

Corporate law change could affect validity of profit and loss transfer agreements

MOF decree gives affected taxpayers until 31 December 2021 to amend agreements.

The German Ministry of Finance (MOF) published a decree on 24 March 2021, in which the tax authorities provide guidance on the requirements related to the wording of the loss absorption provision in profit and loss transfer agreements (PLTAs) and necessary amendments to certain PLTAs concluded on or before 26 February 2013, due to recent changes in the German Stock Corporation Act. Failure to make the necessary amendments by 31 December 2021 potentially could result in the invalidation of existing tax consolidated groups.

Under German tax law, strict formal requirements must be met to form a valid tax consolidated group (Organschaft). More specifically, Germany's tax consolidated group regime is based on a legal concept and has tax, legal, and accounting consequences. One of the requirements to form a tax consolidated group is that the members must conclude a valid PLTA for at least five years. A PLTA requires a controlled subsidiary in a group to automatically transfer its annual profits to the controlling parent company; where the controlled entity has incurred losses, the controlling entity must compensate the subsidiary for those losses.

PLTAs that are concluded after 26 February 2013 must contain a provision for the absorption of losses that specifically refers to the current version of section 302 of the Stock Corporation Act, as amended from time to time (a "dynamic reference"). The PLTA must contain the correct wording for the agreement to be valid; failure to use the appropriate wording could result in invalidation of the tax consolidated group, with the result that the companies that are parties to the PLTA could be taxed on a standalone basis instead on a consolidated basis. For PLTAs concluded on or before 26 February 2013, a dynamic reference to section 302 had not been a mandatory requirement to comply with the rules for PLTAs. Following the 2013 law change, such older PLTAs could either remain in place unchanged or, based on a transition rule that provided for the option to amend the loss absorption provision, be amended to include the appropriate wording without triggering a new mandatory five-year minimum period for the PLTA (see [GTLN dated 08/13/2014](#)).

However, section 302 of the Stock Corporation Act was amended on 22 December 2020 with effect as from 1 January 2021. Following the amendment, PLTAs that do not include the dynamic reference to section 302 must be amended to remain compliant with the rules for PLTAs. The decree confirms that the German tax authorities will not consider an amendment of the loss absorption provision in such PLTAs as a conclusion of a new PLTA, if made by 31 December 2021. Consequently, a new mandatory five-year minimum period for the PLTA should not be triggered if taxpayers take action and amend existing PLTAs accordingly. An amendment of PLTAs that do not contain a dynamic reference to section 302 is not required if the PLTA is terminated during 2021.

Taxpayers should review any existing PLTAs to analyze whether a dynamic reference to section 302 of the German Stock Corporation Act is included and whether any action is required, since the invalidation of an existing tax consolidated group could have highly disadvantageous consequences.

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