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# German Tax Monthly

Information on the latest tax developments in Germany

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## Discussion Draft for a Tax Adjustment Act to the Partnership Law Modernisation Act

The Federal Ministry of Finance (BMF) is currently working on a Tax Adjustment Act to the Partnership Law Modernisation Act (MoPeG), a discussion draft is currently available.

With the MoPeG of 10 August 2021, the civil law regulations concerning the civil law partnership (GbR) were completely revised with effect from 1 January 2024. The main change is the now legally standardised recognition of the legal capacity of the GbR, from which it follows that the company itself can form assets.

The MoPeG Tax Adjustment Act is intended to adapt various tax laws to changes in the law with effect from 1 January 2024. The focus of the draft is on procedural adjustments, particularly in the Tax Procedure Law (AO).

In future, a distinction will be made between associations of persons with legal capacity and associations of persons without legal capacity. Associations of persons with legal capacity are, in particular, partnerships with legal capacity (including general partnership (OHG) and limited partnership (KG)). Associations of persons without legal capacity are, for example, communities of heirs.

Under the MoPeG, partnerships with legal capacity have abandoned the principle of joint ownership in favor of the company's assets, i.e. the company itself is the owner of the assets. In contrast, a partnership without legal capacity has neither its own assets nor assets held in joint ownership under civil law. In the case of income taxation, on the other hand, the joint ownership principle should continue to apply and the basic principle of transparent taxation, e.g. in the case of business partnerships, should be retained. Assets belonging to a partnership with legal capacity will continue to be allocated to the participants on a pro rata basis. Partnerships with legal capacity are deemed to be joint owners and their assets are deemed to be joint owners' assets for the purposes of income taxation.

According to the new version, the legal representatives of associations of persons with legal capacity have to fulfill their tax obligations, and no longer their managing directors. In the future, the declaration obligation for the separate assessment shall primarily lie with the association of persons with legal capacity instead of with each participant in the assessment. Accordingly, the

## Content

association of persons shall also be primarily liable for the late payment surcharge. All administrative acts and notifications related to the separate assessment procedure and the administrative appeal procedure shall, as a matter of principle, be notified to the association of persons with legal capacity with effect for and against the participants in the assessment. Thus, it is no longer necessary to designate a joint receiving agent. Against the separate assessment, only the association of persons with legal capacity is to be authorised to lodge an administrative appeal, and no longer the managing director, as was previously the case. In the Tax Court Code (FGO), the right of action is to be adjusted accordingly, so that associations of persons with legal capacity can, in principle, file an action themselves.

In contrast, there are hardly any changes for associations of persons without legal capacity.

A new provision is to be added to the AO regarding tax administrative acts to dual-resident corporations. A corporation with its registered office in a third country and its place of management in Germany is to be the addressee of tax administrative acts, irrespective of the civil law classification (so-called registered office theory, according to which the law of the country in which the company has its actual registered office applies). This applies insofar as the corporation itself is liable for tax (e.g. in the case of corporation tax, trade tax and value added tax). However, states or territories for which the so-called foundation theory (applicability of the legal system of the founding state) applies on the basis of intergovernmental agreements do not count as third states. Such dual-resident corporations are to be treated like comparable domestic corporations with regard to legal representation and capacity to act in the taxation procedure.

The Act is to enter into force on 1 January 2024; transitional arrangements are provided for 2024 in particular.

The discussion draft at hand has not yet been published by the BMF. It is possible that the professional public will be given the opportunity to comment on the discussion draft before the official legislative process begins, which usually starts with the publication of a draft bill. Only after publication of a draft bill and subsequently a government bill will the Federal Council have the opportunity to comment on the bill. This will be followed by the resolutions of the German Parliament and the Federal Council. The legislative process is not expected to be completed until the second half of the year.

## Draft Bill for a Future Financing Act

The Federal Ministry of Finance (BMF) has published a draft bill for a Law on the Financing of future-proofing Investments (Future Financing Act).

The Future Financing Act contains measures in financial market law, company law and tax law that are intended to strengthen the performance of the German capital market and increase the attractiveness of Germany as a financial location for both national and international companies and investors. In particular, start-ups, growth companies and small and medium-sized enterprises (SMEs) as drivers of innovation are to be facilitated in accessing the capital market and raising equity capital.

In the area of tax law, a reform of the tax treatment is to facilitate employee share ownership in particular with effect from 2024.

### *Tax exemption for the transfer of employee share ownership at a discount*

The tax-free maximum amount is to be raised from EUR 1,440 to EUR 5,000. However, in future the tax-free amount is to be linked to a requirement of additionality ("in addition to the salary owed anyway"). This would exclude deferred compensation in the future.

In addition, an "indirect holding period" of three years is to be introduced for employee share ownerships in order to avoid undesirable windfall effects through immediate sale after transfer of the share by the employee without loss of tax exemption. If the shareholding is sold or transferred free of charge within three years, the initially tax-exempt portion of the salary is to be taxed at the final withholding tax rate of 25 percent.

### *Deferral model for employee share ownerships provided at a discount*

The scope of application of the preferential treatment is to be extended in that in future it will no longer be based on the single SME threshold but on the double SME threshold. The companies must then have fewer than 500 employees (instead of the previous 250 employees) and may have an annual turnover of no more than EUR 100 million (instead of the previous EUR 50 million) or an annual balance sheet total of no more than EUR 86 million (instead of the previous EUR 43 million).

In this context, the period in which exceeding the threshold is harmless is also to be extended. In the future, the preferential treatment can be claimed if the threshold was not exceeded at the time of the transfer of the share or in one of the six preceding calendar years (7-year period, previously 2-

year period). So far, "young" companies whose date of foundation is no more than 12 years ago are eligible. In future, the date of foundation may be up to 20 years before the date of the transfer of the share.

The tax exemption is to be extended to cases where the company shares are not granted by the employer itself, but by the (founding) partners or other group companies.

In future, the final taxation of the non-cash benefit is not to take place after twelve years, but only after 20 years, if the employee has not sold the shareholding or terminated his employment relationship beforehand.

In addition, a possibility for lump-sum wage taxation by the employer with a tax rate of 25 per cent is to be created for all taxable events (transfer of the share ownership, expiry of (in future) 20 years, termination of the employment relationship).

Finally, it should be possible to further postpone taxation for the facts "expiry of 20 years" and "termination of employment relationship " (dry income) if the employer irrevocably declares that he assumes liability for the wage tax (optional liability regulation). In these cases, only the later fact of the actual "transfer or sale" would trigger taxation.

## BFH (III R 35/21): (No) Trade Tax Addition in the Case of Rental of a Trade Fair Stand

In its ruling of 20 October 2022 (III R 35/21), the German Federal Tax Court (BFH) decided that the expenses incurred by a production company for the rental of a trade fair stand are generally not subject to trade tax addition.

Corporations that maintain a permanent establishment in Germany are subject not only to corporate income tax but also to trade tax. Trade tax is calculated based on trade income. The trade income is the profit from business operations determined in accordance with the German Corporate Income Tax Act (KStG), which is increased or reduced by additions or reductions in accordance with the German Trade Tax Act (GewStG). For example, rental expenses for the use of movable and immovable fixed assets owned by another party are to be added to the trade income (Sec. 8 No. 1 Letters d and e GewStG).

The business purpose of the plaintiff (GmbH) is the production and distribution of certain goods. In the year in dispute 2016, it participated in three trade fairs. It was disputed whether the expenses for the rental of the trade fair stands (possibly movable assets), and trade fair stand areas (immovable assets) were subject to the trade tax addition.

In the case at hand, the BFH denied a trade tax addition. Sec. 8 No. 1 Letters d and e GewStG requires a "fictitious" allocation of the rented assets to the fixed assets of the tenant. Fictitious because the rented assets cannot be allocated to the business assets of the tenant due to the lack of ownership. It must be determined whether the assets would be fixed assets of the tenant if he were their owner (so-called fictitious fixed assets).

When examining whether fictitious fixed assets exist, the business purpose of the company must be considered. The question to be asked is whether the business purpose presupposes the permanent existence of such assets. The duration of the rental, on the other hand, would not be relevant, so that an asset can also be a fictitious fixed asset if it is only rented for a short period of time.

According to these principles, the expenses for the rental of the trade fair stands and trade fair stand areas do not form part of the plaintiff's fictitious fixed assets. It participated in trade fairs on a total of only 10 days in 2016. In addition, there are no circumstances from which it can be seen that the economic success of the plaintiff depends on the permanent maintenance of the trade fair stands. In addition, it had to be considered that it was primarily a production company and not a classic sales company. The trade fair stands therefore had no economic significance, as they were not used as a means of production. However, it could also have meaningfully carried out its sales activities (secondary business purpose) without participating in trade fairs.

As a result, the plaintiff's expenses for the rental of the trade fair stands and trade fair stand areas in 2016 are not subject to trade tax additions due to the lack of fictitious fixed assets.

Finally, it should be noted that the BFH also decided in its ruling of 23 March 2022 (III R 14/21) that in such cases (the plaintiff was also primarily a production company) there is no trade tax addition.

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