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By PwC Deutschland | 11 January 2021

Review of profit and loss pooling agreements concluded prior to 27 February 2013 recommended

An amendment to a statutory law which was passed by the Bundestag and Bundesrat in December 2020, entered into force on 1 January 2021, requires a review of those profit and loss pooling agreements concluded and last amended before 27 February 2013. This pertains to profit and loss pooling agreements (PLPA) for tax groups ("Organschaft") with a GmbH as controlled subsidiary and which do not (yet) contain an explicit and unconditional reference to Section 302 of the German Stock Corporation Act (GSCA) which includes future changes of the provision (so-called "dynamic reference").

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The change in Section 302 (3) sent. 2 GSCA entered into force on 1 January 2021…

In the course of the *Restructuring and Insolvency Development Act* (Sanierungs- und Insolvenzrechtsfortentwicklungsgesetz - SanInsFoG) of 22 December 2020, Section 302 (3) sent. 2 GSCA was amended by adding a specific reference to the restructuring plan as laid down in the *Act on the Stabilization and Restructuring Framework for Companies* (Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen – StaRUG)). The new regulation came into force on 1 January 2021. The “StaRUG” is part of the Restructuring and Insolvency Development Act and introduces a legal framework for the implementation and execution of reorganizations outside of insolvency proceedings from the beginning of the impending insolvency.

… calls for review of existing PLPAs with a GmbH as controlled company and which were concluded and last amended before 27 February 2013

In the light of the decision of the German Federal Fiscal Court (Bundesfinanzhof) of 10 May 2017 (I R 93/15) existing PLPAs and in particular the following cases should be reviewed:

- PLPA with a GmbH as controlled subsidiary,
- PLPA concluded and last amended prior to 27 February 2013 and
- PLPA has no explicit and unconditional reference to Section 302 GCSA which includes future changes of the provision.

Background

In its decision dated 10 May 2017 (I R 93/15) the German Federal Fiscal Court held that according to the former Section 17 German Corporation Tax Act (GCTA) – in the case of tax groups with a GmbH as controlled subsidiary - the compensation of losses needs to be explicitly agreed in the PLPA in accordance with all aspects of Section 302 GSCA. This holds true, even if the changes of this provision were introduced after an agreement was concluded. Therefore, PLPAs might have to be amended if the wording of Section 302 GSCA is changed in order to maintain a fiscal unity.

PLPAs concluded and amended before 27 February 2013 do not contain a dynamic reference to Section 302 GSCA (i.e. a reference which alludes to this provision in general and also covers future changes) in all cases. Therefore, existing PLPAs need to be monitored whether an adjustment is required. In particular for PLPAs with a deviating business year such review should be done in due time as the amendment of an existing PLPA (if required) and the entry in the commercial register take some time and have to be finalized until the end of the current business year of the controlled subsidiary.

Keywords

Organschaft, dynamic reference, profit and loss pooling agreement, profit and loss transfer agreement