

Draft law would mitigate issues related to German extraterritorial taxation

Draft legislation proposed by Germany's Ministry of Finance (MOF) on 19 November 2020 would mitigate issues related to the application of German extraterritorial taxation in "ETT and ORIP situations," as further defined below. The proposed legislation is part of a broader package addressing the German withholding tax regime in general.

A limited German tax liability may apply in cases where German nexus intellectual property (German nexus IP) is being transferred or where royalty payments between two non-German entities are being made with regard to German nexus IP. German nexus IP is defined as either (i) rights that are registered in a German public register, or (ii) IP that is being exploited in a German permanent establishment or other German facility. The draft law proposal would remove the first part of this definition, i.e., IP that is being exploited in a German permanent establishment or other German facility would still give rise to German extraterritorial taxation but rights registered in a German public register no longer would. According to the legislative material, the current provision, which was enacted in 1925, was not intended to apply to cases where the registration in a German public register is the only German nexus.

The provision in the draft law proposal would apply to all past, current, and future situations and would apply both to German nexus IP transfer situations (ETT) as well as to royalty payments with regard to German nexus IP (ORIP). Based on the wording of the current draft proposal, the rule change would apply to all open cases and regardless of where the parties to the transaction or license agreement are resident.

At this time, it is uncertain whether the legislation will be enacted and, given that it is part of a broader package, it is likely that nothing will be finally enacted until 2021 at the earliest.

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