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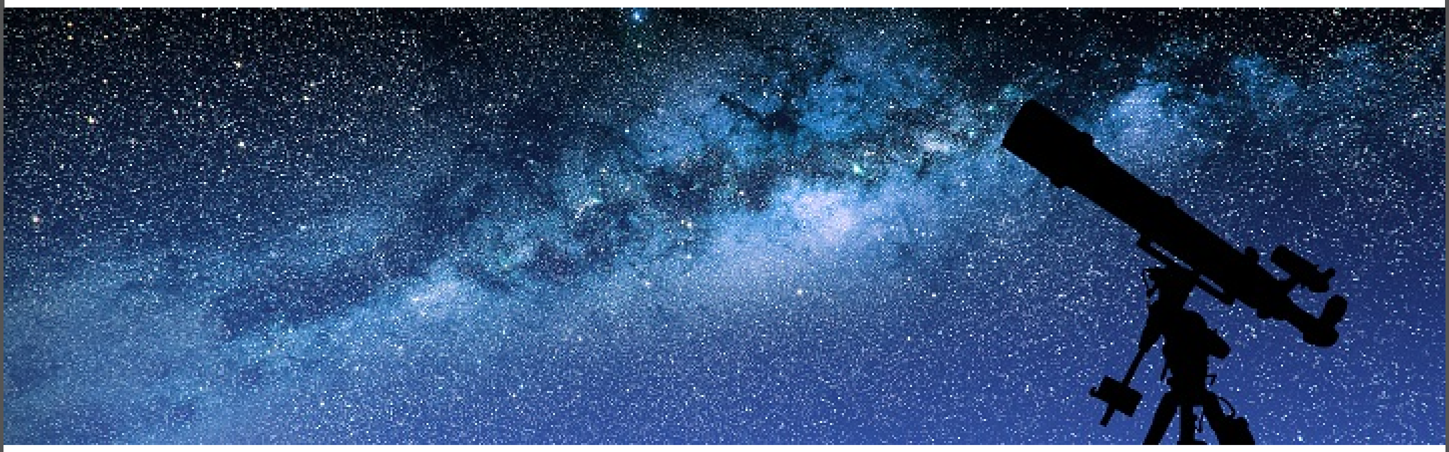

Germany's draft tax law includes CbC measures

Global Transfer Pricing Alert 2016-019

Germany's Ministry of Finance on June 1 issued a draft tax law that includes measures based on the recommendations in the OECD's final reports on the base erosion and profit shifting (BEPS) initiative and the amendments to the EU administrative cooperation directive to introduce country-by-country (CbC) reporting.

The draft law – *Draft law on the implementation of amendments to the EU Mutual Assistance Directive and other measures against base erosion and profit shifting* -- also includes non-BEPS-related measures in response to judicial developments in cases where Germany's Federal Tax Court (BFH) decision went against the views of the tax authorities. The measures in the draft law generally were anticipated.

The draft law also would implement automatic information exchange procedures regarding advance cross-border tax rulings, to comply with a new EU directive (and would introduce a six-year retention period for information required to be exchanged under the Foreign Account Tax Compliance Act Agreement with the United States).

The CbC reporting rules would apply for fiscal years beginning after December 31, 2015 (except for the "secondary mechanism," which would apply only for fiscal years beginning after December 31, 2016).

Proposed changes

CbC reporting: The proposed CbC rules would require multinational companies with consolidated group turnover of EUR 750 million or more to file a CbC report. The requirements for the report would be based on the recommendations under Action13 of the BEPS initiative and the EU CbC directive.

In line with the report on Action 13, the draft law would require a CbC report consisting of three parts: (i) an overview of the aggregate allocation of income, taxes, and business activities (including capital, assets, and employees) to each tax jurisdiction; (ii) a list of all "constituent entities" of the multinational group included in the aggregation for each tax jurisdiction; and (iii) additional information that is necessary to understand the information provided for the first two parts. The draft law also includes rules for the determination of a "surrogate parent entity" and a "local entity," for purposes of the CbC reporting rules. Certain information regarding an entity's status as an ultimate parent entity, surrogate parent entity, or local entity would have to be included in the annual tax return of the respective entity.

CbC reports would have to be filed electronically with the federal tax office no later than 12 months after the end of the relevant fiscal year. The draft law provides for a 15-year retention period for the data, which the federal tax authorities would have to comply with.

The draft law also would introduce a mechanism for the automatic exchange of CbC reports between governments.

Master file reporting obligation: The OECD recommendations under BEPS action 13 include the introduction of master file and local file reporting requirements for transfer pricing documentation purposes. An obligation for companies to prepare a local file already is part of German tax law in some cases; the draft law proposes only minor changes.

The draft law would introduce a new obligation to prepare a master file for certain German taxpayers that are part of a multinational group with consolidated turnover of at least EUR 100 million in the preceding year. However, as with the local file, the master file would have to be presented only upon request from the tax authorities in case of a tax audit. The information would have to be provided to the tax authorities within 60 days of the request (30 days for extraordinary business transactions).

Treaty override provision for the application of the arm’s length principle: In 2014, the BFH held that Germany’s tax treaties can limit Germany’s taxing rights based on section 1(1) of the Foreign Tax Act (FTA) if the treaty contains a provision equivalent to the associated enterprises article (article 9) in the OECD model treaty and if the prices paid between the entities involved are at arm’s length. The draft law proposes to amend section 1(1) of the FTA to eliminate this limitation. Germany’s constitutional court recently held that the legislature can enact tax treaty override provisions that aim to secure Germany’s taxation rights.

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