

INTERNATIONAL TAX SERVICES

CHANGES IN TRANSFER PRICING, AFTER ALL

Tax Bill AbzStEntModG enters into force



The Act to Modernise the Relief from Withholding Tax and the Certification of Capital Gains Tax (**AbzStEntModG**) was passed by the Bundesrat on 26 May 2021. Essentially, the Act intends to reduce and streamline the existing procedures for relief from withholding tax and tax deduction in accordance with § 50a Income Tax Act (EStG) for foreign taxpayers, as well as to digitalise the relief procedure at the Federal Central Tax Office (BZSt) for application, tax certification and assessment. On 30 June 2021, the law to implement the EU Anti-Tax Avoidance Directives (**ATAD-UmsG**) was promulgated.

TRANSFER PRICING RULES ADOPTED FROM FORMER DRAFT OF ATAD-UMSG

The AbzStEntModG also contains amendments in other areas, such as a regulation in the Re-organization Tax Act (UmwStG) to prevent abusive tax arrangements and on **transfer pricing** in § 1 and § 1a Foreign Tax Act (AStG), which was taken over from an earlier draft of the ATAD-UmsG. On the other hand, expected amendments, e.g. to § 49 No. 2f EStG on linking the right of taxation to the mere registration of rights in Germany, are not included, and further regulations in the area of transfer pricing, such as on group financing, have not been taken up either. Among other things, the regulations on the annual electronic submission of the master file were not adopted from the draft ATAD-UmsG. New in the draft of the ATAD-UmsG, on the other hand, are regulations on the term "related party".

EXPANSION OF THE CONCEPT OF RELATED PERSON

According to the ATAD-UmsG, certain constellations of multiple voting rights or voting trust agreements are to be defined as related parties in the future. Triangular cases and networks are also included, although certain franchise companies are not to be affected, according to the explanatory memorandum.

THE ARM'S LENGTH PRINCIPLE

The Arm's Length Principle is concretised and expanded in the AbzStEntModG. For example, the hierarchy of transfer pricing methods is abandoned. As in the OECD Transfer Pricing Guidelines 2017, the most appropriate method is to be chosen in future.

STRENGTHENING OF ECONOMIC ANALYSES

The importance of economic analyses of actual circumstances is strengthened (functional and risk analysis). The interquartile range, which is common in practice with limited comparability, is given legal status. The **hypothetical arm's length comparison** is to be carried out using economically recognised valuation methods.

ABOUT BDO

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TRANSFER OF FUNCTIONS

Transfer package and intangible assets are defined by law. The period for price adjustments for transfer packages is reduced from **10 to 7 years**. In this context, a price variation of 20% is not considered mandatory to be corrected. Two of the escape clauses are abolished, but the most relevant exception in practice of the currently applicable § 1 paragraph 3 sentence 10 AStG (so-called 25% rule) is to continue to apply. However, the legislator is apparently attempting to limit its application to contract manufacturers or similar who are remunerated based on the cost-plus method.

OECD'S DEMPE APPROACH

The **OECD's DEMPE approach** to intangible assets is also adopted, according to which an analysis of the individual functions of development, enhancement, maintenance, protection and exploitation must be carried out. This is to determine which shares of the value added are to be allocated to the respective enterprises engaged in intangible assets.

ADVANCE PRICING AGREEMENTS

A national legal basis for **advance pricing agreements** is created, which applies to all international cases with countries with which a double taxation treaty has been concluded and where double taxation is imminent. Previously, there was only an administrative instruction on this. The possibilities of extension as well as retroactivity are included. The application fee is increased to € 30,000 (previously € 20,000). The **new § 89a AO** is to come into force as soon as the law is announced and thus applies to all applications filed thereafter.

ENTRY INTO FORCE

The AbzStEntModG was promulgated on 8 June 2021. Most of the regulations will come into force on the day after promulgation; the new regulations of section 1 and section 1a AStG and of ATAD-UmsG will apply for the first time in 2022.

ACTION REQUIRED

Already now, groups of companies operating across borders should examine the possible effects for their own company. **DEMPE functions** in particular should be mentioned here.

EFFECTIVE SUPPORT BY BDO

Please get in touch with your BDO contact person for a **quick check to identify the need for action**. We will be happy to assist you with any necessary adjustments to your transfer pricing system. If necessary, we will call on colleagues from other specialist areas, for example in the audit or adaptation of compliance structures and IT systems or the integration of IT tools. If necessary, we work together with colleagues from the respective BDO member firms from our international network in more than 160 countries.