Tax on corporate lending and bond issues in Germany: overview

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A Q&A guide to tax on corporate lending and bond issues in Germany.

This Q&A provides a high level overview of finance tax in Germany and focuses on corporate lending and borrowing (including withholding tax requirements), bond issues, plant and machinery leasing, taxation of the borrower and lender when restructuring debt, securitisations, the Foreign Account Tax Compliance Act (FATCA) and bank levies.

To compare answers across multiple jurisdictions, visit the *Tax on Corporate Lending and Bond Issues: Country Q&A tool*.

The Q&A is part of the global guide to tax on transactions. For a full list of jurisdictional Q&As visit *www.practicallaw.com/taxontransactions-guide*.

Tax authorities

1. What are the main authorities responsible for enforcing taxes on finance transactions in your jurisdiction?

The local tax office (*Finanzamt*) generally enforces taxes on finance transactions, including:

- Corporate tax.
- Value added tax (VAT).
- Real estate transfer tax (*Grunderwerbsteuer*) (RETT).

However, where the transaction has significant financial importance (for example, a large investment exceeding the limit of the local tax offices' competence), the local tax office may be required to involve the regional fiscal office (*Oberfinanzdirektion*).

Trade tax (*Gewerbesteuer*) is based on the assessment of corporate taxes but is enforced and assessed by the local municipalities (*Gemeinde*).

The Federal Central Tax Office (*Bundeszentralamt für Steuern*) is involved in certain cases requiring the official notification and enforcement of foreign tax assessments. Besides enforcement, the Federal Central Tax Office is the competent authority in other cases for foreign investors (for example, in relation to withholding tax refunds for

foreign taxpayers and where there is no tax office responsible for the taxpayer). The Federal Central Tax Office is also responsible, among other things, for the issuance of tax clearances relating to planned investments sufficiently likely to be realised by foreign investors.

Pre-completion tax clearances

2. Is it possible or necessary to apply for tax clearances or obtain guidance from the tax authorities before completing a finance transaction?

Circumstances for obtaining clearance

There are no specific circumstances where tax clearance must be obtained.

Mandatory or optional clearance?

An application for a clearance from the tax authorities before completion of a finance transaction is not required. However, to safeguard the tax treatment of an intended transaction, taxpayers can request a binding ruling from the tax authorities before executing a transaction, although this is not mandatory.

Procedure for obtaining clearance

The tax authorities have discretion to issue a tax ruling, although they can only decline to issue a ruling in limited circumstances and it is possible to appeal a decision not to issue a ruling. If the relevant tax authority issues a ruling, it is (subject to a potential change of the relevant tax code in the future) bound by it if the taxpayer has executed the transaction as described in its request. A taxpayer can only receive a ruling concerning the application of tax laws to certain specific facts. The tax authorities will not rule on the existence of certain facts.

The taxpayer must pay a fee with the application for a ruling. The fee is between EUR241 and EUR109,736 and is based on the difference between the taxpayer's legal analysis of the tax effect (tax liability) of the intended transaction and the tax authorities' (potentially opposing) legal analysis. For example, if the intended transaction will result in a tax liability of EUR500,000 based on the taxpayer's legal analysis, and a tax liability of EUR1 million based on the potential tax authorities' legal analysis, the tax effect is EUR500,000 and the fee is based on this amount. No fees are due if the tax effects are below EUR10,000. If the tax liability cannot be determined, the tax authorities charge a rate of EUR50 per half-hour (no hourly fees apply where the tax authorities need less than two hours to provide the ruling). Fees for rulings are deductible for tax purposes only if the taxes for which the ruling is issued can also be deducted. As a result, the fees for a ruling concerning corporate income tax or trade tax are not deductible.

The application for a ruling must be in writing and include all of the following details:

- The name, address and tax number (if applicable) of the applicant.
- A detailed and complete description of the intended transaction. The transaction must not be carried out until the ruling request has been answered and the taxpayer cannot apply for a ruling based on speculative alternative facts.

- A demonstration of a taxpayer's special interest in the ruling. The taxpayer must have a substantial economic interest in the intended transaction and its tax treatment.
- Extensive legal analysis (giving details for and against) of the tax question on which a ruling is requested.
- Precise legal questions for the tax authorities to answer. The tax authorities will not answer general questions on tax consequences.
- A declaration that the applicant has not applied for a binding ruling in relation to the same transaction with another tax authority.
- Certification that the applicant has provided all information necessary for the ruling and that this information is true.

The application must be filed with either the:

- Taxpayer's relevant local tax authority (*zuständiges Finanzamt*).
- Federal Central Tax Office, where a foreign taxpayer has no relevant tax authority at the time of the application.

Until 31 December 2016, there is no specific time frame within which the tax authorities must answer an application for a ruling. Generally, the answer on an application for a ruling takes at least some weeks but it can also take several months, depending on the complexity of the case. For applications filed after 1 January 2017, the tax authorities must either:

- Answer the application within six months.
- Communicate their reasons to the applicant for not doing so.

Disclosure of finance transactions

3. Is it necessary to disclose the existence of any finance transactions to the tax authorities?

Circumstances where disclosure is required

It is not necessary to disclose the existence of any finance transactions to the tax authorities in advance. However, tax returns must be filed (see below, *Manner and timing of disclosure*).

Manner and timing of disclosure

Taxpayers are not required to disclose the existence of finance transactions to the tax authorities. However, taxpayers must file ordinary tax returns. In particular, for certain factual or indirect transfers of real estate by transfer of shares or partnership interests, the taxpayer must notify the local tax authorities and submit a tax return. This includes where:

- At least 95% of the shares in a corporation are directly or indirectly aggregated in the hands of one entity or person, or certain related persons.
- At least 95% of the partnership interests in a partnership are directly or indirectly transferred over a five-year period to new partners (even if the persons are not related).
- Economically at least 95% of the shares/interest in a corporation/partnership are held (directly or indirectly) by one shareholder/partner. The indirect shareholding/interest is calculated by multiplying the participations in the capital and/or in the assets of the entities involved.

Proposals under recent tax reforms relating to mandatory information requirements for certain types of tax structures have not been implemented. However, taxpayers must promptly document business transactions with related persons (*paragraph 1, section 2, Foreign Tax Act (Aussensteuergesetz)* (AStG)). This affects, in particular, intercompany transfer pricing.

Taxes on corporate lending/borrowing

Taxes potentially chargeable on amounts receivable

4. What are the main corporate taxes potentially chargeable on interest and other amounts receivable under a loan?

Corporate income tax
Corporate income tax at 15% is payable on interest and other amounts receivable under a loan, irrespective of whether received or accrued by a corporate lender. A solidarity surcharge of 5.5% is added, resulting in a cumulative tax rate of 15.825%.

Trade tax
Trade tax applies to interest and other amounts a corporate lender receives or accrues under a loan. Trade tax is determined by multiplying the base rate (*Steuermessbetrag*) of 3.5% with a multiplier (*Gewerbesteuerhebesatz*). The multiplier depends on the location (municipality) of the taxpayer and is typically between 300% and 490% (the statutory minimum rate is 200%). For example, the Munich trade tax multiplier is 490%, resulting in a trade tax rate of 17.15%.

Tax reliefs available for borrowing costs

5. What corporate tax reliefs are available for borrowing costs (including interest and other amounts payable under a loan)?

Deductible expenses
Interest expenses and other borrowing costs payable under a loan are generally tax deductible for the purposes of both:

- Corporate income tax.
- Trade tax (however, 25% of an interest payment deductible for corporate income tax purposes is not deductible for trade tax purposes).

Interest payments and other borrowing costs between related parties are deductible under the same general principles, if the terms and conditions meet arm's-length standards. Otherwise, the payments are not deductible but are re-qualified as hidden dividends for tax purposes (*verdeckte Gewinnausschüttung*).

Since fiscal year 2010, business relationships with non-co-operative countries (that is, countries that have not agreed on an information clause under Article 26 of the Organisation for Economic Co-operation and Development (OECD) Model Tax Convention on Income and on Capital) can be subject to various sanctions. As a result, for example, the deduction of business expenses is subject to further obligations on the German taxpayer to provide additional information to the tax authorities and to produce supporting documents.

Interest deduction ceiling rule (Zinsschranke) (IDC rule)
The general deductibility of interest is limited by the complex IDC rule, which limits the amount of deductible interest. For any amount of interest expenses exceeding interest income, only 30% of earnings before interest, taxes, depreciation, and amortisation (EBITDA) are deductible under the IDC rule, except if certain escape clauses apply (*see below*). Interest not deductible under the IDC rule can be carried forward until forfeiture events occur. In addition, under certain restrictions, it is possible to carry forward EBITDA for use in later years, for the determination of interest deductible under the IDC rule. Details of how the IDC rule works are set out below.

The IDC rule limits the deductibility of interest for corporate income and trade tax purposes. It applies to all interest expenses, irrespective of whether either:

- They are paid to third parties (for example, banks) or related parties.
- The borrowing is long or short term, or is secured.

However, the IDC rule only applies to expenses on capital lending (and not to, for example, leasing expenses). It also applies to foreign corporations realising only income subject to German non-resident taxation.

Under the IDC rule, interest expenses are deductible without any limitation at the same amount of interest income received in the same business year. Net interest expenses (that is, the amount of interest expenses exceeding interest income) are deductible in the amount of 30% of EBITDA (unless an exception applies (*see below*)). For the purposes of the IDC rule, EBITDA can vary considerably for accounting purposes, in particular for holding companies. The following cannot be taken into account in determining EBITDA:

- Any (largely) tax-exempt capital gain on shares or dividend income.
- Income from an interest in a limited partnership.

The IDC rule does not apply for corporate income tax or trade tax purposes and interest expenses therefore remain fully deductible (75% deductible for trade tax purposes), in any of the following circumstances:

- The company's net interest expenses during the fiscal year are less than EUR3 million (*Freigrenze*). If the EUR3 million tax exempt threshold is exceeded, there is no allowance (*Freibetrag*) for the amount below EUR3 million, that is, the safe harbour ceases to apply completely.
- The company is not part of a group (*Konzern*) (*see below*) and can demonstrate that it pays no more than 10% of its net interest expenses to substantial shareholders, which are:
    - shareholders that directly or indirectly hold more than 25% of the shares in the corporation (except for shareholders within the same fiscal group (*see below*));
    - persons related to such shareholders (*section 1, paragraph 2, Foreign Tax Act*); or
    - third parties with recourse against such shareholders (except for shareholders within the same fiscal group (*see below*)) or persons related to such shareholders.
- The company is part of a group (*Konzern*) (*see below*) but both of the following conditions are met:
    - the company's equity ratio equals or exceeds the group equity ratio (up to 2% below the group equity rate is ignored);
    - no more than 10% of the company's (or any other companyies in the group, including those located abroad) net interest expenses are paid to substantial shareholders provided the debt is shown in the consolidated accounts. Shareholder financing within the consolidated group is not considered in determining the 10% net interest expenses threshold. Recourse by a third party is only considered in determining the 10% threshold if the third party has recourse against the relevant shareholders or persons related to such shareholders that are not part of the consolidated group.

A company is part of a group (*Konzern*) for the purposes of the IDC rule if either:

- It is, or could be, consolidated with one or several other businesses under the applicable reporting standards.
- Its financial or operating policies can be determined uniformly, which is the case if control within the meaning of the International Accounting Standard Rule 27 (IAS 27) can be exercised.

If companies are organised in a German fiscal group (*Organschaft*) in which the controlled company's income and losses are allocated to the controlling company, the IDC rule applies on the accumulated interest expenses and EBITDA of the tax group. This means that the EUR3 million threshold applies only once for the whole tax group. Interest expenses and interest income from loans between fiscal group companies are disregarded for the purposes of:

- The IDC rule.
- Corporate income tax.
- Trade tax.

Carry forwards of non-deductible interest expenses
Non-deductible interest expenses in a specific assessment period can be carried forward and set off against income in the following business years (subject to the IDC rule). The Federal Ministry of Finance (*Bundesministerium der Finanzen*) treats carried-forward non-deductible interest as increasing the interest expenses of later years.

Carried-forward interest expenses that are not deductible under the IDC rule can be forfeited in relation to:

- Direct share transfers (or comparable restructuring measures).
- Indirect share transfers (or comparable restructuring measures) one or several tiers above the corporation to which the interest carry-forward is attributable.

For transfers (or comparable restructuring measures) of more than 25% to one acquirer (or related persons), the interest expenses carried forward are forfeited pro rata. For transfers (or comparable restructuring measures) of more than 50%, the interest expenses carried forward are fully forfeited.

A direct or indirect transfer of shares in a corporation does not result in forfeiture of interest carry forwards if certain requirements are met that qualify the transfer as a privileged intragroup transfer. Initially, certain restructuring measures were privileged. However, the European Commission declared that this violated EU law and therefore must not be applied by the German tax authorities. Under a further rule, interest carry forwards are not forfeited to the extent hidden reserves exist that would be taxable in Germany. Hidden reserves in non-taxable shares in a corporation are not taken into account for the determination of those hidden reserves.

Carry forwards of clearable EBITDA
It is also possible to carry forward clearable EBITDA not used in the previous years and to use it for determination of future deductible interest expenses under the IDC rule. Clearable EBITDA is 30% of applicable earnings, increased by interest expenses, depreciations and amortisations, decreased by interest income.

Carry forward of EBITDA of a given year is not possible if the escape clause is used in that year. EBITDA carry forward is limited to five years, whereas the oldest EBITDA carry forward is deemed to be used as the first one. Forfeiture of EBITDA carry forward arises in similar circumstances as for carried-forward interest expenses (for example, withdrawal of a partner in a limited partnership, transfer or termination of business and measures under the Reorganisation Act). However, there are exemptions from this rule (such as in the case of share transfers in a corporation).

Tax payable on the transfer of debt

6. What corporate, transfer, stamp or other taxes are payable on the transfer of a debt under a loan?

No special corporate, transfer, stamp or other taxes are payable on the transfer of a debt under a loan.

However, the realisation of gains or losses where the book value and the purchase price on transfer, or later repayment of the debt, under a loan are different triggers ordinary tax consequences (for example, distressed debt).

Withholding tax

7. Is there withholding tax on interest or any other payments under a loan?

When withholding tax applies

There is generally no withholding tax on interest or other payments under a loan (apart from deposits with a German bank).

A 26.375% withholding tax is due on:

- Bonds granting the bondholder the right to convert the bonds into shares in addition to a fixed interest payment (*Wandelanleihen*).
- Bonds granting the bondholder the right to receive an interest dependent on the debtor's dividend distributions in addition to a fixed interest payment (*Gewinnobligationen*).
- Profit participating loans (*partiarische Darlehen*) (that is, where the interest depends on debtor's profits). Under a recent decision, the Federal Court of Justice treated a loan where the interest depended on the liquidity of the debtor as a profit participation loan.
- Jouissance rights that are loans granting participation in the debtor's profits and/or participation in liquidation proceeds of the debtor (*Genussrechte*).
- Loans or bonds registered in a public register of debt or foreign register.
- Collective bonds (*section 9, Securities Deposit Act*) (*Depotgesetz*).
- Partial debentures (*Teilschuldverschreibungen*).
- Interest payments from a borrower that is a domestic financial institution (*Kreditinstitut*) or financial services provider (*Finanzdienstleistungsinstitut*) within the meaning of the German Banking Act (*Kreditwesengesetz*) or their German branches in the case of foreign financial institutions or financial services providers.
- Interest payments not at arm's length if re-qualified as hidden distributions.

Applicable rate(s) of withholding tax

The applicable rate is 26.375% (see above, *When withholding tax applies*).

Exemptions from withholding tax

For foreign investors, exemption from withholding tax is available under certain circumstances.

For a comparative summary of withholding tax on interest, see table, *Withholding tax on interest on corporate debt, and the key exemptions*, in this global guide.

Guarantees

8. Do any particular tax issues arise on the provision of a guarantee?

No particular tax issues generally arise on the provision of a guarantee. Where a guarantee is provided between affiliated companies, a guarantee commission is required to avoid a constructive dividend.

If the guarantee is in favour of a related entity, it must be at arm's length (that is, the guarantor must receive adequate compensation). If not, the provision of the guarantee may qualify as a hidden dividend distribution.

Providing a guarantee can negatively affect the application of the interest deduction ceiling rule (IDC rule). Interest on loans secured by a guarantee of substantial shareholders (or persons related to those shareholders) may qualify as harmful shareholder financing exceeding the 10% net interest threshold, in which case the IDC rule applies (see *Question 5, Interest deduction ceiling rule (Zinsschranke) (IDC rule)*).

Bond issues

9. For corporate taxation purposes, are bonds treated any differently from standard corporate loans?

Bonds are generally subject to the same tax treatment as standard corporate loans. Withholding tax requirements may apply on interest payments (see *Question 4*).

Taxes payable on the issue and/or transfer of a bond

10. What stamp, transfer or similar taxes are payable on the issue and/or transfer of a bond?

The issue and/or transfer of a bond are not subject to stamp, transfer or similar taxes.

Exemptions

11. Are any exemptions available?

Not applicable (see *Question 10*).

Plant and machinery leasing

Claiming capital allowances/tax depreciation

12. What are the basic rules for enabling the lessor or lessee of plant and machinery to claim capital allowances/tax depreciation?

The beneficial owner of leased assets is treated as the owner of the assets for tax purposes and can both:

- Report the assets in its financial accounts.
- Claim depreciation under the general rules (see *Question 13*).

The legal owner (generally the lessor) is not necessarily the beneficial owner. Beneficial ownership is determined by reference to the specific terms and conditions of the lease. The Federal Ministry of Finance has issued several public rulings concerning the beneficial ownership of leased assets (for example, movable and immovable assets, purchase options and prolongation options). Under these general rules, a leased movable asset without a purchase option is allocated to the:

- Lessor, where the basic lease term is at least 40% and not more than 90% of the expected useful life of the asset.
- Lessee, where the basic lease term is less than 40% or more than 90% of the assets' expected useful life.

Leased movable assets for which a purchase option is granted are generally allocated to the:

- Lessor, where both the:
  - basic lease term is at least 40% and not more than 90% of the expected useful life of the leased asset;
  - price that must be paid to execute the option (that is, acquire the asset) is not less than the book value resulting from straight line depreciation, or a lower current value.
- Lessee, where the above conditions do not apply.

Regardless of the existence of a purchase option, a movable asset is generally allocated to the lessee where the lease agreement is over movable assets that are both:

- Tailored to the particular needs of the lessee.
- Economically useful only for the lessee after the basic lease term (*Spezialleasing*).

Rate of capital allowances/tax depreciation

13. What is the rate of capital allowances/tax depreciation; does it depend on the type of assets?

Special depreciation rules and rates apply to buildings. Land and shareholdings in corporations are not subject to depreciation.

Limited-life fixed assets that are expected to be used for more than one year are generally subject to straight-line depreciation. This results in recognition of the depreciation as an expense item for every year of expected use. Dividing the acquisition costs (including any incidental acquisition expenses) by the number of expected years of use determines the amount of depreciation. The tax authorities have issued depreciation tables determining the expected useful life of many assets. These tables bind the tax authorities (but not the fiscal courts) and any variation from the defined useful time must be properly justified (for example, where it can be proved that the wear and tear in the individual case exceeds the wear and tear on which the depreciation tables are based).

A taxpayer who can prove extraordinary technical or economic wear and tear can write down the book value of the fixed asset to its lower market value (extraordinary depreciation). A write down of the book value due to a decrease in the asset's value is only possible if it can be demonstrated that the decrease is long term.

The declining balance method at a rate of 2.5 times the straight-line depreciation (with a maximum depreciation rate of 25%) has been reintroduced for two years and can be applied to fixed assets acquired after 31 December 2008 and before 1 January 2011.

For all limited-life fixed assets acquired or produced after 31 December 2009, the taxpayer can elect for two alternative depreciation methods, but the elected method must be applied uniformly for all limited-life fixed assets acquired or produced in a given year:

- Under the first method, limited-life fixed assets with acquisition acquired with costs of no more than EUR150 are tax deductible immediately in the business year of acquisition. Limited-life fixed assets acquired in a given year with a value between EUR150 and EUR1,000 are allocated to a pool (*Sammelposten*) for each year, which is subject to straight-line depreciation in the business year of acquisition and in the following four business years, at 20%.
- Under the second method, limited-life fixed assets with acquisition or production costs of up to EUR410 (excluding VAT) are tax deductible immediately in the business year of acquisition. Limited-life fixed assets exceeding this limit are subject to straight line depreciation results, in recognition of the depreciation as an expense item for every year of expected use.

Lessees not carrying on business in the jurisdiction

14. Are there special rules for leasing to lessees that do not carry on business in your jurisdiction?

There are no special rules for leasing to lessees that do not carry on business in Germany.

Taxation of rentals

15. How are rentals taxed?

The taxation of rentals depends on the beneficial ownership of the leased asset (allocation either to the lessor or lessee) (see *Question 12*).

Allocation to the lessor

If the lessor is the beneficial owner of the leased asset, any income of the lessor under the lease agreement is subject to ordinary taxation (that is, corporate income tax and trade tax (see *Question 4*)). The lessor can depreciate the asset under general principles (see Questions *12* and *13*).

The lessee can deduct payments under the lease for corporate income tax purposes under general principles. Payments are also deductible for trade tax purposes, but the tax base for trade tax is increased by:

- 5% of the rental expenses for movable assets.
- 12.5% of the rental expenses for real estate.

Payments under the lease are generally subject to VAT, although special rules exist for real estate.

Allocation to the lessee

If the lessee is the beneficial owner of the leased asset, the lessee is taxed as if he or she has acquired the asset. Therefore, the lessee can capitalise the asset in his/her balance sheet and depreciate the asset under general principles. Payments due under the lease are divided into:

- Interest payments, which are deductible or taxable items (subject to the general rules (see *Question 5*)).
- A non-deductible amortisation component (tax effective only through depreciation, if applicable).

Rulings and clearances

16. Is a ruling or clearance necessary or common?

In relation to leases, it is not usually necessary (or common) to obtain a tax ruling or clearance for German tax purposes.

A taxpayer can file an application for a binding ruling for complex and unusual structures, to safeguard its tax treatment (see *Question 2*). Where the intended transaction complies with public rulings issued by the tax authorities concerning the treatment of leases, it is not necessary to obtain a binding ruling (see *Question 12*).

Restructuring debt

Unpaid or deferred interest or capital

17. What is the tax treatment of the borrower and the lender if interest or capital is unpaid or deferred?

Lender

Interest income of corporate lenders is taxed on an accrual basis. Therefore, payment is generally neglected for tax purposes and the accounting is taxable. A write down may be required if the loan is in danger of no longer being collectable (see *Question 18*).

Borrower
The deferral or missing payment of interest or principal is generally tax neutral for a corporate borrower, if the interest or loan has not been waived. In this case, extraordinary income may be recognised (see *Question 18*).

For interest-free loans with a maturity of more than one year, the nominal value is discounted based on deemed interest of 5.5%. This results in an extraordinary taxable income, which is reverted pro rata in the subsequent years.

Debt write-off/release and debt for equity swap

18. What is the tax treatment of the borrower and lender if a loan is:

- Written off or released (wholly or partly)?
- Replaced by shares in the borrower (debt for equity swap)?

Lender
If the borrower and lender are not related parties, the write-off or release of a loan generally is tax deductible. If the borrower and lender are related parties, any write-off or release can result in either a hidden:

- Dividend (where the lender is a subsidiary).
- Contribution (where the lender is a parent).

The release or write-off is not tax deductible if any of the following apply:

- The lender is a substantial shareholder in the borrower (that is, it directly or indirectly holds (or held) more than 25% of the borrower).
- The lender is a related person to the substantial shareholders (*section 1, paragraph 2, Foreign Tax Act*).

Expenses on collaterals are also within the scope of this rule, if third parties have recourse to the substantial shareholders or related persons of such shareholders. This rule does not apply if the taxpayer can demonstrate that, under arm's length standards, a third party would have granted the loan under the same terms and conditions or would not have called in the loan.

A replacement of the loan by shares in the borrower is a tax-neutral capital contribution equal to the fair market value of the loan at the time of the replacement. If the fair market value of the loan is below the nominal value, the deductibility of the loss is subject to the restrictions stated above.

Borrower
The write-off or release of a loan is treated as taxable income in the amount of either the:

- Difference between the nominal value and fair market value (for related parties).
- Full released amount (for non-related parties).

In relation to restructuring, tax on income realised on the release of a loan can be deferred or dispensed. For related parties, the remaining fair market value of the loan is treated as a contribution in the equity.

The replacement of a loan by shares in the borrower (debt to equity swap) is generally a tax-neutral capital contribution in the amount of the fair market value of the loan. Any amount exceeding the fair market value of the release is taxable income in the hands of the borrowing company.

The Federal Finance Ministry issued a public ruling stating that capital increases that are not proportionate among the existing shareholders may lead to a pro rata forfeiture of loss carry-forwards and interest carry-forwards, if more than 25% of the shares are transferred to one acquirer (or related persons). For a transfer of more than 50%, the loss and interest carry-forwards are forfeited entirely.

Securitisation

19. Briefly explain the key features of the tax regime applicable to securitisations, including details of any specific tax rules that apply or issues that arise in relation to securitisations.

Corporate income tax and trade tax
In relation to securitisation and refinancing expenses (and other expenses), the difference between the income received from interest payments or other payments realised is subject to the general corporate income tax and trade tax regime. The deduction of interest expenses is subject to the interest deduction ceiling rule (IDC rule) (see *Question 5*). In special cases, the tax authorities may not consider a special purpose vehicle (SPV) as part of a group under the IDC rule.

A banking privilege may apply if certain requirements are fulfilled, under which the 25% add-back of interest payments for trade tax purposes (see *Question 5*) does not apply to a German SPV. A foreign SPV that does not maintain a permanent establishment in Germany is not subject to German trade tax. A permanent establishment may exist where the SPV has a fixed place of business in Germany or any facilities that serve its business.

VAT
It is possible to choose a securitisation structure under which the securitisation is not subject to VAT. This requires particularly that the securitisation does not qualify as a factoring activity.

Foreign Account Tax Compliance Act (FATCA)

20. Has your jurisdiction entered into an intergovernmental agreement (IGA) to implement FATCA, or does it intend to enter into an IGA to implement FATCA?

Germany signed an IGA with the US on 31 May 2013, which is based on the IGA Model 1A.

Germany agreed under the Germany-US IGA to report to the US Internal Revenue Service (IRS) specified information about the US accounts maintained by all relevant domestic financial institutions. In return, the US provides Germany with tax-relevant information.

Relevant German financial institutions must register themselves online with the IRS by 31 December 2014, to apply for a global intermediary identification number with the IRS and to report to the German Federal Fiscal Tax Office (*Bundeszentralamt für Steuern*) the data in respect of US accounts, which must be notified under the IGA. The German Federal Central Tax Office transmits this data to the IRS. Data that the German Federal Central Tax Office receives in turn from the IRS are transmitted by it to the domestic federal finance authorities.

21. Have there been any particular difficulties in light of your jurisdiction's domestic legislation with implementing the FATCA requirements?

The implementation of the intergovernmental agreement (IGA) required a limitation of the German banking secrecy law. This was adopted together with an ordinance in section 117 of the German Tax Code (*Verordnungs-Ermächtigung*), which entitles the German Federal Ministry of Finance to enact appropriate executive order laws (*Rechtverordnungen*) to enable German financial entities to comply with the requirements under the Germany-US IGA.

22. Are there any provisions of your jurisdiction's IGA and/or domestic implementing legislation, if any, that are more onerous than the US FATCA requirements?

The IGA and the domestic implementing legislation are based on the Model 1A IGA, and there are generally no provisions in the IGA between Germany and the US or the domestic legislation that are more onerous than the US FATCA requirements.

Bank levies

23. Are there any bank levies or similar taxes imposed specifically on financial institutions?

There are no bank levies or similar taxes imposed specifically on financial institutions.

24. On what are any such levies or taxes charged?

Not applicable (see *Question 23*).

25. At what rate(s) are the levies or taxes charged?

Not applicable (see *Question 23*).

26. Are there any thresholds or exemptions?

Not applicable (see *Question 23*).

Reform

27. Please summarise any proposals for reform that will impact on the taxation of finance transactions.

There are currently no proposals in Germany for reform that will affect the taxation of finance transactions described in this chapter. However, there have been ongoing discussions for several years to introduce a financial transaction tax, which will affect trading with stocks and certain derivatives. In December 2015, 11 member states of the EU, including Germany, have confirmed their intention to introduce a financial transaction tax. The details of this financial transaction tax are still under discussion.

Additionally, following discussions on base erosion and profit shifting (BEPS) at the Organisation for Economic Co-operation and Development, the EU recently issued Directive (EU) 2016/1164 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (Anti-Tax Avoidance Directive). Article 9 of the Anti-Tax Avoidance Directive provides that the legal characterisation given to a hybrid instrument or entity by the member state where a payment, expense or loss originates must be followed by the other member state involved in the mismatch. Germany must implement the Anti-Tax Avoidance Directive into national law. Therefore, Germany has set up a working group that is considering drafting a domestic anti-hybrid provision which would most likely go beyond the Anti-Tax Avoidance Directive, as it would also cover third-country hybrid mismatches. Details have not been released yet, but are expected in the next few months.

Online resources

Federal Ministry of Justice and Consumer Protection (Gesetze im Internet)
W *www.gesetze-im-internet.de*

Description. Nearly all up-to-date Federal German laws are provided by the Federal Ministry of Justice and Consumer Protection (in the German language).

Foreign Investors Help Desk of the Federal Central Tax Office (Bundeszentralamt für Steuern)
W *www.germantaxes.info* and *www.bzst.de*

Description. The Foreign Investors Help Desk gives investors an initial overview of German taxation law in addition to the more specific information on the site.

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Professional associations/memberships

- Bar Association Munich.
- Deutsche Vereinigung für Internationales Steuerrecht (International Fiscal Association of Germany).

Publications. *Form Book Law and Tax, chapter acquisition of companies (Formularbuch Recht und Steuern, Unternehmenskauf); several publications in Handelsblatt Steuerboard.*

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