. That's good news for U.S. investors in Europe. U.S. multinational corporations (MNCs) are the biggest beneficiaries because EU countries such as the Netherlands,[1] Luxembourg,[2] Belgium,[3] and Ireland[4] belong to the most favorable tax havens for

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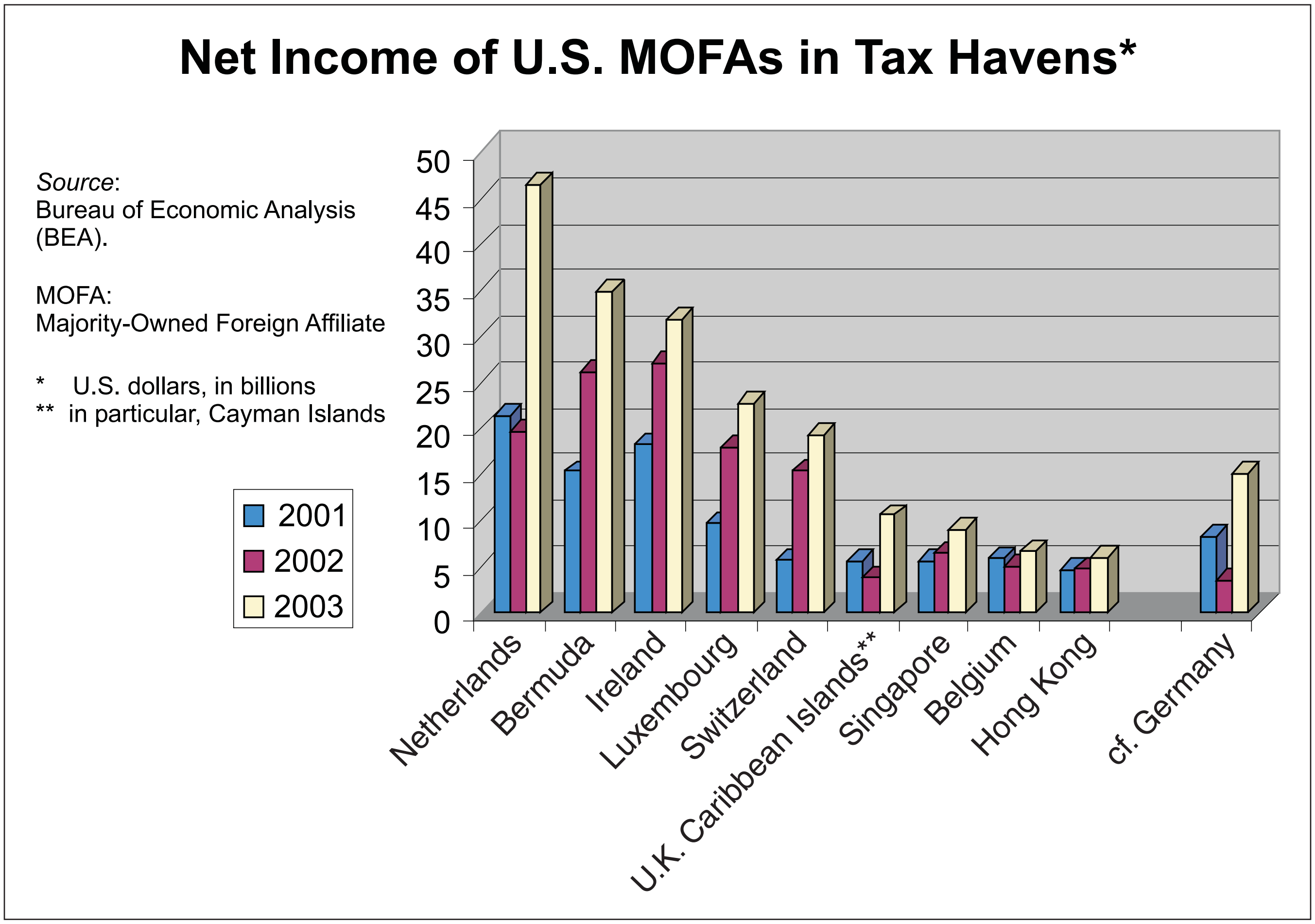
[1]Rosmalen, "The Netherlands: The Preferred Country to Establish an Intermediate Holding Company," 32 *Tax Planning International Review* (2006), p. 21; Müller, *The Netherlands in International Tax Planning* (2005), p. 145.

[2]Warner, *Luxembourg in International Tax Planning* (2004), p. 8.

[3]Vanhaute, *Belgium in International Tax Planning* (2004), p. 173.

[4]Haccius, *Ireland in International Tax Planning* (2004), p. 1368.



U.S. MNCs.[5] Hence, repatriating U.S. profits from Europe is easier since the sun set on IRC section 965.[6]

Every tax jurisdiction is forced to protect itself against abuse. The weapons of the German tax regime are the general antiabuse rule in section 42 AO (*Abgabenordnung*, or the General Fiscal Code) and the anti-treaty-shopping rule[7] in section 50d(3) EStG (*Einkommensteuergesetz*, or the German Income Tax Code). The latter applies only to the abuse

[5]Those facts are based on BEA data. It has been continuously pointed out by Tax Analysts' economic correspondent Martin A. Sullivan in "U.S. Multinationals Move More Profits to Tax Havens," *Tax Notes Int'l*, Feb. 16, 2004, p. 589; "Shifting of Profits Offshore Costs U.S. Treasury $10 Billion or More," *Tax Notes Int'l*, Oct. 4, 2004, p. 13; "Latest U.S. IRS Data Show Jump in Tax Haven Profits," *Tax Notes Int'l*, Oct. 18, 2004, p. 202; "Data Show U.S. Companies Shifting Profits to Tax Havens," *Tax Notes Int'l*, Sept. 20, 2004, p. 1035; "The Truth About Offshore Outsourcing and Profit Shifting," *Tax Notes Int'l*, Mar. 15, 2005, p. 951; "Tax Amnesty International: U.S. Relief for Prodigal Profits," *Tax Notes Int'l*, May 26, 2006, p. 742; "Data Show Europe's Tax Havens Soak Up U.S. Capital," *Tax Notes Int'l*, Feb. 11, 2002, p. 551.

[6]Kessler and Eicke, "Arbeitsplätze aus dem Steuerparadies: Neue US-Subpart F-Regel schafft Anreize zur Repatriierung von Gewinnen aus Tax Havens in die USA — Ein Vorbild für Deutschland?" *Internationales Steuerrecht* (2006), p. 1.

[7]"Treaty Shopping has been described as the situation where a person who is not entitled to the benefits of a tax treaty makes use — in the widest meaning of the word — of an individual or of a legal person in order to obtain those treaty benefits that are not available directly." Larking, *IBFD International Tax Glossary*, 4th ed. (2001), p. 367. *Also see* the detailed report on treaty shopping in Haug, "The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis," 29 *Vand. J. Transnat'l L.* 191 (1996); Streng, "Treaty Shopping: Tax Treaty 'Limitation of Benefits' Issues," 15 *Houston Journal of International Law* 1, 4 (1992); Panayi, "Limitation on Benefits and State Aid," *European Taxation* (2004) pp. 83, 84; Petkova, "Treaty Shopping — The Perspective of National Regulators," *Intertax* (2004) pp. 543, 544; Becker and Thömmes, "Treaty shopping and EC Law," *European Taxation* (1991) p. 173; Becker and Thömmes, "Treaty Shopping und EG-Recht — Kritische Anmerkungen zu Art. 28 des neuen deutsch-amerikanischen Doppelbesteuerungsabkommens," *Der Betrieb* (1991), p. 566.

of benefits derived from double tax treaties (so-called treaty shopping)[8] or EC law (so-called directive shopping).[9] Those two belong to the most dangerous cliffs tax planners have to sail around when dealing with German international tax law. They both fiscally ignore any tax planning that is merely motivated by tax savings — that is, by measures that otherwise would not be considered and are therefore exclusively planned to circumvent the wording of the tax provision.[10]

In general, the legislation responds to the two major evils for tax jurisdictions. Those are, on one hand, the increase of passive international holding companies as well as finance companies and, on the other hand, the rise of ever-changing tax avoidance strategies. While common-law countries apply the substance-over-form doctrine in those cases, civil law countries like Germany focus on the abuse itself.[11]

The question of whether there has been an abuse of benefits for tax purposes was the subject of many decisions of the BFH, including, for example, the *Dublin Docks* cases, the *Delaware* decision, the *Dutch Foundation* cases, and the *Hilversum* decisions.[12]

	Inbound	Outbound
Section 42 AO	*Hilversum I* and *II* *Dutch Foundation I* and *II*	*Delaware* decision *Dublin Docks I*, *II*, and *III*
Section 50d(3) EStG	*Hilversum I* and *II*	

This article presents new tax planning opportunities for international investors in Germany on the basis of those landmark decisions, drawing particular attention to the latest *Hilversum II* decision.

After all, the BFH burnished the cliff into a rock in the everlasting troubled waters of German international taxation.

I. Anti-Treaty-Shopping Rule

Treaty shopping is widely regarded as a legitimate instrument of international tax planning based on the notion that taxpayers should be free to structure their economic actions in ways that are most beneficial to them.[13] Yet distinguishing between legitimate and abusive tax planning is a task that legislatures and courts around the world face continuously.

The creation of the German anti-treaty-shopping rule of section 50d(3) EStG[14] was the legislature's response to the so-called *Monaco* decision of the BFH.[15] In that highly controversial[16] decision, the court held that the existing general antiabuse rule of

[8]Wassermeyer in: Debatin and Wassermeyer, DBA, article 1 MA, note 65.

[9]Kessler, "Grundlagen der Steuerplanung mit Holdinggesellschaften," in: Grotherr, *Handbuch der Internationalen Steuerplanung*, (2003), pp. 159, 177; Dreβler, *Gewinn- und Vermögensverlagerungen in Niedrigsteuerländer und ihre steuerliche Überprüfung* (2000), p. 288; Füger, "Probleme und Zweifelsfragen der Missbrauchsvorschriften bei beschränkter Steuerpflicht," in: Grotherr, *Handbuch der Internationalen Steuerplanung* (2003), pp. 785, 787; Frotscher, *Internationales Steuerrecht* (2005), p. 49; Hahn-Joecks in: Kirchhof, Söhn, and Mellinghoff, Einkommensteuergesetz — Kommentar, section 50d, note A 30; Reith, *Internationales Steuerrecht* (2004), p. 168.

[10]Strunk, "Erstattung der Kapitalertragssteuer bei zwischengeschalteter ausländischer Basisgesellschaft," *Internationale Wirtschaftsbriefe* (2005), Gruppe 2, p. 1253, shows what benefits those legal consequences might have and how to construct a tax plan by triggering the anti-treaty-shopping rule and the antiabuse rule on purpose.

[11]Haug, "The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis," 29 *Vand. J. Transnat'l L.* (1996), p. 191; Hundt, "Entwicklung des deutschen Miβbrauchsverständnisses bei grenzüberschreitenden Gestaltungen," in: Gocke, Gosch, and Lang, *Festschrift für Franz Wassermeyer* (2005), p. 153; Streng, "Treaty Shopping: Tax Treaty 'Limitation of Benefits' Issues," 15 *Houston Journal of International Law* (1992), p. 1; Panayi, "Limitation on Benefits and State Aid," *European Taxation* (2004), pp. 83, 84.

[12]For an overview, see Kessler and Eicke, "Neue Gestaltungsmöglichkeiten im Lichte des Treaty-Shoppings," *Praxis*

(Footnote continued in next column.)

Internationale Steuerberatung (2006), p. 23; Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), p. 474; Ritzer and Stangl, "Aktuelle Entwicklungen bei den steuerlichen Anforderungen an die Zwischenschaltung ausländischer Kapitalgesellschaften," *Finanz-Rundschau* (2005), p. 1063; Kraft, "Finanzierungsstrukturen im internationalen Konzern auf dem Prüfstand der höchstrichterlichen Rechtsprechung," *Internationales Steuerrecht* (2000), p. 11.

[13]Haug, "The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis," 29 *Vand. J. Transnat'l L.* (1996), pp. 191, 198.

[14]Today's treaty shopping rule in section 50d(3) EStG used to be section 50d(1a) EStG. The decision applied to the latter, which has the same wording as the current version. An analysis of the old version can be found in Thömmes and Eicker, "Limitation of Benefits: The German View — Sec. 50d(1a) Individual Income Tax Act and EC Law Issues," 39 *European Taxation* (1999), p. 9.

[15]BFH decision of October 29, 1997, Federal Tax Bulletin II (1998), p. 235.

[16]Wassermeyer in: Debatin and Wassermeyer, DBA, article 1 MA note 65.

section 42 AO did not apply to nonresidents. It found that the establishment of a foreign subsidiary was beyond the scope of the German tax jurisdiction.[17] The BFH later overruled its own decision,[18] and the legislature eventually created what is now section 50d(3) EStG.

A. Prerequisites

The rule provides that treaty benefits must be denied if the following three-part test is fulfilled cumulatively:[19]

- The shareholder of the corporation eligible for treaty benefits would not be entitled to receive the benefits if he or she received the income directly.
- There are neither justifiable economic nor any other nontax reasons for the interposition of the corporation.
- The interposed corporation does not conduct any active business.

To a large extent, those criteria are the codification of the so-called oasis jurisdiction of the BFH.[20]

To avoid being trapped by that rule, it is essential to know how many economic reasons and how much business activity is required for a foreign holding company — in short, how much substance is necessary. Yet, if there are any economic reasons *or* if there is any business activity, the anti-treaty-shopping rule doesn't apply. As a result, an international tax planner must wonder where to draw the line between a passive letterbox company and an active holding company.

At the end of the day, only an in-depth look at all of the criteria can answer that question. There are interdependencies between economic reasons and business activities. In practice, economic reasons often cannot be verified without simultaneously providing evidence of business activity.

1. Economic Reasons

Unfortunately, there is no sharp line between eligible economic or other justifiable nontax reasons and those that trigger the anti-treaty-shopping rule. However, case law suggests that the formation of a company constitutes an economic reason if it is either used as the headquarters of a worldwide operating group[21] or to acquire major company shares in the home country of the target companies,[22] or if it has the purpose of acquiring and financing at least two subsidiaries.[23]

Economic or other nontax reasons have been rejected by case law in situations when the interposition was merely:

- motivated by tax savings;[24]
- to limit the risk of liability;[25]
- to secure assets in times of crisis;[26]
- when the company exclusively held assets without any further activities;[27] or
- when the company only held shares of another corporation to finance the latter with debt.[28]

2. Business Activity

A company's business activity requires more than passive asset management. Generally, holding only

[17]Kramer, "Host Country Germany," 22 *Tax Planning International Forum* (2001), March, pp. 16, 17; Schaefer and Vree, "German Court Clarifies Substance Standard Under Antiabuse Rules," *Tax Notes Int'l*, Aug. 12, 2002, p. 757; very critical Wassermeyer in: Debatin and Wassermeyer, DBA, article 1 MA note 65.

[18]BFH decision of October 29, 1997, Federal Tax Bulletin II (1998), p. 235.

[19]Even though the wording suggests that there is a cumulative link between all three criteria, the German tax authorities maintain that a company can only apply for a reduction/exemption if it can demonstrate that there is an economic reason *and* a business activity. *See* Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), p. 74; Hahn-Joecks in: Kirchhof, Söhn, and Mellinghoff, Einkommensteuergesetz — Kommentar, sec. 50d note G1.

[20]BFH decision of January 28, 1992, Federal Tax Bulletin II (1993), p. 84; Luttermann, "Die Rechtsprechung des Bundesfinanzhofes zur Anerkennung von Basisunternehmen im Internationalen Steuerrecht," *Internationales Steuerrecht* (1993), pp. 153, 155; Bosch, "Gedanken zur Missbrauchsvermutung des [section] 42 AO bei Zwischenschaltung einer Basisgesellschaft aus Sicht der steuerlichen Betriebsprüfung," *Internationales Steuerrecht* (1998), pp. 393, 395.

[21]BFH decision of January 29, 1975, Federal Tax Bulletin II (1975), pp. 553, 555; Flick, "Deutsche Aktivitäten von Ausländern über ausländische Zwischengesellschaften und die Mißbrauchsgesetzgebung des [section] 50d Abs. 1a EStG," *Internationales Steuerrecht* (1994), pp. 223, 224.

[22]BFH decision of July 29, 1976, Federal Tax Bulletin II (1977), pp. 261, 263.

[23]BFH decision of October 23, 1991, Federal Tax Bulletin II (1992), pp. 1026, 1028.

[24]BFH decision of July 29, 1976, Federal Tax Bulletin II (1977), pp. 263, 264.

[25]BFH decision of August 27, 1997, Federal Tax Bulletin II (1998), p. 163. Yet, in the more recent *Dutch Foundation II* case (BFH decision of November 17, 2004, *Deutsches Steuerrecht Entscheidungen* (2005), p. 580), the court accepted the planning in spite of the fact that one reason was to limit the liability.

[26]BFH decision of March 5, 1986, Federal Tax Bulletin II (1986), pp. 496, 498.

[27]BFH decision of July 29, 1976, Federal Tax Bulletin II (1977), pp. 263, 264.

[28]BFH decision of December 9, 1980, Federal Tax Bulletin II (1981), pp. 339, 341.

one participation doesn't suffice.[29] Thus, it is required that more than one major participation is held and managed.[30] The activity must be performed by the company applying for the benefits. It is generally not possible to impute activities of other group members.[31]

a. No letterbox company

A company is not eligible for benefits if it turns out to be a mere letterbox company. The main characteristics of a letterbox company are a minimum of substance — figuratively, only the company nameplate on the front door of an office building. In most cases, the tasks of the company are fulfilled by the parent or other affiliated companies.[32] The basic test to determine letterbox status is whether the substance of the holding company is consistent with the function it serves.[33] In most cases, there is interdependence between the substance and the function. The more substance a company has, the more one can assume that it fulfills its function.

To carry out a specific function, the company must have sufficient personnel and equipment, such as its own offices and means of communication. The traditional view deems the disputed company to be a letterbox company if it depends on support for personnel and the items mentioned above. Those prerequisites have become particularly interesting because of the developments in the cases *Hilversum II* and *Dutch Foundation II,* discussed below.[34] In both cases, the companies in question lacked anything that used to be the minimum standard for an eligible company under the anti-treaty-shopping rule — no employees, no own office, and no telephone or fax lines.

b. Not just formally interposed

Also, the company must not only be formally interposed with the intention of enforcing the directions of the principal company of the group.[35] In practice, this prerequisite can be easily met by a simple reorganization. The company — located, for example, in a group-owned "office hotel" — could be put in charge of performing tax arbitrage for the entire group.[36] Most importantly, the company must have the last word when it comes to decisions directly related to the company. Thus, the company must not just carry out decisions made at the group headquarters.[37]

B. Legal Consequences

By triggering the anti-treaty-shopping rule, the taxpayer loses all tax benefits arising out of either EC law, particularly the parent-subsidiary directive, or a double tax treaty (DTT). Yet, contrary to section 42 AO, the interposed company is not disregarded for tax purposes.[38]

The structure of the anti-treaty-shopping rule largely resembles a limitation on benefits (LOB) clause in DTTs.[39] By contrast, a letterbox company under an LOB clause is disregarded for tax purposes.[40]

C. Case Law

1. Hilversum I

A Bermuda resident (G, 85 percent), an Australian resident (H, 7.5 percent) and a U.S. resident (B, 7.5 percent) were shareholders of a Bermuda-based

[29]In an *obiter dictum* in *Hilversum II*, the BFH left that question open. Notably, holding only one participation does not trigger the antiabuse rule if there are economic reasons to do so. *See* Kessler and Eicke, "Neue Gestaltungsmöglichkeiten im Lichte des Treaty-Shoppings," *Praxis Internationale Steuerberatung* (2006), pp. 23, 27.

[30]Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 480, with further references to the "*Basisgesellschaftsrechtsprechung*" of the BFH.

[31]Yet, in *Hilversum II*, the BFH put a lot of emphasis on the fact that other group members performed operating activities in the Netherlands, the country in which the disputed company resided. However, the legal background for this remains unclear. *See* Kessler and Eicke, "Neue Gestaltungsmöglichkeiten im Lichte des Treaty-Shoppings," *Praxis Internationale Steuerberatung* (2006), pp. 23, 27.

[32]Jacobs, *Internationale Unternehmensbesteuerung* (2002), p. 508.

[33]Eilers, "Substanzerfordernis an ausländische Finanzierungsgesellschaften," in: Gocke, Gosch, and Lang, *Festschrift für Franz Wassermeyer*, (2005), pp. 323, 328.

[34]*Cf.* II.C.ii and III.C.iii.

[35]Menck, "Internationale Steuerarbitrage — zu einem BFH-Urteil," *Internationales Steuerrecht* (2002), p. 807; Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 477, 480.

[36]For an in-depth look on international tax arbitrage in the aftermath of the *Delaware* decision, see Menck, "Internationale Steuerarbitrage — zu einem BFH-Urteil," *Internationales Steuerrecht* (2002), p. 807.

[37]Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 480.

[38]Lieber, *Internationale Wirtschaftsbriefe* (2005), Fach 3a, Gruppe 1, pp. 1088, 1089; Strunk, "Erstattung der Kapitalertragssteuer bei zwischengeschalteter ausländischer Basisgesellschaft," *Internationale Wirtschaftsbriefe* (2005), Gruppe 2, pp. 1253, 1254.

[39]Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), p. 692; Kofler, "Treaty Shopping, Quota Hopping und Open Skies," in: Lang and Jirousek, *Praxis des Internationalen Steuerrechts,* (2005), p. 211.

[40]That is not necessarily a disadvantage, as shown by Strunk, "Erstattung der Kapitalertragssteuer bei zwischengeschalteter ausländischer Basisgesellschaft," *Internationale Wirtschaftsbriefe* (2005), Gruppe 2, p. 1253.

holding company, G Ltd. G-Ltd. owned an interposed Dutch company (B.V.) that held a German GmbH.[41] B.V. claimed a refund of dividend withholding tax[42] to the extent that the withholding tax exceeded the 5 percent under the Germany-Netherlands tax treaty at the time of the distribution.[43] The German Federal Tax Agency (*Bundesamt für Finanzen*)[44] denied the request as it deemed the B.V. to be a letterbox company as B.V. had neither its own offices nor its own telephone lines. B.V. used the offices and telecommunication facilities of a sister company and was represented by a shared-director, a managing director who was in charge of several group companies. There were no other employees.

The court found that B.V. had neither any business activity nor any economic reason for the interposition of the company; therefore, it applied the anti-treaty-shopping rule of what is today section 50d(3) EStG.[45] Hence, the presumption that the company was only formally interposed could not be disproved at any time.[46] That other group companies were operating very actively in the Netherlands was not relevant to the court.[47] As a result, the court refunded only the difference between the nontreaty rate of 25 percent and the treaty rates of 10 percent (under the Australia-Germany treaty for H) and 15 percent (under the Germany-U.S. treaty for B). G did not get reimbursed because there is no Bermuda-Germany treaty.

2. Hilversum II

The shareholders in *Hilversum II* were almost identical with those in *Hilversum I*. In *Hilversum II*, two sister companies (B.V. I and B.V. II) of the disputed company in *Hilversum I* claimed for the benefits provided by the Germany-Netherlands tax treaty, thus the reimbursement of the dividend withholding tax that exceeded 5 percent.[48] The shareholder structure was very similar despite the minor, but not crucial, difference that both B.V.s were held by a company located in the Dutch Antilles.

In the course of the group's expansion, the two B.V.s were outsourced to hold participations for the entire group. Both were located in the Dutch "media Mecca" of Hilversum in offices of an affiliated company. Neither of the two B.V.s in question had its own telecommunication lines or personnel. Each of them held a German GmbH participation and other European and non-European participations. That was a significant difference to *Hilversum I*, in which only one German GmbH participation was held. Other affiliated companies of the group operated actively in the entertainment business in the Netherlands, which was the core operational location for the group at large. Yet the disputed companies did not perform any active business.

The court found that the B.V.s were not merely letterbox companies, because their existence was justified by the following economic reasons:

- the participations were held permanently;
- the companies were functionally independent;
- the outsourcing of the holding activities into an interposed corporation was part of the group-wide strategy; and
- the interposed company was *part of an active group* because other group companies operated in the Netherlands.

In contrast to *Hilversum I*, the court put a lot of emphasis on the latter.[49] It remains the court's secret what the legal roots are and if there is any imputation of activities.[50]

D. Tax Planning After *Hilversum II*

From a tax planner's point of view, *Hilversum II* facilitates international transactions. Most striking

[41]Schaefer and Vree, "German Court Clarifies Economic Substance Under Antiabuse Rules," *Tax Notes Int'l*, Aug. 12, 2002, p. 757.

[42]Section 43(b)(1) EStG.

[43]The zero rate under the EC parent-subsidiary directive was not in force at that time. Now, profit distributions by a German subsidiary to an EC holding company are generally tax-free according to the parent-subsidiary directive (section 8(b)(1) KStG (Corporate Tax Code)). However, an amount equivalent to 5 percent of the dividend income is to be treated as a nondeductible business expense that may not reduce the income of the recipient holding company (section 8(b)(5) KStG). Thus, only 95 percent of the dividend income received by the EC holding company is tax-free. In contrast, all costs incurred on the investment in a subsidiary company may be deducted for tax purposes.

[44]The agency was closed on December 31, 2005. Most of the tasks are now performed by the *Bundeszentralamt für Steuern* (BZSt).

[45]BFH decision of March 20, 2002, *Internationales Steuerrecht* (2002), p. 597.

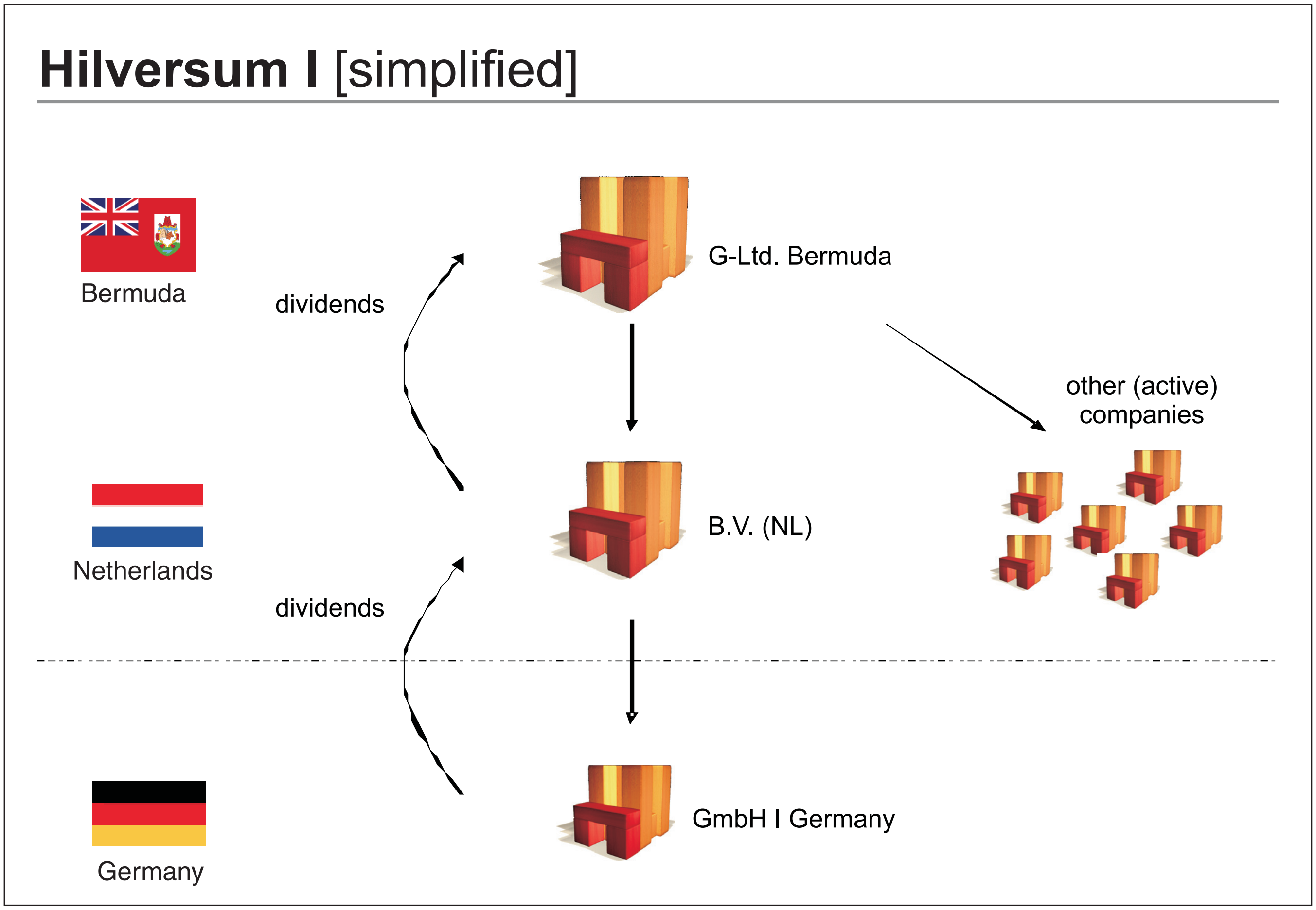
[46]Jacob and Klein, *Internationales Steuerrecht* (2002), p. 599; Füger, "NL-Zwischenholding: Steuerentlastung oder Gestaltungsmissbrauch," *Praxis Internationale Steuerberatung* (2002), pp. 291, 292; Lieber, *Internationale Wirtschaftsbriefe* (2002), Fach 3a, Gruppe 1, pp. 1029, 1034.

[47]Hey, "German Tax Court Revamps Treaty Shopping Law," *Tax Notes Int'l*, Oct. 10, 2005, p. 122, at 124.

[48]For an in-depth analysis of this decision in *Tax Notes Int'l*, see Hey, *supra* note 47. *See also* Ritzer and Stangl, "German Tax Authorities Disregard Hilversum II Ruling," *Tax Notes Int'l*, Feb. 27, 2006, p. 677.

[49]Miles, "Intermediary Dutch Holding Company Qualifies for Parent/Subsidiary Directive Relief," 32 *Tax Planning International Review* (2005), pp. 16, 17.

[50]Hey, *supra* note 47, at 125.



is that a company can be accepted for tax purposes without using an office or telecommunication lines or having personnel. In any event, it is highly recommended that the holding company be located in the country of the core business activity.[51] Against that background, the policy of the group to hold participations permanently through an interposed holding is an important new factor for the BFH to accept the planning.[52]

There is one more surprise hidden in the wording of the decision. In its *obiter dictum*, the court considered whether a company holding only a single participation could be eligible under the anti-treaty-shopping rule.[53] In other words, one participation suffices as long as there are economic reasons for that structure. Although that *obiter dictum* still raises some uncertainties, it leads to one more practice advice: To be safe, take two, even though one participation might be enough.[54]

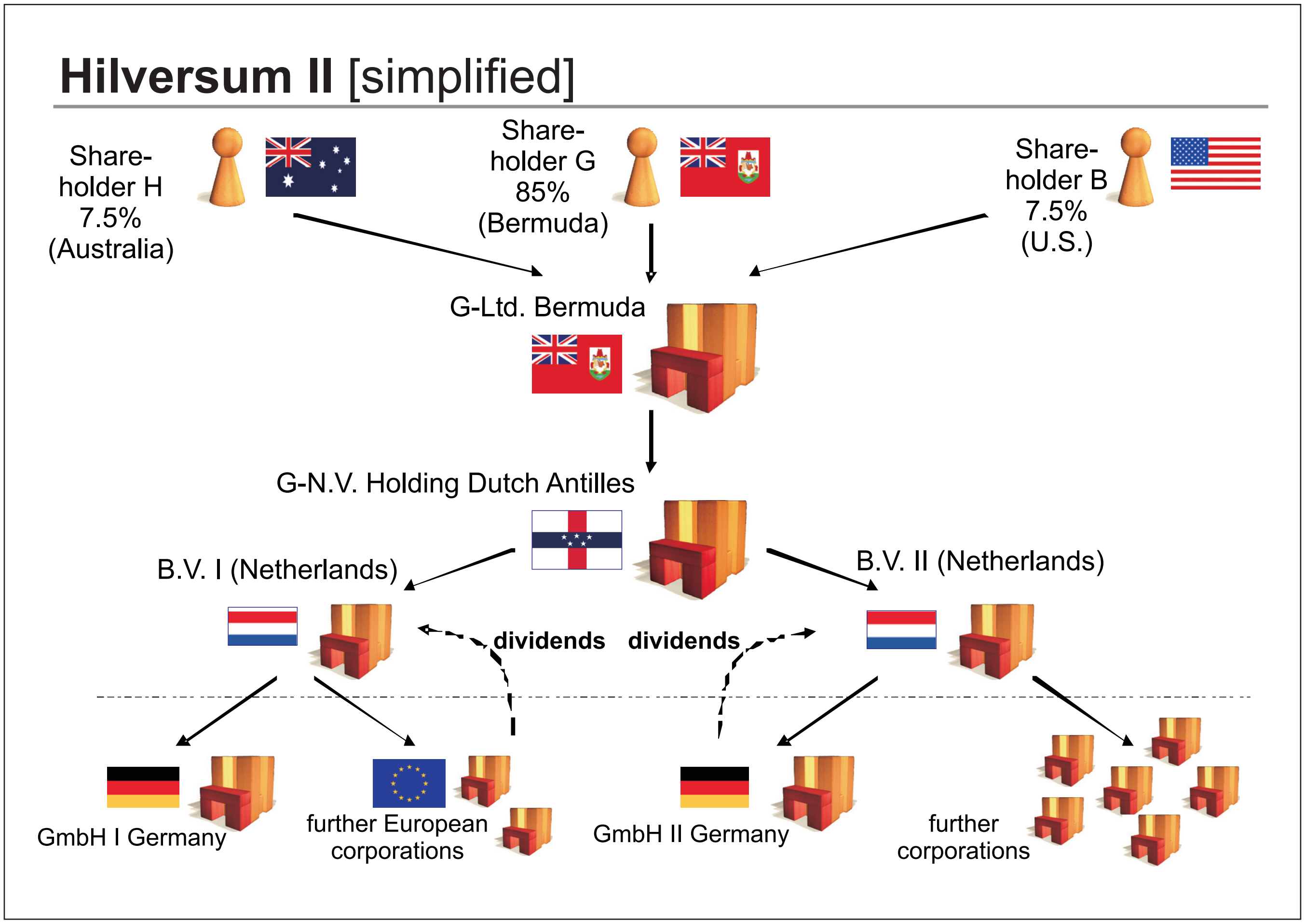
On the basis of the described cases, we assessed all possible combinations of holding company features. The result is the matrix below in which we speculated whether the anti-treaty-shopping rule would apply. Again, if the court finds any economic reason or business activity, the rule does not apply.

[51]Hey, *supra* note 47, at 125. *See* Kessler, *Die Euro-Holding*, 1996, pp. 97 to find the perfect holding location.

[52]Jacob and Klein, "Anmerkung zur BFH-Entscheidung v. 31.5.2005," *Internationales Steuerrecht* (2005), pp. 711, 713.

[53]Kessler and Eicke, "Neue Gestaltungsmöglichkeiten im Lichte des Treaty-Shoppings," *Praxis Internationale Steuerberatung* (2006), pp. 23, 25; Breuninger and Schade, *GmbH-Rundschau* (2005), pp. 1375, 1377.

[54]Hey, *supra* note 47, at 124; Haarmann, *Internationales Steuerrecht* (2005), pp. 713, 720; Jahn, "Erstattung der Kapitalertragssteuer bei zwischengeschalteter ausländischer Basisgesellschaft," *Praxis Internationale Steuerberatung* (2005), pp. 271, 273.



It is important to note the interdependencies between economic reasons and business activities; in particular, a fact that was originally crucial for the business activity might have an impact on the existence of an economic reason and vice versa.[55] At the end of the day, only a comprehensive look at both legal criteria leads to the solution.

II. Antiabuse Rule

Throughout its existence, the BFH in its antiabuse jurisdiction has reiterated that the mere intention to save taxes does not suffice to trigger the antiabuse rule; nor can a tax-efficient structure of finance lead to tax avoidance.[56] The court maintains the principle that the tax law by and large accepts the civil law framework.[57]

A. Prerequisites

The wording of the provision is as general as it is simple. It states that tax-related facts and circumstances should be taxed regardless of the legal framework if a legal construction is meant to evade taxation.

[55]Kessler and Eicke, "Neue Gestaltungsmöglichkeiten im Lichte des Treaty-Shoppings," *Praxis Internationale Steuerberatung* (2006), pp. 23, 25; Jahn, "Erstattung der Kapitalertragssteuer bei zwischengeschalteter ausländischer Basisgesellschaft," *Praxis Internationale Steuerberatung* (2005), pp. 271, 273.

[56]BFH decision of August 27, 1997, Federal Tax Bulletin II (1998), p. 163; Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 475, 478.

[57]Schimmele, *Ertrag-Steuerberater* (2002), p. 347.

The legislature also recently amended a clarification in paragraph 2, codifying that paragraph 1 is relevant unless its application is explicitly precluded.[58]

Under the continuous jurisdiction of the BFH, section 42 AO is fulfilled when the legal framework of a company is inappropriate considering the economic goals pursued. Moreover, the planning must be performed solely for tax purposes and not justifiable by economic or other nontax reasons.[59]

There are several criteria specified in case law to determine whether section 42 AO is applicable. The provision applies if the company is either a letterbox company or acting abusively on the basis of several other facts.

1. Letterbox Company

The characteristics of a letterbox company are the same as in the anti-treaty-shopping rule.[60] A minimum substance is required that exists if the company has enough personnel, office space, and telecommunications equipment to accomplish its function.

2. Other Circumstances

If the company is not a letterbox company, other circumstances may lead to an application of the antiabuse rule. An important indication is whether the company has, legally and factually, the last word in its own affairs. It is also vital that the company act on its own behalf and trade on its own account.[61] Last, the company must not be just formally interposed for tax purposes. In the past, that criterion was fulfilled by companies that merely managed some assets. Thus, an international tax planner should strongly advise that the interposed company must not just carry out what has been decided somewhere else.[62]

The BFH in its antiabuse jurisdiction has reiterated that the mere intention to save taxes does not suffice to trigger the antiabuse rule.

In a nutshell, the company is safe for tax purposes if it acts and performs its business like an independent company, including maintaining the right to make binding decisions.

B. Legal Consequences

The most striking difference between the anti-treaty-shopping and the antiabuse rules are the legal consequences. While the former denies the benefits for which the taxpayer has applied, the latter leads to a "piercing of the corporate veil" for tax purposes, meaning that all taxable income of the holding or finance company in question is attributed to the shareholder of the company.[63] Hence, the transaction will be taxed as if a proper legal structure has been implemented.

C. Case Law

The landmark cases in this area are the *Delaware* decision, the *Dublin-Docks* jurisdiction, and the *Dutch Foundation* jurisdiction.

1. Delaware Decision

In this section 42 AO landmark case,[64] a German corporation (GmbH) owned by a U.S. group established a company as a special purpose vehicle in Delaware. To capitalize the Delaware corporation, the German corporation took out a loan and deducted the interest thereon as business expenses. The one and only purpose of the Delaware corporation was to finance the construction of a research and development center along with the headquarters of another U.S. affiliate in the United States. There was a tax advantage for the German company because of a debt-push-down planning. All finance expenses were deductible, while all dividends would

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[58]The lawmaker put forward that this clarification was necessary because the BFH found in its *Dublin Docks* jurisdiction that section 42 AO is not applicable when special provisions apply. *See* Hahn-Joecks in: Kirchhof, Söhn, and Mellinghoff, Einkommensteuergesetz — Kommentar, section 50d, note A 59a. That "clarification," of course, received some critical comments by the BFH, yet confining itself to an appropriate judicial self-restraint as can be seen in BFH, decision of March 20, 2002, *Internationales Steuerrecht* (2002), pp. 568, 571. *See also* Kraft, *Internationales Steuerrecht* (2002), pp. 571, 572; Schimmele, *GmbH-Steuerberater* (2002), pp. 254, 255; Fischer*, Finanz-Rundschau* (2002), pp. 1080, 1081.

The BFH is right when it finds that a case that is "CFC rule proof" cannot be subject to section 42 AO. It would be a contradiction in terms if the strict and special CFC rule accepts a tax planning whereas the general antiabuse rule considers the very same situation as abusive (so-called *argumentum a maiore ad minus* argument). *See* Gosch, *Deutsches Steuerrecht* (2002), pp. 1351, 1352; Schimmele, *Ertrag-Steuerberater* (2002), p. 347.

[59]BFH decision of March 20, 2002, *Internationales Steuerrecht* (2002), pp. 568, 569; BFH, decision of August 19, 1999, Federal Tax Bulletin II (2001), p. 43.

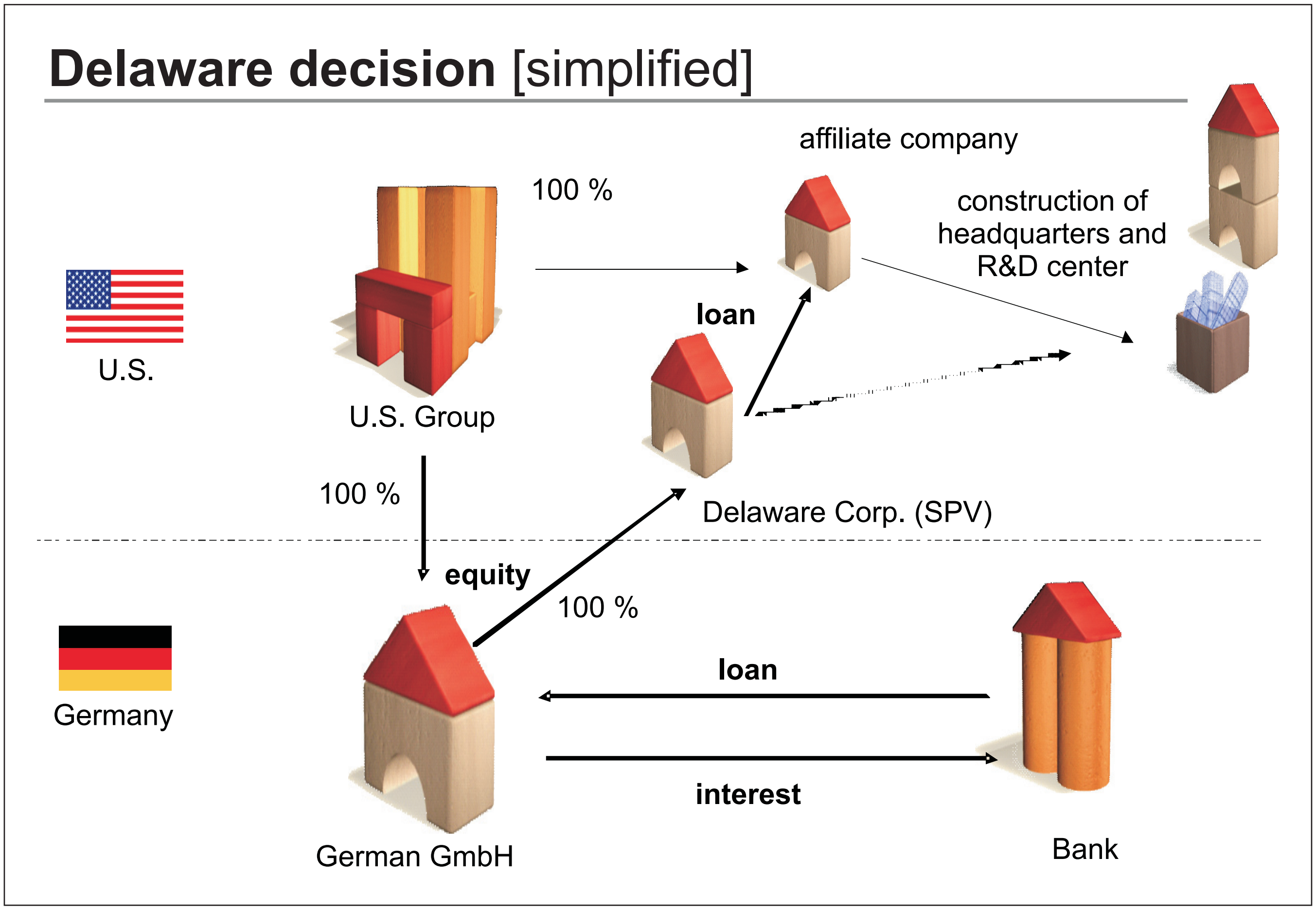
[60]*Cf.* I.A.2.a.

[61]Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 477.

[62]*Id.*

[63]Lieber, *Internationale Wirtschaftsbriefe* (2005), Fach 3a, Gruppe 1, pp. 1088, 1089.

[64]BFH decision of March 20, 2002, Federal Tax Bulletin II (2003), p. 50 and *Internationales Steuerrecht* (2002), p. 568.



have been tax-free.[65] This structure took advantage of the ballooning concept — that is, the timed separation between financing costs and dividend income.[66] The Delaware corporation had its own office facilities and telephone and fax lines and had part-time employees occupied with accounting tasks.

The BFH did not articulate any doubt that the corporation had enough substance; hence, it was not deemed to be a letterbox company. We learned four lessons from that decision:

- first, given any substance, like an office or (part-time) personnel, there is no room for the antiabuse rule;
- second, tax arbitrage is accepted by the BFH — in case law, the court has even set a safe haven for any tax arbitrage if the definite final tax liability is above the "oasis level" (currently 25 percent);[67]
- third, the decision endorsed dividend ballooning as a legal tax planning measure;[68] and
- fourth, outsourcing passive activities into a separate company causes no fiscal detriment.[69]

Interestingly, the court found that the arrangement was mainly tax-driven, but that even if the key

[65]Moreover, the company took advantage of an interest arbitrage between the high German and the low U.S. interest level. *See* Menck, "Internationale Steuerarbitrage — zu einem BFH-Urteil," *Internationales Steuerrecht* (2002), p. 807.

[66]Roser, *GmbH-Rundschau* (2002), pp. 869, 870.

[67]Menck, "Internationale Steuerarbitrage — zu einem BFH-Urteil," *Internationales Steuerrecht* (2002), p. 807. The oasis level is derived from section 10(6)(no. 2) AStG (*Außensteuergesetz*, or the Foreign Relations Tax Code).

[68]Kraft, *Internationales Steuerrecht* (2002), pp. 571, 572; Gosch, *Deutsches Steuerrecht* (2002), pp. 1351, 1352; Fischer, *Finanz-Rundschau* (2002), pp. 1080, 1081; Menck, "Internationale Steuerarbitrage — zu einem BFH-Urteil," *Internationales Steuerrecht* (2002), p. 807.

[69]Lieber, *Internationale Wirtschaftsbriefe* (2002), Fach 3a, Gruppe 1, pp. 1029, 1030; Menck, "Internationale Steuerarbitrage — zu einem BFH-Urteil," *Internationales Steuerrecht* (2002), p. 807.

motivation was using tax arbitration to save taxes, it was not abusive.[70] The decision may have frightened the German tax authorities, but it suits international tax planners who can continue to see the BFH as savior of their domain.

Another controversial issue of this case and the *Dublin-Docks* jurisdiction was the relationship between section 42 AO and the German CFC rules in section 7 et seq. AStG (*Außensteuergesetz*, or Foreign Relations Tax Code). The BFH has repeatedly[71] found that section 42 AO prevails over the German CFC rules;[72] yet the practical results for tax purpose are often the same. This is presumably why the tax authorities do not have a preference either way.[73]

2. Dublin-Docks Jurisdiction

The *Dublin-Docks* cases[74] deal with International Finance and Service Centre (IFSC) companies located in the port area of Dublin.[75] From a German perspective, the tax scheme was popular because it took advantage of an interplay between the low Irish tax rate and the old Germany-Ireland tax treaty, which did not contain an "activity clause."[76] The IFSC regime was part of the EC state aid rules to promote business in Ireland.[77] It expired on December 31, 2005.

In the latest case (*Dublin Docks III*),[78] a German financial institution (AG) held participations in two IFSC companies.[79] Contrary to the *Delaware* decision, the company employed no personnel besides a statutory board of directors. It was stipulated that the IFSC companies would be liquidated after a holding period of two years. The operative management of the Irish companies was outsourced to an Irish management company (IBI).

If the company is not a letterbox company, other circumstances may lead to an application of the antiabuse rule.

The tax advantage of this scheme was as follows: The German parent capitalizes the Irish subsidiary, IFSC, which invested the money. IFSC is subject to taxation on the earnings with the fairly low Irish tax rate.

The court accepted the planning as the two years sufficed to consider the holdings permanent.[80] Further, the structure was based on a justified economic reason because a reasonable businessperson would be free to decide whether the money would be invested from the parent or from the subsidiary company, whether it would be invested domestically or abroad, and if the profits would be taxed in a high-tax country or in a low-tax country.[81] To cut a

[70]BFH decision of March 20, 2002, *Internationales Steuerrecht* (2002), pp. 568, 570.

[71]BFH decision of October 23, 1991, Federal Tax Bulletin II (1992), p. 1026; BFH decision of June 10, 1992, Federal Tax Bulletin II (1992), p. 1029; BFH decision of January 1, 2000, Federal Tax Bulletin II (2001), p. 222.

[72]The BFH reasoned that section 42 AO logically has to take priority over the CFC rules due to the different legal consequences. While the consequence of section 42 AO is that all earnings of the foreign company are deemed to be profits of the German parent company denying the company status of the foreign company for tax purposes, the German CFC rules accept the foreign company and its earnings as such. Eventually, those earnings are added to those of the German parent company.

[73]Haase, "Dublin Dock Companies and the German Anti-Abuse Provision," 31 *Tax Planning International Forum* (2004), October, p. 15.

[74]The basic scheme of the *Dublin-Docks* case is that a German corporation establishes a foreign subsidiary corporation in Ireland carrying out management and finance activities. The advantage is that all profits on those activities are subject to the low Irish corporate tax rate. *See* Wassermeyer in: Debatin and Wassermeyer, DBA, article 1 MA note 69.

[75]The development of Ireland as a financial center is an impressive example for how an innovative fiscal policy can result into a major rise of welfare. When Ireland joined the European Union, it was one of the poorest member states with one of the lowest growth rates. Because of the IFSC regime and other incentives, Ireland became a favorite location for MNCs within a decade, creating double-digit growth rates for the Irish economy. Martin Sullivan calls it "Ireland's rise from rags to riches" in "The U.S.'s Multibillion-Dollar Subsidy for Ireland," *Tax Notes Int'l*, July 25, 2005, p. 296.

[76]Kraft, "German-Controlled IFSCs Not Abusive," 40 *European Taxation* (2000), 288.

[77]Moran, "Extended Date for Dublin IFSC Projects Boosts Tax Advantages," 6 *Journal of International Taxation* (1995), October, pp. 86, 87; Diamond and Diamond, *Tax Havens of the World — Ireland*, (2004), p. 4.

[78]BFH decision of February 25, 2004, *Internationales Steuerrecht* (2004), p. 527. An earlier account on IFSC companies in light of the German antiabuse rule is Rädler, Lausterer, and Blumenberg, "Tax Abuse and EC Law," 6 *EC Tax Review* (1997), p. 86.

[79]For a detailed analysis of this case, see Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), p. 74.

[80]Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), pp. 74, 75; Miles, "Germany/Ireland," 31 *Tax Planning International Review* (2004), September, p. 27; Lieber, *Internationale Wirtschaftsbriefe* (2004), Fach 3a, Gruppe 1, p. 1063; Haase, "Dublin Dock Companies and the German Anti-Abuse Provision," 31 *Tax Planning International Forum* (2004), October, 15.

[81]Laule, "Grenzen internationaler Steurgestaltung im Lichte der Rechtsprechung des EuGH," *Internationales Steuerrecht* (2003), pp. 217, 221; Philipowski, *Internationales Steuerrecht* (2004), pp. 531, 532; Ribbrock, "Anmerkung zu

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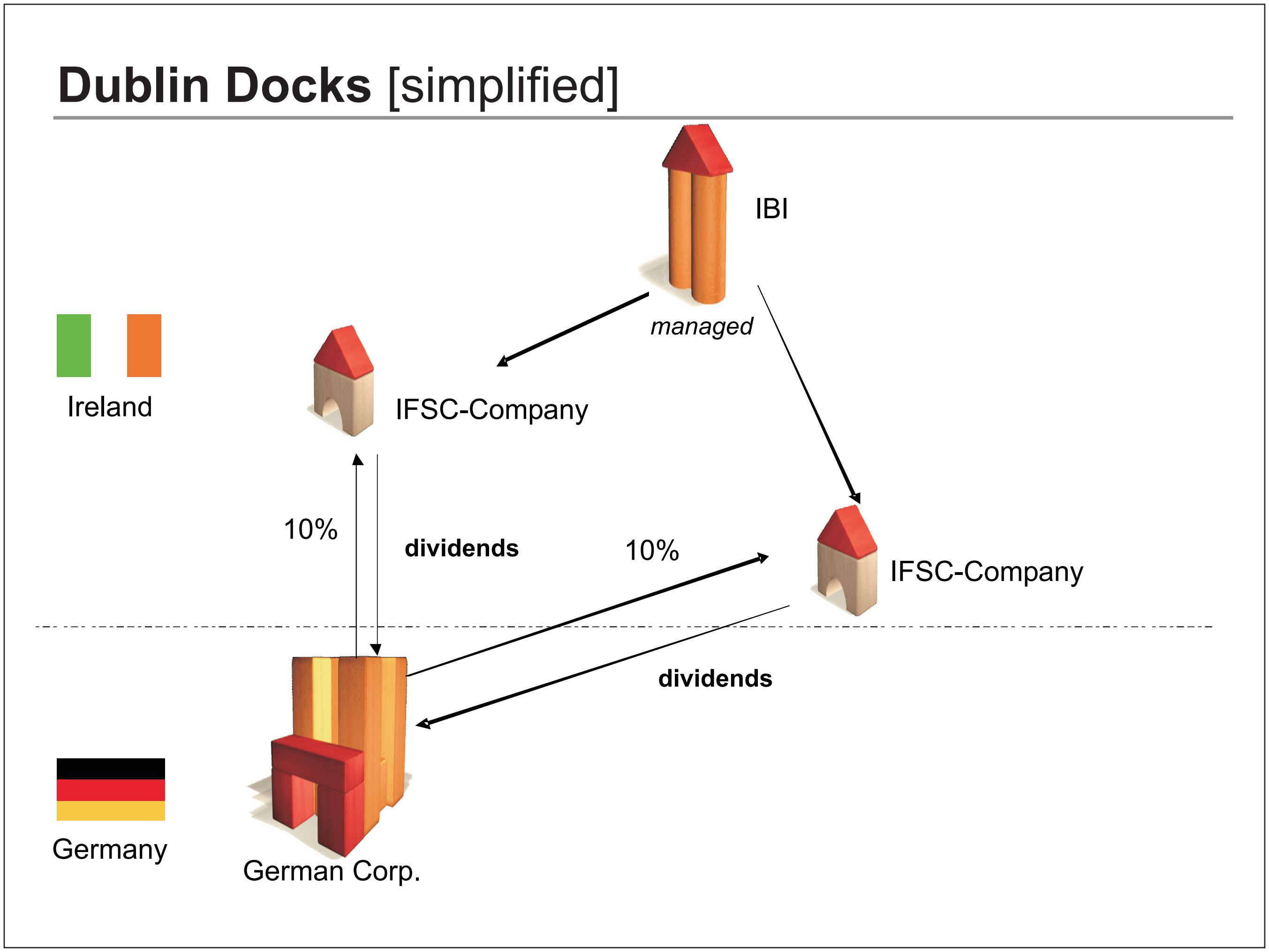


long story short, there is no rule demanding that interest earnings and earnings from group reorganization must be taxed in Germany.[82] Yet, most striking in the *Dublin Docks* cases is that section 42 AO cannot possibly be applicable if the taxpayer took advantage of a special tax incentive scheme that is expressly provided for by EC state aid rules.[83]

The lesson to be learned from *Dublin Docks III* is that once there are no presumptions toward a letterbox company, section 42 AO does not apply.[84] That decision is consistent with the court's position in previous *Dublin Docks* decisions.[85]

BFH Urt. v. 25.2.(2004) — Dublin-Docks," *Recht der Internationalen Wirtschaft* (2004), pp. 959, 960; Gosch, "Anmerkung zu BFH Urt. v. 25.2.(2004) — Dublin-Docks," *Deutsches Steuerrecht* (2004), p. 1286.

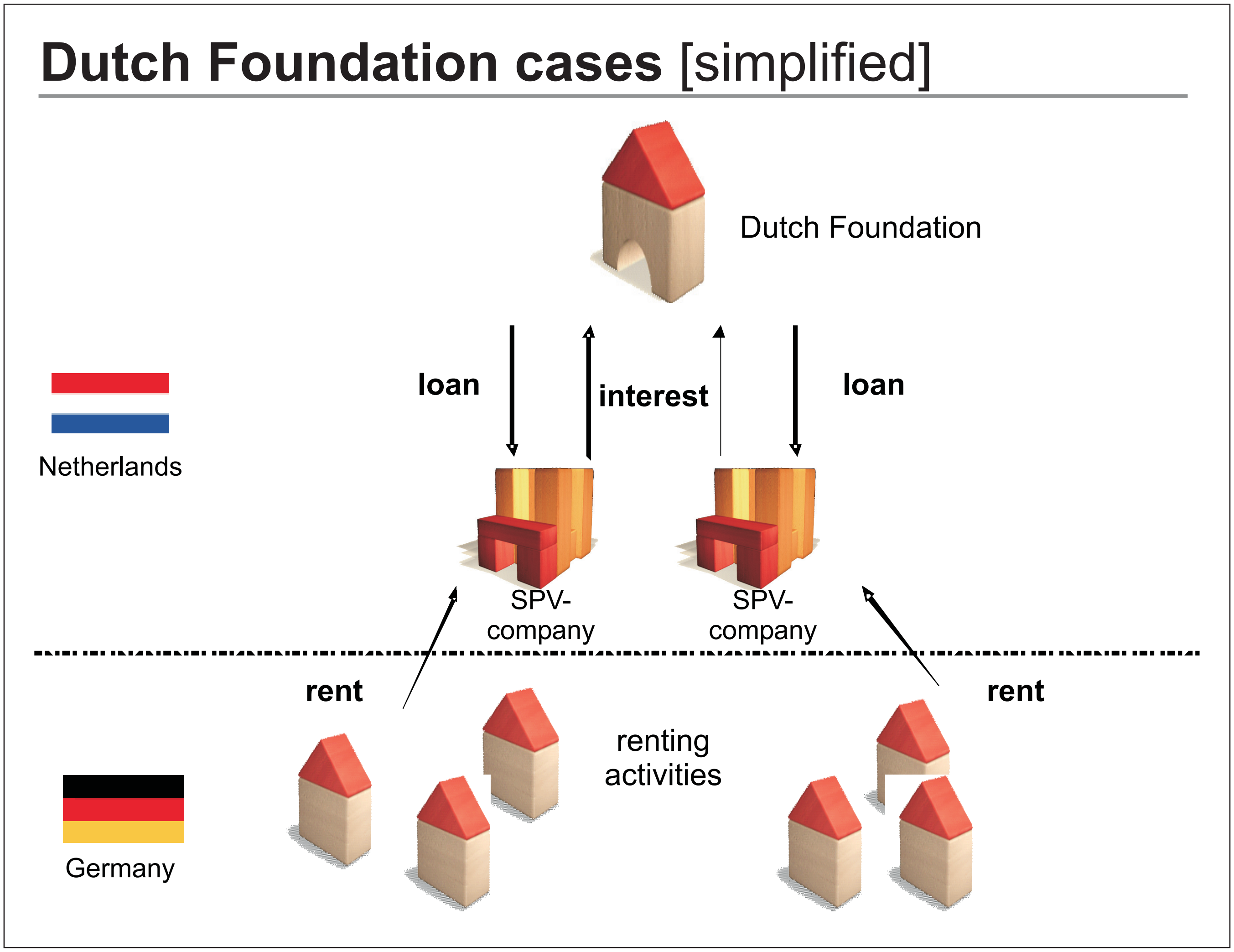
[82]Philipowski, "Anmerkung zu BFH urteil v. 25.2.2004 — Dublin-Docks III," *Internationales Steuerrecht* (2004), pp. 531, 532.

[83]Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), pp. 74, 75; Wilke, "BFH hat seine bisherige Rechtsprechung zu den 'Dublin Docks-Fällen' nochmals bestätigt," *Praxis Internationale Steuerberatung* (2004), pp. 217, 218; Ritzer and Stangl, "Aktuelle Entwicklungen bei den steuerlichen Anforderungen an die Zwischenschaltung ausländischer Kapitalgesellschaften," *Finanz-Rundschau* (2005), pp. 1063, 1064.

(Footnote continued in next column.)

[84]Wolff, *Internationales Steuerrecht* (2004), pp. 532, 533.

[85]BFH decision of January 19, 2000, Federal Tax Bulletin II (2001), p. 222 and BFH, decision of January 19, 2000, BFH/NV (2000), p. 824; Kraft, "Finanzierungsstrukturen im internationalen Konzern auf dem Prüfstand der höchstrichterlichen Rechtsprechung," *Internationales Steuerrecht* (2000), pp. 11, 12. For an analysis of the recent decision of the Austrian Supreme Administrative Court on IFSC-Companies, see Obermair and Weninger, "Treaty Shopping and Domestic GAARs in the Light of a Recent Austrian Decision on Irish IFS Companies," 33 *Intertax* (2005), p. 466; Loukota, *Steuer und Wirtschaft International* (2005), p. 205.



3. Dutch Foundation Cases

As *Hilversum I* and *Hilversum II* are linked to the anti-treaty-shopping clause, *Dutch Foundation I*[86] and *Dutch Foundation II*[87] are related to the anti-abuse rule.

In the 1997 case *Dutch Foundation I*, several special purpose vehicle (SPV) companies were outsourced by a Dutch foundation. The SPV companies performed renting activities in Germany. They did not have any employees, mailing address, or telephone numbers. The *Dutch Foundation* gave credits to each SPV company and collected interest on them. The BFH regarded the SPV as a functionless base company and concluded that the interposition was for tax purposes only.[88] The tax advantage of the structure was that the SPV companies did not have any taxable income, because they could deduct all interest payments from their earnings. Another reason for the structure was a limitation of liability. However, the court did not consider that to be an essential nontax purpose for the structure. The result was that all SPV earnings were attributed to the Dutch foundation for tax purposes.

A similar case was *Dutch Foundation II* in 2004, in which the court overruled its *Dutch Foundation I* decision. The facts sound like an old story by now.

[86]BFH decision of August 27, 1997, Federal Tax Bulletin II (1998), p. 163.

[87]BFH decision of November 17, 2004, *Deutsches Steuerrecht Entscheidungen* (2005), p. 580.

[88]Ritzer and Stangl, "Aktuelle Entwicklungen bei den steuerlichen Anforderungen an die Zwischenschaltung ausländischer Kapitalgesellschaften," *Finanz-Rundschau* (2005), pp. 1063, 1066; Baranowski, "Anmerkung zu BFH Urt. v. 17.11.1997 — Stiftungsfall I," *Internationale Wirtschaftsbriefe* (1998), Fach 3a, Gruppe 1, pp. 667, 668; Roser, *GmbH-Rundschau* (2002), pp. 869, 870.

The company did not have any employees or any telecommunication means. Surprisingly, the BFH found that the interposition of the SPV companies was based on organizational and liability reasons, which this time sufficed to constitute nontax reasons for the structure.[89] Other significant factors were that the structure was established throughout the group with all foreign corporations and that the outsourcing of renting activities into the SPV companies was of a permanent nature.[90] The remarkable change of position in *Dutch Foundation II* had more than likely a decisive impact on the outcome in *Hilversum II*.

D. Future Tax Planning

The bottom line of the discussed cases is that in the course of its section 42 AO jurisdiction, the BFH has adopted an increasingly taxpayer-friendly position not only for EU companies (like in the *Dublin Docks* cases) but also toward an interposed U.S. company (as in the *Delaware* decision). After all, the decisive criteria of whether the BFH accepts an intermediate holding company for tax purposes is the duration of the interposition.[91] Thus, with a permanent interposition, the taxpayer is sailing within the boundaries of a safe haven, harbored by the case law of the BFH. There has never been a case in which the interposition was permanent *and* section 42 AO applied.[92] Nevertheless, at the core of the concern remains that the decisions have to be made at the place of the subsidiary company.[93]

A never-ending controversy is the relationship between section 42 AO and the German CFC rules in section 7 et seq. AStG. The good news is that even for lower taxation abroad, the application of the CFC rules is barred as long as there is a minimum amount of substance. The cases show that there can even be enough substance despite the absence of any employees.[94]

For any future tax planning, one must consider that the German CFC rules will presumably undergo a fundamental change. The background for that prediction is the pending European Court of Justice case *Cadbury Schweppes*,[95] in which the court will decide whether or not the British CFC rules comply with EC law. If the British CFC rules infringe EC law, the very similar German CFC rules will share their destiny.[96] The fear of being trapped into section 42 AO has eased after *Hilversum II*, although it should not be assumed that "anything goes" for the substance of foreign intermediate holding companies. In any case, it is mandatory and highly important to request a tax exemption certificate well *in advance* to obtain the benefits of reduced withholding taxes under a tax treaty. Any distribution before the certificate is received must be avoided because the certificate cannot be issued with retroactive effect.[97]

The trend shows that the BFH has increasingly adopted a taxpayer-friendly position in recent years. For that reason, the odds are good that section 42 AO will not be triggered.

III. Relationship Between the Rules

Another fundamental aspect of the *Hilversum II* decision is that it created more legal certainty for a dispute that has been going on for decades. The BFH found that the anti-treaty-shopping clause of section 50d(3) EStG, as a special provision, takes precedence over the general antiabuse rule in section 42 AO.[98] In the past, that has only been stated as *obiter dictum* by the BFH.[99] How much it can be taken at face value in terms of legal certainty depends to some extent on the point of view the tax authorities

[89]Ritzer and Stangl, "Aktuelle Entwicklungen bei den steuerlichen Anforderungen an die Zwischenschaltung ausländischer Kapitalgesellschaften," *Finanz-Rundschau* (2005), pp. 1063, 1066.

[90]Breuninger and Schade, *GmbH-Rundschau* (2005), pp. 1375, 1376.

[91]Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), 74, 79.

[92]Wolff, *Internationales Steuerrecht* (2004), pp. 532, 540.

[93]Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), pp. 74, 79.

[94]Other than either members of the board of directors who have outsourced the management (*Dublin Docks*) or a shared-director (*Dutch Foundation I* and *II*). Nevertheless, it helps to decrease uncertainty to convince the tax authorities or later on the tax courts that the director or the CEO is not in charge for several other companies as well just to be safe.

[95]ECJ case C-196/04, *Cadbury Schweppes*, OJ June 26, 2004, C-168, 3.

[96]For the latest account on the German CFC rules in the EC law context, see Schönfeld, "Quo vadis Hinzurechnungsbesteuerung und EG-Recht — Bestandsaufnahme und neuere Entwicklungen," *Internationale Wirtschaftsbriefe* (2006), Fach 3, Gruppe 1, p. 2119.

[97]Schaefer and Vree, "German Court Clarifies Economic Substance Under Antiabuse Rules," *Tax Notes Int'l*, Aug. 12, 2002, p. 757.

[98]Hey, *supra* note 47, at 124, welcomes this line of reasoning stating that section 42 AO is too uncertain and too broad in its nature as an "all facts and circumstances test" to deal with the specific cases meant to be covered by section 50d(3) EStG. Still, Lieber, *Internationale Wirtschaftsbriefe* (2005), Fach 3a, Gruppe 1, pp. 1088, 1089, puts forward that the BFH has not per se precluded any application of section 42 AO next to section 50d(3) EStG.

[99]Füger, "NL-Zwischenholding: Steuerentlastung oder Gestaltungsmissbrauch," *Praxis Internationale Steuerberatung* (2002), 291, 293; Lieber, *Internationale Wirtschaftsbriefe* (2002), Fach 3a, Gruppe 1, pp. 1029, 1033.

adopt in the future. Yet that sound statement of the BFH is more than just a "fallback line" for an international tax planner. For the time being, it can be relied on to prevent any liability claims on illegal tax planning.

IV. Implications of the EC Law

Although the BFH cases shown are essential and highly important for secure tax planning, the taxpayer must not lose sight of the far-reaching implications of the EC law.

First of all, the influence of the European Court of Justice on BFH decisions should not be underestimated. In the course of recent decades, the ECJ has become the guardian of the EC Treaty. As far as the issues discussed in these articles are concerned, it particularly rules on the basis of the freedom of establishment[100] (EC Treaty articles 43 and 48). The ECJ has the final word on all EC-law-related questions of interpretation and enforcement,[101] and the BFH must refrain from any interpretation that infringes on EC law.[102] Thus, in the cases at hand, any interpretation of the BFH of the anti-treaty-shopping rule and the antiabuse rule must comply with EC law. In the past, the BFH had to fear a dissenting ECJ opinion in all the cases discussed above. That fear will continue, constituting nothing less than a sword of Damocles hanging over the BFH.[103]

As far as the described cases are concerned, the parent-subsidiary directive does not contain a specific anti-treaty-shopping rule, but it contains a general antiabuse rule in article 1(2).[104] It provides that the directive does not preclude the application of domestic or agreement-based provisions required for the prevention of fraud or abuse. However, too broad an interpretation would violate the rationale of the directive and the EC freedom of establishment.[105] It has been the distinct privilege of the ECJ to substantiate that clause. According to the ECJ, abusive tax planning can be sanctioned only by specific provisions specifically targeting the case in question.[106] Thus, the ECJ does not permit foreign corporations to be ignored for tax purposes on the basis of abstract criteria like personnel, business address, or means of communication.[107] That view of the ECJ might be an explanation for the BFH's change of heart in *Dutch Foundation II* and *Hilversum II*. As a matter of fact, the plaintiffs in *Hilversum II* demanded that the case be referred to the ECJ for a preliminary ruling to ensure that the interpretation of the BFH of section 50d(3) EStG complies with EC law. Eventually, because of the outcome of the decision, there was no longer a need for that reference. The driving force that prompted the BFH to refrain from referring the case to the ECJ might have been the concern that the ECJ would have imposed on the BFH an even more liberal interpretation of the domestic anti-treaty-shopping and antiabuse rules.

V. LOB Clauses in Tax Treaties

The last resort of governments to deter treaty shopping are limitations on benefits (LOB) clauses in tax treaties. One of the first LOB clauses was article 28 of the Germany-U.S. tax treaty of 1989.

[100]The freedom of establishment principle provides that an EU member state must not treat a corporation established in one member state less favorably than a corporation resident in its own territory. For more details, see Sánchez and Fluxà, "Transfer of the Seat of and the Freedom of Establishment," 45 *European Taxation* (2005), p. 219.

[101]Stoschek and Peter, "Section 50d Abs. 3 EStG — erste Rechtsprechung zu einer verfehlten Missbrauchsvorschrift — Vereinbarkeit von Section 50d Abs. 3 EStG mit Europarecht?" *Internationales Steuerrecht* (2002), pp. 656, 663; Laule, "Grenzen internationaler Steurgestaltung im Lichte der Rechtsprechung des EuGH," *Internationales Steuerrecht* (2003), pp. 212, 217; Weber-Grellet, *Europäisches Steuerrecht*, (2005), p. 177.

[102]An updated 2006 checklist on German tax provisions that potentially infringe EC law can be seen in Kessler and Spengel, "Checkliste potenziell EG-rechtswidriger Normen des deutschen direkten Steuerrechts — Update 2006," *Der Betrieb* (2006), Beilage 1, p. 1. *See also* Rädler, Lausterer, and Blumenberg, "Tax Abuse and EC Law," 6 *EC Tax Review* (1997), pp. 86, 100.

[103]Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), p. 74, predict that the BFH will be more and more inclined to apply in the future standards set forth by the ECJ without any prior consultation of that court.

[104]For a detailed look at tax avoidance in the European context, see Almendral, "Tax Avoidance and the European Court of Justice: What is at Stake for European General Anti-Avoidance Rules?" 33 *Intertax* (2005), pp. 562, 569.

[105]Thömmes and Nakhai, "New Case Law on Anti-Abuse Provisions in Germany," 33 *Intertax* (2005), pp. 74, 78; Thömmes and Eicker, "Limitation on Benefits: The German View — Sec. 50d(1a) Individual Income Tax Act and EC Law Issues," 39 *European Taxation* (1999), pp. 9, 12.

[106]ECJ decision of October 17, 1996 (*Denkavit*), *Finanz-Rundschau* (1996), p. 821; Eilers, "Substanzerfordernis an ausländische Finanzierungsgesellschaften," in: Gocke, Gosch, and Lang, *Festschrift für Franz Wassermeyer* (2005), pp. 323, 330. *See also* Thömmes in: Commentary on the Parent/Subsidiary Directive, article 1, note 2.1; Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 481; Hahn-Joecks in: Kirchhof, Söhn, and Mellinghoff, Einkommensteuergesetz — Kommentar, section 50d, note A 32; Roser, *GmbH-Rundschau* (2002), pp. 869, 871.

[107]That notion has been reiterated in the current *Bosal* decision of the ECJ. ECJ decision of September 18, 2003, *GmbH-Rundschau* (2003), p. 1286.

The clause is a vital part of modern U.S. treaty policy,[108] which explains why U.S. treaties contain more LOB clauses than German treaties do, as can be seen in tables 1 and 2 below.

A. LOB Clauses in German Tax Treaties

The taxpayer will not find any LOB clauses in Germany's double tax treaties with the U.S. MNCs' favorite holding locations of Luxembourg and the Netherlands. There are, for instance, LOB clauses in the Germany-U.S. tax treaty and the Germany-Switzerland tax treaty.

Table 1. LOB Clauses in German Tax Treaties With U.S. MNCs' Favorite Holding Countries

Holding Country	LOB Clause
Netherlands	no clause
Luxembourg	no clause
Ireland	no clause
Bermuda	no treaty
Belgium	no clause
Switzerland	Art. 23
Cayman Islands	no treaty
Hong Kong	no treaty
Singapore	Art. 29[a]

[a]The Germany-Singapore tax treaty of 2004 adopted art. 29, which says: "This Agreement shall not be interpreted to mean that a Contracting State is prevented from applying its domestic legal provisions on the prevention of tax evasion or tax avoidance." Thus, sec. 42 AO and sec. 50(d)(3) EStG remain applicable. See also Dörrfuβ and Weidlich, "Neues DBA zwischen Deutschland und Singapur," *Internationales Steuerrecht* (2005), pp. 518, 523.

1. *Germany-U.S. Treaty*

The LOB clause in the Germany-U.S. tax treaty[109] is special because it turned out to be a trendsetter for all further negotiations of income tax treaties signed by the United States.[110] It is an ongoing discussion whether or not the clause complies with EC law.[111] The provision in article 28 of the treaty features two major innovations:

- First, there is an active business test[112] that is met if the income meets the connection requirement and if the active German business is substantial in relation to the U.S. subsidiary. Even though no substantiality test is provided in the LOB provision, the test is described in one of the examples contained in the memorandum of understanding.[113]
- Second, there is competent authority discretion,[114] which grants treaty benefits to taxpayers failing to meet any of the mechanical tests. Essential factors to be considered are the existence of a clear business purpose for the structure and location of the income-earning entity, an active trade, and a valid business nexus between the countries in question.

2. *Germany-Switzerland Treaty*

The Germany-Switzerland tax treaty[115] does not contain an LOB clause, but it contains an antiabuse rule in article 23. The rule is not as restrictive as the

[108]Article 22 U.S. model treaty.

[109]Germany-U.S. Income and Capital Tax Treaty, signed on August 29, 1989, entered into force August 21, 1991.

[110]Debatin and Endres, *The New US/German Double Tax Treaty* (1990), p. 459, and *also see* the checklist for the right to claim treaty benefits on p. 471; Haase, "Limitation-on-Benefits-Clause in the U.S./German Double Taxation Treaty," 32 *Tax Planning International Review* (2005), January, pp. 26, 27; Debatin, "Das neue Doppelbesteuerungsabkommen mit den USA (Teil 2)," *Der Betrieb* (1990), pp. 654, 660; Debatin, "Das neue Doppelbesteuerungsabkommen mit den USA (Teil 1)," (*Der Betrieb* 1990), p. 598; Streng, "Treaty Shopping: Tax Treaty 'Limitation of Benefits' Issues," 15 *Houston Journal of International Law* (1992), pp. 1, 23; Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 700. *See* U.S. and German anti-treaty-shopping measures in their respective tax treaties in Haug, "The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis," 29 *Vand. J. Transnat'l L.* (1996), pp. 191, 238, 262; Eilers and Watkins, "Article 28 of the German-U.S. double taxation treaty of 1989: An Appropriate Solution to the Treaty Shopping Problem?" 20 *Tax Planning International* (1993), pp. 15, 16.

[111]Wassermeyer, article 28 DBA USA, in: Debatin and Wassermeyer, *Doppelbesteuerung* (2005), pp. 1, 11; Becker and Thömmes, "Treaty Shopping und EG-Recht — Kritische Anmerkungen zu Art. 28 des neuen deutsch-amerikanischen Doppelbesteuerungsabkommens," *Der Betrieb* (1991) p. 566; Portner, "Vereinbarkeit der Miβbrauchsklausel im DBA-USA 1989 mit EG-Recht," *Internationale Wirtschaftsbriefe* (1991), Fach 8, Gruppe 2, pp. 663, 664; Becker and Thömmes, "Treaty Shopping and EC Law," *European Taxation* (1991), p. 173.

[112]Article 28(1c) Germany-U.S. tax treaty.

[113]Haase, "Limitation-on-Benefits-Clause in the U.S./German Double Taxation Treaty," 32 *Tax Planning International Review* (2005), January, pp. 26, 27.

[114]Article 28(2) Germany-U.S. treaty.

[115]Germany-Switzerland Income and Capital Tax Treaty, signed on August 11, 1971, as amended by the protocol signed on March 12, 2002, entered into force March 24, 2003.

LOB clause in the Germany-U.S. treaty.[116] That clause was unprecedented and unique[117] in the German treaties until the conclusion of the Germany-Singapore treaty in 2004.[118] It says, in the unofficial translation, "This Convention shall not be construed so as to prevent a Contracting State from applying the provision of its national law on the prevention of tax evasion or tax fraud." The 2002 protocol amends article 23 providing that "the German legal provisions for the prevention of tax evasion include the provisions of Section 42 of the General Tax Code (*Abgabenordnung*) and paragraph 3 of Section 50d of the Income Tax Law (*Einkommenssteuergesetz*)." Thus, both countries can apply their domestic anti-treaty-shopping and antiabuse rules without any restrictions on specific topics as in the version that had been in force until January 1, 2004.[119] Hence, the BFH decision *Hilversum II* has the additional effect that it makes transactions of U.S. MNCs within the scope of the Germany-Switzerland tax treaty easier.

3. Treaty-Overriding

Last, it is not always certain if a tax treaty ultimately prevails over domestic provisions or if a domestic provision overrides a tax treaty. The situation is not always as clear as in the Germany-Switzerland tax treaty, which explicitly provides for an application of domestic provisions.

Under article 28 of the Germany-U.S. tax treaty, which specifically provides requirements that have to be met to be eligible for the treaty benefits, most scholars maintain that if the specific and exclusive prerequisites of article 28 of the Germany-U.S. tax treaty are fulfilled, the clause is exclusive and the benefits have to be granted.[120] In turn, beyond the scope of article 28, domestic rules such as section 42 AO and section 50(d)(3) EStG apply, which means that the taxpayer is not protected by the treaty.

If a tax treaty does not contain any reference to domestic antiabuse provisions or an LOB clause as in the Germany-Netherlands and Germany-Luxembourg treaties, the problem is either solved based on the good-faith principle (when both contracting states have antiabuse provisions)[121] or an implicit general international antiabuse caveat.[122]

B. LOB Clauses in U.S. Tax Treaties

To repatriate profits from a German subsidiary over an interposed holding company, the structure must also comply with LOB clauses in tax treaties between the United States and countries in which the holding companies of U.S. MNCs are located. In that context, it has been a highly disputed issue whether LOB clauses between the United States and EC member states are in conformity with EC law because of the discriminatory effect on other EC member states.[123] That is a major reason why LOB clauses between the United States and EC member states have become increasingly complex to avoid conflicts with EC law.[124]

Because U.S. MNCs in Germany route their dividends from Germany over Luxembourg and the

[116]Debatin, "Das neue Doppelbesteuerungsabkommen mit den USA (Teil 2)," *Der Betrieb* (1990), pp. 654, 661.

[117]There is no rule like this in other German treaties. It has its roots in article 14 of the France-Switzerland tax treaty. *See* Wassermeyer, article 23, in: Flick, Wassermeyer, Wingert, and Kempermann, *Doppelbesteuerungsabkommen Deutschland-Schweiz*, (2004), p. 13.

[118]Article 29 Germany-Singapore tax treaty.

[119]Zwosta, article 23 DBA-Schweiz, in: Debatin and Wassermeyer, *Doppelbesteuerung* (2005), p. 1, 4.

[120]Wassermeyer, article 28 DBA USA, in: Debatin and Wassermeyer, *Doppelbesteuerung* (2005), p. 1; Menhorn, "Section 50d Abs. 3 EStG und der stillschweigende Missbrauchsvorbehalt in Doppelbsteuerungsabkommen," *Internationales Steuerrecht* (2005), p. 325; Prokisch, article 1 DBA-MA, in: Vogel and Lehner, DBA (2003), pp. 203, 289.

[121]Good-faith principle applies. *See* Haase, "Dublin Dock Companies and the German Anti-Abuse Provision," 31 *Tax Planning International Forum* (2004), October, p. 15. *See also* Henkel, "Auslandsaktivitäten inländischer Unternehmen," in: Mössner et al., *Steuerrecht international tätiger Unternehmen* (2005), pp. 715, 818, who maintains that section 42 AO does not apply when double tax treaties are involved.

[122]Prokisch, article 1 DBA-MA, in: Vogel and Lehner, DBA (2003), pp. 203, 284; Menhorn, section 50d Abs. 3 EStG und der stillschweigende Missbrauchsvorbehalt, in: Doppelbsteuerungsabkommen, *Internationales Steuerrecht* (2005), pp. 325, 326.

[123]Thömmes, "US-German tax treaty under examination by the EC Commission," *Intertax* (1990), p. 605; De Carlo, Granwell, and van Weeghel, "An Overview of the Limitation on Benefits Article of the New Netherlands-U.S. Income Tax Convention," 34 *Tax Management International Journal* (1993), pp. 163, 170; Kofler, "Treaty Shopping, Quota Hopping und Open Skies," in: Lang and Jirousek, *Praxis des Internationalen Steuerrechts* (2005), pp. 211, 218; De Ceulaer, "Community Most-Favoured-Nation Treatment: One Step Closer to the Multilateralization of Income Tax Treaties in the European Union?" *BIFD* (2003), p. 493; Craig, "Open Your Eyes: What the 'Open Skies' Cases Could Mean for the U.S. Tax Treaties With the EU Member States," *BIFD* (2003), p. 63; Panayi, "Limitation on Benefits and State Aid," *European Taxation* (2004), p. 83; Becker and Thömmes, "Treaty Shopping and EC Law," *European Taxation* (1991), pp. 173, 175.

[124]Kofler, "European Taxation Under an 'Open' Sky: LOB Clauses in Tax Treaties Between the U.S. and EU Member States," *Tax Notes Int'l,* July 5, 2004, p. 45, at 48; Kofler, "Treaty Shopping, Quota Hopping and Open Skies," in: Lang and Jirousek, *Praxis des Internationalen Steuerrechts* (2005), pp. 211, 219; Haug, "The United States Policy of Stringent Anti-Treaty-Shopping Provisions: A Comparative Analysis," 29 *Vand. J. Transnat'l L.* (1996), pp. 191, 198; Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 700.

Netherlands,[125] it is worthwhile to look at the LOB clauses in the respective treaties with the United States.

Table 2. LOB Clauses in U.S. Tax Treaties With U.S. MNCs' Favorite Holding Country Locations

Holding Country	LOB Clause
Netherlands	Art. 26
Luxembourg	Art. 24
Ireland	Art. 23
Bermuda	no treaty
Belgium	Art. 12 A
Switzerland	Art. 22[a]
Cayman Islands	no treaty
Hong Kong	no treaty
Singapore	no treaty[b]

[a]See Huber and Blum, "Limitation on benefits according to article 22 of the convention between the United States of America and the Swiss Confederation," *Internationales Steuerrecht* in der Schweiz (2005), p. 23; Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management Inernational Journal* (2000), p. 692, 710; Reinarz, "Treaty Shopping and the Swiss Withholding Tax Trap," *European Taxation* (2001), pp. 415, 416.

[b]Yet a high-level, government-appointed tax subcommittee recommended to conlcude a double tax treaty with the U.S. in 2002. See Ng, "Singapore's Non-Garden-Variety Limitation on Benefits Provisions," *Tax Notes Int'l*, Dec. 5, 2005, p. 877 (note 3). Singapore wants to rapidly expand its treaty network of about 50 comprehensive income tax treaties today.

1. *U.S.-Netherlands Treaty*

Compared with the LOB clause in the Germany-U.S. treaty, the LOB clause in the Netherlands-U.S. treaty[126] is more advanced. It is more precise and sophisticated, offers more legal certainty, and complies much better with EC law.[127] This is the main reason why article 26 of the Netherlands-U.S. treaty (23 pages) and the memorandum of understanding (19 pages) are so complex.[128] As the Germany-U.S. treaty set innovative milestones, the Netherlands-U.S. treaty did so as well. Those innovations include benefits for headquarters companies,[129] derivative benefits, and triangular cases.[130] Before the United States and the Netherlands signed the tax treaty protocol of 2004,[131] the Luxembourg-U.S. treaty had a considerably broader derivative benefits provision,[132] which made Luxembourg more attractive as a location for intermediate holding companies for inbound U.S. investments in some situations. With the new derivative benefits clause, Dutch companies can be owned by qualifying third-country shareholders and still obtain the benefits of the Netherlands-U.S. treaty. Further, the protocol promotes the Netherlands as a location for intermediate holding companies for U.S. outbound investments as well, because it introduced a zero rate of withholding tax for dividends in 80 percent shareholder relationships.[133] That means that Dutch companies can receive U.S. dividends free of any withholding tax and vice versa.[134]

2. *Luxembourg-U.S. Treaty*

Also crucial for U.S. MNCs is the LOB clause in article 24 of the Luxembourg-U.S. treaty of 1996.[135] The LOB clause was one of the main reasons why the United States wanted to renegotiate the 1962 tax treaty to prevent or limit "tax leakage" from treaty shopping.[136] The most interesting aspect is

[125]Hey, "German Tax Court Revamps Treaty Shopping Law," *Tax Notes Int'l*, Oct. 10, 2005, p. 122, at 125.

[126]Netherlands-U.S. treaty of December 18, 1992, as amended by the protocol of October 13, 1993, entered into force on December 31, 1993.

[127]For a comparison between the Germany-U.S. treaty and the Netherlands-U.S. treaty, see Galavazi, "Die Miβbrauchsregelung im neuen DBA USA-Niederlande," *Internationales Steuerrecht* (1994), p. 225; Berman and Hynes,
(Footnote continued in next column.)
"Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 700.

[128]Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 700.

[129]Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 700.

[130]For more detail, see Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 701.

[131]Protocol of March 8, 2004, entered into force on December 28, 2004.

[132]Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 704.

[133]Van Weeghel and van den Berg, "The New US-Netherlands Tax Treaty Protocol," *European Taxation* (2004), pp. 386, 391; van der Weijden and Doets, "The New Protocol to the Netherlands-United States Tax Treaty," *BIFD* (2004), p. 304.

[134]Van der Weijden and Doets, "The New Protocol to the Netherlands-United States Tax Treaty," *BIFD* (2004), p. 304.

[135]Luxembourg-U.S. Income and Capital Tax Treaty of April 3, 1996, entered into force on January 1, 2001.

[136]Warner, *Luxembourg in International Tax Planning* (2004), p. 494.

the derivative benefits provision, which attracts U.S. inbound investments.[137] It is very taxpayer-friendly and can be seen as one reason why its holding location arch-rival the Netherlands designed its new derivative benefits clause to be much more U.S. investor friendly in the 2004 protocol.

Another important feature of the treaty is the generous treatment of subsidiaries of publicly traded companies; however, there are no benefits for headquarter companies as in the Netherlands-U.S. treaty.

In brief, the LOB clauses in the Netherlands-U.S. treaty and the Luxembourg-U.S. treaty exist thanks to the negotiators from the Netherlands and Luxembourg being not very restrictive; therefore, they do not constitute a big threat for U.S. MNCs. The rivalry between Luxembourg and the Netherlands to attract U.S. investors ensures that those taxpayer-friendly regimes will not change in the near future.

VI. Conclusion

An international tax planner dealing with Germany must be familiar with the anti-treaty-shopping and the antiabuse rules to avoid venturing into uncharted waters.

First and foremost, the tax planner must distinguish between outbound and inbound situations. In outbound cases, the planning opportunities are better than in inbound cases; for the former, neither economic nor other nontax reasons are required to justify the legal planning.[138] However, in neither situation is a letterbox company or a mere formal interposition of a foreign company accepted for tax purposes. After all, *Hilversum II* did not create a whole new world for tax planning, but a safer world.

Second, the taxpayer should pay attention to LOB clauses in German and U.S. tax treaties. Even though they are not the biggest obstacle to tax planning, their scope and possible interdependencies with domestic antiabuse provisions should not be underestimated.

Finally, the checklist below should help with planning more safely. But that is not the end of the story. Let us see what checklist situation arises behind the horizon to succeed *Hilversum II*. At the end of the day, the outsourcing of permanent holding activities into an interposed foreign corporation is, after *Hilversum II*, an even more promising avenue on the tax planning road map. ◆

[137]Berman and Hynes, "Limitation on Benefits Clauses in U.S. Income Tax Treaties," 29 *Tax Management International Journal* (2000), pp. 692, 704.

[138]Niedrig, "Substanzerfordernisse bei ausländischen Gesellschaften," *Internationales Steuerrecht* (2003), pp. 474, 480.

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Business Activity				Economic Reason					
Company holds more than one participation		Personnel and equipment		Nontax motives (group motive, liability, organizational)		Permanent nature of the holding		Anti-Treaty-Shopping Rule sec. 50d(3) EStG applies	Commentary
+	—	+	—	+	—	+	—		
X		X		X		X		No	"Safe haven"; far beyond *Hilversum II*.
X			X	X		X		No	Facts of *Hilversum II*, no problem under the new jurisdiction.
X		X			X	X		No	Definitely no economic reason but due to business activity safe.
X		X		X			X	No	Economic reason problematic since "long-term holdings" are a striking feature for the BFH; yet business activity will more than likely ensure a happy ending.
X			X		X	X		Critical	After *obiter dictum* in *Hilversum II* business activity likely (+), in that case no sec. 50d(3) EStG; yet definitely no economic reason (–).
X		X			X		X	Critical	Business activity (+), economic reason (–); comprehensive look suggests a very risky tax planning due to interdependencies.
X			X	X			X	Critical	Comprehensive look might give green light for this planning. Yet a tax planner should try everything to avoid a short-term holding.
X			X		X	X		Yes	Due to *obiter dictum* in *Hilversum II* business activity rather (+), in this case no sec. 50d(3) EStG; economic reason in any case (–); however, comprehensive look suggests applicability of anti-treaty-shopping rule.
	X	X		X		X		No	After *obiter dictum* in *Hilversum II* business activity likely (+), in any case economic reason (+), safe.
	X		X	X		X		No	Similar to the facts in *Dutch Foundation II*; moreover after *obiter dictum* in *Hilversum II* business activity likely (+), in any case economic reason (+).
	X	X			X	X		Likely no	According to *obiter dictum* in *Hilversum II* business activity likely (+), in that case no sec. 50d(3) EStG; economic reason in any case.
	X	X		X			X	No	Due to *obiter dictum* in *Hilversum II* business activity likely (+), in that case no sec. 50d(3) EStG; economic reason problematical since "long-term holdings" henceforth a crucial point for BFH.

Business Activity				Economic Reason					
Company holds more than one participation		Personnel and equipment		Nontax motives (group motive, liability, organizational)		Permanent nature of the holding		Anti-Treaty-Shopping Rule sec. 50d(3) EStG applies	Commentary
+	—	+	—	+	—	+	—		
	X		X		X	X		Likely yes	Similar to the facts in *Dutch Foundation I*. Back then limitation of liability was not a sufficient nontax reason; after *Dutch Foundation II* likely to be sufficient as one of several motives; if not, comprehensive view would suggest applicability of anti-treaty-shopping rule.
	X	X			X		X	Likely yes	In spite of the fact that *obiter dictum* in *Hilversum II* suggests business activity likely to be (+). But: comprehensive look recommends anti-treaty-shopping rule.
	X		X	X			X	Critical	Rebuttal of the assumption that the interposition was necessary will be a long shot; applicability of anti-treaty-shopping rule possible.
	X		X		X		X	Likely yes	Facts of *Hilversum I*, despite *obiter dictum* in *Hilversum II* very problematical, since tough to disprove company was formally interposed.