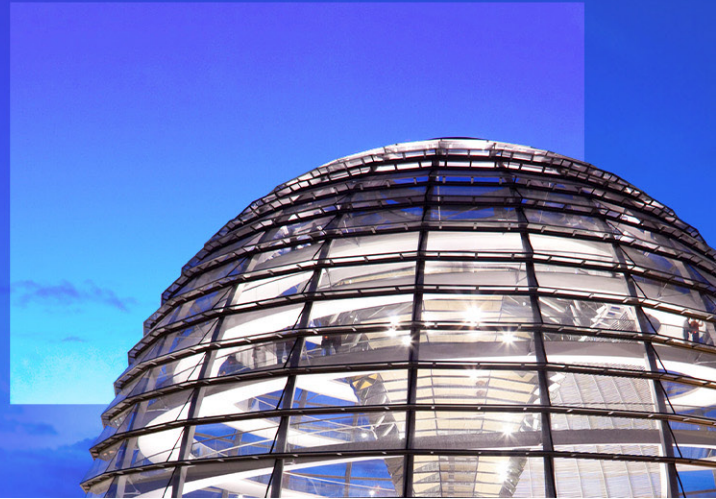


German Tax Monthly

Information on the latest tax developments
in Germany

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Federal Tax Court (III R 36/22 and III R 33/22): (No) Trade Tax Addition for Advertising Expenses

In two rulings, the German Federal Tax Court has commented on the question of whether advertising expenses of companies are subject to trade tax addition for rental expenses.

In principle, corporations in Germany must not only pay corporation tax, but also trade tax. Trade tax is calculated on the basis of trade income. Trade income is the profit from business operations determined in accordance with the German Corporation Income Tax Act, which is increased or reduced by additions or deductions in accordance with the German Trade Income Tax Act. In particular, rental expenses for the use of movable / immovable fixed assets owned by another party are to be added to the trade income (Section 8 no. 1 letters d and e Trade Income Tax Act). However, expenses within the scope of a contract for work and services are not subject to trade tax addition. Expenses for the use of advertising space are often the subject of dispute in practice: the question arises as to whether these - depending on the particularities of the individual case - constitute rental expenses in whole or in part within the meaning of the trade tax addition.

Facts of case 1 (III R 36/22):

The plaintiff (limited liability company) operated an amusement park and recorded expenses for the use of various advertising spaces (in particular on streetcars, highways, train stations and restaurants) in the years 2012 to 2015. In addition, it acted as a sponsor of two soccer clubs (in particular jersey and perimeter advertising and ground advertising on the pitch of the soccer field).

Decision of the Federal Tax Court (dated 16 September 2024):

The Federal Tax Court referred the case back to the Lower Court of Berlin-Brandenburg as the so-called factual instance for a new review. The lower court had not sufficiently assessed the contracts on which the advertising expenses were based. It must now make up for this in a second legal process. It must be examined whether

- a contractual structure of its own kind with various service components (including the provision of advertising space as a rental element; advertising services as a work contract element) exists. This results in an inseparable type merging agreement in which the advertising service is in the foreground and therefore does not result in an addition for trade tax purposes in its entirety,

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- or the contracts are to be classified as rental or lease agreements in terms of their essential legal content or at least contain separable rental elements. If (separable) rental elements are present, a further requirement for a trade tax addition in accordance with Section 8 no. 1 letters d and e Trade Income Tax Act is that the advertising expenses are absolutely necessary for the business purpose.

Facts of case 2 (III R 33/22):

The plaintiff (limited liability company) was an advertising agency that rented digital and analog advertising media surfaces in public spaces for customers as part of advertising campaigns. With regard to the advertising media, the plaintiff's contractual partners had to fulfill so-called performance-related contractual obligations (e.g. maintenance and repair of the advertising media) in addition to an installation obligation.

Decision of the BFH (dated 17 October 2024):

The plaintiff's expenses are not subject to trade tax addition in their entirety. There is a contract for work and services with regard to the digital advertising media. The focus is on the advertising service and not on the use of the advertising space (rental agreement). With regard to the analog advertising media, there is also a contract for work and services, at least in the case in dispute, due to the performance-related obligations.

Federal Tax Court (III R 1/23): No Extended Trade Tax Deduction if the Entire Property Is Sold During the Tax Period

In its judgement of 17 October 2024 (III R 1/23), the Federal Tax Court decided that the extended property deduction pursuant to Section 9 no. 1 sentence 2 Trade

Income Tax Act is not to be granted if the entire property is sold during the tax period.

The plaintiff, a corporation, had as its corporate purpose the acquisition, management (namely letting and leasing) and sale of real estate, including the realisation of construction measures on third-party real estate. In the year in dispute, the plaintiff sold all of its real estate with effect "from the beginning of 31 December 2016".

The court denied the extended property deduction for the year in dispute 2016. If a corporation sells all of its real estate one day before the end of the tax period ("at the beginning of 31 December"), it cannot claim the extended real estate deduction pursuant to Section 9 no. 1 sentence 2 Trade Income Tax Act, as it was not exclusively active in real estate management in this case.

The management of own capital assets mentioned in the legal text is only harmless if it takes place alongside the management of own real estate, but not if it is the sole activity before the start or after the end of a favoured real estate management. The concept of exclusivity is to be understood qualitatively, quantitatively and in terms of time. In terms of time, the entrepreneur must pursue the favoured activity during the entire tax period. If a non-favoured activity is only carried out during part of the tax period, the conditions for the extended deduction do not apply for the entire tax period.

As the plaintiff continued to exist as a corporation beyond the date of sale, its substantive trade tax liability also continued beyond this date and the assessment period (calendar year) was not abbreviated. As a result, the plaintiff did not pursue the favoured activity on one day of the assessment period (31 December 2016). According to the BFH, there is no so-called

technical exception (sale on 31 December, 11:59 pm).

Federal Ministry of Finance: Status of Double Taxation Treaties

The Federal Ministry of Finance (MoF) has published the current status of double taxation treaties (DTTs) and treaty negotiations as of 1 January 2025. The MoF guidance also addresses the first-time application of the BEPS Multilateral Instrument (MLI) from 1 January 2025 for certain countries. It also addresses the "suspension" of the DTTs with Russia and Belarus as well as DTTs with non-cooperative tax jurisdictions (within the meaning of the Tax Haven Defence Act).

In the annual guidance, the MoF provides an overview of the current status of DTTs and other treaties in the tax area as well as the treaty negotiations.

DTT with Russia

In a note verbale dated 8 August 2023, the Russian Federation announced the "suspension" of Articles 5 to 22 and 24 of the DTTA between Germany and Russia as well as points 2 to 7 of the protocol to this treaty with immediate effect and until further notice, without providing a specific legal basis. This affects all types of income covered by the DTT and additionally by the Protocol to the DTT as well as the suspension of the prohibition of discrimination under Article 24 of the DTT in conjunction with the Protocol to the DTT. This unilateral suspension does not lead to a cancellation of the treaty under international law, meaning that it continues to exist. However, from 1 January 2024, German taxation rights will no longer be affected by the DTT with the Russian Federation on the basis of Section 1 (3) sentence 2 of the Tax Haven Defence Act in

conjunction with the Tax Haven Defence Regulation.

DTT with Belarus

The DTT of 30 September 2005 between Germany and Belarus is fully suspended with effect from 1 January 2025. This was notified to the Republic of Belarus on 30 December 2024. The Republic of Belarus had already suspended individual provisions of the DTT as of 1 June 2024. The Republic of Belarus has not complied with a request from the Federal Government to reverse this partial suspension of the treaty. The Federal Government considers this to be a material breach of the treaty within the meaning of the Vienna Convention on the Law of Treaties.

Non-cooperative tax jurisdictions

The MoF guidance also refers to the procedure with regard to non-cooperative tax jurisdictions. This concerns Trinidad and Tobago from 2022 and the Russian Federation from 2024. In this context, German taxation rights are not affected by the DTT on the basis of Section 1 (3) sentence 2 of the Tax Haven Defence Act in conjunction with the Tax Haven Defence Regulation.

Multilateral Convention (MLI)

Germany has nominated the tax treaties with the following countries for modification by the MLI: Austria, Croatia, Czech Republic, France, Greece, Hungary, Italy, Japan, Luxembourg, Malta, Romania, Slovakia, Spain and Turkey. The MLI entered into force for Germany on 1 April 2021. However, due to the selection decision made by the German side on Article 35(7) MLI, the modification of a tax treaty covered by the MLI will only become effective after the conclusion of a subsequent application legislative procedure and corresponding notification to the OECD as depositary of the MLI for

reasons of legal certainty and clarity.

The legislative procedure for the so-called MLI Application Act has now been completed. The OECD has been notified of the domestic implementation and application of the MLI from 1 January 2025 for the following DTTs Croatia, France, Greece, Hungary, Malta, Slovakia and Spain.

Status of the double taxation treaties

As of 1 January 2025, the following DTTs and revision protocols are (so far) applicable:

- Belarus - but suspended (see above)
- Latvia

A revised protocol to the DTT with South Africa was **newly signed** in 2024.

The treaty still has to be transposed into national law.

In 2024, new treaty texts for the following (revision) treaties or revision protocols were **initialled** (it should be noted that the treaty texts are generally only published after signing):

- Albania
- Kyrgyzstan (initialling already on 15 November 2023)
- Kosovo
- Moldova
- the Netherlands
- San Marino
- Ukraine

Negotiations on (revision) treaties or revision protocols were commenced with the following countries in 2024:

- Andorra
- France

It is not possible to predict how long the respective negotiations

will last. The negotiations may also extend over several years.

Bundestag Election 2025: Tax Policy Plans of the Parties

Following the break-up of the coalition in November 2024, early elections to the 21st German Bundestag took place on 23 February 2025. According to the preliminary results, a coalition between the Christian Democratic Union/Christian Social Union and Social Democrats is possible. In addition, The Greens, The Left and the Alternative for Germany will be represented in parliament and are therefore basically eligible for coalition negotiations.

We have analysed the election manifestos of these parties and compiled their tax policy plans.

Core statements of the parties:

Christian Democratic Union/Christian Social Union (CDU/CSU):

- Major tax reform for competitive corporate taxation of a maximum of 25 per cent
- Investment incentives: Improvement of depreciation, further development of the tax research allowance
- Improved loss offsetting
- Relief for low and middle incomes: Adjustment of the income tax rate, relief on social security contributions
- Abolition of the residual solidarity surcharge
- Tax incentives for overtime
- Relief for inheritance and gift tax, rejection of a wealth tax

Social Democrats (SPD):

- Tax relief for companies, but no across-the-board tax cuts
- Targeted investment incentives in Germany: "Made in Germany" bonus, expansion of tax incentives for research, better depreciation conditions for electric vehicles
- Continuation of the solidarity surcharge

- Tax incentives for overtime
- Relief for 95 per cent of taxpayers; instead, greater burden on top incomes and assets
- Introduction of a billionaires' tax/minimum tax for the super-rich
- Reform of inheritance and gift tax; effective minimum taxation for large business assets
- Introduction of a financial transaction tax
- Relief for low and middle incomes, higher taxation of very high incomes
- Retention of the solidarity surcharge
- Increase of inheritance and gift tax on inheritances worth millions and billions; reintroduction of wealth tax
- Introduction of a financial transaction tax

The Greens (Bündnis 90 / Die Grünen):

- Investment incentives: Temporary investment premium of 10 per cent, extension of the research allowance
- Integration of the solidarity surcharge into the income tax rate
- Reform of inheritance tax, including changes to exemptions for very large inheritances; introduction of the global billionaires' tax
- Harmonising the taxation of labour and capital income

The Left (Die Linke):

- Increase in corporation tax and the global minimum tax rate to 25 per cent
- Excess profits tax of 90 per cent on extra profits of corporations

Alternative for Germany (AFD):

- Reduction of corporate taxes to an internationally competitive level
- Organisation of corporate tax to be neutral in terms of legal form
- Reduction of the tax and duty burden (higher basic tax-free allowance of 15,000 euros, changed income tax rate)
- Abolition of the solidarity surcharge
- Abolition of wealth and inheritance tax.

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