

# The Single Instruments (New Rules and Critical Issues) The German Perspective

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## 1.1 Need to use presumptions

The Information Center for Taxation of International Relations (IZA), Bonn maintains IT-based databanks of foreign:

- legal and natural persons (ISI);
- residents with German-sourced income (BEST);
- tax systems (IZSt).

However cannot gather intelligence on business data and reliably allocate functions, risks, intangibles.

## § 90 II AO German Tax (Procedure) Code

The tax payer has to bear the burden of proof for international transactions.

## 1.2 Procedural rules

§ 160 AO Statement of creditors and payment recipients

§ 16 AStG Tax payer's obligation to cooperate

§ 138 AO Declaration of economic activity

§ 17 AStG Background clarification

## § 160 AO Statement of creditors and payment recipients

Business expenses are not deductible if the tax payer is not able to state the exact recipient of the respective payments.

## § 16 AstG Tax payer's obligation to cooperate

In addition to § 160 AO:

- If the payment recipient is resident of a jurisdiction with insignificant taxation (up to 10 %),
- All connections (direct and indirect) to the recipient have to be disclosed.
- Under circumstances this can/shall be done under oath.

## § 138 sec. 2 AO Declaration of foreign economic activity

Declaration about:

- economic activity abroad (through a subsidiary or a PE);
- receiving (changing) the participation in a partnership abroad;
- receiving (changing) the shares in a corporation abroad.

## § 17 AstG Background clarification on exit taxation and CFC

Obligation of the tax payer to procure alone or with the help of others all relevant tax information such as:

- list of shareholders and other related parties,
- audited financial statements;
- business forecasts.

In cases of non-compliance the CFC income will be assessed at not less than 20 % of the market value of the shares.

## 1.3. Tax avoidance vs. tax evasion

§ 42 AO General anti-avoidance rule

CFC special anti-avoidance

## § 42 AO German Tax (Procedure) Code

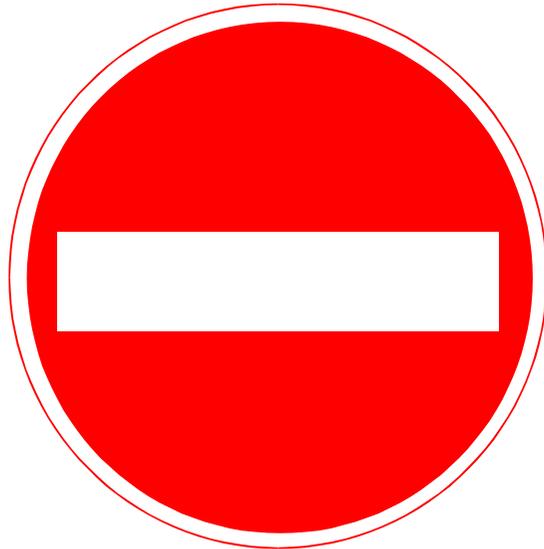
Legal structure, which simultaneously:

- is not adequate to its aim;
- leads to tax benefits;
- serves tax avoidance purposes;
- is not justified by reasons outside of the tax sphere

has to be substituted for tax purposes by an adequate one.



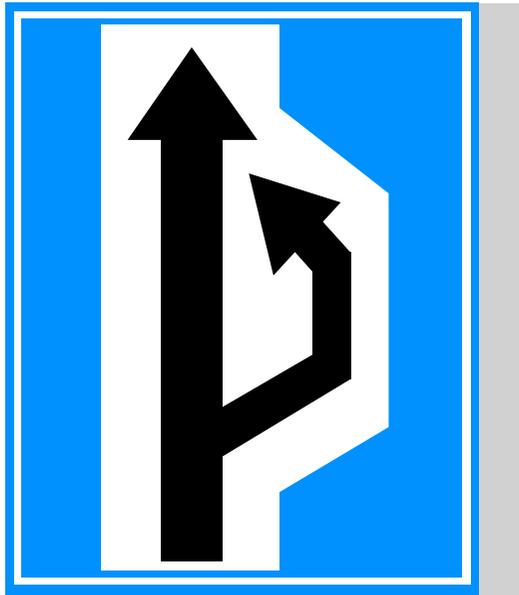
# Tax Evasion



- Intentional behavior
- Direct violation of tax law
- Escaping tax obligations by illicit means
- Non billing, non existing transactions, false documents...
- Tax fraud



# Tax Avoidance



- Transaction that formally respects the law, but actually frustrates its spirit
- Circumvention of the tax system (“getting around”)
- Complexity, artificiality, contrivance
- Lack of valid economic purposes



# Tax Avoidance: Two Quotations

*"The difference between tax evasion and tax avoidance is the thickness of a prison wall"*

**Sir Denis W. Healey**

UK Chancellor to the Exchequer from 1974 to 1979



*"A deal done by very smart people that, absent tax considerations, would be very stupid"*

**Professor Michael J. Graetz**

Justus S. Hotchkiss Professor Emeritus of Law and  
Professorial Lecturer in Law at Yale University.

Former U.S. Treasury Official

## 2. CFC Rules

§ 7 AStG Definition CFC

§ 8 AStG Definition of bona fide income

§ 10 AStG Taxation of CFC-income

§ 8 sec. 2 AStG Safe-heaven for EU companies

§ 20 sec. 2 AStG Treaty override of PE exemption

## AStG Law on Foreign Transactions

Contains complex anti-avoidance rules:

- transfer pricing;
- business restructuring (transfer of functions);
- CFC;
- exit taxation, etc.;
- no treaty shopping.

## § 7 AStG Definition CFC

- Held by more than 50 % by German tax residents;
- Lower thresholds for income from dividends, interests and capital gains;
- Subject to low taxation (less than 25 %);
- Does not obtain sufficiently „bona fide income“.

## § 8 AStG Definition of bona fide income

Proceeds from:

- Agriculture;
- Production and construction;
- Financial institutions dealing mainly with the general public and not with related parties tax resident in Germany;
- Trading activity independent from related parties;
- Services supplied independently from related parties.

## § 8 AStG Definition of bona fide income cont'd

Further can proceed from:

- Renting activities independent from German related parties;
- Lending of capital, which was gathered on the free market and not from related parties;
- Dividends (limitations apply);
- Capital gains (limitations apply);
- Restructurings done at book-value (limitations apply).