Deloitte.

URL: http://mobile.deloitte-tax-news.de/german-tax-legal-news/draft-tax-law-includes-beps-measures-incl-country-by-country-reporting-requirements.html

09.06.2016

German Tax and Legal News

Draft tax law includes BEPS measures incl. country-by-country reporting requirements

Germany to introduce CbC reporting requirements and obligation to prepare master file

On 1 June 2016, Germany's Ministry of Finance issued a draft tax law that includes certain measures based on the recommendations in the final reports issued under the OECD 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 also includes certain 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.

Notable proposed measures are discussed below; additionally, the draft law 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 US.

With the exception of the proposed CbC reporting rules, the proposed rules are expected to apply as from 1 January 2017; the CbC reporting rules would apply for fiscal years (FYs) beginning after 31 December 2015 (except for the "secondary mechanism," which would apply only for FYs beginning after 31 December 2016).

Details on 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 FY. The draft law provides for a 15-year retention period for the data which has to be fulfilled by the federal tax authorities.

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 the German tax law in certain cases; only minor changes are proposed by the draft law. 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 prepared only upon a request from the tax authorities in the case of a tax audit. The information would have to be provided to the tax authorities within a 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 (for prior coverage, see Deloitte Tax-News dated March 23, 2015).

Trade tax on income subject to controlled foreign company (CFC) rules: In 2015, the BFH held that passive income of a wholly-owned, low-taxed foreign subsidiary that is subject to income tax under the German CFC rules is not subject to German trade tax. The BFH concluded that this CFC income constitutes deemed income of a foreign permanent establishment for German tax purposes and, thus, is deductible from the trade tax base (for prior coverage, see Deloitte Tax-News dated May 19, 2015). The proposed amendment of the trade tax rules by the draft law would reverse the BFH's decision. In addition, another change would only allow exclusion of foreign passive income of foreign permanent establishments for trade tax purposes, if the foreign permanent establishment (or partnership) is situated in the EU and has sufficient substance. This change is expected to restrict the use of certain IP structures where license income may not be subject to taxation for trade tax purposes.

Trade tax on certain dividends distributed by a nonresident subsidiary: In 2014, the BFH held that dividends distributed by a nonresident subsidiary to a German parent company that is a controlled entity in a German tax group are fully exempt from trade tax (not merely 95% tax exempt; for prior coverage, see Deloitte Tax-News dated March 24, 2015). The draft tax law includes an amendment to the trade tax rules that would reestablish the 95% participation exemption for such dividends.

Participation exemption for finance companies and financial institutions: The draft law would clarify that the exception to the application of the 95% participation exemption for banks and financial institutions (which requires full recognition of gains and losses) applies only to income from shares that are accounted for as trade assets (as defined in the Commercial Code) at the time of their acquisition. In addition, the definition of a finance company for purposes of the relevant rules would be clarified.

Domestic switch-over and subject-to-tax clauses: To prevent the nontaxation or the low taxation of certain items of income of a taxpayer that is subject to unlimited tax liability in Germany, certain clauses in the income tax code provide that a tax exemption for the relevant income based on an applicable tax treaty is granted only if the income is actually subject to tax in the other treaty partner state at a certain minimum rate. The draft law would amend the relevant rule in the income tax code in response to certain 2015 BFH decisions and would clarify that the clauses also would apply if only part of the income is subject to tax in the other state.

Comments

The draft law is silent regarding the long-awaited anti-hybrid rule (which was proposed in 2014 but has never been implemented; for prior coverage, see Deloitte Tax-News dated March 3, 2015). Tax practitioners are eagerly awaiting this piece of BEPS legislation; however, draft rules may not be published until 2017, so that they can be aligned with the EU anti-tax avoidance directive.

www.deloitte-tax-news.de