

Federal Fiscal Court declares also new circular on recapitalization gains as inapplicable

November 2017

In brief

In two recently published judgements, the Federal Fiscal Court declared the Federal Ministry of Finance's instruction to apply the recapitalization decree up to 8 February 2017 inapplicable based on the same reasoning it found the recapitalization decree itself to be in conflict with administrative law. The decisions by the BFH as well as the pending state-aid control of the recently introduced German legislation by the EU Commission pose significant uncertainty to past, present and future recapitalizations. Future developments have to be monitored closely. We will keep you posted.

General background

Pursuant to the recapitalization decree ("Sanierungserlass") dated 27 March 2003 issued by the German Federal Ministry of Finance ("BMF"), recapitalization gains were exempt from taxation under certain circumstances.

Through judgment dated 8 February 2017 the Grand Senate of the Federal Fiscal Court ("BFH") decided that the tax circular is in violation with general administrative principles, since it infringes the duty of the tax authorities to comply with the actual law.

The lawmaker reacted to this decision with new provisions (§ 3a ITA and § 7b TTA) which provide a tax exemption under certain prerequisites similar to those of the recapitalization decree. However, the new provisions are not yet in force as they are subject to review by the European Commission to comply with EU state-aid rules. If coming into force, the new rules shall only apply to debt waivers after 8 February 2017 and thus only take effect after the judgment of the Grand Senate of the BFH.

As a consequence, the BMF responded to the decision by issuing a follow-up tax circular dated 27 April 2017. According to the new circular, the recapitalization decree remains applicable in cases in which the debt waiver of the creditors involved has been carried out until 8 February 2017 (publishing date of the Federal Fiscal Court's decision). Hence, granted tax waivers shall remain effective for the period

prior to the decision of the BFH declaring the recapitalization decree as invalid.

The decision

In two recently published judgements, the BFH declared the BMF's instruction to apply the recapitalization decree up to 8 February 2017 inapplicable based on the same reasoning it found the recapitalization decree itself to be in conflict with administrative law. The court stated that only the legislator may enact such rules, but not the Ministry of Finance. Therefore, the recapitalization decree is not only inapplicable for future reorganizations, but also for the past.

Takeaways

The decisions by the BFH as well as the pending state-aid control of the recently introduced German legislation by the EU Commission pose significant uncertainty to past, present and future recapitalizations. Future developments have to be monitored closely. We will keep you posted.

Contact

Dr. Ralf U. Braunagel
Frankfurt

Tel.: +49 69 9585-6376

ralf.ulrich.braunagel@de.pwc.com

Nicole Dehnhard
Frankfurt

Tel.: +49 69 9585-2513

nicole.dehnhard@de.pwc.com

Alke Fiebig
Hamburg

Tel.: +49 40 6378-1318

alke.fiebig@de.pwc.com

Hansjoachim Köhler
Frankfurt

Tel.: +49 69 9585-5039

hansjoachim.koehler@de.pwc.com

Dr. Lars Lawall
Frankfurt

Tel.: +49 69 9585-6622

lars.lawall@de.pwc.com

Dr. Axel P. Mielke
Frankfurt

Tel.: +49 69 9585-6926

axel.mielke@de.pwc.com

Jürgen Scheidsteger
Frankfurt

Tel.: +49 69 9585-5150

juergen.scheidsteger@de.pwc.com

Christian Tempich
München

Tel.: +49 89 5790-6321

christian.tempich@de.pwc.com

Subscribe / Unsubscribe

If you would like to subscribe to our English PDF M&A Tax Newsletter, please send an e-mail with “Subscribe” in the subject line to the following address: ADValue@de.pwc.com.

If you would like to cancel your subscription, please send an e-mail with the word “Cancel” in the subject line to the following address: ADValue@de.pwc.com.

The publication is intended to be a resource for our clients. Before making any decision or taking any action, you should consult the sources or contacts listed here. The opinions reflected are those of the authors.

© July 2018 PricewaterhouseCoopers GmbH Wirtschaftsprüfungsgesellschaft. All rights reserved.

In this document, “PwC” refers to PricewaterhouseCoopers GmbH Wirtschaftsprüfungsgesellschaft, which is a member firm of PricewaterhouseCoopers GmbH International Limited (PwCIL). Each member firm of PwCIL is a separate and independent legal entity.