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German Tax and Legal News

MOF publishes decree announcing not to apply favorable 2016 federal tax court decision regarding dual-consolidated loss rules

Decree outlines the MOF's opinion to apply the DCL rules on a stand-alone basis instead of a consolidated basis.

On 31 January 2022, the German Ministry of Finance (MoF) published a decree dated 14 January 2022 regarding the non-application of a federal tax court decision dated 12 October 2016 (see GTLN dated 04/04/17) related to the dual consolidated loss (DCL) rules of section 14 (1) No. 5 CITC. In its 2016 decision, the federal tax court stated that the existence of a loss for purposes of the DCL rules must be determined on a consolidated basis at the level of a German tax consolidated group and not at the level of the controlling/controlled entity on a stand-alone basis. The decree states that the MoF is not going to apply the decision of the federal tax court for cases other than the one that was decided back in 2016 and is still of the opinion that for purposes of the DCL rules the existence of a loss must be analyzed at the level of the controlling parent entity and its controlled subsidiaries on a stand-alone basis.

Germany's DCL rules were amended at the beginning of 2013 to apply to any situation in which the losses of either a group parent or a group subsidiary are taken into account in a foreign jurisdiction. Where the DCL rules apply, the relevant losses are disallowed for German tax purposes. Due to the unclear wording of the amended rules, tax practitioners have been facing significant uncertainty on how to interpret and apply the DCL rules. The 2016 federal tax court decision was greeted by tax practitioners and taxpayers as a favorable and welcome clarification.

In its 2016 decision, the federal tax court did not follow the arguments of the tax authorities. The court referred to the positive overall income of the tax consolidated group in deciding that the DCL rules were not applicable. The court did not rule on the question of whether the application of the DCL rules is limited to cases where the negative income at the level of the controlling entity is a result of losses from subsidiaries transferred under a profit and loss pooling agreement.

The decision of the MoF not to apply the 2016 federal tax court decision on a general basis and to limit its application to the case decided by the tax court more than five years after the decision is a disappointing and unfavorable development. It is unknown at this point why the tax authorities are issuing the non-application decree with such a delay. Even though such non-application decrees are not uncommon in the area of taxation, the legal grounds for non-application decrees remain uncertain. Tax court opinions generally do not have legally binding effect except for the specific case that was the basis for the decision, but it can be expected that the federal tax court would decide in the same way if the same legal question were decided again. There are no other government branches where such non-application decrees after a decision of the highest federal court was rendered exist.

The MoF decree adds to the significant uncertainty around the interpretation of the DCL rules; taxpayers should carefully assess their situation and positions taken in past tax returns. It also is unclear at this point whether the German DCL rules are in line with EU law. Even though it should still be possible to take the position that the DCL rules must be applied at the level of the tax consolidated group and to refer to the 2016 federal tax court decision, it can be expected that the tax authorities are not going to accept this position and that another tax court procedure might be required.

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