www.pwc.com

NewsAlert

Real Estate Tax Services

Germany *March 2013*

New German tax bills impact real estate investment structures and reorganisations

A German tax bill dealing with portfolio investments is expected to be enacted in March. The bill will abolish the participation exemption for dividends received by portfolio investments after 28 February 2013. Further, the Federal Council (Bundesrat) has proposed a new Annual Tax Bill 2013 addressing the use of specific real estate transfer tax (RETT) Blocker Schemes, the use of hybrid instruments, and loss utilisation limitations following reorganisations. The proposed new rules shall have retrospective effect.

New rules for portfolio dividends approved

The German Federal Council approved the Tax Bill on Portfolio Investments on 1 March 2013, following approval by the Federal Parliament (*Bundestag*) on 28 February 2013. The bill will apply to all dividends received after 28 February 2013.

The new rules will abolish the participation exemption for dividends received by portfolio investments. A portfolio investment is an investment in which the shareholder holds less than 10% of the share capital of the distributing entity at the beginning of the calendar year in which the dividend is distributed. An acquisition of at least 10% of the shares within a calendar year is deemed to have occurred at the beginning of that calendar year. The bill contains provisions for determining shareholder percentages for *Organschaft* groups (German tax consolidation groups) and when shares are held via a partnership.

The bill also impacts withholding taxes levied on dividends distributed to EU/EEA corporations. For withholding taxes on dividends received by EU/EEA corporations on portfolio investments before 1 March 2013 a refund can be claimed based on EU law for tax years not barred by the statute of limitations. For this, applications have to be filed with the Federal Central Tax Office. For dividends received after 28 February 2013 the new German regulations should be in line with European law. Hence, no reclaims could be filed for dividends received after 28 February 2013.

The bill has no impact on capital gains. Capital gains realised upon disposal of portfolio investments generally will still qualify for the 95% participation exemption, if certain conditions are met. Generally, capital losses will still not be deductible.

Company Taxation Bill enacted

Another bill, the Company Taxation Bill, was enacted on 25 February 2013. It contains significant amendments to the *Organschaft* regime, such as amended dual consolidated loss rules and the so-called permanent establishment allocation requirement.

Federal Council proposes new Annual Tax Bill 2013

The Federal Council proposed on 1 March 2013 a new Annual Tax Bill 2013. This bill, like the former Annual Tax Bill 2013 which was rejected earlier this year, contains provisions to end the use of specific RETT Blocker Schemes, the use of hybrid instruments in German outbound structures, and loss utilisation limitations following reorganisations.

RETT Blocker Schemes

Under German RETT law it is possible to indirectly acquire up to 100% of the shares in a property holding entity without triggering RETT ("RETT Blocker Schemes"). The proposed new rules aim to look through indirect holding structures and to consider any indirect holding for calculating the 95% threshold. As a consequence, for calculating the 95% threshold, any direct and any indirect holding in a property company would be considered.

The new rules should apply with retrospective effect on all transactions after 31 December 2012. It is doubtful if such retrospective effect is lawful (for more details see Real Estate Tax Services NewsAlert “German Federal Council plans to end RETT Blocker Schemes with retrospective effect", February 2013).

Hybrid financing instruments

In light of the EU initiative on aggressive tax planning, the proposed new rules would limit the 95% participation exemption to dividends that have not been deducted for tax purposes at the distributing entity level.

The amendment targets certain hybrid financing instruments in German outbound structures and is intended to be effective for dividends received in business years beginning after 31 December 2012.

Loss utilisation

The proposed Annual Tax Bill 2013 also contains a provision for limiting loss utilisation following reorganisations. Where a profitable company merges retroactively into a company with tax losses, the tax losses cannot be used to offset against the profits of the profitable company. The new provision shall not apply in the case of a group internal reorganisation.

The new rule should apply with retrospective effect for reorganisations that filed an application for registration with the commercial register after 13 December 2012.

Our view

The enacted and the proposed new rules potentially increase the German tax burden for real estate investors. Consequently, investment and acquisition structures need to be adapted to the new rules.

Investors should review existing shareholding structures to identify and eliminate portfolio investments. Also, the possibilities for applying for a withholding tax refund should be checked.

Investors should closely monitor the legislative process of Annual Tax Bill 2013 and consider the retrospective application of the proposed new rules.

We doubt that the retrospective effect for some of the proposed new rules would be legitimate. However, any planned or ongoing share deal transactions based on RETT Blocker Schemes entail a high risk of triggering RETT. Hybrid dividends received in business years beginning after 31 December 2012 entail a high risk of being fully taxable. Hence, cross-border financing instruments should be subject to review regarding their tax efficiency.

2013 is an election year in Germany. All bets are off. The new tax bill initiative may be refused, accepted or even postponed to 2014.

For more information, please contact your local PwC real estate tax service provider or one of the contacts below.

Global

Uwe Stoschek
Global Real Estate Tax Leader
+49 30 2636-5286
uwe.stoschek@de.pwc.com

Europe and Africa

Angus Johnston
Real Estate Tax Leader - EMEA
+44 207 804 2722
angus.i.johnston@uk.pwc.com

Middle East

Oliver Reichel
Regional Real Estate Tax Leader
+971 2694 6946
oliver.reichel@ae.pwc.com

Central Eastern Europe

Glen Lonie
Real Estate Tax Leader - CEE
+420 251 152 619
glen.lonie@cz.pwc.com

Americas

Paul Ryan
US Real Estate Tax Leader
+1 646-471-8419
paul.ryan@us.pwc.com

AsiaPacific

KK So
Real Estate Tax Leader - AsiaPac
+852 2289 3789
kwok.kay.so@hk.pwc.com

Nationally

Germany

Uwe Stoschek
+49 30 2636-5286
uwe.stoschek@de.pwc.com

Dr. Michael A. Müller
+49 30 2636-5572
mueller.michael@de.pwc.com

Helge Dammann
+49 30 2636-5222
helge.dammann@de.pwc.com

Dr. Hans-Ulrich Lauermann
+49 69 9585-6174
hansulrich.lauermann@de.pwc.com

Sven Behrends
+49 89 5790-5887
sven.behrends@de.pwc.com

Marcel Mies
+49 211 981-2294
marcel.mies@de.pwc.com

Alexander Lehnen
+49 40 6378-2136
alexander.lehnen@de.pwc.com

These Newsalerts are intended as general information for our clients. Concrete action should not be taken without reference to the specific sources given or advice from your usual PwC office. The comments above do not purport to be sufficient information to take a management decision. Parts of this publication may not be copied or otherwise disseminated without the written permission of the publisher.

© 2013 PricewaterhouseCoopers. All rights reserved. "PwC" refers to the network of member firms of PricewaterhouseCoopers International Limited (PwCIL), or, as the context requires, individual member firms of the PwC network. Each member firm is a separate legal entity and does not act as agent of PwCIL or any other member firm.