



NEWS INTERNATIONAL

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International unsecured group loans - change in case law by the German Federal Fiscal Court (BFH)

Dear Sir or Madam,

In its ruling I R 73/16, dated 02/27/2019, the BFH changed its case law pertaining to the blocking effect of Art. 9 of the OECD Model Tax Convention (OECD MTC) with regard to income adjustments for international unsecured group loans. In its rulings of 2014 and 2015 (12/17/2014, I R 23/13; 06/24/2015, I R 29/14), the BFH had considered that such a provision, as is found in this form in nearly all German double taxation agreements, prevents the national income adjustment norm of Sec. 1 (1) German Foreign Transaction Tax Act (AStG). When unsecured loans are granted within a group, ultimately only the rate of interest needs to be considered. Thus, a profit-reducing write-off of a loan or a partial depreciation may have a tax-reducing effect. The missing loan security is not considered to represent a non-arm's length condition within the meaning of Art. 9 OECD MTC.

In the recently published ruling, the BFH has changed its case law after a surprisingly short time. This is surely due, in particular, to the new staffing in the First Senate of the BFH. From a practical perspective, it must be noted that legal provisions already exist - since 2008 in the area of corporation law and since 2015 for partnerships - that (should) exclude a reduction of the taxable income used as the basis of assessment. However, numerous cases have been and are still open. This is shown by the large number of recent tax court rulings relating to such matters.

Nevertheless, the BFH ruling does bring

The ruling was published in the German Federal Tax Gazette and must therefore be implemented by German fiscal authorities. Of course, this does not imply free rein for unrestricted invoicing of inbound management fees by foreign group companies. As previously, evidence of the provision of services is required and must be as detailed as possible ("timesheets"). From the point of view of tax defence consultation, however, this BFH ruling could be a saving grace in some circumstances.

In a number of ways, the BFH ruling under consideration represents a realignment of case law around international loans within groups. As well as clarifying the blocking effect of double taxation treaties, the ruling brings new definition to the distinction between business-related loans and capital contributions resulting from a corporate relationship or general group support. In addition, further rulings are still pending or yet to be published. These will (hopefully) provide key findings in relation to international financing issues within groups.

Finally, the BFH also applied the much-discussed Hornbach-Baumarkt ECJ judgement (05/31/2018, C-382/16) to the facts of the case under consideration. It came to the decision that these principles have no bearing on the current case. This might "relieve" lawmakers who, by all accounts, are considering creating legal provisions to prevent negative effects of the ECJ judgement as anticipated by the tax authorities. As is often the case, an

good news for taxpayers: The 2012 BFH ruling (10/11/2012, I R 75/11), which points in a similar direction, is not affected by the latest case law. Thus, for example, fees for international services from a foreign parent company to its domestic subsidiary have a tax-reducing effect even if there is no prior written agreement on the matter. This “lack of form”, according to the BFH’s opinion, does not in itself imply that a non-arm’s length condition exists within the meaning of Art. 9 OECD MTC.

excessive impact of this decision could also lead to a significant burden for taxpayers in domestic situations. We will keep you informed.

Best regards



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In July 2007, Dr. Schäfer was made a person with full commercial power of attorney and on January 1st, 2011, he was accepted as a partner.

In 2003, he received a doctorate at the Chair for Business Management Studies, particularly Business Taxation from Univ. Prof. Dr. Heinz Kussmaul on the subject of "Taxation of a German-French company". Dr. Schäfer completed the examination for Tax Advisor in 2005. Since 2008, he has also possessed the title of "Specialist Advisor for International Tax Law".

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