Real Estate Tax Services News

Keeping you informed

Germany – December 2019

German Federal Ministry of Finance circulates draft bill on implementation of ATAD in Germany

In brief

The draft bill circulated by the German Federal Ministry of Finance on 10 December 2019 for consultation purposes provides for the implementation of the EU Anti-Tax Avoidance Directive (ATAD) in Germany. The draft bill in particular includes (i) the implementation of anti-hybrid rules into German tax law as well as (ii) the amendment of existing German 'controlled foreign company' (CFC) rules.

Implementation of Council Directive (EU)

The German Federal Ministry of Finance has circulated a draft bill for consultation purposes on 10 December 2019 on the implementation of Council Directive (EU) 2016/1164 of 12 July 2016 (ATAD) as amended by Council Directive (EU) 2017/952 of 29 May 2017 (ATAD II).

In the past months, several other EU Member States have issued draft legislation or have already passed their ATAD laws as well.

The German draft bill particularly includes (i) the implementation of anti-hybrid rules into German tax law and (ii) the amendment of existing German CFC rules.

Draft anti-hybrid rules

The draft anti-hybrid rules seek to particularly prevent situations that give rise to a hybrid mismatch outcome, including a double deduction outcome and a deduction without inclusion outcome.

The German draft anti-hybrid rules have generally been designed to apply to arrangements between related parties respectively to arrangements affecting a company and its permanent establishment. However, anti-hybrid rules can also apply for certain "unrelated" party situations particularly in cases of structured arrangements.

Based on the draft bill, the anti-hybrid rules shall enter into force as of 1 January 2020.

Already existing anti-hybrid rules under current German tax law (eg, on double deduction in certain partnership and income tax group structures) are not abolished by the draft bill. Hence, those rules still need to be considered.

Draft changes to existing German CFC rules

The draft changes to existing German CFC rules as included in the draft bill include comprehensive changes with an extended scope. While the low taxation threshold remains at 25%, the definition of active income is amended (eg, regarding dividends, capital gains and reorganisations) as well the prerequisites for benefitting from the substance-based Cadbury Schweppes test.

Based on the draft bill, amendments to German CFC rules shall generally enter into force as of 1 January 2020, however, complex effective date and transition rules need to be considered.

Other draft changes

The draft bill includes further draft changes including far-reaching changes to transfer pricing rules. Within those changes a proposed regulation limiting the deduction of interest expense is foreseen, if certain legally defined requirements to prove arm's length settlement of the underlying loans are not met. The provision is applicable from 1 January 2020 onwards.

Also, the existing German exit taxation rules as well as administrative rules are amended.

Legislative process

The draft bill has been circulated by the German Federal Ministry of Finance on 10 December 2019 for consultation purposes and is planned to be approved by the Cabinet of the German Federal Government on 18 December 2019.

Our view

The draft legislation on the implementation of ATAD in Germany needs to be considered carefully by all German and non-German taxpayers with German real estate investments or asset management interests, particularly if being part of multinational groups of companies or similar fund managers. Therefore, taxpayers should consider whether and how these rules might impact them. Also, given that it is currently unclear whether the draft version of the rules is subject to (significant) change, the legislative process should be closely monitored.

Contacts

Uwe Stoschek
Global Real Estate Tax Leader
+49 30 2636-5286
uwe.stoschek@pwc.com

Jeroen Elink Schuurman
EMEA Real Estate Tax Leader
+31 88 792-6428
jeroen.elink.schuurman@pwc.com

Germany

Uwe Stoschek
National Real Estate Tax Leader
+49 30 2636-5286
uwe.stoschek@pwc.com

Sven Behrends
Tax Partner, Munich
+49 89 5790-5887
sven.behrends@pwc.com

Helge Dammann
Tax Partner, Berlin
+49 30 2636-5222
helge.dammann@pwc.com

Jana Greiser
Tax Director, Berlin
+49 30 2636-5067
jana.greiser@pwc.com

Marcel Mies
Tax Partner, Dusseldorf
+49 211 981-2294
marcel.mies@pwc.com

Dr Michael A Müller
Tax Partner, Berlin
+49 30 2636-5572
mueller.michael@pwc.com

Josip Oreskovic-Rips
Tax Partner, Frankfurt am Main
+49 69 9585-6255
josip.oreskovic-rips@pwc.com

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