

# German Tax & Legal News

Monthly Newsletter for Inbound Investors into Germany

## Legislative Update

### Overview of enacted legislative changes for 2009

#### Annual Tax Act 2009

The legislative process on the German Annual Tax Act 2009 was finalized on 24 December 2008 with the official publication of the law in the Federal Gazette. No significant changes were made to the Act since it was adopted by the Lower House of Parliament (see GTLN 11/2008 for an overview of the most relevant changes).

#### Tax Bureaucracy Deregulation Act

The Tax Bureaucracy Deregulation Act also was finalized on 24 December 2008 with the official publication of the law in the Federal Gazette. The Act basically reduces bureaucracy costs, for example by substituting paper-based information exchanges with the tax authorities with electronic transmissions (for an overview of the main changes, see GTLN 9/2008).

There are some minor changes to the draft version of the Act presented in July 2008. In particular, the taxpayer must file a written request to continue to use a non-electronic submission of information in the event of undue hardship. The Ministry of Finance may defer mandatory electronic filing past 1 January 2011 due to potential difficulties with the necessary technical and organizational implementation.

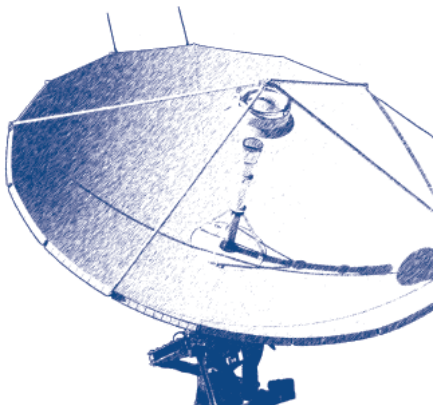
The final version of the Act did not include any exceptions for smaller companies or a general right to choose between electronic and paper filing (both requested by the German Upper House of Parliament).

#### Renewal of Investment Allowance Act

The legislative process to renew the Investment Allowance Act was finalized with the publication in the Federal Gazette on 10 December 2008. The law grants some investment allowances for manufacturing companies, companies that supply manufacturing-related services and certain accommodation businesses when they invest in the "new" German federal states and fulfill certain requirements. The investment allowances will be reduced annually until they are completely discontinued in 2014.

#### Protection of Employment and Prosperity Act

The Protection of Employment and Prosperity Act was finalized with its official publication on 29 December 2008 to address the current economic challenges. For a certain period of time, the Act reestablishes the declining balance depreciation method for movable assets, extends the special depreciation and investment allowance to larger



companies, further increases the deductible amount of housekeeping-related craftsperson services costs and grants a limited car tax exemption in certain cases (see GTLN 10/2008 for further details).

## Hamburg increases RETT rate

The federal state of Hamburg decided to increase the real estate transfer tax (RETT) rate from 3.5% to 4.5% effective 1 January 2009. The tax increase affects real estate situated in the state of Hamburg that is transferred by way of a sale or in a reorganization or acquisition. Until 2006, a uniform RETT rate of 3.5% applied throughout Germany, but an amendment to the constitution gave the federal states the right to set the RETT rate themselves. As a result, the rate can vary from one federal state to another. Hamburg is the second state to raise the RETT rate; Berlin increased its rate to 4.5% in 2007 (see GTLN 11/2006). It is unknown whether other federal states will follow suit.

## Draft Act to combat tax fraud

The German Ministry of Finance recently published a draft law to combat tax evasion and fraud, but the discussions are in a preliminary stage and it is unclear whether the draft will make it through the legislative process.

In its current draft version, the Act allows the German government to restrict the application of certain tax provisions in transactions with countries that do not apply an information exchange according to the latest OECD standards. The government will be authorized to issue a list of countries that do not have an adequate exchange of information process and to implement the following restrictions:

- Denial of a tax deduction for business expenses incurred in connection with payments made to recipients in the relevant countries;
- Full or partial denial of a withholding tax reduction/exemption on payments to nonresident companies (even if they meet the requirements of the anti-treaty shopping rule) if their shareholders are resident in the relevant countries;
- Full or partial denial of the application of the flat tax on investment income or the participation exemption for individuals in respect of income originating from the relevant countries; and
- Full or partial denial of the participation exemption in respect of dividends or capital gains received by domestic corporations with respect to investments in the relevant countries.

Additional information and document retention requirements for certain taxpayers are also included in the draft.

At the moment the legislative process is only in a very early stage and it currently seems unlikely that the law will be implemented in its present version. Nevertheless, the further legislative process should be carefully monitored.

## Penalty under electronic bookkeeping rules

A provision in the Annual Tax Act 2009 permits the relocation of electronic bookkeeping to another EU member state under certain circumstances. This provision is accompanied by a new penalty (from € 2,500 to € 250,000 at the discretion of the tax office) for non-compliance (see GTLN 11/2008 for further details).

The penalty, however, has broad application beyond electronic bookkeeping and generally affects all taxpayers. Specifically, the penalty may be imposed if the taxpayer fails to comply with any one of the following obligations:

- Timely submission of requested documentation and information during a tax audit;
- Granting of access to electronic accounting systems;
- Obtaining permission from the tax authorities prior to relocating electronic accounting systems outside of Germany;
- Re-transfer of electronic accounting systems back to Germany at the request of the tax authorities; or
- Duty to inform the tax authorities about tax relevant facts.

## Court Decisions

### **BFH decides on formal requirements for amendment of profit and loss pooling agreement**

The Federal Tax Court (BFH) recently published a decision on the formal requirements for an amendment of a profit and loss pooling agreement (PLPA) to be recognized for tax purposes. A PLPA is a basic prerequisite for an income tax group ("Organschaft") in Germany. To be recognized for tax purposes, a PLPA must be legally valid and concluded for at least five years. The legal validity requirement means that the PLPA must be notarized and registered in the commercial register, and the shareholders of the controlling and the controlled company must consent to the PLPA.

In the case, the original PLPA had not been concluded for the minimum five-year period because registration in the commercial register had been delayed and the fixed termination date in the agreement was not amended accordingly. To resolve the issue, the parties to the PLPA agreed in a separate letter, which was not registered with the commercial register, to extend the minimum period. No shareholder resolutions were passed on the letter by either of the parties.

The BFH confirmed in its decision that an amendment to a PLPA must meet the same formal requirements as apply to the original agreement. Thus, an amendment agreement must be notarized and registered with the commercial register and the shareholders of the controlled and the controlling company must consent to the agreement. When concluding or amending a PLPA, taxpayers should ensure that all requirements are met, because failure to meet any of the formal requirements could lead to a non-recognition of the tax consolidation in a tax audit.

### **RETT: Indirect unification of shares in a real estate-owning corporation**

Under the German RETT Act, in addition to the direct transfer of real estate, the direct or indirect concentration of at least 95% of the shares in a corporation owning German real estate in the hands of a single owner is a taxable event (unification of shares).

This provision treats the shareholder of at least 95% of the shares in a corporation as if he directly owns the corporation's real estate (via the unification of shares in his hands). The same applies if the real estate is owned by a corporation that is located several tiers below the shareholder and the minimum threshold of 95% for the indirect participation is reached (indirect unification of shares).

#### **Examples**

1. A-GmbH acquires 95% or more of the shares in B-GmbH, which owns 100% of the shares in C-GmbH, which owns German real estate. In the view of the tax authorities and the prevailing professional literature, it is sufficient for an indirect unification of shares when in a multiple-tier ownership chain the minimum threshold of 95% is reached at the level of each shareholding.
2. A-GmbH acquires 95% of the shares in B-GmbH, which owns 95% of the shares in C-GmbH, which owns German real estate. The participation held by B-GmbH in C-GmbH will be fully attributed to A-GmbH according to the tax authorities and the prevailing view in the professional literature.

In September 2008, the local tax court of Münster issued a decision which deals with the following facts (i.e. a case similar to Example 2 mentioned above): A (claimant) acquired 96.92% of the shares in GmbH I, which was the 97.5% shareholder in GmbH II. GmbH II owned German real estate. The local tax court decided that the acquisition did not result in an indirect unification of shares in the hands of the claimant since, from a mere mathematical perspective, A only became a 94.49% (96.92% x 97.5%) indirect shareholder in real estate-owning GmbH II. The local tax court of Münster held that an indirect unification of shares requires that one becomes a "real" shareholder of (indirectly) at least 95% of the shares in the real estate corporation. The case is now pending before the BFH.

## VAT News

### VAT groups subject to review

Two rather restrictive decisions of the BFH relating to the organizational integration requirement to qualify as a valid VAT group have caused considerable uncertainty. This is even more the case since the German tax authorities have indicated that they will follow the court's decisions.

To qualify as a VAT group in Germany, the companies must be economically, financially and organizationally integrated. The organizational integration requirement is met where the parent company has the necessary means to exercise management at the level of the controlled subsidiary. Organizational integration is present, for example, where the managing director/board of the parent and the relevant subsidiary are identical.

In practice, the German tax authorities have usually accepted the organizational integration – without particular examination – where the parent and subsidiary were financially integrated. The BFH decisions, however, contradict this practice. The key points of the court's decisions are:

- Organizational integration is an autonomous prerequisite for a VAT group and, therefore, must be substantiated by the taxpayer and examined by the tax authorities.
- Taxpayers that intend to opt for a VAT group must prove that the parent company fully controls the subsidiary and that the management of the subsidiary cannot make decisions that conflict with the will of the parent.
- Proof that a parent company controls the subsidiary is generally twofold:
  - A “legal basis”, i.e. a document (control agreement, constitution, bylaws) that ensures “theoretically” that the subsidiary is not entitled to make decisions deviating from the will of the parent; and
  - Actual implementation of the agreement, meaning that the parent company must in fact direct the management of the subsidiary.
- The most effective (but not the only) way to control the subsidiary is to appoint the same persons as managers of both the parent and the subsidiary.

Following these decisions of the BFH, the German tax authorities may – in contrast to their previous practice – focus on examining all of the prerequisites for a VAT group and in particular the organizational integration. Affiliated groups should review their existing practices with regard to organizational integration and discuss with their VAT advisors any alternatives to ensure that the strict requirements set up by the court are met.

## Other

### Filing deadlines for 2008 tax returns

The tax authorities of the federal states recently issued the annual coordinated guidance on filing deadlines for 2008 tax returns. Unchanged from 2007, (corporate) income tax, trade tax and VAT returns for the assessment period 2008 must be filed with the tax office by 31 May 2009. Where the taxpayer has engaged a tax advisor to prepare the return, the filing deadline is generally extended until 31 December 2009. A further extension of the deadline until 28 February 2010 may be granted upon request in individual cases at the discretion of the tax office. However, irrespective of the general filing extension, the tax office may still request filing at an earlier date (e.g. if substantial tax payments can be expected, if losses are assessed for partners in a partnership or if the tax office considers early filing necessary for their workflow).

## Deloitte News

### Seminar on employee secondments

Deloitte will host a two-day seminar on employee secondments, addressing tax, employment law and social security aspects of cross-border secondments of employees.

The seminar will take place in the following locations:

Frankfurt: 11–12 February 2009  
Munich: 25–26 March 2009

If you are interested in attending and would like to receive a detailed program, please contact Ms. Uta Ley (uley@deloitte.de). The seminar will be held in German.

## Transfer Pricing Workshop

The Deloitte Transfer Pricing Team will hold a one-day seminar with specialist workshops on recent German transfer pricing developments, including business restructurings and implications of the economic downturn.

The seminar will be held in the following locations:

Düsseldorf: 31 March 2009, Tanja Meiers, tmeiers@deloitte.de  
Hamburg: 26 February 2009, Lola Atabaeva, latabaeva@deloitte.de  
Hannover: 5 March 2009, Lola Atabaeva, latabaeva@deloitte.de  
Munich: 12 February 2009, Mira Dahmen, mdahmen@deloitte.de  
Stuttgart: 27 April 2009, Tanja Meiers, tmeiers@deloitte.de

To register or receive more information, please contact the persons mentioned above. The seminar will be held in German.

## Deloitte European Tax Briefings

Deloitte regularly hosts English language tax webcasts on current European tax developments. The tax briefings, which are free of charge, are designed to bring tax executives up to speed on European tax developments.

Upcoming tax briefings, which will take place at 8.30 am and 12.00 noon (U.K. time), will address the following:

18 February 2009: A Tax Tour of Europe: Overview of key international tax developments in Europe  
13 May 2009: An approach to analysing, setting and managing the effective tax rate

Please email [taxdeloitteeuropeanbriefing@deloitte.co.uk](mailto:taxdeloitteeuropeanbriefing@deloitte.co.uk) if you would like to attend the next tax briefing and/or would like to receive an agenda.

## Notice

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