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By PwC Deutschland | 15 December 2023

Bundesrat approves a partial implementation of the Growth Opportunities Act into the Act to Promote the Secondary Credit Market.

On 15 December 2023, the Bundesrat approved the partial implementation of the contents of the Growth Opportunities Act in the Act to Promote the Secondary Credit Market. This includes changes to the interest limitation rule and adjustments resulting from the introduction of the Act for the Modernisation of Partnerships.

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Background

On 24 November 2023, the Bundesrat decided to request that the Mediation Committee be convened with the aim of bringing about a fundamental revision of the Growth Opportunities Act which was passed by the Bundestag under Art. 77 Para. 2 of the Constitution. The Mediation Committee has not yet convened, meaning that it will not be possible to conclude the mediation process this year.

At the request of the coalition parties, parts of the Growth Opportunities Act were adopted into the Act to Promote the Secondary Credit Market during the deliberations of the Finance Committee of the Bundestag on 13 December 2023. The Finance Committee's recommended resolution formed the basis for the Bundestag's decision of 14 December 2023.

The Bundesrat gave its consent to this today in accordance with Art. 105 Para. 3 of the Constitution. The printed version is not yet available.

The following legal changes were included:

Amendments to the interest limitation rule to bring it into line with the requirements of the ATAD (Art. 20 of the Act to Promote the Secondary Credit Market Act):

Amendments to Section 4h Income Tax Act:

- Limited effect and partial modification of the grounds for exclusion under Section 4h (2) Income Tax Act (ITA) when applying the interest limitation rule (exemption limit of EUR 3,000,000, stand-alone operations, equity escape clause): All three exemptions will no longer apply in future where the interest expenses for a year have been increased by the interest carry-forward from previous years. As a result, interest carried forward will only be deductible if there is sufficient EBITDA available for set off. With regard to the grounds for exclusion themselves, a stand-alone operation will in future no longer be deemed to exist simply on the grounds that there is no affiliation to the group or only a proportionate one; in future the taxpayer will need to show that it is not a related party within the meaning of Section 1 (2) Foreign Taxes Act and that it does not have a permanent establishment outside its country of residence. The so-called **anti-fragmentation rule** provided for in the government draft in Section 4h (2) Sentence 1 Letter (a) ITA - according to which similar businesses under the uniform management or controlling influence of one person or group of persons would be deemed to be one business for the purposes of the exemption limit of EUR 3,000,000 and would thus only benefit from the exemption limit in proportion to their share of the net interest expenses - **is no longer being considered.**
- Broadening of the definition of “interest expense” (previously only remuneration for borrowed capital) to include economically equivalent expenses and other expenses connected with the procurement of borrowed capital within the meaning of the ATAD Directive and the definition of “interest income” is to include economic equivalents of income connected to capital receivables.
- Additional grounds for the (pro rata) forfeiture of EBITDA carry-forward or interest carry-forward to

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include the cessation or transfer of a business unit.

- Section 4h ITA is to be applied for the first time for financial years which begin after the date of the German Bundestag's legislative resolution on the **Act to Promote the Secondary Credit Market** but do not end before 1 January 2024.

Amendments to Section 8a Corporation Tax Act:

Changes to Section 8a Corporation Tax Act (CTA):> In future, for all corporate taxpayers, all income will be deemed to be generated through one business for the purposes of the interest limitation rule. Whilst previously this was only the case for corporations with unlimited tax liability, in future corporations with limited tax liability and corporations with unlimited tax liability under Section 1 (1) Nos. 4 and 5 CTA will only be considered to maintain one business for the purposes of the interest limitation rules. The current requirements for the application of the exclusion rule for shareholder debt financing under Section 8a (2) CTA will be deleted in light of the changes to the stand-alone clause (Section 4h (2) Sentence 1 Letter b ITA-Draft). Corporations must also continue to observe the regulations on shareholder debt financing in Section 8a (3) CTA with regard to the equity escape. On the one hand, these regulations will be adapted to the requirements of the ATAD by lowering the relevant participation threshold to "at least 25%" of the capital from the previous "more than 25%". In addition, the wording has been amended in response to a decision of the Supreme Tax Court (judgement I R 57/13 of 11 November 2015), according to which remuneration for debt capital of the individual qualifying shareholders is not to be added together when assessing the 10% limit for harmful shareholder debt financing. This codifies the tax authorities' previous opinion and provides for an evaluation of the 10% limit based upon the total remuneration paid for debt capital to qualifying shareholders.

Temporary continuation of the status quo for real estate transfer tax (Art. 29 and 30 of the Act to Promote the Secondary Credit Market): Introduction of a new Section 24 Real Estate Transfer Tax Act-Draft (RETTA); in derogation to the Growth Opportunities Act, however, temporary extension until 31 December 2026

According to the new Section 24 RETTA, partnerships with legal capacity will be deemed to be joint owners for the purposes of real estate transfer tax for a further three years (previously only one year, i.e. only 2024) and their assets will be deemed to be joint assets. This is intended to prevent property transfers from or to a partnership no longer being able to benefit from Sections 5, 6 and 7 RETTA due to the Act for the Modernisation of Partnerships coming into force on 1 January 2024 and the associated abolition of the "Gesamthand" concept of joint ownership. In addition, this will also prevent the violation of current retention periods for property transfers carried out in the past, which would automatically result from the entry into force of the Act for the Modernisation of Partnerships.

Follow-up adjustments to the law resulting from the Modernisation of Partnerships in the **General Tax Code /Code of Procedure for Tax Courts, CTA, Trade Tax Act, Inheritance Tax Act/ Tax Valuations Act** and other laws (Art. 21 et seq. of the Act to Promote the Secondary Credit Market Act).

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Repeal of the provisions on the **taxation of so-called December aid** pursuant to Sections 123 to 126 ITA (Art. 19 of the Act to Promote the Secondary Credit Market Act)

Update of the general application rule in Section 34 (1) CTA from the 2022 period of assessment to the 2024 period of assessment (Art. 21 of the Act to Promote the Secondary Credit Market Act).

Keywords

Growth Opportuity Act, interest limitation, real estate transfer tax, thin capitalisation