NEWS INTERNATIONAL

E-MAIL NEWSLETTER
Seventh edition of 2020

Dear Sir or Madam,

At the end of March, the German Federal Ministry of Finance published its second draft bill on the so-called Anti-Tax Avoidance Directive (ATAD Implementation Act). In addition to the new regulations concerning transfer pricing, hybrid mismatches and controlled foreign corporation rules, the draft also contains a complete overhaul of exit taxation. These changes in the context of exit taxation lead to an acute need for action, as they result in considerable disadvantages for the taxpayer.

According to the current legal position, hidden reserves in shares of incorporated companies according to Section 6 of the German Foreign Tax Act (AStG) are expressly taxable if the shareholders hold a direct or indirect interest of at least 1% in the share capital, have had unlimited tax liability in Germany for a total of at least ten years and end their unlimited tax liability by giving up their residence or habitual residence. If the shareholder moves to another EU/EEA state, the tax will be deferred indefinitely upon application until actual divestment or until other circumstances arise, such as a departure from the EU/EEA. If the shareholder moves to a third country, there is, in principle, the possibility of an interest-bearing tax payment deferral for a maximum of five years.

The ATAD Implementation Act completely rewrites exit taxation. In future, the provisions of Section 6 AStG will already apply if the departing taxpayer has had unlimited tax liability for at least seven within the last twelve years and not ten years, as was the case previously.

A major disadvantage and a strain on liquidity is the fact that the previously applicable deferral rules will be standardised to the detriment of taxpayers: the distinction between moving to an EU/EEA state on the one hand and a third country on the other no longer applies. There will only be the possibility to pay tax in seven equal annual instalments, which are, however, meant to be interest-free. Nevertheless, in principle this will require a collateral security. The previously valid deferral in the event of a departure to an EU/EEA state no longer applies. The resulting liquidity strain amounts to an attack on the mobility of business-owning families in particular.

The current draft proposes that the revisions of Section 6 AStG come into force on 1 January 2021. Therefore, companies that operate across borders, as well as their business-owning families, would be well advised to look into possible impacts sooner rather than later. According to current assessments, indefinite tax deferral in the event of a departure to another EU/EEA state will only be possible until the end of this year. Anyone who does not take immediate action, therefore, is wasting precious time to take advantage of the currently still valid and, compared to the draft version, more favourable rules of exit taxation.

Please feel free to contact us with any questions relating to moving countries. We are happy to advise and support you.

Best regards

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Mr Feldmann already started working for the law firm Alpers & Stenger (today: ALPERS WESSEL DORNBACH) during his studies of business administration at the University of Hamburg. After passing the tax consultant examination, Mr Feldmann was appointed authorised representative in 2014. He has been a partner in ALPERS WESSEL DORNBACH since 2015.

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Company presentation

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