

By PwC Deutschland | 23 January 2013

Bill for Revision and Simplification of Corporate Taxation and on Travel Cost now passed

A partial compromise was reached by a mediation committee of the two chambers of Parliament leading to a modified Bill for the Revision and Simplification of Corporate Taxation and of the Tax Law on Travel Cost and to acceptance of a modest increase in the basic personal allowance for income tax. The Bundestag has now passed both bills and forwarded them to the Bundesrat for confirmation at its next session, due to be held on February 1, 2013.

Certain other proposals, not controversial in themselves, are likely to be incorporated into other bills currently before the Bundestag and so reach enactment in 2013 despite the initial rejection. An example is the “authorised OECD approach” (AOA) to taxing permanent establishments as though they were separate legal entities.

The main changes passed by the Bundestag on January 17, 2013 were

Tax groups (*Organschaft*)

At present, an *Organschaft* subsidiary must be both registered in and managed from Germany. This “dual tie” to Germany appeared to the European Commission to be an excessive restriction on the freedom of establishment and the government has responded with its proposal to require any *Organschaft* subsidiary to be managed from Germany, provided its seat (registered office) is in an EU/EEA member state. This amendment is to apply to all cases still open.

Partly in reaction to a Supreme Tax Court judgment on the non-discrimination of foreign shareholders, the bill provides that the holding in an *Organschaft* subsidiary must be attributable to the German permanent establishment of the parent, regardless of that entity’s seat or place of management. There is also a condition to the effect that the income attributed to that permanent establishment must be taxable in Germany under both domestic law and the relevant double tax treaty. The intention is to close a loophole potentially attributing German taxable income to a foreign parent without its own German tax liability, although the consequences may well be farther reaching. The change is to apply to the 2012 year of assessment.

Present law denies relief for the losses of an *Organschaft* parent that can also be claimed abroad. Cutting the “dual tie” by allowing foreign subsidiaries to join an *Organschaft* if they are managed from Germany (see above) requires extension of the denial of loss relief to the *Organschaft* subsidiary. Henceforth, losses of an *Organschaft* parent or subsidiary are to be excluded from German relief if they are offset abroad by the parent, the subsidiary or by any other person. This change is to apply to all open cases.

At present, an *Organschaft* may be invalidated through incomplete or incorrect application of the profit pooling agreement where the accounts on which the calculations were based are later found to be in error. Typically, the error is found by the tax auditors long after the following year’s financial statements had been resolved. The bill would protect companies from this collapse of their *Organschaft*, provided

- The shareholders had validly adopted the accounts under company law,
- The error was not necessarily apparent to management applying acceptable standards of commercial prudence (this is the case, for example, if the accounts were audited), and
- The error is corrected in the accounts for the year following its discovery and an appropriate adjusting payment made to the correct amount of profit surrender or loss subvention.

This change also applies to all cases still open.

The profit pooling agreement of a GmbH must now make an explicit and unqualified reference to Sec. 302 of the Aktiengesetz (Public Companies Act), the provision governing the loss subvention of public companies by their controlling parents. This is to ensure that any changes to the Public Companies Act in this regard automatically apply to GmbHs in a similar position. Any necessary alteration to the profit pooling agreement must be resolved and registered by December 31, 2014, unless the Organschaft terminates on or before that date. Such alteration is not to be regarded as a new agreement.

From 2014, the procedures for taxing an Organschaft parent will become fully dependent on the taxation position of the subsidiary. This will avoid the discrepancy occasionally experienced from retrospective changes to a subsidiary's results (say on tax audit) that cannot be taken up by the parent, whose assessment for that year has already become final and binding.

Loss carry back

The maximum loss carry back from 2013 is to be increased from €511,500 to €1,000,000.

Travel cost

The rules for calculating tax allowable costs of business travel (including the cost of maintaining a double household for those working away from their main home) are to be slightly simplified. The changes will apply from January 1, 2014.

Basic personal allowance

The basic personal allowance for income tax payers is to be increased from €8,004 in 2012 to €8,130 in 2012 and to €8,350 in 2014. This follows from a Constitutional Court demand that the basic personal allowance keep pace with inflation, as its object is to relieve the basic subsistence minimum from a tax burden. The change is to be enacted in a parallel bill.

Keywords

Organschaft losses, dual-tie, loss carry-back, profit pooling agreement, tax group