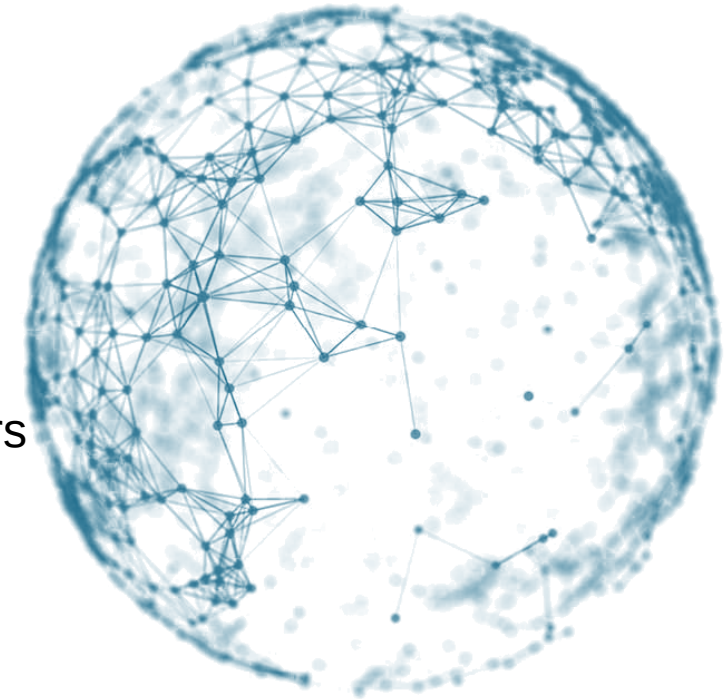
International Fiscal Association

Session 4

Partnerships in a French-German context: French and German approaches



Prof. Dr. Stefan Köhler, EY

Philippe Legentil, EY Société d'Avocats

Dr. Thomas Töben, Schnittker Möllmann Partners

François Hellio, CMS Francis Lefebvre Avocats

Contents

1. General Legal and Tax features of Partnerships in France and Germany

1. General Legal and Tax features of Partnerships in France and Germany
1.1 The French approach

– Legal personality as soon as registration of the partnership in the commercial registry.
  → In that respect, no difference between partnerships and corporations;
  → Partnerships without legal personality may still be considered for tax purposes.

– The main legal forms of partnerships are:
  - The general partnership: SNC (société en nom collectif);
  - The limited partnership: SCS (société en commandite simple);
  - The civil partnership: SC, used in particular for the holding of real property (SCI);
  - The interest groupings: GIE, GEIE (EEIG/EWIV);
  - The deemed partnerships (SEP, société de fait…).

1. General Legal and Tax features of Partnerships in France and Germany
1.1 The French approach

- In general, the profits are deemed immediately attributed to the partners but by-laws may provide otherwise.

- From a tax perspective, partnerships are generally treated as semi-transparent/ translucent (French concept of “translucidité”) i.e. the profit or loss is deemed realized at the level of partnership even if the tax is assessed at the level of the partners (depending on their nature, individual income tax or CIT).

  → This semi-transparency concept leads to specific tax consequences in an international context, see below.

1. General Legal and Tax features of Partnerships in France and Germany
1.1 The French approach

– However, there are various exceptions to the semi-transparency concept:
  - Partnerships may elect for their submission to CIT (this election being irrevocable);
  - A limited partnership is subject to CIT for the part of its income corresponding to the rights of its limited partners;
  - Civil partnerships exercising a commercial activity are – with few exceptions – automatically subject to CIT;
  - Undisclosed deemed partnerships (SEP) are subject to CIT.

– Conversely, unipersonal or family-held corporations may be treated as semi-transparent partnerships.

1. General Legal and Tax features of Partnerships in France and Germany
1.1 The French approach

– The traditional approach of the FTA is that French partnerships are deemed tax residents in France for the purpose of the application of tax treaties.

– This approach has recently been confirmed in the new French-Luxemburg treaty:

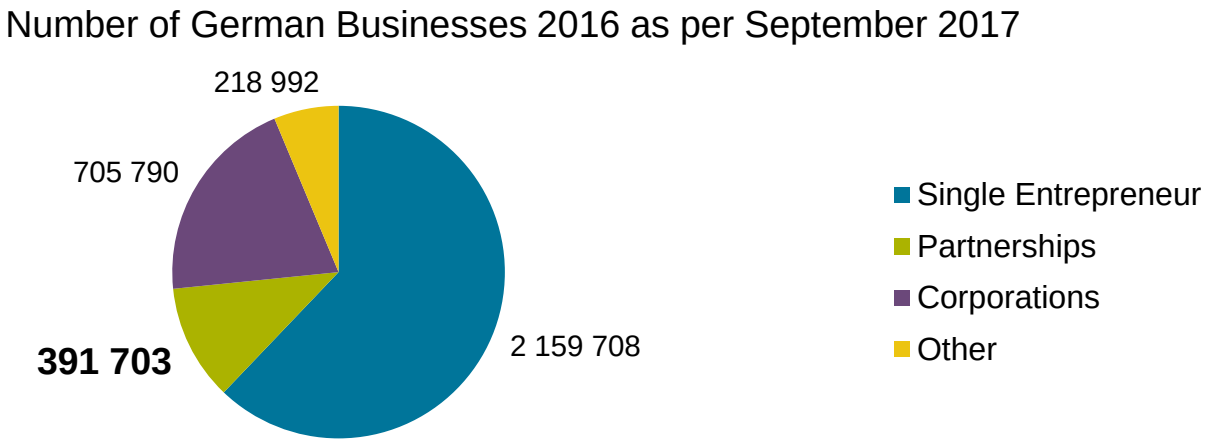
→ See article 4.4 : *The term "resident of a contracting State" shall include, where that Contracting State is France, any partnership, group of persons or any other similar entity:*

(a) which has its place of effective management in France;

(b) which is subject to tax in France; and

(c) all of whose shareholders, associates or members are, pursuant to the tax laws of France, personally liable to tax therein in respect of their share of the profits of that partnership, group of persons or other similar entity."

– German Business Entities – Legal Forms



	0 – 9 employees	10 – 49 employees	50 – 249 employees	> 250 employees	Total	In %
Single Entrepreneur	2 094 176	63 007	2 446	79	2 159 708	62%
Partnerships	323 450	52 845	12 610	2 798	391 703	11%
Corporations	511 172	145 080	40 157	9 381	705 790	20%
Other	182 937	26 561	7 122	2 372	218 992	6%
Total	3 111 735	287 493	62 335	14 630	3 476 193	100%

— Legal forms

1. Gesellschaft bürgerlichen Rechts (GbR)
   - comparable to société civile
2. Partnerschaftsgesellschaft mit beschränkter Berufshaftung (PartGmbB)
3. Europäische Wirtschaftliche Interessenvereinigung (EWIV)
4. Typical / atypical Silent Partnership
5. **Offene Handelsgesellschaft (OHG)**
   - société en nom collectif, SNC
6. **Kommanditgesellschaft (KG); generally as GmbH & Co KG**
   - comparable to société en commandite simple
7. Kommanditgesellschaft auf Aktien (KGaA)

1. General Legal and Tax features of Partnerships in France and Germany
1.2 The German approach

— General

1. Legal personality but transparent for individual income / corporate income tax purposes
2. Income to be determined at the partnership level
3. But: partnership's income directly allocable to the partners; irrespective of "distribution" to partners
4. Partners (individuals & corporations) are subject to German individual or corporate income tax (IT / CIT) on their portion of the (business) partnership's income

— German Specific = Trade Tax on Income (TT):

1. Like corporations also (deemed) business partnerships are subject to local TT
2. Due to local communities' (limited) right to fix TT rate annually, TT rates vary between 7% up to 17.15%;(Munich) all over Germany.
3. TT not deductible for purposes of determining taxable income, but TT is creditable against individual partners Income Tax of up to 45% (with cap).
4. TT is not creditable against CIT (due to low CIT rate of 15%).
5. Thus, overall tax for corporate partners (TT+CIT+Solid.-Surcharge): 22.8% – generally around 32.9%.
6. Many further specifics, add-back of certain cost items; but also deductions and exemption for certain income etc.

- **Three "types" of partnerships (due to Trade Tax) acc. to German domestic law**

  1. Engaged in trade or business ("*gewerblich"* - "true business")

  2. Mere asset management activities (""*vermögensverwaltend*" –"private")

  3. Deemed business although only / nearly exclusively mere asset management activities due to

     a) legal features (factual limited liability)or

     or

     a) some "true business" income in addition to almost "private" income

- **Only no.1 follows tax treaty rules for business income**

Other German Specifics caused by Local Trade Tax

— Ignoring different "legal spheres" of partners and partnership

1. Partnerships to be treated **similar to single business entrepreneurs for TT purposes** (e.g. loans by partners to the partnership disregarded as otherwise interest would not trigger TT at all).

2. Salary income of partners from the partnership and income from **Special Business Assets I (SBV I)** like interest income from loans and licenses granted and real property lent to the partnership: taxed as business income at the partnership level, i.e. not as salary, interest, license or lease income only at partner level.

3. **Special Business Assets II (SBV II) and allocable income**: e.g. dividends / share capital gains from shares in the GP-Corporation of a limited partnership (generally a GmbH) of a GmbH & Co KG), as well as dividends / share capital gains from shares in other corporations held by a partner or income from patents and license income from 3rd parties may also be treated as part of the partnerships business income provided respective shares and other assets legally owned by a partner (even a foreign partner) are "economically" connected to the partnership's business, thereby strengthen the (German or foreign) partner's position in "its" business partnership.

2. Partnerships in an international context: tax approach in France and in Germany

– 2.1.1. French partnership with foreign partners

– Due to the semi-transparency concept, and depending on the wording of applicable tax treaties, if any, foreign partners are taxed in France on their part of the French partnership's income, i.e. corresponding to their interest in this partnership.

- Conseil d'Etat, 11 July 2011, Quality Invest (French partnership with a Norwegian partner (corporation));
- Conseil d'Etat, 4 April 1997, Sté Kingroup Inc (French Interest grouping (GIE) with a Canadian partner);
- Conseil d'Etat, 9 February 2000, Hubertus AG (French partnership with a Swiss partner (corporation)).

– **2.1.2. Tax treatment of foreign partnerships in France**

– **French sourced income derived by foreign partnerships:**
  - CE, 13 October 1999, Diebold Courtage.
  - In a French-Dutch context, the Supreme tax court stated that, irrespective of the fact that a Dutch limited partnership (CV) could not be regarded as a tax resident for French tax purposes, the tax treaty could still apply to French sourced renting payments as the CV was 100% held by two BVs in the Netherlands (the Dutch legal and tax transparency approach was regarded as relevant for the French tax analysis).

    → Case law adopted by the FTA in their guidelines

– 2.1.2. Tax treatment of foreign partnerships in France

– Income derived by French residents through a foreign partnership

- Conseil d'Etat, 24 November 2014, Artémis.
- In order to determine the tax treatment of income derived by French resident partners through a foreign partnership, the CE ruled that the local legal principles governing the constitution and the administration / functioning of said partnership must be taken into account.
- The analysis of the foreign legal features of the partnership enables a comparison with the equivalent French form.
- E.g. where a foreign partnership can be assimilated to a French limited partnership for tax purposes, the French limited partner can be deemed receiving for tax purposes a distributed (capital) income (as a French SCS is subject to CIT for the part of its income corresponding to the rights of its limited partners), but limited to certain passive income (dividends, interest and royalties).

– 2.1.2. Tax treatment of foreign partnerships in France

– Only a few tax treaties provide with some specific provisions as regards partnerships, and each time, different rules:
  - In particular: Germany (see Appendix), Japan, Switzerland, United Kingdom, United States;
  - Latest one: Luxemburg (2018 - not yet in force):
    – In principle, Luxembourg tax transparent entities (partnerships) are excluded from the definition of resident for treaty purposes. French partnerships are treated as French tax residents (condition: liable to tax).
    – Income derived by or through a partnership that is treated as wholly or partly fiscally transparent under the tax law of either Contracting State shall be considered to be income of a resident of a Contracting State but only to the extent that the income is treated, for purposes of taxation by that State, as the income of a resident of that State.

- **Specific tax treaty rules for partnerships**
  - Like e.g. France, Belgium, Portugal, Spain and many East European countries
- **Specific German rules for partnerships**
  - Section 50d (9) and (10) ITA; Section 4i ITA – Treaty Override
- **German views on how to treat "hybrid" partnerships**
  1. Different qualification / qualification conflict
  2. Tax treaty perspective vs each single state's perspective
  3. Income allocation (to whom?) vs partnership's' treaty entitlement
  4. Partnerships' tax treaty entitlement: implications, if any?
  5. Relevance of OECD-Partnership Report?
- **Critical cross-border partnership constellations**
  1. Inbound vs outbound constellations
  2. Non-German partnerships, German partners, German source dividends
  3. Non-German partnership with branches in and income from 3rd countries
  4. Income (gain) from special business assets I (e.g. partner loan interest)
  5. Income / gain from special business assets II (e.g. IPs / license income)

Federal Tax Court (BFH) on Cross-Border Partnership Cases

- **French / German cross-border partnership constellations**

1. BFH 10.08.2006, II R 59/05, BStBl 2009 II, 758: Loan receivables and accrued interest claims from a loan granted by a German business Holding Partnership (KG) to its French subsidiary partnership (société en commandite simple) to be treated as business assets of the German Holding KG.

   ➢ A finding **not surprising** to French tax experts

2. BFH 19.05.1993 I R 60/92, BStBl. 1993 II 714: The value decrease of a loan (e.g. as a result of changes in currency exchange rates) granted by a German business partnership (KG) to its French subsidiary partnership (SNC, société en nom collectif) has no impact for (former) German wealth tax purposes (lower German tax base). This is because – acc. to German domestic tax law – such a loan is not to be treated as a business asset of the German business KG but as equity of the French partnership (SNC)

   ➢ A finding **surprising** to French tax experts

Federal Tax Court (BFH) on Cross-Border Partnership Cases

- **Hungary / German cross-border partnership – Landmark Decision** *BFH 25.05.2011, I R 95/10; BFH/NV 2011, 1602; BStBl. 2014, II 760, BStBl. II 2014:*

Case

German tax resident controlled as partner "his" two Hungarian limited partnerships, the one which

1. was subject to Hungarian corporate income, i.e. treated as non-transparent Hungarian corporate taxpayer, and
2. earned Hungarian source passive lease income from its Hungarian sister partnership (lessee) from the lease of immovable and movable properties;
3. such income in similar cases ("*Betriebsaufspaltung*") is treated under German domestic law as "*deemed*" business income;
4. but under tax treaty law as rental income (Art. 6).

Federal Tax Court (BFH) on Cross-Border Partnership Cases

- **Hungary / German cross-border partnership – Landmark Decision :**

Disputed questions and Federal Tax Court's findings

1. Tax treaty exemption in Germany as only Hungary may tax the income of "its" Hungarian partnerships treated acc. to Hungarian law as corporate taxpayer and as such being treated entitled?

   ➢ The Court said **NO!** The German view (transparent) prevails.

2. Tax treaty exemption in Germany as the income is to be treated as "**business income**" allocable to an Hungarian PE provided that income is "**active**"?

   ➢ The Court said **NO!** Only "deemed" business income (from a purely German perspective) does **not qualify as business income** for tax treaty purposes.

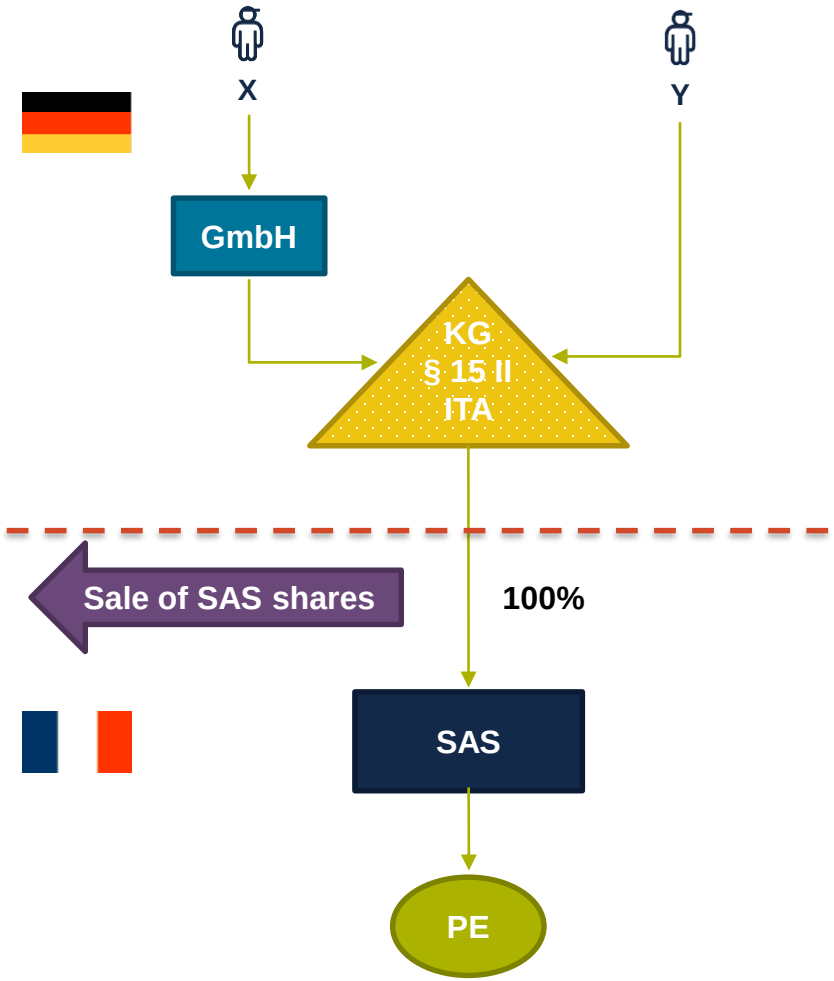
3. Tax treaty exemption in Germany only to the extent the Hungarian partnership's income is lease income from the lease of Hungarian located immovable properties?

   ➢ The Court said **YES**, but the respective part of the overall income (from the lease of immovable / movable assets) to be determined **by local tax court**.

3. Case studies

3. Case studies

3.1 Case 1: Sale SAS share – Who is subject to tax in which country?



– **Tax issues from a German perspective**

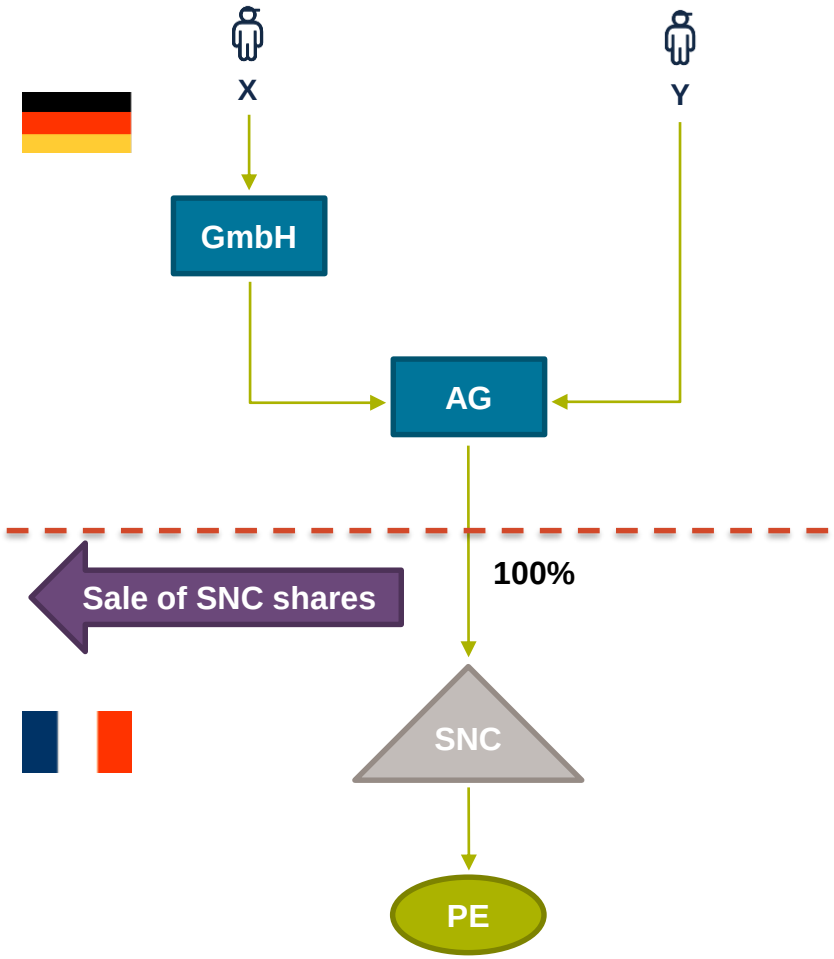
1. Tax resident person according to tax treaty?
2. Treaty entitlement / benefits for GmbH, Y or KG?
3. May Germany tax SAS share capital gain?

– **Tax issues from a French perspective**

1. Can the KG be treated as a tax resident in the meaning of the tax treaty?
2. Irrespective of 1, application of Article 4(3) of the tax treaty?
3. If not, application of the Diebold Courtage exception?
4. Application of Article 244 bis B FTC on the gain?

3. Case studies

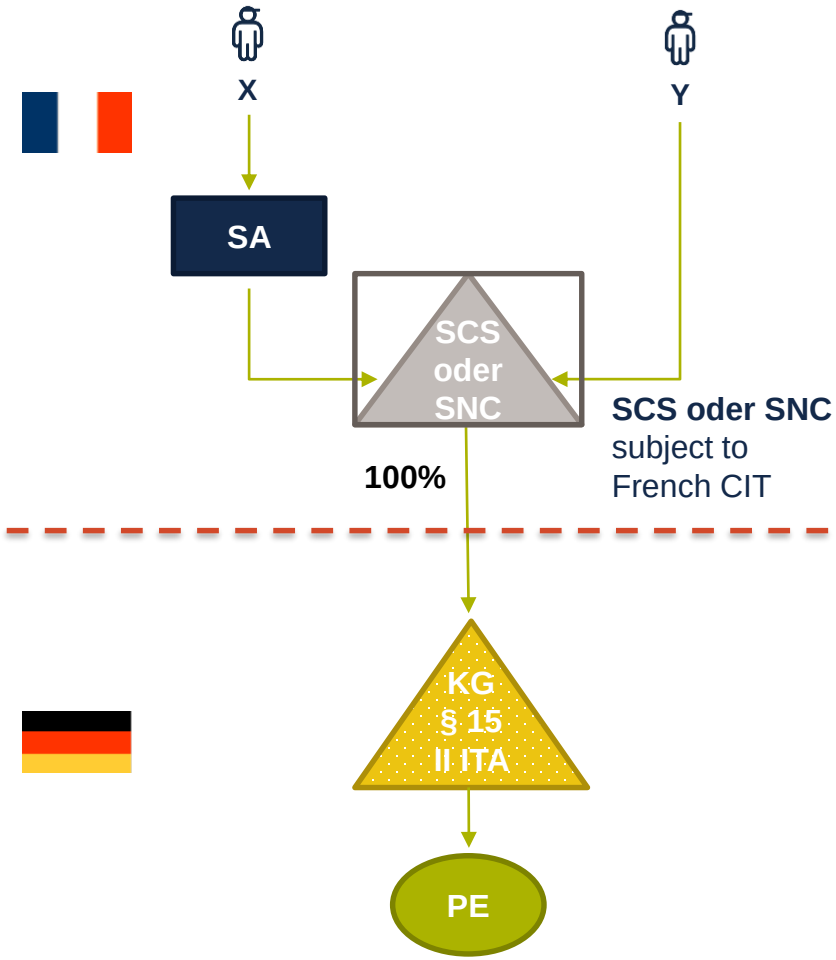
3.2 Case 2: Sale of SNC – Who has the right to tax?



- **Tax issues from a German perspective**
  1. Tax resident person according to tax treaty?
  2. Treaty entitlement / benefits for AG, GmbH or Y?
  3. May Germany tax gain from sale of SNC interest (“shares”)?
- **Tax issues from a French perspective**
  1. Treaty entitlement for the taxation of the capital gain?
  2. If France has a right to tax: What are the tax computation rules?

3. Case studies

3.3 Case 3: “Hybrid” SNC – Who is subject to tax?



– **Tax issues from a German perspective**

1. Who is subject to German limited income tax liability on KG’s (German) source income: SNC treated as corporate income taxpayer in France or SA and Y?

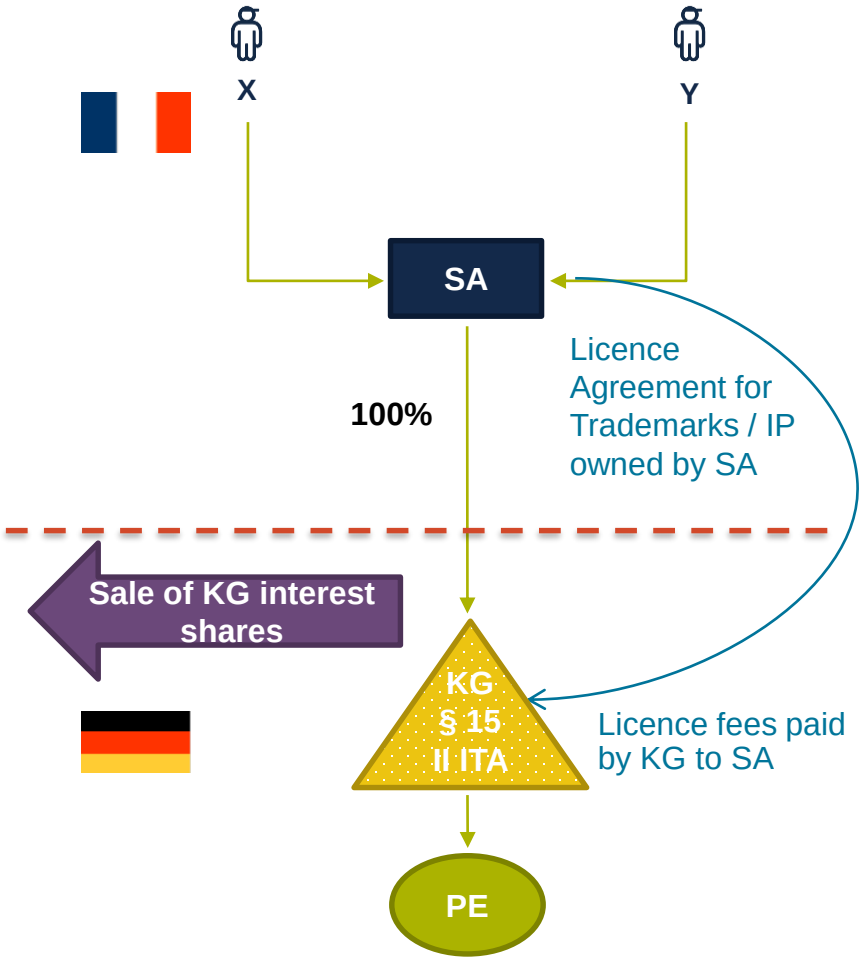
– **Tax issues from a French perspective**

1. SCS / SNC subject to CIT: What if the German profits are partly subject to individual income tax in Germany?
2. If needed: Conversion of SCS / SNC into a corporation? Or of KG into a GmbH?

   → Tax consequences in such conversions in France (or Germany)?

3. Case studies

3.4 Case 4a: Sale KG – Gain on French IP?



– **Tax issues from a German perspective**

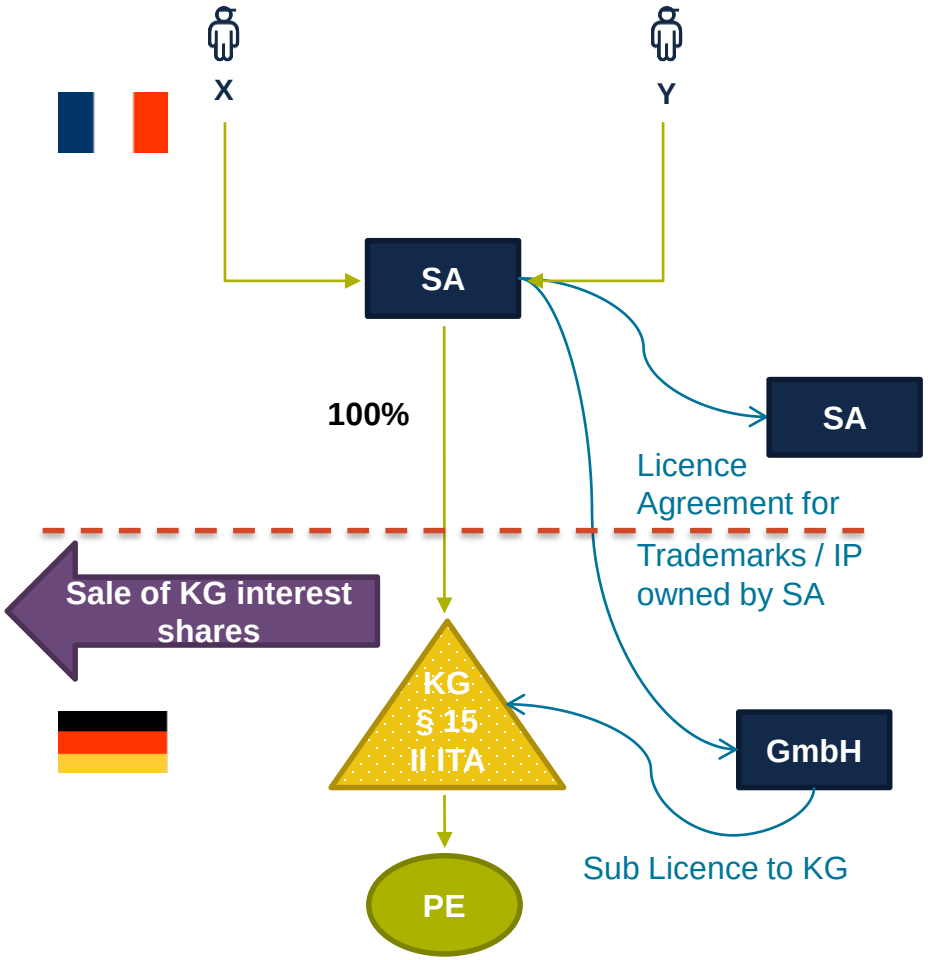
1. Trademarks / IP owned by SA to be treated as special business assets (SBV I) at KG level?
2. License fees paid by KG to SA (i) deductible for German CIT and TT purposes or (ii) subject to German CIT and TT?
3. Tax treaty override by section 50d ITA?
4. Tax credit for French tax, if any? Timing?

– **Tax issues from a French perspective**

1. Entitlement of France to tax the capital gain?
2. Applicable rules if gain taxable in France?

3. Case studies – Variation of Case 4a

3.4 Case 4b: Sale KG – Gain on French IP?



– **Tax issues from a German perspective**

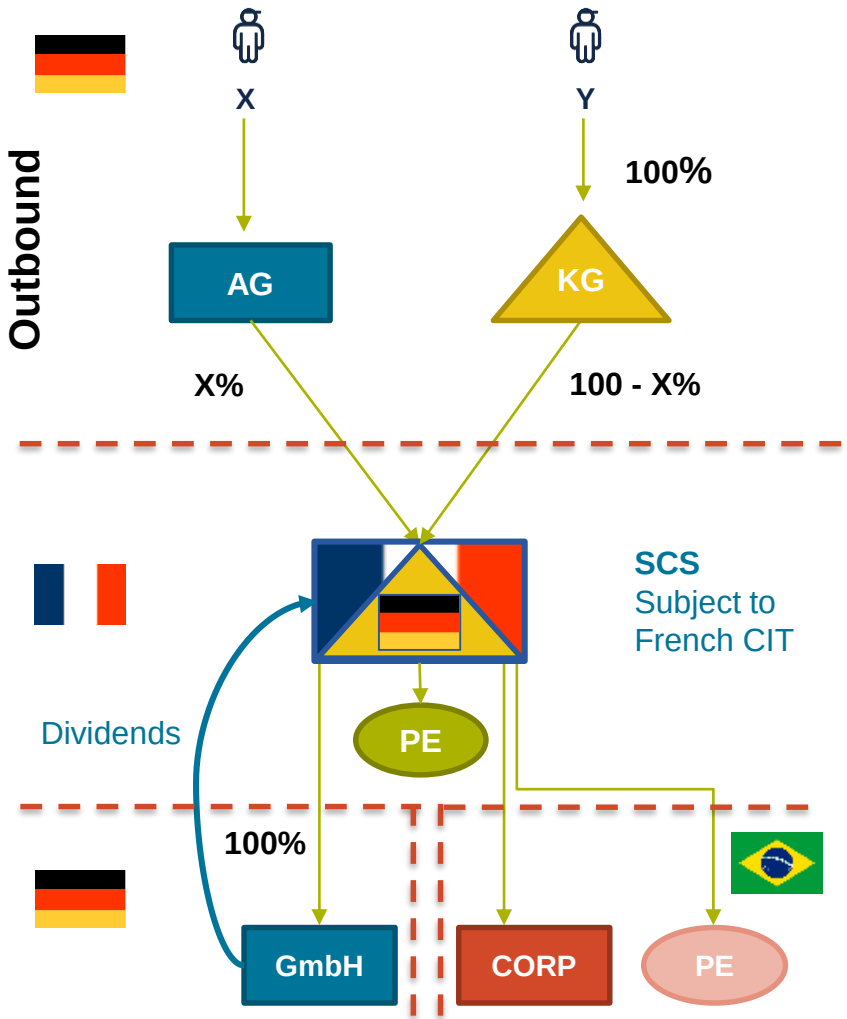
1. Gain realised by SA when selling KG equity interest taxable in Germany?
2. Trademarks and IP owned by SA to be treated as special business assets (SBV II) at KG-level?
3. IP / asset allocation rules for German tax purposes?
4. Realization of IP/Trademark's hidden reserves in case KG equity interest transferred / sold?
5. How to avoid double taxation?

– **Tax issues from a French perspective**

1. Entitlement of France to tax the gain realised by selling KG equity interest, like for share capital gains?
2. Applicable rules if gain taxable in France?

3. Case studies

3.5 Case 5: French “hybrid” SCS as Holding for German Shareholders



– **Tax issues from a German perspective**

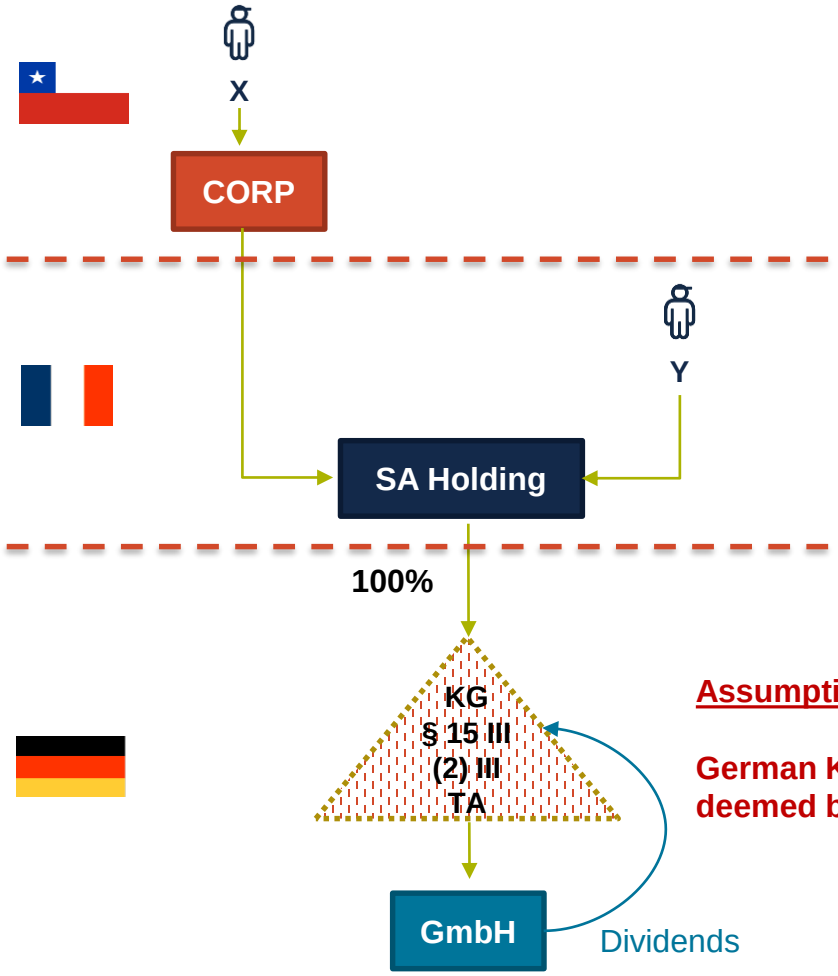
1. SCS = French tax resident? Consequences?
2. Tax treaty benefits for AG and Y or KG?
3. SCS’s income allocable to German AG / X as taxpayers?
4. GmbH‘s / CORP‘s shares + dividends allocable as business assets / business income to SCS’s French PE; thus: tax-exempt in Germany?
5. Tax exemption in Germany with progression?
6. Brazil PE’s income subject to tax in Germany and/or France?

– **Tax issues from a French perspective**

1. French SCS intransparent for French tax purposes.
2. Thus, SCS as such taxpayer and subject to French CIT
3. French SCS‘ s income subject to French CIT include:
   a) French source business income
   b) also income from German GmbH’ shares
   c) as well as income from Brazil CORP’s shares
   d) Brazil sub-PE’s income not subject to tax in France?
4. French WHT on distribution to AG / KG?

3. Case studies

3.5 Case 6: Deemed Business KG as Holding



Assumption:

German KG with only deemed business income

– **Tax issues from a German perspective**

1. GmbH dividends covered by Art. 4 (business profits) or Art. 9 (dividends) French/German tax treaty?
2. GmbH dividends directly allocable to SA Holding, not KG; thus, these dividends not assessed at KG level?
3. 25% DWT to be withheld by GmbH reduced only according to § 50d III ITA rules? Or only 1.5% tax?

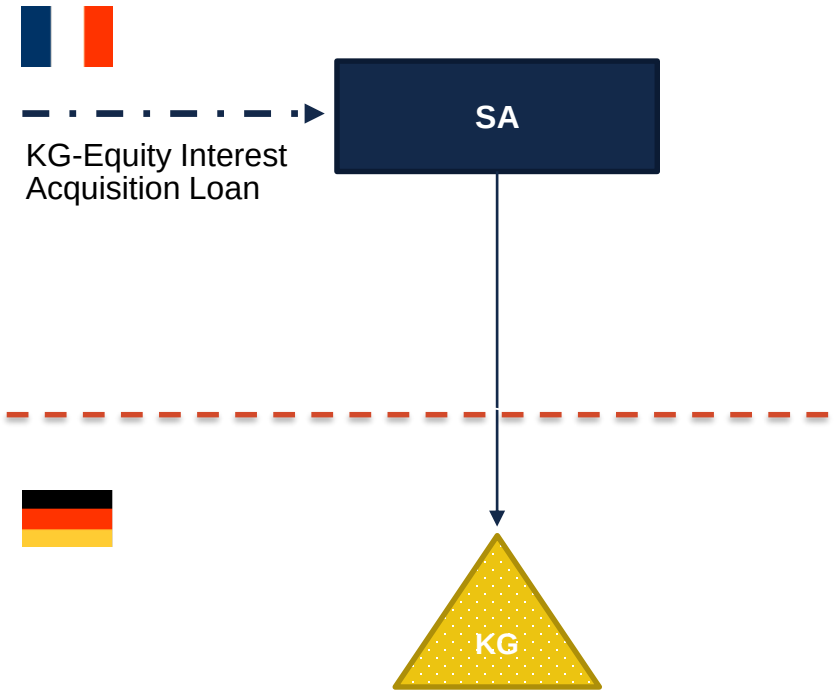
– **Tax issues from a French perspective**

1. Treatment of German source income: p.e. income or dividends?
2. Applicable tax treaty rules (subject to DTT)?

   → Application of the Artemis case law?

3. Case studies

3.5 Case 7: No double deduction of special business expense - § 4i ITA



Bank loan interest owed / paid by SA deductible as special business expense for German tax purposes?

- A business partnership‘s PE is generally allocated to each partner as if the partner would own that PE directly, also in cross border constellations-
- Acc. to tax treaty as well as domestic tax law cost borne by a partner may be allocated to such a PE in case that PE have caused these cost.
- These („partner“) cost, namely interest on acquisition loans, may be deducted at the level of the partnership as so-called special business expense for purposes of determining the partner‘s allocable share in the partnership‘s business profit.
- But: since 2017 these special business expenses may not be deducted for German tax purposes anymore, if these cost can also be deducted in the partners home country (state of residence)
- However, double deduction is permitted in case such expenses would offset the same profit subject to tax in both states and the taxpayer can prove the effective taxation in the other country.

Appendix: Specific French-German tax treaty rules
Section 50d (9) and (10) German ITA

Appendix: Specific French-German tax treaty rules

Amending treaty signed in April 2015 entered into force as from 1.1.2016

Until 31.12.2015

- Article 4(3): income derived from partnerships
  - *“Income derived from participations in enterprises established in the form of a "société de droit civil" (civil partnership), "société en nom collectif" (general partnership) or "société en commandite simple" (simple limited partnership) accruing to a partner thereof and income derived from participations in a "société de fait" (society in fact), an "association en participation" (joint venture) or a "société civile" (civil partnership) organized under French law, shall be taxable only in the State in which the enterprise has a permanent establishment, but only to the extent of the partner's participation in the profits of that permanent establishment.”*

As from 1.1.2016

- Article 4(3) remains unchanged.

Appendix: Specific French-German tax treaty rules

Amending treaty signed in April 2015 entered into force as from 1.1.2016

Until 31.12.2015

- Article 4(4):
  - "*Paragraphs 1 and 3 shall apply both to income derived from direct administration and exploitation and to income derived from the lease or use in any other form of the business enterprise and to profits derived from the alienation of the entire enterprise, of a share in the enterprise, of a part of the enterprise or of any asset used in the enterprise*."

As from 1.1.2016

- New article 4(4):
  - deletes any reference to the alienation of the entire enterprise, of a share in the enterprise, of a part of the enterprise or of any asset used in the enterprise. However, German tax authorities can use article 7(2), so that Germany still has the right to tax capital gains derived from the alienation of shares of a partnership since PE and partnerships have very close tax impacts from a German prospective.

Appendix: Specific French-German tax treaty rules

Amending treaty signed in April 2015 entered into force as from 1.1.2016

Until 31.12.2015

- Article 4(9):
  - "*Paragraphs 1 and 3 shall not be so construed as to prevent one of the Contracting States from imposing pursuant to this Convention tax on income derived from sources within its territory by an enterprise of the other Contracting State (income from immovable property, dividends), where such income cannot be attributed to a permanent establishment situated in the territory of the first-mentioned State*"

As from 1.1.2016

- New article 4(9):
  - "*Paragraphs 1 and 3 shall not be construed as preventing a Contracting State from taxing, in accordance with this Convention, income arising from sources in its territory and derived by an enterprise of the other Contracting State (income from immovable property, capital gains within the meaning of paragraphs 1 and 4 of Article 7, dividends) if such income cannot be attributed to a permanent establishment situated in the territory of the first-mentioned State.*"

Appendix: Specific French-German tax treaty rules

Amending treaty signed in April 2015 entered into force as from 1.1.2016

Until 31.12.2015

- Article 7(2): alienation of assets
  - "*Paragraph 1 shall not apply where the holding alienated forms part of the assets of a permanent establishment in the other State owned by the alienator. In this case, Article 4 shall apply*."

As from 1.1.2016

- New article 7(2): alienation of assets
  - "*Gains from the alienation of movable property forming part of the business property of a permanent establishment which an enterprise of a Contracting State has in the other Contracting State or of movable property pertaining to a fixed base available to a resident of a Contracting State in the other Contracting State for the purpose of performing independent personal services, including such gains from the alienation of such a permanent establishment (alone or with the whole enterprise) or of such fixed base, may be taxed in that other State*."

Appendix: Specific French-German tax treaty rules

Amending treaty signed in April 2015 entered into force as from 1.1.2016

Until 31.12.2015

- Article 20: avoidance of double taxation
  - Income arising from Germany (French residents)
    - for most of categories of revenues: tax credit equal to the amount of French tax attributable to such income.
  - Income arising from France:
    - any item of income arising in France and any element of capital situated in France which, in accordance with this Convention, may be taxed in France. shall be excluded from the base upon which German tax is imposed.

As from 1.1.2016

- New article 20: avoidance of double taxation
  - Income arising from Germany (French residents)
    - gains from the alienation of movable property (art. 7(2)) : tax credit which amounts to the tax paid in the Germany. It shall not, however, exceed the amount of French tax attributable to such income
  - Income arising from France (German residents)
    - any item of income arising in France and any element of capital situated in France which, in accordance with this Convention, may be taxed in France. shall be excluded from the base upon which German tax is imposed.

Appendix: Section 50d para 9 German ITA

Source: German EStG - Income Tax Act, 2nd Ed.; German - English Synopsis; translated by Dr. Thomas Rittler, RA, Frankfurt am Main; ISBN 978-3-9816457-8-1

(9) **1**In case that revenues of a person subject to unlimited tax liability are exempt from the tax base of German tax pursuant to an agreement on elimination of double taxation, an exemption of revenues shall not be granted, irrespective of the agreement, to the extent that

1. the regulations of the agreement are applied by the other State in a way that the revenues in this State shall be exempt from taxation or may be taxed only at a tax rate limited by the agreement; or
2. the revenues are not taxable in the other state merely because they are received by a person not subject to unlimited tax liability in this state on the basis of its residence, permanent abode, place of its centre of management, its registered office or a similar feature.

2Number 2 shall not apply to dividends that have to be excluded from the tax base of German tax pursuant to an agreement on elimination of double taxation, unless the dividends were deducted in the calculation of profit of the distributing company.

3Regulation s of an agreement on elimination of double taxation and paragraph 8 and § 20 paragraph 2 of the Foreign Transactions Tax Act shall remain unaffected to the extent that they restrict each exemption of revenues to a greater extent.

4Regulations of an agreement on elimination of double taxation pursuant to which revenues are not excluded from the tax base of German tax due to their treatment in the other contracting state shall also be applied to parts of revenues to the extent that the requirements of the respective provisions of the agreement are met with respect to these parts of revenues.

(9) **1**Sind Einkünfte eines unbeschränkt Steuerpflichtigen nach einem Abkommen zur Vermeidung der Doppelbesteuerung von der Bemessungsgrundlage der deutschen Steuer auszunehmen, so wird die Freistellung der Einkünfte ungeachtet des Abkommens nicht gewährt, soweit

1. der andere Staat die Bestimmungen des Abkommens so anwendet, dass die Einkünfte in diesem Staat von der Besteuerung auszunehmen sind oder nur zu einem durch das Abkommen begrenzten Steuersatz besteuert werden können, oder
2. die Einkünfte in dem anderen Staat nur deshalb nicht steuerpflichtig sind, weil sie von einer Person bezogen werden, die in diesem Staat nicht auf Grund ihres Wohnsitzes, ständigen Aufenthalts, des Ortes ihrer Geschäftsleitung, des Sitzes oder eines ähnlichen Merkmals unbeschränkt steuerpflichtig ist.

2Nummer 2 gilt nicht für Dividenden, die nach einem Abkommen zur Vermeidung der Doppelbesteuerung von der Bemessungsgrundlage der deutschen Steuer auszunehmen sind, es sei denn, die Dividenden sind bei der Ermittlung des Gewinns der ausschüttenden Gesellschaft abgezogen worden.

3Bestimmungen eines Abkommens zur Vermeidung der Doppelbesteuerung sowie Absatz 8 und § 20 Absatz 2 des Außensteuergesetzes bleiben unberührt, soweit sie jeweils die Freistellung von Einkünften in einem weitergehenden Umfang einschränken.

4Bestimmungen eines Abkommens zur Vermeidung der Doppelbesteuerung, nach denen Einkünfte aufgrund ihrer Behandlung im anderen Vertragsstaat nicht von der Bemessungsgrundlage der deutschen Steuer ausgenommen werden, sind auch auf Teile von Einkünften anzuwenden, soweit die Voraussetzungen der jeweiligen Bestimmung des Abkommens hinsichtlich dieser Einkunftsteile erfüllt sind.

Appendix: Section 50d para 10 German ITA

Source: German EStG - Income Tax Act, 2nd Ed.; German - English Synopsis; translated by Dr. Thomas Rittler, RA, Frankfurt am Main; ISBN 978-3-9816457-8-1

10) **1**n case that the provisions of an agreement on elimination of double taxation have to be applied to a remuneration within the meaning of § 15 paragraph 1 sentence 1 Number 2 sentence 1 second clause and Number 3 second clause and the agreement does not provide an explicit regulation with regard to such remunerations, the remuneration shall be exclusively deemed to be part of the business profits of the shareholder entitled to remuneration for the purpose of application of the agreement on elimination of double taxation. **2**Sentence 1 shall also apply to the earnings and expenditures caused through the personal business assets. **3**Irrespective of the provisions of an agreement on elimination of double taxation on the allocation of financial assets to a permanent establishment, the remuneration of the shareholder shall be attributed to the permanent establishment of the company to which the expenses for the performance on which the remuneration is based are attributable, the earnings and expenditures referred to in sentence 2 are to be attributed to the permanent establishment to which the remuneration is attributable. **4**Sentences 1 to 3 shall also apply in cases of § 15 paragraph 1 sentence 1 Number 2 sentence 2; sentence 2 shall apply analogously in cases of § 15 paragraph 1. **5**1n case that the revenues within the meaning of sentences 1 to 4 are attributable to a person who, pursuant to an agreement on elimination of double taxation, is deemed as resident in the other state , and it is proven by the person subject to taxation that the revenues are taxed by the other state without crediting the German tax related thereto, the tax that is provably assessed and paid on these revenues in this state and reduced by an arisen claim to reduction, equivalent to German income tax, proportionate foreign tax shall be credited on German income tax up to the amount proportionately related to these revenues. **6**Sentence 5 shall not apply in case that an explicit regulation for such revenues is included in the agreement on elimination of double taxation. **7**Sentences 1 to 6

1. are not to be applied to companies within the meaning of § 15 paragraph 3 Number 2;
2. shall apply analogously in case that the revenues qualify as revenues from self-employed work with in the meaning of § 18; in this context, the article on revenues of enterprises is replaced by the article on self-employed work if such an article is included in the agreement on elimination of double taxation.

8Paragraph 9 sentence 1 Number 1 shall remain unaffected.

(10) **1**Sind auf eine Vergütung im Sinne des § 15 Absatz 1 Satz 1 Nummer 2 Satz 1 zweiter Halbsatz und Nummer 3 zweiter Halbsatz die Vorschriften eines Abkommens zur Vermeidung der Doppelbesteuerung anzuwenden und enthält das Abkommen keine solche Vergütungen betreffende ausdrückliche Regelung, gilt die Vergütung für Zwecke der Anwendung des Abkommens zur Vermeidung der Doppelbesteuerung ausschließlich als Teil des Unternehmensgewinns des vergütungsberechtigten Gesellschafters. **2**Satz 1 gilt auch für die durch das Sonderbetriebsvermögen veranlassten Erträge und Aufwendungen. **3**Die Vergütung des Gesellschafters ist ungeachtet der Vorschriften eines Abkommens zur Vermeidung der Doppelbesteuerung über die Zuordnung von Vermögenswerten zu einer Betriebsstätte derjenigen Betriebsstätte der Gesellschaft zuzurechnen, der der Aufwand für die der Vergütung zugrunde liegende Leistung zuzuordnen ist; die in Satz 2 genannten Erträge und Aufwendungen sind der Betriebsstätte zuzurechnen, der die Vergütung zuzuordnen ist. **4**Die Sätze 1 bis 3 gelten auch in den Fällen des § 15 Absatz 1 Satz 1 Nummer 2 Satz 2 sowie in den Fällen des § 15 Absatz 1 Satz 2 entsprechend. **5**Sind Einkünfte im Sinne der Sätze 1 bis 4 einer Person zuzurechnen, die nach einem Abkommen zur Vermeidung der Doppelbesteuerung als im anderen Staat ansässig gilt, und weist der Steuerpflichtige nach, dass der andere Staat die Einkünfte besteuert, ohne die darauf entfallende deutsche Steuer anzurechnen, ist die in diesem Staat nachweislich auf diese Einkünfte festgesetzte und gezahlte und um einen entstandenen Ermäßigungsanspruch gekürzte, der deutschen Einkommensteuer entsprechende, anteilige ausländische Steuer bis zur Höhe der anteilig auf diese Einkünfte entfallenden deutschen Einkommensteuer anzurechnen. **6**Satz 5 gilt nicht, wenn das Abkommen zur Vermeidung der Doppelbesteuerung eine ausdrückliche Regelung für solche Einkünfte enthält. **7**Die Sätze 1 bis 6

1. sind nicht auf Gesellschaften im Sinne des § 15 Absatz 3 Nummer 2 anzuwenden;
2. gelten entsprechend, wenn die Einkünfte zu den Einkünften aus selbständiger Arbeit im Sinne des § 18 gehören; dabei tritt der Artikel über die selbständige Arbeit an die Stelle des Artikels über die Unternehmenseinkünfte, wenn das Abkommen zur Vermeidung der Doppelbesteuerung einen solchen Artikel enthält.

8Absatz 9 Satz 1 Nummer 1 bleibt unberührt.