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Dear Sir/Madam,

"*Temblar como un flan*" - in Spanish is comparable to the expression "*to be on tenterhooks*". Since the publication of the new BMF letter of 26 October 2018, this is likely to apply to many shareholders of a Spanish real estate corporation.

Accordingly, the tax liability removal provision in Sec. 6 para. 1 (2) no. 4 AStG [German foreign tax act], which is based on the exclusion or limitation of a German taxation right, does not require any action on the part of the taxpayer (so-called passive tax liability removal). Consequently, this provision also applies to situations in which the right to tax is excluded by amending or concluding a double taxation agreement (DTA).

For example, natural persons resident for tax purposes in Germany often hold their Spanish holiday property via a Spanish corporation, because such a structuring variant - at least in the past - offered tax advantages. However, the new DTA with Spain now contains a so-called "property clause" for the first time in accordance with Art. 13 para. 2. The primary right of taxation with regard to the profit from the sale of shares in real estate companies now lies with Spain. Germany is obligated to offset the taxes paid in Spain.

According to the new BMF letter, the silent reserves in the shares will be disclosed on 1 January 2013 (first-time application of the DTA).

However, in this case the tax can be deferred without interest, for an indefinite period and without security in accordance with Sec. 6 para. 5 AStG because it is an EU/EEA company. Nevertheless, the taxpayer must carry out a valuation of the company, declare a fictitious capital gain and comply with annual reporting requirements.

Since not only the DTA with Spain but also numerous other DTAs will contain a property clause in the future, consideration should be given to taking action contrary to a corresponding application of the BMF letter, in particular in the case of corporations domiciled in non-EU/EEA states where immediate taxation would take place.

Best regards

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Dr. René Schäfer completed his degree in Business Administration at Saarland University in Saarbrücken in 1999 as a Business Administrator. At the same time, he received the Diploma of the Ecole Supérieure de Commerce, Lyon after one year of study in France.

In 2003, he received a doctorate at the Chair for Business Management Studies, particularly Business Taxation from Univ. Prof. Dr. Heinz Kussmaul on the subject of "Taxation of a German-French company". Dr. Schäfer completed the examination for Tax Consultants in 2005. Since 2008, he has also possessed the title of "Specialist in International Tax Law".

In mid-February 2005, Dr. Schäfer began working as an employee in the tax department of DORNBACH GmbH, Saarbrücken branch.

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Company presentation

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