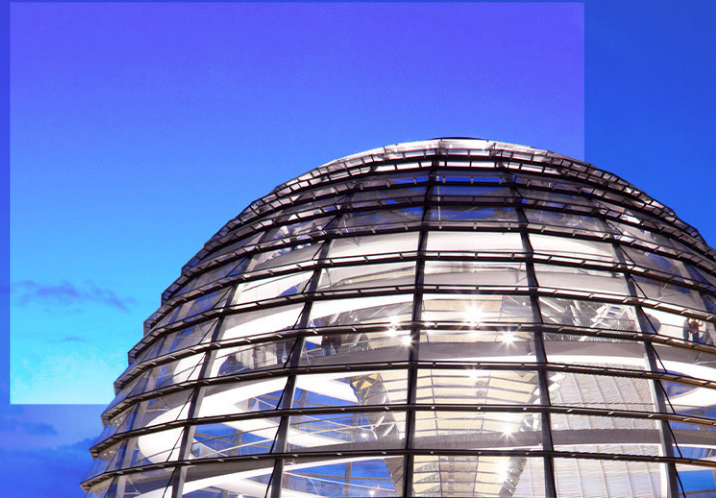


German Tax Monthly

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Amendment of the Regulation to apply the Act to Combat Tax Avoidance and Unfair Tax Competition

The German Federal Ministry of Finance [BMF] has published a ministerial draft for a Regulation to apply the Act to Combat Tax Avoidance and Unfair Tax Competition.

The Act to Combat Tax Avoidance and Unfair Tax Competition (Act to Combat Tax Havens – StAbwG) of 25 June 2021 provides administrative and legislative measures that apply in relation to those states and territories that are non-cooperative tax jurisdictions. Tax jurisdictions are non-cooperative pursuant to the StAbwG, if they are on the EU list of non-cooperative countries and territories for tax purposes and specified in the StAbwV.

The EU list was updated in October 2023. Compared to the status in October 2022 Antigua and Barbuda, Belize, Russia and the Seychelles have been added to the updated EU list.

This amending regulation transposes this expansion into German law.

The EU list and the amended StAbwV therefore list the following sixteen non-cooperative tax jurisdictions: American Samoa, An-

guilla, Antigua and Barbuda, Bahamas, Belize, Fiji, Guam, Palau, Panama, Russia, Samoa, Seychelles, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands and Vanuatu.

If a tax jurisdiction is added to the national regulation, the defensive measures and enhanced cooperation obligations related to that tax jurisdiction shall generally apply from the beginning of the following year (or financial year). A "step model" is set out for the time of application for specific defensive measures: the prohibition on deducting business and income-related expenses (Section 8 StAbwG) applies only from the beginning of the fourth year (or financial year) following a country's inclusion in the regulation, while the measures for dividends and sale of shares / ownership interests (Section 11 StAbwG) apply only from the beginning of the third year (or financial year) following inclusion in the list.

Example for Russia:

2023: Included in the regulation

From 2024: tighter CFC rules (Section 9 StAbwG), withholding tax measures (Section 10 StAbwG), enhanced cooperation obligations (Section 12 StAbwG).

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From 2026: Measures for dividends and sale of shares/ownership interests (Section 11 StAbwG).

From 2027: Prohibition on deducting business expenses and income-related expenses (Section 8 StAbwG).

For the regulation to enter into force, it must be promulgated in the German Federal Law Gazette after approval by the Upper House of the German Parliament (Bundesrat).

Münster Tax Court: Application of the Loss Deduction Limitation Rule in the Case of a Harmful Acquisition of an Equity Interest without a Change of Control

In its ruling of 23 August 2023 (9 K 2166/21 K,G,F), the Münster Tax Court ruled on the loss deduction limitation rule of Sec. 8c Corporate Income Tax Act in the case of a harmful acquisition of an equity interest that does not lead to a change of control.

According to the loss deduction limitation rule, unused tax losses of a corporation are no longer deductible, if more than 50% of the shares are transferred to a purchaser within five years (so-called detrimental change in ownership).

In the case in question, two shareholders initially held shares in a LossCo: A held 50.2% and B held 49.8%. In 2015, A acquired B's shares and subsequently held 100% of the LossCo. In the further course of time, several share transfers took place: Shareholder A sold part of his shares and then reacquired part of them. However, Shareholder A continued to hold an interest of more than 50% in LossCo without interruption (A's interest in LossCo over time until the end of 2017: 50.2%, 100%, 60%, 72.4%). In 2018, an increase of the share capital took

place at LossCo, which was taken over disproportionately by Shareholder A alone. Thereafter, Shareholder A held approximately 79.98% of the shares. In the opinion of the tax office, the relevant acquisition limit of the loss deduction limitation rule of 50% had thus been exceeded (49.8% in 2015 + 7.58% in 2018).

The action brought against this was successful. According to the wording, a detrimental acquisition of shares had taken place. In any case, shares of more than 50% had been transferred as a result of the transaction in 2015 and the capital increase in 2018. However, this did not result in the destruction of losses. The loss deduction limitation rule is to be reduced teleologically and in conformity with the constitution insofar as the share transfers and capital increase did not result in a change of control. Shareholder A had always held more than 50% of the shares in LossCo. Neither the transfer transactions nor the capital increase had changed this. However, the loss deduction limitation rule is based on the fundamental idea of a change of control, which must occur as a result of the share transfers.

The appeal to the Federal Tax Court was admitted.

It should be noted that proceedings on the unconstitutionality of the loss deduction limitation rule are pending before the Federal Constitutional Court (2 BvL 19/17).

Draft of an Updated BMF Guidance on the Application of the German Reorganisation Tax Act

On 11 October 2023, the Federal Ministry of Finance (BMF) published a draft of an updated BMF guidance on the application of the German Reorganisation Tax Act (Reorganisation Tax Decree).

As with the current guidance, the draft is very comprehensive and extremely relevant for the practical application of reorganisation tax law. The guidance deals with, among other things:

- Scope of application
- Tax consequences of conversions and contributions under the Reorganisation Tax Act
- Transfer of assets in the case of a merger with a partnership or with a natural person and conversion of a corporation into a partnership
- Splitting up, splitting off and transfer of assets (partial transfer)
- Trade tax
- Contribution of parts of a business to a corporation or cooperative and exchange of shares
- Contribution of a business, part of a business or business partner share to a partnership
- Conversion of a partnership into a corporation or cooperative
- Prevention of abuses
- Application rules and authorisation.

According to the BMF, the update contains clarifications and specifications compared to the Reorganisation Tax Decree of 11 November 2011 and takes into account the amendments to the law and decisions of the Federal Tax Court on the Reorganisation Tax Act that have occurred over the past twelve years since its publication.

For example, with the Act to Modernise Corporate Tax Law of 25 June 2021, restrictions to EU member states and EEA states contained in the Reorganisation Tax Act have been lifted for tax transfer dates after 31 December 2021 and the scope of application of the Reorganisation Tax Act has thus been opened for certain transformations of corporations

worldwide. This concerns, in particular, split-ups or split-offs of third-country companies as well as mergers also across national borders. Furthermore, the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the EU (Brexit) alone does not trigger the retroactive contribution profit taxation if, in the cases of universal succession, the conversion resolution took place before 1 January 2021 or, in other cases, the contribution agreement was concluded before 1 January 2021. In particular, such legal changes are now to be tracked in the updated Reorganisation Tax Decree.

The BMF has sent the draft of the updated BMF guidance to various associations for comments. The associations now have the opportunity to comment on the draft until 6 December 2023.

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Editorial team

Dr. Cora Bickert (V.i.S.d.P.)
Directorin, Tax

Veronika Aschenbrenner
Manager, Tax

Julian Fey
Senior Manager, Tax

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