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Tax & Legal News

Statutes
Cases
Decrees

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June 2018

Official Pronouncements

- Federal Finance Ministry circular on the tax treatment of salaries for tax treaty purposes is updated
- Federal Ministry of Finance amends earlier circular on treaty-shopping rules

Tax Court Cases

- Input VAT deduction available despite missing details on the date of supply
- Pensions paid abroad subject to limited tax liability
- Statutory interest rate levied on late payment of taxes no longer up-to-date?
- Principle of deemed single uniform compensation
- Curtailment of loss relief: Lower tax court allows suspension of payment

From Europe

- ECJ – Refusal to set-off EU-branch losses in Denmark not compatible with EU law
- ECJ decision on German CFC regulations
- Latest Updates from OECD/EU in the tax avoidance arena
- ECOFIN-Council formally accepts the changes to the Mutual Assistance Directive in relation to cross border reporting

Official Pronouncements

Federal Finance Ministry circular on the tax treatment of salaries for tax treaty purposes is updated

The Federal Finance Ministry circular of 12 November 2014 on the taxation of salaries for tax treaty purposes has been revised by a committee made up of both the Federal and the States' governments. The new version recognises OECD developments as well as recent case law and relevant changes in the legislation.

The original circular of 12 November 2014 has been withdrawn and replaced with the current circular of 3 May 2018 which contains 95 pages. Likewise the circular of 21 July 2005 with the code of practice on the tax exemption of foreign income according to Section 50d (8) Income Tax Act (ITA) has been withdrawn and replaced by the new circular.
Here is a quick overview on some of the adaptations and changes to the earlier circular:

Application of Sec 50d (8) ITA (*Proof of tax treaty exemption; Para. 2.3 et seq*)
The circular has been completely restructured here and includes far more detail compared to its predecessor (inter alia, vis-à-vis the obligation to provide evidence, the taxation in the foreign state / the waiver of the right to tax, the question as to whether the donor state or the performance state has the right to tax in cases of development cooperation, assessment procedures, and exchange of information).

Taxtion in the state of residence according to Art. 15 (2) OECD-Model Treaty (*183-Day-Clause*)
New here are the comments on situations where there are subsequent changes to the allocation of the right to tax. (Para. 4.2.7).
Examples of the allocation of certain salary components in the calculation of taxable /exempt salaries (Para. 5.5)
Here the existing examples are complemented with remarks on signing bonuses (Para. 5.5.2); if the signing bonus is agreed before the employment relationship has begun, the right to tax is to be allocated – taking an economic approach – to the state where the work is performed on the basis of the duration of the contract.

Assessment of certain activities abroad from a tax treaty perspective. (*Para. 6 et seq*)
Para. 6.2 makes clear that services provided as part of a stand-by service (i.e. where the employee must remain on call without actually performing any work) are deemed to be performed at the place, at which the employee actually stays whilst he is on call. The current circular adds that "in cases of non-variable paid leave, no activity takes place, so that, according to Article 15 (1), first sentence, of the OECD-Model Treaty, the state of residence generally has the right to tax the other remuneration."

Special rules for professional drivers (*Para. 7 et seq*)
The circular specifies in Para. 7.4 that the special rule in Art 14 (3) of the tax treaty with Spain, which contains special rules for personnel on ships and aircraft, also applies to personnel working in road vehicles.

Subject-to-Tax clauses in tax treaties (*Para. 9*)
This paragraph has been developed with, inter alia, the further clarification that subject-to tax clauses are also to be applied to parts of income (i.e. to individual income positions). On this point the Federal Finance Ministry notes that: "insofar as the tax treaty only refuses tax relief on untaxed 'income', but not expressly on untaxed 'parts of income', the application of such subject-to-tax clauses for assessment periods prior to 2017 cannot be based upon the application of Section 50d (9) sentence 4 ITA, but only on the interpretation of the actual clause in the treaty itself."

Application
The provisions of the circular may –at the request of the taxpayer – be applied in all open cases, unless this is precluded by legal regulations.

Source
Circular of the Ministry of Finance dated 3 May 2018 - published on 17 Mai 2018

Federal Ministry of Finance amends earlier circular on treaty-shopping rules

On 20 December 2017 the European Court of Justice (ECJ) took the view that Section 50d (3) Income Tax Act prohibiting certain intermediary foreign companies from (full or partial) refund of German withholding tax was incompatible with both the Parent-Subsidiary Directive and the freedom of establishment. The German Tax Authorities have recently issued a circular on its application of the rules.

The ECJ decision related to the so-called anti-treaty shopping regulation in Section 50d (3) Income Tax Act (ITA) in the version of the 2007 Finance Act (old version), according to which a foreign company – under specific circumstances and scenarios – was refused relief under a directive or tax treaty to the extent that persons had holdings in it who would not be entitled to the relief if they earned the income directly. Further information and details of the ECJ judgment can be found in our *Tax & Legal Newsflash* of 21 December 2017.

The Federal Ministry of Finance has now published a circular of their view on how the ECJ judgment should be applied in practice, but only insofar as refund claims under the Parent-Subsidiary Directive are concerned (the circular therefore does not refer to third-country cases). The current administrative decree on Sec. 50d (3) ITA partially changes the preceding Finance Ministry's Decree of 24 January 2015 dealing with the general application of various aspects of the new version of § 50d ITA as applicable from 2012.

Old version of Section 50d (3) ITA

With respect to the full or partial refund claims the rules of Section 50d (3) ITA in the version of the 2007 Finance Act (old version) are no longer to be applied.

Current version of Sec. 50d (3) ITA (applicable from 2012)

Here the tax administration takes a more moderate attitude on selected points. For example, there are certain modifications on the requirement of substance with respect to economic or other substantial reasons for the involvement of the foreign company and on the interpretation of the term "taking part in active business".

Corporate group structure: Sect. 50d (3) sentence 2 ITA under which the eligibility-test is to be measured solely against the criteria of the foreign company (and organizational, business or other relevant interests of related companies are to be ignored) is dropped altogether.

The current circular is applicable in all open cases.

Source
Circular of the Ministry of Finance dated 4 April 2018

Note: The Lower Tax Court of Cologne meanwhile has also expressed its doubts in relation to the current version of Section 50d (3) ITA (applicable from 2012) and referred the question to the ECJ on 17 May 2017. The case is pending under the ECJ reference C-440/17.

Tax Court Cases

Input VAT deduction available despite missing details on the date of supply

For the purposes of input VAT deduction, the necessary information about the tax point (the date of the supply) may be inferred from the date on which an invoice was issued, if it can be assumed that the service was provided in the month in which invoice was issued. The Supreme Tax Court also confirmed European Court of Justice case law, according to which a retroactive adjustment of the invoice reverts to the year of its issue.

Firstly, it discussed the availability of an input VAT deduction in situations where there is an insufficient description of the services performed. The appellant had received invoices, which contained incorrect or insufficient descriptions of the services performed, such as "advertising costs as agreed", "acquisition costs", "transfer costs". The Supreme Tax Court refused the input VAT deduction in this case, because it was not possible – from the descriptions – to identify the place of supply (and thus determine whether a taxable supply had occurred). Such an omission could not be rectified by a correction of the invoice or in fact in any other way.

Secondly, the Court considered the tax point of the supply in connection with a motor car supplied to the appellant. The invoice provided to the appellant contained neither the VAT ID number nor information on the date of delivery. The invoice was later amended to include the VAT ID number but not the information on the date of delivery. The tax office refused to allow an input VAT deduction but this refusal was reversed by both the court of first instance and the Supreme Tax Court.

Section 14 (4) sentence 1 no. 6 of the VAT Act requires an invoice to state the date of the supply of goods or services. According to Section 31 (4) of the VAT Implementation Regulations (UStDV), the calendar month in which the service is performed can be specified as the time of supply of the goods or services.

In its decision, the Supreme Tax Court construed the requirement for the date of the supply very broadly and in a manner favourable to the taxpayer. As a result the tax point (the date of the supply) may be inferred from the date on which an invoice was issued, provided it can be assumed that in the individual case the supply was provided in the month in which the invoice was issued. In the case before the Court separate invoices were issued for single deliveries of vehicles and – as was customary in the industry – such supplies were accompanied by the invoice or were made directly before or after the issue of the invoice. Following the meaning of Section 31 (4) of the VAT Implementation Regulations therefore, the month of each of the supplies could be inferred from the date in the invoice.

The Supreme Tax Court further held that the amendments made to those invoices by the appellant in 2011 effected the years 2005 and 2006. The Court was thus following the guidelines set out by the European Court of Justice (ECJ) in the past. Accordingly, invoices that contain missing or incorrect information may be corrected with retroactive effect for the date of the initial invoice (ECJ judgment *Senatex* of 15 September 2016 – C-518/14, and Supreme Tax Court judgment of 20 October 2016 – VR 26/15). This should always apply where the invoice contains information on the issuer of the invoice, the recipient of the supply, the description of supply, the remuneration and the separately stated value added tax. In German law, this follows from section 31 (5) of the VAT Implementation Regulations which allows for a correction of the invoice until the end of the last oral proceedings before the tax court.

Source:
Supreme Tax Court judgment of 1 March 2018 (V R 18/17), published on 6 June 2018

Pensions paid abroad subject to limited tax liability

A limited tax liability on payments by the German State pension fund to a resident of Canada is not nullified by the tax treaty. The Supreme Tax Court took the view that in such a case Germany held a competing right to tax.

Where a resident of Canada receives pension payments from a domestic – here German - pension fund, it was necessary to examine whether the payments were subject to a limited tax liability in Germany and if this was the case whether the tax treaty with Canada prevented Germany from taxing the income.

The Court had to consider the impact of the tax treaty in two separate cases. The appellants, who had lived in Canada for many years, received a life annuity from the German State pension fund, which the tax office considered partially taxable. The Lower Tax Court allowed the appellants' appeals to treat the pension payments as exempt from German tax, on the basis that the taxation by Germany of domestic state scheme pension payments to recipients in Canada was excluded by No. 5b of the Tax Treaty Protocol which provides for a limitation on tax at source. According to that provision German tax could only be levied on pension payments arising from a German source, where those payments were made by the German State itself, or by one of its federal states or by a regional/local authority. In addition a tax deduction at source was only possible in relation to pensions paid to public servants; this did not include state pensions paid by the German State pension fund.

In both cases the Supreme Tax Court allowed the appeals of the tax office.

The fact that the appellants were limited taxpayers for German tax purposes was not in dispute, as they realised domestic source income in the form of a German state pension without being resident or having a regular place of abode in Germany. The Supreme Tax Court took a different view, however, in relation to the impact of the tax treaty, namely that the treaty with Canada did not stop Germany from taxing the pensions. This view was based on the competing right to tax given to the country of source (Germany) by Article 18 (1) 2nd Sentence of the German/Canadian treaty. According to this, state scheme pensions fall within the term "pensions and similar allowances" applied in the Article, so that Germany was (also) entitled to tax pensions paid to the plaintiff.

The Supreme Tax Court did not see the provision in the protocol mentioned by the local tax court as an obstacle. That wording only covered "pensions" and in doing so, merely complemented Article 19 which regulated "active benefits" received by public servants.

Source:
Supreme Tax Court decision of 20 December 2017 (I R 9/16 und I R 8/16 NV), published on 16 May 2018.

Statutory interest rate levied on late payment of taxes no longer up-to-date?

The Supreme Tax Court has serious doubts as to the appropriateness of the current fixed rate of interest on late payments which is levied at a rate of 6 per cent per annum. This is especially relevant when considering the generally low interest rates which have been charged in the market for some considerable time.

Simple interest at a rate of 6 per cent per annum or a half per cent for every month is levied on tax amounts paid late and also in cases where a suspension of payment was granted initially and the amounts later become due for payment. The interest period does not start until 15 months after the end of the year of assessment.

After summarily examining the situation the Supreme Tax Court expressed serious doubts as to whether the current rate, which has remained unchanged since 1961, conforms to the German constitution. At least from 2015 the Court sees no conformity to the principle of equality and therefore has granted the applicant suspension of payment pending a final decision in the main case. In its opinion the interest rate is far from reflecting the economic situation, since the current low interest rates have become established in the market for some time. The legislature must from time to time review the appropriateness of the rate of interest on late payments, especially against a background of continuing low interest rates over a long period of time. The unrealistic assessment of the interest rate is therefore similar to a surcharge on tax assessments without any legal justification. The level of interest on late payments lacks justification.

Source
Supreme Tax Court, resolution IX B 21/18 of 25 April 2018 published on 14 May 2018

Principle of deemed single uniform compensation

Where an employer contractually obliges himself to make several payments to an employee in connection with a termination of employment, the payments will only be considered as a single uniform compensation payment which is taxed at preferred rates if there is clear evidence that all instalments were paid "as compensation for lost income or expected loss of income".

According to Section 24 (1) No.1a) (read in conjunction with Sections 2 (1) and 19 (1)) of the Income Tax Act income from employment also includes compensation, which is paid "as compensation for lost income or for expected loss of income". According to its wording, the provision only applies to compensation for losses of income suffered or expected to be suffered; this does not include compensation paid for any other type of damage. The case revolved around a contract signed by the appellant and his former employer, which split the compensation to be paid into severance pay and damages.

The dispute before the Supreme Tax Court related to how the compensation payments, which were designated in the contract partially as severance pay and partially as damages, should be treated for tax purposes, in particular whether the instalments should each be viewed on an isolated basis or whether the principle of a single uniform compensation should be applied.
Sending the case back to the tax court for a further review of the facts, the Supreme Tax Court laid down the following principles:

- Where an employer contractually obliges himself to make several payments to an employee in connection with the termination of employment, the principle of deemed single uniform compensation is only to be applied where there is real evidence to show that each of the partial payments (i.e. each instalment / indemnity), viewed separately, were made "as compensation for lost income or expected loss of income".
- Where the circumstances indicate that a payment is not made as compensation for lost income, it cannot be treated as such merely on the basis of the principle of deemed single uniform compensation.
- In circumstances where an additional payment is significantly higher than the compensation paid for the lost income, which itself cannot be considered to be out of the ordinary, then this should generally indicate that the additional payment is not compensation for lost income.
- The additional payment will be considered significantly higher, where the total amount received is doubled through the addition of the second instalment.

Source
Supreme Tax Court decision (IX R 34/16) of 9 January 2018, published on 25 April 2018

Curtailment of loss relief: Lower tax court allows suspension of payment

The Lower Tax Court of Hamburg has granted a suspension of payment request because of doubts whether the loss forfeiture rules for companies where more than 50% of the shares in the loss making company are transferred are compatible with the German constitution.

On 29 March 2017, the Constitutional Court has held that Sec. 8c sub-sec. 1 sentence 1 of the Corporation Tax Act (CTA) dealing with changes of more than 25% and up to 50% of the shares in a company within a period of five years (*alt. 1*) is unconstitutional (case ref. 2 BvL 6/11). On 29 August 2017, the Lower Tax Court of Hamburg (case 2 V 20/18) referred a further request to the Constitutional Court on the constitutionality of the rules on the full forfeiture of loss relief under Section 8c 2nd Sentence of the CTA, namely where more than 50% of the shares in the loss making company are transferred (*alt. 2*).

The Lower Tax Court of Hamburg has granted suspension of payment because and on the basis of its second referral to the Constitutional Court. After summarily examining the situation the Court has serious doubts on the appropriateness of the loss forfeiture rules under *alt. 2* as they are no different from the situation under *alt. 1* of Sec. 8c CTA which was held by the Constitutional Court to be in breach of the formal provisions of the constitution.

By granting provisional suspension of tax payment, the lower tax court disagrees with current practice of the tax administration (in the letter from the Federal Ministry of Finance of 15 January 2018), according to which there is no reason to suspend enforcement in these cases.

Nevertheless, the Lower Tax Court has granted the payment suspension pending the final decision in the main case by the Constitutional Court.

Source
Lower Tax Court of Hamburg, resolution 2 V 20/18 of April 11, 2018

From Europe

ECJ – Refusal to set-off EU-branch losses in Denmark not compatible with EU law

A Danish company may set off the final losses of its foreign EU-permanent establishment against its own taxable income, provided it can prove that the losses incurred are final and the company has exhausted the possibilities to deduct those losses in that Member State.

With its judgment the ECJ saw an infringement of the freedom of establishment (Article 49 TFEU) insofar as the Danish authorities refused to allow the Danish Head Office to deduct from its taxable income the losses incurred by its Finnish permanent establishment (PE).

Background

The Danish company (Bevola) operated a PE in Finland which was closed down in 2009. Bevola maintained that the losses of the PE could not be utilised in Finland. The Danish tax authorities refused a set-off of these losses against the income of the head office because the company had not elected to apply the "international joint taxation" scheme. This scheme grouped together the joint income of the parent and all its subsidiaries and all its permanent establishments situated outside Denmark for tax purposes; the election was binding for a period of 10 years.

Danish regulation infringes freedom of establishment...

The ECJ ruled that Article 49 TFEU in fact precludes the Danish tax regulations under which it is on the one hand possible for a Danish company to deduct losses of its domestic branches, while this is not possible for losses of its foreign EU-branches, unless the group has opted for international joint taxation on the terms as set out above.

The Court took into consideration the decision from 2005 of the ECJ in Marks & Spencer, in which UK law was found to be incompatible with EU law in the situation where a UK parent company could not deduct the final losses of its subsidiaries which were resident in other Member States although such a deduction would have been permissible under the UK group tax relief scheme had the losses been those of a UK subsidiary.

...but the difference in treatment could be justified by overriding reasons

Those overriding reasons could relate to the balanced allocation of powers of taxation between Member States, the coherence of the Danish tax system and the need to prevent the risk of double deduction of losses. But only to the extent it is proportionate to that objective.

Although the principle of maintaining the coherence of the tax system constitutes a convincing justification for the difference in treatment the Court nevertheless held that the Danish regulations go beyond what is necessary to achieve the desired objectives.

With regard to the question of international group relief scheme being justified by the necessity of ensuring the balanced allocation of the power to impose taxes between Member States and by the necessity to safeguard the coherence of the Danish tax system, the Court took the view that the scheme was disproportionately onerous and subject to strict conditions as it requires all companies and all PEs in the group to participate and had to be adhered to for a minimum period of 10 years. The fact that participation in the scheme was optional did not stop it being excessively restrictive.

Deduction of losses of foreign PE may be possible....

Where there is no longer any possibility of deducting the losses of the non-resident PE in the Member State in which it is situated, the risk of a double deduction of losses no longer exists. The Court went on to say that alignment of Bevola's tax burden with its ability to pay tax is ensured better if it could, in that specific case, deduct from its taxable income the definitive losses attributable to the Finnish PE.

... if those losses are definite

In order not to compromise the coherence of the Danish tax system, deduction of the losses under dispute could be set-off only if Bevola demonstrates that those losses are definitive. Generally, the losses attributable to a non-resident PE become definitive when, first, the company (in the case at hand: Bevola) has exhausted the possibilities of deducting those losses available under the law of the Member State in which the establishment is situated (here: Finland) and, second, it has ceased to receive any income from that PE, so that there is no longer any possibility of the losses being taken into account in that Member State.

It is for the national court to assess whether those conditions are satisfied in the case of Bevola's Finnish establishment.

Conclusion

In various EU Member States, there have been doubts as to the applicability of the Marks & Spencer doctrine and consequently whether companies resident in an EU Member State may deduct final losses incurred in non-resident subsidiaries. With this judgment, the ECJ has confirmed that the Marks & Spencer doctrine still applies and that it also extends to and includes final losses incurred by non-resident PEs.

Source

The ECJ case reference is C-650/16 Bevola und Jens W. Trock judgment of June 12, 2018

ECJ decision on German CFC regulations

On 31 May 2018, the European Court for Justice (ECJ) published its decision in the Hornbach-Baumarkt case. The case revolves around the question as to whether Section 1 of the Foreign Transaction Tax Act ("FTTA" – in the version in force in 2003) – which calls for income corrections to be made on related party transactions, which are not considered to have been concluded at arm's length – is considered compatible with EU law.

The ECJ held that whilst the German rule did, in principle, constitute a restriction on the freedom of establishment, it could be justified by the principle of territoriality. However, any measure devised to preserve the balanced allocation of the power to tax may not go beyond what is necessary to achieve this objective. According to the Court, the provision under review could be regarded as meeting this latter criterion, provided the taxpayer was given the opportunity to prove that the terms were agreed on for commercial reasons, which may also include its status as a shareholder in the non-resident company.

Background: Hornbach-Baumarkt AG held an indirect shareholding of 100% in two companies established in the Netherlands ('the foreign group companies'). These companies both were in negative equity and required money in order to continue their business operations as well as to finance the planned construction of a DIY store and a garden centre.

The bank ensuring the financing of those companies had made the granting of the loans contingent on the provision of comfort letters containing a guarantee statement from Hornbach-Baumarkt AG. Hornbach-Baumarkt AG subsequently provided those comfort letters gratuitously.

The tax office held that the comfort letters had not been granted on arm's-length terms and therefore increased Hornbach's tax base to reflect the notional remuneration that it considered would normally have been paid to Hornbach by an unconnected third party in consideration for the comfort letters.

The case appeared before the Rhineland Palatinate tax court, which referred the case to the ECJ.

In principle the ECJ found that the measure did violate the right to freedom of establishment in that a German parent company holding an interest in a company resident in another Member State was treated less favourably than one with a shareholding in a German resident company. However, this could be justified by overriding reasons of public interest, namely the need to preserve a balanced allocation of the power to tax between the Member States.

Following established case law the Court noted that allowing companies resident in a Member State to transfer their profits, in the form of unusual or gratuitous advantages, to related companies established in other Member States may undermine the balanced allocation of the power to tax between the Member States. As such national legislation, such as the measure under review, which allows a Member State to redress this situation may be considered as pursuing legitimate objectives compatible with the Treaty and constitute an overriding reason in the public interest. However, the Court noted, such legislation should not go beyond what is necessary to achieve the objective pursued.

Following its previous case law, the Court noted that national legislation which provides for a consideration of objective and verifiable elements in order to determine whether a transaction can be considered artificial may be regarded as proportionate where, inter alia, the taxpayer is given an opportunity, without being subject to undue administrative constraints, to provide evidence of any commercial justification that there may have been for that transaction.

In the present case, the Court, referencing the facts of the case, noted that there may be a commercial justification by virtue of the fact that Hornbach-Baumarkt AG is a shareholder in the foreign group companies, which could justify the conclusion of the transaction on non-arm's-length terms. In particular since the continuation and expansion of the business operations of those foreign companies was, due to a lack of sufficient equity, dependent upon the availability of financing, the gratis issue of letters of comfort, could be explained by Hornbach-Baumarkt AG's own economic interest in the financial success of the foreign group companies, in which it participates through the distribution of profits, as well as by its responsibilities as a shareholder for the financing of those companies.

However, it is up to the referring court to decide whether the legislation did in fact give the taxpayer the chance to prove that the terms were agreed on for commercial reasons resulting from its status as a shareholder of the non-resident company.

Source
ECJ decision of 31 May 2018 (C-382/16, *Hornbach-Baumarkt*)

Latest Updates from OECD/EU in the tax avoidance arena

The second half of May 2018 saw updates to the OECD Harmful Tax Practices – 2017 Progress Report on Preferential Regimes and to the EU's list of non-cooperative tax jurisdictions.

<u>Updates to OECD Harmful Tax Practices – 2017 Progress Report on Preferential Regimes</u>

On 17 May 2018, the Inclusive Framework on BEPS (see below) published updates to its Harmful Tax Practices – 2017 Progress Report on Preferential Regimes following the reviews of certain preferential tax regimes conducted in connection with BEPS Action 5 (Countering Harmful Tax Practices More Effectively, Taking into Account Transparency and Substance), which it had approved on 9 May 2018. The data represents the conclusions of the reviews of the relevant regimes carried out by the Forum on Harmful Tax Practices (FHTP).

The Inclusive Framework on BEPS is a body in which over 100 countries and jurisdictions collaborate on the implementation of the OECD/ G20 BEPS Package.

Since the creation of the Inclusive Framework, the FHTP have considered 175 regimes in over 50 jurisdictions. The latest review has released updates on 11 regimes:

- Four new regimes designed by Lithuania, Luxembourg, Singapore, Slovak Republic were considered to comply with FHTP standards;
- Chile, Malaysia, Turkey and Uruguay abolished regimes or amended them to remove harmful features or potentially harmful features.
- A further three regimes (Kenya and two in Vietnam) were considered to be outside the scope of BEPS Action 5.

<u>EU list of non-cooperative tax jurisdiction amended</u>

On 25 May 2018, the Council of the EU removed the Bahamas and Saint Kitts and Nevis from the EU's list of non-cooperative tax jurisdictions.

As a result, seven jurisdictions remain on the list of non-cooperative jurisdictions: American Samoa, Guam, Namibia, Palau, Samoa, Trinidad and Tobago and the US Virgin Islands.

ECOFIN-Council formally accepts the changes to the Mutual Assistance Directive in relation to cross border reporting

In its sitting on 25 May 2018, the ECOFIN council formally accepted the Directive to amend the Mutual Assistance Directive 2011/16/EU to provide for the mandatory exchange of information in the area of taxation for reportable cross-border arrangements. ECOFIN had already reached a political agreement on the planned reporting obligation for cross-border tax arrangements at its plenum on 13 March 2018.

There were no significant changes from the draft agreed upon in March; some added technical references are, however, of interest. In addition certain differences between the German version of the Directive and the English one (which was the basis of the negotiations) have now been removed. By way of example, the term "scheme" (German "Modell"), previously used in the German version, has been replaced by the term "arrangement" (German "Gestaltung") which more accurately reflects the term used in the negotiated English version.

A brief summary

The reporting obligation
The new regulations state that intermediaries and taxpayers are obliged to report certain cross-border arrangements to the tax authorities.

Intermediaries
The term "intermediary" means any person that designs, markets, organises, makes available for implementation, or manages the implementation of a reportable cross-border arrangement.
In relation to the three criteria decisive for when the reporting obligation deadline of 30 days should begin to run – namely the day after the reportable cross-border arrangement is made available for implementation to that relevant taxpayer, or the day after the reportable cross-border arrangement is implemented or when the first implementation step of the reportable cross-border arrangement is carried out – certain linguistic changes have now been made in the German version. In particular, the term "implementation" (German "Umsetzung") has replaced the term "use" ("Nutzung") and the term "ready for implementation" (German "umsetzungsbereit") has replaced the term "ready for use" (German "nutzungsbereit").
With regard to which intermediaries the Member States may exempt from the reporting obligation, the German version, rather than translating the original term "legal professional privilege"(German "Privilegien der Angehörigen von Rechtsberufen") literally, now applies the more precise description of all intermediaries, which according to the law of the Member State are subject to a legal obligation of confidentiality.

Taxpayers
Taxpayers may be obliged to report themselves where, for example, they have developed the reportable cross-border arrangement themselves or where the intermediary is exempt because of legal professional privilege.

Reportable cross-border arrangements
A cross-border arrangement will be reportable where at least one of the "hallmarks" (A1-E3) is fulfilled.
The text describing the generic hallmark (A2) where the intermediary is entitled to receive a fee, which is fixed by reference to the amount of the tax advantage, has now been changed; however the substance remains the same.

Penalties
The final version now makes clear that Member States *must pass* effective measures, rather than the situation in the earlier version which only required the Member States *to determine* measures.

Application
No changes have been made to the March document with regard to the date of application.
The Directive was meanwhile published in the Official Journal and thus will come into force on 25 June 2018.

Note:
On 8 March 2018, the Conference of German Ministers of Finance adopted certain key points on a "mandatory reporting for national tax arrangements", on the basis of which a bill is currently being drafted.

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
http://www.pwc.de/en/internationale-maerkte/doing-business-and-investing-in-germany.html

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