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German Tax and Legal News

New initiative launched to enact AIFM Tax Adaption Act

The AIFM Tax Adaption Act has been approved by the upper house of the German parliament (Bundesrat) and the federal government, and it is possible that the legislative process may be finalized before the end of 2013.

The AIFM (Alternative Investment Fund Managers) Tax Adaption Act is intended to make the necessary changes to the Germany's Investment Tax Act to correspond to amendments to regulatory and company law. The first initiative to enact an AIFM Tax Adaption Act earlier in 2013 was unsuccessful and was abandoned due to the federal elections on 22 September 2013. The legislative process now has been renewed by several states (North Rhine-Westphalia, Baden-Wuerttemberg, Bremen, Hamburg, Hesse, Lower-Saxony and Rhineland-Palatinate) and the upper house of parliament. The upper house of parliament (Bundesrat) approved the draft bill on 8 November and forwarded it to the federal government. The government approved the draft bill on 20 November and forwarded it to the lower house of the German parliament (Bundestag). The bill may be finalized before year end.

The changes to the Investment Tax Act in the current version of the draft bill mainly are based on the version of the bill that approved by the lower house on 16 May 2013. In addition to clearly defining the scope of application of the Investment Tax Act for foreign funds (e.g. UCITS and AIF), the draft bill provides a new model for domestic fund organization: a limited liability partnership with variable capital (an "Investment KG"). The controversial provision on lump-sum taxation of retained earnings of corporate-type investment entities is not included in the draft bill. The draft bill also would apply to Investment KGs used for pension asset pooling purposes, an issue that was at the center of the discussion between the upper and lower houses of parliament earlier this year.

The draft bill includes a provision that should serve as the legal basis for a future FATCA decree and for implementing the FATC agreement between Germany and the US into German law. Additionally, some technical amendments to reflect recently introduced rules regarding the requirements of a valid tax group are included in the draft bill.

In addition to the rules implementing the AIFM directive in German tax law and the other provisions mentioned above, the draft bill includes a provision dealing with the transfer of accruals/liabilities in an asset sale. A similar provision was included in the first draft of the bill.

Under German income tax law, certain provisions for liabilities may not be recognized in the tax balance sheet or may not be recorded in the same amount as for German GAAP purposes (e.g. pension provisions, jubilee provisions). If such provisions are transferred as a result of an asset sale to an acquirer, the fair market value (FMV) of such a provision/liability reduces the purchase price. The same rule applies to liabilities that are not shown on the seller's tax balance sheet. Based on jurisprudence of the Federal Tax Court (see BFH decision dated 14 December 2011, I R 72/10), the acquirer of the business may recognize these provisions in its tax balance sheet and may continue to record the items at subsequent balance sheet dates if such provisions are acquired.
The draft bill abandons the view of the BFH and implements the tax authorities' approach. Based on the draft rules, the seller would not be allowed to immediately deduct a built-in-loss on a provision/liability (i.e. the difference between tax book value and German GAAP value); instead, the tax deduction for such a loss would have to be spread over a 15-year period. Exceptions from this 15-year spread would apply for small and medium-sized businesses, if the whole business of a company is transferred or if the complete ownership interest held by a partner in a partnership is transferred. Immediate taxation also would apply if an employee switches to a new employer and transfers its pension claims to the new employer.

At the level of the acquirer, such provisions/liabilities would have to be recognized at

FMV/German GAAP value on the tax balance sheet reflecting the acquisition. However, on subsequent tax balance sheets such provisions/liabilities would have to be eliminated/shown at the value based on tax principles, creating a taxable gain. Such gain would then be spread over a 15-year period.

The provision for the transfer of provisions/liabilities should apply for fiscal years ending after the provision has been approved by the lower house of parliament. The draft rule, therefore, also would apply with future effect on transactions carried out in the past where the taxpayer relied on the opinion of the Federal Tax Court. For such transactions carried out before 14 December 2011, the taxable gain would be able to be spread over a 20-year period instead of a 15-year period.
