ALERT

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# German Profit and Loss Transfer Agreements Face Deadline to Protect Consolidated Tax Treatments

***Existing contracts must be amended no later than December 31, 2019.***

Parties to certain older German profit and loss transfer agreements ("PLTA"), take note. According to the German Federal Ministry of Finance's ("BMF") April 3, 2019, circular letter, PLTA with controlled limited liability companies ("GmbH") must be amended by December 31, 2019, to ensure that an existing income tax group will continue to be recognized in the future.

Affected PLTA include those concluded before January 1, 2006, that do not contain references to the statute of limitation provisions of § 302 para. 4 of the German Stock Corporation Act ("AktG") of December 9, 2004. These references could include wording such as, "The assumption of losses takes place in accordance with § 302 para. 1–3 AktG," for example.

According to the previous administrative opinion (BMF of December 16, 2005), this requirement did not apply to contracts concluded before January 1, 2006. However, the German Federal Court of Finance decided otherwise in its judgment of May 10, 2017 (DStR 2017, 2429). The BMF now follows this interpretation.

Existing contracts therefore must be amended no later than December 31, 2019, to include a dynamic reference to § 302 AktG in its current version (§ 17 para. 1 sentence 2 no. 2 KStG). The five-year minimum term for tax groups does not restart.

The amendment of the PLTA must be in writing and must be approved by the shareholders of the controlling company and the parent company. The shareholders' resolution of the GmbH must be notarized and entered into its commercial register, so that implementation can begin in a timely fashion.

For subsidiaries in the legal form of a stock corporation (i.e., AGs and not limited liability companies such as GmbHs), § 302 AktG already applies by law. The change in administrative practice is therefore irrelevant for those entities.

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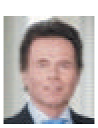

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