

## **MOF clarifies Organschaft rules for atypical silent partnerships**

A new circular clarifies and confirms the MOF position on the treatment of atypical silent partnerships under the tax consolidation rules

Germany's Ministry of Finance (MOF) issued a circular on 20 August 2015 that sets out the tax authorities' position on the existence of an atypical silent partnership and the consequences for a valid tax consolidation (Organschaft). The circular reflects the tax authorities' position articulated in a previous decree issued by the regional tax office of Frankfurt, in which the authorities state that an atypical silent partnership and a corporation being a partner in an atypical silent partnership may not be a controlled or controlling entity in a tax group.

Under German tax law, an atypical silent partnership is treated like a partnership, so that income from business activities is taxed at the level of the atypical silent partner. The question whether the existence of an atypical silent partnership either at the level of the controlling or the controlled entity in an Organschaft affects the validity of the Organschaft for tax purposes has been a controversial issue.

The MOF circular clarifies that the atypical silent partnership itself cannot be a controlling or controlled entity in a tax group. Case law of the federal tax court (BFH) is clear that an atypical silent partnership cannot be a controlled entity in a tax group (due to its qualification as a partnership), but the issue of whether an atypical silent partnership can be a controlled entity has not been clear. The MOF circular now confirms the view of the tax authorities on this point.

The circular also confirms that a corporation that is a partner in an atypical silent partnership cannot be a controlled or controlling entity in a tax group. The MOF follows the view of the BFH by stating that such a corporation cannot be a controlled entity in a tax group (see [Deloitte Tax-News](#)) because the controlled subsidiary in this case does not transfer all of its profits to the controlling entity. The tax authorities have used the same rationale when denying tax consolidation for a controlling corporation that is a partner in an atypical silent partnership. This fact pattern, however, has not yet been ruled on by the BFH and is controversially discussed in tax literature.

Finally, the circular states that tax consolidated groups with a controlling corporation that is a partner in an atypical silent partnership and that was recognized for tax purposes before the publication of the new circular still may be recognized in the future under a grandfathering rule, depending on the facts and circumstances of the case.

Taxpayers should carefully review any existing profit-participating partnership-type instruments at the level of a parent or subsidiary in a tax group to determine whether they may adversely affect the validity of the group. Such instruments should not be used in the future for corporations that are part of a tax consolidated group.

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