KPMG

German Tax Monthly

Information on the latest tax developments in Germany

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German Bundestag passes Act on the Transposition of DAC 7 and the Modernization of the Tax Procedures Law

The Bundestag adopted the act on the transposition of the EU DAC 7 Directive and the modernization of the Tax Procedures Law on 10 November 2022.

The act transposes 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 is 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.

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 can 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 will 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.

- A **trial of alternative audit methods** and tax audit relief when using a tax compliance management system (Tax CMS) was implemented for a limited period until 2029. A Tax CMS is defined 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. Binding commitment with regard to restrictions on the nature and extent of investigations for the next tax audit is at the discretion of the tax authorities and may be granted subject to revocation where a corresponding request is submitted by the taxpayer.

- 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.

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.

Reporting obligations for platform operators

The reporting obligations of digital platform operators will be regulated in a separate law: **the Platform Tax Transparency Act**. The act 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 Bundestag added the possibility of an application for information on the scope of application of the Platform Tax Transparency Act.

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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.

Outlook

After the Bundestag, the Bundesrat still has to approve the law. After the decisions of the Bundestag and Bundesrat, the law must be promulgated in the Federal Law Gazette.

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, generally apply for the first time to taxes arising after 31 December 2024; by way of derogation, the new provisions essentially also apply to taxes arising before 1 January 2025 if an audit order is disclosed in this regard after 31 December 2024.

Fiscal Court of Münster (13 K 559/19): No Exit Taxation due to Amendment of a Double Taxation Treaty

In its judgement dated 10 August 2022, the Fiscal Court of Münster ruled that amendment to a double taxation treaty (DTT) cannot lead to a taxable disjunction of assets ("exit taxation").

A company domiciled in Germany held shares in a Spanish S.L: (comparable to a German corporation – "Kapitalgesellschaft") in the year of dispute (2013). The S.L. was a real estate company within the meaning of the DTT, as more than 50% of the assets consisted of real estate located in Spain. An amendment to the DTT between Germany and Spain (introduction of Art. 13 (2)), effective 1 January 2013, means gains on the disposal of shares in a real estate company can now also be taxed in the situs state (Spain). Germany, as the country of domicile, uses the tax credit method for the capital gains. The country of domicile (Germany) had the sole right to tax under the previous DTT between Germany and Spain. In dispute was whether the amendment to the DTT restricts Germany's right to tax, which would result in taxation in Germany of the hidden reserves in the shares ("exit taxation").

The Fiscal Court ruled that the mere change in the legal situation cannot lead to an act of taxable disjunction. The potential restriction of Germany's right to tax due to amendment of the DTT cannot be attributed to the taxable entity. Rather, a requirement here is that the taxable entity actively participates in excluding or restricting Germany's right to tax.

Contrary to the view taken by the tax authorities (BMF guidance dated 26 October 2018), the Fiscal Court ruled that exit taxation is not possible due to an amendment to a DTT. Comparable scenarios can occur by, for example, concluding the DTT Liechtenstein, effective 1 January 2013, amendment to the DTT Luxembourg, effective 1 January 2014, and amendment to the DTT Australia, effective 1 January 2017, with a view to the respective rights to tax capital gains.

It is still unclear whether this view could change due to the Act Implementing the EU Anti-Tax Avoidance Directive (ATAD Implementation Act) in 2021, at least possibly for new cases. This is because the legislator assumes that the ATAD Implementation Act makes exit taxation possible given amendment to or new conclusion of a DTT.

An appeal against the Fiscal Court's decision was permitted and is pending before the German Federal Tax Court under file number I R 41/22.

Application Decree on the Stock Exchange Clause for the Purpose of Real Estate Transfer Tax

The supreme tax authorities of the federal states published on 4 October 2022 an identical decree on the use of the stock exchange clause for the purpose of real estate transfer tax (Section 1 (2c) of the German Real Estate Transfer Tax Act [GrEStG]).

The direct or indirect acquisition of shares in a real estate company is subject, if certain conditions are met, to real estate transfer tax in Germany ("share deal"). The Share Deal Reform, which came into effect as at 1 July 2021, tightened and expanded the rules on share deals. In this regard, the "stock exchange clause" was introduced (Section 1 (2c) GrEStG). This rule is intended to avoid excessive taxation in the event that alone the trading of shares in a corporation through a stock exchange would lead to taxation pursuant to Section 1 (2a) and (2b) GrEStG. The tax authorities have, in this decree, taken a position for the first time on the application of the stock exchange clause.

Three requirements must be cumulatively fulfilled in order to apply the stock exchange clause:

(1.) This must involve shares in a corporation ("Kapitalgesellschaft"). The tax authorities take, in this regard, the view that securities that concern only shares in a corporation without conveying ownership to these shares do not represent shares within the meaning of the stock exchange clause (e.g. American Depositary Receipts).

(2.) The shares must be admitted for trading on an "organised market" in Germany or in another

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EU/EEA member state or on a comparable third-country trading venue. In this regard, the decree states that in Germany the regulated market on a stock exchange represents such an "organised market" within the meaning of the stock exchange clause. The most important German securities exchange is in Frankfurt am Main. By contrast, Multilateral Trading Facilities (MTF) are, according to the decree, not "organised markets" within the meaning of the stock exchange clause because they are not publicly authorised, regulated and monitored. The tax authorities include in this category the over-the-counter market pursuant to Section 48 of the German Stock Exchange Act [BörsG]. The Commission of the European Union currently views comparable third-country trading venues as including only the regulated markets based in the US, Hong Kong and Australia. By contrast, the stock exchanges in Switzerland and the UK are currently not recognised as being comparable.

(3.) The shares must be transferred on account of a transaction via a privileged securities trading venue. In this case – contrary to the admission requirement under (2.) – a MTF may also be used. The tax authorities are of the view that there is generally no such transaction via a privileged securities trading venue in the case of an IPO, the issue of new shares as a result of a capital increase as well as in the case of securities lending or a repurchase agreement.

If the aforementioned three requirements are met, then the transfer of shares when determining the percentage rate pursuant to Section 1 (2a) and (2b) GrEStG is not taken into consideration. Should such non-consideration of the transfer of shares lead to the tax-triggering participation threshold of 90% of the shares not being reached, then – according to the tax authorities – there is also no notification requirement.

The decree is to be applied to all outstanding cases, i.e. all cases under procedural law that have not yet been concluded.

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