

German Tax & Legal News

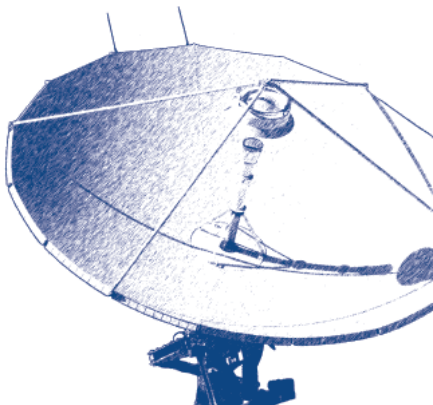
Monthly Newsletter for Inbound Investors into Germany

Legislative Update

Current status of Annual Tax Act 2009 (Jahressteuergesetz 2009)

On 19 September 2008, the German Upper House proposed various changes to the Annual Tax Act 2009, which was endorsed by the government on 18 June 2008 (see GTLN 6/2008). The Upper House proposed the following:

- A review of whether the change-in-ownership rule could be amended so that certain types of restructurings would still be possible without loss carryforwards being eliminated. The Upper House would like consideration to be given to a rule that would allow losses not to be eliminated to the extent they correspond to built-in gains in the assets of the loss company whose shares are transferred.
- A review of whether a change in the law could put an end to a structure that currently allows trade tax carryforwards to be protected upon a change in ownership by effecting a hive-down into a partnership before the tainted share transfer. Under the wording proposed by the Upper House, losses transferred to a partnership in a hive-down would be eliminated if the corporation effecting the hive down is subject to the change-in-ownership rule within five years from the hive down (under current rules, an indirect change in the partners of a partnership should not lead to the elimination of trade tax loss carryforwards of the partnership).
- An amendment of the proposed rules allowing a transfer of the bookkeeping function to another EU/EEA country (see GTLN 6/2008) that i) would allow such a transfer to a non-EU/EEA country; ii) would make a temporary transfer of paper documents to the other country possible; and iii) eliminate the requirement that the consent of the other country be sought to allow electronic access of the German tax authorities.
- An amendment to the tax treatment of interest expenses paid by domestic partnerships to nonresident partners for purposes of the interest deduction limitation following a decision of the Federal Tax Court (BFH) (see GTLN 5/2008).
- Special rules relating to the allocation of trade tax income between various municipalities for wind park operators.



Significantly, no changes have been put forward that would affect the proposed rule making the 40% refund of dividend withholding tax for nonresident corporations from 2009 subject to the anti-treaty shopping rule. Absent any changes to the proposed rule, nonresident companies that do not meet the substance requirements under the anti-treaty shopping rule will be subject to a final withholding tax of 26.375% as from 2009.

On 8 October 2008, there will be a meeting of the finance committee of the German Lower House to discuss a number of the proposed changes. Deloitte professionals will be present at the meeting to give an expert view on the proposed rule relating to the transfer of bookkeeping abroad, its limitations especially with regard to the limited territorial scope (i.e. the restriction to EU/EEA countries) and its implications for existing structures.

The German Lower House is expected to adopt the Annual Tax Act in mid-November 2008 and the Upper House should give its approval in December.

New draft law on deregulation of bureaucracy relating to tax collection published

In July 2008, a draft law for modernizing and deregulating the bureaucracy in the field of tax collection was published. Designed to reduce bureaucracy and facilitate the tax declaration and tax collection process for both taxpayers and the authorities, the draft law would amend the procedural tax law so that, for instance, the electronic transmission of information to the tax authorities would be mandatory.

Until now, with the exception of wage tax and VAT declarations, tax-related documents must be transmitted to the tax authorities in hard copy. Beginning with fiscal years starting after 31 December 2010, the draft law provides for the electronic transmission of (corporate) income tax returns and trade tax returns, as well as tax balance sheets and income statements. The draft rules, which would apply to all taxpayers with income from a trade or business, would be compulsory and would require the use of a qualifying electronic signature. The continued use of a non-electronic submission would have to be approved by the tax authorities and would be permitted only in the case of undue hardship.

The draft law also contains various other changes to the tax law with the objective of administrative simplification, e.g. an increase in the threshold amounts for filing wage tax and VAT declarations, abolition of the legal obligation to prepare invoices for VAT-exempt services, waiver of the requirement that electronic invoices be accompanied by a summarizing paper invoice from 2009, etc. While the government believes the draft law is an important step towards deregulation, the bill has been criticized by tax practitioners as being one-sided in favour of the tax authorities and shifting the administrative burden to taxpayers.

The Upper House published comments on the draft law on 19 September 2008, proposing certain options and exceptions for smaller companies. Since the draft still has to be passed by the lower and upper houses of Parliament, taxpayers should monitor the continuing legislative process with a view to making timely preparations for the potential administrative changes.

Court Decisions

BFH rules on requirements for a permanent establishment

In a recently published decision dated 4 June 2008, the BFH ruled that a permanent establishment (PE) is not created under German domestic law if activities by a service provider are carried out on the premises of a contracting partner and the activities are not sufficiently linked to a certain fixed base. The case involved a Dutch cleaning company that performed cleaning activities for airplanes on a German NATO airbase as a subcontractor for another company. To store cleaning materials owned by NATO and for personnel recreation, NATO provided a lounge (which included a telephone and fax line) and shower facilities for the cleaners. The Dutch cleaning company did not maintain its own premises on the airbase.

The BFH ruled that even though the premises used by the Dutch cleaning company could be considered a fixed place of business under German domestic law, the company did not control the premises. Merely having the right to use premises in the interest of another party or the mere possibility of using a room are insufficient. Although the most recent jurisprudence tends to recognize a PE if it can be presumed that a certain space is permanently available even though the space is not necessarily connected to a defined room, the activity also must have a certain degree of permanency and a fixed base to presume that a PE exists. This requirement was not met in the case decided by the BFH since the Dutch company cleaned the airplanes in buildings on the NATO airbase, and the cleaning service as such was not locally connected to the buildings, the lounge or the shower facilities made available to the Dutch cleaning company.

According to the BFH, the decision does not conflict with its previous decision in a case in which a U.S. company performed training and technical assistance activities in German barracks of the U.S. Army. Specially equipped rooms were necessary for the provision of training services, functional efficiency checks, technical maintenance and development of flight simulator systems, and the

services could only be performed in these rooms. Due to the local connection of the activities to special purpose rooms, the BFH presumed there was a contractual obligation for the U.S. Army to provide the rooms to the service provider and recognised a sufficient possibility to control the premises and, hence, concluded a PE was created.

Although the June 2008 decision is taxpayer-friendly, any decision relating to the creation of a PE in Germany is very fact-specific and the key criteria used by the BFH remain rather vague. Nonresident taxpayers that perform activities for a certain period of time in Germany should analyze their position carefully to avoid adverse tax consequences.

BFH publishes decision in the Lidl case

In a decision issued in July 2008, the BFH issued its follow-up decision in the Lidl Belgium case decided by the ECJ in May 2008 (see GTLN 5/2008). The case involved the cross-border utilization of losses incurred by a Luxembourg PE by its German head office, even though the applicable tax treaty applied the exemption method to PE profits. The ECJ held that a measure precluding the deduction of losses incurred by a PE in another member state could be viewed as proportionate and, therefore, in line with the EC treaty. The German law would be incompatible with EC law only if the taxpayer could demonstrate that it had exhausted all possibilities to use such losses in the member state of the PE (including loss carryforwards). The BFH has now issued its decision based on these principles.

It remains to be seen how the tax authorities will react to the decision and whether they will take the decision in the Lidl case as an opportunity to publish an official view on the cross-border loss-utilization for corporations.

Compatibility of solidarity surcharge with German constitution

A new case dealing with the compatibility of the solidarity surcharge with the German constitution in the year 2007 is pending before the local tax court of Lower Saxony (case 7 K 143/08). Since the BFH held in 2006 that the tax did not constitute a prohibited "extraordinary tax" and the Federal Constitutional Court rejected the constitutional complaint filed against the BFH decision (see GTLN 6/2008 and 8/2006), the chances of success appear to be relatively low. Taxpayers should still consider keeping their assessments open to be in a position to benefit from a potential future decision in favour of the taxpayer.

Legal News

Government proposes draft bill that may restrict acquisitions of German companies by nonresidents

In August 2008, the German government published a draft bill that would supplement the Foreign Trade and Payments Law and related regulations. The draft bill would allow a limited review of foreign investments in all industries. The review would not be mandatory in all cases but could be initiated by the Federal Ministry of Economics and Technology at its discretion or at the request of a concerned party provided the intended acquisition by the foreign investor corresponds to at least 25% of the overall voting rights in the domestic enterprise. A discretionary review by the Ministry would only be permitted within three months from the date the acquisition agreement was signed or three months from the date the tender offer was published, and limitations could only be ordered within two months after all documentation was submitted. A review could be initiated where there was a real and sufficiently serious endangerment of the law and order or security of the Federal Republic of Germany. The Ministry would be authorized to issue and prohibit the acquisition but only after consulting with the government. If an acquisition was prohibited, the transaction would be deemed to be void on a retroactive basis, so that if the acquisition already had been consummated, the transaction would need to be unwound.

If enacted, the bill would have a severe impact on all foreign investments of at least 25% in domestic enterprises, since to receive certainty regarding the permissibility of the transaction, the investor would either need to request a review or wait until the time for a Ministerial review (which could last up to five months provided all required documents were submitted by the end of the first three-month period) expired. The review would not apply to investors from EU or EFTA member states. The draft bill would come into force after adoption by the Lower House and other legislative requirements (e.g. involvement of the Upper House).

This article was drafted by Dr. Tim Luthra (tluthra@raupach.de), Raupach & Wollert Elmendorff Rechtsanwalts-gesellschaft mbH.

Deloitte News

Enhanced version of Deloitte International Tax Source (DITS) now available

Deloitte is pleased to announce an enhanced version of the premier online "one-stop shop" for international tax/transfer pricing information and analysis: Deloitte International Tax Source (DITS). Whether you need to compare specific country rates, verify the accuracy of tax rates used for tax provisions, look up tax treaty rates, analyze transfer pricing regimes or just want to keep current on global tax developments, the new DITS provides easily accessible answers in a searchable online database.

DITS now offers:

- Historic, as well as current, corporate income tax rates for more than 60 jurisdictions (new).
- Comparative information on holding companies including considerations for establishing a holding company, income taxation of holding company, and the tax treatment on disposal of a holding company as well as payments made and received by a holding company (new).
- Comparative information on transfer pricing regimes; including methodologies, set offs, cost sharing and cost contribution arrangements, self-initiated adjustments, documentation, benchmarking and comparative data, management fees, penalties, advance pricing agreements and competent authority relief (new).
- Domestic withholding tax rates.
- In-force and pending tax treaty rates on dividends, interest and royalties.
- Indirect tax rates (VAT/GST/sales tax).

Additional tax tools available through DITS to help you gain a fresh perspective on all components of your international tax and business operations include Tax and Business Guides, Country Highlights tax alerts, tax newsletters and webcasts.

Please visit and bookmark DITS at www.deloitte.com/DITS. For more information, contact your local Deloitte tax professional or the editors of this newsletter.

Frankfurt Breakfast Briefings

Deloitte Frankfurt hosts regular breakfast meetings on international tax developments. The next breakfast meeting will take place on 1 October 2008 at 8.30 am in Deloitte's Frankfurt offices and will focus on current EC law developments relevant for corporations. If you are interested in attending or would like to receive invitations for upcoming meetings, please contact Ms. Ebru Özüaydin (eoetzueaydin@deloitte.de).

Seminar on current tax developments in the real estate sector

In October and November 2008, Deloitte Germany will host seminars on current tax developments and their implications on the real estate sector. Topics to be covered include the implications of the new interest deduction limitation rule on the real estate sector, the new trade tax add-backs and the implications of the broad reform of the accounting rules (see GTLN 8/2008) on real estate investments in Germany. The seminar will be held in German and will be hosted in the following locations:

Berlin	16.10.2008
Düsseldorf	15.10.2008
Frankfurt	16.10.2008
Hamburg	05.11.2008
München	04.11.2008
Stuttgart	30.10.2008

If you are interest in attending or would like more information, please contact Ms. Michaela Hesse (mhesse@deloitte.de).

Seminar on current developments in tax reporting

On 27 October 2008, Deloitte Munich will host an afternoon seminar on current developments in tax reporting, discussing among other topics the short-term convergence project – income taxes and its implications for IAS 12, the implications of the reform of German accounting rules and a variety of practical issues. The seminar will be held in German. If you are interested in attending or would like more information, please contact Ms. Lolita Blankenstein (lblankenstein@deloitte.de).

IIR International Tax Seminar

From 17–21 November 2008, IIR Ltd. will be hosting an International Tax Seminar in London that addresses current tax practice and planning opportunities in the US, Germany, France and Italy, and provides an overview of European holding and financing regimes. Practitioners from Deloitte Munich will give a full-day presentation on 20 November on the key features of the German tax system, with an emphasis on corporate taxation and transfer pricing. To register, or for more information, please contact IIR Ltd. (kmregistration@informa.com or www.iir-conferences.com/ITS).

Save the date: Deloitte year-end tax planning conference

In November and December 2008, Deloitte Germany will host its annual year-end tax planning conference in the following locations:

Berlin	04.12.2008
Bremen	25.11.2008
Dresden	26.11.2008
Düsseldorf	26.11.2008
Erfurt	16.12.2008
Frankfurt	20.11.2008
Freising	02.12.2008
Hamburg	26.11.2008
Hannover	19.11.2008
Leipzig	02.12.2008
Magdeburg	26.11.2008
München	24.11.2008
Münster	04.12.2008
Nürnberg	02.12.2008
Stuttgart	24.11.2008

The conference, which will be conducted in German, will focus on current German tax developments and the implications of potential tax law changes. If you are interested in attending or require more information, please contact Ms. Silvia van den Eeden (svandeneeden@deloitte.de).

Notice

If you are interested in regularly receiving this publication or if you know anyone else interested in receiving a copy, please send his/her information to the following email-address: gtln@deloitte.de

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