German Tax Monthly

Information on the latest tax developments in Germany

March | 2022

Government Bill for a Fourth Coronavirus Tax Assistance Act

On 16 February 2022, the German Federal Government passed the **government bill to implement tax relief measures for coping with the coronavirus crisis** (Fourth Coronavirus Tax Assistance Act).

Against the backdrop of the ongoing pandemic-related restrictions, the people as well as the economy are to be supported in overcoming the corresponding economic ramifications. The planned measures are especially intended to support economic recovery, provide additional investment incentives and reduce the burden on employees.

Key points of the Fourth Coronavirus Tax Assistance Act

Extension of declining-balance method of depreciation: The option of using the declining-balance method of depreciation for movable fixed assets shall be extended by one year. Accordingly, assets that are acquired or manufactured also still in 2022 (currently 2020 and 2021) can be depreciated by up to two and a half times the depreciation on a straight-line basis, but 25% at most.

Loss utilisation:

- **Extending the loss carry-back:** The option of recognising loss carry-backs shall be extended indefinitely from one to two years. Thus, a loss carry-back would be possible in both years directly preceding the year in which the loss was incurred. This is to apply for the first time for losses that are incurred in 2022, i.e. loss carry-backs from 2022 to 2021 and 2020.
- **Extending expanded loss offsetting:** The Third Coronavirus Tax Assistance Act raised the maximum amount of the loss carry-back to EUR 10 million and EUR 20 million in the case of joint assessment for 2020 and 2021. These upper limits are now to be extended to the end of 2023, which means for loss carry-backs from 2023 to 2022 and 2021.

Extending the deadline for tax-privileged (re)investments: The deadlines for tax-privileged (re)investments pursuant to Section 6b

Content

of the German Income Tax Act [EStG] and Section 7g EStG shall be extended by another year (until 2023).

Subsidies granted for compensation for short-time work: The tax exemption for employer's grants to increase short-time allowance shall be extended by six months until the end of June 2022 (from previously the end of December 2021).

"Carer bonus": Special benefits granted by employers to employees working in specific areas (especially hospitals) in recognition of their special contribution during the coronavirus crisis (so-called carer bonus) are to be allowed tax-free up to an amount of EUR 3,000 in the period from 18 November 2021 until 31 December 2022.

Extending the filing deadline for tax returns: The draft bill provides for various extensions of filing deadlines for tax returns from 2020 to 2022.

Wage tax deduction in maritime transport: In order to implement the agreement with the European Commission, the register reference for merchant vessels shall be expanded from Germany to include EU/EEA countries.

Outlook

Once it has received the government bill, the Bundesrat can then form its opinion on it. This is followed by the decisions of the Bundestag and the Bundesrat, so that there may still be amendments to the draft bill. The Fourth Coronavirus Tax Assistance Act includes the first tax measures from the new German government's coalition agreement: including expansion of loss carry-backs and extension of expanded loss offsetting. The "super depreciation" for climate protection and digital assets announced in the government's coalition agreement is not included; however, by all accounts, a separate draft bill is being prepared.

BMF Circulars on the Royalty Deduction Limitation Rule (Section 4j EStG)

The German Federal Ministry of Finance [BMF] issued circulars on the application of the German royalty deduction limitation rule [Lizenzschranke] (Section 4j German Income Tax Act [EStG]) dated 5 and 6 January 2022.

Under the rules of German royalty deduction limitation (Section 4j EStG), expenses for granting of rights on the payor side are not deductible or are only partially deductible if the corresponding income for the foreign recipient is subject to lower taxation deviating from standard taxation (preferential tax regime) and the recipient is a related party of the payor. The deduction limit does not apply if the preferential tax regime applied to the relevant income at the recipient complies with the OECD's nexus approach.

General application issues (BMF circular dated 5 January 2022)

Preferential tax systems are classified as harmful if they are not linked to the substantial activity of the taxpayer subject to preferential treatment. However, systems based on the nexus approach are not harmful. This approach makes the tax privilege for the granting of rights dependent on the research and development expenses incurred in this jurisdiction for the generation of a licensed right or patent.

In respect of IP regimes classified as harmful, OECD member states undertook to end or amend the rules to comply with the nexus approach by 30 June 2021 at the latest. According to the BMF circular, however, some countries have grandfather rules whereby non-nexus-compliant preferential regimes may (on application) continue to be applied in the transitional phase until 30 June 2021. In these cases, the BMF considers it necessary to check whether the expenses claimed for deduction by the recipient actually already fell under a nexus-compliant preferential regime or still fell under a preferential regime classified as harmful.

According to the BMF circular, proof that a royalty payment to a foreign recipient is subject to standard taxation and not to harmful preferential tax treatment can generally only be provided through submission of documents from the accounting records of the recipient of royalty expenses and from the foreign tax assessment notice issued for the tax assessment period together with the basis for calculation. Any taxpayer wishing to prove that the income in question actually fell under a nexus-compliant preferential tax regime must provide proof by submitting a confirmation from the foreign tax authority.

Non-nexus-compliant preferential tax regimes (BMF circular dated 6 January 2022)

The BMF circular dated 6 January 2022 includes guidance in the form of a table with a non-exhaustive list of preferential tax regimes classified as non-nexus-compliant for the assessment periods 2018 to 2020. Any current transitional provisions are also shown in the "period of application" [Anwendungszeitraum] column of the table.

The two recipient countries Switzerland and the USA are highly relevant in term of practical application. In respect of Switzerland, there is now clarity that the Swiss holding company privilege in place up to and including the assessment period 2019 is non-nexus-compliant according to the BMF and the subsequent arrangement (harmonised patent box) applicable for the assessment period from 2020 is a nexus-compliant preferential tax regime. By contrast, there is still no final clarification of whether the existing FDII regime in the US is harmful or not. In these cases, the BMF circular says that a business expense deduction can initially be claimed. The relevant tax assessment notices will be kept open in accordance with procedural law.

German Federal Ministry of Finance: Dual Consolidated Loss Rule

The German Federal Ministry of Finance [BMF] has issued a statement on the dual consolidated loss rule (DCL rule) of the German tax group scheme and simultaneously stated that a ruling by the German Federal Tax Court is not applicable beyond the specific case that was ruled upon (guidance as of 14 January 2022).

According to the German DCL rule, negative income of a tax group parent may not be considered if it is (also) considered in a foreign jurisdiction in the taxation of the tax group parent, the tax group subsidiary or another person. The German Federal Tax Court ruled on this in its decision of 12 October 2016 as follows: in the case at hand, a Dutch corporation held ownership interests in a German partnership. The Dutch corporation raised a loan to finance the investment in the partnership. In turn, the partnership was the tax group parent of a German corporation as tax group subsidiary. According to the law governing at that time, the interest expense for the loan could be deducted both in the Netherlands as well as in Germany (note: according to the amendment of Section 4i of the German Income Tax Act [EStG], deduction of interest in Germany in such a case has been prohibited since 2017).

The question was whether interest expenses represent "negative income" of the tax group parent within the meaning of the DCL rule and whether the DCL rule even applies at all if the tax group parent is a partnership. The German Federal Tax Court rejected this: in its view the consolidated income of the tax group parent is to be used as a basis (income after adding the income of its tax group subsidiary (income consolidation)). However, the consolidated income of the partnership (tax group parent) was positive in the case at hand. Consequently, the German Federal Tax Court was not required to rule on whether the DCL rule was even applicable for tax group parents with the legal form of a partnership. Furthermore, the German Federal Tax Court ruled that due to the term of "income" as a net amount, individual operating expenses incurred at the tax group parent are not excluded from deduction in accordance with the DCL rule if there is overall positive income at the level of the tax group parent.

The German Federal Ministry of Finance has now decided that the ruling is not applicable beyond the individual case. Contrary to the German Federal Tax Court's interpretation, the application of the DCL rule is to be based in isolation respectively on the income of the tax group parent and the income of the individual tax group subsidiaries. Therefore, in the case ruled on, the interest expenses – to the extent that they would have resulted in negative income of the tax group parent when viewed in isolation – would not be deductible at the level of the tax group parent. The German Federal Ministry of Finance has not commented on the German Federal Tax Court's interpretation that the net amount of operating income and operating expenses is decisive and not the individual operating expenses. Therefore, it should be possible to assume that the ruling is applicable at least in this respect.

Status of Double Taxation Treaties

By guidance dated 19 January 2022, the German Federal Ministry of Finance [BMF] provided information on the current status of the double taxation treaties (DTTs) and negotiations regarding the treaties. In its annual guidance, the BMF provides an overview of the current status of DTTs and other tax agreements concluded between Germany and other countries as well as treaty negotiations.

Germany currently has DTTs with 96 countries.

The DTT dated 1 July 2010 with the United Arab Emirates ceased to apply as at 31 December 2021, as it was not renewed.

The following DTTs and protocols of amendment (so far) are applicable for the first time from 1 January 2022:

- Denmark
- Estonia
- Finland
- Ireland
- Liechtenstein
- Singapore
- United Kingdom and
- Cyprus.

Protocols of amendment to the DTTs were newly signed in 2021 with

- Mauritius
- Mexico and
- the Netherlands.

The agreements still need to be transposed into national law.

No new treaty text was added to the (amended) treaties or protocols of amendments in 2021.

Negotiations for (amended) treaties or protocols of amendment were initiated with the following countries:

- Sri Lanka
- Tunisia and
- Vietnam.

It cannot be predicted how long each set of negotiations will last. Negotiations can span over several years.

Pursuant to the BMF guidance, several of the aforementioned treaties will become applicable retroactively after they have taken effect. In suitable cases, tax assessments must be made provisionally if it is uncertain when the signed treaty will come into effect, which will be to the benefit of the taxable entity.

Imprint

Published by
KPMG AG Wirtschaftsprüfungs-gesellschaft
THE SQUAIRE, Am Flughafen
60549 Frankfurt/Main, Germany

Editorial Team
Prof. Dr. Gerrit Adrian (Responsible*)
gadrian@kpmg.com

Veronika Aschenbrenner
Julian Fey
Alexander Hahn

Newsletter subscription
https://www.kpmg.de/newsletter/subscribe.aspx

*Responsible according to German Law (§7 (2) Berliner PresseG)

kpmg.de

kpmg.de/socialmedia.de