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Cross-Border Information -
The German Approach

1. Obligations for taxpayers to deliver information

a) Obligation to file a tax return

In Germany, for all major taxes, taxpayers have to file a tax return with the Inland Revenue (Finanzamt), usually within a certain time frame. Relevant provisions are incorporated in the specific tax acts. For Income Tax purposes, § 25 III of the German Income Tax Act (Einkommensteuergesetz – EStG -) applies. According to that, taxpayers residing in Germany (subject to unlimited tax liability) as well as those subject to extended restricted tax liability[1] have to declare their worldwide income whilst those subject to limited tax liability and where the tax due is not covered by witholding taxes have to only declare their income generated in Germany. For Corporation Tax purposes the obligation to file a tax return is embedded in § 31 of the German Corporation Tax Act (Körperschaftsteuergesetz – KStG -) and has basically the same requirements as for income tax. In general the time limit to submit a tax return for the previous year is May 31st of the following year for non-represented tax payers whilst those using an accountant are granted an extension till the end of the following year. As for Value Added Tax (VAT) the entrepreneur has to send an electronic tax return periodically every quarter of a year and compute the tax due with regard to supplies and other services in Germany or the EU. Furthermore a yearly tax return has to be filed where again the tax/credit due is self-computed.

[1] Pursuant to § 2 of the German Foreign Transactions Tax Act (Außensteuergesetz – AStG -) a person is subject to extended restricted tax liability if, as a German citizen, for ten years before the end of his unlimited tax liability, he was subject to unlimited tax liability at least five years and moved to a foreign state with no or minor income tax liability but still has essential economic inter-

b) Obligation to provide information

- ✓ In principle the burden of proof for taxable receipts is on the Inland Revenue whereas the taxpayer has to prove his deductible expenses. German tax law obliges the Inland Revenue to find facts and clarify matters of its own motion. Parallel, the taxpayer has the obligation to deliver information in order to be assessed. The quality and quantity of information the taxpayer is required to communicate depends on whether the tax case is of national or international scale. In a purely national context § 90 I of the German Revenue Code (Abgabenordnung – AO -) asks the taxpayer to generally co-operate and disclose facts and figures as well as provide the relevant proof for his individual case. In an international context however the taxpayer has an increased obligation of co-operation. He then not only has to name the facts and means of proof but also has to supply a witness or documents about foreign bank accounts for example. He cannot refer to the fact that he is prevented from presenting documents by a contractual confidentiality clause but has to ensure, for example by relevant clauses in an agreement, to be able and allowed to submit relevant documents for tax purposes (§ 90 II 1-2 AO). For taxpayers holding equity interests in foreign interim companies there is also an extended obligation for co-operation. The Inland Revenue can ask them to clarify in detail their business relationship and provide the relevant documents of proof, for example the balance sheets and profit and loss accounts. In asking so the principle of proportionality has to be observed.

- ✓ To grant the Inland Revenue even more comprehensive power to fight tax evasion and force non co-operative jurisdictions to co-operate, a new provision was added in § 90 II 3 AO as of 1 January 2009. If there are objective indications that the taxpayer maintains a business relationship with financial institutions in tax havens the taxpayer has to affirm under oath that the statements he submits are correct[2]. He furthermore has to authorise the Inland Revenue to seek information with the foreign financial institution in the name of the taxpayer.

- ✓ If a taxpayer carries out cross border operations, § 90 III AO imposes on him obligations to provide extended information regarding the business relationship with related companies and also the profit distribution between the parent company

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est in Germany. The consequence is that this person, for the fortcoming ten years, is subject to a limited tax liability on a wider income basis than those subject to a limited tax liability only.

and the subsidiary. The taxpayer at first has the obligation to document the content, scope, handling and economic as well as legal framework of the operation (Functional and Risk Analysis). Secondly, he has to give a written legal appreciation of the business operation as well as the market and competition circumstances (Transfer Pricing Analysis). In case of a specific transaction (e.g. if the group is restructured) the documentation has to be produced promptly (within six months of the transaction being carried out). In general the documentation has to be produced for purposes of a tax audit. Once again the Inland Revenue has to observe the Principle of Proportionality.

- ✓ Both in a national as well as an international context the Inland Revenue can deny the deduction of business expenses if the taxpayers does not name the recipient of the payment (§ 160 AO). In a cross-border situation where the taxpayer maintains business relations with entities which are not/not significantly taxed the taxpayer not only has to name the recipient of the payment but also has to disclose and give detailed information about the relationship between the taxpayer, the company located in a tax haven as well as other entities involved in order to be able to deduct the business expenses (§ 16 AStG). This is to prevent income or profit shifting to low tax countries and erode the national tax base.

c) Obligation to keep proper accounting records and to store the data carriers belonging thereto

- ✓ § 146 II AO introduces a legal obligation for taxpayers to keep records. In general the records have to be kept in Germany, both for national permanent establishments and those abroad, providing the foreign law does not oblige the entity to keep the records in its home country. If that is the case the results have to be implemented in the national German records.

- ✓ A new subsection II was added to grant a relief to those taxpayers with permanent establishments abroad and to give them the possibility upon request to keep electronic records in the country where the company has got its seat. In order to be granted such relief the taxpayer has to fulfil certain criteria. At first, he has to inform the Inland Revenue about the exact location of the data processing register.

[2] Please note that no coercive measures can be used to obtain the affirmation under oath.

He also has to meet his obligation of information according to § 90 AO. Thirdly, the Inland Revenue has to have full access to electronic data at all times. Finally, all other possible obstacles for taxations must be erased. In case the taxpayer does not comply with all the above mentioned criteria the Inland Revenue can order him to shift the electronic data back to Germany.

2. Information located abroad

In the 21st century taxpayers increasingly move cross- border both for personal residence purposes and in business transactions. The Inland Revenue is required by law to carry out a correct, equal and neutral tax assessment in both a national as well as an international context. However by international law their field of investigation is limited to the national territory (Principle of Territoriality), i.e. tax audits in general cannot be carried out in another state without the consent of this other state. Therefore the Inland Revenue depends on specific provisions to achieve information regarding cross-border issues. These provisions originate both in national and international law.

a) National provisions

The legal basis for the German Inland Revenue to both seek as well as receive information from foreign states is § 117 AO. § 117 I AO allows the Inland Revenue to seek information from a foreign country. The information has to be necessary for the national taxation. In addition the request for information has to be reasonable, i.e. the Inland Revenue must have exhausted all national potentials (request for information according to § 90 AO) beforehand. On the basis of this provision the Inland Revenue is also allowed to receive information without a request (spontaneous information) from other countries. In all cases the fiscal secret has to be observed. The taxpayer – if he is aware of the request for information – can appeal against it. In most cases he has to apply for interim measures due to the urgency for time. § 117 II AO empowers the Inland Revenue to give information to other non-EU States[3]. A request by the state is obligatory. Also it has to be ensured that there is the possibility of a mutual exchange with the other country, the information is only exchanged for purposes

[3] The exchange of information between Germany and other EU- Member States is governed by EU-law.

of a tax procedure or a criminal procedure reg. tax issues, double taxation can be avoided using the information, the ordre public is not violated and there is no harm to a German party (e.g. the disclosure of a business secrecy). Finally, the taxpayer has to be heard before the action.

In July 2012 § 117a AO was implemented in the German Revenue Code to allow the exchange of data between EU- Member States in order to prevent crime. Personal data from tax and customs investigation can be exchanged on request. The “competent authority” are the bureau of tax investigation, the police and the prosecution. Without request an exchange of data is possible to prevent specific criminal offences like terrorism, human trafficking and child pornography. The exchange of data can be prohibited in certain cases, for example if the partner state does not have certain standards of data protection. § 117b AO regulates the use of data received. It can only be used for the purpose of the transmission or to protect the ordre public. In all other cases the data can be used if the transmitting state agrees.

b) Provisions based on EU-Law

- ✓ **EU- Exchange of Information Law (EU-Amtshilfegesetz – EU-AHIG-)**
  As of 01/01/2013 Germany implemented Art. 8 of the Mutual Assistance Directive 2011/16/EU in its national EU-AHIG. It is applicable on income and capital gain taxes and allows exchange of information with other EU-Member States. The OECD’s standards are observed, the information to be exchanged has to be most likely relevant for taxation and there are no “fishing expeditions” permitted. The Inland Revenue is authorized to seek and receive information in individual cases as well as spontaneous information. Routine information can be granted to other Member States. A right for the taxpayer to be heard before granting the information is not included. Therefore in practice it might be difficult for the taxpayer to appeal against the procedures as he might not learn about the exchange of information in time. Unlike its predecessor the EU-AHIG contains time limits to grant the info (as in the past the potential exchange of information became ineffective because it took too long amongst the Member States). In general it has to be given without delay, the latest six months after receipt of the request. If the Inland Revenue already has the information to be exchanged the exchange has to take place the latest two months after the request for information. The exchanging

Member States can agree on differing time frames. There are several prohibitions, for example the information shall not be exchanged because the other state has not yet exploited all of its national means to receive the information, the information procurement is forbidden under German law, confidentiality is not guaranteed or the ordre public may be violated.

- ✓ **§ 9 II of the German Interest Regulation (Zinsverordnung – ZIV -)**
  Furthermore § 9 II ZIV contains another possibility to routinely exchange information on interest payments within the EU. The ZIV is based on the Interest Directive 2003/48/EG which - after many years of consultation and discussion - finally allowed the exchange of information on interest payments between the EU Member States. Not all Member States agreed to exchange the information; Austria for example does not exchange information about interest payments to foreign recipients, and Belgium did not do so till 31/12/2009. In that case a graduated withholding tax applies which started at 15 % in 2005 and currently is at 35% as of 01/07/2011. In Luxembourg the recipient can choose between the withholding tax and the exchange of information. As the original Interest Directive did not reach all the goals set (for example it became possible to escape the obligations laid down by using different forms of investments or divert interest payments to outside the EU) it was punctually corrected and made more efficient through the new Directive 2014/48/EU from 24/03/2014. For example the terms “recipient” and “interest payment” were widened, in the latter case also to include certain life insurance payments. The member states now have till 01/01/2016 to implement the new Directive in their national law, to be applicable as of 01/01/2017.

c) International Agreements

Finally there are various bi- and multilateral agreements the German Inland Revenue can refer to to seek information from abroad.

- ✓ **Art. 26 OECD-Model Agreement**
  All of the double tax agreements Germany has concluded with other states contain an “exchange of information” – clause based on Art. 26 OECD-Model Agreement. Whereas some of the older agreements still contain a so called “small exchange of information” clause where information can only be exchanged for the purposes and taxes contained in the agreement, all of the newer agreements in-

clude a “comprehensive exchange of information” –clause that allows information to be exchanged not only for the purpose of the agreement but also national law. The requirements are that the information will most probably be relevant for taxation, cannot be achieved otherwise and the partner state grants information as well. Confidentiality has to be respected and in certain cases (e.g. potential danger for the ordre public) the exchange of information is prohibited. Group requests are now allowed but “fishing expeditions” are prohibited.

- ✓ **Bilateral agreements on exchange of information**

  With those countries Germany has not agreed upon a (full) double taxation agreement (yet) but has progressed in the dialogue it has multiple[4] agreements on exchange of information. Thereby it achieved a first step with so called “tax havens” which in the past were not co-operative reg. tax matters to communicate about cross-border tax issues and exchange information on that. Several of these exchange of information agreements lead up to a full double taxation agreement then containing an exchange of information clause mentioned above in 2.c).

- ✓ **Foreign Account Tax Compliance Act (FATCA)**

  FATCA as a unilateral mean came into force in the USA in 2010 to intensify the US-Tax-Reporting by foreign financial institutions. The goal is to prevent US taxpayers from transferring assets untaxed to tax havens. In 2012 the US and its FATCA partner countries (UK, Germany, France, Italy and Spain) developed bilateral model agreements, and the first one to sign was the UK in September 2012. Germany signed on 31/05/2013. So far several more countries either signed such a bilateral agreement or are negotiating one. According to the agreement, financial institutions have to enter into an additional contract with the US Inland Revenue Service (IRS). All clients have to be identified towards a potential US tax obligation. Accounts, shares, stakes etc. have to be yearly reported. The term “revenue” was widened. Non co-operative clients and financial institutions have to pay a 30 % withholding tax on withholdable payments (revenue from US-source). The withholding tax however does not have definitive effect and does not excuse the taxpayer not to file a FATCA report. The goal is to exchange information. Germany has implemented the FATCA rules in its national law in October 2013 and 2014. Discussions with the Inland Revenue how to handle FATCA in practice are ongoing.

d) Information unlawfully obtained

Since 2006 several Data-CDs containing information about bank data of German individual taxpayers or other legal constructions involving German taxpayers (e.g. trusts etc.) in low-/no tax countries with no exchange of information – mostly Switzerland and Luxembourg - were offered by private foreign individuals to the German government/the governments of the German "Länder"[5] in exchange for some financial compensation. The foreign individuals normally were (ex-) employees of the financial institutions. They took advantage of the fact that in most cases they had - within their job framework - legal access to the information of the client. The information was then copied to a CD. This behaviour in general is seen as a criminal offence[6] .Germany over the last few years – in nine cases – purchased tax data CDs from six Swiss banks and one in Lichtenstein and paid all in all 11 million €.[7] Parallel to using the data contained on the CD for tax assessments the Inland Revenue initiated criminal proceedings for tax evasion – the offence the taxpayer was accused of. The affected taxpayers – both in the criminal as well as the tax proceedings – in their defense argued that the information on the data CDs were unlawfully obtained and therefore could not be used against them. As the German individuals were not only confronted with a retrospective tax payment for evaded tax on interest payments but also feared criminal sanctions[8], many of the cases were not brought to court procedures but settled amongst the Inland Revenue/prosecution and the taxpayer/their defense after the taxpayer gave a full confession. Therefore there is for example no jurisprudence yet by the Federal Courts reg. the question whether the German government officials purchasing the data committed a criminal offence. Reg. the exploitation of the data as a mean of proof in the criminal trial however there are decisions by both criminal courts and constitutional courts of the Länder. In addition the question is frequently discussed in the literature[9]. To this date the general opinion still is that there is no prohibition of exploitation. The main argument used is that under German criminal law – especially

[4] On 01/01/2015 31 agreements on exchange of information were concluded.
[5] Federal states.
[6] Art. 47 Schweizer Bankgesetz (Suisse Bank law): Betrayal of confident bank secret (if employee had granted access to data); Artt. 23, 6 Schweizer Bundesgesetz gegen den unlauteren Wettbebewerb (unfair competition law): Betrayal of business secret (if employee had no granted access to data).
[7] Höring, Deutsche Steuerzeitung 2015, p. 341 ff.
[8] Financial penalties or –depending on the amount of the evaded tax – a prison sentence.

the provision in § 136a of the German Strafprozessordnung – StPO[10] - dealing with the prohibition of exploitation - proof obtained by a private person – whether legally or illegally – and then used in the criminal procedure does not lead to a prohibition of exploitation. The most recent case I found on this particular subject is a decision by the Constitutional Court of Rheinland-Pfalz[11] concerning a constitutional appeal by a taxpayer whose data was found on a purchased CD containing data of his account with a Swiss bank. As a consequence, upon the suspicion of tax evasion and on the basis of a judicial search warrant, his home was searched and several documents were seized. He appealed against the search procedures on the grounds that data found on the CD was used to issue the search warrant. He claimed that his right to a fair trial, his general right of privacy and also his general right to an inviolable home were breached. The court held that in general the criminal acquisition of evidence by a private person not necessarily leads to a prohibition of exploitation in the criminal procedures. The taxpayer's right to a fair trial is met by the public pursuit for a functional criminal procedure. However also in criminal procedures there is no need to disclose the truth at any price. Governmental institutions are only allowed to find evidence within the constitutional and legal framework. Interventions without a legal basis are not allowed. The legal framework for buying tax data CDs so far has remained unclear. There is no general provision in German law that allows the government to buy unlawfully obtained means of proof from third parties in order to use them in a criminal/tax procedure. Therefore in future cases the courts will precisely have to deal with the question what kind of far-reaching considerations the German Government/Inland Revenue had purchasing the CD. Also the role of the acting civil servants buying the CDs has to be considered. So far it has been stated by courts of first instance that civil servants did not commit a criminal offence. The Federal Courts have not decided on this question yet. In the previous cases as well as the case in question the purchase was initiated by a private person (the bank employee). His actions could not be assigned to the government as the governmental influence was not strong enough. However in the future the court could see a situation where such actions could be assigned to the government if its role became influential to an extent that the private person only acts as an extended arm of the

[9] Amongst others: Ostendorf, Zeitschrift für Internationale Strafrechtsdogmatik 4/2010, p. 301; Spatscheck, Festschrift für Klaus Volk 2009, p. 771; Schünemann, Neue Juristische Wochenzeitschrift 2008, p. 305.
[10] German Criminal Procedure Act.
[11] Decision of 24/02/2014, VGH B 26/13, Neue Juristische Wochenschau 2014, 234.

government. Such a situation might occur under the following four conditions: At first, governmental institutions will get involved more heavily in the process of the data purchase. Secondly, there is a more intensive and planned cooperation between the government and the private person. Thirdly, the government works together with the same private person several times to purchase the data, or fourthly, the government repeatedly buys CD data within a short time frame and therefore incentivises private persons to “steal” data to sell it on. In these cases the government willingly seeks proof knowing that the way to receive it includes a criminal offence. This could then lead to a prohibition of exploitation in the criminal procedure. In the tax procedure the protection of the data might be a bit lower. At first there is the need to create fiscal justice and also a secure tax revenue. Also in an international context the taxpayer in Germany has the increased obligation to deliver information (§ 90 I, III AO). In case he does not do so the Inland Revenue can apply the consequences discussed in the following subsection 3.

I personally however find the stage the jurisdiction is in at the moment a rather impractical one. Especially in the short time frame judges have in particular to issue a search warrant they most probably cannot collect all the information necessary to weigh up. Therefore as time has moved on more court decisions would be welcomed to have some applicable jurisdiction in the end. It might swing towards a prohibition of exploitation under the condition that more tax data CDs were purchased and the initiative came from the government. However I do not think that we will reach that state as also the environment of seeking information is changing. Amongst others in 2014 Switzerland has agreed to an automatic exchange of information in tax cases and on 27 May 2015 entered into a corresponding agreement with the EU to come into force as of 2018. This will have the effect that the Inland Revenues on both sides can inter alia exchange information about interest and other taxable advantages drawn from investments in both countries. As a consequence stolen data CDs might not be as interesting any more as a mean of proof as there will be a legal way of obtaining data which the government can be referred to. Also taxpayers will fear more and more to be discovered so the motivation to seek such risky investment will become less. Therefore, in my opinion, the purchase of stolen data will become needless.

3. Sanctions in Case of Non-Compliance

In case taxpayers do not observe their obligations quoted in 1. b) above to co-operate and deliver information to the Inland Revenue regarding cross-border tax matters there are various sanctions the Inland Revenue has to or can apply by law.

- ✓ **Estimation of tax base (§ 90 II 1, § 160 II 1 AO)**
  If the taxpayer does not comply with his duties laid down in § 90 II 1 AO to deliver the relevant information as well as proof in international matters the Inland Revenue has got the right to estimate the tax base arising from these international matters (§ 160 II 1 AO). The estimation has to be reasonable and comprehensible but can also lead to a higher tax base than the actual one would be. This is at the risk of the taxpayer not providing the relevant information.

- ✓ **Disputable presumption that income/assets in non-cooperative states exist/are higher than declared (§ 90 II 3, § 162 II 3 AO)**
  In case the taxpayer does not fulfil his obligations in § 90 II 3 AO (affirmation under oath that the statements from the financial institutions in the low tax countries he submitted are correct, and authorisation of the Inland Revenue to seek information with the foreign financial institution in the name of the taxpayer) the Inland Revenue has to presume that the income/assets in non-cooperative states exist/are higher than declared (§ 162 II 3 AO). The presumption can be disputed by the taxpayer.

- ✓ **Disputable presumption that income/assets in Germany affected by documents are higher than declared (§ 90 III, § 162 III AO)**
  § 90 III AO binds the taxpayer to provide extended information regarding his business relationship with related companies and also the profit distribution between the parent company and the subsidiary. If the required documents are not delivered or are delivered but are not of the quality asked for or the delivery did not meet the set time frame (prompt, respectively six month after the transaction) the Inland Revenue has to presume that the income/assets in Germany affected by these documents are higher than declared (§ 162 III AO). If there is a scale for transfer pricing the Inland Revenue can – to the disadvantage of the taxpayer - choose the high end of the scale. The presumption can be disputed by the taxpayer.

- ✓ **Additional „tax“ (§ 90 III, § 162 IV AO)**

  Additively to the sanctions given in § 162 III AO, the Inland Revenue has to assess an additional “tax”[12]. The additional “tax” is in general 5.000 €. It is increased to a minimum of 5% and a maximum of 10% of the increased estimated revenue if the latter amount is higher than 5.000 €. If the documents are presented late (e.g. not promptly in case of a tax audit, respectively not within six month of the transaction in specific cases) an additional “tax” of up to 1.000.000 € has to be assessed, at least 100 € for every day the time-limit was not observed. The amount of the additional “tax” is at the discretion of the Inland Revenue. In exercising it, it has to bear in mind how much the taxpayer can be blamed for, e.g. how unusable the documents are or how late the taxpayer submitted them. The Principle of Proportionality has to be observed.

- ✓ **Related jurisdiction**

  The Bundesfinanzhof (BFH), in its judgment of 10/04/2013 I R 45/11[13], held that the obligation laid out in § 90 II 6 AO to present the required documentation is - in general - lawful and does not breach EU law. It is an impediment to the freedom to provide services (Art. 56 Treaty on the Functioning of the European Union). But it is justified by the need to safeguard the effectiveness of fiscal supervision. However the court has not decided yet[14] whether the requirements laid down in § 162 III AO are proportionate as such. In particular is it proportionate that the Inland Revenue can choose – to the disadvantage of the taxpayer - the highest price on a scale of transfer pricing? Is it in accordance with international law that a national provision obliges foreign related entities to co-operate with the Inland Revenue or does the Inland Revenue not have to use the means of international administrative assistance instead? With respect to the “additional tax”/criminal surcharge embedded in § 162 IV AO is it compatible with EU law/proportionate that it is only used as a leverage in cross-border issues and that the sanctions for not obliging the documentation requirements in an international context are much higher than in a purely national one?[15]

[12] Even though the law speaks about an „additional tax“ it is in real terms a criminal surcharge.
[13] Bundessteuerblatt II 2013, 771; Deutsches Steuerrecht 2013, 1824.
[14] And did not have to as it was not relevant to the particular judgment.

- ✓ **No deduction of business expenses (§ 160 AO, § 16 AStG)**
  Lastly, if the taxpayer, in a cross border context, does not let the Inland Revenue know who received a business receipt, the taxpayer cannot deduct the receipt as a business expense.

[15] If in a national context bookkeeping requirements are not observed the records are partly/fully disregarded as a mean of proof and as a consequence the Inland Revenue can estimate the tax base.