

Finance Ministry Liberalizes *Organschaft* Rules

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COUNTRY DIGEST

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The German Ministry of Finance announced in a March 28 letter (IV C 2 - S 2770/09/1001) that starting immediately, a corporation incorporated in another EU/European Economic Area state with its place of management in Germany can allocate its (positive or negative) income from domestic taxable earnings to an *Organschaft* (German consolidated group) parent. The law has not been formally amended.

According to the MOF letter, the European Commission has taken up the provisions of section 14, paragraph 1, sentence 1 and section 17 of the German Corporate Tax Act regarding the recognition of an *Organschaft* in infringement proceedings (no. 2008/4909). According to those provisions, only corporations that have both their seat and their place of management in Germany can serve as *Organschaft* subsidiaries (the so-called dual domestic link). (The dual domestic link has not been required for *Organschaft* parents since the 2001 assessment period.)

The European Commission believes this dual domestic link requirement violates the freedom of establishment of the Treaty on the Functioning of the European Union (TFEU) as well as the EEA Agreement, because corporations established in another EU/EEA state that have their place of management in Germany, and as such are subject to German-resident taxation, are not entitled to form a tax group. (For a related European Commission release, see *Doc 2010-21359* or *2010 WTD 190-16*.)

Implications

Migration From Another EU/EEA State

As of March 28, the dual domestic link requirement for *Organschaft* subsidiaries no longer applies to corporations that have been established under the laws of another EU/EEA state with their place of management and control in Germany. Thus, the ability to serve as an *Organschaft* subsidiary has been expanded to migrated/dual-resident corporations. To form a tax group, the other requirements of section 14 of the Corporate Tax Act must still be met.

Migration From the U.S.

It is likely that a U.S. corporation that moves its place of management to Germany but maintains its seat in the U.S. can also serve as an *Organschaft* subsidiary in light of the nondiscrimination clause (article 24, paragraph 4) of the Germany-U.S. tax treaty.¹ (For the Germany-U.S. treaty, see *Doc 90-4347* or *90 TNI 26-48*.) ♦

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¹See Federal Tax Court (Jan. 29, 2003), I R 6/99, BStBl. 2004 II, p. 1043; Ministry of Finance letter (Dec. 8, 2004), IV B 4 - S 1301 USA 12/04, BStBl. 2004 I, p. 1181.