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Shareholder loans and *safe harbour rules*

Introduction

In the context of intra-group loans, tax authorities require that the arm's length conditions are respected. If the interest rates applied to the loan are deemed too low or too high, they may, depending on the circumstances, be reclassified as hidden profit distributions, potentially resulting in tax implications.

Safe harbour rules

To provide taxpayers with a degree of legal certainty, the Federal Tax Administration (FTA) annually publishes a circular letter specifying the minimum interest rates for loans granted by a company to its shareholders and the maximum interest rates in the reverse situation. If the rate applied complies with these safe harbour rates, the FTA will consider it as being adequate and in line with the arm's length principle. Non-compliance with these rates, on the other hand, leads to a rebuttable presumption of a hidden distribution of profits, thus reversing the burden of proof to the taxpayer's disadvantage. The taxpayer retains the right to demonstrate that the interest rate applied complies with the arm's length principle. If they fail to do so, the tax authorities will adjust the company's taxable profit and levy withholding tax on the hidden profit distribution.

Once the tax authority has determined that the rate is inadequate, the extent of this inadequacy must still be established. One might assume that the hidden profit distribution would be calculated based on the difference between the effective interest rate and the minimum or maximum rate published by the FTA. However, as we will explain, the Federal Court recently confirmed a stricter position adopted by the Zurich cantonal tax authority (Decision of the Federal Court 9C_690/2022 dated 17 July 2024).

Extent of hidden profit distribution

In the decision in question, a foreign company had granted several loans to its Swiss subsidiary at interest rates of 2.5% and 3%. For the tax periods in question, the maximum rates published by the FTA were 1.5% and 2%. The Zurich tax authority has ruled that the rates applied were too high and applied a market interest rate of 1.08%, reclassifying the difference as hidden profit distributions.

In this decision, the Federal Court first pointed out that the FTA's annual circulars are intended to simplify the application of the arm's length principle to interest rates on loans between companies and shareholders. Circular letters constitute administrative guidance and promote consistent application of the law. However, they are not binding on the courts.

Secondly, the Federal Court held that if the taxpayer decides not to apply the safe harbour interest rates, the tax authority is likewise not bound by these rates. In fact, once the taxpayer applies a rate exceeding the maximum interest rates allowed, the tax authority may, in turn, set a market-based interest rate lower than the interest rate in the circular letter. In such a case, there is no violation of the protection of good faith since the taxpayer himself chose to deviate from the safe harbour rates.

Actions to be taken

In principle, strict compliance with the safe harbour rates would be sufficient to avoid tax risks. However, in practice, there are many situations in which a taxpayer deviates from safe harbour rates, particularly in cross-border intra-group loans where these rates are not binding for foreign tax authorities. In such cases, it is necessary to prove that the applied interest rate complies with international transfer pricing guidelines. If the determined market interest rate exceeds the reference rates published in the tax circular letters, obtaining a ruling is generally advisable.

Conclusion

This decision highlights the consequences of non-compliance with the safe harbour rules on intra-group loans. These consequences can be particularly severe if the parties are unable to demonstrate compliance with arm's length conditions, for example through a transfer pricing study or by obtaining a prior ruling to that effect from the relevant tax authority.

Please do not hesitate to contact us if you have any questions.

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