

Germany:

BMF withdraws decree on tax treatment of treasury stock/share buy-backs

In a decree issued 11 August 2010, the German Ministry of Finance (BMF) changed its position that a share buy-back should be treated as an acquisition from the perspective of the acquiring company and as a sale from the perspective of the selling shareholder.

There has been considerable debate in German tax literature as to whether the acquisition of treasury stock by a corporation (i.e. a share buy-back) should be considered an acquisition of an asset (legal perspective) or a partial capital reduction (economic perspective). Many commentators have agreed that an acquisition should be treated as a partial capital reduction in cases in which all shareholders participated equally in the buy-back scheme, although the BMF rejected this treatment in a 1998 decree. The BMF took the position that a share buy-back should be treated as an acquisition from the perspective of the acquiring company and a sale from the perspective of the selling shareholder.

In the August 2010 decree, the BMF officially withdrew the 1998 decree, specifically stating that the 1998 decree no longer applies. However, since the new decree does not provide any transition rules, the status of cases that have not received a final assessment remains unclear.

The withdrawal of the 1998 decree comes at a time in which there has been a renewed interest in the tax treatment of share buy-backs in German tax literature, particularly because of the recent changes to German accounting principles. Those changes apply as from 2010 and result in treatment as a capital reduction for German GAAP purposes even when the shares are not acquired for purposes of being redeemed. As a result, the treatment for GAAP purposes (partial capital reduction) and for tax purposes (acquisition) conflicts. Surprisingly, however, the new decree does not mention the revised accounting principles or any of the comments in the literature. Instead, it only states that the reason for withdrawing the 1998 decree is that it addressed, in particular, issues relating to the old corporate tax imputation system. Therefore, it is unclear whether the BMF actually intended to revise its position on how share buy-backs should be treated or whether the withdrawal of the decree was simply a housekeeping measure that may have unintended consequences. In any event, taxpayers will no longer be able to rely on the 1998 decree and may need to request a binding ruling when buying back shares, particularly if the shares are bought back equally from all shareholders and the shareholders are foreign holding companies.

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