PKF

Newsletter

Key Issue

Transparency register – Disclosure requirements for *Kommanditgesellschaften* (German limited partnerships)

12|19

Dear Readers,

The draft for the **Annual Tax Act** was presented by the German government already in the summer, which was even earlier than in the previous year. Then, in November, the final amendments were incorporated and these pertained to taxes on corporate income and business profits as well as VAT. In the first report in our Tax section, we provide information about this and, moreover, about the resolution on the **abolition of the solidarity surcharge**. Most of the amendments will come into force on 1.1.2020 already. In the second report, we take a close look at the background to two important tax changes, firstly, the frequently discussed topic of **"commercial tainting"** and, secondly, the issue of whether or not **loan losses** are deductible, at least, as subsequent acquisition costs.

In international tax law, the gap arising from the different treatment of third countries and EU states has been eliminated. The Federal Fiscal Court clarified that **repayments of capital contributions** that do not affect the operating result for tax purposes should not come unstuck because of formal German requirements. In the article that follows, we highlight possible structures for the **tax-free transfer of properties to relatives**. We round off the Tax section with encouraging news – the Federal Fiscal Court has allowed greater flexibility for the conversion of cash remuneration in support of **payments that are taxed at a flat rate**.

The articles in our Legal section are of such great importance that we could actually have selected both of them for our Key Issue section. The first issue came up in the context of proceedings that are currently being conducted by the Federal Administration Office. In the course of these proceedings it emerged that so-called obligated parties of a **KG** [limited partnership], a **GmbH & Co. KG** [special form of limited partnership in which the unlimited partner is a private limited company] and a **KGaA** [partnership limited by shares] are indeed required to submit a supplementary **report to the transparency register**.

The second issue concerns GDPR and the resolution adopted by the **data protection officers** of the *Länder* (Federal States) to crack down even more strongly on infringements of this Regulation. A look beyond Germany's borders makes it clear that fines that previously averaged €6,000 could instead now rise to €200 m. For the Key Issue in the final edition of our PKF Newsletter in 2019 we decided to pick the topic of fulfilling transparency requirements because it is one that concerns nearly all business partnerships. Nevertheless, this does not mean that the topic of data protection can be shelved - you can read about that on p. 13.

In the Accounting & Finance section, we have a quick look at what is needed in order to implement **integrated forecasting** in a company. This analytical tool would definitely be useful, for example, when estimating financing requirements or in the context of a company valuation.

Once again, another year is drawing to a close. We hope you appreciated the new layout that was introduced in 2019 and the contributions from eight different firms in our PKF network.

We would like to wish you not only an interesting read but also a happy holiday season and a good start to a prosperous 2020.

Your Team at PKF

Key Issue

Transparency register – Disclosure requirements for *Kommanditgesellschaften* (German limited partnerships)

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TAX

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch

An overview of the final amendments to the 2019 Annual Tax Act and the abolition of the solidarity surcharge

On 7.11.2019, the lower house of the German parliament (Bundestag, BT) passed the "Act to provide for further fiscal incentives to promote electromobility and to amend other tax regulations" ("2019 Annual Tax Act") as amended in the "recommended resolution" (BT printed matter 19/14873) and in its Finance Committee's "report" (BT printed matter 19/14909) (for preliminary reports cf. articles in the PKF Newsletters 06/2019 and 07-08/2019 where we discussed the special provisions to promote electromobility and the new regulations relating to VAT). There are plans for this Act to be passed by the upper house of the German parliament *(Bundesrat, BR)* on 29.11.2019.

In the following section, we explain the amendments to the Act in relation to the governmental draft from 31.7.2019. On 14.11.2019, one week after the Act was passed, the Bundestag then approved the virtual abolition of the solidarity surcharge – we will briefly report on this, too.

1. 2019 Annual Tax Act – final amendments in relation to the governmental draft

1.1 Income and payroll taxes

(1) The Act that was passed no longer includes the tax exemption for benefits in kind to **promote alternative housing options** (Section 3 no. 49 of the Income Tax Act – Draft *(Einkommenssteuergesetz-Entwurf, EStG-E)*).

(2) In the context of the implementation of the Climate Package 2030, a reduction in the assessment base for the **taxation of the private use of certain company hybrid/ electric vehicles** will be granted (Section 6(1) no. 4 clause 2 nos. 3-5 EStG-E). For motor vehicles acquired between 1.1.2019 and 31.12.2030, the assessment base will be reduced down to one quarter of the domestic (German) gross list price. A reduction will only be granted for motor

vehicles that have no carbon dioxide emissions per km driven and whose gross list price does not exceed € 40,000 (Section 6(1) no. 4 clause 2 no. 3 EStG-E). If these conditions are not satisfied then the following rules will apply.

- For motor vehicles acquired between 1.1.2022 and 31.12.2024, only half of the gross list price should be included if their carbon dioxide emissions per km driven are a maximum of 50 grams, or if the range of the vehicle is at least 60 km when the electric drive system is solely used (Section 6(1) no. 4 clause 2 no. 4 EStG-E).
- For motor vehicles acquired between 1.1.2025 and 31.12.2030, only half of the gross list price should be included if their carbon dioxide emissions per km driven are a maximum of 50 grams, or if the range of the vehicle is at least 80 km when the electric drive system is solely used (Section 6(1) no. 4 clause 2 no. 5 EStG-E).

(3) The clarification that the **special depreciation under Section 7b EStG** for income from letting and leasing will be permitted for the related deductible costs stems from Section 9(1) clause 3 no. 7 clause 1 EStG-E. The special depreciation allowance under Section 7b EStG may already be claimed for the 2018 assessment period.

(4) The scope of application of the new Section 7c EStG has not only been opened up for electric delivery vehicles but has also been extended to include **electric commercial vehicles** within the meaning of Section 7c(2) EStG-E and electric-powered **cargo bikes** within the meaning of Section 7c(3) EStG-E. In this connection, in the year of purchase, besides the depreciation allowance under Section 7(1) EStG, it will also be possible to claim special depreciation in the amount of 50% of the cost of acquisition (Section 7c(1) EStG-E). In order to be able to claim special depreciation the taxpayer will have to submit details of the acquisition costs that underlie the special depreciation, together with information on the above-mentioned conditions, to the competent tax authority (Section 7c Abs. 4 EStG-E).

(5) In Section 8(1) EStG, the widening of the **definition of a payment in cash** as opposed to payments in kind has been included (Section 8(1) clauses 2 and 3 EStG-E and Section 8(2) clause 11 EStG-E). According to this definition, payments for a specific purpose, subsequent reimbursements of costs, monetary surrogates and other benefits that are based on an amount of money will not be allowed as payments in kind. This will not apply to payments in kind in the form of vouchers and cash cards that entitle holders solely to the purchase of goods or services and not for payments in kind that are granted in addition to the remuneration that would in any case be due to employees. Employers will still be able to make these payments in kind, free of tax, to their employees up to an amount of € 44 per month.

(6) The new rules on **defaults on investments** (Section 20(2) EStG-E) that were originally planned have been omitted.

(7) A mandatory assessment will be introduced for employees who have received **investment income for which no tax has been deducted** (Section 32d(3) clause 3 EStG-E).

(8) Employers that transfer the ownership of **company bicycles** free of charge or at a discount to employees in addition to the remuneration that is due will be given the option of taxing such non-cash benefits at a flat rate of 25% of payroll tax (Section 40(2) clause 1 no. 7 EStG-E). The solidarity surcharge and, if applicable, church tax will be added to this.

(9) There are plans to extend the **payroll tax return** such that details of the payroll tax to be withheld and assumed will have to be provided separately for the calendar years in which the remuneration is drawn or deemed to have been drawn (Section 41a(1) clause 1 no. 1 EStG-E).

(10) The aim of Section 49(1) no. 5a) EStG-E is to introduce **restricted tax liability** for capital gains in accordance with Section 20(1) no. 1 clause 4 EStG.

(11) Section 50d EStG will be amended to include **other payments** that are made instead of dividends to foreign-based purchasers of shares in corporations with headquarters or management in Germany (Section 50d(13) EStG-E).

1.2 Corporation tax

The effect of amending Section 15 clause 1 no. 2 clause 2 of the German Corporation Tax Act (*Körperschaftsteuergesetz*, *KStG*) by adding "profits and losses as defined in Section 12(2) of the Reorganisation Tax Act (*Umwandlungssteuergesetz*, *UmwStG*)" will be that the blanket ban on business expense deductions under Section 8b(3) clause 1 KStG will now also have to be applied to takeover gains from **upstream mergers in consolidated tax group cases** (Section 15 clause 1 no. 2 KStG-E).

1.3 Trade tax

Section 7 clause 3 of the Trade Tax Act (*Gewerbesteuergesetz*, *GewStG*) will be extended to include profits arising from **excess amounts in accordance with Section**

5a(4) and (4a) EStG. Such a profit was hitherto subject to trade tax in accordance with Section 7 clause 1 GewStG and, consequently, it was possible to reduce this profit pursuant to Section 9 no. 3 clause 2 GewStG. As a result of the extension of Section 7 clause 3 GewStG a reduction will now no longer be possible.

1.4 Value added tax

(1) The scope of application of the reduced VAT rate has been extended by the addition of Section 12(2) no. 14 of the VAT Act (Umsatzsteuergesetz, UStG). According to this, the reduced VAT rate will also apply to **e-books, e-papers** as well as to the provision of access to **databases** that contain a large number of electronic books, newspapers or periodicals or parts of these.

(2) The Act no longer includes the VAT exemption arrangement for **educational services** that was originally proposed in the governmental draft (previously Section 4 nos. 21 and 22 UStG-E).

(3) Gas and electricity certificates have been added to Section 13b(2) no. 6 UStG.

1.5 Real Estate Transfer Tax

The new regulations for the purpose of restricting so-called **share deals** within the context of real estate transfer tax have now been transferred to their own legislative procedure.

1.6 Investment Tax Act

The aim of Section 31 of the Investment Tax Act-Draft *(Investmentsteuergesetz-Entwurf, InvStG-E*) is to prevent cum/cum transactions with **special investment holdings**.

1.7 Housing Construction Premiums Act

This Act provides for

- a rise in the **income thresholds** from €25,600 to €35,000 and from €51,200 to €70,000 (Section 2a clause 1 of the Housing Construction Premiums Act (*Wohnungsbauprämiengesetz*, *WoPG-E*)), moreover, to
- an increase in the **premium rates** from 8.8% to 10% (Section 3(1) clause 2 WoPG-E) and
- a rise in the **funding limits** from €512 to €700 and from €1,024 € to €1,400 € per calendar year (Section 3(2) clause 1 WoPG-E).

2. The solidarity surcharge will be virtually abolished

On 14.11.2019, the *Bundestag* passed a resolution to virtually abolish the solidarity surcharge. The Bundesrat still has to give its approval. According to the draft law, the tax would be cancelled for 90% of German citizens as of 2021. A further 6.5% would still have to partially pay the solidarity surcharge and only the richest 3.5% would continue to be charged the full amount. The arrangements for the easing of this tax burden will be as follows.

- There will be an increase in the **tax exemption limits** for the assessment base from €972 to €16,956 and from €1,944 to €33,912 for married couples (Section 3(3) of the Solidarity Surcharge Act (*Solidaritätszuschlaggesetz, SolZG*).
- There will be a corresponding increase in the **monthly marginal amounts** for the assessment base of payroll tax depending on the tax code.
- The **mitigation zone** linked to the tax exemption limit will be adjusted up to full taxation (Section 4 SolZG).

StB [German tax consultant] Steffen Zipperling

In focus – Two especially important profit tax changes that ensue from the 2019 Annual Tax Act

The following sections examine the background to two further legislative changes that form part of the 2019 Annual Tax Act. The first of the changes, in particular, makes the to-ings and fro-ings between the old legislation, negative rulings and the new legislation apparent and this is conducive to understanding the new regulations.

1. Tainting in the case of partnership companies

An asset managing partnership generally generates no commercial income, i.e. the appreciation in the value of its assets is not generally taxable and the income is not subject to trade tax. However, this changes when a partnership takes up a commercial activity in addition to asset management, or if the partnership takes a stake in another partnership that is engaged in a business activity. Usually, this results in the original activity becoming 'infected' and, consequently, all the income has to be classified as being commercial (so-called 'tainting' pursuant to Section 15(3) no. 1 of the Income Tax Act *(Einkommenssteuergesetz, EStG-E)*).

However, the Federal Fiscal Court *(Bundesfinanzhof, BFH),* in its ruling from 12.4.2018 (case reference: IV R 5/15), rejected this tainting effect if the income that could, in principle, trigger tainting is negative. In the case in question, a loss was generated from a provision for use in the context of a corporate demerger. According to the BFH, in the reasons given for its ruling, in such cases the reclassification of income would not be justified because there is no threat to trade tax revenue.

The legislature provided a response to this ruling as part of the 2019 Annual Tax Act and extended the statutory provisions on tainting such that, in future, it will not be of any relevance for the tainting effect if a loss is generated from the commercial activity that has been additionally taken on, or if negative income has been generated from a business holding (Section 15(3) no. 1 clause 2 EStG-E). These new rules should be applied from the 2019 assessment period already.

Please note: It remains to be seen, however, to what extent these new legal rules will relate to case law according to which, for reasons of proportionality, other income should not become tainted where there is a particularly minimal level of commercial activity.

2. Loan losses as subsequent acquisition costs when shareholdings in corporations are sold pursuant to Section 17 EStG

As already outlined in the PKF Newsletter 09/2019, BFH case law (ruling from 11.7.2017, case reference: IX R 36/15), was the reason for abandoning the taking into account of losses arising from shareholder loans as subsequent acquisition costs for a shareholding pursuant to Section 17 EStG. The background here was the abolition of the Equity Substitution Law through the Act for the Modernisation of Limited Liability Company Law *(Gesetz zur Modernisierung des GmbH-Rechts, MoMiG)*, which came into force already on 1.11.2008.

For reasons of legitimate expectations, it was possible to still apply the previous guidelines (in accordance with the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* circular from 21.10.2010) if the financial assistance had been granted before 27.9.2017, or had become equity-substituting by this date.

The uncertainties that have existed since then – in particular, the question of whether or not the default of a shareholder loan that had been granted or, possibly, losses in the case of income from capital assets can be taken into account (according to the BFH in its ruling from 24.10.2017, case reference: VIII R 13/15) – will now be eliminated via the new rules that have been included in the 2019 Annual Tax Act. Accordingly, a new paragraph 2a will be added to Section 17 EStG. This paragraph essentially incorporates the contents of the previous relevant BMF circular from 21.10.2010.

Under the new legal provisions, the acquisition costs of a material interest in a corporation (size of shareholding ≥ 1%) that is held in private assets will also include loan losses if company law determined the reason for granting a loan or upholding a loan in a corporate crisis. A reason under company law would usually be deemed to exist if, under the same circumstances, an outside third party would have demanded repayment of the loan or would not have granted it.

Please note: According to the current status of the draft law, this amendment would apply to disposals of shares that took place already after 31.7.2019.

RA/StB [German lawyer/tax consultant] Reinhard Ewert

Repayment of capital contributions by a third country entity

If a corporation whose management and headquarters are in a third country distributes assets to its shareholder then these payments could be treated as repayments of capital contributions even if a contribution account for tax purposes within the meaning of Section 27 of the Corporation Tax Act *(Körperschaftsteuergesetz, KStG)* is not maintained for the company.

1. A case of ...

The claimant, a German corporation, had a stake in a US Inc. and, in the past, had financed this company via capital contributions. In the relevant year, the claimant had received payments from the US Inc. that were classified in the USA as "return of capital". Nevertheless, the local tax office treated the payment as a dividend and added 5% of this payment to the claimant's profit in the off-balance sheet accounts pursuant to Section 8b(3) KStG. The claimant filed an action against this before the Münster tax court and then won its case at the Federal Fiscal Court *(Bundesfinanzhof, BFH)* (ruling from 10.4.2019, case reference: I R 15/16).

... distributions exceeding profit ...

Distributions from corporations insofar as they do not derive from the company's contribution account for tax purposes, within the meaning of Section 27 KStG, constitute neither income from capital assets nor tax-exempt dividends to which the addition of 5% of notional non-deductible business expenses would have to be applied. Although, here the company's contribution account for tax purposes can only be used to the extent that the payment exceeds the distributable profits that have been calculated for the company for the previous financial year. This rule also applies to EU corporations (Section 27(8) KStG).

... from a third country

Already in 2016, the BFH had decided that, from the point of view of the free movement of capital, the option to repay capital contributions would have to be opened up for corporations in a third country, too. Since, in the above-mentioned case, in the period prior to the "distribution" the US Inc. had not generated any (accounting) profit then, in the case in question, this could only have constituted a tax-neutral repayment of capital contributions that, accordingly, led to a reduction in the book value of the shareholding in the claimant's accounts and, indeed, despite the fact that the balance of the contribution account for tax purposes of the distributing US Inc. had not been (could not be) determined.

2. Reconciliation is not necessary

Unlike in the case of domestic (German) or EU corporations – where the repayment of capital contributions is essentially based on the respective balance of the contribution account that has to be separately determined within the meaning of Section 27 KStG and, moreover, on the distributable profits that have to be calculated in accordance with (German) tax principles -, in the case in question, the BFH based its argument on the accounting profit of the US company. In practice, this at least implies a simplification to the extent that a time-consuming reconciliation, including an extrapolation over several years, would not have to be carried out.

Outlook

What remains unclear (since it was not relevant for the decision in the case in question) is whether the principles that were mentioned in the ruling also apply to EEA corporations, or whether the existing statutory provisions for EU corporations should be used (the fiscal authority is of a different opinion, cf. Federal Ministry of Finance on the separate assessment for nominal capital repayments in the case of foreign corporations *(Gesonderten Feststellung von Nennkapitalrückzahlungen bei ausländischen Kapitalgesellschaften)*, case reference: IV C 2 – S 2836/08/10002, published in the Bundessteuerblatt, BStBl 2016 I p. 468, subsection 1.

WPin [German public auditor] Julia Rösger

The tax-neutral transfer of real estate assets to children

For owners of a property the question of transferring it for no consideration during their lifetimes is frequently of great importance. Besides the tax-based opportunities, such as for example, taking advantage of the gift and inheritance tax allowances, in some cases several times, other motives could be to avoid disputes between the children or to prevent the entitlement to a compulsory share being asserted. Then again, the financial security of the donors has to be ensured during their lifetimes. In the following section we provide an overview of the structuring options that would minimise the tax burden.

1. Basic principles

While the same principles apply to both inheritance tax and gift tax, nevertheless, the concessions could be more far reaching in the case of gifting. It is basically true to say that the gifting of a property out of private assets requires certification by a notary. In both succession and gifting cases, the property has to be recorded at its fair market value. Although, in the case of gifting, the assessment basis can be reduced by agreeing considerations in order to be able to make the best possible use of the existing tax allowances. In general, it is only the amount that exceeds the tax allowance of €400,000 per child and parent that has to be taxed, at the applicable rate, in accordance with Section 19(1) of the Inheritance Tax Act (Erbschaftsteuergesetz, ErbStG). This tax-exempt allowance may be used again every ten years. Possible and frequently used ways of reducing the assessment basis involve considerations in the form of a usufruct or granting the right of residence – these leave the transferors financially secure. In the case of a property rented out for residential purposes as defined in Section 13d(3) ErbStG, the fair market value of the property would be reduced by a flat rate of 10% if the narrow criteria stated in the Act have been fulfilled.

2. Right of usufruct

Parents who opt for gifting under a reservation of the right of usufruct retain their right to use the asset that they have donated. They continue to have the right to rent out the property, to retain the rental income and, under income tax law, to deduct property-related expenses as costs related to income from letting and leasing. Although, the sale or encumbrance of the property would be conditional on the approval of the children. The usufruct has to be entered into Section II of the land register (*Grundbuch*).

The main advantage of using right of usufruct is that the value of the usufruct would be deducted from the donation value and, consequently, the taxable base could be reduced considerably. The cash value of a usufruct is calculated on the basis of the net income of the property and the age of the parents. If ten years have elapsed since the donation was made then, in a succession case, this transfer would not be taken into consideration. Although, this period begins on the date when the donor has relinquished his/her right of use. If the aim is to reduce the compulsory share to which a legal heir would be entitled, normally, the right of usufruct does not lead to the desired outcome.

Please note: Furthermore, it should be borne in mind that the subsequent waiver of the right of usufruct constitutes an event that could be liable to gift tax. A waiver would be regarded as a new donation between the persons involved in the original transfer. In such a case, it also has to be taken into account that the value of the right of usufruct could, over the course of time, turn out to be higher than the value deducted in the context of the asset transfer due to, for example, an increased income situation.

3. The right of residence

The main difference here when compared with usufruct is that the property may only be used by the donors themselves. The formal requirements and the general conditions cor-

respond to those for usufruct. In case of doubt, usufruct is preferable to the right of residence because of its greater flexibility.

4. (Partial) remuneration

Partial remuneration would occur, for instance, if in the course of the transfer of the property liabilities were also passed on to the beneficiary. This is usually the case with plots of land and properties that are encumbered. Here, the transfer would have to be divided between the portion for payment and the one for no payment. The apportionment would be performed on the basis of the ratio of the payment to the fair market value of the property.

» If a property were transferred in return for payment under a reservation of usufruct then the depreciation would be measured according to the cost of the acquisition for the owner. In this case, the cash value of the usufruct would not be included in the cost of the acquisition. The depreciation volume would have to be reduced by the amounts of depreciation in the owner's acquisition costs that relate to the period between the acquisition of the property and the expiry of the usufruct.

» By contrast, if the property were transferred for no payment made under a reservation of usufruct then, after the usufruct has expired, the owner would continue with the depreciation schedule of the predecessor-in-title (in this case the transferor).

Recommendation

Early planning would be worthwhile for larger assets in view of the tax allowances, which may be used again every ten years. Prior to any agreements, the effects of a right of usufruct should be thoroughly analysed and calculated so that no nasty surprises can emerge out of this. In view of the individual personal, tax and legal requirements that are involved it is absolutely essential to obtain comprehensive advice.

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

Flat-rate payroll tax for benefits provided by employers in addition to the remuneration due in any case to employees

Additional remuneration will be assumed if it is paid for a specific use and/or purpose apart from the remuneration due in any case to employees. Contrary to previous case law, it does not matter whether or not, under employment law, the employee is entitled to the additional remuneration. The Federal Fiscal Court *(Bundesfinanzhof, BFH)* recently decided this in three rulings from 1.8.2019 (case references: VI R 32/18, VI R 21/17 and VI R 40/17) and thus changed its previously held legal position on the criterion of "in addition to remuneration due in any case to employees".

1. Issue – Subsidies paid by employers for travel costs and internet usage

In the case that the BFH ruled on, the claimant had concluded new pay agreements with several employees. In these agreements, the previous gross salary had been reduced. At the same time, a subsidy had been agreed for the journeys between home and the workplace as well as for internet usage. In this context, it was questionable whether an additional benefit that allows tax to be charged at a flat rate could indeed be assumed, or whether such a tactic constituted a change in the remuneration system that was harmful for tax purposes.

2. Previously the voluntary aspect had been crucial

According to the legal rulings hitherto by the BFH, employer subsidies are granted "in addition to the remuneration due in any case to employees" when such subsidies are added to wage and salary payments that are due under employment law. Consequently, employer subsidies are only paid "in addition to the remuneration due in any case to employees" if the employer voluntarily pays for them and the employees are thus not entitled to them under employment law. The BFH no longer adheres to these case law principles.

3. Change in case law

The BFH assumes that amounts that are paid in addition to the remuneration due in any case to employees constitute wages or salaries if the employer pays out these amounts for a specific use and/or purpose. As a result, it no longer matters whether or not there is an entitlement to these payments under employment law. Notably, the wording of the law does not necessarily have to be interpreted as meaning that wages or salaries paid in addition to the remuneration due in any case to employees may not be owed. This is because voluntary payments and additional payments are not mutually exclusive.

In the cases in question, there was a particular examination of the issue of the point in time that relates to the feature "in addition to the remuneration due in any case to employees". The BFH decided that the requirement that the payment should be additional should relate to the date when the wage or salary is paid. Therefore, a change in the remuneration system that has been agreed in an employment contract is not harmful from a preferential tax rate perspective. Consequently, in an agreed salary conversion, employers and employees are able to reduce the "remuneration due in any case to employees" for future wage or salary payment periods and compensate for the reduction, in a tax privileged way, with an additional payment for a specific use.

Finally, the BFH established (in two parallel rulings from 1.8.2019 with the case references: VI R 21/17 and VI 40/17 where the decisions were identical in terms of their contents) that salary conversion is not arbitrary. It is rather on a par with contractual freedom and a legitimate interest in "optimising the employment contract" in relation to the tax and social security regulations.

Please note

For the moment, the new BFH ruling should be viewed positively because the condition of being "in addition to the remuneration due in any case to employees" has been interpreted in a more practice-oriented way. Nevertheless, it remains unclear how the fiscal authority will respond to these rulings. Therefore, remuneration optimisation models ("more net pay") can be applied with legal certainty to this extent until further notice.

LEGAL

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

Transparency register – Disclosure requirements for registered *KG* (German limited partnerships)

In the wake of the entry into force of the new German Anti-Money Laundering Act, on 26.6.2017, an electronic transparency register was introduced in Germany for the first time. The beneficial owners of companies and associations specified in the Act have to be recorded in the transparency register. The aim of this is to help prevent the abuse of associations and legal structures for the purpose of money laundering and terrorist financing.

1. Types of companies affected

The types of companies affected include legal entities under private law (e.g. a *GmbH* [limited company]) as well as registered partnerships (e.g. *Kommanditgesellschaft*, KG [limited partnership]).

2. Required information

The name and surname, date of birth and place of residence of the beneficial owners as well as the nature and extent of their economic interests have to be provided in electronic form to the *Bundesanzeiger Verlags GmbH* (German Federal Gazette).

Beneficial owners are generally natural persons who are either owners or who exercise significant control in other ways. The latter would be presumed, for example, if 25% of the voting rights or of the capital stock were held.

The disclosure requirement shall be deemed to have been fulfilled if all the information required from the documents and entries that are listed under Section 22(1) of the German Anti-Money Laundering Act is available electronically from the commercial register or other public registers.

3. Notification requirement for a registered KG

Previously, entering a Kommanditgesellschaft (including the legal form of a *GmbH & Co. KG* – a special form of limited partnership in which the unlimited partner is a private limited company) in the commercial register would have satisfied the aforementioned notification requirement.

In the context of administrative offence proceedings that are currently being conducted, the Federal Admin-

istration Office (as the competent authority for pursuing contraventions of the transparency register rules) expressed the view that in the case of a Kommanditgesellschaft the notification requirement cannot be satisfied by solely making an entry in the commercial register.

This view was justified on the grounds that it is only the liability amount and not the mandatory capital contribution that is entered into the commercial register. For this reason, it would not be possible to ascertain the size of the shareholding by inspecting the commercial register. Likewise, the amount of the capital contribution and thus the extent of the ownership interest of the general partner could not be ascertained by inspecting the commercial register. It would thus not be possible to determine the beneficial owner.

It is for these reasons that the Federal Administration Office has argued that Kommanditgesellschaften should also be required to make disclosures vis-à-vis the transparency register.

Please note

It is currently difficult to gauge whether or not the courts will follow the Federal Administration Office's interpretation of the law. In order to avoid potential administrative offence proceedings, *KGs, GmbH & Co. KGs* as well as *KGaAs* [partnerships limited by shares] should submit supplementary disclosures to the transparency register.

RA [German lawyer] Ralf Lüdeke

High administrative fines for infringements of the GDPR

Since the end of May last year, the data protection officers of the Länder (Federal States) have imposed administrative fines in more than 100 cases of infringements of the European general data protection regulation (GDPR). In an international comparison, the actions of the authorities in Germany have so far been moderate. Based on a search through the press, the average level of these fines was reportedly almost € 6,000. A new concept for calculating administrative fines has now been published according to which there would be a risk of much higher fines.

1. Current sanctions practice

The GDPR applies to all companies that are based in the EU or that process the data of EU citizens. In accordance with Article 83 GDPR, infringements of the GDPR may result in the imposition of administrative fines of up to €20m or of up to 4% of the total worldwide annual turnover of the preceding financial year – the higher of the two values shall be applicable. The administrative fines that have been imposed in Germany have been relatively moderate. By contrast, France fined Google €50m and the UK fined the Marriott hotel chain €110m and issued the airline British Airways with a fine of €204m.

2. New concept and higher administrative fines

On 25.6.2019, the Conference of the German Independent Data Protection Supervisory Authorities of the Federal Government and the States (Datenschutzkonferenz, DSK) agreed a new concept for calculating administrative fines that has now been published and could lead to greater transparency but also to higher administrative fines.

In proceedings against companies, the calculation of administrative fines under this concept would be performed according to the following steps.

- First of all, the company concerned would be assigned to a size category.
- Next, the average annual turnover of the respective sub-group for the size category would be determined.
- After that, an economic base value would be calculated. This base value would then be multiplied by a factor that would be contingent on the seriousness of the infringement, for instance, a factor between 1 and 4 for a slight infringement and up to a factor of between 12 and 14 for a serious infringement.
- The value that is determined would then be adjusted for circumstances connected with the offender and other circumstances that had not yet been taken into consideration.

Several factors would have to be taken into account when making the adjustment. In cases of minor or unintentional negligence the amount would go down by 25%. For ordinary negligence the amount would remain the same and in the case of the negligence being wilful or deliberate the fine could go up by 25% or even 50%. If

the authority had already previously found irregularities at the company then this would likewise be reflected in the calculation of the fine. One new infringement would entail a 50% premium, two would mean a 150% premium and three or more infringements would entail a 300% premium. Furthermore, other factors could also have a negative impact, for example, how the authority assesses the cooperation with it, or also the measures that the company has already taken to mitigate the damage.

Please note: The DSK views this procedure as being appropriate for guaranteeing a verifiable and transparent way of assessing case-specific administrative fines.

Recommendation

The current concept for administrative fines applies solely to German authorities and also only until the European Data Protection Board issues guidelines in this respect. Moreover, the concept is not binding with respect to the fixing of administrative fines by the courts. Nevertheless, in view of the potentially draconian level of administrative fines we strongly recommend closing any existing data protection gaps.

ACCOUNTING & FINANCE

StBin [German tax consultant] Kim Xuan Tran

Integrated forecasting as a tool in the context of estimates of financing requirements and company valuations

1. Concept of integrated forecasting

An integrated forecast consists of mutually compatible projected P&Ls, projected balance sheets and projected cash flow statements. It routinely constitutes a key element of company valuations and is of particular importance for companies in crisis situations. An integrated restructuring plan is the starting point for developing a restructuring concept, for example, as the basis for financing decisions, or for the discharge vis-à-vis creditors who, being aware of the debtor's (imminent) illiquidity, have given their approval for a part-payment agreement (cf. IDW* Standard 6, subsection 2); *[Institute of Public Auditors in Germany – *Institut der Wirtschaftsprüfer, IDW*]. The main focus here is on the liquidity forecast (cf. IDW Practice Statement 2/2017, subsection 5).

2. Preparing a forecast

The projected P&L is of particular importance when forecasting the future chances of success. The starting points for the forecast are a detailed sales forecast on the basis of a price and quantity structure, or possibly broken down into the most important product and customer groups as well as the corresponding forecasts for the cost of materials. In addition, separate sub-plans such as investment and staffing plans will also be integrated. In practice, relatively detailed forecasts for the income statement are normally only made down to the level of EBIT (earnings before interest and tax) while, frequently, less importance is attached to the financial result and taxes on corporate income and business profits.

Forecasts for the projected balance sheet can be generated, for example, on the basis of performance metrics. 'Payment target in days' is a metric that can be used to generate forecasts for trade receivables where sales revenues form the basis of the calculation. The trade payables can then be estimated accordingly using the forecasts for the cost of materials. Forecasts for inventories can be carried out, for example, by taking into account the storage periods or stock turnover.

A projected cash flow statement can be derived from the projected P&L and the projected balance sheet.

3. Practical relevance of integrated forecasting

In practice, balance sheet forecasts are frequently neglected. While there is usually still a short or medi-

um-term investment plan that forms the basis for the forecasting of fixed assets, in practice, the forecast for net working capital is frequently one of flat growth, i.e. no changes are forecast for net current assets. Yet, it is precisely net working capital that is of considerable importance for a company's liquidity. A forecast for the latter will highlight the potential amount of capital required. That is why integrated forecasting is indispensable particularly for companies in crisis situations that would also like to initiate restructuring measures.

Then again, in the context of company valuations, balance sheet forecasts have a material influence on a company's indebtedness. In the context of deriving the financial result, it is especially important to calculate the gearing ratio properly since indebtedness affects not only the level of distributable profits but, in particular, also the level of the beta factor and, thus, the discount rate (see also PKF Newsletter 11/2018, 'Particularities of the valuation of highly indebted companies').

Please note: The quality of integrated forecasting naturally depends not only on mathematical accuracy but notably on the quality of the underlying information. Bearing in mind the uncertainties of forecasts, the assumptions that underlie integrated forecasting should be plausible, i.e. verifiable, consistent and without contradictions (cf. IDW Practice Statement 2/2017, subsection 5).

Conclusion

Integrated forecasting provides high added value particularly for companies in crisis situations, or those businesses that have to perform a well-founded company valuation because, without such forecasting, it is not possible to carry out a proper estimate of the financing requirements. Furthermore, through integrated forecasting, the factors that affect the gearing ratio become transparent – their impact on enterprise value should not be underestimated.

LATEST REPORTS

RAin [German lawyer] Yvonne Sinram

Time limitation of an employment contract in the case of previous employment

Limiting an employment relationship for no objective or material reason is permitted, in principle, for up to two years unless an employment relationship had already existed between the parties at some point previously (pre-employment prohibition). However, according to case law, this prohibition would not apply if the pre-employment had been a very long time ago. The question that now arises is what period of time should be viewed as being "very long".

In this respect, while an interim period of eight years is not long enough (Federal Labour Court (*Bundesarbeitsgericht, BAG*) from 23.1.2019, cf. PKF Newsletter 5/19, p. 10), 22 years is in any case sufficient. The BAG recently decided this in its ruling from 21.8.2019 (case reference: 7 AZR 452/17). In the event of such a long interval between the periods of employment, under a constitutional interpretation, it would not be reasonable to prohibit time limitation for no objective or material reason.

Please note: Unfortunately, the ruling did not include precise details of the length of time after which this prohibition starts to be not reasonable.

AND FINALLY...

"The difficulty lies, not in the new ideas, but in escaping from the old ones."

John Maynard Keynes, (5.6.1883 – 21.4.1946), British economist, politician and mathematician. He ranks among the most important economists of the 20th century and Keynesianism got its name from him.

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