German Tax Monthly

Information on the latest tax developments in Germany

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Law for the Amendment to the Interest Rate for Back Taxes and Tax Refunds

The law particularly governing the amendment to interest on back taxes and tax refunds was promulgated in the Federal Law Gazette on 21 July 2022. The Act enters into force on 22 July 2022. The legislative procedure is thus completed.

With its decision of 8 July 2021, the German Federal Constitutional Court ruled that the interest on back taxes and tax refunds of 6% annually (0.5% per month) was unconstitutional for interest calculation periods starting as from 2014. However, application of the 6% interest rate was still permitted for interest periods up to and including 2018; the Constitutional Court declared the rules inapplicable only for interest periods from 2019 onwards. The legislator was asked by the court to prepare by 31 July 2022 an amendment to the full interest rule for interest periods from 1 January 2019. This is now to be implemented with the promulgated law.

Main content of the law

The law provides for a retroactive reduction of the interest rate for interest on back taxes and refunds to **0.15% per month** (thus **1.8% per year**) for interest periods from 1 January 2019. The new interest rate is based on the Deutsche Bundesbank's current base rate (-0.88% p.a.) with a mark-up of approx. 2.7 percentage points, which is considered "appropriate" according to the explanatory memorandum.

This interest rate is to be **evaluated** for appropriateness at least every two years taking into account movements in the base rate; for the first time as of 1 January 2024. Any adjustment of the interest rate shall then only take effect for subsequent calendar years. To avoid overly frequent or minor adjustments to the interest rate, however, the rate is to change only if the base rate applicable as at 1 January of the evaluation year deviates by more than one percentage point from the base rate applicable when the interest rate was last fixed or adjusted.

The amendments are generally applicable in all cases pending on 22 July 2022 (the day following promulgation of the act). In cases of

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interest being recalculated retroactively, the comments in the law indicate that the principle of **protection of confidence** shall apply. Accordingly, if an interest assessment is revoked or amended, the taxpayer may not be disadvantaged by any recognition of the Federal Constitutional Court's having established as invalid a law upon which the previous assessed interest was based.

This law contains no adjustment of other interest rates under procedural law such as interest on deferrals, evasion or suspension of collection. The Federal Constitutional Court explicitly stated in its decision that the unconstitutionality does not apply to these other interest situations falling under the same interest rate according to the Germany Tax Code, to the detriment of the taxpayer. There are also constitutional concerns about the amount of other interest rates under tax law not covered by procedural law of the Tax Code: discounting of pension provisions at 6% annually, discounting of liabilities at 5.5% annually. The statutory discounting requirement for non-interest-bearing liabilities for tax purposes was recently removed by the Fourth Coronavirus Tax Assistance Act (promulgated in the Federal Gazette on 22 June 2022).

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

The Federal Ministry of Finance [BMF] has published a ministerial 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).
- The tax authority shall be able to also request **accounting documents** as soon as a tax audit is disclosed. 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.
- **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.
- **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 to 30 days from the date of the disclosure of the audit order instead of 60 days.
- **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 given or not given in full or in a timely manner.
- 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**. Further, it will be sufficient to specify either the **location** *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.

3. Outlook

The publication of the ministerial draft bill is the first step in the legislative procedure. Hence, amendments may still occur in the further course of the legislative procedure.

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.

Ministerial Draft for a 2022 Annual Tax Act

The German Federal Ministry of Finance [BMF] published the ministerial draft for a 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 judgments of the German Federal Fiscal Court.

1. "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.

2. 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%.

With the 2022 Annual Tax Act [JStG 2022], the increase in the **straight-line depreciation rate for new residential buildings** to 3%, as agreed in the coalition agreement, is now to be implemented. The change affects residential buildings held as private and business assets that are completed **after 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 to prove 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 is to be for assessment period 2022** in order to be able to use the shorter depreciation period.

3. VAT

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. 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 may be fined up to 5,000 euros.

The regulations are to take effect on 1 January 2024.

4. Outlook

Only after publication of the government draft will the Bundesrat have the opportunity to comment on the draft bill. This is followed by the decisions of the Bundestag and the Bundesrat. Significant changes can therefore still be made in the course of the legislative process. 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.

German Federal Tax Court: Permanent Establishment in Case of Involvement of a Management Company

In its judgment of 23 March 2022 (file ref. III R 35/20), the German Federal Tax Court (BFH) ruled that if certain conditions are met the premises of a mandated management company can be an own permanent establishment (PE) of the contracting company even if no contractually granted own right of use over these premises is given. In the court's opinion this applies only if the lack of power of disposal over the premises is substituted by own business operations

locally, e.g. due to the management body of the contractor and of the management company being identical or continuous, sustained supervision at the premises of the management company.

A German limited liability company [GmbH] (plaintiff) domiciled in Germany was owner of a property, which was also located in Germany. Two individuals held interests in the plaintiff: "A" held 94% and "B" held 6%. A and B were both domiciled in Luxembourg. A was managing director of the plaintiff. The place of effective management of the plaintiff was in Luxembourg. A further GmbH "M" was mandated to manage the property. The sole shareholder of M was individual "H". For the purposes of property management, the plaintiff issued M a comprehensive mandate for property management. The mandate [power of attorney] covered in particular all rights and obligations arising from rental agreements, the authorisation for conclusion and termination of contracts for services and work, representation in dealings with other companies, authorities and courts as well as the engagement of lawyers. In the year under dispute, the plaintiff realised income from rental and from the sale of property. In dispute was whether the income was also subject to German trade tax in addition to corporate income tax.

Only trading entities that are operated by a permanent establishment located in Germany are subject to trade tax. The permanent establishment must be of a certain duration, serve the operations of the business and the taxpayer must have power of disposal over the PE that is not solely temporary.

In the case of property companies, the particularity is given that possession of a rental property in Germany is alone not sufficient to give rise to a PE. As a rule, the management work customarily associated with collection of the rental fee and the maintenance of the property is not sufficient for the assumption of a PE at the place of the landed property as this management work is typically carried out by the owner from the PE of its administrative headquarters. However, the BFH ruled that in certain circumstances a PE of the contracting company (in this case: the plaintiff) may arise also by mandating a management company without right of disposal over its premises.

The Lower Tax Court affirmed the existence of a PE of the plaintiff at M as there were close economic links between the two companies. Furthermore, the plaintiff is said to have supervised M in writing and by telephone. According to the BFH, these considerations are insufficient to give rise to the existence of a PE. Alone the (even comprehensive) transfer of tasks to another independently operating company is insufficient to give rise to a PE in the premises of this company. If the contractor does not have power of disposal over the premises of the management company, a PE can only arise if the lack of power of disposal is replaced by other circumstances which allow the contractor to actually conduct its own business operations in the premises of the management company.

Such own business operations may then, for instance, be assumed if – owing to the management body of the property company and the mandated management company being identical – continuous, sustained supervision is made possible. Even if the management body is not identical, the premises of the management company can only become the PE of the contractor, if the contractor conducts its own business activities in these offices, e.g. if the contractor carries out the supervision of the management company locally in the premises of the management company. By contrast, supervision by telephone or writing from the contractor's own administrative headquarters is insufficient.

The BFH referred the case back to the lower court. The lower court must now make the necessary findings on the facts of the case. In addition, the BFH considered that in certain circumstances the plaintiff could also have a managing PE in Germany, for instance if, based on the comprehensive property management mandate, the actual management was transferred to the property management company and exercised by the local managing director.

German Federal Ministry of Finance: Non-Resident Tax Liability when Rights listed in Domestic Registers

The German Federal Ministry of Finance [BMF] has extended the simplification procedure for non-resident tax liability arising from transfers of rights in cases where the right is merely entered into a German public register for consideration received before 1 July 2023.

By guidance dated 11 February 2021, the BMF granted a simplification procedure for non-resident tax liability arising from transfers of rights in cases where the right is merely entered into a German public register. If certain conditions are met, a tax deduction can be waived. The simplification procedure originally applied to consideration already received by the payment creditor (cases in the past) or was still to be received up to and including 30 September 2021. Among other things, the other requirements stipulate that

an application to the German Federal Central Tax Office for exemption from tax deduction must be made until 31 December 2021.

A guidance dated 14 July 2021 has extended this deadline. The simplification procedure can be used also for consideration received by the payment creditor after 30 September 2021 but before 1 July 2022. The deadline for application at the German Federal Central Tax Office for exemption from tax deduction was extended until 30 June 2022. With guidance dated 29 June 2022 the BMF has once more extended these deadlines. The simplification procedure can be used also for consideration received by the payment creditor after 30 June 2022 but before 1 July 2023. The deadline for application at the German Federal Central Tax Office for exemption from tax deduction has been extended until 30 June 2023 – for both consideration received before 1 July 2022 and consideration received after 30 June 2022. The other requirements of the BMF circular dated 11 February 2021 continue to apply without change.

The simplification rule covers cases which are subject to non-resident tax liability and withholding tax solely based on entry in a domestic register and for which, on account of a double taxation agreement (DTA), no German tax liability ultimately arises. No other domestic nexus (e.g. use of the rights in a domestic permanent establishment) may exist. The rule applies for considerations already received by the licensor (creditor) or still to be received up to and including 30 June 2023.

In these cases, the withholding of tax, remittance of tax, and reporting of tax to the German Federal Central Tax Office [BZSt] may be waived if the following cumulative requirements are satisfied:

1. Payment debtors: no residency (residence or habitual abode or place of management) in Germany at the time the receipt consideration is received.

2. Payment creditors:

- **Residency** in a country with which Germany has concluded a **DTA** at the time the consideration is received
- Eligibility and entitlement to relief pursuant to the respective DTA
- If a fiscally **transparent partnership** is a payment creditor, the key criteria are the partners' residency as well as eligibility and entitlement to relief under the DTA
- **Allocation** of the consideration according to the respective DTA
- Submission of **application** to the BZSt for exemption from withholding tax by 30 June 2022
- Disclosure of relevant **contracts** to the BZSt along with the application. Important contract passages must be translated into German and submitted with the application

If there is any doubt regarding eligibility or entitlement to relief of the payment creditor under the DTA or German law, the simplification rule cannot be applied.

The **sale of rights** entered in a public register in Germany also fulfils the condition of non-resident tax liability. For these sales transactions, which are not subject to withholding tax, tax returns must be submitted by the non-resident taxpayer (licensor). If a DTA accords the sole right to taxation for these capital gains to the country of residence, a nil tax return can be submitted.

BMF Guidance dated 2 August 2022: Withholding Tax in the Case of Software Contract Development

In its guidance dated 2 August 2022, the German Federal Ministry of Finance (BMF) commented on the withholding tax deduction pursuant to § 50a EStG [Income Tax Act] in the case of **software contract development**. This is against the background of **amendments to the German Copyright Act** (UrhG), which entered into force on 7 June 2021.

Income of a non-resident taxpayer from a time-limited license to use rights is subject to **limited tax liability** and **withholding tax deduction** (§ 50a (1) no. 3 EStG) in Germany.

The latest BMF guidance was preceded by a **BMF guidance of 27 October 2017** on the limited tax liability and withholding tax deduction in the case of cross-border licensing of **software and databanks**. The BMF had explained there, among other things, that in the case of cross-border software licensing, income is deemed to be derived from the licensing of rights only if the user is granted extensive usage rights to the software for further economic exploitation, and that a licensing of rights in the case of copyright-protected software must generally be regarded as a temporary licensing of rights because a full transfer is excluded in the case of copyright-protected rights.

The principles set forth in the BMF guidance of 27 October 2017 shall not be affected by the BMF guidance on software contract development.

With effect from 7 June 2021, however, **amendments to the German Copyright Act** were made, which may have an impact on the tax assessment of the licensing of

rights in the case of software. This concerns § 32a UrhG [Copyright Act] (**author's further participation**) and § 41 UrhG (**right of revocation for non-exercise**). Following the amendments to the Copyright Act, both norms are **no** longer **applicable** to **computer programs.**

Against the background of the changes to the law, the BMF guidance regulates that even though the transfer of the copyright from the creator of the work is excluded and thus a **purchase of the copyrights** and a resulting final licensing for use continue to be legally excluded under German civil law, a final economic transfer of the copyright in the form of an **economic purchase of rights** is (now) in principle possible. Thus – depending on the respective (contractual) arrangement in the individual case – there is the possibility that not only a temporary licensing for use but a **final licensing for use** is given. In this case, there is no obligation to deduct withholding tax on the basis of § 50a (1) no. 3 EStG.

In the BMF guidance, non-exhaustive criteria for copyrights to software are listed in order to **make a distinction** between an economic purchase of rights and a temporary licensing for use combined with the obligation to deduct withholding tax pursuant to § 50a (1) no. 3 EStG. In any case, users must be contractually granted extensive, exclusive and irrevocable **rights of use and exploitation** to the software for an unlimited period of time.

Due to the particularities of copyright law, the distinction criteria shall not be transferable to **other protective rights**.

In the case of **multi-level contractual relationships**, i.e. if one or more licensing for use takes place abroad prior to the licensing of the rights of use and exploitation, it must be examined for each individual level whether there is an economic purchase of rights or a temporary licensing for use. If at one of the levels there is merely a temporary licensing of copyright use, then, according to the BMF, an economic purchase of rights and thus a final licensing for use can be ruled out with respect to any subsequent licensing for use.

The present BMF guidance is applicable to **all open cases** for which the **agreement** on software contract development was concluded **after 6 June 2021**, and to matters arising after this date.

For reasons of simplification, the tax administration will apply the principles of the guidance also to all payments that accrue after 6 June 2021. In so doing, also agreements concluded prior to the amendment to the Copyright Act are covered to the extent that payments after said deadline accrue on the part of the creditor.

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