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German Case on Nexus and WHT

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LAW TAX
BOUTIQUE**



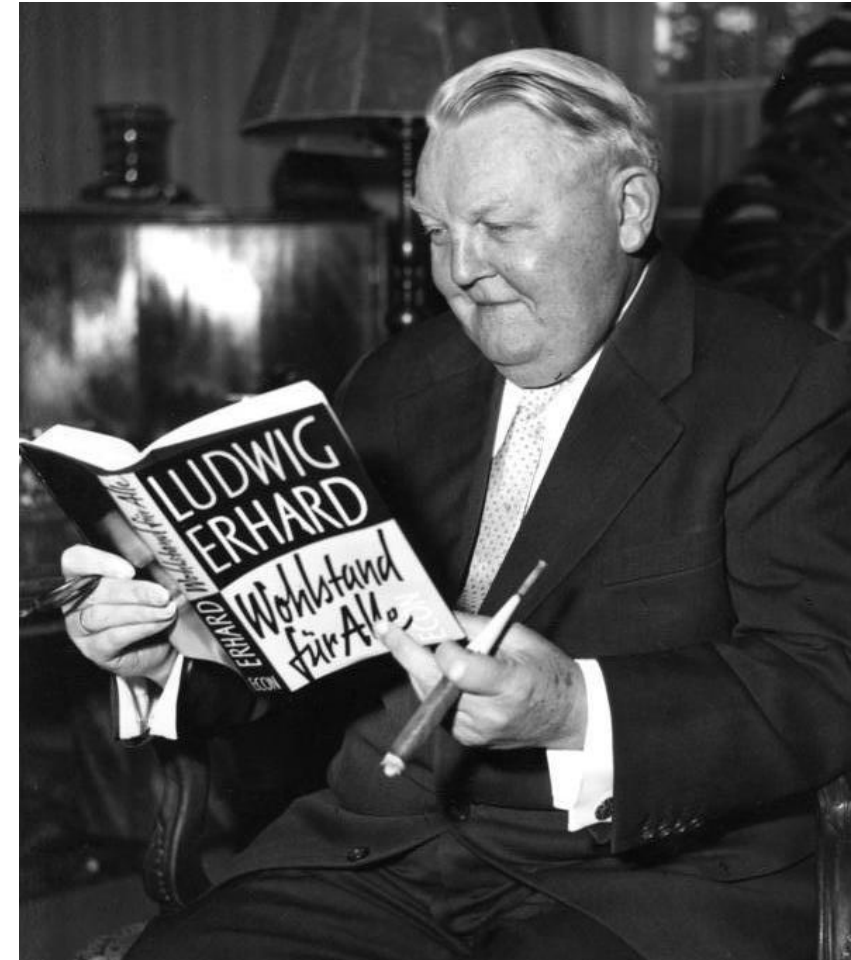
Agenda

- Current activities regarding Nexus and WHT in Germany
- Nexus requirements
- Treaty limitations
- Non-Treaty Countries
- Transfer Pricing Aspects

Developments on Nexus and WHT regarding intangibles in Germany

Before 2020

- Transactions involving IP rights were – in certain cases – subject to withholding tax
 - Payment of royalties to non-German recipients
 - Until 2009 also on purchase of IP rights from non-German sellers
- Requirement for withholding for German resident taxpayers
- Application of rules to non-German taxpayers
 - Prevailing view did not subject non-Germans to German rules
 - No case law
 - Generally, taxation of transactions subject to German nexus



Domestic Rules in Germany

- IP licensed to German tax resident licensee
- German tax resident licensor
- Registration in a German register
 - German patent
 - German trademark
 - European Patent
 - European Trademark?
- Even where neither licensor nor licensee are German residents
- Also, where included in larger transaction
- Legal Concerns



Model Tax Convention on Income and on Capital

FULL VERSION
(as it read on 15 July 2014)

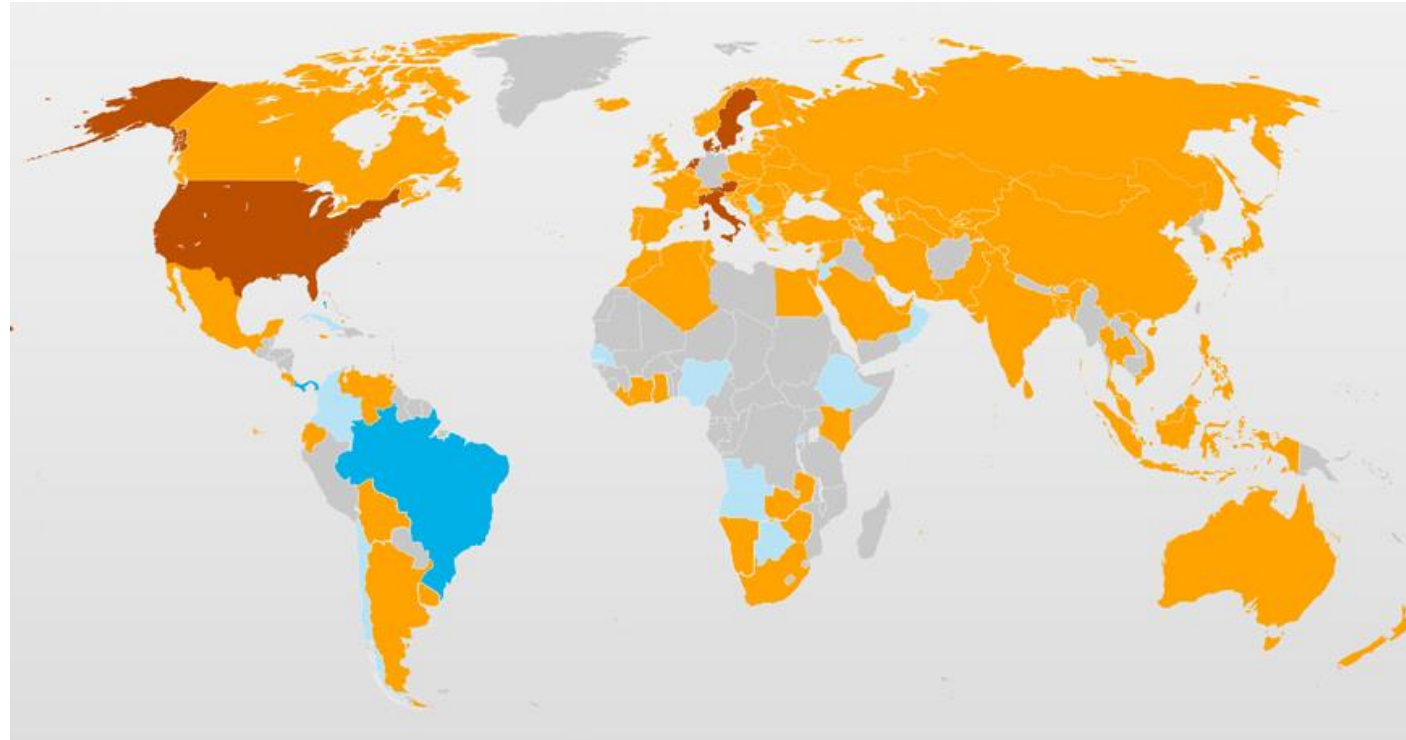


Treaty Countries

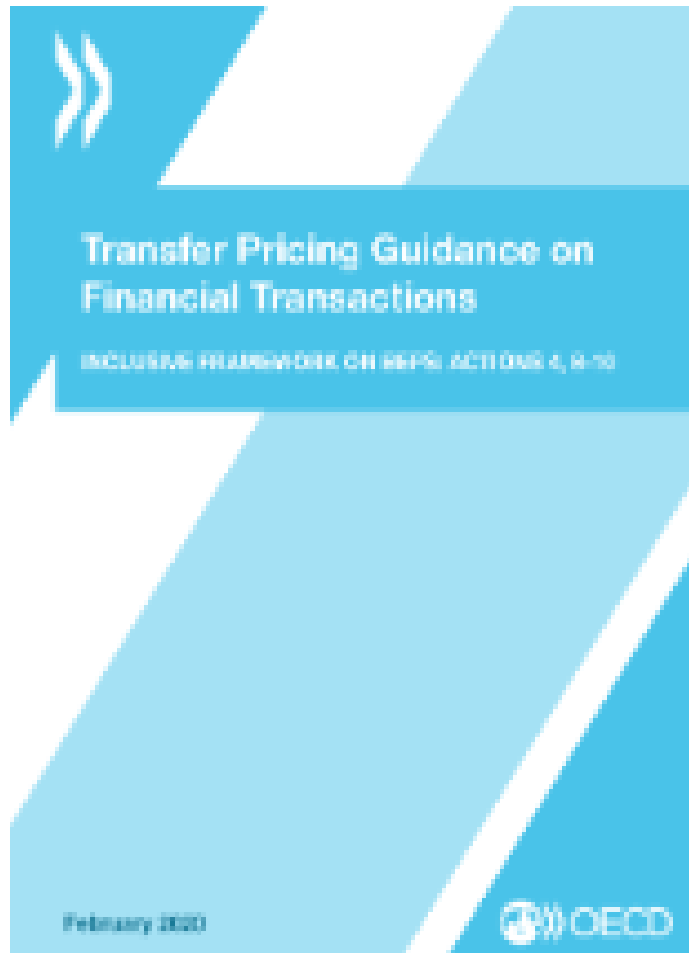
- Royalties
 - Art 12: Generally taxable in recipient's home country
 - Where IP rights are attributable to a PE, royalties may be taxed in the country where the PE is located
- Sale of IP Rights
 - Art 13: Generally taxable in the seller's home country
 - Where IP rights are attributable to a PE, a sale may be taxed in the country where the PE is located
- Thus, substantially higher Nexus threshold
- Reporting requirements may remain

Non-Treaty Countries

- No treaty protection
- Retrospective application
 - Statutes of limitation
 - Potential reporting obligation
- Potential legal impediments
 - Excessive taxation
 - Extraterritorial application of tax laws
 - Constitutional Aspects
 - Where non-German licensor is held liable:
 - Discretion to select person from whom to collect a tax?
 - Priority for collection from taxable person?



Source: www.bundesfinanzministerium.de



What is being transferred

- Royalties
 - Is there a separate royalty?
 - Does German nexus IP have separate value justifying allocation of part of the royalty fee?
- Sale of IP Rights
 - Where does the value of the IP rest?
 - Patents: Do non-German patents already grant sufficient protection?
 - In trademarks: Is German trademark merely a reflex of a European trademark?

Domestic Rules in Austria

- Austrian tax resident licensor
- Austrian tax resident licensee
- IP used/exploited in Austrian PE
 - Not necessarily a PE of the taxpayer
- Registration in an Austrian register
 - Austrian patent
 - Austrian trademark
 - Even where neither licensor nor licensee are Austrian tax residents (and no Austrian PE)?
- License vs. sale (one-off payments)
- Withholding vs. assessment
- Limitations: Tax treaties, Interest and Royalties Directive
- Legal Concerns / Enforcement





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