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By PwC Deutschland | 14 November 2019

Bundestag approve 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.

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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**). 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

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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

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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

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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

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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

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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).

Keywords

Finance Bill, electric mobility