

German Tax Monthly

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Draft Law for the Amendment to the Interest Rate for Back Taxes and Tax Refunds

The German Federal Ministry of Finance [BMF] has published a draft law particularly governing the amendment to interest on back taxes and tax refunds.

With its decision of 8 July 2021, the German Federal Constitutional Court ruled that the interest on back taxes and tax refunds of 6% annually (0.5% per month) was unconstitutional for interest calculation periods starting as from 2014. However, application of the 6% interest rate was still permitted for interest periods up to and including 2018; the Constitutional Court declared the rules inapplicable only for interest periods from 2019 onwards. The legislator was asked by the court to prepare by 31 July 2022 an amendment to the full interest rule for interest periods from 1 January 2019. This is now to be implemented with the draft law.

Main content of the draft law

The draft provides for a retroactive reduction of the interest rate for interest on back taxes and refunds to **0.15% per month** (thus **1.8%**

per year) for interest periods from 1 January 2019. The new interest rate is based on the Deutsche Bundesbank's current base rate (-0.88% p.a.) with a mark-up of approx. 2.7 percentage points, which is considered "appropriate" according to the explanatory memorandum.

This interest rate is to be **evaluated** for appropriateness every three years taking into account movements in the base rate; this will then take effect for following interest periods, for the first time as at 1 January 2026. Should there be significant changes in the base rate, the interest rate may also be adjusted at an earlier date, according to the explanatory memorandum. To avoid overly frequent or minor adjustments to the interest rate, however, the rate is to change only if the base rate applicable as at 1 January of the evaluation year deviates by more than one percentage point from the base rate applicable when the interest rate was last fixed or adjusted.

The amendments will generally be applicable in all cases pending on the day following promulgation of the act. In cases of interest being recalculated retroactively, the

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comments in the draft law indicate that the principle of **protection of confidence** shall apply. Accordingly, if an interest assessment is revoked or amended, the taxpayer may not be disadvantaged by any recognition of the Federal Constitutional Court's having established as invalid a law upon which the previous assessed interest was based.

This draft law contains no adjustment of other interest rates under procedural law such as interest on deferrals, evasion or suspension of collection. The Federal Constitutional Court explicitly stated in its decision that the unconstitutionality does not apply to these other interest situations falling under the same interest rate according to the Germany Tax Code, to the detriment of the taxpayer. According to the explanatory memorandum, the question of whether and how these rules are also to be amended in view of the Constitutional Court's decision must be further examined in detail and is not addressed in this draft law. There are also constitutional concerns about the amount of other interest rates under tax law not covered by procedural law of the Tax Code: discounting of pension provisions at 6% annually, discounting of liabilities at 5.5% annually.

Outlook

With this draft law, the BMF proposes to link the interest rate for back taxes and refunds to the Bundesbank's base rate under certain conditions in the future, and to make it subject to regular evaluation.

The ministerial draft has been forwarded to relevant associations for comment. This will be followed by publication of the government draft, on which the Upper House of the German Parliament [Bundesrat] will then be able to add its

comments. For that reason, there may still be amendments in the course of the legislative process.

BMF Guidance on Useful Lives of Computer Hardware and Software

UPDATE: The German Federal Ministry of Finance [BMF] issued an updated version of its Guidance (originally from 26 February 2021) on the useful lives of computer hardware and software on 22 February 2022. The key aspect of the original BMF guidance dated 26 February 2021 was that one year can be applied as the useful live with a view to the "rapid technical progress" in the area of digitalisation. The revisions now made address some of the accounting tax issues raised in practice over the last twelve months, among others:

- The option of using a shorter useful life (in line with the BMF guidance) does not constitute immediate write-off according to the BMF. Even in assuming a useful life of one year in principle, depreciation or amortisation starts on the date of acquisition or production of the asset. This means that if the asset is acquired/produced during the year, depreciation/amortisation would have to be calculated beyond the reporting date (spread on an exact monthly basis over 12 months). However, no objections are raised by the BMF if, contrary to this, the asset is depreciated/amortised in full in the year of acquisition or production (i.e. not spread on an exact monthly basis).
- It is also possible to deviate from the assumption of a useful life of one year.
- Moreover, applying a shorter useful life does not constitute a tax option. The BMF guidance does not otherwise comment

on the relationship to the balance sheet for financial reporting purposes, in which a longer useful life is typically applied.

Unchanged contents of the BMF guidance: The tax authorities adjust the useful lives of computer hardware and software, which are to be used for tax depreciation and amortisation, in line with the "changed actual circumstances". The tax authorities assume a useful life of one year for computer hardware and software – which are specified in detail in the BMF guidance. According to the BMF guidance dated 18 November 2005, the useful lives for computers and similar equipment thus far – based on the tax depreciation table – were three years for general fixed assets and five years for business software systems (ERP software).

The term "computer hardware" includes, among other elements, computers, desktop computers, notebook computers (including tablets, slate computers, mobile thin clients), mobile workstations and peripheral devices.

The assets are defined individually in the BMF guidance. In this regard, the BMF draws on the definitions in Regulation (EU) No 617/2013 dated 26 June 2013 with regard to "ecodesign requirements for computers and computer servers". According to the BMF guidance, the hardware products specified under items 1 to 7 are only recognised under the condition that information is to be provided by manufacturers pursuant to Annex II of the above-mentioned EU Regulation, according to which the product type is to be provided in the technical documentation ("ecodesign requirements" for computers). Listing computer hardware according to items 1 to 7 is therefore final.

"Peripherals" are subdivided into input devices (e.g. keyboard, mouse, scanner, digital camera, microphone, headset), external storage (e.g. hard disk; DVD/CD drive, USB stick) and output devices (e.g. speaker, monitor, display, printer). Peripherals are to be identified in close alignment with the listed devices. This list is, however, not exhaustive.

The term "software" includes operating and user software for data entry and processing. Besides standard applications, this also includes applications customised for individual users, such as ERP software, software for merchandise management systems or other application software for business management or process control.

These rules apply for the first time to financial years ending after 31 December 2020. The BMF guidance can also be applied to corresponding assets that were acquired or manufactured in previous financial years and for which a useful life other than one year was used as a basis. Thus, the residual book values can also be written off in full in financial year 2021.

Attribution of Profits and Exit in the case of a Permanent Establishment without Personnel

The Lower Tax Court of Saarland passed a ruling on the attribution of assets, attribution of profits and so-called "passive exit" in the case of permanent establishments without personnel (ruling dated 30 March 2021, file ref. 1 V 1374/20). These proceedings only addressed suspending the enforcement of the tax assessment. Such suspension is to be effected when there are serious doubts as to the legality of the tax assessment.

UPDATE: The suspension of enforcement has now been confirmed by the German Federal Tax Court [BFH] in its decision of 24 November 2021 (I B 44/21).

The plaintiff was a German limited partnership that has been operating a wind farm on leased property since 2011. The plaintiff's partner was a Danish partnership. The plaintiff has no own staff either in Germany or in Denmark. Both technical and business management is carried out by two German service companies.

With effect from 1 January 2013, the Authorised OECD Approach (AOA) for attributing profits to a permanent establishment was transposed into German tax law. Accordingly, a permanent establishment is treated as a separate and independent business entity. The significant people function is relevant to the attribution of assets. As a result, the German tax office assumed that all assets and transactions are, contrary to previous practice, not attributable to the plaintiff's German permanent establishment (wind farm), but instead for the first time to the management permanent establishment in Denmark because the sole and, thus, the significant people function of the plaintiff is performed in the management permanent establishment in Denmark. As a result, the plaintiff's entire assets did exit for tax purposes. Furthermore, the current loss from the year under dispute (2013) can no longer be taken into account in Germany.

The Lower Tax Court of Saarland first found that in the case of the wind farm – according to German law as well as pursuant to the tax treaty with Denmark – this involves a German permanent establishment whose income falls under German tax jurisdiction. Furthermore, the wind farm's assets are also to be attributed to this

German permanent establishment for the period prior to 2013.

However, in its ruling, the Lower Tax Court of Saarland expressed serious doubts in many respects regarding the legality of the tax office's view:

- There is serious doubt whether the assets of the German permanent establishment following introduction of the AOA with effect from 1 January 2013 are now attributable to the management permanent establishment in Denmark and, as a result, this leads to the realisation of profits through fictitious withdrawal. **The BFH also has doubt in this regard: According to the court, it is conceivable that "external personnel" working at the permanent establishment would also be sufficient.**
- There is also serious doubt as to whether the attribution of assets according to the people function can even be applied at all in the case of permanent establishments without personnel. **The BFH has also confirmed these doubts.**
- Finally, there is serious doubt as to whether a so-called "passive exit" can occur if Germany's right to tax is excluded or restricted just through government action (i.e. due to transposing the AOA into law with effect from 1 January 2013). **This point was left open by the BFH for lack of relevance to the decision.**

The issue of assets (which previously were attributed to a German permanent establishment) possibly exiting as a result of implementing the AOA concerns cases where the permanent establishment existed already before 1 January 2013. The doubts regarding attributing assets in the case of

permanent establishments without personnel could also be transferable to other cases, e.g. computer servers or solar parks. The doubts regarding the so-called "passive exit" could equally be transferable to other cases, e.g. concluding a new tax treaty or amending an existing tax treaty, whereby the German right to tax assets is restricted or excluded.

In the proceedings to suspend enforcement, only a summary review is conducted as to whether there also are substantial circumstances that contradict the legality. The Lower Tax Court of Saarland has not yet reached a decision on the main proceedings.

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