

German Tax Update

Accountants Group in Germany

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German Tax Update - Agenda

1. OECD / EU Pillar 2
2. "UNSHELL" Directive (ATAD 3)
3. DEBRA Initiative
4. Foreign-to-foreign IP transactions
5. Overview of other German legislation developments



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OECD / EU Pillar 2

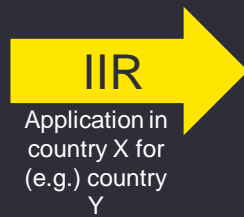
Pillar 2

Basic Concept

GloBE: Income Inclusion Rule (IIR)

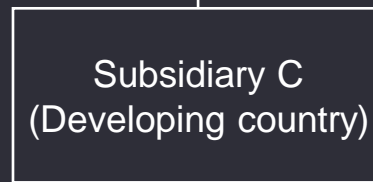
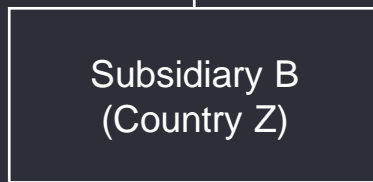
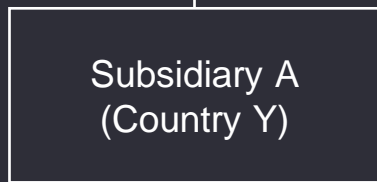
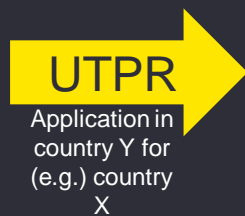
Primary rule: taxation at the group parent on profits of a group company, where effective tax rate below the agreed minimum tax rate

Focus for German corporations



De minimis rule per Country (Art. 29)

- ▶ Revenue below € 10 Mio.
- ▶ Income below € 1 Mio.



GloBE: Undertaxed payment rule (UTPR)

Secondary rule: additional taxation after formulaic apportionment for Top-Up Tax not covered by IIR

German subsidiaries of foreign corporations without IIR

Subject to Tax Rule (STTR)

(not part of the Model Rules)

Pillar 2

Planned BEPS 2.0 timeline



Pillar 2

Pillar Two Directive - Current status and recent development

EU / ECOFIN:

- ▶ Envisaged coming into effect: postponement to 2024 (Unanimity needed)
- ▶ ECOFIN Meetings: Hungary denied approval (also regarding proposal for a postponement into 2024)

Selected EU countries incl. Germany: Declaration as of 9 September 2022:

- ▶ Joint declaration of France, Italy, Netherlands, Spain and Germany: Introduction of the rules in 2023, which shall come into effect as of 2024.
- ▶ Germany: draft bill shall be issued soon (will potentially wait for OECD developments on safe harbor rules)

USA:

- ▶ National minimum tax of 15 % ("Corporate Alternative Minimum Tax"; CAMT) was introduced with the "Inflation Reduction Act" of 2022 (IRA).
- ▶ AMT should not be a "qualified IIR", as (besides others), there is no "jurisdictional blending".
- ▶ Currently unclear, whether and when the US will introduce a qualified IIR which would be in line with the Pillar 2 rules.

OECD:

To come: GLoBE Implementation Framework; STTR; safe harbor rules?

“UNSHELL” Directive (ATAD 3)

UNSHELL Directive (ATAD 3)

Background

- ▶ On 22 December 2021, the EU Commission published a draft directive on the abusive use of so-called "shell companies" or "shell entities" resident in the EU (UNSHELL initiative or ATAD 3).
- ▶ This initiative was already announced in spring 2021 as part of the Communication on Corporate Taxation for the 21st Century.

Objective and Content

- ▶ The draft directive aims to introduce an EU-wide legal framework to assist in the identification of EU companies that are resident in the EU and engage in economic activity but have no substance and, as a result, obtain tax benefits (so-called "letterbox companies").
- ▶ Although the rules are mainly aimed at companies without substance, they nevertheless lead to additional compliance burdens for many taxpayers.
- ▶ Main differences to Pillar 2:
 - Pillar 2: Minimum taxation for large groups (MNE, > EUR 750 million turnover).
 - ATAD 3: Establishment of a minimum level of substance in the EU

Status

- ▶ The draft directive is now being negotiated among the 27 member states and requires the unanimous consent of all 27 member states.
- ▶ The draft provides for transposition into national law by June 30, 2023, and applicability of the regulations as of 1 January 2024.

Draft directive

- ▶ The Directive provides for an audit sequence (seven steps). The audit is to be followed for each company that is resident for corporate tax purposes in a Member State (Art. 2).

1. **"Gateway" test:** Does the company meet certain criteria, so-called "entity at risk"? Exceptions, e.g., for listed companies

2. **Consequence if "at risk":** Duty to inform tax authorities with possibility to prove otherwise

3. **Presumption of the existence of a "letterbox company":** Company is "at risk" and does not meet counterevidence from step 2.

4. **Rebuttal of the presumption (1):** If a significant activity is carried out

5. **Rebuttal of presumption (2):** No tax advantage

6. **Tax penalties (if presumption not rebutted):** Impact on tax residency certificate and possible tax benefits under DTA/EU guidelines.

7. **Further consequences:** Automatic exchange of information among EU states on affected companies.

Takeaways

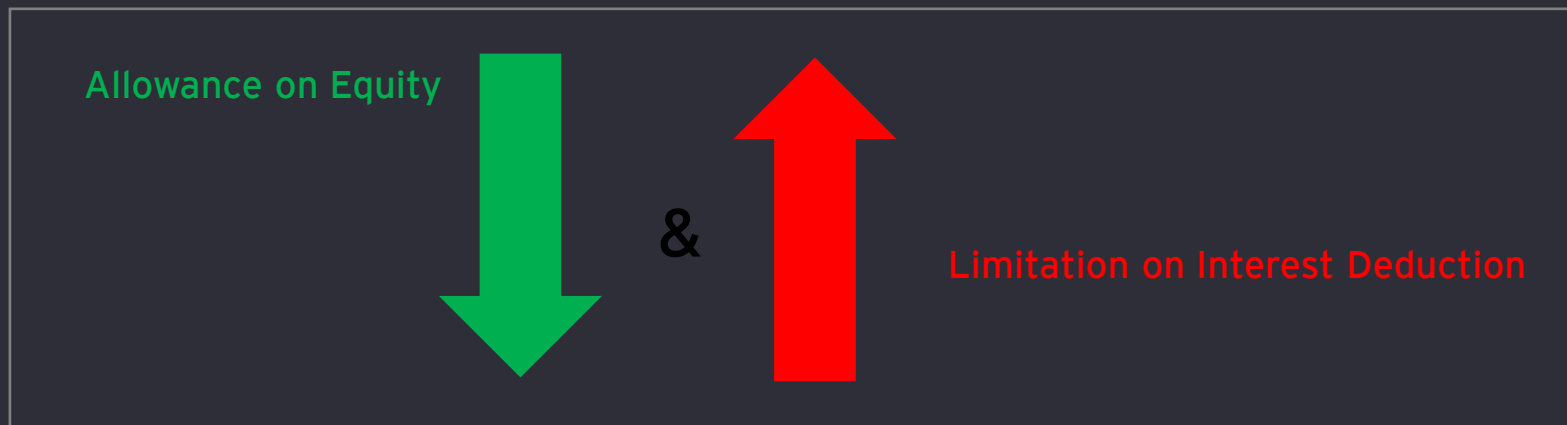
- Denial of DTA/guideline benefits for "letterbox companies" domiciled in the EU!
- Examination of the constituent elements has a retroactive effect to 2022!

DEBRA Initiative

DEBRA Initiative

EU Council Directive Draft from 11 May 2022

- ▶ The EU Council Directive Draft from 11 May 2022 on *debt-equity bias reduction allowance* (DEBRA) proposes EU-wide measures which shall counteract the debt-equity bias ([LINK](#)).
- ▶ Among other things, the Directive targets the **deviating tax treatment** of payments stemming from **debt** (basically tax deductible) and payments on **equity** (basically not tax deductible).
- ▶ Basically, two measures are foreseen:



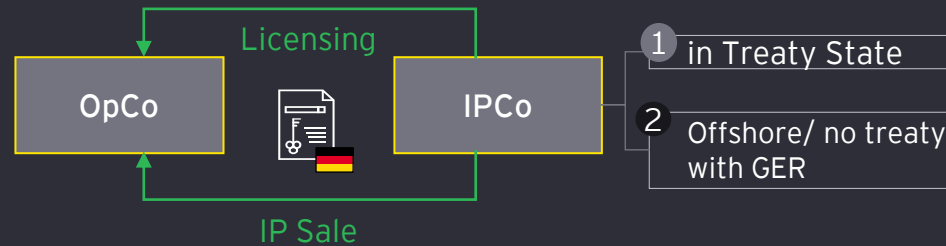
Foreign-to-foreign IP transactions

(Sec. 49 ITA)

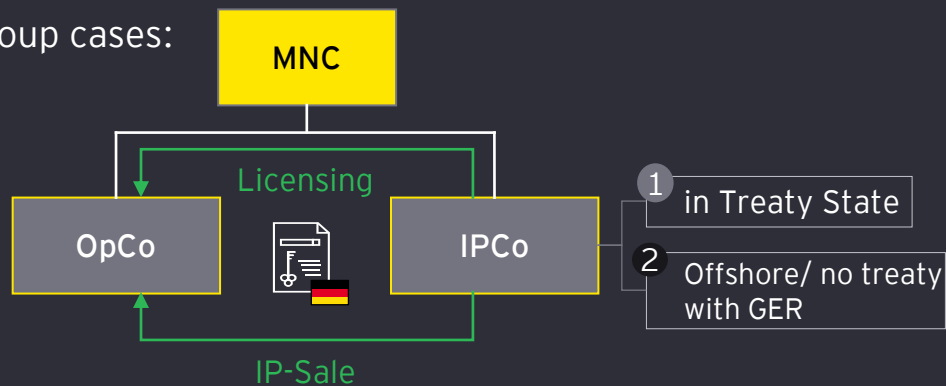
Foreign-to-foreign IP transactions

Envisaged law changes (Annual Tax Act 2022)

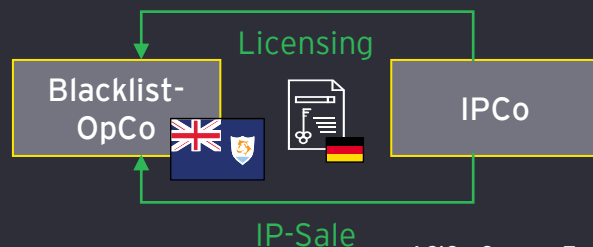
3rd party cases:



Group cases:



„Tax Haven“-Cases:



Current draft bill of Annual Tax Act 2022:

- ▶ Retroactive abolishment for all open cases
- ▶ Abolishment of the rules as of 1/1/2023
- ▶ Adoption of additional rules in the so-called "Anti-Tax-Haven Act"

Other interesting developments in legislation

Other interesting developments in legislation

Draft bill on the Adoption of DAC 7 and the Overhaul of Procedural Tax Law

- ▶ Tax Audits: Measures to make sure that tax audits can be accomplished quicker (especially: changes to limitation period).
- ▶ Time limit for filing of TP Doc tightened (from 60 to 30 days and as of announcement of the tax audit).
- ▶ Most changes shall be applicable as of 2025 .

Draft bill on the Adoption EU Directive regarding cross-border conversions, mergers and divisions

- ▶ Adoption of the directive into German national law (Reorganization Act)
- ▶ E.g. for the first time possibility to carry out cross-border de-mergers and cross-border changes of legal form.

Draft bill on the Adoption of Public Country-by-Country Reporting (CbCR)

- ▶ Adoption of the directive into German national law (Commercial Code)
- ▶ For MNEs with a consolidated turnover of > 750 mEUR
- ▶ Public disclosure within 12 months after FY end (extensions possible)
- ▶ Applicable for Financial Years beginning after 21 June 2024

4th Corona Tax Act (already enacted), includes among others:

- ▶ Extension of utilization of tax loss carryforwards until and including 2023.
- ▶ Possibilities for degressive depreciation (movable assets acquired prior to 1/1/2023)
- ▶ Extension of re-investment deadlines for purposes of Sec. 6b and 7g ITA
- ▶ No discounting of non-interest-bearing liabilities with a term of more than 12 months anymore (so far: discounting with interest rate of 5.5%)

Outlook for future legislation

Innovation bonus/climate and investment allowance (formerly "super depreciation")

- ▶ Allowance in the form of a bonus instead of depreciation likely
- ▶ Postponement to 2023/24 communicated.
- ▶ Problem of EU state aid law and from constitutional perspective (e.g.: when only available for certain industries).

Real Estate Transfer Tax flexibilization for federal States

- ▶ Opening clause for the federal states, e.g. for a lower rate or allowance for the acquisition of owner-occupied residential property
- ▶ Counter-financing through renewed aggravation for share deals.

Obligation to report national tax arrangements

- ▶ Extension of the reporting obligation for cross-border tax arrangements to national tax arrangements of companies with a turnover of >10 million euros

Interest rate cap

- ▶ Target: remaining BEPS risk in case of arm's length lending
- ▶ Possible approach: prohibition of deduction of operating expenses or reclassification as hidden profit distribution, insofar as interest rate $> x$ // (x = fixed percentage or refinancing rate at top of group or ...)
- ▶ Also relevant for inflation/lead interest rate development

Return of capital contributions/globalization

Sec. 27 (8) German Corporation Tax Act (KStG) (third-country cases)

- ▶ Legal amendment (globalization/third-country cases) of Sec. 27 (8) German Corporation Tax Act (KStG) in preparation

Extension of "Anti Tax Haven Tax Act"

- ▶ German domestic extension of the catalogue of tax havens (so far: EU blacklist)

Questions

Thank you!

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