Case Review

Taxation of fictional earnings on occasion of changes to double taxation agreements

Review of German Federal Tax Court, judgements from 19 November 2025

BFH, Urt. v. 19.11.2025 – I R 41/22, BeckRS 2025, 43749; DStR 2026, 775

BFH, Urt. v. 19.11.2025 – I R 6/23, BeckRS 2025, 43752; DStR 2026, 849

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Germany's Federal Tax Court (*BFH*) has rejected two appeals filed by different fiscal authorities against judgements denying their power to tax a certain type of (fictional) earnings. The legal problems in the cases concerned surround the circumstances under which mere changes to the law, namely double taxation agreements (DTA), may result in exit taxation upon leaving of the tax net (*Entstrickung*), and in which moment. In addition, the Court had to discern whether distributive articles contained in DTA and dealing with income from certain activities may be construed to cover income from the sales of the corresponding business assets as well, in absence of explicit rules to the contrary.

A. Procedural Background

The BFH is the highest-ranking court within Germany's tax or, more accurately, finance judiciary (*Finanzgerichtsbarkeit*). These institutions are guaranteed by Article 95 paragraph 1 of the German constitution (*Grundgesetz*/*GG*) alongside the four other jurisdictions (ordinary, administrative, labour and social) and their respective federal courts. Unlike these other judiciaries, the tax courts are structured into two instead of three tiers. Thus, the regular, state-level tax courts always have jurisdiction concerning financial matters the first instance (section 35 of the Code of Tax Court Procedure or *Finanzgerichtsordnung*/*FGO*) while the Federal Tax Court possesses jurisdiction regarding appeals and complaints (sections 115 and following FGO).

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Also unlike the other aforementioned judiciaries, the tax court system lacks the possibility for appeals on points of fact and law (*Berufung*). The appeals at hand were therefore ones exclusively on points of law (*Revision*, see section 118 paragraph 1 FGO), without any new evidence being taken.

B. Revision I R 41/22 (Tax Court of Münster)

I. Facts of the case

In the first procedure, a German company was claimed to owe income tax for the year of 2013 due to the sale of shares in a Spanish corporation belonging to its business assets. In fact, the shares had not actually been sold. However, the DTA between Germany and Spain had been updated in 2011 to allow for the taxation of share deals by the state in which at least 50% of the company's actual net worth was situated. On 31 December 2013, the Spanish company owned immovable property in Spain which made up 51.1% of its actual net worth. Hence, the DTA now allowed for Spanish tax to be levied on a potential sale of those shares, and accordingly obliged Germany to give credit to the Spanish tax (credit method, compare Article 23B of the OECD Model Agreement/OECD-MA). The tax assessment was ultimately based on the consequences of that amendment.

II. Context

German income tax is calculated according to profit (compare section 2 paragraph 2 sentence 1 Nr. 1 of the Income Tax Code or *Einkommensteuergesetz/EStG*). Per section 4 paragraph 1 sentence 1 EStG, the profit (*Gewinn*) is in principle equal to the difference between the business assets (*Betriebsvermögen*) at the close of the previous fiscal year and at the close of the current fiscal year, corrected by adding withdrawals (*Entnahmen*) and subtracting deposits (*Einlagen*). A withdrawal in this sense is defined as any withdrawal of goods for non-business purposes (section 4 paragraph 1 sentence 2 EStG). Additionally, it is equated to a withdrawal if the taxation rights of Germany with respects to the sale of business assets are excluded or limited, especially if assets are reattributed from domestic to foreign permanent establishments (section 4 paragraph 1 sentences 3 and 4 EStG). In this way, a (fictional) profit is generated by realising the positive difference between the affected goods' value on the books (*Buchwert*) and on the market (*gemeiner Wert*), the so-called "hidden reserves" (*stille Reserven*), without the goods having to actually be sold.[1]

[1] Xaver Ditz and Thomas Rupp, 'Entstrickung und Verstrickung: Aktuelle Fragen und ATADUmsG' (2021) 10 ISR 413, 413.

It was therefore up for the Fiscal Court of Münster in the first instance[2] and subsequently the Federal Tax Court to decide if the amendment made to the DTA Germany-Spain qualified as an exclusion or limitation of German taxation rights within the meaning of section 4 paragraph 1 sentence 3 EStG, leading to a fictional withdrawal of business assets.

III. Decision

1. Question 1: On the principle taxability of passive exits from the tax net

The question at hand was first and foremost whether goods being "unsnared" from a business's assets according to section 4 paragraph 1 sentence 3 EStG (or similar provisions) also necessitates active behaviour by the taxpayer, or whether it also includes "passive" release from such attachment. This had previously been controversial in scholarship and unanswered by judicial jurisprudence. Objections had been raised, for example, concerning general rules of attribution as well as the capability of the taxpayer to perform without having actual sales profits at his disposal.[3] On the other hand, among others, instructions given by the Federal Ministry of Finance had been affirmative.[4]

The BFH ends up agreeing with these less critical voices.[5] Its reasoning picks up with what is essentially an argument from silence: The wording of section 4 paragraph 1 sentence 3 EStG does not, on its own, explicitly nor implicitly necessitate wilful conduct on the part of the taxpayer. Furthermore, the equivocation of limiting the Federal Republic of Germany's taxation rights with a withdrawal in the sense of section 4 paragraph 1 sentence 2 EStG is said not to extend to the conditional elements of that provision. Instead, it is restricted to the legal consequences of section 4 paragraph 1 sentence 2 EStG, namely that the value of the goods in question is always assessed by reference to their common or market value (see above as well as section 6 paragraph 1 number 4 EStG).

Additionally, it is contended by the BFH that attributing profits to the company does not demand wilful or controllable behaviour of the company or its agents. Rather, the affair should be considered a matter of mere causation. Stricter requirements within the bounds of section 4 paragraph 1 sentence 3 EStG cannot be drawn from the phrasing of more general provisions, such as the scope of application of income tax being tied to the "realisation of earnings" (*Erzielung von Einkünften*) by section 2 paragraph 1 sentence 1 number 2 EStG, or the coupling of the tax claim to the realization (*Verwirklichung*) of the

[2] FG Münster, Urt. v. 10.08.2022 – 13 K 559/19 G F, DStR 2022, 2413.
[3] ibid 2415.
[4] BMF, Schreiben v. 26.10.2018, BMF IV B 5 – S 1348/07/10002-01; DOK 2018/0734820, BStBl I 2018, 1104; BeckVerw 441700.
[5] For the authorities cited by the Court, see the respective decisions themselves.

elements of a tax law (*Steuertatbestand*) in section 38 of the Fiscal Code (*AO*). Alternatively, the BFH justifies the applicability of section 4 paragraph 1 sentence 3 EStG by disputing that taxation in the cases concerned occurs without any input by the taxpayer. On the contrary, the taxpayer is being taxed for continuing to keep the company shares as part of their operational assets. Taxing mere passive exits from the taxation net would therefore seem just as legitimate as taxing passive income in general (*Einkünfte aus Kapitalvermögen*, section 2 paragraph 1 sentence 1 number 5 and section 20 EStG).

The overall scheme of section 4 paragraph 1 EStG does not seem to hinder this line of thought either. Initially, the BFH acknowledges that the legislature intended section 4 paragraph 1 sentence 3 EStG to codify pre-existing jurisprudence, under which the taxation of passive exits had been rejected due to the lack of a statutory basis.[6] In contrast to this, the BFH had originally assumed that cases essentially now clarified as taxable by section 4 paragraph 1 sentence 4 EStG (i.e. assets being removed from establishments under German sovereignty to foreign establishments, the profits derived from which are exempted from German taxation by DTA) were taxable under section 4 paragraph 1 sentence 2 EStG. This theory of the final withdrawal (*Theorie der finalen Entnahme*) – "final" not as in "purposeful" but as in "ultimate" or "conclusive" - was abandoned in 2008 for much the same reasons as the taxation of passive exits had been dismissed decades earlier.[7] Section 4 paragraph 1 sentence 4 EStG was then inserted into the Tax Code to resolve interpretative issues revolving around section 4 paragraph 1 sentence 3 EStG that arose due to this change in jurisprudence.[8] Subsequently, it had been left open by the BFH whether the legal effects of a DTA may fulfil the elements of section 4 paragraph 1 sentence 3 EStG, as it was decided that this was inconsequential for the applicability of sentence 4 as a provision in its own right.[9]

According to the BFH, section 4 paragraph 1 sentence 3 EStG is supposed to create a sufficient legal basis for the taxation of *Entstrickung* in cross-border contexts and to summarise all the different possible constellations, all while allowing for further development in the area. It does not follow from the intent behind section 4 paragraph 1 sentence 3 EStG, therefore, that passive exits are still not covered. Quite the opposite: That provision now functions precisely as the sufficient legal basis for taxation. The catch-all

[6] BFH, Urt. v. 16.12.1975 – VIII r 3/74, BFHE 117, 563; BeckRS 1975, 22003453. The indirect application of tax statutes by way of analogy to the detriment of the taxpayer is considered under German constitutional law to be as heinous as an analogous application of criminal offences, which is explicitly prohibited by Article 103 paragraph 2 GG.

[7] For the history of *Entstrickungsbesteuerung*, see Xaver Ditz, 'Aufgabe der finalen Entnahmetheorie – Analyse des BFH-Urteils vom 17.7.2008 und seiner Konsequenzen' (2009) 18 IStR 115 and Julian Böhmer and Katharina Schlücke, 'Entstrickung trotz fortbestehendem deutschen Besteuerungsrecht?' (2026) 79 Der Betrieb 145.

[8] Klaus Dieter Drüen, '§ 4 EStG' in Bernd Heuermann and Peter Brandis, *Ertragsteuerrecht* (181st supplement, Vahlen February 2026) para 487.

[9] BFH, Urt. 26.03.2025 – I R 5/24 (I R 99/15), IStR 2025, 709 [21-22]; Böhmer and Schlücke (n 7) 147.

purpose of section 4 paragraph 1 sentence 3 EStG also explains why the legislature added the clause equating mere "limitations" on German taxation rights to outright "exclusions" of those same rights.

The Court then moves to refute objections not founded on the structure of German income tax law but on higher law, specifically the EU guarantee of free movement of capital (Articles 63 and following TFEU), the general right to equality (Article 3 GG), the principle of human dignity (Article 1 paragraph 1 GG), and the principle of the rule of law as manifested in the prohibition of *ex post facto* laws. In the matter of the fundamental freedom contained in Article 63 TFEU, the BFH cites the European Court of Justice (ECJ) decisions of 23 January 2014 and 21 May 2015,[10] allowing for the taxation of "hidden reserves" in cases where the member state cannot in fact exercise their taxation rights at the time in which these reserves are realised, under the condition that the taxpayer is granted a moratorium of five years. The BFH contends that section 4g EStG originally not covering passive exits does not preclude the application of section 4 paragraph 1 sentence 3 and that the retroactive amendment to section 4g EStG (as part of the Law implementing the EU Anti-Tax Avoidance Directive – *ATADUmsG*) was meant to fix just that. Moreover, the Court notes that even if the retroactive introduction of section 4g EStG would not satisfy the CJEU's demands, this would result not in the complete inapplicability of section 4 paragraph 1 sentence 3 in this case, but only constitute a right to such a memorandum.

As far as the right to equal treatment is concerned, according to the Court, the timing of taxation must under Article 3 paragraph 1 be judged merely by the standards of the prohibition on arbitrariness. Facilitating the levying of taxes by way of simplification and avoiding administrative deficits qualifies as sufficient reasonable grounds, accordingly justifying any unequal treatment. A violation of the fundamental guarantee of human dignity is, of course, handwaved away. The onset of taxation due to changes in the applicable DTA is said not to equate to the degradation of a human to the mere object of state or third-party behaviour, also taking into account the fact that the whole affair can also be traced back to the taxpayer's own behaviour, as mentioned earlier. Lastly, the "phony" retroactive effect (*unechte Rückwirkung*) of the introduction of section 4 paragraph 1 sentence 3 EStG is, in view of its stated goals, proportional and thus justified as well.

2. Question 2: The exact timing of taxation

Nevertheless, the tax assessment was judged as faulty, the "profits" in question being taxable not in 2013, as assessed, but rather back in 2012. In lieu of an actual withdrawal from the business assets, it had been questioned whether the relevant point in time

[10] Case C-164/12 *DMC* [2014] OJ C93/08 and Case C-657/13 *Verder Lab Tec* [2015] OJ C236/14.

corresponds to the actual occurrence of an exclusion or limitation of German taxation rights, as preferred by the government,[11] or the last "juridical" moment before the limitation becomes legally valid, which the BFH has now decided in favour of. Since Article 30 paragraph 2 letter b of the newer DTA Germany-Spain postulates that the DTA is applicable to taxes being levied for periods after the beginning of the year following the DTA coming into force (18 October 2012), German taxation rights were impeded from 1 January 2013 onwards, and the fictional withdrawal had to be considered as if it had happened in the last moments of 31 December 2012.

The Court cites section 6 paragraph 1 number 4 EStG once more, arguing that the teleology of Article 4 paragraph 1 sentence 3 EStG is directed towards establishing a final or concluding taxation (*Schlussbesteuerung*) of German hidden reserves. This result is also supported by the parallelism between section 4 paragraph 1 sentence 3 EStG and other examples of exit taxation, such as section 12 paragraph 1 of the Corporate Tax Code (*Körperschaftsteuergesetz/KStG*), section 6 of the Foreign Transaction Tax Act (*Außensteuergesetz/AStG*) or section 21 paragraph 2 sentence 1 number 2 of the Reorganisation Tax Act (*Umwandlungssteuergesetz/UmwStG*). In the case of section 6 paragraph 1 sentence 2 number 4 AStG (now section 6 paragraph 1 sentence 1 number 3 AStG), it is already recognised in jurisprudence - and subsequently by explicit statutory amendment to that effect (section 6 paragraph 1 sentence 2 number 3 AStG) - that tax liability is triggered at the point at which German taxation rights would otherwise be negatively affected.

C. Revision I R 6/23 (Tax Court of Hesse)

In a parallel case, previously decided upon by the Tax Court in Kassel,[12] the BFH had to evaluate similar problems as applied to German corporate tax.

I. Facts of the case

In 2009, the claimant had acquired property in Australia which it rented out to third parties. Article 6 of the DTA Germany-Australia allows for taxation of income from immoveable property in the state where said property is located (*situs*). The amended DTA from 2015, applicable from 1 January 2017, adopted Article 13 paragraph 1 OECD-MA and therefore now explicitly provided that income from the sale of such property was taxable by the state of *situs* as well. Accordingly, the authorities assessed that an exit tax on a fictional sale was owed due to the limitation on Germany's previous taxation rights.

[11] BMF (n 4).
[12] FG Hessen, Urt. v. 08.12.2022 – 4 K 1006/20, IStR 2023, 622.

II. Context

Since partnerships are not corporations enumerated in section 1 paragraph 1 KStG, the Münster case had dealt with exit taxation within the Income Tax Code. In the Hessian Case, on the other hand, the company now operating as a partnership - albeit with a corporation as the personally liable partner (*GmbH & Co. KG*) - had, in the relevant time period, existed as a limited liability company (*GmbH*) and hence as a corporation in the sense of section 1 paragraph 1 number 1 KStG. Thus, the applicable regime for exit taxation was section 12 paragraph 1 KStG instead of section 4 paragraph 1 sentence 3 EStG, which it nevertheless closely corresponds to.

III. Decision

In their second decision of the day, the BFH takes recourse to their principled affirmation of the possibility of a "passive exit" from the German tax net. However, they had to assess whether Germany had hitherto even enjoyed the right to tax the sale of immoveable property by German companies in Australia. Otherwise, such rights could logically not have been excluded or limited by amending the DTA.

Whether income from sales was covered by the general provision for income from immoveable property is a simple matter of interpretation. Firstly, the Court states that the plain wording of Article 6 DTA Germany-Australia had never been limited to current receipts and could therefore be construed to include income from sales without further ado. Such an inclusive reading is not contingent on a legal definition contained in the Treaty text, as an argument from the contrary would not necessarily have to be drawn from it. The same argument applies to a protocol to the DTA concluded by Germany and Spain, which extended the scope of Article 6 to income from the lease of land but did not preclude it being applied to the sale of land. In applying the DTA, it is immaterial whether the Treaty states have or have not, in the eyes of the tax authorities or the courts, realised the principle of *situs* in a consistent and consequent manner. Their decision as embodied in the existing Treaty would not and could not be corrected by the judiciary.

A mere memorandum enumerating income from sales as "other income" does not hinder the literal reading of the DTA either. Also, the interpretation of Article 6 of the 1972 DTA is not retroactively determined by the exclusion of income from sales from Article 6 of the 2015 DTA. Lastly, a restrictive interpretation of Article 6 of the 1972 DTA is not justified by subsequent agreements or practice as provided for by Article 31(3) of the Vienna Convention on the Law of Treaties. For one, the Convention did not apply to Germany before the transposing law in 1987. Even then, the Court simply states that the wording of Article 6 had been clear.

Since Article 6 – to the benefit of Australia - effectively functions as a distributive norm for all income stemming from immoveable property, neither Article 21 nor Article 22 paragraph 2 letter b of the DTA lead to exclusive German taxation rights. In the view of the BFH, the tax authorities could therefore not claim exit taxation on occasion of the amendment of the German-Australian DTA. In addition, they could not have claimed liability for 2017 but for 2016, the Court reiterating its opinion on at which point in time tax liability is realised.

D. Criticism and Implications

I. Exit taxation

The Court's conclusion that amendments to DTA might trigger exit taxation, while convincing, is a little less compelling than it may seem at first. While the open-ended phrasing of section 4 paragraph 1 sentence 3 EStG discourages a more restrictive interpretation, it does not necessarily determine that it should be applied to the greatest possible extent.[13] Instead, that result is ultimately implied in the stated goal of the provision, namely that German taxation rights concerning hidden reserves should be staunchly safeguarded, as far as it does not contravene EU law.[14]

Against this background, it is plausible that the more technical objections to passive exits from the tax net are ultimately rejected by the Court. Section 4 paragraph 1 sentence 3 EStG must be characterised as a legal fiction that is not conditional on an actual withdrawal or even a present action performed by the taxpayer, instead being based on normative elements.[15] The principle possibility of passive exit taxation is implied in the clarification on Brexit found in section 4g paragraph 6 EStG as well.[16]

One can scarcely argue on literal grounds that taxation rights are not "excluded" or "limited" if the German government and legislature willingly relinquish them in the course of negotiations.[17] Nonetheless, one could accuse the German state of legal abuse,

[13] Wolfgang Kessler and Alexander Spychalski, 'Die Tatbestandsvoraussetzungen einer passiven Entstrickung bei Änderung bilateraler Verträge – Kann rein staatliches Handeln die Aufdeckung stiller Reserven implizieren?' (2019) 28 IStR 193, 199.

[14] Klaus-Dieter Drüen, '§ 4 EStG' in Peter Brandis and Bernd Heuermann, *Ertragsteuerrecht* (181st supplement, Vahlen February 2026) para 486; BT-Drs 16/2710, 1.

[15] Peter Reiter, 'Entstrickung durch Abschluss oder Revision eines DBA' (2012) 21 IStR 357, 359.

[16] Martin Weiss, annotation of FG Hessen, Urt. v. 8.12.2022 – 4 K 1006/20, (2023) 32 IStR 2023, 626, 626. For the opposite view with regards to section 22 paragraph 5 UmwStG. see Ditz and Rupp (n 1) 420.

[17] cf Jan F Bron, 'Zum Risiko der Entstrickung durch den Abschluss bzw. die Revision von DBA - Überlegungen zu Outbound-Investitionen unter besonderer Berücksichtigung von Art. 13 Abs. 4 OECD-MA, § 6 AStG sowie von Umstrukturierungen' (2012) 21 IStR 904, 906-07.

taxing states of affairs entirely of his own doing.[18] While this should not be considered a breach of human dignity regardless of the circumstances, it is telling that the Court does not directly address the principle of performance ability (*Leistungsfähigkeitsprinzip*),[19] which is also subsumed under Article 3 paragraph 1 GG and functions as the *Magna Charta* of German tax law.[20] Exit taxation leads to unmitigated (economic) double taxation.[21] Seeing how taxation does not depend on an actual reduction in taxes owed in Germany due to taxation by the other Treaty state, the BFH's interpretation of section 4 paragraph 1 sentence 3 EStG substitutes a mere endangerment for a limitation.[22]

The Court also ignores that the onset of an exit taxation due to the introduction of new legislation in the form of DTAs may be classified as a genuine retroactive effect (*echte Rückwirkung*). While not categorically unjustifiable, the recognised case groups in which genuine retroactivity is deemed as justified – like clarifications of confusing or unequitable legal situations, as with the retroactive introduction of section 4g EStG – do not apply here.[23] Moreover, in view of the aforementioned economic hardships that enterprises may face due to the lack of actual profit at the time of taxation, even a phony retroactive effect may be considered unjustified.[24]

The contention that any taxation upon leaving the German tax net hinges on Germany possessing taxation rights in the first place is, of course, cogent.[25] What remains to be said is that the provisions providing for exit taxation should be applied paying respects to the specific circumstances of the DTA and the other Treaty state. It follows from this that changes to DTA must be considered with special attention towards the moment in time where they come into force.[26] On top of that, the other state's taxation praxis will have to be continuously observed. If the relevant DTA contains an applicable *subject-to-tax clause* and the other State does not actually tax the income as allowed for in the Treaty, taxation rights remain with Germany and neither section 4 paragraph 1 sentence 3 EStG nor

[18] Jens Schönfeld, 'Entstrickung über die Grenze aus Sicht des § 4 Abs. 1 Satz 3 EStG anhand von Fallbeispielen. Zugleich Besprechung der jüngsten BFH-Rechtsprechung zur Aufgabe der „Theorie der finalen Entnahme" sowie zur „finalen Betriebsaufgabe"' (2010) 19 IStR 2010, 133, 135-36.

[19] ibid 137.

[20] Ferdinand Wollenschläger, 'Art. 3 GG' in Peter M Huber and Andreas Voßkuhle (eds), *Grundgesetz Kommentar* (8th edn, C.H. Beck 2024) para 279.

[21] Wolfram Birkenfeld, Clemens Fuest, Bert Kaminski and others, 'Die Systematik der sog. Entstrickungsbesteuerung. Eine kritische Gesamtbetrachtung anhand von praktischen Einzelfällen' (2010) 63 Der Betrieb 1776, 1778-79.

[22] FG Münster (n 2) 2416; Schönfeld (n 18) 134; Birkenfeld, Fuest and Kaminski (n 21) 1780-81; Florian Oppel, 'Allgemeiner Entstrickungstatbestand in 3 4 Abs. 1 Sätze 3 und 4 EStG' (2025) 78 Der Betrieb 2805, 2806. Note that this is not considered a transgression of the text by Drüen (n 14) para 486c.

[23] Reiter (n 15) 361.

[24] Kessler and Spychalski (n 13) 200-01; cf Bron (n 17) 906; cf Schönfeld (n 18) 135.

[25] Christoph Ott, annotation of BFH, Urt. v. 19.11.2025 – I R 6/23, [2026] DStR 853, 853.

[26] Erik Muscheites, 'Passive Entstrickung infolge DBA-Änderung. Anwendungsbereich und Besteuerungszeitpunkt nach BFH' (2026) 79 Der Betrieb 1111, 1112.

section 12 paragraph 1 KStG are fulfilled.[27]

Since the amendments concerned affected only the distributive articles and therefore German taxation rights as whole, the BFH did not have to deal with exchanges between exemption and credit method.[28] It is to be expected that the jurisprudence surrounding section 4 paragraph 1 sentence 3 EStG and section 12 paragraph 1 KStG will be extended to section 6 paragraph 1 sentence 2 number 4 AStG in the near future.[29]

II. Treaty interpretation

Although the memorandum mentioned by the BFH could qualify as a supplementary means of interpretation in the sense of Article 32 of the Vienna Convention, any conclusions drawn from the memorandum would in turn also be *argumenta e contrario*. It is therefore still completely consistent to disregard the memorandum.[30]

The BFH is reinforced in this stance by the fact that the international treaties have to be interpreted autonomously (see Article 3 paragraph 2 OECD-MA), the German distinction between current receipts and income from sales (compare section 21 paragraph 1 sentence 1 number 1 and section 23 paragraph 1 sentence 1 number 1 EStG) which is implied in the dissenting interpretation of Article 6 DTA Germany-Australia 1972 therefore being of no concern.[31] In fact, section 2 paragraph 1 sentence number 7 EStG, section 22 number 2 and section 23 paragraph 1 sentence 1 number 1 EStG would hint that the term "income" does, in principle, include sales profits.[32] The BFH does not repeat some arguments employed by the lower court that are also appealing, such as the sales profits being the economic equivalent of current receipts that would be received in the future[33] or the generally extensive interpretation of distributive articles based on the *situs* principle.[34]

Save for the DTA with Poland from 1972 or DTAs that are out of force but concerning which there are still appeals pending, equivalents of Article 13 paragraph 1 OECD-MA are now present in every DTA concluded by Germany. Consequently, the interpretive issue at hand is no longer very relevant in practice.[35]

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[27] Ott (n 25) 854.
[28] Compare FG Münster (n 2) 2415; Reiter (n 15) 358; Kessler and Spychalski (n 13) 196.
[29] Against FG Köln, Urt. v. 17.6.2021 – 15 K 888/18, IStR 2021, 818 (Tax Court of Cologne) – appeal pending.
[30] Ott (n 25) 854.
[31] ibid.
[32] FG Hessen (n 12) 625.
[33] ibid 624.
[34] ibid 625.
[35] Weiss (n 16) 628.