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By PwC Deutschland | 30. November 2018

Finance Act 2018

On 8 November 2018, the Finance Bill 2018 was adopted by the German parliament and received the consent of the Bundesrat on 23 November 2018 in the form of “The Act for the Avoidance of VAT Losses on the Trading of Goods on the Internet and Amendments to other Tax Regulations”(hereafter “Finance Act 2018”).

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This article sets out a selection of the new regulations.

AMENDMENTS TO THE CORPORATION TAX ACT:

Organschaft: variable compensation payments to external shareholders

As a general rule one of the conditions for the recognition of a corporation tax “Organschaft” (tax group) is that the “Organgesellschaft” (subsidiary company) transfers its whole profit to the “Organträger” (parent company). The draft bill provides that the whole profit will also be treated as having been transferred, even when compensation payments, which exceed the minimum assured amount according to Section 304 (2) 1st Sentence of the Stock Corporation Tax Act, are agreed and paid. However, in such a case the compensation payment cannot exceed the profit share corresponding to the relevant interest in the share capital for the year which would have been paid if no profit transfer agreement had existed. Furthermore, any payments exceeding the amount set out in Section 304 (2) 1st Sentence of the Stock Corporation Tax Act must be based upon an economically reasonable decision.

This amendment is intended to redress the position after the Supreme Tax Court ruled on a number of occasions that the payment to an external shareholder of both a fixed compensation and a variable amount calculated with reference to the annual profit precluded the recognition of an income tax Organschaft, as the whole profit could not then be transferred.

The Bundesrat’s proposal regarding public sector entities, multi-utility businesses and municipal corporations was not taken up.

Investment income and Organschaft

The Investment Tax Act 2018 provides for a partial tax exemption for income arising from stock funds, from real estate funds and from mixed funds. The level of the exemption is dependent upon the person of the investor (i.e. whether it is an individual, a corporation or another fund.) Business expenses and losses in business assets, which are economically related to the tax- free income, are not deductible in an amount corresponding to the percentage of the partial exemption.

The nature of the relief has meant that in the case of an income tax Organschaft the transfer of the partially exempt income could give rise to the Organträger receiving either excessive or insufficient relief. (This was due to the fact that an Organträger can be both an individual or a corporation.) To avoid such a systematic discrepancy, the amendment provides that the exempt income should be transferred gross so that the partial exemption relief occurs at the level of the Organträger.

The new provision applies to assessment periods from 2019 onwards.

Loss forfeiture rules: implementation of the decision of the Federal Constitutional Court

On 29 March 2017 the Constitutional Court held as unconstitutional the rule on the partial forfeiture of losses where shareholdings of between 25% and 50% were transferred within a five year period for transactions occurring in the periods 2008 to 2015. The government was required by the Court to introduce new rules

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retroactively. Rather than introducing a new rule to meet this requirement it was decided to order that the unconstitutional rule should not be applied retroactively at all. The dispensation applies to transfers made after 31 December 2007 and goes beyond the requirement of the Court in that it also applies to periods after 31 December 2015.

This only applies to shareholding transfers of between 25% and 50%. The rule applying to the full forfeiture of losses, where shareholdings of over 50% are transferred, is still applicable. It is worth noting that this rule is also awaiting review by the Constitutional Court (2 BvL 19/17).

Loss forfeiture rules: reintroduction of relief following the decision of the European Court of Justice

In its judgments in, inter alia, Heitkamp BauHolding GmbH) (C-203/16 P), and Lowell Financial Services GmbH (f.k.a. GFKL Financial Services AG) (C-219/16 P) on 28 June 2018, the ECJ held that in its decision to classify the so-called “Restructuring Clause” as illegal State Aid, the European Commission had applied an incorrect reference system and its decision was thus was void. Following the release of the European Commission’s decision in 2011, the Restructuring Clause – under which the loss forfeiture rules did not apply in the case of certain restructuring arrangements –had been suspended. The Finance Act 2018 now revokes the suspension and as originally planned, the relief will apply to share transfers made after 31 December 2007.

Tax exemption for restructuring income

Following the issue by the European Commission of a comfort letter stating that no formal notification of Germany’s compliance with EU State Aid rules was necessary with regard to the tax exemption on certain restructuring income, the said exemption has been reintroduced from 5 July 2017 retroactively. In addition, upon application, the exemption should apply to debt waivers made on or before 8 February 2017.

AMENDMENTS APPLICABLE TO LIMITED TAXPAYERS:

Disposals of shares in real estate companies

The Act introduces a broadening of the Income Tax Act (ITA) provision whereby a non-resident person’s capital gain on the disposal of shares will give rise to a limited tax obligation. Under the earlier provision, the gain on disposal of shares was subject to German tax where an interest of at least 1% was held during a five year and the underlying company had its registered office or its place of management in Germany (i.e. was German resident). The rule has now been extended to gains arising from the disposals of shares in a non-resident company, where:

- more than 50% of the underlying value of the share (whether direct or indirect),
- at any point in time in the 365 day period before the disposal,
- is based on immovable assets located in Germany
- and the shares are attributable to the seller at this point in time.

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In line with the OECD Model Tax Convention (2014), many of the German tax treaties provide Germany with a taxing right on the capital gain on disposal where more than 50% of the value of a company is made up (directly or indirectly) of immoveable assets located in Germany. To date Germany has been unable to invoke this provision because domestic law did not contain a provision for such a chargeable event.

The new rule should cover situations involving both tax treaty states and states without a tax treaty. The provision applies to disposals made after 31 December 2018 to the extent that the gain relates to changes in value occurring after that date.

Disposals of immoveable assets, rights and aggregates of assets located in Germany and changes in value of related assets.

The new provision includes in the calculation of the chargeable gain on the disposal of immoveable assets, rights and aggregates of assets located in Germany, any changes in value of assets, which have an economic link with the asset disposed of. The provision is a reaction to a decision of the Supreme Tax Court (on 7 December 2016, - I R 76/14) where the limited taxpayer disposed of domestic real estate, from which it had generated letting income. The purchase of the real estate had been financed by a loan provided by a related entity. After the sale, the related entity waived the part of the loan not covered by the proceeds of sale. The Court held that the income arising from the waiver was not taxable in the hands of the limited taxpayer as it neither constituted letting income nor was it part of the capital gain on the disposal of the real estate.

The amendment applies to changes in value occurring after 31 December 2018.

PREVENTION OF TAX AVOIDANCE: CUM/CUM TRANSACTIONS:

Withholding tax

The ITA provides that in certain listed circumstances, withholding tax on capital yields will not be withheld (so-called suspension of the WHT deduction). The relevant provisions have now been amended to introduce a restriction on the suspension of 2/5ths of the withholding tax available to certain tax privileged corporations where the capital yield emanates from stock held in a collective securities account. The restriction should apply to capital yield receipts in excess of €20,000, where the recipient held the stock as beneficial owner for less than a year at the time of receipt.

The rule is aimed at preventing tax privileged investors being used for cum/cum transactions. The tax withheld will be refunded to the tax privileged investors upon application, provided he meets certain criteria, such as beneficial ownership for a minimum of 45 days and the bearing of a minimum risk.

The rule applies to capital yields received after 31 December 2018.

Prohibition of withholding tax imputation

The provision in the ITA regulating the exclusion of a withholding tax imputation is to be amended for the avoidance of doubt to state that both the refund and the imputation of dividend withholding tax is prohibited,

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where the dividend is paid to a person who is not the beneficial owner of the shares at the time of the dividend resolution.

Where the claim to a dividend (dividend coupon) is transferred but the voting rights retained, the purchaser of the dividend coup may still obtain a refund of the withholding tax paid; however, the claim in these circumstances will be restricted to 2/5ths of the withholding tax.

The rule applies to capital yields accrued on or after 1 January 2018.

AMENDMENTS TO VAT ACT:

Introduction of filing obligations for operators of an electronic market place

The Act imposes an obligation on operators of electronic market places to provide information on potentially VATable supplies in Germany made by the users of their platform. The information should include the name and address of the supplier, his tax number and/or his VAT ID number, the start-date and the end-date of the tax registration certificate, the place of commencement of the transportation/shipment, the destination, the date and the amount of the supply.

The entrepreneur will have to prove to the operator that he is VAT registered. For these purposes, the local tax office of the entrepreneur should issue a tax registration certificate in paper form. Such a certificate is a condition for the operator obtaining an indemnity against liability for the lost VAT. An online procedure is in the process of being set up.

The new rules come into effect on 1 January 2019.

Enactment of EU Directive on VAT treatment of vouchers

The EU Directive on the VAT treatment of vouchers (Directive (EU) 2016/1065) was designed to ensure a consistency in the tax treatment of transactions

involving vouchers within the single market.

The new provision in the VAT Act only applies to vouchers, which can be used for redemption against goods or services. Vouchers entitling the holder to a discount upon purchase of goods or services but carrying no right to receive such goods or services are not subject to the new rules.

As required by the Directive, the provision should take effect from 31 December 2018.

Supply for telecommunications, broadcasting and electronically supplied services

The proposed amendment of the provision relates to suppliers of telecommunications, broadcasting and electronically supplied services, who are only resident in a single Member State. The amendment provides that for entrepreneurs who supply such services to non-entrepreneurs in other Member States, the place of supply will be deemed the place where the entrepreneur runs his business or the place of the branch which provides the supply, provided the total amount of consideration received for the relevant services in both the

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current and the previous calendar year does not exceed €10,000. The supplier may choose not to apply the supply threshold of € 10,000 and continue to treat the place of supply as the place at which the recipient of the services has his usual residence.

More detailed information on the VAT changes can be found in our ***VAT Newsflash 1/2019***

Schlagwörter

Cum/cum transactions, Finance Act 2018, Organschaft, VAT, e-commerce, electronic market place, real estate companies, tax group