

Real Estate Tax Services News

Keeping you informed

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German draft bill for a “Tax Haven Defence Act” published

In brief

On 15 February 2021, the German Federal Ministry of Finance has published a draft bill for a so-called "Tax Haven Defence Act", which provides for the implementation of defence measures in regard to business relationships or shareholdings with reference to certain non-cooperative states.

In detail

The purpose of this draft bill is to implement the conclusions of the Council of the European Union on Annex I of the EU list of non-cooperative countries and territories for tax purposes (so-called "blacklist") into German law as well as the measures negotiated and approved by the Council and the Code of Conduct Group on Business Taxation.

Key component of the draft bill is the introduction of a "Law on the Defence against Tax Avoidance and Unfair Tax Competition" (*Gesetz zur Abwehr von Steuervermeidung und unfairem Steuerwettbewerb*, hereinafter referred to as "the Act").

Scope

The Act shall apply to natural persons, corporations, associations of persons (eg, cooperatives) and trusts subject to German resident or non-resident taxation.

According to the materials of the draft bill, partnerships shall also be within the scope in some cases.

In principle, the Act shall apply to all taxes – including tax refunds – that are regulated by German Federal law or European Union law and administered by Federal or State tax authorities or municipalities. VAT (including import VAT), import and export duties and excise duties are explicitly excluded from the scope.

The provisions of the Act shall apply as a tax treaty override and shall in principle supersede the German Fiscal Code and other national tax law.

Non-cooperative states

The defence measures against tax avoidance and unfair tax competition under the Act shall apply to specific, non-cooperative states and territories only.

A state shall be considered non-cooperative if all of the following conditions are met:

1. A state that is listed on the so-called EU "blacklist" which is amended from time to time and published in the Official Journal of the European Union (note that the last published list as of **7 October 2020** still includes Barbados and not Domenica) – see current status as of **22 February 2021**: American Samoa, Anguilla, Domenica, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, the U.S. Virgin Islands, Vanuatu and the Seychelles), and
2. this state
 - (i) does not ensure sufficient transparency in tax matters,
 - (ii) engages in unfair tax competition, or
 - (iii) has not committed itself to implementing the minimum standards of the OECD/G20 BEPS framework against base erosion and profit shifting, and
3. the non-cooperative state in the meaning mentioned above is named as being non-cooperative on an envisaged legislative decree issued by the German Federal Ministry of Finance with the consent of the German Federal Council.

Envisaged defence measures

The Act contains various defence measures that shall apply with respect to certain business relationships in place with non-cooperative states. The measures shall apply to inbound as well as to outbound cases. The materials state that only one of the defence measures shall apply as reflected in the following rules.

1. Non-deduction of business expenses

Expenses from business transactions with individuals or corporations resident in non-cooperative states should generally be not deductible for tax purposes (exception: the income corresponding to the expenses is subject to German (non-)resident taxation).

2. Enhanced controlled foreign company (CFC) rules

German CFC rules are enhanced also to active income (irrespective of the low tax threshold) of corporations resident in a non-cooperative state. In case active income is received and the aforementioned measure 1. is applicable, the enhanced CFC rules should not apply.

3. Restriction of relief from withholding tax (WHT) and extension of non-resident taxation

Notwithstanding Germany's anti-treaty shopping rules, no tax refund or tax exemption of WHT shall be granted if more than 10% of the shares in a foreign company are directly or indirectly held by individuals resident in a non-cooperative tax jurisdiction.

Furthermore, if individuals or corporations are resident in a non-cooperative tax jurisdiction and generate income from financing activities/insurance or reinsurance services/further services/trade in goods or services, they shall be subject to German non-resident taxation. Such non-resident income shall be subject to 15.825% WHT (including solidarity surcharge).

4. Restriction of the domestic participation exemption

Dividends and capital gains shall not be subject to the domestic participation exemption if the distributing/transferred corporation is resident in a non-cooperative tax jurisdiction. An exception applies if the aforementioned measures under 1. or 3. applies.

Extended obligations to cooperate

In addition to the domestic (general) obligations to cooperate, the draft bill provides for increased obligations to cooperate for business transactions within the meaning of the Act.

Envisaged timing of application

The provisions of the Act shall apply as of 1 January 2022.

However, the Act shall apply as of 1 January 2023 with respect to states that were not yet named on the EU's so-called "blacklist" as of 1 January 2021.

The draft bill also includes further details on the impact of changes to the "blacklist".

Amendment of the German Fiscal Code

In case the extended obligations to cooperate are not met, the German tax administration shall impose penalties.

Our view

The draft bill implements the EU agenda on the subject matter and increases pressure to stay away from listed tax havens. Further developments of the legislative process should be monitored.

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