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German Tax and Legal News

Guidance issued on use of OECD model commentary in double tax treaty interpretation

MOF does not follow the opinion of the federal tax court and emphasizes dynamic application of the OECD model commentary

In a decree dated 19 April 2023, the German Ministry of Finance (MOF) provided guidance on the use of the commentaries on the articles of the OECD Model Tax Convention on Income and on Capital (hereinafter referred to as the "OECD model commentary") when interpreting German double taxation treaties (DTTs). The guidance clarifies that updates to the OECD model commentary must be considered when interpreting DTTs, even if a DTT was concluded prior to such updates, unless an MOF decree or other administrative circular applies a contrary interpretation.

The guidance first reaffirms that the OECD model commentary, as well as observations of the OECD member states, must be treated as rebuttable indications of how OECD member states are interpreting DTTs based on the OECD Model Tax Convention on Income and on Capital. The guidance explains that the OECD model commentary is drafted by representatives of the OECD member states, which also are responsible for the negotiation and interpretation of their respective DTTs.

The guidance then refers to an OECD Council decision on updates to the OECD model commentary, which states if an OECD member state did not explicitly put forward a statement against its OECD Council representative's approval of an update to the OECD model commentary, such update should apply to the interpretation of the OECD member state's own DTTs. The guidance further refers to article 31 (3) (b) of the Vienna Convention on the Law of Treaties, which indicates that the OECD model commentary (including subsequent additions and clarifications) must be considered in its applicable version at the time when a DTT is interpreted and not at the time of the conclusion of the DTT.

The guidance also points out that a specific provision of the OECD model commentary is rebutted if there is a different DTT interpretation resulting from a MOF decree or other administrative circular. As such, the binding effect of MOF decrees or other administrative circulars on the tax authorities is not affected by the OECD model commentary.

The guidance rejects the view of the federal tax court in a 2018 decision (BFH I R 44/16) in which the court did not take into account updated language in the OECD model commentary that was included after the DTT that had to be interpreted was concluded. The federal tax court based its decision on constitutional grounds and ceded priority to the DTT, because the German implementation law for the DTT had been approved by the legislator and the updated language in the OECD model commentary could not take precedence over such law.

Comments

The MOF decree touches on some fundamental constitutional issues and the precedence between domestic law and supranational guidance on rules that the domestic law is based on. The MOF decree adds additional uncertainty on this matter, even though it might provide some support to taxpayers that may want to rely on beneficial guidance in the OECD model commentary that was included after the respective DTT was put in place.

The MOF decree and the 2018 federal tax court decision highlight some of the potential German constitutional issues in connection with the implementation of OECD Pillar Two into domestic tax law. Even considering the additional complexity caused by the existence of a (static) EU directive, the MOF decree and the 2018 federal tax court decision will have relevance for any future updated OECD guidance after the OECD Pillar Two domestic implementation law is in place.

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