

Act Combating Tax Avoidance and Unfair Tax Competition

With the Combating Tax Havens Act (Steueroasen-Abwehrgesetz, "StAbwG") which came into force in 2021, the legislator of the Federal Republic of Germany is pursuing the goal of curbing tax avoidance and aggressive tax planning through business relationships in so-called non-cooperative tax jurisdictions. Incentives to shift profits to low-tax countries shall be reduced in order to prevent disproportionate tax advantages and ensure tax revenues in Germany. To this end, various defensive measures are introduced and the documentation requirements for affected business transactions are tightened.

Scope

The StAbwG applies to individuals with unlimited and limited tax liability, corporations, associations of persons and funds. In principle, all types of tax fall within the scope of the StAbwG; however, VAT (including import VAT), import and export duties and excise duties are explicitly excluded. The provisions of the StAbwG take precedence over those in double taxation agreements.

Non-cooperative tax jurisdictions

A tax jurisdiction is specifically classified as non-cooperative if it is listed in the Ordinance to Combat Tax Evasion (Steueroasen-Abwehrverordnung, "StAbwV"), which is based on the EU list of non-cooperative countries and territories for tax purposes. The Russian Federation was included in the ordinance as the most prominent non-cooperative tax jurisdiction in December 2023.

Business transactions affected

The business transactions (and shareholdings) affected by the StAbwG are those that taxpayers maintain in or with reference to a non-cooperative tax jurisdiction. This also includes assumed contractual relationships („dealings") pursuant to § 1 (4) s. 1 no. 2 of the German External Tax Relations Act (Außensteuergesetz, "AStG") and business transactions of or via a partnership or permanent establishment. Whether these transactions take place at arm's length or between related parties is irrelevant for this purpose.

Defensive measures under the Combating Tax Havens Act

In relation to the respective business transaction, only one of the following defense measures applies.

► Tighter rules on controlled foreign company (CFC)

§§ 7 to 21 AStG are extended to the effect that all income of the foreign company as an intermediate company is subject to CFC legislation.

The tighter CFC legislation applies from the year following the inclusion of a territory in the StAbwV.

► Withholding tax measures

Income with limited tax liability pursuant to § 49 of the German Income Tax Act (Einkommensteuergesetz, "EStG") is limited by the StAbwG for non-cooperative tax jurisdictions. Withholding tax obligations are significantly extended to persons, corporations, associations of persons or funds domiciled in Germany.

About us

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In addition, income from

1. financing arrangements (in particular loans and finance leases)
2. insurance or reinsurance benefits
3. provision of other services (except: transfer of use)
4. trade in goods or services
5. renting & leasing or sale of rights that are entered in a domestic public book or register („register cases“)

is subject to withholding tax in Germany.

These supplementary withholding tax measures apply from the year following the inclusion of a territory in the StAbwV.

► **Measures relating to profit distributions and sale of shares**

The tax exemptions and benefits otherwise applicable to profit distributions and the sale of shares are not applicable within the scope of shareholdings in a company in a non-cooperative tax jurisdiction. This specifically concerns § 8b (1) of the German Corporation Income Tax Act (Körperschaftsteuergesetz, "KStG"), DTA regulations, the partial income method and the final withholding tax. These tightening measures apply from the third year following the inclusion of an area in the StAbwV.

► **Ban on deduction of operating expenses and work-related expenses**

The ban on deduction is subordinate to the tighter CFC legislation pursuant to the StAbwG, the CFC legislation pursuant to the AStG, the withholding tax measures pursuant to the StAbwG and § 49 of the EStG.

The ban on the deduction of operating expenses only applies from the fourth year following the inclusion of a territory in the StAbwV.

Enhanced cooperation obligations

§ 12 StAbwG imposes enhanced obligations of cooperation for business transactions within the scope of the StAbwG that go beyond § 90 of the German Fiscal Code (Abgabenordnung, "AO"). The corresponding records have to be created at the latest one year after the end of the relevant financial year and submitted without request to the local competent tax office and, if the limit of EUR 750 million is exceeded, also to the German Federal Central Tax Office (Bundeszentralamt für Steuern). For financial years that began before December 31, 2022, no objections will be raised if the records are submitted for the first time by December 31, 2024.

If these obligations are not complied with, the tax authorities may estimate income from non-cooperative tax jurisdictions and the admissibility of external audits is extended.

Need for action and support from BDO

Taxpayers who conduct business transactions in non-cooperative tax jurisdictions should check whether and to what extent the defensive measures of the StAbwG apply to them to ensure that they meet their tax obligations.

Your contact at BDO will be happy to help you determine your specific need for action. Depending on requirements, we will be happy to support you with the broad expertise of BDO in Germany and, where appropriate, also with colleagues from our network represented across 166 countries worldwide.

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