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1. Tax Amendment Act 2015

On 16 October 2015, the German Bundesrat (upper house of the German Parliament) approved the Tax Amendment Act 2015, previously named "Bill on the Implementation of the Minutes Statement on the Customs Code Alignment Law" ([for details please refer to the June 2015 edition of German Tax Monthly](#)). On 24 September 2015, the German Bundestag (lower house of the German Parliament) enacted the law.

The most important contents of the Tax Amendment Act 2015 are as follows:

- § 8c KStG – Extension of the Group Exemption Provision
- Other Considerations in Exchange for Contributions
- Indirect Changes in the Compositions of the Shareholders of a Partnership owning Real Property (§ 1 (2a) GrEStG – Real Estate Transfer Tax Act)
- Alignment of the auxiliary basis of assessment for real estate transfer tax purposes with the case law of the Federal Constitutional Court
- Introduction of an option to spread payment of the tax on the gain on sales of certain assets over five

years if the replacement asset is to be allocated to business assets located in another EU/EEA Member State

- Changes of the qualification as business under VAT law for public law legal persons as well as changes to the reverse charge procedure.

In the following we will summarize the most significant changes compared to the government draft of 8 April 2015 ([for details on the legislative amendments already included in the government draft please refer to the April 2015 edition of German Tax Monthly, p. 1](#)) of the Tax Amendment Act 2015.

All further amendment proposals and requests for review of the Bundesrat were not included in the law ([for details please refer to the June 2015 edition of German Tax Monthly](#)).

Changes in the Auxiliary Basis of Assessment

In its decisions of 23 June 2015 (1 BvL 13/11 and 1 BvL 14/11), the Federal Constitutional Court declared the regulation regarding the auxiliary basis of assessment (Ersatzbemessungsgrundlage) provided for in the Real Estate Transfer Tax Act unconstitutional due to the fact that the values determined as auxiliary basis of

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assessment deviate significantly from the fair market value (regular basis of assessment) ([for details please refer to the September 2015 edition of German Tax Monthly](#)).

The auxiliary basis of assessment is applied if there is no consideration (i.e. in particular in the case of a property transfer due to restructuring or transfers of shares). On the basis of the new law, the values of the auxiliary basis of assessment will be determined in accordance with the valuation provisions for real estate, which are to be used for inheritance tax purposes. This is to bring the values determined as the auxiliary basis of assessment closer to the fair market value.

These revisions will be applicable with retroactive effect to all acquisition processes carried out after 31 December 2008. A retroactive application of the revision, however, may be in conflict with the protection of legitimate expectations.

Increase of the Absolute Tax-Exempt Amount and Restrictions on Other Considerations in Exchange for Contributions

The Tax Amendment Act 2015 restricts the possibilities of granting other considerations than new shares in cases of tax-neutral contributions of business segments to corporations (§ 20 Reorganization Tax Law [UmwStG]) and in cases of exchanges of shares (§ 21 UmwStG) ([for details please refer to the April 2015 edition of German Tax Monthly](#)).

However, in contrast to the government draft the absolute tax-free amount for other considerations was increased from € 300,000 € to € 500,000.

Spreading of Tax Payment in the Case of Replacement Assets in EU/EEA Permanent Establishments

§ 6b Income Tax Act [EStG] facilitates the tax-free transfer of hidden reserves from the disposal of certain fixed assets to certain replacement assets. It is a prerequisite, among others, that the replacement assets belong to the fixed assets of a German permanent establishment. In the case of a reinvestment in a foreign EU/EEA permanent establishment, however, the gain on the disposal is immediately subject to tax. In its judgment of 16 April 2015 (C-591/13), the CJEU ruled that this unequal treatment infringes EU law.

For this reason, § 6b EStG shall henceforth be opened for reinvestments in permanent establishments located in other EU/EEA Member States. To this end, taxpayers will, upon request, be granted an option to spread payment of the tax on the gain of the disposal over a period of five years (§ 6b (2a) EStG) if the replacement asset is to be allocated to business assets located in another EU/EEA Member State.

The revision will also be applicable to gains on sales that were generated before the promulgation of the law.

Outlook

The law still has to be promulgated to enter into force.

2. BFH (I R 75/14): Subsequent Income of a Discontinued Foreign Permanent Establishment

In a ruling of 20 May 2015 the Federal Tax Court (BFH) decided on the right to tax income resulting from the reversal of provisions created by a foreign permanent establishment which has been discontinued in the meantime.

In the case at issue, a German limited liability company (GmbH) operated a permanent establishment in Belgium until the year 2000. In the context of the operation of the permanent establishment, a provision for contingent liabilities was created. The expenses that related to the creation of the provision were allocated to the profit/loss of the permanent establishment and therefore have no tax impact on the GmbH [exemption method Art. 23 (1) Double Tax Treaty (DTT) USA-Belgium]. In 2009 the provision was partially reversed.

The BFH ruled that the income from the reversal of the provision must be treated as subsequent income from the Belgian permanent establishment and therefore has to be exempt from taxation in Germany. In the view of the BFH it is irrelevant that, in actual fact, the permanent establishment in Belgium no longer existed in the year 2009. The provision was attributable to the permanent establishment. The causality did not end just because the permanent establishment was discontinued [contrary to the Federal Ministry of Finance (BMF) guidance of 24 December 1999, Federal Tax Gazette (BStBl.) I 1999, p. 1076].

In the view of the BFH, the tax principles relating to exit taxation or the establishment of Germany's right to tax hidden reserves/capital gains in assets transferred from a foreign permanent establishment cannot be applied to the specific case at hand. In line with these principles, the provision could be fictitiously contributed from the permanent establishment to the German head office so that at the moment of its reversal the provision would be attributable to the head office. The BFH does not agree with this view, because in the BFH's opinion a statutory basis for such an approach does not exist, at least not in the year at issue, 2009. However, the BFH expressly leaves open whether due to the introduction of two pertinent rules in the German Income Tax Law (EStG), namely §§ 4 (1) sent. 8 and 16 (3a) EStG, relating to exit taxation and to the establishment of Germany's right to tax hidden reserves/capital gains in assets transferred from a foreign permanent establishment, the case would be judged differently under the current legal situation.

3. Federal Tax Court (IV R 13/12): Calculation of the Fee for a Binding Ruling

In a judgment of 22 April 2015 the Federal Tax Court (BFH) decided that the fee charged for the issuing of a binding ruling by the tax authorities depends on the legal matters on which the ruling is requested.

Tax authorities may be requested for a binding ruling which binds the tax authorities for the presented case provided the facts do not change.

Tax authorities are authorized to charge fees when a taxpayer requests such a ruling. The amount of the fee depends on the potential tax consequences of the matters set forth in the request.

In the case at issue the plaintiff intended to restructure a group of companies. The plaintiff requested a binding ruling on the potential immediate taxation of hidden reserves. In the context of its request the plaintiff did, however, not ask whether the immediate taxation of the hidden reserves could also result in an increased write-down with tax-reducing effect. The local tax office stated in its ruling that there will be no immediate taxation of hidden reserves and levied a fee for issuing this information. The tax office based the fee on the estimated tax burden which would have applied if the hidden reserves had to be recognized and taxed. The plaintiff, however, requested a potential write-down with tax-reducing effect to be accounted for in the calculation of the fee.

According to the BFH, the fee for a binding ruling can only be calculated on the basis of the matters on which the ruling is requested. Therefore, in the opinion of the BFH, legal questions not asked are not to be considered, even if they may result as consequential questions from the request. Since the binding ruling did not relate to the increased write-down, it could not be accounted for in the assessment basis of the fee. Apart from this the BFH points out that the fee would have increased had the plaintiff submitted a (separate) request for a binding ruling regarding the higher write-down. The reason for this seems to lie in the fact that the fee is calculated based on the tax difference between the legal opinion of the taxpayer (higher write-down) and the alleged deviating legal opinion of the tax office (lower write-down).

4. Lower Tax Court of Cologne (10 K 73/13): No Trade Income Reduction for Buying Office Located in Turkey

In its decision of 7 May 2015 the Lower Tax Court of Cologne ruled that a reduction of the trade income pursuant to § 9 no. 3 trade tax law (GewStG) is not possible for a buying office located in Turkey.

Any commercial business activity located and operated in Germany is principally subject to German trade tax. Pursuant to § 9 no. 3 GewStG the trade income of a domestic company may be reduced by the amount of the trade income that is attributable to a permanent establishment located abroad.

In the case at issue, a corporation resident in Germany operated a buying office in Turkey in the years at issue (from 2004 to 2007). The local tax office is of the opinion that the buying office in Turkey indeed qualifies as permanent establishment under German tax law.

However, it does not qualify as a permanent establishment under the Double Tax Treaty with Turkey of 16 April 1985 (DTT Turkey). Consequently, the local tax office excludes a reduction of the trade income because of a lack of existence of a permanent establishment under tax treaty law.

A court case initiated against this decision remained unsuccessful. The Lower Tax Court of Cologne shares the opinion of the local tax office, i.e. that the conditions for the applicability of the trade tax provisions regarding a trade income reduction are not met. The applicability of § 9 no. 3 GewStG requires "a permanent establishment not located and operated in Germany". It is uncontroversial that the buying office located in Turkey qualifies as a permanent establishment under German tax law (§ 12 sent. 2 no. 6 Tax Procedure Law (AO)). However, pursuant to the exceptions in Art. 5 (3) d of the DTT Turkey, a mere buying office does not constitute a permanent establishment within the meaning of tax treaty law.

The Lower Tax Court of Cologne holds the view that the only authoritative answer to the question whether a "permanent establishment not located and operated in Germany" within the meaning of § 9 no. 3 GewStG exists is the definition of the term "permanent establishment" in the DTT. The conflict between the national definition of permanent establishment and the exceptions in the DTT Turkey has to be settled in favor of the DTT.

The Court reasons that due to the direct foreign relationship the term permanent establishment as defined in § 9 no. 3 GewStG can only be interpreted in keeping with the DTT Turkey, in particular as Art. 2 (3) b (dd) of the DTT Turkey expressly also covers trade tax, although no such tax is imposed under Turkish law. The Lower Tax Court of Cologne therefore concludes that where no permanent establishment under tax treaty law exists, the right to tax income generated by the foreign entity including trade tax has to be fully allocated to Germany. In addition, there would be double non-taxation, if trade income is reduced in Germany pursuant to § 9 no. 3 GewStG, while Turkey does not levy tax for lack of a permanent establishment pursuant to Art. 5 (3) d of the DTT Turkey. Such non-taxation is not compatible with the purpose of the DTT Turkey and the will of the parties thereto.

The principles of the decision are generally also applicable in the current legal situation. The content of the exception provision for buying entities has been included unchanged into the current DTT Turkey of 19 September 2011 (Art. 5 (4) d DTT Turkey). Appeal against the decision of the Lower Tax Court of Cologne has been filed and is still pending (I R 50/15).

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