Deloitte.

URL: http://www.deloitte-tax-news.de/german-tax-legal-news/upper-house-of-parliament-provides-final-approval-of-amended-german-ettorip-rules.html

21.12.2022

German Tax and Legal News

Upper House of parliament provides final approval of amended German ETT/ORIP rules

For German registered rights, limited German tax liability is abolished with retroactive effect for 3rd party payments and for related party payments for periods after 2022 in case treaty protection is available.

The German upper house of parliament (Bundesrat) on 16 December 2022 approved the Annual Tax Act 2022 after the lower house of parliament (Bundestag) provided its approval already on 2 December 2022 (see GTLN dated 7 december 2022). The law inter alia includes a significant reduction of the scope of German extraterritorial taxation of royalty payments between nonresidents (referred to as offshore receipts in respect of intangible property or ORIP) or intellectual property (IP) transfers by nonresidents (referred to as extraterritorial capital gains taxation or ETT) where German-nexus IP exists solely as the result of the registration of rights in a German public book or register.

The bill still has to be signed by the president and then published in the federal gazette before becoming effective (which are seen as mere formalities and which is expected to happen before year-end).

The final bill that was now approved does not include any changes compared to the version that was approved by the lower house of parliament earlier in December:

- For royalties and capital gains from transactions between unrelated parties, a tax liability is eliminated retroactively. The only exception is that for periods as from 1 January 2022, the ORIP/ETT rules are still applicable in transactions between unrelated parties where the licensor or transferor is resident in a noncooperative tax jurisdiction as defined in a proposed amendment to section 10 of the Tax Haven Defense Act. The list of noncooperative tax jurisdictions mirrors the so-called EU blacklist, changes in the EU blacklist (and any future domestic blacklist) have to be constantly monitored in this regard.
- For related party transactions, taxation is generally maintained (which is significantly different from what was proposed in the original version of the bill). However, as from 1 January 2023, a tax liability no longer applies in related party transactions if a double tax treaty prevents such taxation, taking into account German anti-treaty shopping and other relevant treaty-related provisions. Furthermore, related party licensors are no longer required to obtain a royalty withholding tax exemption certificate in order to rely on such treaty protection.

Comments
The final adoption of the ORIP/ETT rules still provides considerable relief for affected taxpayers; in particular, for payments between unrelated parties. For related party payments, there still is significant relief compared to the current situation, but the final version of the bill may result in significant complexities for affected taxpayers. Such related party payments, as from 1 January 2023, still require a comprehensive analysis as to whether the recipient of a payment can rely on treaty protection. This assessment includes an analysis of the limitation on benefits treaty provision, German anti-treaty shopping rules, and domestic rules dealing with hybrid entities. Once such an analysis establishes eligibility for treaty protection, the ORIP/ETT rules should not apply.

It is important to highlight that related party transactions are going to remain taxable until the end of 2022 under current rules, so that appropriate compliance efforts must be undertaken to either obtain exemption certificates under the simplified procedure available until 30 June 2023 per administrative guidance (for treaty protected cases) or file tax returns and withholding tax declarations as soon as possible (for non-treaty protected cases). It also should be noted that the rules for German-nexus IP where rights are being exploited in a German permanent establishment or other German facility are unchanged and are not affected by the amended rules as described above.