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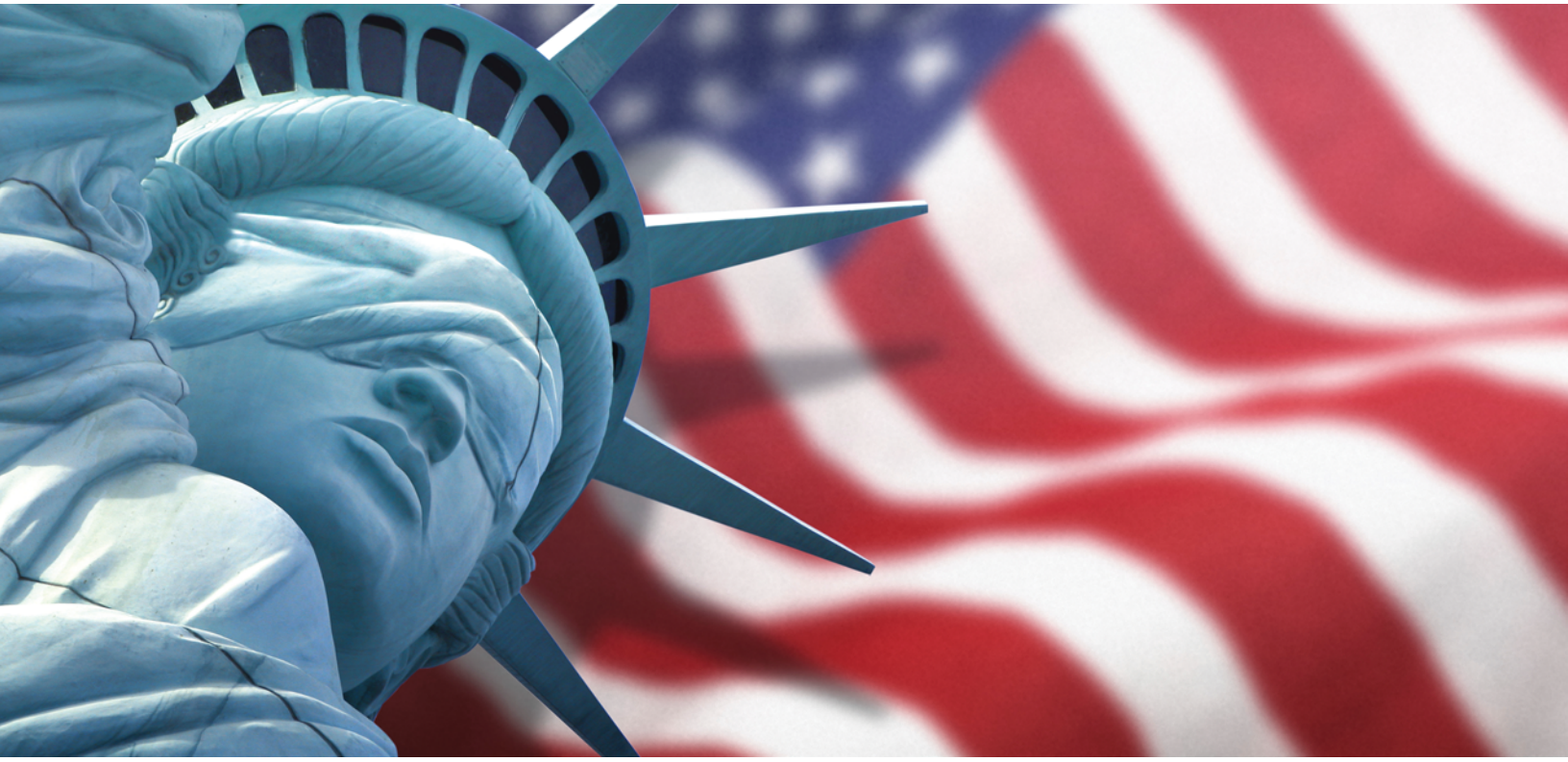

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The EU Commission's directives to reform public procurement – new opportunities for US-based companies to enter the German market

The EU Commission is close to passing a set of three directives on public procurement. The new legislation is expected to come into force by the end of 2013, giving EU member states a 12-month implementation deadline to adapt their national procurement laws to satisfy the directives' goals by the end of 2014. What can US-based companies in the infrastructure sector expect?

Background

Recent press releases indicate that German-based infrastructure developers like Hochtief or Bilfinger Berger have gained traction in the US building and infrastructure sector in the past few years. For example, in June 2012, a consortium led by US subsidiary Hochtief PPP Solutions North America reached financial close on a public private partnership (sometimes referred to in the US as P3) project in San Francisco to design, finance, build and operate a new southern access route to the Golden Gate Bridge worth €800 million (US$1 billion). In April 2013, US subsidiary Bilfinger Project Investment, in a consortium with French contractor Vinci and US partner Walsh construction, closed a deal on a P3 highway concession project near Louisville, KY, also worth €800 million (US$1 billion).

In contrast, US-based contractors seemed less likely to enter the European and German public infrastructure market in the past. According to a global construction survey conducted by KPMG International in 2012, although there are numerous reasons why contractors doing business globally may be reluctant to invest in a particular geographic market, respondents, especially those based in the Americas, maintained that among the most significant barriers to infrastructure investments were complex regulatory and legislative burdens encountered overseas.

The EU Commission's proposals

The above findings coincide with those of the EU Commission gathered in extensive stakeholder consultations on the modernization of EU public procurement policy which preceded publication of the proposed directives. The Commission found that the public procurement market in Europe was more national than international because cross-border bidders were hampered by excessive administrative requirements (e.g., provision of evidentiary documents). International bidders also seemed to have problems obtaining up-to-date market information. Figures showed that 98% of contracts awarded according to EU rules were won by national, and only 2% by international (cross-border), bidders.

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The Commission's proposed directives on public tendering try to resolve these problems and to reinforce the concept of a single market. Their main objective is to simplify procurement rules and procedures and make them more flexible. The directives propose:

- increased recourse to negotiation, thus enabling the contracting authority to receive the goods and services best tailored to its needs
- extension and generalization of electronic communication in public procurement and
- a drastic cut in the administrative burden, including a significant reduction in the number of documents required from commercial operators, thereby simplifying the process.

These measures apply particularly to the Commission's proposed directive on the award of concession contracts. The directive on concessions covers the rules applying to P3 procurements. It aims to complete the European public procurement regime by including works and service concessions to ensure a clear legal framework and create legal certainty. As works and service concessions are often the underlying model in P3 projects (ports, car parks, toll roads, etc.), this directive focuses primarily on stimulating international partnership agreements.

Outlook

The EU Commission's proposed directives aim to establish a modern public procurement legislative framework. Based on current drafts, US contractors will find flexible P3 rules and procedures that reduce regulatory barriers thus easing market access. German market figures indicate a promising project pipeline with 600 new P3 projects underway, worth up to an estimated €6 billion (US$8 billion), to be awarded during the next several years. These projects must be published in the Supplement to the Official Journal of the European Union and published throughout the EU. The online version of the supplement (http://ted.europa.eu/TED/main/HomePage.do) offers free access to browse, search and sort current procurement notices by country, region, business and sector.

US contractors should take a close look at these soon to be available business opportunities.

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Doing Business in the United States Today: The Absolute Necessity of Instituting Compliance Programs to Reduce Operational Risk

Banks and publicly-held companies have long been aware of the necessity of vigorous compliance programs. But in the past several years, it has become increasingly clear that all companies, regardless of size, must implement stringent compliance programs in order to avoid huge and potentially debilitating penalties.

There are two related reasons for this. First, of course, is the rapidly increasing rate of governmental regulations: the more regulations; the more companies there are, which must comply. This has spawned the second reason. The U.S. Government earns enormous amounts of money from imposing penalties on companies who violate these regulations. And the more these violations involve national security, public health, international affairs or relations, or other politically-sensitive areas, the less likely courts are to intervene to reign in the discretion of U.S. administrative agencies in imposing penalties. Because there is very little judicial control of the agency penalty process, the agencies feel freer to impose ever harsher and arbitrary penalties, and are likewise more reluctant to reduce the penalties when the supposed violators file petitions to have the penalties reduced. As a result, the supposed violator usually settles with the agency and pays a large penalty amount.

This process has now extended to almost every area which the federal government regulates or supervises: banking, food, immigration, agriculture, securities, commodities, employment, imports, exports, business dealings with foreign businesses (Foreign Corrupt Practices Act), high technology products, and every other imaginable area which the federal government in any way regulates. In short, almost every aspect of business is affected.

The only way to reduce these risks is to implement a compliance program in every business. The compliance program should cover every area of the business, and should include detailed manuals of the company's operations and compliance procedures, training throughout the company, compulsory familiarity of company employees with the program, and periodic internal audits to ensure that the compliance program actually works.

Implementation of the compliance programs will have two long-lasting beneficial effects. First, it will make it far less likely that the company will violate any law or regulation. This, in turn, will make it far less likely that the company will face the imposition of penalties and the related legal and transaction costs involved in being involved with a penalty investigation or penalty imposition. Second, if there is a violation,

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almost all agencies will forego or greatly reduce a penalty if the company has an effective compliance program and complies with it. The enormous costs savings involved with instituting a compliance program are almost always well worth the initial costs involved.

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Concept of bad faith of a trademark applicant

In legal practice quite frequently the question arises: Is an applicant applying for a German trademark acting in bad faith if he is in knowledge of the existence of a foreign trademark which is likely to be confused with the trademark applied for? So far, the answer was: Not per se, but under certain circumstances.

Recently the Court of Justice of the European Union (CJEU) was concerned with the interpretation of the concept of bad faith within the meaning of Directive 2008/95/EC (Trademark Directive). In a preliminary ruling (case C 320/12), the CJEU was requested by the Supreme Court of Denmark in the proceedings between Malaysia Dairy Industries Pte. Ltd (Malaysia Dairy) and the Appeal Board of the Danish Patent and Trademark Office (Appeal Board) regarding the legality of a decision delivered by the Appeal Board to cancel the Danish trademark registration of a plastic bottle as a three-dimensional trademark for goods including milk drinks on the ground that Malaysia Dairy knew of a Japanese trademark of Kabushiki Kaisha Yakult Honsha exhibiting a three-dimensional bottle for milk drinks at the time that it filed its trademark application for registration with the Danish Patent and Trademark Office.

In its decision, the CJEU ruled that in order to permit the conclusion that the person making the application for registration of a trademark is acting in bad faith it is necessary to take into consideration all the relevant factors specific to the particular case which pertained at the time of filing the application for registration. The fact that the person making that application knows or should know that a third party is using a trademark abroad at the time of filing his application which is likely to be confused with the trademark whose registration has been applied for is not sufficient, in itself, to permit the conclusion that the person making that application is acting in bad faith. Since the concept of bad faith is an autonomous concept of European Union law, it must be given a uniform interpretation in the European Union. This means that the ruling in the case cited is applicable to legal relations in Germany. Therefore, the new answer to the above question remains to be: Not per se, but under certain circumstances.

Consequently, the certain circumstances are the crux. As can be seen from the above, mere knowledge of the existence of a foreign trademark which is likely to be confused with the trademark applied for is not sufficient to establish a relevant factor within the meaning of the concept of bad faith. According to the CJEU, consideration must be given to the intention of the applicant at the time of filing the application for registration of a trademark, a subjective factor which must be determined by reference to the objective circumstances of the particular case. If, for instance, the main intention of the applicant at the time of filing the application for registration of a trademark was to keep the proprietor

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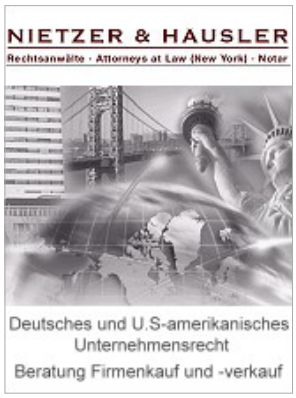
of a foreign trademark from continuing the use of the foreign trademark, the applicant might be considered to be acting in bad faith.

Independently of the case constellation discussed above, the German jurisdiction has developed several universally valid case groups to positively define relevant factors within the meaning of the concept of bad faith. The three most prominent are:

- Application of a speculative trademark in order to snow under third parties with cease and desist orders and claims for money without a general will of use of the trademark applicant;
- Application of a trademark in knowledge of an acquired right worth being protected of a prior user for identical or similar marks with the only objective to disturb or prevent the acquired right worth being protected of the prior user; and
- Application of a trademark for an improper use as a means of unfair competition.

Within the framework of German Trademark Act, bad faith of a trademark applicant primarily constitutes an absolute obstacle to registration assessed ex officio before registration and a ground for cancelation of the registration to be claimed in an official cancelation proceeding or in a cancelation action at a competent civil court after registration.

In conclusion, the concept of bad faith is principally a sharp sword to eliminate unpleasant trademark applications and registrations of competitors. However, in the light of the above decision it remains necessary to show the presence of certain circumstances.



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Beitreibung von Forderungen in den USA – A long way to go

Deutsche Unternehmen, die Waren in die USA exportieren, stehen nicht selten vor der Frage, wie sie gegebenenfalls ihre Forderungen gegen säumige Schuldner in den USA beitreiben können. Vielfach wird in diesem Zusammenhang lediglich versucht, eine mögliche gerichtliche Auseinandersetzung mit dem Vertragspartner im Vorfeld durch Vereinbarung eines (ausschließlichen) Gerichtsstandes in Deutschland führen zu können. Dies kann in der Folge jedoch zu erheblichen Problemen führen: Einerseits besteht ein nicht unbedeutendes Risiko, dass sich ein vom Vertragspartner angerufenes U.S.-Gericht – trotz des vereinbarten Gerichtsstandes in Deutschland – selbst für zuständig erachtet. Andererseits kann auch ein in Deutschland gegen den U.S.-Vertragspartner erwirktes Gerichtsurteil zur Enttäuschung des Klägers führen, wenn er die Anforderungen in den USA für die Anerkennung und Vollstreckung eines deutschen Gerichtsurteils nicht kennt.

Im vertraglichen Rahmen können Gerichtsstandsvereinbarungen einen gewissen „Schutz“ vor einem U.S.-amerikanischen Gerichtsstand bieten. Im U.S.-amerikanischen Zivilprozessrecht sind zwar Gerichtsstandsvereinbarungen seit vielen Jahren grundsätzlich anerkannt. Allerdings werden solche Gerichtsstandsvereinbarungen nur dann als zulässig erachtet, wenn diese nicht *„unreasonable, unjust, unfair or unconscionable“* sind. U.S.-Gerichte behalten sich insofern das Recht vor, Gerichtsstandsvereinbarungen nicht anzuerkennen, wenn nach Auffassung des jeweiligen Gerichts die vorgenannten Voraussetzungen nicht gegeben sind. Da es sich insofern um auslegungsbedürftige und relativ offene Kriterien handelt, die stark von den Umständen des Einzelfalles abhängen, muss die ausländische Prozesspartei auch in Fällen, in denen man dies nicht unbedingt erwarten dürfte, damit rechnen, dass sich ein U.S.-Gericht trotz anderslautender Gerichtsstandsvereinbarung für zuständig erklärt.

Doch selbst, wenn ein entsprechendes Gerichtsverfahren in Deutschland gegen den U.S.-Vertragspartner erfolgreich abgeschlossen wurde, liegt vielfach noch ein weiter Weg vor dem Kläger, bis er vom U.S.-Schuldner im Wege der Vollstreckung tatsächlich Geld erhält. Denn der klagende Exporteur muss damit rechnen, dass der U.S.-Schuldner über keine Vermögenswerte in Deutschland verfügt, in die auf Grundlage des deutschen Gerichtsurteils „direkt“ vollstreckt werden kann. Vor diesem Hintergrund stellt sich dann wiederum die Frage, auf welchem Wege der Kläger mit einem deutschen Urteil in den USA gegen den säumigen Schuldner vorgehen kann. Zwar besteht zwischen der BRD und den USA kein Abkommen über die gegenseitige Anerkennung und Vollstreckung von Gerichtsentscheidungen (der wesentliche Grund hierfür liegt darin, dass dieses Rechtsgebiet den Kompetenzen der einzelnen U.S.-

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Beitreibung von Forderungen in den USA – A long way to go

Bundesstaaten zugeordnet ist), die meisten Bundesstaaten haben jedoch (teils mit Abänderungen) ein sog. „Mustergesetz", den Uniform Foreign Money Judgments Recognition Act (UFMJRA) von 1962*, übernommen.

Dieses Mustergesetz stellt ausländische Zahlungsurteile nach erfolgter Überprüfung durch ein U.S.-Gericht innerstaatlichen amerikanischen Urteilen gleich, was nichts anderes bedeutet, als dass der deutsche Exporteur zunächst ein zweites, „abgekürztes" Gerichtsverfahren in den USA führen muss, bevor er Vollstreckungsmaßnahmen gegen das in den USA belegene Vermögen des Schuldners durchführen kann.

Eine erneute inhaltliche Prüfung des geltend gemachten Anspruchs findet im Rahmen dieses abgekürzten U.S.-Verfahrens nicht statt, die Anerkennung des deutschen Urteil kann vom U.S.-Gericht jedoch – unter anderem – dann versagt werden, wenn das ausländische Urteil nach Ansicht des Gerichts „erschlichen" wurde oder der Beklagte nach Auffassung des Gerichts gar nicht der Zuständigkeit des deutschen Gerichts unterlag (siehe vorstehende Ausführungen zu Gerichtsstandsvereinbarungen!).

Sofern das US-Gericht jedoch das deutsche Urteil anerkennt und für vollstreckbar erklärt, erhält der Kläger damit schließlich die Möglichkeit (ggf. nach vorheriger Registrierung des Urteils im entsprechenden U.S.-Bundesstaat), in das in den USA befindliche Vermögen des Schuldners vollstrecken zu können.

Als eine seit über 17 Jahren auf deutsches und U.S.-amerikanisches Unternehmensrecht spezialisierte Wirtschaftskanzlei (nunmehr auch auf China und UK ausgerichtet) verfügt NIETZER & HÄUSLER über entsprechende Erfahrungen im Umgang mit internationalen Verfahren im Bereich des Handelsrechts und berät Sie gerne bei der Vertragsgestaltung und drohender rechtlicher Auseinandersetzung mit einem U.S.-Vertragspartner.

* zuletzt 2005 überarbeitet durch UFCMJRA (Uniform Foreign Country Money Judgments Recognition Act)

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Court holds tax accrual workpapers protected under work product doctrine, but taxpayer required to disclose identification of UTPs

On June 4, 2013 a U.S. District Court for the District of Minnesota held that Wells Fargo & Co. ("Wells Fargo") was required to disclose to the Internal Revenue Service ("IRS") the identification of Wells Fargo's federal uncertain tax positions ("UTPs)", but that the recognition and measurement analysis included in Wells Fargo's tax accrual workpapers ("TAWs") was protected by the work product doctrine. The court also held that the disclosure of these TAWs to the financial statement auditors did not waive the work product privilege.

In the course of examining Wells Fargo's 2007 and 2008 tax return, the IRS sought to compel production the TAWs prepared during its FIN 48 process for these years. The IRS issued summonses to both Wells Fargo and its financial statement auditor, to require testimony and production of TAWs. The summons issued to the financial statement auditor required the production of TAWs prepared to analyze and validate Wells Fargo's UTPs. Wells Fargo asserted a variety of challenges to the summonses including: improper purpose, work product doctrine for all TAWs, and attorney-client privilege for certain items.

The court found that the IRS had a proper purpose for the issuance of the summonses as the TAWs could be relevant for determining the accuracy of the return. The court examined whether the TAWs were protected by the work product doctrine, which provides qualified protection from disclosure for documents prepared "in anticipation of litigation". The court concluded that the identification of UTPs, and factual information related to those UTPs, was not prepared in anticipation of litigation despite in-house attorney involvement. The court stated that any activity by in-house attorneys at this juncture was more properly characterized as business advisory, instead of legal advice or preparation for litigation.

While the identification information related to the UTPs was held not to be privileged or otherwise protected from disclosure, the court held that TAWs related to recognition and measurement of Wells Fargo's UTP were protected under the work product doctrine. The court stated that Wells Fargo established that these materials were created in anticipation of litigation and reflected the attorneys' thoughts, conclusions and opinions about potential litigation.

However, the court cautioned that its ruling was limited to the "unique circumstances" of the case and pointed out that much of the analysis was prepared outside the FIN 48 process and included settlement figures, strengths and weaknesses of each position, and

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assessments of chances of prevailing in litigation. The court noted that Wells Fargo has litigated cases in Tax Court and frequently utilized IRS Appeals. Based upon this analysis, the court held that the TAWs were prepared in anticipation of litigation, and thereby, were protected from disclosure under the work product doctrine.

The IRS also sought to access TAWs prepared by the financial statement auditor of Wells Fargo for purposes of assessing and evaluating reserves. The court held that the financial statement auditor prepared TAWs, related to the recognition and measurement of the UTPs, were protected under work product doctrine, as these documents were closely tied to the analysis of the Wells Fargo's attorneys.

In addition, the court held that Wells Fargo did not have to disclose various email communications between its employees and in-house attorneys seeking legal advice related to specific UTPs, regardless of the fact that some information contained in the communications was ultimately disclosed in its TAWs. Generally, it is well established under common law that confidential communications between an attorney and a client are privileged and not subject to disclosure absent consent of the client. This protection has been interpreted to include communications made by corporate employees to get legal advice from corporate counsel.

Ultimately, the court held based upon Wells Fargo's specific facts, the work product doctrine did not protect Wells Fargo from being required to disclose to the IRS the identity of its UTPs, its processes for identifying its UTPs, and some facts surrounding those UTPs. Wells Fargo was not required to disclose TAWs related to recognition and measurement, even if shared with the financial statement auditor, as these were protected under the work product doctrine. In addition, Wells Fargo did not have to disclose any communications between its employees and in-house attorneys seeking legal advice, regardless of the fact that some information contained in the communications was ultimately disclosed in its TAWs.

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GIBBONS

Die steuerlichen Auswirkungen der Organisation Ihres U.S. Unternehmens als „Corporation“ oder „Limited Liability Company“

Bei der Gründung eines Unternehmens in den USA haben deutsche Inhaber ein Interesse daran, sich von den Verbindlichkeiten des neugegründeten Unternehmens abzuschirmen. Zur Erreichung dieses Ziels gibt es zwei bekannte amerikanische Gesellschaftsformen, und zwar die „Limited Liability Company“ (LLC) und die „Corporation“, die beide durch eine einfache Anmeldung beim Secretary of State des Gründungsstaates gegründet werden. Während beide Unternehmensformen, sofern sie gesellschaftsrechtlich richtig strukturiert sind, eine „Haftungs-Firewall“ für die deutschen Inhaber bieten können, werden sie im Hinblick auf ihre steuerlichen Auswirkungen recht unterschiedlich behandelt.

Corporations werden zunächst mit progressiven Einkommensteuersätzen auf ihre Gewinne besteuert (vergleichbar mit der - allerdings nicht progressiven- Körperschaftsteuer einer deutschen GmbH). Anschließend wird die Gewinnausschüttung der Corporation beim Anteilseigner nochmals besteuert, im Fall ausländischer Anteilseigner regelmäßig durch eine sogenannte „withholding tax“, d.h. die Corporation muss den Steuerbetrag einbehalten und an das Finanzamt abführen (vergleichbar mit der Einbehaltung der Kapitalertragsteuer durch eine deutsche GmbH). Im Gegensatz hierzu werden LLCs für Einkommensteuerzwecke auf Bundes- und Staatenebene standardmäßig als sogenannte „flow through“-Unternehmen behandelt (vergleichbar mit transparenten Personengesellschaften in Deutschland): Die Gewinne der LLCs werden nur einmal auf der Gesellschaftererebene mit progressiven amerikanischen Einkommensteuersätzen besteuert[1]. Demzufolge bevorzugen es viele amerikanische Unternehmensinhaber in flow-through LLCs zu investieren oder ihre unternehmerischen Vorhaben mit dieser Gesellschaftsform zu beginnen.

Für deutsche und ausländische Unternehmsinhaber ohne festen Wohnsitz in den USA ist die Situation allerdings eine andere. Sofern ein ausländischer Investor Gesellschafter einer LLC mit geschäftlichen Tätigkeiten, Büroräumen und Angestellten in den USA ist (ein sogenanntes „Permanent Establishment“ nach U.S. Steuerrecht und den geltenden Einkommensteuerabkommen), wird dessen Anteil am Gewinn der LLC nach den Vorschriften des U.S. Internal Revenue Code („IRC“) mit der Geschäftstätigkeit

[1] Zwar könnte eine LLC auch eine sog. „check-the-box“-Wahl durchführen und dadurch den „corporate tax status“ erlangen, d.h., dass die LLC selbst die progressive Einkommensteuer zahlt. Aber sofern ein deutscher LLC-Inhaber die Besteuerung der Gesellschaft wünscht, könnte er auch genauso gut eine Corporation gründen.

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Die steuerlichen Auswirkungen der Organisation Ihres U.S. Unternehmens als „Corporation" oder „Limited Liability Company"

in den USA automatisch als effektiv verbunden angesehen. Infolgedessen müsste der deutsche Unternehmensinhaber nicht nur Einkommensteuererklärungen auf Staaten- und Bundesebene in den USA einreichen, in denen er sein weltweites Einkommen angibt, sondern auch Einkommensteuer auf all seine US-Einkünfte zahlen, selbst wenn diese nicht zur LLC gehören. Darüber hinaus müsste die LLC gemäß §1446 IRC eventuell die withholding taxes (in Höhe des auf den einzelnen Gesellschafter höchsten anwendbaren Steuersatzes) für jeden Gewinnanteil eines ausländischen Gesellschafters einbehalten, und zwar unabhängig davon, ob eine Barausschüttung tatsächlich stattgefunden hat oder nicht.

Da all diese steuerlichen Auswirkungen für deutsche Investoren grundsätzlich nicht akzeptabel sind, ist die Corporation in der Regel die bevorzugte Gesellschaftsform für Investitionen. Der Nachteil der oben aufgeführten Doppelbesteuerung von Corporations wird oft dadurch limitiert, dass das deutsch-amerikanische Doppelbesteuerungsabkommen reduzierte Steuern auf Dividenden von 5% vorsieht, soweit die deutsche Muttergesellschaft mindestens 10% an der amerikanischen Corporation hält, und in allen anderen Fällen von 15%.

Nichtsdestotrotz können Situationen entstehen, in denen sich der deutsche Unternehmensinhaber eine Beteiligung an einer LLC, die als flow-through Gesellschaft behandelt wird, aus anderen Gründen wünscht oder haben muss. Beispielsweise könnte ein deutscher Investor oder ein deutsches Unternehmen ein Joint Venture mit einer amerikanischen Gesellschaft gründen wollen. Die amerikanische Gesellschaft hat aufgrund der oben beschriebenen steuerlichen Vorteile oftmals ein starkes Interesse daran, das Joint Venture in der Form einer LLC zu gründen und könnte dies zur Bedingung für die Entstehung des Joint Venture machen. Vorstellbar wäre auch, dass ein deutsches Unternehmen zwei (oder mehr) Geschäftsbereiche in den USA betreiben will, und zwar jeweilig als eigenständige juristische Person. Wenn die deutsche Gesellschaft nun nur eine Einkommensteuererklärung für beide Geschäftsbetriebe vorbereiten und einreichen will, wäre es effizient, jeden Geschäftsbetrieb als eine separate flow-through-LLC zu strukturieren.

Wenn diese oder ähnliche Situationen aufkommen, die deutsche Muttergesellschaft jedoch das Einreichen amerikanischer Einkommensteuererklärungen auf Staaten- und Bundesebene und die damit zusammenhängende Offenlegugn ihres weltweiten Einkommens vermeiden will, könnte eine sog. „blocker holding corporation" die Lösung sein. Der Vorteil einer solchen blocker holding corporation besteht darin, dass diese jegliche U.S. Steuern auf das Einkommen der LLC, die dem ausländischen Investor

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auferlegt werden, wenn dieser direkt in die LLC investiert, vom deutschen Inhaber abblockt. Im Gegensatz zur LLC wird die Geschäftstätigkeit der blocker holding corporation nämlich grundsätzlich nicht dem ausländischen Investor zugeschrieben, so dass er hiermit nicht als nach U.S. Steuerrecht effektiv verbunden gilt. Stattdessen unterfällt nur die blocker holding corporation der Einkommenbesteuerung hinsichtlich ihres Anteils an den Gewinnen der LLC. Und im Hinblick auf die Ausschüttungen der LLC an die blocker holding corporation unterfällt diese als amerikanisches Unternehmen nicht den withholding taxes nach §1446 IRC. Ausschüttungen der blocker holding corporation an die deutsche Muttergesellschaft unterfallen zwar der withholding tax, wie bereits oben erörtert jedoch nur zum reduzierten Steuersatz unter dem deutsch-amerikanischen Doppelbesteuerungsabkommen.

Zusammenfassend bleibt festzuhalten, dass deutsche Unternehmen, die in den USA Geschäfte betreiben, ihre Tätigkeiten oft durch Corporations ausführen. Sofern eine LLC notwendig oder aus anderen als steuerlichen Gründen wünschenswert ist, könnte eine blocker holding corporation zwischen der LLC und der deutschen Muttergesellschaft errichtet werden.

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Steuerfallen der Limited Liability Company

This article describes selected U.S. and German tax traps of investment structures involving an LLC.

Die Wahl der Rechtsform für das US-Investment im gewerblichen oder Immobilien-Bereich kann erhebliche Auswirkungen auf die Höhe der Steuerbelastung sowohl in den USA als auch in Deutschland haben. In vielen Konstellationen ergeben sich attraktive Möglichkeiten zur steuergestalterischen Optimierung. Allerdings kann sich dabei der unsachgemäße Einsatz einer Limited Liability Company (LLC, LC) als Steuerfalle erweisen.

Die LLC erfreut sich allgemeiner Beliebtheit, da sie die gesellschaftsrechtlichen Charakteristiken einer Corporation (US-Kapitalgesellschaft) mit denen einer Partnership (US-Personengesellschaft) verbindet. Ähnlich der deutschen GmbH haften die LLC-Gesellschafter grundsätzlich nicht persönlich für die Verbindlichkeiten der LLC und zur Haftungsbeschränkung wird keine Komplementär-Corporation benötigt. Die Anfälligkeit für Steuerrisiken beruht auf der besonderen steuerlichen Behandlung der LLC.

Steuerliche Behandlung der LLC in den USA

Das US-Steuerrecht gewährt für bestimmte in- und ausländische Rechtsformen, wie z.B. die LLC, ein Einordnungswahlrecht, das durch Ankreuzen im Steuerformular 8832 ausgeübt wird („Check-the-box"-Verfahren). Es kann zwischen der Besteuerung als Corporation (der US-Körperschaftsteuerpflicht unterliegend), als Partnership (deren Gewinnanteile mittelbar bei ihren Gesellschaftern US-einkommensteuerpflichtig sind) und im Fall der Ein-Pesonen-LLC als „Disregarded Entity" (Versteuerung unmittelbar beim Gesellschafter) gewählt werden.

Steuerliche Behandlung der LLC in Deutschland

Da es die Rechtsform der LLC im deutschen Gesellschaftsrecht nicht gibt, erfolgt ihre deutsche steuerliche Einordnung auf der Grundlage eines Rechtstypenvergleichs und ist somit von der einzelnen gesellschaftsvertraglichen Ausgestaltung und deren Interpretation abhängig. Die deutsche Finanzverwaltung geht dabei von einem Kriterienkatalog aus, der zu bewerten ist (BMF-Schreiben vom 19.03.04, BStBl. I 2004, 411).

Steuerfalle Nr. 1: Steuerpflichtige Dividenden in Deutschland

Angenommen die LLC wird in den USA plangemäß als Partnership behandelt und nach einer finanzbehördlichen Prüfung in Deutschland wird sie ungeplanterweise als Kapitalgesellschaft eingeordnet. Sofern an ihr Personen (unmittelbar oder mittelbar über eine Personengesellschaft) beteiligt sind, die in Deutschland steuerlich ansässig

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sind, haben diese nunmehr ihre anteiligen Entnahmen als steuerpflichtige Dividenden zu versteuern. Die in den USA bezahlte Einkommensteuer ist in diesem Fall nicht anrechenbar. Die Gesamtsteuerbelastung kann bis zu 60 % betragen (abhängig vom Tarifbereich und dem Steuersatz des US-Bundesstaates, in dem die LLC tätig ist).

Der gleichen Problematik steht ein LLC-Gesellschafter gegenüber, der zunächst in den USA lebt und zu einem späteren Zeitpunkt nach Deutschland umzieht und fortan dort steuerlich ansässig ist.

Steuerfalle Nr. 2: 30% Quellensteuer in den USA

An der LLC soll eine deutsche GmbH zu 100% beteiligt sein. Die LLC soll in den USA plangerecht als Partnership besteuert werden. Nach einer Betriebsprüfung bei der GmbH behandelt der deutsche Fiskus die LLC als Kapitalgesellschaft und sendet eine Kontrollmitteilung an das US Treasury Department, worauf der Internal Revenue Service (IRS) eine Betriebsprüfung bei der LLC einleitet und sämtliche Entnahmen der GmbH aus der LLC der US-Branch Profits Tax von 30% unterwirft. Dies kann im Einzelfall zu einer Gesamtsteuerbelastung von bis zu ca. 70% führen.

Sofern die LLC darüberhinaus in einem Bundesstaat tätig ist, der nach dem sog. Unitary Tax Prinzip besteuert (z.B. New York, New Jersey, Kalifornien), unterliegt bei dieser Fallgestaltung grundsätzlich der weltweite Gewinn des Gesamtunternehmens (inkl. der GmbH) der Bundesstaatensteuer.

Fazit

Vor der Gründung eines US-Unternehmens bzw. zur Kontrolle der steuerlich optimalen Beteiligungsstruktur eines bereits existierenden US-Investments sollte die US-Gesellschaftsform unter Berücksichtigung des Beteiligungssbildes in Deutschland einem „Check-up“ unterzogen werden, um Steuerfallen zu vermeiden und um das höchstmögliche Maß an Ersparnis von US- und deutschen Steuern zu erreichen.

Die Rechtsform der LLC sollte grundsätzlich nur für besondere Situationen genutzt werden. Durch die sorgfältige Nutzung von Wahlrechten (z.B. Check-the-box Wahlrecht in den USA bzw. Anpassung des Gesellschaftsvertrags der LLC für deutsche steuerliche Zwecke) sollten mögliche Steuerfallen vermieden werden. Dabei ist allerdings darauf zu achten, dass durch diese Maßnahmen nicht neue Steuerprobleme hervorgerufen werden. Denn die Änderung der steuerlichen Einordnung kann eine steuerpflichtige (fiktive) Liquidation der „alten“ LLC mit gleichzeitiger Wiedereinlage des Vermögens in die „neue“ LLC auslösen.

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Net Investment Income Tax (NIIT) A new Tax – A new Acronym – A new Form

Starting with their 2013 tax returns, many US individual taxpayers will face an additional income tax, the Net Investment Income Tax (NIIT). The legal authority for imposition of the NIIT is found in Section 1411 of the Internal Revenue Code which was added by the "Health Care and Education Reconciliation Act of 2010". The tax is effective for tax years beginning after December 31, 2012. Proposed regulations were issued by the Treasury in December of 2012 and the IRS has now posted a draft version of Form 8960, "Net Investment Income Tax- Individuals, Estates, and Trusts", making the prospect of paying additional taxes more real for many affected taxpayers. According to the IRS, the instructions for this form will also be released before the end of 2013. Now that we have the mechanisms to report the tax, it is important to examine the amount of the tax and which individuals will be taxed.

The NIIT imposes an additional 3.8% tax on the lesser "Net Investment Income" or the excess, if any, of the modified adjusted gross income over a defined threshold amount. The threshold amount for this computation depends on the filing status of the taxpayer:

- $ 250,000 for married couples filing joint a tax return
- $ 200,000 for single filers or a head of household with a qualifying person
- $ 125,000 for married filing separately

But what is "Net Investment Income" (NII)? Fundamentally it includes: gross income from interest, royalties, dividends, annuities and rents; gross income from passive trade or business (see IRC Sec. 469) or from the passive or active business of trading in financial instruments or commodities (See IRC Sec. 475(e)(2)); and net gain on the sale of assets held in one of the aforementioned trade or business. Expenses that are "properly allocable" to the income are allowable deductions. There are several exceptions to investment income such as distributions from qualified retirement plans, income that is subject to Self Employment Tax, and excludable capital gains from the sale of a principal residence. Despite these exceptions, many individuals will find themselves with some form of investment income subject to the tax.

The following examples illustrate how the NIIT is calculated:

Example 1: A married couple filing a joint tax return has a NII of $ 100,000 and their modified AGI is $ 280,000. The modified AGI exceeds the threshold ($ 250,000) by $ 30,000 and is lesser than the NII. Consequently the 3.8% Tax applies to the $ 30,000 amount.

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Example 2: Changing the example 1 so far, that the couple earns a NII of $ 150,000 and the modified AGI is $ 230,000, they aren't taxed with the NIIT, because their modified AGI doesn't exceed the threshold of $ 250,000.

In the end, an individual owes the tax if there is any NII and their modified AGI exceeds the aforementioned thresholds. In terms of the NIIT it must be pointed out that there will be no withholding such as there is with wages and taxpayers must make estimated payments or arrange for extra withholding from their employers or they might find themselves with surprise balances due at the time of filing their tax returns. Taxpayers who generate investment income will need to monitor their adjusted gross incomes through the year to determine if they will be subject to the NIIT. Also, while the new Form 8960 is just one page, often the computations of the NII can be very complex where the taxpayer invests in multiple passthrough entities. Hopefully, the IRS instructions will provide further guidance in these situations.

There are some planning ideas that can be implemented to help taxpayers avoid the tax. Adjusted gross income should be closely monitored so that taxpayers who are close to the threshold amounts can try to avoid the tax by deferring income or accelerating losses. Furthermore, nonresident aliens are not subject to the tax; therefore, if possible taxpayers with the requisite NII and AGI might want to avoid passing the substantial presence test so as to be nonresidents for the tax year whenever possible.

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Autocomplete Function of Internet Search Engines under Scrutiny by German Federal Court of Justice

Internet users know that search machines have become quicker and more efficient since the operators of search engines introduced autocomplete functions. The user enters a word and the engine automatically adds one or several words which apparently are associated with the searched word ("predictions"). The autocomplete function is prompted by software which analyzes the frequency of a combination of search words entered by users of the search engine.

In the past, individuals who were not happy with the search results when their name was googled complained without success. Now, the German Federal Court of Justice (Bundesgerichtshof) ruled for the first time that a search engine operator can be held liable to remove search results from the internet which infringe the individual's privacy. In a ruling published on May 14, 2013, the Federal Court of Justice held that Google has the obligation to remove search word results which violate the searched individual's personal rights and reputation. In the case at stake, a German businessman claimed that his reputation was damaged by the fact that when one entered his name in the search engine, the machine automatically suggested to add words like "Scientology" and the German word for "fraud". He went to court and sued Google to remove the autocomplete function. He could demonstrate that he had no connection whatsoever with the Scientology sect nor had he ever been convicted or prosecuted for fraud. The search engine operator defended itself by arguing that the automatic completion with words in the search function is operated by software which is based on an algorithm and only analyzes the frequency with which word combinations are being searched by internet users and that the result therefore lies beyond its control. The Higher Regional Court in Cologne which was in charge of deciding over the plaintiff's appeal could not find an infringement of his privacy rights basically saying that the automatically completed search words did not have a meaning by itself and were not directly connected to the name of the man.

The Federal Court of Justice, however, did not agree with this perception. It straightened out in its decision of May 14, 2013 that it is not Google's primary responsibility to avoid search results which potentially can infringe individual's personal rights. Therefore the search engine operator does not have an obligation to actively look out for such cases or even change the used software. It cannot reasonably be expected from a search engine operator to browse the internet for search results which could possibly harm an individual's reputation. The search engine operator does,

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however, have the obligation to react to complaints of individuals once they noticed that the autocomplete function leads to the association with offensive words or concepts. According to the Federal Court of Justice, the annoyance which is caused by such search results is imputable to the search engine operator because it put the software in place to find out about the frequency of search word combinations used by internet users and it prompts the prediction of words and concepts to be added to the searched word. In the future, Google and other search engine operators will probably receive quite a few requests to filter out offensive search results.

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Proposed Food Import Regulations Issued Under the Food Modernization Act

The Food Safety Modernization Act (FSMA), signed into law by President Obama on January 4, 2011, represents the first major piece of legislation addressing food safety in the U.S. since the 1930s. The passage of the law followed a number food safety breakdowns and heightened concerns about potential acts of terrorism. Food-borne illnesses are estimated to kill 3,000 people in the United States every year, and imports have been responsible for eight of the 19 reported multi-state food-related illness outbreaks since 2011, according to the federal Center for Disease Control. To increase the safety of imported foods, the U.S. Food and Drug Administration (FDA) on July 26, 2013 proposed new regulations under the FSMA requiring importers to perform certain risk-based activities to verify that food imported into the United States has been produced in a manner providing the same level of public health protection as that required of domestic food producers.

FDA Shifts Focus from Hazard Reaction to Prevention

The goal of the FSMA is to enable the FDA to focus more on preventing food safety problems rather than relying primarily on reacting to problems after they occur. Thus, the intent of the food import regulations – referred to as the Foreign Supplier Verification Program (FSVP) regulations – is to prevent the importation of hazardous products by focusing on the foreign sources of those products rather than identifying hazardous foods as they enter the U.S. The FDA estimates 24 million shipments of regulated products will arrive this year, but only a mere 2 percent of food imports is inspected at ports as they enter the country – and that percentage is expected to decline with increasing shipments and decreasing budgets. Thus the development of regulations and an improved framework to insure the safety of food products imported into the U.S. is essential.

Identification of Hazards and Parties That Control Hazards

An importer of food under the proposed FSVP regulations is the U.S. owner or consignee of the food at the time of entry, or, if there is no U.S. owner or consignee at the time of entry, the U.S. agent or representative of the foreign owner or consignee. Under the proposed rules, an importer would be required to develop, maintain, and follow an FSVP protocol for each food it imports, and would need to include the following:

- Compliance status review of foods and suppliers
- Analyze and asses the hazards of importing each food

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- Verification activities, such as onsite auditing, periodic sampling and testing of food
- Maintain a detailed and up-to-date list of suppliers, as well as verification procedures
- Evaluate, assess, and correct any and all complaints regarding the foods imported
- Conduct Periodic Reassessments of the FSVP rules and guidelines
- Obtain an identification number to be electronically attached to all imports and records
- Maintain clear, detailed records that include, among other things, hazard analyses

The proposed requirements for supplier verification are primarily based on who is to control the hazards that are reasonably likely to occur. The FDA has the authority to require that imported foods that are at high risk of contamination have a credible third-party certification or other assurance of compliance as a condition of entry into the U.S. The "third party" could be a private company or a governmental entity. The rules allow the FDA to accredit third-party auditors in other countries to certify the safety of high-risk imported foods or the foreign facilities from which they come.

The FDA was tasked by the statute with establishing a voluntary program for importers that provides for expedited review and entry of foods from participating importers. Eligibility is limited to importers offering food from program-certified facilities. The FDA can refuse entry into the U.S. of food from a foreign facility if the agency is denied inspection access by the facility or the country in which the facility is located.

Exemptions and Modified Requirements

The proposed rules provide for both exemptions and modified requirements in certain limited circumstances. Importers of juice, seafood subject to hazard analysis and critical control points (HACCP) regulations, food for personal consumption, alcoholic beverages, food that is transshipped or imported for re-export, and food imported for research or evaluation are exempt from FSVP requirements. Additionally, modified FSVP requirements apply to the following:

- dietary supplements and dietary supplement components;
- food imported by a very small importer or from a very small foreign supplier (less than $500,000 in annual food sales); and
- food from a foreign supplier in good compliance standing with a food safety system that the FDA has officially recognized.

Interested parties have through November 26, 2013 to submit comments on the proposed rules. Businesses operating foreign food facilities or relying on foreign suppliers should familiarize themselves carefully with the proposed rules and identify foreseeable

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compliance issues, for example, whether other types of foods should be exempt from or subject to modified FSVP requirements. The comment period provides a valuable tool to interested parties to participate in the crafting of the final rules through the submission of their comments.

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