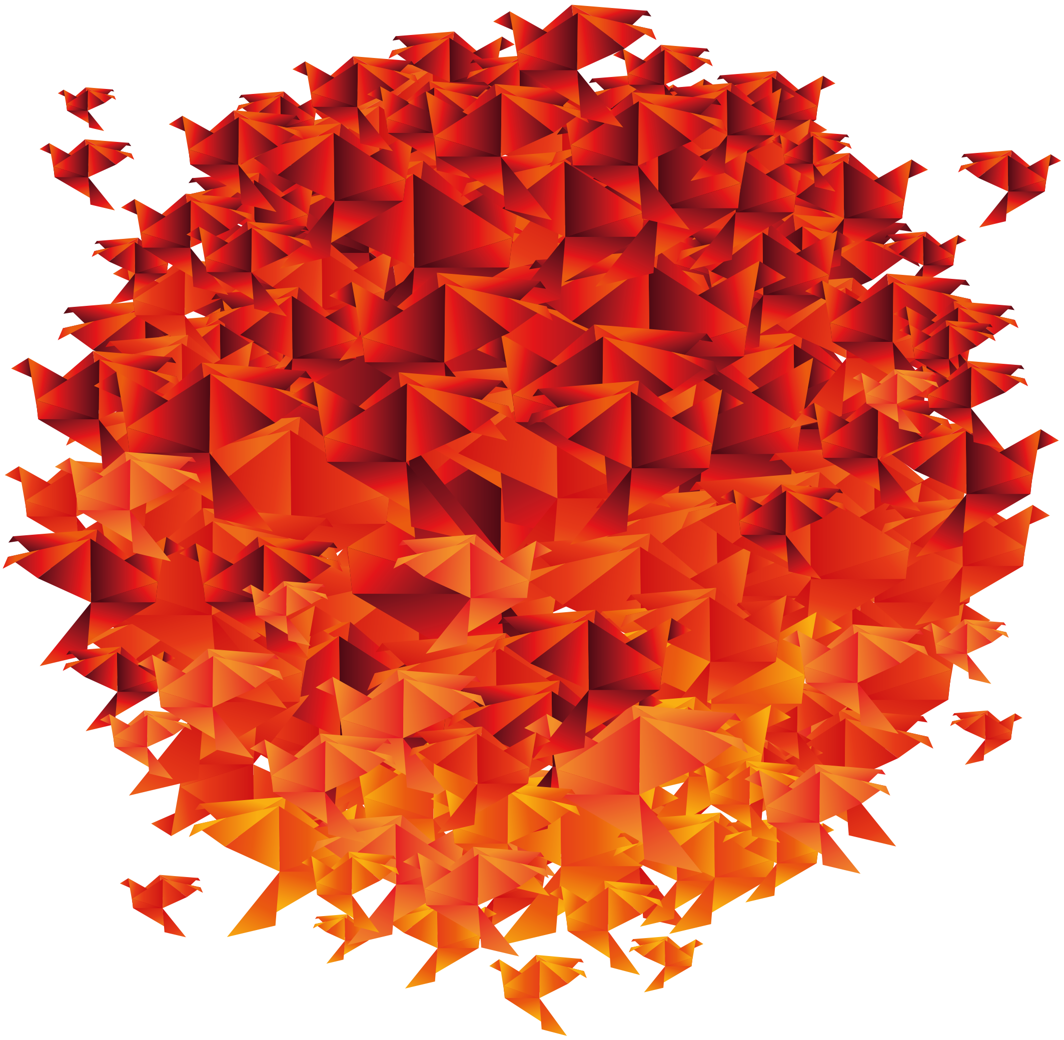

Monthly German tax news update

[Same content as August 2024 German tax news update – now English Newsletter link available] German Federal Ministry of Finance (BMF) Draft on Transfer Pricing Administrative Principles 2023

2024年8月14日、ドイツ連邦財務省は、2023年の移転価格管理原則を補完する草案を発表した。この草案は、新たに導入されたグループ内融資取引に関する規定の適用における、明確なルールを含んでいるが、まだ不明瞭な点を多く残している。納税者は、特に既存のローンに対する影響を検討し、2024年1月1日より前に締結されたローンに遡及しても新ルール適用される可能性に留意する必要がある。

- On 14 August 2024, the German Federal Ministry of Finance (BMF) released a draft amendments of the 2023 Transfer Pricing Administrative Principles with regard to the intra-group financing transactions pursuant to Sections 1 (3d) and 1 (3e) of the German Foreign Tax Act (AStG) introduced under the Growth Opportunities Act.

- **Key Aspects inter alia include:**
  - **Debt capacity and financing needs:** The draft outlines how taxpayers must demonstrate their ability to service debt over its entire term and justify the economic necessity of financing. In order to substantiate the existence of the requirements, the criteria must be met with a high degree of probability (cumulative). To substantiate this, the taxpayer must show (e.g., by means of corresponding forecast calculations) that the debt service can be (or will be) provided and for what purpose the funds were raised or how the capital will be used.

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- **Arm's length interest rates:** According to the wording of the law, the rating of the corporate group (group rating) is generally used to determine an arm's length interest rate. In addition, it is possible to apply a rating derived from the group rating for the borrower if the taxpayer proves that this rating complies with the arm's length principle. For the determination of the applicable group rating, the draft defines for the first time a corresponding order of priority. If the group does not have a rating, the group rating can also be derived from the group's external financing costs vis-à-vis third parties at the time the loan is granted for reasons of simplification. In case of a derivation of a rating from the group rating, the creditworthiness assessment including the (customary) qualitative and quantitative factors as well as the consideration of a possible group backing must be presented.
- **Low-function and low-risk financing services:** The classification of intra-group financing as low-risk services and the application of the arm's length principle are further clarified. The draft clarifies that the arm's length price for financing relationships is generally to be determined primarily using the price comparison method, whereby the role of the financing company generally has no influence on the choice of method and price determination.

- A positive remark is that the draft clearly is based on Chapter X of the OECD TP Guidelines and also refers to it. While the draft offers some expected clarifications, its effectiveness in easing compliance and resolving audit disputes remains uncertain. The potential retroactive application to loans made before 1 January 2024, remains particularly unclear.

- Taxpayers are encouraged to review the impact of these changes, especially concerning existing loans.
Link

Ministry of Finance publishes updated decree related to incongruent dividend distributions – the updated decree incorporates recent taxpayer favorable jurisprudence from the federal tax court

ドイツ財務省、不均衡配当に関する最新の通達を発表

2024年9月4日、ドイツ財務省は、不均衡配当の税務上の認識に関する新たな通達を発表した。この通達は、2021年および2022年の連邦税裁判所の判決に基づき、GmbH（有限責任会社）およびAG（株式会社）における不均衡配当の取り扱いを明確にしている。

主な内容:

AGに関するルール: 配当が定款に明記されている場合のみ税務上認められ、一般的な株主決議や逃げ道条項は認められない。

GmbHに関するルール: GmbHの場合は、株主全員の承認がある場合や一時的な決議に基づく場合など、不均衡配当が認められるケースがあり、通達においては4つのケースに基づき説明されている。

- On 4 September 2024, the German Ministry of Finance (MOF) issued an updated decree on the tax recognition of disproportionate (incongruent) dividend distributions. The updated decree incorporates taxpayer friendly decisions of the federal tax court from 2021 and 2022, providing more clarity on how such distributions are treated for both limited liability companies (GmbHs) and stock corporations (AGs).

- For AGs, the tax authorities will recognize disproportionate dividend distributions only if explicitly stated in the company's articles of association; a disproportionate profit distribution that is based on a general escape clause in the articles or a shareholder resolution will not be recognized by the tax authorities in the case of AGs.

- For GmbHs, the decree offers four scenarios under which disproportionate distributions can be recognized, including those that may deviate from the articles if they are approved by all shareholders or based on one-time resolutions.

- **The treatment of limited liability companies (GmbHs) is more nuanced. The decree distinguishes between four scenarios:**
  - **Scenario 1:** A disproportionate dividend distribution will generally be recognized for tax purposes if the articles of association explicitly provide for such distributions.
  - **Scenario 2:** If the articles include an escape clause that allows for disproportionate dividend distributions, these will also be recognized by the tax authorities.
  - **Scenario 3:** In response to a 2022 Federal Tax Court decision, the MOF will now recognize disproportionate dividend distributions where a shareholder resolution having its one-time effect is passed with the approval of all shareholders, even if it violates the articles.
  - **Scenario 4:** Reflecting a 2021 court ruling, the decree also recognizes temporary disproportionate distributions, often referred to as "split dividend distributions." Here, a shareholder resolution can be recognized for tax purposes if the majority shareholder's profit share is retained within the company while the minority shareholders receive their profit distributions.

- These revisions apply to all open cases and aim to align the tax authorities' stance with the federal court's rulings. The updated decree brings welcome clarity for taxpayers, particularly by confirming that, as long as a disproportionate dividend distribution is legally valid, it will generally be recognized for tax purposes.
Link

Federal Fiscal Court: Qualification of a deemed distribution due to cost savings

連邦財務裁判所: 親会社側のコスト削減による隠れた利益分配配当の認定

2024年5月22日、ドイツ連邦財務裁判所は、親会社のコスト削減に関連する隠れた利益配当について判決を下した。本ケースは、米国親会社Xの指示でGmbHが契約を履行せず、それによる第三者への損害賠償の支払いを隠れた利益配当と見なすかが争点となった。

- On 22 May 2024 (published 12 September), the German Federal Fiscal Court (BFH) ruled on the deemed distributions related to cost savings for the shareholder. The case involved a GmbH that was part of a corporate group with a U.S.-based parent company, X, and a contract with a third party Venezuelan company. Due to a U.S. embargo on Venezuela, the parent company instructed the GmbH not to carry out the orders placed by the Venezuelan company, which led to a legal dispute and the GmbH to pay damages. The tax office considered the payment of damages as a deemed dividend, as the decision to cancel the contract solely benefited the parent company.

- **Key Aspects inter alia include:**
  - **Deemed dividend due to prevented increase in assets:** The BFH confirmed that a deemed distribution could result from the GmbH preventing an increase in its assets by covering expenses that should have been borne by the parent company. This concept applies when the shareholder benefits by avoiding costs that the company assumes on their behalf.
  - **No deemed dividend for the reduction of asset:** The BFH clarified that the payment of legal costs and damages does not constitute a deemed dividend as the GmbH has made payment to a third party based on its legal obligation.
  - **Shareholder cost savings:** The BFH highlighted that a shareholder benefits from a deemed dividend when the company bears expenses the shareholder would otherwise face. The saved costs might come from a lack of compensation agreements or other obligations typically required in arm's length transactions.
  - **Further investigation needed:** The case was sent back to the lower court to determine whether the expense was primarily caused by the corporate relationship between the GmbH and the parent company.

- Taxpayers are advised to carefully assess the tax consequences of internal corporate directives that shift costs between group entities, as they may lead to unintended tax liabilities.
  Link (only in German language)

Federal Fiscal Court: Preservation of corporate identity for a corporation in the transfer of trade tax loss carryforwards through a merger

連邦財務裁判所: 営業税繰越欠損金の引き継ぎにおける、法人のアイデンティティ維持に関する判決

ドイツ連邦財務裁判所は、パートナーシップから合併により引き継いだ営業税繰越欠損金について、法人が当該事業を売却した後でも引き続き利用できると判断した。

- The German Federal Fiscal Court (BFH) ruled on the preservation of corporate identity of a corporation in relation to trade tax loss carryforwards transferred from a partnership through a merger. The court held that the loss carryforward remains available at the corporation even after the sale the business that generated the loss.

- **Key Aspects inter alia include:**
  - **Corporate identity preservation:** The BFH ruled that the corporation retains its corporate identity thus the trade tax loss carryforward transferred from a partnership is not impacted, even if it disposes the business that caused the loss via an asset deal.
  - **No cessation of trade or business:** The BFH clarified that the sale of the business does not constitute a cessation of operations for the capital company, which continues to be considered a unified trade or business under Section 2(2) German Trade Tax Act.
  - **No legal basis for the forfeiture of the trade tax loss carryforward:** The BFH emphasized that there is no provision in the trade tax law that would cause the loss carryforward to be forfeited due to the sale of a business and not the entire business.
  - **No exceptional treatment for the preceding merger:** The court reaffirmed that no exceptions to the principle of corporate identity apply to the corporation even the preceding merger. The loss carryforward remains available as long as the company itself continues to operate.
  Link (only in German language)

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