



Monthly German tax news update

Ministry of Finance publishes draft legislation to implement the EU Pillar Two Global Minimum Taxation Directive into domestic German tax law. Draft bill is in line with requirements as described in the EU directive, introduces qualified domestic minimum top-up tax (QDMTT).

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- On 20 March 2023, the German Ministry of Finance published draft legislation on the domestic implementation of the EU directive on ensuring a global minimum level of taxation for multinational enterprise (MNE) groups and large-scale domestic groups in the EU ("Pillar Two" directive).
- Germany is among the first EU member states to publish draft legislation to implement into domestic law the Pillar Two directive. As expected, the draft legislation closely reflects the Pillar Two directive,

which is based on the Pillar Two Model Rules ("Model Rules") of the OECD/G20 Inclusive Framework on BEPS (Inclusive Framework). The Pillar Two directive contains certain adjustments from the Model Rules to ensure conformity with primary EU law (i.e., domestic groups also being in-scope). ➤

- The draft legislation contains an income inclusion rule (IIR) (Primärer ergänzungssteuer), an undertaxed profits rule (UTPR) (Sekundärer ergänzungssteuer), and a qualified domestic minimum top-up tax (QDMTT) (nationale Ergänzungssteuer).
- The IIR and QDMTT are expected to apply for fiscal years starting after 30 December 2023. The UTPR is expected to apply for fiscal years starting after 30 December 2024.
- Comments to the draft legislation may be submitted until 21 April 2023. It is expected that the draft legislation will be approved by the government shortly afterwards, and then officially introduced into the legislative process so that the rules can be finalized and be approved by the upper and lower houses of parliament prior to the end of 2023.

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EU adds Russia to the list of non-cooperative jurisdictions. The addition of Russia might trigger significant German tax consequences starting from 2024.

EUは課税非協力的地域の一覧にロシアを加えました。当該措置は2024年以降に開始する事業年度においてドイツ税務上重要な影響を及ぼす可能性があります。

- On 14 February 2023, the EU added four new jurisdictions to annex I of the list of noncooperative jurisdictions for tax purposes: British Virgin Islands, Costa Rica, Marshall Islands, and Russia. Since the EU list was first published in December 2017, it has been subject to several updates, and annex I now consists of the following 16 jurisdictions: American Samoa, Anguilla, Bahamas, British Virgin Islands, Costa Rica, Fiji, Guam, Marshall Islands, Palau, Panama, Russia, Samoa, Trinidad and Tobago, Turks and Caicos Islands, US Virgin Islands, and Vanuatu.
- The EU list functions as a tool to improve tax good governance globally and to promote the EU's tax governance standards and values to other jurisdictions. Jurisdictions are assessed against criteria that relate to transparency, fair taxation, and implementation of the OECD's BEPS measures.
- At the EU level, member states must implement into domestic law various tax and non-tax measures regarding jurisdictions included on annex I. The German Tax Haven Defense Act, which was implemented in 2021, is designed to impose specific penalties on jurisdictions included on annex I. When jurisdictions are newly added to annex I, the German list of noncooperative jurisdictions is updated (usually on an annual basis) for purposes of the Tax Haven Defense Act. The penalties apply to such jurisdictions generally in the year following the year the German list is updated (although some penalties apply in the third and fourth years following the year the German list is updated). As such, it is expected that the next update (likely at the end of 2023) will include the four jurisdictions that have been newly added to annex I, and the penalties will apply to these jurisdictions generally as from 2024.
- Taxpayers should carefully review the impact of the updated EU list on their business relationships with entities residing in jurisdictions included on annex I and determine whether any action should be taken. Further developments regarding the EU list also should be monitored.

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Lower tax court rules that dividends paid to US S-Corporation qualify for a reduced 5% or 0% WHT under the Germany-US DTT. Lower tax court decision confirms 2013 federal tax court decision and rejects tax authorities' view that law change has changed the treatment of S-Corporations.

下級裁判所は米国のS Corporationに支払われる配当はドイツ・米国の租税条約により、源泉税の軽減税率5%又は0%が適用されると判断した。ただし、当該判断は控訴されると見込まれており、今後の状況を引き続き注視する必要があると考えられる。

- On 10 March 2023, the lower tax court of Cologne published a long-awaited decision dated 16 November 2022. In the case at hand, a German GmbH paid a dividend to its 100% shareholder, a US resident corporation that elected to be treated as a transparent entity for US federal income tax purposes under subchapter S of the US Internal Revenue Code ("S corporation"). The income of the S corporation was taxed for US federal income tax purposes only at the level of the shareholders. The shareholders were US tax resident individuals and US trusts with US tax resident individuals as beneficiaries.

- The German GmbH withheld tax at a rate of 26.375% on the dividend payment to the S corporation. The S corporation applied to the German tax authorities for a 0% WHT rate based on article 10 (3) (a) (bb) of the DTT (for certain companies holding at least an 80% interest in the company paying the dividends) and requested a refund of the tax withheld. The tax authorities denied the request but granted a rate reduction to 15% pursuant to article 10 (2) (b) of the DTT, which was based on the individual shareholders of the S corporation receiving the dividends. The tax authorities argued that section 50d (1) sentence 11 ITC (which states that only the person to whom the tax law of its country of residence allocates the income is entitled to claim a refund of WHT) overrides the DTT and requires the tax authorities to determine treaty eligibility for a transparent entity at the level of the shareholders that are ultimately subject to tax for local country tax purposes.
- The lower tax court of Cologne ruled that the dividends paid to the S corporation by the German GmbH were subject to WHT at a 0% rate based on articles 1(7) and 10 (3) (a) (bb) of the DTT. The lower tax court's ruling followed and confirmed a 2013 federal tax court decision that the WHT provisions of the DTT applied to a US S corporation even though it was transparent for US federal income tax purposes.
- It is widely expected that the tax authorities will appeal the decision of the lower tax court and the case ultimately will be decided by the federal tax court. Affected taxpayers and US investors with pending WHT refund applications likely must wait for another few years until a final decision of the federal tax court is available.

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