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Newsletter for foreign investors in Germany
December 2018



Dear Julia,

Benefitax in the Cloud (s). Benefitax moved all data to an external server. We are therefore in the cloud. Furthermore we offer our clients a secure dropbox for the exchange of documents which will automatically inform the other party once a document has been uploaded.

Please find below a tax and accounting update of interest to cross-border investors and especially foreign investors in Germany. If you have found a topic for which you need further information, do not hesitate to contact us or the respective author. We will be happy to support you.

We are very proud to present a new series of videos to you. They are called "International Tax News" and adress foreign investors to Germany and also German investors abroad. Please find details below.



Benefitax Video "International Tax News"

Due to the many tax pitfalls in cross-border activities, we have launched a new video series that is aimed at foreign companies doing business in Germany or planning to do so on the one hand, and German companies doing business abroad on the other. The focus is on international tax topics, but also national tax topics that might be interesting for the above-mentioned target group should not be neglected.

In addition to the presentation in the form of a news programme, one or two interviews with foreign tax experts will be shown. The duration of a video with all contributions is approx. 10 minutes. However, if you are only interested in individual topics, you will find an overview map with the starting times of the topics at the beginning and can "jump" directly there if necessary.

In the first issue "December 2018" the following topics will be covered:

- Permanent Establishments in Germany. Is the new OECD definition of a P.E. applied in Germany?
- Interview with Ross Forrester on investing in Australia as a German investor and on is Germany an interesting location for Australians to invest after the Brexit?
- Is investing in Germany via a letterbox company in a tax haven a good idea?

You can access the video by clicking on the photo above or [here](#). Further issues with interviews by tax experts from Hungary, China, Hong Kong and Thailand will follow in early 2019.



Court Decisions

National court rulings

Where are dividends of US S-Corps with German owners taxable?

The German Federal Tax Court ruled that it does not matter for German tax purposes if another country qualifies an entity as a corporation or as a partnership. When it comes to the comparison of legal types only German law is applicable.

In the USA S-Corporations may choose to be treated tax-wise as corporations (opaque) or as partnerships (transparent). In the case to be discussed here an S-Corp. with German shareholders opted in the US to be treated as transparent. According to article 4 chapter 1, half clause 2, letter b) of the US-German Double Taxation Treaty 1989 (old version) the S-Corp. then no longer qualifies as resident in the US, as its partners reside in Germany according to article 4 chapter 2 of the DTT. Therefore Germany reserves the sole right to tax all dividend income of the S-Corp. according to article 21 of the DTT.

Recommendation: We recommend to have the cross-border tax situation checked before setting up a foreign company, paying out dividends, selling or liquidating the company.

Cash-Pooling Agreements

If an intragroup cash-pooling agreement only sets a minimum and a maximum interest-rate and a wide range for calculating the interest remains, this is a violation of the dealing at arm's length principle. Therefore the German tax authorities may do their own interest calculation for the purpose of taxation in Germany.

Recommendation: Intragroup cash-pooling agreements should not leave space for interpretation and should include an interest ruling that third parties would have agreed on, too.

Rules for estimation of the tax base by the tax authorities

When tax authorities estimate a tax base, the estimation results must be coherent, economically possible and reasonable. An estimation must on the one hand consider actual indications for an appropriate amount of a tax base and on the other hand must consider the extent of the breach of the duty to cooperate. If a taxpayer recites in detail, that and why certain sales and profits were not possible according to the circumstances, the court must deal explicitly with this.

Recommendation: Taxpayers should not accept estimations of the tax base by the tax authorities that are clearly against the above mentioned principles and just in favor of maximising the taxes. If the tax authorities are not cooperative you may go to court.

European Court of Justice (ECJ) rulings

Letter of comfort by parent company

This ruling deals with the Hornbach DIY group, where a parent company gave a letter of comfort to a subsidiary without asking for any compensation for doing so. The German tax office corrected the income and considered a fictitious compensation a third party would have asked for.

The court ruled: "It is not against EU law if national German law allows a German company to grant benefits to another German affiliated company without compensation, while the same benefits granted to or from a company located in another EU country require a compensation if not at arm's length. It is the task of the national courts to check, if this rule allows national taxpayers the possibility to prove that the compensation has been agreed on for economic reasons resulting from his position as a shareholder of the non-resident company. "

Recommendation: The ruling opens the possibility not to ask for compensation for benefits granted within a group such as a letter of comfort if one is able to give economic reasons, but it is uncertain if one will succeed.

Final Losses

The ECJ rulings regarding final losses have not been consistent in the past. While the Marks & Spencer ruling allowed that a parent company may deduct final losses of an unsuccessful subsidiary in another country under tight conditions, the Timac Agro ruling made it quite impossible to do so. In the latest ECJ decision “Bevola” the court returned to its view in the first Marks & Spencer ruling and said it is against EU rules not to accept such losses.

Recommendation: Parent companies with loss-making subsidiaries should try to declare losses in their own country if they meet the conditions set up by the court.

Trade Tax Reductions

The ECJ ruled that the German law allowing a company to reduce its trade income base by profits from shares on corporations is against EU law because the conditions to be met by companies with place of management and legal seat abroad are stricter than those for purely German companies.

Recommendation: Please check if you can profit from the new rules to be expected soon.



OECD Model convention 2017

Avoiding a permanent establishment in Germany

While many rules included in the BEPS actions plans are already implemented in German law the German side seems to avoid e.g. the new much broader definition of the permanent establishment (P.E.) for agents in recently negotiated Double Taxation Treaties (DTT's) with Germany on one side. So far it is possible to avoid a permanent establishment if the agents have no power to conclude contracts and the German activities are very limited to e.g. providing general information.

According to the new OECD definition of a P.E. it is no longer possible for a company to avoid a P.E. in another country if “a person is acting in a Contracting State on behalf of an enterprise and in doing so, habitually concludes contracts, or habitually plays the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the enterprise, and these contracts are

- a) in the name of the enterprise, or
- b) for the transfer of the ownership of, or for the granting of the right to use, property owned by that enterprise or that the enterprise has the right to use, or
- c) for the provision of services by that enterprise,

unless the activities of such person are limited to those mentioned in paragraph 4.”

This new definition is therefore much wider than the old one and many representation offices would be qualified as permanent establishments (P.E.) with the effect that the tax authorities in the country the P.E. is located would be entitled to tax the profits of the P.E.. BUT: The only DTT where Germany has accepted the new P.E. definition is the DTT with Australia.

Recommendation: Foreign (except Australian) companies having an information or representative office in Germany, who want to avoid a permanent establishment in Germany, should not follow the OECD approach but insist that national German law or, if applicable, the respective DTT shall be used.

New Tie Breaker Rule

While so far the place of management was the key factor to the Tie-Breaker Rule, the new article 4 chapter 3 now asks for an agreement of the involved authorities. This applies e.g. to the DTT Germany has agreed on with the USA and Turkey.

Recommendation: That bears a big danger as it means that in case no agreement can be reached between the involved authorities the affected taxpayers have no right to benefit from the reliefs or exemptions of the DTT, except for those the involved authorities agree on.

Holding period for dividend income

A minimum holding period has been introduced for dividend income in article 10. So now the recipient of the dividends must prove for a holding period of 365 days including the day of payment of the dividend, that he held at least 25% of the nominal share capital of the company that pays the dividends. Similar rules can be found in the DTT with the USA and Liechtenstein.

Recommendation: If this is applicable to you make sure you meet the new minimum holding period.

Exemption rule

Article 23, chapter 1, has been changed. In case of a dual residency non-taxation shall be avoided.

Mutual Agreement Procedures

Article 25 has been changed. While so far it was only possible for the taxpayer in the country of residence to apply for Mutual Agreement Procedures it is now also possible for the taxpayer in the source country.

Recommendation: German tax authorities often have their own interpretation of DTT rules and Mutual Agreement Procedures are normal. If you are located in a source country and are not happy with how German tax authorities interpret DTT rules, consider Mutual Agreement Procedures if the amount is significant and you have enough time.

Entitled to benefits

A new Article 29 has been added. It deals with the entitlement to benefits and related commentary, which includes in the OECD Model a limitation-on-benefits (LOB) rule (simplified and detailed versions), an anti-abuse rule for permanent establishments situated in third States, and a principal purposes test (PPT) rule.



The Multilateral

Instrument (MLI)

In order to adapt BEPS action plans in 2017, 76 countries signed a multilateral instrument (MLI) which should serve to automatically change Double Taxation Treaties (DTT's) of the countries involved, without having to change the DTT's individually. Since then other countries followed. The MLI has officially come into force on 1st. July 2018 for those countries that have already ratified it or do not have to ratify it domestically.

The German legislative bodies have a (legal) problem with the MLI. Germany has registered 35 out of the existing 96 DTT's with other countries for the MLI. The other way round 33 countries had registered their DTT with Germany for the MLI. The countries where both sides have registered the MLI with Germany are: Bulgaria, Costa Rica, France, PR of China, Denmark, Finland, UK, Ireland, Israel, Italy, Japan, Korea, Croatia, Latvia, Liechtenstein, Lithuania, Luxemburg, Malta, Mauritius, Mexico, New Zealand, The Netherlands, Austria, Romania, Russia, Slovakia, Slovenia, Spain, Czech Republic, Turkey, Hungary, Cyprus.

That means that many other important countries are missing such as USA, India, Vietnam, Belgium, Norway, Poland, Portugal, Sweden, Switzerland, Estonia and the UAE.

Even where both countries have registered the MLI, Germany is not ready to apply all parts of the MLI. Therefore individual negotiations can be expected and the purpose of the MLI to change many DTT's in one go is therefore obsolete.



Tax News from Germany

Notification obligation for tax structuring arrangements

The European Union has published a new directive on a notification obligation for cross-border tax structuring arrangements in June 2018 which must be implemented into national law of the member countries until the end of 2019 and which must be applied starting 1st. July 2020. The new directive has come into force on 25th. June 2018 and goes back to BEPS action plan 12.

The notification must be made within 30 days after the tax structuring arrangement has been provided. In some cases a regular report needs to be filed by intermediaries every 3 months. In case of non-compliance negative consequences are planned. Details will follow.

Although this has not been implemented in German law some experts are of the opinion that the directive must be applied since 25th June 2018, so there is some uncertainty at the moment. Please note that this obligation also includes intermediaries such as lawyers, chartered accountants, certified tax advisors, banks, insurance companies, brokers etc. It is planned that chartered accountants and certified tax advisors will be exempt from the notification obligation due to their professional discretion.

Recommendation: Please note that if you are affected, you as a German taxpayer need to notify yourself.

Cross-border mergers of corporations

In the past few years a new variation of cross-border mergers can be observed in the European Union. This kind of merger is based on court decisions of the ECJ and the German Higher Regional Court. Using this a cross-border change of the legal form of a corporation (e.g. French S.a.r.l. to German GmbH) without liquidating a legal entity and setting up a new one is now possible.

One must differentiate between transformations among corporations seated in the European Union and those where corporations seated in third countries are involved. § 21 of the German Conversion Tax Act goes beyond the Transformation Act and allows a share swap if just the receiving company is seated in the European Union or the European Economic Area (EEA). The court decisions mentioned above now allow all corporations to do a share swap.

Common problems in reorganizations are that hidden reserves will be uncovered and must be taxed, or a loss carried forward will be lost. The most common mistake is that an application for continuance of book value is not made or made too late. The last due date for doing so is when you submit the tax declarations for the respective year for the first time.

Recommendation: Reorganization within groups without uncovering hidden reserves or losing a loss carried forward is now often possible. Before doing so really good tax advice from an expert should be obtained.

Extension of the Money Laundering Directive

The 5th. European Union Money Laundering Directive has come into force in 2018. It must be implemented into national law of the member countries until 10th. January 2020 so here is a summary of what can be expected.

The focus of the changes deal with an extension of persons affected by the directive, such as platforms for exchanging virtual currencies and providers of electronic money exchanges (wallets). They will be looked at like banks and payment service providers if they have a similar function. Exchange platforms for cryptocurrencies must store the identity of their users as well as their wallet addresses centrally.

Online Payments with E-money will only be possible for rechargeable prepaid products if the amount is not exceeding 150 € (in Germany it is already 100 €).

Those who own more than 25% of certain corporations or trusts must register in the transparency register. The right who can have a look into the transparency register will be liberalised. So far one must prove a legitimate interest. This will be waived in 2020, so that everybody can see what have been entered in the transparency register.

There will be high minimum transparency requirements for banks, which must be met when making first payments to a customer in a high risk country. In addition to that the managing directors must approve of starting business relations with customers in high risk countries.

Deletion of the proportional loss transfer regulation

§ Section 8c (1) sentence 1 of the Körperschaftsteuergesetz (German Corporation Tax Act) contains provisions to the effect that loss carryforwards are lost proportionately if more than 25% but not more than 50% of the subscribed capital or voting rights in a corporation are transferred to an acquirer within five years.



Relatively surprisingly, the Bundestag decided on 8 November 2018 to delete this rule without replacement. The Bundesrat agreed on 23 November 2018 so that the changes can come into effect very soon. The abolition of the proportional loss loss also applies to trade tax due to the reference in § 10a sentence 10 GewStG.

The new version of Section 8c (1) KStG will be applied for the first time for the 2008 assessment period and for share transfers after 31 December 2007. At present, the legislator sees no need for amendments to the regulations on the complete loss of loss in the event of a harmful acquisition of more than 50%, as proceedings are still pending with the BVerfG on a legal issue at the fiscal court in Hamburg.



Benefitax News

Office closed between Christmas and New Year

Please note that we will close our office between 22 December 2018 and 01 January 2019. From 02 January we will be rested and fresh again and wish you a Merry Christmas and a Happy New Year.





We are in the cloud now



On 15 and 16 November our systems were completely converted. Our systems and data are no longer stored on our own server, but in the certified cloud - an external server of Datev, the largest IT service provider and solution partner for tax consultants and auditors in Germany.

This step ensures seamless access to our data, as we can no longer be slowed down by the failure of individual components or programs in our work for you. At the same time, we were able to increase the security of our data because external access is even more difficult than before and we are no longer affected by data loss due to burglary, water damage or fire.

All highly available and powerful systems are centrally maintained to ensure that updates and new releases are promptly available - and all of this under DATEV's high standard. Our new system partner ensures smooth processes on site. For our clients, this means that we have once again increased the security of our data and can react more flexibly and individually to their requirements through the possibility of associated additional functions.

Benefitax solution for secure data exchange for our clients



From now on you can exchange your data encrypted and absolutely secure with us. We offer you a cloud-based platform for data exchange hosted by Datev, the largest German solution provider for tax consultants and recommended by the German Lawyers Association as the only solution. This solution fulfills all legal requirements by the end-to-end encryption, which are to be considered in particular since introduction of the GDPR.

Our solution offers:

- Storage of your data on servers rented from us in DATEV's computer centre
- Encryption of data already before uploading
- Data exchange between you and us in a secure data room to which only you and we have access
- Outlook plug-in for secure sending of file attachments even without e-mail encryption
- Access from almost all end devices possible (App, Webclient, Terminalserver-Client and many more)

Your advantages:

- You already meet tomorrow's data protection requirements today
- Data on terminals can be deleted remotely ("Wipe")
- Direct and secure transport of your documents- (Saving of storage capacities in your network)
- Transparent and simple pricing

- Monthly notice- Provide sensitive data with little effort
- No further costs for data exchange between us

If you are interested in such a solution, we are looking forward to your call or [e-mail](#).

Benefitax Retrospective 2018

An exciting year lies behind us. Here you can see the Benefitax highlights of the year 2018, summarized in just two minutes. Just click on the photo on the right or [here](#) and you will get to the slideshow on our Youtube channel. Have fun with it.



Instead of Christmas cards this year we donated money to the German Red Cross (DRK) and made a calorie donation to a DRK sanctuary in the form of a 1 kilogram box of chocolates, so that the poor paramedics and doctors, who have to push over the holidays, also have a little joy.

We wish those of you who have the festive season ahead a very nice holiday, Merry Christmas and a healthy start to a successful New Year 2019.



Best regards from Frankfurt

Oliver Biernat,
Managing Director

- German Chartered Accountant
- German Certified Tax Advisor
- Specialist Advisor in International Taxation

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If you do not wish to receive this newsletter, you can unsubscribe [here](#).

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The brand "Benefitax" has been registered as brandname with the registration number 30622634 at the German patent and brandoffice (Deutsches Patent- und Markenamt).

Notes to auditing services

Competent chamber:

Wirtschaftsprüferkammer (WPK = Chamber of Chartered Accountants), Corporation under Public Law,

Rauchstr. 26, 10787 Berlin

The following provisions of law apply to the auditing work:

Wirtschaftsprüferordnung (WPO),

Berufssatzung für Wirtschaftsprüfer/vereidigte Buchprüfer (BS WP/vBP),

Satzung für Qualitätskontrolle,

Wirtschaftsprüfer-Berufshaftpflichtversicherung (WPBHV).

All these can be found on the homepage of the German Chamber of Public Accountants (Wirtschaftsprüferkammer) on www.wpk.de.

The legal title "Wirtschaftsprüfungsgesellschaft" has been granted to Benefitax GmbH in the Federal Republic of Germany.

Notes to tax consultancy services

Competent chamber: Steuerberaterkammer Hessen (StBK = Chamber of Tax Consultants), Gutleutstr. 175, 60327 Frankfurt am Main.

The following provisions of law apply to the tax consultancy work:

Steuerberatergebührenverordnung,

Steuerberatungsgesetz,

Durchführungsverordnung,

Berufsordnung.

These regulations can be found on the homepage of the German Chamber of Certified Tax Advisors (Steuerberaterkammer) on www.bstbk.de/de/steuerberater/berufsrecht/

The legal title "Steuerberatungsgesellschaft" has been granted to Benefitax GmbH in Germany in the federal state of Hesse.

Engagement Terms:

In case of an engagement the "General Engagement Terms for Wirtschaftsprüfer and Wirtschaftsprüfungsgesellschaften" in the latest version are applicable, unless other agreements have been taken in writing. "[General Engagement Terms](#)"

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Applicable law and place of jurisdiction: Place of execution for all mutual obligations resulting from contracts concluded with Benefitax GmbH is the seat of Benefitax GmbH which is also deemed place of jurisdiction.

Disclaimer regarding our international alliance

GGI, a company incorporated in accordance with the laws of Switzerland, provides no legal, audit or other professional services to clients. Such services are provided solely by GGI member firms in their respective geographic areas. GGI and its member firms are legally distinct and separate entities that are absolutely independent and autonomous. They are not and nothing shall be construed to place these entities in the relationship of parents, subsidiaries, partners, joint ventures or agents. No member firm of GGI has any authority (actual, apparent, implied or otherwise) to obligate or bind GGI or any other GGI member firm in any manner whatsoever. We do thus assume that the legal definition in accordance with sec. 319 b), para. 1, p. 3. HGB (German Commercial Law) does not apply and GGI is therefore an alliance and no network in the sense of the network definition in the EU directive.

We do legally and economically not depend in any kind from the other members of the GGI alliance. Benefitax GmbH assumes all liability for the mandates assigned to us; in no case any other company, study or consultant will be liable although it might bear the name "GGI", "Geneva Group" or "Geneva Group International". In the same manner, Benefitax GmbH does not assume any liability for mandates assigned to other companies, studies or consultants although they might bear the name "GGI", "Geneva Group" or "Geneva Group International".

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Anonymous collection of data: As a rule, you can visit our web sites without providing us with your personal data. Only for statistical purposes we are informed about the name of your internet service provider, the page from which you accessed our website and the pages of ours that you visited. As a single user you remain anonymous.

Collection and processing of personal data: Personal data is collected and processed by us only if you provide it voluntarily, e.g. for processing a contract or a survey or for registration for personalized services. If you do not object, data collected in the process of registration for personalized services of Benefitax GmbH is processed for customer management and marketing purposes as well as for the customer-orientated development of electronic services.

Use and forwarding of personal data:

No data is forwarded to states outside the European Economic Area. Personal data collected by us on our web sites are used without your consent only for processing your enquiries and requests. Moreover, if you do not object, your data is used only for customer management and marketing purposes as well as for the customer-orientated development of our electronic services. Beyond that no data is forwarded to other third parties.

You can express your objection at any time with an effect towards the future.

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Further information and contact: If you have further questions about Benefitax GmbH's data protection procedures, please contact our data protection officer. He would be happy to provide you with information as to whether – and if so, which – personal data we store in relation to you. Moreover, you might send at any time your questions and requests for modification or deletion of your personal data as well as comments and suggestions by e-mail or by regular mail to the following address:

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