

# German Tax Monthly

Information on the latest tax developments  
in Germany

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## 2022 Annual Tax Act

The 2022 Annual Tax Act (Jahressteuergesetz 2022 – JStG 2022) was promulgated in the Federal Law Gazette on 20 December 2022. In general, the Act becomes effective on 21 December 2022. The special regulations on the effective date of the individual articles and on the timing of application of the individual laws must be observed. The legislative procedure is thus completed.

Legislative action was necessary 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” in accordance with Section 49 EStG*

“Register cases” are cases in which rights that are entered in a German register have no further link to Germany but are nevertheless subject to limited tax liability in Germany in accordance with Section 49 EStG (royalties and capital gains). Grants/disposals of rights typically take place between non-domestic taxpayers. For these register cases, the tax au-

thorities granted a simplified process for obtaining a retroactive certificate of exemption (last renewed by way of BMF guidance of 29 June 2022). The simplified procedure can be used for payments received before 1 July 2023, provided the application is submitted by 30 June 2023.

The 2022 Annual Tax Act now provides the following new regulation for the taxation of “register cases”:

- **Cases between related parties:** In future, no limited tax liability if a **double taxation agreement** prevents domestic taxation (allocation of the right of taxation to the foreign state). The application for an exemption certificate is not required in these cases. Taxation is thus limited to cases in which the recipient of the income cannot rely on a double taxation agreement. The new regulation applies to income from royalties or disposals, but only if the disposals occur after 31 December 2022 or the payments are received after 31 December 2022.
- **Cases between third parties: Third-party licences** (not related parties) are exempt from the limited tax liability; this also applies retroactively in all open cases.

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- **Special case for “tax havens”:** Limited tax liability also applies in register cases if the recipient of the royalties or proceeds from disposals is domiciled in a non-cooperative tax jurisdiction as referred to by the German Act to Combat Tax Havens. The new regulation applies both to payments between **related parties** and those to **third parties** and applies from 1 January 2022. The territories concerned are currently American Samoa, Anguilla, Bahamas, Fiji, Guam, Palau, Panama, Samoa, Trinidad and Tobago, Turks and Caicos, US Virgin Islands and Vanuatu.

#### *Depreciation of real estate*

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 agreed in the coalition agreement, will now be implemented with the 2022 Annual Tax Act. The change affects residential buildings held as private and business assets that are completed **after 31 December 2022** (government bill: after 30 June 2023). Application of the higher standard depreciation rate therefore results in a shorter depreciation period of around 33 years (instead of the previous standard 50 or 40 years).

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. In the draft bill, it was intended to abolish this **possibility of proving that a building has a shorter useful life**. However, the Bundestag did not

implement this, hence a shorter useful life can still be demonstrated in future.

The existing **special depreciation allowance for new rental accommodation** (20% over four years) will be extended. The new regulation applies only to such new apartments built on the basis of an application or a corresponding building permit in the years 2023 to 2026. Further points of the regulation were also amended (e.g. efficiency standard introduced for new buildings).

#### *Deferred income and prepaid expenses*

The Bundestag has introduced an option to waive the recognition of deferred income and prepaid expenses in the tax balance sheet (up to an amount of EUR 800 each) that must be exercised uniformly.

The amended regulation applies for the first time to financial years ending after 31 December 2021.

#### *Photovoltaic systems*

**Measures to promote the expansion of photovoltaic systems** will be implemented by the 2022 Annual Tax Act.

Among other things, an **income tax exemption** for revenue from the operation of certain photovoltaic systems will be introduced. This applies to systems with a gross 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 other buildings (e.g. apartment buildings, mixed-use properties). In the latter case, the criterion of “primarily used for residential purposes” intended in the government bill was dropped. As a result, photovoltaic systems on buildings primarily used for commercial purposes will

also benefit up to 15 kW (peak) per residential/commercial unit.

The tax exemption applies 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 business partnership.

The regulations apply to revenue generated made after 31 December 2021, and thus one year earlier than initially intended in the government’s draft.

#### *Contribution refund for third-country corporations*

The regulation on the separate assessment of a contribution refund in cross-border cases is being extended to the **contribution refund of other EEA and third-country corporations** (previously only EU cases). The BMF guidance of 21 April 2022 currently regulates claims by assessment procedure for shareholders for the contribution refunds of these companies.

The change in the law now resolved will create a legal basis for applications for separate assessment of the contribution refund by EEA and third-country corporations. This entails stricter requirements of documentary evidence and calculations as well as the application deadline.

Individual provisions have been amended as well – also for EU cases:

- Explicitly also applicable to repayments of nominal capital;
- Unlike before, the relevant period is no longer the assessment period but rather the financial year;
- The application must be made by the end of the 12th month

following the end of the financial year (previous year: calendar year) in which payment occurred;

- Issue of the certification of the contribution refund to the shareholders by the foreign company (previously: by the tax office/German Federal Central Tax Office).

The amendments apply for the first time to payments and nominal capital repayment made after 31 December 2022.

### *EU energy crisis contribution*

A new law introduces the “EU energy crisis contribution” to be paid by companies in the crude oil, natural gas, coal and refinery industries (**fossil sector**) – the (German EU Energy Crisis Contribution Introduction Act). Surplus profits of these companies will be taxed in the financial years 2022 and 2023. This implements a measure of the Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices.

Any company that operates in Germany will be subject to the EU energy crisis contribution. This will be determined by the existence of a German permanent establishment. At least 75% of revenue must be generated in the areas of extraction, mining, oil refining or the production of coke oven products. For tax groups, the controlling company and the controlled subsidiary will be subject to the EU energy crisis contribution on a standalone basis.

The EU energy crisis contribution – assuming that the calendar year is the financial year – will be charged on profits only for the 2022 and 2023 financial years (tax periods 1 and 2) that exceed the average taxable profits of the four financial years 2018 to 2021 by more than 20%. These surplus

profits will be taxed in addition to the income/corporate tax at a tax rate of 33%. The EU energy crisis contribution is not tax-deductible.

The companies affected must calculate their own EU energy crisis contribution and report this to the German Federal Central Tax Office, by no later than when they file their income or corporation tax returns for the corresponding financial year.

The regulations became effective on 21 December 2022.

### *VAT: (Reporting) obligations for payment service providers*

The 2022 Annual Tax Act introduces special (reporting) obligations for **payment service providers for cross-border payments**. 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 reporting requirement 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 payment service provider must transmit the records to the German Federal Central Tax Office by the end of the calendar month following the end of the reporting period (calendar quarter) in accordance with an officially prescribed data record via an offi-

cially specified interface. The payment service provider must retain the records in electronic form for three calendar years.

The regulations became effective on 1 January 2024.

### *VAT: Zero tax rate for photovoltaic systems*

No VAT (zero tax rate) will be charged on the supply, import, intra-Community purchase and installation of photovoltaic systems, including energy storage units.

The zero tax rate applies 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 can be used only 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).

According to the explanatory memorandum, the rule is intended to enable operators of photovoltaic systems to apply the small business regulation in future without this being financially disadvantageous to them; opting for purposes of input tax deduction is no longer necessary given the absence of VAT.

The regulation became effective on 1 January 2023.

### *Lower Tax Court of Cologne (6 K 2661/18): German CFC Rules – Requirements of the Motive Test*

Under German tax law the CFC rules according to the old version apply where foreign companies are controlled by German resident taxpayers and generate so-called passive income which are subject

to a low rate of taxation (controlled foreign company - CFC). Where the CFC rules apply, the income of the CFC is attributed to the shareholder and is thus subject to German taxation. In the case of EU/EEA companies, the application of the CFC rules may be avoided if evidence can be provided that the controlled subsidiary pursues a genuine and actual business activity in the Member State in which it was established ("motive test").

In the case at hand, the Lower Tax Court of Cologne was required to rule on whether a Dutch corporation (B.V. 1) had satisfied the requirements for conducting the motive test in the years 2011 to 2013. B.V. 1 acquired and sold film licences in the Netherlands. The particularity was that B.V. 1 employed no personnel of its own apart from its two managing directors. Further, the two managing directors were at the same time responsible for the organisation of another Dutch company (B.V. 2) belonging to the same group, and they received no separate remuneration from B.V. 1. For liability reasons, the acquisition and marketing of film licences had been transferred (outsourced) from B.V. 2 to B.V. 1, while the material and personnel resources required for the business were provided by B.V. 2.

The law is silent on whether outsourced activities can be assigned to a company for the purposes of conducting the motive test as an own action or whether a company is required to have its own personnel and material resources.

The Lower Tax Court of Cologne ruled that the requirements for conducting the motive test had been satisfied in this case. The court judged that B.V. 1, by acquiring and marketing film licences, was pursuing an actual business activity in the Netherlands. The law does not require

that the "actual business activity" be realised solely by an entity's own personnel. In purchasing and marketing licences, the personnel of B.V. 2 were operating in the name and on behalf of B.V. 1. In the court's view, the activities of B.V. 2's personnel were therefore attributable to B.V. 1. The court determined that, for group companies, the outsourcing of multiple managerial functions can be sensible from a commercial perspective to create synergy effects, ensure an aligned strategy and keep communication and decision-making channels short. Further, B.V. 1 was established for liability reasons and not for tax reasons.

No appeal to the German Federal Tax Court was allowed, meaning that the judgement of the Lower Tax Court of Cologne is final. In addition, it should be noted that the requirements for the motive test have been tightened from the 2022 tax assessment period onwards. The new rules state that the motive test can explicitly not be applied if the company has arranged for its main business activity to be provided largely by third parties.

### Status of Double Taxation Treaties

By guidance dated 18 January 2023, 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 following DTTs and protocols of amendment (so far) are applicable for the first time from 1 January 2023:

- Mauritius
- The Netherlands

Protocols of amendment to the DTTs were newly signed in 2022 with

- Bulgaria
- Latvia
- Lithuania

The agreements still need to be transposed into national law.

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

- Albania
- Brazil
- Luxembourg
- Malaysia
- Montenegro
- the Netherlands

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.

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Editorial team

**Prof. Dr. Gerrit Adrian (V.i.S.d.P.)**  
Partner, Tax

**Veronika Aschenbrenner**  
Manager, Tax

**Alexander Hahn**  
Senior Manager, Tax

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