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Government Bill on the Transposition of DAC 7 and the Modernization of the Tax Procedures Law

The Federal Ministry of Finance [BMF] has published the government draft bill of an act on the transposition of the EU DAC 7 Directive and the modernization of the Tax Procedures Law.

The bill is to transpose the directive (EU) 2021/514 called "DAC 7" (Directive on Administrative Cooperation) into German law. The directive introduces an obligation for operators of certain digital platforms to provide the tax authorities with information on income derived by sellers through these platforms. This information will be automatically exchanged between EU Member States.

Further, also the German tax procedures law shall be selectively modernized, in particular in connection with tax audits and in the area of digitization. Both are projects agreed on by the governing parties in the coalition agreement.

1. Modernization of the Tax Procedures Law

Acceleration of tax audits and cooperation and digitization

- The time limit of the **suspension of expiration** for the amended tax assessment due to a **tax audit** will be shortened (five years after the end of the calendar year in which the order for the tax audit was disclosed). Furthermore, the suspension of expiration is to be further limited by the earlier issuance of the disclosure of an audit order. In future, the audit order shall generally be issued until the end of the calendar year following the calendar year in which the tax assessment notice became effective.
- The tax authority shall be able to also request **accounting documents** as soon as a tax audit is disclosed, which must be submitted within a reasonable period of time, which may already end before the beginning of the external audit. On the basis of the documents subsequently submitted, it will be possible to determine particularly the **focus areas of the tax audit** and to communicate these to the taxpayer.
- **Partial final assessment notices**: it shall be possible to issue "partial final assessment notices" already during the tax audit. In a partial final assessment notice, the delimitable tax bases resulting from self-contained and conclusively audited facts can be determined separately.

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- **Obligations to cooperate**: the tax authority and the taxpayer may agree to have **regular discussions** during the tax audit on the determined facts and the possible tax consequences. Furthermore, a new instrument "**qualified request for cooperation**" will be created and according to the explanatory memorandum, is to be applied to taxpayers who do not, or not sufficiently, fulfil their general duties to cooperate.
- **Correction of tax returns**: taxpayers who subsequently realize that tax returns submitted by them are incorrect or incomplete and that this may result in a tax shortage are obliged to report this immediately to the tax authority and to make the necessary correction. In future, also cases will be covered where the findings of a tax audit were uncontestably implemented in an administrative act and where the underlying facts also impact other taxation bases.
- **Transfer pricing documentation**: There will be a new provision to the effect that in the event of a tax audit the transfer pricing documentation must invariably be submitted, i.e. without separate request by the tax authority. In addition, the deadline will be shortened from 60 to 30 days from the date of the disclosure of the audit order.
- **Administrative offenses:** the facts of an administrative offense that may lead to a general minor tax fraud will be expanded. Accordingly, it will also be deemed an administrative offense if documents or records subject to the retention requirements are not retained or not fully retained, or if access to data is not granted, not granted correctly or not granted in full.
- Negotiations and meetings between tax officials and taxpayers can also be conducted **electronically**, e.g. through video conferencing; the same applies to final meetings for a tax audit. In future, also the audit report can be issued electronically.
- In addition, there is a proposal that regulations are added according to which on a test basis in tax audits relief can be granted if companies have an effective Tax Compliance Management System (Tax CMS). The draft defines a Tax CMS as all internal measures that ensure that the bases of taxation are correctly recorded and taken into account and that the taxes due on them are paid in full and on time. The Tax CMS must map the tax risks on an ongoing basis.

Relocation of electronic accounting

- In future, accounting records can be relocated not only to one EU Member State or third country but to **several EU Member States or third countries**. In the case of relocation to third countries, it will be sufficient to specify either the **location** of the data processing system *or* **the name and the address** of the commissioned third party. Currently, the prerequisite for the relocation of accounting to third countries is, among others, the **designation of the location** of the data processing system *and*, if a third party is commissioned, its name and address.
- If the tax authority requests that accounting be **relocated back**, accounting can in future also be directly relocated back to one or several EU member States and no longer has to be relocated to Germany first.

2. Reporting obligations for platform operators

The reporting obligations of digital platform operators will be regulated in a separate law: **the platform reporting obligation and exchange of information Act**. The draft law is based on the EU Directive (EU) 2021/514, the so-called DAC 7, which expanded the EU Mutual Assistance Directive.

Operators of certain digital platforms will be required to report **specific information** to the Federal Central Tax Office (BZSt) for one calendar year at a time (reporting period), which makes it possible to identify the sellers active on these platforms and the tax evaluation of the transactions carried out by them. Certain "low risk" sellers, however, are exempt. The information will be automatically exchanged with the competent authorities of the EU Member States concerned. Only those platform operators are subject to the reporting obligation who allow their sellers to carry out so-called **relevant activities**. The relevant activities covered are as follows: the temporary assignment of rights of use and other rights of any kind in **immovable assets** in return for payment (in particular the rental of real properties and buildings), the provision of **personal services**, the sale of **goods** (physical objects), and the temporary assignment of rights of use and other rights of any kind in **means of transport**.

The relevant information is reported for one calendar year (**reporting period**) and must be submitted by 31 January of the following year, at the latest. Reporting must be carried out **for the first time** for the calendar year 2023, i.e. by 31 January 2024, at the latest.

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3. Outlook

After the government draft has been forwarded to the Bundesrat [upper house of the German parliament], the latter can comment on the draft bill. Subsequent to this, the Bundestag [lower house of the German parliament] and the Bundesrat will pass their decisions. Hence, it is still possible that amendments to the draft legislation are made.

In principle, the law shall enter into force on 1 January 2023. Individual statutory application regulations are to be observed. The new regulations, intended to accelerate the tax audit, will essentially not be applicable until 2025.

Government Bill for the 2022 Annual Tax Act

The German Federal Ministry of Finance [BMF] has published the government bill for the 2022 Annual Tax Act [Jahressteuergesetz 2022 – JStG 2022]. There was a need for legislative action in various areas of German tax law. This relates in particular to amendments for further digitalisation, procedural simplification, legal certainty and tax equality as well as the implementation of the coalition agreement. There is also a need to adapt to EU law and ECJ case law and to respond to judgements of the German Federal Fiscal Court.

"Register cases" pursuant to Section 49 EStG

The BMF guidance of 29 June 2022 contains a renewed extension for obtaining a retroactive exemption certificate through a simplified procedure in so-called register cases (limited tax liability/non-resident tax status pursuant to Section 49 EStG for licence payments and sales transactions from rights between non-resident taxpayers due to domestic registration in Germany). Accordingly, the simplified procedure can also be used for payments received before 1 July 2023, provided the application is submitted by 30 June 2023.

The 2022 Annual Tax Act [JStG 2022] now provides for the following new regulation for the taxation of "register cases":

- For payments in the form of licences and capital gains which are received until 31 December 2022, application of the Act is to be limited to cases between related parties within the meaning of Section 1 (2) of the German External Tax Relations Act [AStG]. Payments to third parties ("third-party licences") would therefore no longer be subject to limited tax liability – even for the past – as the amendments are to apply in all open cases.
- For payments received after 31 December 2022, the limited tax liability in register cases shall also cease for payments between related parties within the meaning of Section 1 (2) AStG. The BMF guidance of 29 June 2022 should therefore no longer be relevant for payments received after 31 December 2022.
- Draft Tax Haven Defence Act [StAbwG-E], Section 10: Introduction of limited tax liability in register cases, insofar as the creditor of the payment is resident in a non-cooperative tax jurisdiction as defined in Section 2 StAbwG. The new regulation is to apply both to payments between related parties within the meaning of Section 1 (2) AStG and to payments to third parties and is to apply from 1 January 2022. This currently applies to American Samoa, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, the American Virgin Islands and Vanuatu.

Depreciation of real estate pursuant to Section 7 (4) EStG

Buildings used for residential purposes and completed after 31 December 1924 have so far been depreciated on a straight-line basis at 2%; for completion before 1 January 1925 at 2.5%.

The increase in the **straight-line depreciation rate for new residential buildings to 3%**, as set out in the coalition agreement, is now to be implemented with the 2022 Annual Tax Act [JStG 2022]. The change affects residential buildings held as private and business assets that are completed **after 30 June 2023** (ministerial draft: 31 December 2023). Application of the higher standard depreciation rate therefore results in a shorter depreciation period of 33 years (instead of the previous standard 50 or 40 years).

So far, the taxpayer has been able to provide evidence and, in justified exceptional cases, the depreciation can be calculated based on a justified shorter actual useful life – in deviation from the standard depreciation rate.

This **possibility of proving a shorter useful life** of a building is to be **eliminated**. As the standard depreciation rate for residential buildings is to be raised from 2% to 3%, in future all buildings would generally be depreciated over a period of 33 years, so that already due to the general provisions on straight-line depreciation of buildings, these would be depreciated over a shorter than the actual useful life. It should be noted that the **last possibility to provide evidence** in order to be able to use the shorter depreciation period is to be for the **2022 assessment period**.

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Photovoltaic systems

In addition, the 2022 Annual Tax Act [JStG 2022] is to implement **measures to promote the expansion of photovoltaic systems** with effect from 1 January 2023.

Among other things, the government bill provides for the introduction of an **income tax exemption** for income from the operation of certain photovoltaic systems. This will apply to systems with a gross rated output (according to the market master data register) of up to 30 kW in the case of detached houses and commercial properties and up to 15 kW per residential and commercial unit in the case of other buildings used primarily for residential purposes (e.g. apartment buildings, mixed-use properties).

The tax exemption will apply to the operation of an individual system or multiple systems up to a maximum of 100 kW (peak). The 100 kW (peak) limit is to be determined per taxpayer (natural person or corporation) or per co-entrepreneurship.

VAT: (Accounting) obligations for payment service providers for cross-border payments

With the 2022 Annual Tax Act [JStG 2022], special (accounting) obligations for payment service providers for cross-border payments are to be introduced in Section 22g of the Draft German Value Added Tax Act [UStG-E]. The rule implements Council Directive (EU) 2020/284 of 18 February 2020 and is intended to combat VAT fraud, particularly in the area of cross-border electronic commerce.

The accounting obligation applies to payment service providers that make more than 25 cross-border payments to the same payee per calendar quarter (threshold). In particular, the following must be recorded: Information on the payee (name, VAT ID, tax number, address, IBAN of the payment account), the BIC or any other business identifier code that unambiguously identifies the payment service provider and details of all cross-border payments made (date, time, amount, currency, Member State from which the payment originated).

The reporting period is the calendar quarter. The payment service provider must transmit the records to the German Federal Central Tax Office [BZSt] by the end of the calendar month following the end of the calendar quarter in accordance with an officially prescribed data record via an officially specified interface. If the payment service provider subsequently realises that the reported payment information is incorrect or incomplete, it is obliged to correct or complete the incorrect information within one month of becoming aware of it. The payment service provider must retain the records in electronic form for three calendar years. Anyone who intentionally or recklessly fails to provide correct, complete or timely information on cross-border payments or fails to correct or complete such information in a timely manner or who fails to retain the records for at least three calendar years may be fined up to 5,000 euros.

The regulations are to take effect on 1 January 2024.

VAT: Zero tax rate for photovoltaic systems

With the 2022 Annual Tax Act [JStG 2022], a zero tax rate is to be applied to the supply, import, intra-Community purchase and installation of photovoltaic systems, including energy storage units.

The zero tax rate is to apply to the supply of solar modules, including the key components for the operation of a photovoltaic system and the storage units. The zero tax rate may only be applied if the photovoltaic system is installed on or near private apartments, apartments, public buildings or other buildings used for activities that are in the public interest. These conditions are considered to be met if the installed gross output of the photovoltaic system does not exceed 30 kW (peak).

The regulation is to take effect on 1 January 2023.

Outlook

The Bundesrat will have the opportunity to comment on the draft bill once the government bill has been presented to the Bundesrat. This is followed by the decisions of the Bundestag and the Bundesrat, meaning that amendments to the draft bill are still possible. The legislative process can still be concluded in the current year. The Act is to enter into force on the day after its promulgation. The special regulations on the entry into force of the individual articles and on the timing of application of the individual laws must be observed.

Lower Tax Court of Cologne (2 K 1483/19): German Anti-Treaty/Directive Shopping Rule in Forwarding Cases

In its judgment of 16 February 2022, the Lower Tax Court of Cologne ruled that the German Anti-Treaty/Directive Shopping Rule (Section 50d (3) of the German Income Tax Act [EStG]) in accordance with the old and the new version precludes an application for full exemption from German withholding tax in forwarding cases.

Dividend payments from Germany to other EU member states are always subject to withholding tax, irrespective of the EU Parent-Subsidiary Directive. Withholding tax

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can only be waived if the foreign payee receives a so-called exemption certificate from the German Federal Central Tax Office [BZSt] upon application. However, in order to do so, the recipient must fulfil certain substantive requirements in accordance with Section 50d (3) EStG.

In the case under dispute, the plaintiff was a Spanish corporation that held all shares in a German limited liability company [GmbH]. The plaintiff wanted to invest in German real estate through the GmbH. In the year under dispute (2016), it received dividends from the GmbH, which it forwarded to its two Spanish owner-managers. The plaintiff had no office premises of its own and only had one employee resident in Germany. The involvement of the plaintiff had occurred for organisational and liability reasons. The plaintiff wanted to prevent withholding tax from being withheld in Germany by obtaining an exemption certificate.

In its conclusion, the Lower Tax Court agrees with the opinion of the German Federal Central Tax Office [BZSt], according to which Section 50d (3) EStG precludes issuing the requested exemption certificate. The ECJ ruled in 2017 and 2018 that Section 50d (3) EStG (old version) is in violation of European law due to its strict substantive requirements (C-504/16 and C-613/16 as well as C-440/17). Section 50d (3) EStG (old version) was therefore revised. The new version took effect on 9 June 2021 and is in principle applicable to all open cases. To avoid any inadmissible retroactive effect in those cases in which the new regulation would leave the taxpayer in a worse position, a procedure for assessing the most favourable tax treatment is intended, insofar as the payment was received prior to the new version entering into force. The Lower Tax Court therefore had to comment on both versions.

Section 50d (3) EStG old version:

Despite the non-conformity with European law, the provision should continue to be applied by interpreting it in conformity with European law. Accordingly, the plaintiff must be allowed to prove that there is no purely artificial arrangement for the purpose of obtaining a tax advantage. The plaintiff had not succeeded in doing so in the case at hand. It was unable to convince the tax court that its involvement was not a purely artificial arrangement. If the two owner-managers had received the dividends directly, they would not have been entitled to 0% relief, but only to 15% relief under the DTA. In addition, the plaintiff does not carry out any significant economic activity beyond passing on the dividends.

Section 50d (3) EStG new version:

The mere forwarding of dividends is not sufficient to fulfil the substantive requirements, even according to the wording of the new version. In the absence of substantial non-tax reasons for the involvement, the plaintiff had also not succeeded in proving under the new version that none of the main purposes of its involvement was to obtain a tax advantage.

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