

Corporate Tax - Germany

Financing expenses addback under the Trade Tax Act

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[Background](#)
[Proposed amendments](#)
[Further procedure](#)

On August 31 2011 the tax offices of the 16 federal states together issued a draft amending the decree regarding the addback of financing expense for trade tax purposes of July 4 2008.⁽¹⁾ The draft decree has been agreed by the Ministry of Finance and is now open for comments.

Background

Under Section 8(1) of the Trade Tax Act, interest expense as well as certain expenses containing a financing element (eg, rent, lease and royalty payments) are subject to an addback to the trade tax base. Thus, trade tax falls due thereon. The new rule became effective on January 1 2008. The financing element of rent, lease and royalty expenses is a deemed amount of such expense.

The following expenses are subject to a 25% addback to the extent that they together exceed €100,000:

- interest expense (external/internal/short-term/long-term);
- retirement payments and permanent burdens;
- profits of a partner within a silent partnership;
- 20% of rent, tenancy and leasing expenses for fixed movable property owned by a third party;
- 50% of rent, tenancy and leasing expenses for fixed immovable property owned by a third party; and
- 25% of royalty payments for temporarily granted rights (eg, licences or concessions).

On July 4 2008 a first decree detailing the provisions of Section 8(1) of the act was issued. This decree is to be amended.

Proposed amendments

Among other things, the draft includes the following proposals:

- Interest on tax underpayment will be subject to the addback – that is, essentially, only interest expense on value-added tax underpayment will be subject to the addback, since interest expense on corporate income tax and trade tax underpayment is not tax deductible.
- In case of a sublease of fixed movable or immovable property, an addback of expenses has to be made on the level of the lessee, as well as on the level of the sub-lessee. The lessee will not be allowed to offset rental income with the corresponding expenses.
- Expenses resulting from the compounding of pension accruals will not be subject to the trade tax addback (as is the case for the compounding expenses of non-interest-bearing liabilities and certain accruals).
- Expenses for a temporarily granted licence of software will be subject to an addback if the right for the use of the software is granted and the software is protected by, for example, copyright.
- Royalty expenses incurred for unprotected inventions, know-how, goodwill or other unprotected intellectual values are not subject to the addback provision.

Further procedure

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The draft is now subject to comments from Germany's tax-related associations. It is not yet clear when the final version will be published.

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Endnotes

(1) BGBl 1, page 1912.

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