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Information on the latest tax developments in Germany

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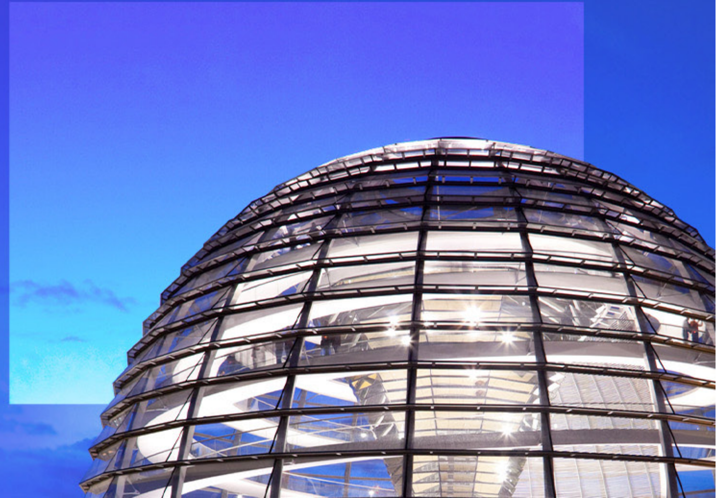

Government Draft Bill for an Annual Tax Act 2024

The Federal Ministry of Finance (BMF) has published the government draft for an Annual Tax Act 2024.

The draft bill contains a large number of thematically unrelated or only partially related individual measures in various areas of tax law, which are predominantly technical in nature. The most important measures are summarised below in bullet points:

1. Restructuring and reorganisations

Book value transfer of assets in connection with partnerships (Section 6 (5) Income Tax Act)

Transfers between “sister partnerships”: Preferential transfer of assets at book value even in the case of a transfer without consideration between different partnerships of the same, identically participating shareholders (so-called “sister partnerships”). Retroactive application of the new regulation is provided for in all open cases (due to a requirement of the Federal Constitutional Court). At the joint request of the shareholders, the new regulation is not to be applied for transfers before 12 January 2024, i.e. recognition of the fair market value and not the book value for the transfer.

The tightening of the so-called corporation tax clause (blocking clause for profit-neutral transfers if a corporation's interest in the transferred asset is established or increased) provided for in the first draft bill was not included in the government draft.

Reorganisations

Deferred taxation of hidden reserves in case of exit taxation (so-called balancing item method of Section 4g Income Tax Act): Extension of the scope of application to cases in which a reorganisation results in the realisation of hidden reserves as a result of the restriction or exclusion of the taxing rights of the Federal Republic of Germany (exit taxation). The taxation of hidden reserves is deferred by creating a balancing item to be released over five years. The new regulation is to be applied in all open cases.

Closing balance sheet of the transferring entity: Introduction of a deadline for submitting the closing tax balance sheet within 14 months after the end of the tax period in which the transfer date for tax purposes falls. The new submission deadline is to apply in all cases in which the application for entry in the register was made after the date of promulgation of the law.

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Taxation of the shareholders of the transferring corporation: Reversal of the valuation rule for mergers for the exchange of shares at shareholder level (shares in the acquiring corporation instead of shares in the transferring corporation). Recognising the book value of the shares in the transferring corporation is the new rule. Recognition at fair market value will only take place at the request of the taxpayer or if the material requirements for the book value approach are not met. The new regulations are to be applied to reorganisations whose tax transfer date is after the date on which the law is promulgated.

Trade tax liability for a gain arising from the sale or the discontinuation of a partnership following a conversion to a partnership even if the shares in the acquiring partnership are only sold indirectly (i.e. in the case of a sale via an intermediary partnership). The rule serves to avoid tax structuring options. First-time application to reorganisations whose tax transfer date is after the date of **publication of the ministerial draft bill**.

Withdrawals from a partnership in the tax retroactive period in case of contributions to a corporation: Valuation of the contributed business assets taking into account the withdrawals from and contributions in the transferred partnership in the tax retroactive period to avoid negative acquisition costs, i.e. hidden reserves may be realised if the transferred business assets would otherwise become negative due to withdrawals in the tax retroactive period. First-time application to contributions if the conversion resolution or the contribution agreement was made or concluded after 31 December 2023.

Retroactive taxation of “contribution gain II” in case of an exchange of shares: After an exchange of shares (contribution of shares to another corporation in return for shares in the acquiring corporation) with a valuation below the fair market value, retroactive taxation, i.e. realisation of hidden reserves at that time (“contribution gain II”) may occur if the shares contributed are sold within seven years (harmful event) after the exchange. However, if the received shares in the acquiring company are sold first before the harmful event, the retroactive taxation of the contribution gain II is waived (exception). The 2024 tax act provides for a “clarifying" legal amendment, according to which this exemption from retroactive taxation of the contribution gain II only applies if the sale of the received shares in the acquiring company (or sale-like circumstances such as conversions and contributions) takes place with the realisation of hidden reserves; entry into force on the day after the promulgation of the law.

Tax-specific capital contribution surplus account:

- In reorganisations, no **initial assessment** of the amount of the tax-specific capital contribution surplus account for the acquiring corporation if this is newly created by the reorganisation, i.e. the transferring amount of the tax-specific capital surplus contribution account is deemed to be an addition in the current financial year; entry into force on the day after promulgation.
- **Cross-border reorganisations:** Replacement of the separate assessment procedure for the amount of contributions not paid into the nominal capital at the transferring (foreign) corporation, for which no tax-specific capital contribution surplus account was previously to be assessed, by determining the transferred amount of contributions as part of the determination of the amount of the tax-specific capital contribution surplus account of the domestic acquiring corporation and treatment as an addition in the current financial year; entry into force on the day after promulgation.

2. International taxation

Trade tax in the case of CFC rules: Passive income from foreign permanent establishments is also subject to German CFC taxation (Section 20 (2) Foreign Transactions Tax Act). In addition to corporation tax, CFC income is also subject to trade tax. The 2024 tax act provides for a "clarification" that all passive foreign permanent establishment income is deemed to have been generated in a domestic permanent establishment and therefore also such income for which Germany is already entitled to taxation under the agreement in the case of a Double Taxation Treaty; application in all open cases.

Minimum Tax Act: Implementation of the administrative guidelines adopted by the Inclusive Framework on BEPS on 13 July 2023 for the administration of the GloBE model regulations with regard to mobile employees (consideration of wage costs in one tax jurisdiction), i.e. no pro rata consideration of employees who carry out more than 50 percent of their work in one tax jurisdiction; entry into force with effect from 28 December 2023.

3. Procedural law

FATCA reporting obligations: Increase in the maximum fine for violations of the reporting obligations under the FATCA-USA Implementation Regulation to EUR 30,000; authorisation to regulate the provisions on fines for violations by reporting financial institutions within the framework of a statutory ordinance; entry into

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force on the day after promulgation.

Financial Account Information Exchange: New offence of fines in the event of a breach by financial institutions of their obligation to prepare records on the application and fulfilment of the due diligence and reporting obligations under the Financial Account Information Exchange Act and specification of the record-keeping obligations. Applicable from 1 January 2025 and only for obligations relating to reporting periods beginning on or after 1 January 2025.

4. Further measures

Tax exemption for photovoltaic systems: increase in the permissible gross output from 15 kW to 30 kW (peak) per residential or commercial unit; application for the first time for photovoltaic systems that are acquired, commissioned or expanded after 31 December 2024.

Real estate transfer tax: New regulation on the attribution of real estate to the assets of a company for so-called “share deal” cases (transfer of shares in corporations or partnerships that own real estate – supplementary cases pursuant to Section 1 (2a) to (3a) Real Estate Transfer Tax Act (RETTA); attribution to the assets of the company that last realised an acquisition of real estate according to the basic cases (e.g. through a purchase agreement) pursuant to Section 1 (1) RETTA. The realisation of a real estate acquisition through a share deal pursuant to Section 1 (3) or (3a) RETTA should no longer lead to a change in the ownership (for RETT purposes) of the property. Entry into force on the day after promulgation.

5. Outlook

The publication of the ministerial draft bill will be followed by the parliamentary procedure in the Bundestag and Bundesrat. Significant changes may still arise in the further course of the legislative process.

The Act should generally enter into force on the day after promulgation. The special regulations on the entry into force of the individual articles and the temporal application of the individual laws must be observed.

In this context, it should be noted that individual, more stringent measures are to be applied retroactively, especially in case of reorganisations.

BMF Guidance dated 14 June 2024: Application of the Act to Combat Tax Havens

On 14 June 2024, the Federal Ministry of Finance (BMF) published a guidance on the application of the Act Combating Tax Avoidance and Unfair Tax Competition (Act to Combat Tax Havens). On 34 pages, the BMF explains in detail the administrative opinion on the following aspects of the Act to Combat Tax Havens:

- Non-cooperative tax jurisdictions (tax havens) and residency
- Scope of application: in personal, factual and temporal terms
- Business transactions affected
- Defensive measures (denial of tax deduction of expenses, tighter CFC rules, withholding tax measures, denial of tax exemption for dividends and capital gains)
- Increased obligations to cooperate
- Relationship of the defensive measures to each other and to other tax regulations as well as to double taxation agreements.

Some key statements are summarised below:

Non-cooperative tax jurisdictions and residency: The tax havens named in the national list of tax havens (“national list”) are decisive for the application of the defensive measures. The national list reflects the EU blacklist and is updated regularly at the end of each calendar year, if necessary.

Scope of application: If a tax haven is added to the national list, the defensive measures and the increased obligations to cooperate in relation to this tax haven apply from the start of the following year. Exceptions apply to the defensive measures denial of tax deduction of expenses and the denial of tax exemption for dividends and capital gains, which means that these only apply at a later date. If a country is removed from the national list, the defensive measures relating to this country will no longer apply from 1 January of this calendar year (favorable retroactive effect). In this case, the BMF guidance contains a simplification rule for withholding tax: there is no objection if no withholding tax is withheld on business transactions relating to a tax haven that has already been removed from the EU blacklist - which is regularly updated each February and October - before the national list is updated at the end of a calendar year.

Note: There are currently 16 tax havens on the national list. Most recently, i.e. at the end of 2023, Antigua and Barbuda, Belize, Russia and Seychelles were included. The EU blacklist was last adjusted in February 2024. Since then, only 12 countries have been on the EU blacklist. Compared to the national list, there are no more listed: Bahamas, Belize, Seychelles, Turks and Caicos Islands.

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Subject to the revision of the EU blacklist in October 2024, these countries should also be removed from the national list at the end of 2024, with preferential retroactive effect from 1 January 2024.

Affected business transactions: All business transactions that have a point of contact with a tax haven are covered, in particular payments that flow out of a tax haven (outbound) or into a tax haven (inbound). Only the activity of the taxpayer who maintains economic transactions with a tax haven is relevant. Any activity of the other parties involved in the economic transactions is irrelevant. A business relationship with reference to a tax haven is maintained in particular if one of the parties involved in the business relationship is resident in this tax jurisdiction.

The business transactions concerned can also be carried out by a partnership or a permanent establishment. However, the mere fact that the partners are domiciled in a tax haven does not mean that there is a business transaction relating to a tax haven. Obligations under public law as well as closely related, obligatory and non-waivable usage relationships and service relationships do not constitute business relationships (e.g. fees for passage through a ship canal).

Denial of tax deduction of expenses: The denial of deduction also covers expenses such as current and extraordinary depreciation, and disposals of assets at book value.

Withholding tax measures: The debtor of the remuneration is obliged to declare the withholding tax to the Federal Central Tax Office (BZSt) and pay it to the BZSt. The withholding tax rate is a uniform 15% plus solidarity surcharge. The withholding tax liability under the Act to Combat Tax Havens is subsidiary to the "regular" limited tax liability for domestic income (Sec. 49 Income Tax Act - ITA). If there is already domestic income under Sec. 49 ITA, the withholding tax obligation under the Act to Combat Tax Havens does not apply. So-called net agreements are also generally possible for withholding tax purposes in accordance with the Tax Haven Defense Act. The withholding tax rate in these cases is 17.82% plus solidarity surcharge.

The BMF guidance contains detailed explanations of the four defensive measures, including a large number of examples.

Increased duties to cooperate: For the purposes of the increased duties to cooperate, a catalog of additional record-keeping obligations is defined, which also apply to business transactions between unrelated parties (in contrast to the regular transfer pricing documentation). The increased duties to cooperate must only be fulfilled if at least one of the four defensive measures applies. These additional obligations include, in particular, records of the business relationship, the underlying contracts, the functions performed, the business strategies and the market and competitive situation.

BMF Guidance dated 4 June 2024: Application Regulation on Increased Duties to cooperate under the Act to Combat Tax Havens

On 4 June 2024, the Federal Ministry of Finance (BMF) published an extended so-called non-objection regulation to Section 12 of the Act to Combat Tax Havens (StAbwG).

Section 12 StAbwG stipulates an increased duty of co-operation on the part of the taxpayer. Accordingly, records must be kept of certain business transactions in or relating to a non-cooperative tax jurisdiction. These records must be transmitted to the locally competent tax authority and, in certain cases, also to the Federal Central Tax Office (BZSt). The transmission must generally take place within a period of one year after the end of the respective calendar year or financial year.

According to the BMF guidance that has now been published, the application of Section 12 StAbwG means that for financial years that began before 31 December 2022, no objections will be raised if the records are submitted for the first time by 31 December 2024 (previously by 31 May 2024).

BMF Guidance dated 18 June 2024: Extension of the Deadline for Submitting German CFC Declarations 2022

Under German tax law, a subsidiary corporation is taxed separately from its shareholders (so-called separation principle). The German CFC rules (Sections 7 et seq. German Foreign Tax Act [AStG]) are intended to prevent income from being shifted to low-taxed foreign countries if certain conditions are met. They apply in general if the foreign subsidiary corporation is controlled by residents, generates passive income that is subject to low taxation and is unable to prove that it is engaged in a significant economic activity (so-called motive test).

The passive income is then taxed in full at the level of the domestic shareholder in accordance with their shareholding, thus breaking the separation principle.

To this end, domestic shareholders must submit a declaration of separate assessment using the officially prescribed form. If it is claimed that there is no CFC taxation due to the motive test, this only needs to be reported using the officially prescribed form.

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With the so-called ATAD Implementation Act of 25 June 2021, the German CFC rules were comprehensively amended with effect from 2022, although the basic system has remained the same. The changes therefore require new declaration and reporting forms.

In a guidance dated 18 June 2024, the BMF extended the deadline for submitting the CFC declarations 2022. Accordingly, they must be submitted by **31 October 2024** at the latest. The BMF has published the declaration and reporting forms adapted to the changed legal situation in a separate guidance dated 25 June 2024.

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