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Tax & Legal News

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Official Pronouncements

Bundestag agrees Finance Act 2019

On 7 November 2019, the Bundestag approved the Act on the Further Tax Promotion of Electric Mobility and the Amendment of Further Tax Regulations (Finance Act 2019 – "FA19") in the version recommended by the Finance Committee of the Bundestag. In its recommendation, the Finance Committee included a number of the Bundesrat's regulatory proposals.

The government's Finance Bill was published by the Federal Cabinet on 31 July 2019 (see our blog post: https://blogs.pwc.de/german-tax-and-legal-news/2019/08/02/finance-bill-2019-gets-green-light-from-federal-cabinet/). At its meeting on 20 September 2019, the Bundesrat made a large number of proposals for amendments, which were in part adopted by the Bundestag and incorporated into the bill. Some changes to the climate package have also been included.

The approval of the Bundesrat is still pending.

We have included a summary of the most important items. Changes to the government draft are in italics.

Income Tax Act (ITA)

- The section excluding the add-back of increases in business assets/business income (Section 3a ITA) resulting from restructuring measures (e.g. debt waivers) is to be supplemented by a provision introducing priority loss set-offs in the case of joint assessments for married couples. The new provision is associated with another provision in Section 3a ITA relating to the elimination of the existing loss set-off potential from prior years, the year of the restructuring measure and the year following. According to the new provision, the current-year amount and the loss carry-forwards of the other spouse should also be taken into account, where married couples are jointly assessed.

- Section 4 (5) Sentence 1 No. 8 Sentence 1 ITA is to be revised. As a result, fines, administrative penalties and warnings imposed in other EU Member States should also be included in the list of non- deductible operating expenses. Up to now, only fines, administrative penalties and warnings imposed by domestic authorities or by an EU body (e.g. by the European Commission in cases of cartel fines) were non-deductible. However, under European competition rules the Member States themselves are (also) responsible for fixing cartel fines. In addition, the costs related to other fines, administrative penalties and warnings (e.g. interest on financing) will also be non-deductible.

- The bar on the deduction of interest on evaded taxes is to be extended to include interest on the late payment of evaded tax assessed for the same period.

- Section 5a ITA will be amended so that where a taxpayer changes his method for determining profits from the flat-rate method applicable to commercial shipping vessels in international waters (tonnage rules) to accruals based accounting under Sections 4 (1) and 5 (1) ITA the further depreciation of assets of depreciable fixed assets is to be carried out unchanged on the basis of the original acquisition or production costs.

- In response to the ruling of the Supreme Tax Court of 26 April2018, (IV R 33/15), the Act provides for the introduction of a new provision according to which fund establishment costs to be paid by the investor in connection with the acquisition of a fund unit are to be retroactively allocated to the acquisition costs of the assets acquired by the fund and are therefore not to be immediately deductible in full as operating expenses or income-related expenses (Section 6e ITA).

- Pursuant to Section 12 No. 4 ITA, expenses arising in connection with criminal penalties will not be allowed to reduce the tax base in future. The proposed amendment to § 12 No. 4 ITA is intended to be in line with the restriction on the deduction of expenses in connection with fines, administrative penalties and warning fines provided for in § 4 (5) Sentence 1 No. 8 Sentence 1 ITA (see above).

- Section 15 (3) No. 1 ITA is to be revised, so that a “trade taint” (i.e. a deemed trade) will occur irrespective of whether a profit or loss is made from the commercial activity or whether the commercial income is positive or negative. Accordingly, an agricultural and forestry, freelance or asset-managing partnership should also be regarded as a business enterprise even if it only realises negative commercial (participation) income. In its judgment of 12 April 2018 (IV R 5/15), the Supreme Tax Court held the contrary view.

- Section 17 ITA (this is the section dealing with the disposal of certain shareholdings in corporations) is being amended to bring the definition of the acquisition costs of a corporation in line with Section 255 of the Commercial Code. The definition includes all costs involved in purchasing the shares, including ancillary and subsequent costs, which include especially:

    - open and hidden contributions to a corporation (e.g. in the form of additional payments-in),
    - losses arising from bad loans, where the decision to provide the loan or to leave it standing when the debtor company was in a crisis was motivated by the shareholder relationship, as well as
    - losses resulting from recourse claims under guarantees and comparable claims where the grant of the relevant security or the decision to leave it in place was motivated by the shareholder relationship. An action will generally be motivated by the shareholder relationship if a third party would have demanded repayment of the loan or security or would not

have granted the loan or security under otherwise identical circumstances.

- Section § 32d (3) ITA has been amended to clarify that a tax assessment is obligatory, where a capital gain is taxable but not subject to withholding tax.

- In Section 34c (6) Sentence 2 ITA, the words "the foreign tax to be credited under the tax convention" are to be replaced by the words "the foreign tax to be credited under the tax convention as reduced by any claim for relief arising". This is intended to mirror Section 34c (1) Sentence 1 (non-tax treaty cases) whereby the foreign tax is reduced by any accrued claim for relief. Since, according to the current wording of the provision, "foreign tax to be credited under the tax convention", i.e. the tax lawfully levied and due to the source state under the terms of the tax treaty, can be credited, this amendment in respect of withholding tax refunds under the terms of a tax treaty is merely intended to clarify matters.

- Section 36a (4) ITA has been supplemented by certain rules establishing the procedures for notification, reporting and payment obligations for persons liable to income or corporation tax for whom tax was not withheld at source (e.g. due to a tax exemption) and who do not meet the requirements of Section 36 (1) to (3) ITA

- Included in FA 2019 are rules whereby domestic operators or the domestic branches of foreign operators of internet service platforms are obliged to withhold income tax on interest where the interest originates from a receivable acquired via an internet service platform (so-called crowdlending) and where the operator of the internet service platform reports the capital receipts to the creditor or otherwise makes available an overview of the capital receipts. This will also apply to any domestic credit institution that pays or credits the income to the creditor on behalf of the domestic or foreign operator of the internet service platform.

- A revision to Section 49(1) No. 5 Sentence 1 Letter c (aa) Sentence 2 ITA (specifies that the limited tax liability for income from convertible bonds and profit participation bonds is solely regulated in § 49 (1) No. 5 Sentence 1 Letter a ITA and the exception from limited tax liability set out in Section 49 (1) No. 5 Sentence 1 Letter 5 Letter c(aa) Sentence 2 ITA does not apply. Following a recommendation of the Finance Committee, a further amendment has been made to Section 49(1) No. 5 ITA. According to this, a limited tax liability shall also arise in cases of income under Section 20(1) No. 1 Sentence 4 ITA (relating to dividend compensation payments made in connection with short selling) where the issuer of the shares has its management or registered office in Germany (Section 49 (1) No. 5 Sentence 1 Letter a (bb) ITA).

- A subsection (13) has been added to Section 50d ITA (deals with withholding tax procedures in cases involving tax treaties) which stipulates that, where shares in a company with its registered office or management in Germany are acquired with a dividend entitlement, but delivered without dividend entitlement, other remuneration received by the acquirer in lieu of dividends shall be treated in the same way as dividends paid by this company for the purposes of the application for relief under a tax treaty.

Corporation Tax Act (CTA)

- The Finance Act 2018 deleted Section 8c (1) Sentence 1 CTA (old version) (change of control rules for shareholdings between 25% and 50%) following a decision of the Federal Constitutional Court. In so doing, the definition of the "unused losses" contained in Sentence 1 was also deleted by mistake. This oversight is now to be corrected by amending § 8c (1) CTA (new version) by replacing the words "unused losses" with the words "negative income not offset or deducted (unused losses)".

- Corresponding to the planned amendments in Sections 12 No. 4 and 4 (5) Sentence 1 No. 8 Sentence 1 ITA (see above) – a prohibition of deduction for expenses in connection with fines is to be introduced in Section 10 No. 3 CTA.

- By altering the wording of Section 15 Sentence 1 No. 2 Sentence 2 CTA it is intended to react to more recent Supreme Tax Court case law. In its judgment of 26 September 2018, (I R 16/16), the Supreme Tax Court ruled that the blanket ban on the deduction of operating expenses pursuant to section 8b (3) Sentence 1 CTA did not apply to the takeover profit realised by a controlled company (Organgesellschaft) as the acquiring legal entity (within the meaning of Section 12 Reorganisations (Taxes) Act) as part of an upstream merger either at the level of the acquiring Organgesellschaft or at the level of the (interim) controlling company(Organträger). The proposed amendment is intended to ensure that the flat-rate prohibition of deduction of operating expenses under Section 8b (3) Sentence 1 CTA is applied in such cases at the level of the Organträger.

Trade Tax Act (TTA)

- Section 7 Sentence 3 TTA is to be extended to explicitly include profits arising from the difference between book value and fair value as calculated under Section 5a (4) and (4a) ITA (profit determination rules for commercial shipping vessels in international waters). The amendment is aimed to nullify the decision of the Supreme Tax Court on 25 October 2018, (IV R 35/16), by which the Supreme Tax Court – reversing its earlier case law in the view of the Bundesrat – decided that add-back of the difference calculated in accordance with Section 5a (4) Sentence 3 Nos. 1 to 3 ITA did not fall under Section 7 Sentence 3 TTA, but rather under Section 7 Sentence 1 TTA. This meant that the related profit could be reduced, in particular, under Section 9 No. 3 Sentence 2 TTA. The proposed amendment to Section 7 Sentence 3 TTA is intended to enshrine the opinion of the tax administration into law.

- The amendment to § 9 No. 7 TTA is intended to take account of the requirements of the ECJ ruling of 20 September 2018 in Case C-685/16 (EV), which found that Section 9 No. 7 TTA in its current form imposed stricter conditions (e.g. activity clause, restriction to certain participation structures and an increased burden of proof) for the trade tax deduction of profits from shareholdings on a company with its management and head office in a non-EU state to than it did on a domestic company. The rule therefore violated EU law in that it restricted the free movement of capital. The new wording of Section 9 No. 7 TTA is to grant the deduction of profits emanating from shareholdings in corporations with management and registered office abroad under the same conditions as apply for profits from shareholdings in a domestic corporation. A reduction is therefore to be made in future if the participation amounts to at least 15% of the nominal capital at the beginning (no longer "since the beginning") of the assessment period and is no longer subject to activity reservations. However, the minimum participation of 15% at the beginning of the assessment period is also to apply to corporations with management or a registered office in the EU, for which – in accordance with the requirements of the Parent-Subsidiary Directive – a reduction is currently available where the minimum participation is 10%.

Other significant changes

- A regulation has been introduced as a reaction to the decision of the Supreme Tax Court of 31 May 2017, (I R 54/15), according to which only the directly controlled company (Organgesellschaft) in a tax consolidation group (Organschaft) is liable for unpaid corporate income tax of the controlling company (Organträger)pursuant to Section 73 General Tax Code. Accordingly, the liability of controlled companies lower down the corporate chain is not covered by the current wording of Section 73 General Tax Code. If a controlled company, which is also a controlling company, is liable for taxes of its controlling company, its controlled companies are also to be liable pursuant to Section 73 Sentence 2 General Tax Code in accordance with Section 73 Sentence

1 General Tax Code. Relevant here is only whether the controlled company, which is itself a controlling company, can in principle be liable for taxes of the controlling company in accordance with Section 73 Sentence 1 General Tax Code. The actual claim against the controlling company/controlled company according to the liability notice based on Section 73 Sentence 1 General Tax Code should not be relevant.

- The government's bill includes as before measures for the promotion through taxation of electromobility in particular an extension of the preferential tax treatment for certain electric and hybrid electric vehicles in the area of the taxation of company cars according to Section 6 (1) No. 4 ITA, a special depreciation for electric delivery vehicles in accordance with Section 7c ITA, in Section 40 (2) Sentence 1 ITA a new flat-rate taxation without a set-off against the commuter allowance in relation in particular to job tickets as well as the preferential treatment of certain electric and hybrid electric vehicles and bicycles in the context of the trade tax add-back in accordance with Section 8 No. 1 Letter d TTA.

- In the area of employee taxation, the government draft also provides, inter alia, for: an increase in the meals lump sum allowance in Section 9 (4a) Sentence 3 ITA from EUR 24 to EUR 28 or from EUR 12 to EUR 14; the application of the arm's length principle when considering whether in the case of employee secondments the "receiving" company is to be regarded as a domestic employer in accordance with § 38 (1) Sentence 2 ITA; as well as making the wage tax annual compensatory adjustment in accordance with Section 42b (1) Sentence 1 ITA available to limited liability taxpayers. In addition, provisions have been added to define the distinction between cash benefits and non-cash benefits as well as between vouchers and cash cards (§ 8 (1) Sentences 2 and 3 and (2) Sentence 11 ITA).

- In the area of Value Added Tax, the government bill provides, inter alia, for the implementation of the so-called "Quick Fixes Directive" ((EU) 2018/1910) of 4 December 2018. Among the amendments are regulations concerning: the treatment of call-off stock (i.e. deliveries to a consignment warehouse); chain transactions; intra-EU supplies; margin taxation for travel services; reduced VAT rate on e-books and a VAT exemption for services provided by independent associations of persons to their members.

No longer contained in the law:

- the income tax exemption on benefits-in-kind in the context of alternative forms of housing;
- the amendment of Section 20 (2) Sentence 3 ITA to make clear that a loss resulting from the default of a capital claim or the derecognition of a share is not relevant for tax purposes;
- the adaptation of VAT rules for the taxation of educational and social welfare institutions.

Source:
Bundestag Finance Committee, recommendation for resolution on the draft law on further tax incentives for electromobility and on the amendment of further tax regulations, BT-Drs. 19/14873 (the law was passed by the Bundestag in the version proposed by the Finance Committee).

Land Tax Reform at the Eleventh Hour

After protracted and difficult negotiations, on 18 October 2019 the Bundestag passed the coalition factions' bill on the reform of the land taxes and valuation laws (Land tax Reform Act).

Following the judgment of the Federal Constitutional Court on 10 April 2018 (BVerfG, 10 April 2018 – BvL 11/14), the Federal Government and the Federal States have been looking for a way to reform land taxes to conform with the decision of the Court. It was *a requirement of the Court that the rules be in place by 31 December 2019. Failure to do so could have led to a "land tax-free period" and the loss of an income source that is so important for the municipalities. After months of negotiations and the consideration of various reform models the Bundestag agreed the bill on 18 October 2019- just in time.*

The Bundesrat approved the bill at their meeting on 8 November 2019.

Complex valuation procedure with escape clause

As was the case previously, land tax will be calculated in a three-step valuation procedure, which is aimed at determining the "actual" value of real estate for the purposes of land tax.

In a first step, the values for land and buildings (land tax values) will be calculated on the basis of largely legally standardized valuation parameters. The aim is to achieve approximately the same taxation of comparable properties.

The new valuation method finally selected was the value-based model proposed by the Federal Ministry of Finance.

For undeveloped land, the value for land tax purposes results from the area of land multiplied by the standard land value.

In the case of residential properties, the calculation to be applied is a simplified capitalised earnings value method based on flat-rate net cold rents, regardless of whether the real estate is actually rented out or used by the owners themselves. In addition to this amount, the value of the (fictitious) undeveloped plot of land will be added, after a discount calculated through applying a factor dependent on the remaining useful life of the building.

A clear distinction is made between residential properties and non-residential properties. For the latter, the valuation is carried out in the form of a simplified asset valuation procedure. For the valuation of the buildings, the usual cost for the construction of the respective building type will be applied. The value for the land based on the value of the undeveloped property will then be added to the value of the building.

In contrast to this, the future valuation of land and buildings for land and forestry businesses will be valued through a simplified capitalised earnings valuation methodology, based on the profitability of the business. In this regard the calculation will be based the net earnings, which can be commonly and sustainably achieved through orderly management.
The land tax is then determined as before through the calculation of the tax base by multiplying the determined land value by the basic federal rate and applying the rate of assessment specific to the municipality where the real estate is located.

Determined land value x basic federal rate x assessment rate = land tax.

The land tax reform should not have any impact on land tax receipts. In order to achieve this desired revenue neutrality, the new basic federal rate has been reduced to roughly one tenth of the current rate. This rate is generally 0.34‰. In addition to the 25% reduction in the basic federal rate for housing schemes, the draft law now also includes a reduction of 10% for developed plots of land, which are listed as historical monuments. For agriculture and forestry, the basic rate is 0.55‰.

In addition, an escape clause will give the Federal States the option to introduce a different valuation model to replace the federal model which has been criticised for being too complex and complicated.

The accompanying discussion on the additional calculation of land tax for the purposes of federal state fiscal equalisation according to the federal model and the concern that it may be necessary for the landowner to file two tax returns, has also been redressed in that the draft law now explicitly excludes this. As a result, the procedure for the standardisation of the land tax receipts may not give rise to a separate filing obligation for the taxpayer.

Introduction of “Land Tax C”

Also adopted in the bill was the introduction of a new “Land Tax C” for undeveloped building plots, which are ready for development.

This provides the municipalities with the right to charge their own rate of assessment on undeveloped building plots of land in the future. The aim is to create an incentive for development but to prevent land value speculation.

In contrast to the government’s original draft, the municipalities can not only assess Land Tax C on building land and cases involving special housing needs but also, where there other urban planning reasons.

Considerable expense for taxpayers and tax authorities

As of 1 January 2022, approximately 36 million plots of land in Germany will have to be newly evaluated. The property owners are obliged to submit tax returns to the responsible tax offices. For this purpose, information on the real estate is required, the collection of which will be particularly onerous for taxpayers with extensive real estate holdings. In particular, in the case of production sites and commercial properties, which are often subject to constant structural changes, the required information and documentation may no longer be available, or may be incomplete and so that its procurement or reconstruction will give rise to considerable expense.

In order to contain the outlay, digital solutions which support data collection, processing and evaluation, (such as PwC’s Property Tax App which will soon be available, see below), can supply support.

After its first valuation on 1 January 2022, the real estate is to be revalued every seven years. Accordingly, 1 January 2029 will be the next valuation date.

In addition, there are new notification obligations for taxpayers. In future, the landowner will have to file a simplified declaration (notice) by the beginning of the following calendar year, where there has been a change in the actual circumstances which would affect the value or the type of property. In the event of non-compliance or failure to comply with the obligation to declare and notify in a timely manner, a late filing penalty may be charged.

For the tax authorities, too, the determination of the new land tax will be a considerable hurdle which needs to be overcome.

Conclusion

With the adoption of the bill, the Federal Government and the Federal States have been able to prevent the cancellation of land tax in good time, thereby meeting the needs of the municipalities. The Federal States are now, however, faced with the agony of choice of how to determine the most appropriate evaluation procedure for themselves.

Indeed, the Federal States’ escape clause does open the way to the Federal States to opt for a simplified and administratively straightforward evaluation procedure. However, whether and above all how the Federal States avail themselves of the option, is still completely open. This is especially the case, since the escape clause may in the end lead to 16 different evaluation procedures for the 16 different States.

Whether the land tax as a whole will be revenue-neutral and whether the evaluation models differing from the federal model will really be more favourable to the taxpayer is also uncertain. In any event, there will be shifts in valuations due to the different locations of the real estate, and the price increases in recent decades. To what extent the municipalities will set off the potential increases in land tax with a reduction of the assessment rates in order to achieve revenue neutrality remains to be seen.

For information regarding PwC's new Property Tax App, see:
https://blogs.pwc.de/german-tax-and-legal-news/2019/10/31/latest-news-on-the-land-tax-reform/

Tax Court Cases

CFC rules considered in line with EU law

Following a ruling by the European Court of Justice (ECJ) earlier this year, the Supreme Tax Court held in its decision of 31 October 2019 that the incorporation into the tax base of controlled company income from invested capital from an intermediary company domiciled in Switzerland in the financial year 2006 may restrict the free movement of capital, but it is justified through compelling reasons of public interest and does not therefore contravene EU law.

Background

In the context of these proceedings, the Supreme Tax Court referred the case to the ECJ for a preliminary ruling, on which the ECJ ruled in its judgment of 26 February 2019 (X, C-135/17) (see our blog article: https://blogs.pwc.de/german-tax-and-legal-news/2019/03/12/ecj-passive-income-attribution-from-controlled-companies-resident-in-third-countries/).

In the disputed case, a German limited liability company (GmbH) held a 30 percent interest in a Swiss AG and generated income from assigned receivables, which the tax office added back to the tax base of the GmbH as controlled company income from invested capital.

The Court confirmed that in the third country constellation in these proceedings the free movement of capital was not superseded by the freedom of establishment. (To be noted here is that in relation to third states only the free movement of capital is applicable.) The application of the free movement of capital must, however, always be seen in the context of the so-called "stand still clause" of Art. 64 TFEU, whereby certain "old provisions" (i.e. those existing on 31 December 1993) are grandfathered.

The ECJ decided, inter alia, that the CFC rule in Section 7 (6) and (6a) Foreign Taxes Act did constitute a restriction on the free movement of capital but the application of the stand-still clause should be considered by the referring court.

Decision of the Supreme Tax Court

Following on from the decision of the ECJ, the Supreme Tax Court has now issued the following opinion:

Referring to the judgment of the ECJ, the Supreme Tax Court concluded that the stand-still clause in Article 64 (1) TFEU (formerly Article 57 (1) TEC) did not apply in the case of these CFC rules. Whilst the amendments to the CFC rules made by the 2000 Tax Reduction Act were never applied in practice (as they were quickly replaced), the Supreme Tax Court held that the legislation had entered into force and the rules had not been deferred. Accordingly, the rules were not grandfathered and the prohibition (Article 63(1) TFEU) of any restrictions on the free movement of capital was to be applied to them.

The Court then went on to hold that the incorporation into the tax base of the controlled company income from invested capital did constitute a restriction on the free movement of capital but was justified in the case under consideration (Swiss resident CFC in the FY 2006) through compelling reasons of public interest, in particular the requirement to prevent tax evasion and tax avoidance.

Again referring to the judgement of the ECJ, the Court took the view that there was no legal framework, in particular no treaty obligations, in 2006, that empowered the German tax authorities to verify the accuracy of information provided in respect of the

Swiss company which could demonstrate that that taxpayer's shareholding in that company was not the result of an artificial scheme.
Source:
Supreme Tax Court, Judgment of 22 May 2019, (I R 11/19, formerly I R 80/14), published 31 October 2019.

From Europe

ECJ: Final losses

The European Court of Justice held in its decision Memira Holding AB issued on 19 June 2019 that when assessing whether the losses of a non-resident subsidiary are final within the meaning of its judgment in Marks & Spencer on 13 December 2005 (C-446/03), the fact that, in the event of a merger, the subsidiary's Member State of establishment does not does not allow the losses of one company to be transferred to another company liable for corporation tax, is not decisive, unless the parent company can demonstrate that it is impossible for it to deduct those losses through ensuring that – in particular by means of a sale- the losses are fiscally taken into account by a third party for future tax periods

Background

Memira is a Swedish company operating, via its subsidiaries, in the sector of ophthalmic surgery. It had a single subsidiary in Germany, which owned and operated clinics. The operations of the German subsidiary gave rise to losses and Memira provided it with a loan to finance its operations. The injections of funds were unsuccessful so that the subsidiary had to cease activities. Only debts and certain liquid assets remained on its balance sheet.

Memira wished to absorb the German subsidiary in a cross-border merger, which would lead to that subsidiary being dissolved without liquidation and Memira subsequently no longer exercising any activity, either directly or indirectly, in Germany.

Of the losses sustained by the German subsidiary, it was not possible to set off an amount of EUR 7.6 million against earlier profits. The ECJ noted that the losses would be eligible for deduction from German corporation tax through deduction from current profits or from earlier profits without limit of time. However, they would not be eligible for deduction in the case of an up-stream merger since, under German law, it is not possible to transfer losses to another company, which is liable for tax in Germany in the event of a merger.

In contrast, in the case of a so-called "qualifying merger", Swedish tax law allows a Swedish tax resident receiving company to deduct the losses of a Swedish tax resident transferring company from earlier tax years.

In this context, Memira applied to the Swedish tax authorities for a preliminary decision on the question whether it could rely on the freedom of establishment to deduct the losses of its German subsidiary from its Swedish corporation tax if it implemented its planned merger. The Swedish tax authorities answered in the negative.

Judgment

Two questions were put before the Court:

<u>Question 1</u>
Must account be taken, in the assessment of whether a loss in a subsidiary in another Member State is definitive within the meaning given in, inter alia, the judgment A. Oy of 21 February 2013, (C-123/11), – i.e. thus allowing the parent company to deduct the loss on the basis of Article 49 TFEU – of the fact that, under the rules of the subsidiary's State, there are rules restricting parties other than the loss-making party itself from deducting the loss?

Question 2
If a restriction such as that referred to in Question 1 must be taken into consideration, must account then be taken of whether, in the case in question, there actually is another party in the subsidiary's State which could have deducted the losses if that were permitted there?'

The ECJ answered as follows:

Question 1
For the purposes of the assessment of the finality of the losses of a non-resident subsidiary, within the meaning of paragraph 55 of the judgment of 13 December 2005, Marks & Spencer (C-446/03), the fact that the subsidiary's Member State of establishment does not does not allow the losses of one company to be transferred, in the event of a merger, to another company liable for corporation tax, whereas such a transfer is provided for by the Member State in which the parent company is established in the event of a merger between resident companies, is not decisive, unless the parent company demonstrates that it is impossible for it to deduct those losses by ensuring, in particular by means of a sale, that they are fiscally taken into account by a third party for future tax periods.

Question 2
If the fact referred to in the first question becomes relevant, the fact that there is, in the State of establishment of the subsidiary, no other entity, which could have deducted those losses in the event of a merger if such a deduction had been authorised is irrelevant.
Source:
Decision of European Court of Justice in Memira Holding AB dated 19 June 2019 (C-607/17)

News in brief	
UPDATE. Federal Cabinet adopts Real Estate Transfer Tax Amendment – Delay announced	In a joint press release dated 24 October 2019 the CDU/CSU and SPD parliamentary groups in the Bundestag have now declared that they still need time for their deliberations on the law to amend the real estate transfer tax law and that further evaluations are necessary. As a result, the reform will be postponed. Read more about the current proposals. https://blogs.pwc.de/german-tax-and-legal-news/2019/11/06/federal-cabinet-adopts-real-estate-transfer-tax-amendment-bill/
Climate Protection Progamme 2030 – changes in tax law	On 25 October 2019, the German Bundestag discussed the implementation of the climate protection programme 2030 into tax law. This was followed by a public hearing on 6 November 2019. The bill for the implementation of the climate protection programme 2030 in tax law had been adopted by the Federal Government on 16 October 2019. The amendments to the law will initiate tax measures designed to support climate protection in the areas of transport, housing and energy generation. https://blogs.pwc.de/german-tax-and-legal-news/2019/11/06/climate-protection-progamme-2030-changes-in-tax-law/
Publication of draft proposal regarding mandatory disclosure rules for cross-border tax arrangements in Germany 11 October 2019	On 9 October 2019, the German Government passed the draft proposal regarding the implementation of mandatory disclosure rules for cross-border tax arrangements. The draft proposal was forwarded to the German Federal Counsel on 10 October 2019 for further consultation. https://blogs.pwc.de/german-tax-and-legal-news/2019/10/14/publication-of-draft-proposal-regarding-mandatory-disclosure-rules-for-cross-border-tax-arrangements-in-germany-2/

No trade tax add-back for letting of hotel rooms to tour operators	According to the Supreme Tax Court in its ruling of 25 July 2019 (III R 22/16), published on 7 November 2019, fees paid by a tour operator to hoteliers for the provision of hotel rooms are not subject to the trade tax add-back. Under Section 8 No. 1 Letters d and e of the Trade Tax Act, rental and leasing payments made for the use of moveable and immoveable assets which have previously been deducted from the income tax/corporation tax base, are to be partially added back to trade tax base, where the asset would be treated as an asset in the balance sheet of the taxpayer, if he actually owned the asse https://blogs.pwc.de/german-tax-and-legal-news/2019/11/07/no-trade-tax-add-back-for-letting-of-hotel-rooms-to-tour-operators/

If you would like to follow the latest news on German tax as it breaks, please visit our Tax & Legal News site at https://blogs.pwc.de/german-tax-and-legal-news/

From PwC

Guide to Doing Business and Investing in Germany

The 2017 edition of our popular Guide to Doing Business and Investing in Germany is now off the press and freely available to those interested. It can be downloaded from https://www.pwc.de/de/internationale-maerkte/doing-business-in-germany-guide-2018.pdf

Do you have any questions?

Then please speak to your PwC-Advisor or send an e-mail to PwC_Mandanteninformation@de.pwc.com.

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