Deloitte.

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ICEbreakers: Unlocking Germany

Hot topics

- **Withholding tax on interest:** Germany generally does not levy withholding tax on interest payments (with limited exceptions).
- **Debt-pushdown considerations:** Debt push-downs may be possible within the limits of the interest deduction limitation rule.
- **Consequences of indirect share transfer:** An indirect share transfer in a German entity could affect German tax attributes and trigger real estate transfer tax (RETT).
- **Trade tax:** The trade tax rate typically is around 15%, but can be as low as 7%.
- **Increased compliance burden:** There are increased requirements to qualify for a reduced or zero withholding tax rate on dividends and royalties under Germany's tax treaties. Strict anti-treaty shopping rules may affect the ability of a taxpayer to qualify for the beneficial rates.
- **Participation exemption for dividends:** Hybrid instruments that provide for a tax deduction at the level of the payer do not qualify for the 95% participation exemption for dividends.

Other developments

- The Constitutional Court has held that the **change-in-ownership rules** that result in the forfeiture of tax losses where there is a direct or indirect transfer of between 25% and 50% of a company are unconstitutional and must be amended with retroactive effect for the period 2008 to 2015. The constitutionality of ownership changes of more than 50% is pending before the court.
- The **tax policy** of the new government does not specifically mention any major tax reform projects or changes in tax rates—the focus will be on combatting tax evasion, harmful tax practices and unfair tax competition.
- The tax authorities have issued guidance on the (partial) incompatibility of the domestic **anti-treaty shopping rules** with EU law and described how they intend to apply the rule in the future.
- The implementation of the results of the BEPS project and the EU ATAD I and II (with potential retroactive effect), including a long-awaited **anti-hybrid rule**, is expected in 2018.
- Germany is one of the countries that signed the OECD **multilateral instrument** on June 7, 2017. As a result of the MLI, the application of some of Germany's tax treaties will change in the future.
- Based on a policy change at the level of the federal tax authorities, the 0% and 5% dividend withholding tax rates under the Germany-US tax treaty may not be available where a **limited liability company** qualifies as a flow-through entity/partnership for US tax purposes or an S corporation in the corporate chain above a German corporation. This policy change should apply for dividends paid after June 30, 2013.

Legislative updates

- The 2016 Act on the Improvement of Corporate Loss Utilization introduced an additional opportunity for taxpayers to obtain **relief from the general change-in-ownership rules**. A taxpayer can avoid a forfeiture of tax losses if it can show, inter alia, that the exact same business activities are carried on after the change in ownership ("business continuation losses.") This rule applies retroactively as from January 1, 2016. The pending cases in front of the Constitutional Court should not impact the validity of the change-in-ownership rules for ownership changes after December 31, 2015.
- A law introduced in July 2017 limits the deductibility of certain **related party royalty payments** for payments made after December 31, 2017. The law applies to royalty payments that result in the "low taxation" of the royalty income at the level of the recipient due to the application of a preferential tax regime/intellectual property regime in situations where the regime is not based on the "nexus approach" described in action 5 of the OECD BEPS project. The law contains several new technical terms and could be broadly applied by the German tax authorities.

Contact

Andreas Maywald
Client Service Executive
Tel: +1 212 436 7487
Email: anmaywald@deloitte.com

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