

Global Tax Update

Germany

Deloitte Tohmatsu Tax Co.

January 2017

BEPS measures and additional relief from change-in-ownership rules approved

On December 16, 2016, the upper house of the German parliament approved two tax bills: one bill introduces measures relating to the OECD base erosion and profit shifting (BEPS) initiative, while the other affects the “change-in-ownership” rules. Both tax bills must be signed by the president and published in the federal gazette before they will enter into force.

The first tax bill includes measures based on the recommendations in the BEPS final reports and the amendments to the EU administrative cooperation directive to introduce country-by-country (CbC) reporting (for a more detailed overview of all measures see GTLN dated June 9, 2016). The CbC reporting rules will apply for fiscal years beginning after December 31, 2015 (except for the “secondary mechanism,” which will apply only for fiscal years beginning after December 31, 2016). An obligation to prepare a master file for transfer pricing documentation purposes also is introduced.

The final version of the law also includes a previously proposed “antidouble dip” rule for partnership structures (see GTLN dated September 23, 2016). Under German tax law, interest expense incurred at the level of a partner of a partnership that is linked to the partnership business (e.g. interest expense related to the acquisition of the partnership interest) is treated as a “special business expense” and is deductible for tax purposes at the level of the partnership. If the partner is a nonresident, the partner becomes subject to limited German tax liability on its income from the partnership (a partnership is transparent for German corporate income tax purposes). The interest expense that qualifies as a special business expense, therefore, is deductible for German tax purposes, but also may be simultaneously deductible for foreign tax purposes at the level of the partner. The anti-double dip rule generally disallows a deduction for German tax purposes in such cases.

The more restrictive approach to certain intellectual property structures that had been discussed by the legislature (see GTLN dated September 23, 2016) is not included in the final version of the law. Also absent from the final version is a tax treaty override provision for the application of the arm’s length principle (see GTLN dated June 9, 2016).

The second tax bill introduces an additional relief measure from the change-in-ownership rules (see GTLN dated September 6, 2016). Under a new section (section 8d) of the Corporate Income Tax Code, the general change-in-ownership rule (which may result in the forfeiture of net operating loss (NOL) carryforwards, interest carryforwards and current year losses in cases involving a direct or an indirect transfer of 50% or more of the shares in a company to one new acquirer, related parties or parties acting in concert) will not apply where the business operations of the loss corporation continue and are unchanged from the earlier of the company’s date of incorporation or the three previous fiscal years before the change in ownership took place. If these conditions are fulfilled and the taxpayer files an application to apply the rules, the regular NOL carryforward will be transformed into a “business continuance NOL carryforward” that will be available for use under the general rules for NOL carryforwards. However, it will be forfeited if one of the following events occurs:

- The business operations are discontinued either temporarily or permanently;
- The purpose of the business operations changes;
- Additional business operations are taken over;
- The company becomes a partner in a partnership;
- The company becomes a controlling parent entity in a tax consolidated group; or
- Assets are transferred to the loss company at a value below fair market value for tax purposes.

Unlike the original proposal for the business continuance NOL carryforwards rule, the final version of the rule will not apply to NOL carryforwards that result from discontinued or dormant business operations of the company. The rule also will not apply if the company was a controlling entity in a tax group or a partner in a partnership during the three-year monitoring period before the “harmful” ownership change. Taxpayers that have been denied input VAT deductions as a result of incorrect or incomplete VAT invoices and that have paid interest relating to such claims should assess whether there is a possibility to challenge the disallowance and the interest charge.

The new relief measure will be applicable retroactively for ownership transfers that take place after December 31, 2015, and will apply for both corporate income tax and trade tax purposes.

The government still has not issued a draft law regarding the long-awaited anti-hybrid rule (which was proposed in 2014, but has not been passed; for prior coverage, see GTLN dated March 3, 2015). Whether a first draft can be expected in 2017 likely will depend on the progress on the proposed amendments to the EU anti-tax avoidance directive with regard to third country financing arrangements and on the German federal elections that will take place in September 2017.

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