PKF

Newsletter

Key Issue:
Second German Coronavirus Tax-Related Assistance Act – Measures for businesses

07|20

Dear Readers,

The comprehensive package of measures to boost **economic recovery, overcome the crisis** and **provide a future-focused stimulus** agreed in Germany's Coalition Committee on 3.6.2020 was approved, in record time and in a summary procedure, already on 12.6 by the federal cabinet, on 19.6/29.6 by the *Bundestag* (lower house of German parliament) and, on the afternoon of 29.6, likewise passed by the *Bundesrat* (upper house of German parliament) and enacted. Our Key Issue is therefore the **"Second Coronavirus Tax-Related Assistance Act"** where we have a report on the tax-related measures for businesses. Besides the much-discussed reduction of the VAT rates, the highlights worth mentioning are the considerable possibilities for carrying back losses, the reintroduction of the declining balance method of depreciation as well as the increases in the research allowances and many tax-exempt amounts. Furthermore, there are still lots of concessions for private individuals and especially for families. The original package of measures, from 3.6.2020, also included an **option model for partnerships under which they could elect to be treated as corporations for tax purposes**. While this can no longer be found in the current legislation this however does not mean that it has been abandoned; it has instead been set aside with the aim of it going through its own separate legislative procedure. In view of the particular importance of this topic, in the second contribution in the Tax section we have highlighted, at a very early stage, that if the equity base is strengthened then the option model would provide partnerships with an opportunity to defer around 13 percentage points of tax and would make them significantly easier to understand from a tax perspective. Our third contribution is the continuation of an analysis from the May edition of our newsletter. This deals with the **changes in transfer pricing rules** – in the current Part II, we focused our discussion particularly on the issues of the arm's length comparison, the transfer of functions and intangible assets. Something else that is also likely to be of great practical interest is the **tax benefit for energy-related building measures**. We have provided information on the eligibility criteria and model certificates.

In our Legal section, we first take a look at the need to create a **European Patent Court** and yet again the current difficulties in finding a uniform solution. The protection against **dismissal enjoyed by data protection officers** is the subject of the subsequent report.

This edition of the PKF newsletter would normally be a consolidated issue for the months of July and August because, firstly, this is the "silly season", when there is usually a lack of major political/administrative news stories and, secondly, both readers and authors go on holiday during this period. However, given the wealth of detail and clarifications with respect to the Coronavirus Tax-Related Assistance Acts and the ATAD Transposition Act, this year we will keep you updated in August, too, with a separate edition 8/2020. Finally, if you are still looking for a holiday destination in Germany for this year then perhaps you will be able to draw inspiration from the images in this edition from the regions of Upper Bavaria/Allgäu of places that provide great photo opportunities.

We hope that you will find the information in this edition to be interesting.

Your Team at PKF

Zugspitze

Key Issue

Second German Coronavirus Tax-Related Assistance Act – Measures for businesses

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TAX

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Second German Coronavirus Tax-Related Assistance Act – Measures for businesses

In view of the continuing coronavirus crisis, on 3.6.2020, Germany's Coalition Committee agreed a comprehensive package of measures to boost economic recovery, overcome the crisis and provide a future-focused stimulus. After the federal cabinet submitted the draft of the Second Act Implementing the Tax-Related Measures to Help Overcome the Coronavirus Crisis (Second Coronavirus Tax-Related Assistance Act), on 12.6.2020, and its approval by the Bundesrat (upper house of German parliament), on 29.6.2020, the legislative process has now been completed. In the following section we have outlined the measures for businesses.

1. VAT related measures

1.1 Temporary cut in the VAT rates from 19 % to 16 % and 7% to 5%

The VAT rates will be reduced from 19 % to 16 % and 7% to 5% for a limited period from 1.7.2020 until 31.12.2020. You can read more about this in relation to the area of continuous services in our report on p. 13 in this edition (based on data available on 30.6.2020) and generally in the PKF special "Reduction of the VAT rate" at www.pkf.de (based on data available on 15.6.2020).

Please note: For the month of July and in B2B business a no objection rule will apply for a VAT charge that is too high. We recommend availing yourself of this option only if it was not possible to fully implement a system changeover by the 1.7.

1.2 Postponement of due date of import VAT to the 26th of the second subsequent month

The due date of import VAT will be postponed until the 26th of the second subsequent month if a deferred payment has already been authorised in accordance with Art. 110 b) or c) of the UCC (Union Customs Code). The effective date of the new provision, which is of indefinite duration, will be made known in a separate Federal Min-

Hiking in the Upper Allgäu Alps

istry of Finance circular as soon as there is a definite date by which the IT requirements can be met.

2. Income tax-related measures

2.1 Increase in the tax loss carry-back

The maximum amount for loss carry-backs for businesses will be increased from € 1m to € 5m for the assessment periods 2020 and 2021. As a result, it will be possible to carry back losses of up to € 5m from 2020 to 2019 for corporation and income tax purposes. In the case of a joint assessment for tax of the commercial income of natural persons the amount of the loss carry-back has been increased from € 2 m to € 10 m. The loss carry-back will not be applicable to trade tax.

2.2 Provisional loss carry-back for 2020

Under the conditions of the new Sections 110 and 111 of the German Income Tax Act (Einkommenssteuergesetz, EStG), a flat rate of 30% of the overall amount of income for the 2019 assessment period can be generally applied as retroactive loss carry-backs to reduce the tax prepayments for 2019 as well as the tax assessment for 2019. A reduction of more than 30% would be possible if a higher anticipated loss carry-back can be demonstrated on the basis of detailed documentation.

2.3 Temporary introduction of the declining balance method of depreciation of up to 25%

It will be possible to depreciate non-current movable assets that are acquired or produced in 2020 and 2021 according to the declining balance method of depreciation, instead of the straight-line method, up to a level of 25% with a maximum of 2.5 times the straight-line depreciation amount.

2.4 The purchase price limit for the purpose of the taxation of the private usage of electric company cars has been increased to € 60,000

If an electric company motor vehicle is used privately then only 0.25% of the gross list price (if the 1% rule is the basis of assessment) has to be applied, or just 25% of the acquisition costs or comparable expenses (if the driver's log book rule is the basis of assessment). However, up to now, this was only applicable if the gross list price of that motor vehicle was not more than € 40,000. The purchase price limit has been raised to € 60,000 with a view to increasing the demand. The change will apply from 1.1.2020 for the assessment of the value of the private usage of such motor vehicles acquired, leased or made available for private usage for the first time after 31.12.2018 and before 1.1.2031.

2.5 Reinvestment periods under Section 6b EStG have been temporarily extended by one year

Under the new rules, for financial years ending after 29.2.2020 and before 1.1.2021, if at the end of those years any reinvestment reserves are still remaining and would have to be reversed then the reinvestment period would not finish until the end of the subsequent financial year. The aim of this temporary measure is to preserve liquidity by not forcing companies to reinvest this reserve in order to avoid the reversal of the reserve, which would attract tax and an additional charge against profits.

2.6 Extension of deadlines ending in 2020 for the use of investment allowances under Section 7g EStG

Investment allowances (*Investitionsabzugsbeträge*, so-called IAB) generally have to be used by the end of the third financial year after the year in which the allowance was deducted for an investment that benefits from preferential tax treatment. Otherwise they would have to be reversed (which would attract tax plus interest on tax arrears). With a view to avoiding this, the deadline for an IAB where the three-year investment period ends in 2020 will be extended by one year.

2.7 The factor for determining the amount of tax relief for income from business activities has gone up from 3.8 to 4.0

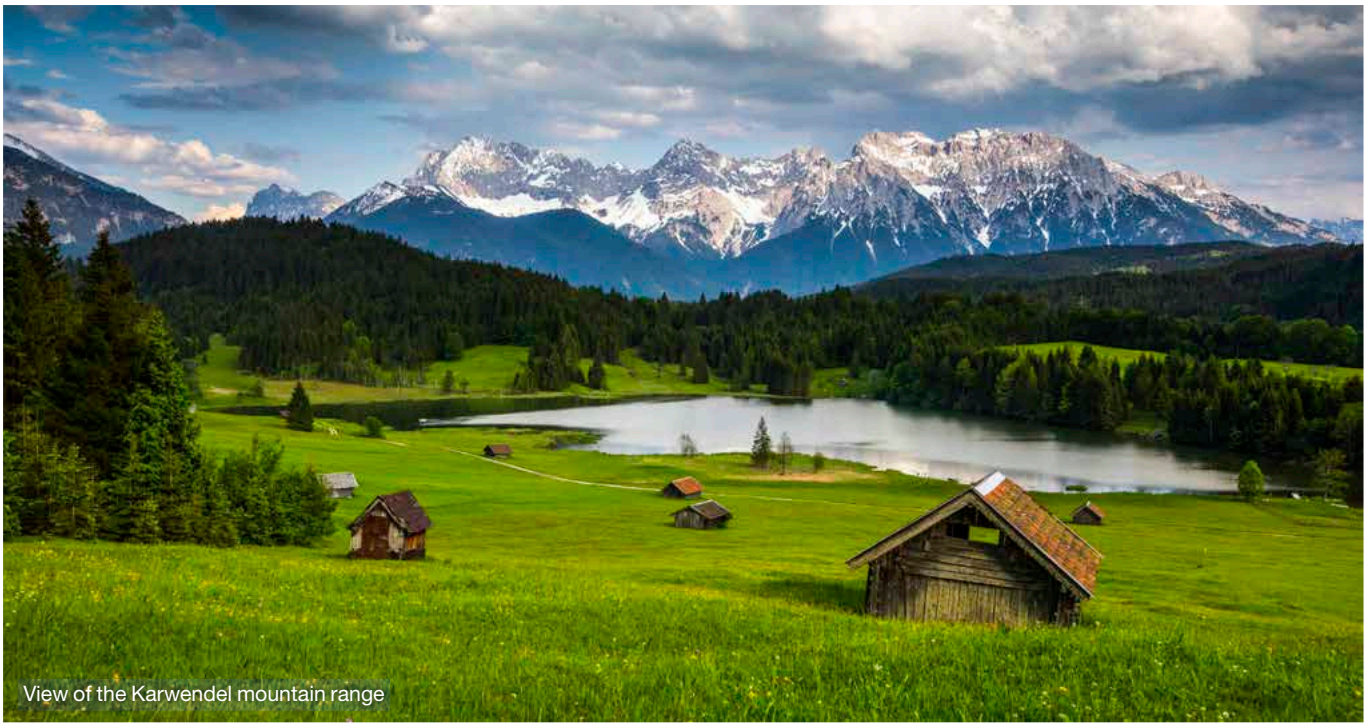
Up to now, sole traders and partners in a commercial partnership were able to offset a maximum of 3.8 times their trade tax base values against their income tax with a view to bringing their tax charges closer to a level that would be independent of their legal forms. From the 2020 assessment period this factor will go up to 4.0 for an indefinite period of time. Therefore, trade tax will now be fully credited where the trade tax rate is 14% (previously 13.3%).

3. Trade Tax – Tax-free amount for add-backs increased to € 200,000

When determining the trade tax add-back amount, the sum of the amounts of the individual trade tax add-back elements (e.g. rent, lease payments and debt interest) should only be taken into consideration if they exceed € 100,000. In order to provide relief and to enhance liquidity, in particular that of SMEs, this tax-free amount will be increased to € 200,000 from the 2020 reporting period for an indefinite period of time.

4. Temporary increase to € 4m for the maximum level of the assessment base for the tax-exempt research allowance

The new tax-exempt research allowance (for detailed explanations of the previous funding modalities please see PKF newsletters 05/2020 and 06/2020) has been made more attractive by increasing the maximum level of the assessment base for the research allowance from € 2m to € 4m p.a. for each enterprise. The new rules will apply for a limited period to all eligible expenses arising after 30.6.2020 and before 1.7.2026.



View of the Karwendel mountain range

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

Check-the-box in Germany, too – Partnerships will be able to opt for corporation tax in the future

The package of measures to boost economic recovery, overcome the crisis and provide a future-focused stimulus, which was passed by the German federal government on 3.6.2020, also included an announcement that there will be an option model as regards the tax treatment of partnerships. Under this model, partners would be able to elect that their partnership should be treated as a corporation for the purpose of taxing the income. In the following section we have outlined the application of such a model for the creation of a system of taxation that is independent of a firm's legal form and have analysed the benefits of this model.

1. What are the options and who can choose?

The option will be available to all partnerships that generate income from business operations, freelance work or agriculture and forestry. As things stand at present, the option would be exercised by the partners passing a resolution. This resolution would have to be adopted unanimously insofar as the partnership agreement did not provide for any other type of majority for transactions beyond the scope of day-to-day business dealings. Subsequently, the legal representatives would have to submit an application to the competent tax office.

2. The effects of the option

2.1 Scope of application

The resolution and the application submitted to the tax office would ensure that for income tax purposes the partnership would be treated like a corporation. The option could be exercised with effect from the end of a financial year and it should be possible to create a short financial year. No impact on other types of tax is expected.

Please note: It should be noted that the term of the option is seven years; it would only be after this period that there would be a possibility to exercise the option to revert back again to being taxed as a partnership.

2.2 Notional change of legal form

By exercising the option, the partnership would notionally be turned into a corporation for income tax purposes. In so doing, a situation would be simulated – as in the case of a change of legal form – where the partners would be granted shares in a corporation.

2.3 Exception – special business assets

If the partners are natural persons – therefore, neither a corporation nor a partnership – then close attention would have to be paid to the treatment of special business assets. Special business assets are primarily assets owned by a partner and these are made available by the partner for use by the partnership. Examples are let factory buildings and business premises or partner loans.

In the event of the option being exercised, these special business assets would generally be transferred at their fair market value to the private assets. In the case of buildings that a partner lets out to the partnership, the hidden reserves that are realised – the difference between the fair market value and the book value – would consequently have to be taxed. In order to avoid the taxation of hidden reserves it is possible to transfer these assets in a tax-neutral way to the partner's other business assets.

3. Regular taxation once the option has been exercised

3.1 Classifying and determining income

Once the option has been exercised the principles relating to trade tax and corporation tax for corporations would have to be applied. In accordance with the separation principle, the corporation and the shareholders are independent tax subjects in each case. Contractual relationships governed by the law of obligations (e.g. loan agreements) between the shareholder and the company would now be recognised for tax purposes. This would also apply to the contracts of shareholding managing directors. The income would then no longer be regarded as business income but, instead, as income from employment. Moreover, a social insurance payment obligation could possibly arise.

Please note: A loan that has been transferred to private assets would be deemed to generate income from capital assets for the partner.

3.2 Appropriation of profits

In the case of "normal" corporations, profits generally remain in the organisation and are recognised as retained profits in reported equity. It is only when the shareholders explicitly decide to distribute all or part of the profit that capital gains tax (CGT) has to be paid and the net dividends have to be paid out or credited to the shareholder accounts.

By contrast, in the case of partnerships – even after the option has been exercised – it is precisely the other way round. The so-called full distribution principle still applies. As a consequence, the company would have to pay CGT on all the taxed profits and the net dividend would be credited to the shareholder accounts. If there is a desire to retain profits or to strengthen the equity base then, under German company law, there has to be a provision stipulating that the profits – possibly a certain amount – will be credited to a reserve account. Only in such a case would no CGT be levied on retained profits.

4. Example – A comparison of tax burdens

The following assumptions have been made:

- The partnership generates a taxable profit of € 100,000.
- The following (German) taxes were considered: trade tax (TT) at 13.3%, corporation tax (CT) at 15%, income tax (IT) at a marginal tax rate of 42% and CGT at 25%.
- For reasons of simplicity, tax allowances, church tax and solidarity surcharge were not included in the calculations.

A distinction was made here between three cases:

(1) Taxation without the option – The partnership would pay TT of € 13,300 on the profits and € 86,700 would be credited to the partners' account. The partners would have business income of € 100,000. The trade tax could be credited against the income tax of € 42,000 and, accordingly, the partners would only pay € 28,700.

Result: After taxes, the partners would have € 58,000 freely available to them while the company would have zero.

(2) Taxation with the option but without profit retention – The partnership would be liable to pay TT of € 13,300 and IT of € 15,000. From the remaining amount of € 71,700, the company would also have to pay CGT of € 17,925. Shareholders would have to pay tax on € 71,700; the tax would be covered by the creditable CGT.

Result: After taxes, the partners would have € 53,775 freely available to them while the company would have zero.

(3) Taxation with the option and with profit retention – The partnership would be liable to pay TT of € 13,300 and IT of € 15,000. € 71,700 could be allocated to reserves.
Result: If the taxed income were retained at the level of the partnership then no amount would be available to the shareholders. It is only once a resolution on the distribution of profit has been passed that capital gains tax would have to be paid and tax would have to be applied at the level of the shareholders – although this tax charge would be covered by the CGT.

Conclusion: The example thus demonstrates that a partnership would not necessarily enjoy tax advantages by opting for corporation tax. The advantage of the option model is that a "company" level is additionally created and if profits are retained then, initially, for each € 100,000 of income approx. € 13,700 less tax would have to be paid and this would be available for internal financing.

5. International tax law

The principle that a partnership can opt to be treated like a corporation for tax purposes would also apply for German international tax law. Disputes over the classification of income from special business assets can be avoided. Admittedly, the allocation of taxing rights at the level of the foreign shareholder would give rise to questions.

Please note:

It remains to be seen what the specific form of the option model will be – this was not yet included in the 2nd Coronavirus Tax-Related Assistance Act – as it is steered through the legislative process. In view of the complexity of the matter, it is likely that this may still take a considerable time.

StB [German tax consultant] Ulrich Creydt

Changes in the area of transfer pricing rules – Part II: Approach for precisely defining the arm's length principle

As already described in Part 1 (please see the PKF Newsletter 05/2020), important changes in the area of transfer pricing rules along with the EU's Anti-Tax Avoidance Directive (ATAD) are going to be implemented. The German cabinet meeting to discuss this was originally planned for 8.4.2020; however, it has not yet taken place due to the COVID-19 crisis. Nevertheless, the timely conclusion of the legislative process (for application as of 2021) should still be possible. In the following section we discuss the key planned changes to the approach for precisely defining the arm's length principle.

1. The arm's length principle

As previously, the new draft Section 1(3) of the Foreign Transactions Tax Act (*Außensteuergesetz*, AStG) will specify how transfer pricing should be determined and reviewed. The new elements are:

» Solely the circumstances at the time when the accounting transaction was agreed will be decisive for determining and reviewing transfer pricing.

» In the future, the most appropriate method for determining transfer pricing will have to be selected. This constitutes a shift away from the hierarchy of methods previously specified in Section 1(3) AStG.

2. Cases where comparability is limited

Under the draft Section 1(3a) AStG, in the future, if there is a range of possible transfer prices then the use of the so-called interquartile method will be mandatory. If the previously selected transfer price lies outside of the range then it will have to be adjusted to the median. What is new here is that this adjustment will constitute a rebuttable presumption. There will thus still be an opportunity to provide proof that a different value does indeed comply with the arm's length principles. However, the burden of proof will now lie with the taxpayer.

3. Transfer of a function

Up to now, in order to justify the transfer of a function there was a requirement that assets and other benefits


St. Coloman church in the Allgäu

would have to be transferred. This "and" conjunction will be omitted when the new draft Section 1(3b) AStG is adopted. Furthermore, the transfer package valuation approach will become mandatory if no precise comparative data are available.

4. Intangible assets

Draft Section 1(3c) AStG will include a legal definition of the term "intangible asset" for the first time. To this end, the definition in the OECD Transfer Pricing Guidelines from 2017 will be adopted. According to those guidelines, an intangible asset is defined as something which

- is not a physical asset, equity interest or financial asset,
- can be the object of an accounting transaction but without having to be separately transferable,
- can be factually and legally attributed to a person.

If an intangible asset gives rise to financial effects between unrelated third parties, e.g. by transferring it or making it available for use, then these should be subject to intra-group remuneration.

However, ownership should be merely the starting point for the transfer pricing analysis for the calculation of earnings derived from intangible assets; an economic perspective should be adopted. In this connection, the so-called DEMPE concept will be legally codified. This will be the basis for an examination to determine which affiliated companies perform functions connected with the:

- **D**evelopment,
- **E**nhancement,
- **M**aintenance,
- **P**rotection and
- **E**xploitation

of the intangible asset. This means that, in the future, separate and detailed functional and risk analyses will have to be carried out for the attribution of earnings derived from intangible assets.

5. Price adjustment clause

The time horizon of the current price adjustment clause was set to 10 years (Section 1(3) clause 11f AStG). In a new draft Section 1b AStG, this time period will be reduced to 7 years in the future. Moreover, three cases have been defined of how it would be possible to avoid a price adjustment:

- the actual price development was unforeseeable at the time of the business transaction;
- uncertainties surrounding the future price development were adequately taken into account when determining the transfer pricing;
- agreement for a sales-related or profit-related royalty.

Tax benefit for energy-related building measures – Level of funding, eligibility criteria and model certificates

Since the start of the year, a tax benefit has been applicable under Section 35c of the German Income Tax Act (*Einkommenssteuergesetz*, EStG) for energy-related building measures. In order to be able to claim this tax relief there are various conditions that have to be satisfied; among other things, the building and construction service company has to issue a certificate for the measures to the client developer. To this end, the Federal Ministry of Finance has now published an appropriate model certificate.

1. Overview of the tax benefit

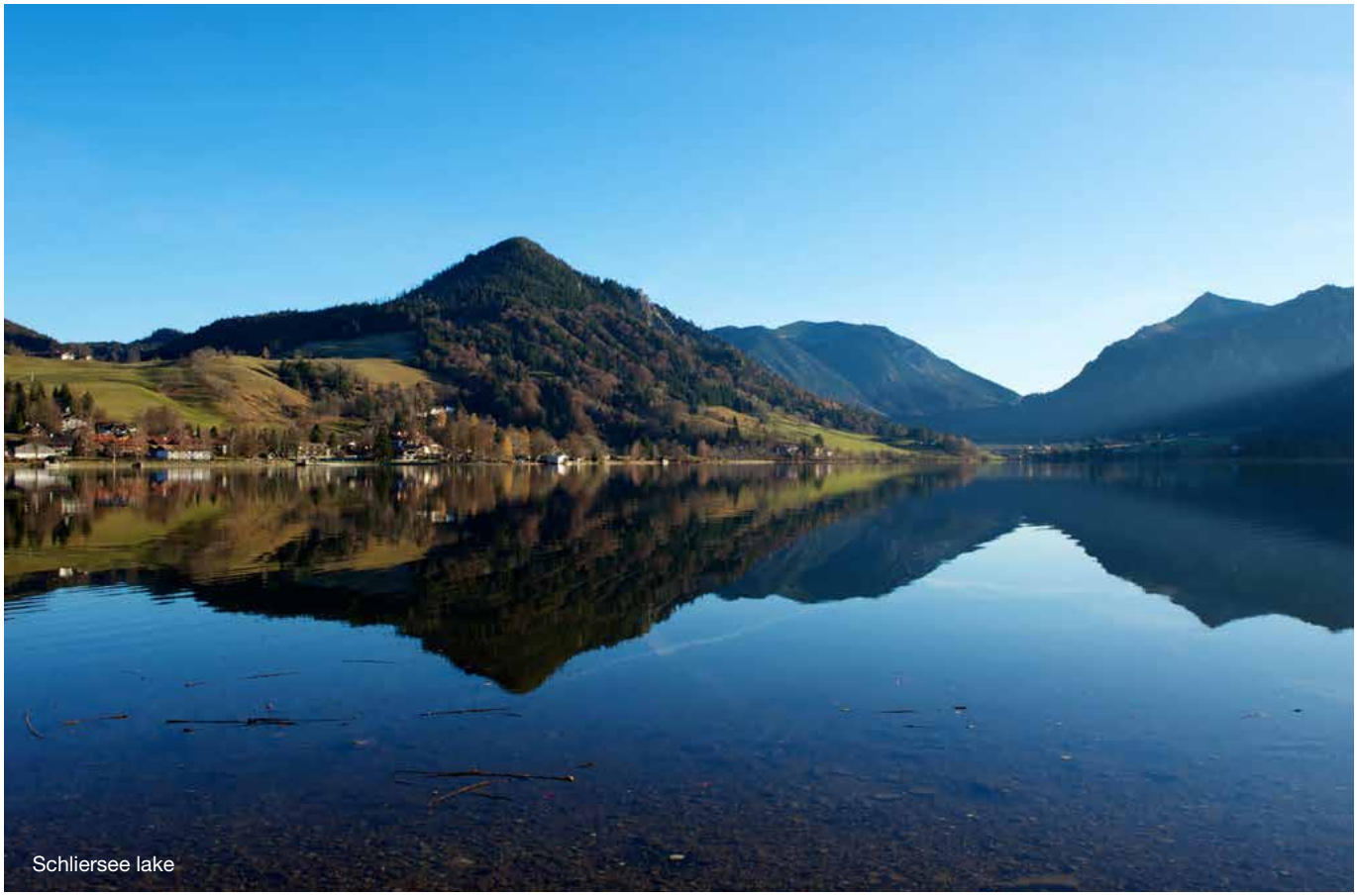
Since 1.1.2020, the state has been subsidising energy-related building measures for owner-occupied residential properties via a tax benefit. This is applicable for building measures started after 31.12.2019 and completed before 1.1.2030. Furthermore, the property has to be older than 10 years when the measures are carried out. Unlike in the case of household-related services and building and construction services under Section 35a EStG, the subsidy covers not only labour costs but also material costs.

The tax benefit includes the following building measures:

- The thermal insulation of walls, roof areas and storey ceilings
- The renovation of windows, exterior doors and heating systems
- The renovation or installation of a ventilation system
- The installation of digital systems for the optimisation of energy operation and consumption
- The optimisation of heating systems that are older than two years

2. Level of funding

There is a maximum amount of € 40,000 in tax relief available for each property. Here, the EStG provides for the following staggered scheduling:



Schliersee lake

Assessment period	What is deductible	Max. amount of tax relief
Year in which building measure completed	7% of expenses	€ 14,000
1st subsequent year	7% of expenses	€ 14,000
2nd subsequent year	6% of expenses	€ 12,000

3. Eligibility

A condition for the funding is, first of all, that the building measure has to be carried out by an approved specialist company while taking into account the minimum energy-related requirements. An invoice has to be issued for the work that shows the measures eligible for tax concessions, the work performed and the address of the qualifying property. Furthermore, the invoiced amount has to be paid into the service provider's bank account (no cash payments). The ordering party who would like to claim the tax benefit in his/her tax return, moreover, has to submit to the local tax office a certificate, based on the officially prescribed model, from the specialist company about the building measure.

Work on rental properties is excluded from the funding programme because solely the taxpayer him/herself has to have been living in the property in the respective calendar year. However, the applicable expenses can be deducted as related costs by private landlords from their income from letting and leasing.

Please note: If energy-related measures are carried out at a multi-party apartment building then a certificate basically has to be issued for each individual residential unit. There is an exception if the refurbishment expense applies to the entire building.

4. Model certificate

The Federal Ministry of Finance published the appropriate model certificate in its circular from 31.3.2020 (case reference: IV C 1 – S 2296-c/20/10003 :001). This specifies the content, structure and order of the information from which the building and construction service company may not deviate. In addition, the issuers may also send the certificates in electronic form to the ordering parties.

LEGAL

RAin/StBin [German lawyer/tax consultant] Kathrin Deitmar

Patent law – The reform aimed at creating patents valid throughout the EU is close to completion

Up to now, patents have had to be separately registered in each individual EU country even though there is a European Patent Office. It was not competent to grant a patent that would be valid throughout the EU. In the Agreement on a Unified Patent Court (UPC) it was decided to establish an EU Patent Court at the EU level as well as an EU-wide patent. The formal transposition of this in Germany is still being delayed by a Federal Constitutional Court ruling, although there are no material objections.

1. Starting Situation

In Germany, the system of legal protection for industrial property is extensive. Numerous industrial property rights afford protection to business owners for their developments (e.g. patents, utility models and registered designs). Researching and developing new products is time consuming and expensive. That is why it is necessary to have extensive protection for these inventions in order to be able to accomplish the amortisation of the costs.

The most far-reaching industrial property right in Germany is the patent. This grants the patent owner the right to prohibit others from using the invention for 20 years or allows them to use it with permission by way of a licence. The scope of a patent registered in Germany is restricted to the territory of Germany. To take effect throughout the EU it is necessary to validate the patent in each member state. In some cases, there are different applicable processes to achieve recognition in the individual EU member states. For businesses that operate internationally this could entail considerable administrative effort and costs.

2. A European patent and the EU patent

There has indeed been a “European patent” based on the European Patent Convention of 1973 for several decades already. However, this is not a patent that is valid throughout the EU. Only the application and the process for granting the patent happen centrally at the European Patent Office. The current European Patent can take effect (like a national patent) only in those states where the respective national conditions have been satisfied. The Agreement on a Unified Patent Court that was concluded is a prerequisite for the creation of “EU patents” that will automatically be valid for the entire EU.

3. Advantages and aims of the European Patent Court

The establishment of a European patent court is intended to open up a comprehensive uniform and thus cost effective system of patent protection in Europe. The efficacy of the protection will be enhanced by the ability to enforce a ruling with effect for all member states. Patent owners will thus no longer have to initiate legal action in each individual signatory state and spend time and money engaging in several legal proceedings.

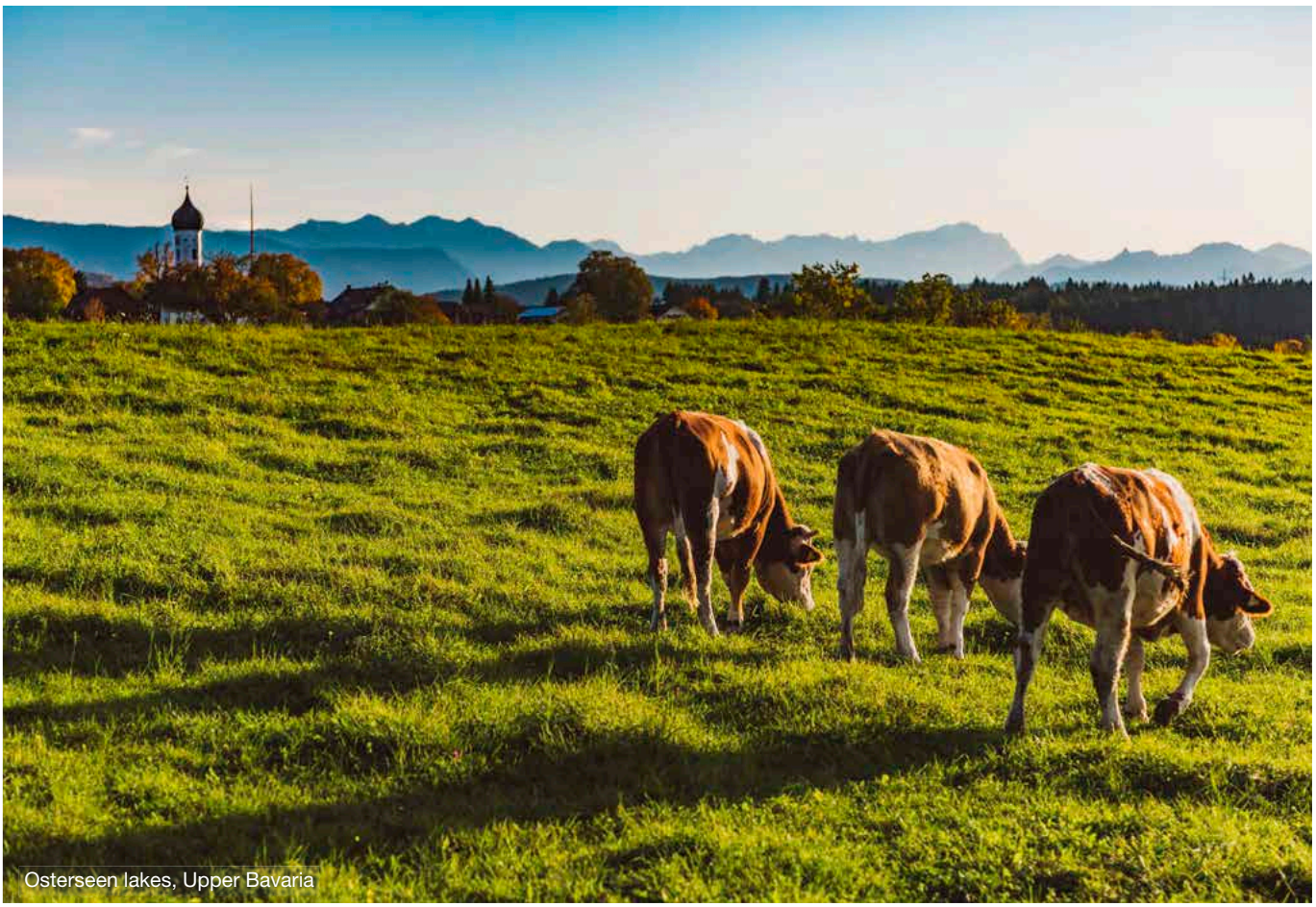
4. Procedural objections in the constitutional complaint

The obstacle to transposition in Germany is a Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) ruling from 13.2.2020 (case reference: 2 BvR 739/17) according to which the approval law for the Agreement on a Unified Patent Court was declared to be formally unconstitutional. The reason provided for this was that the Bundestag (lower house of German parliament) had not passed the approval law by the required two-thirds majority of its members.

In this respect, the Agreement can only come into force after the legislative process has again been properly conducted. By contrast, the BVerfG rejected the claim that there had been material violations of EU law.

Conclusion

The constitutional complaint has delayed the transposition of the Agreement on a Unified Patent Court by three years. The German government should now ensure that the Agreement is swiftly transposed.



Osterseen lakes, Upper Bavaria

Protection against dismissal for data protection officers

According to the Federal Labour Court (Bundesarbeitsgericht, BAG) a reduction in the workforce will result in the special protection against dismissal of the data protection officer – in the version of the regulations applicable up to 24.5.2018 – ceasing to apply without any requirement for the employer to revoke this appointment. After this date, ongoing special protection against dismissal will apply.

1. Threshold level for the dismissal of a data protection officer

As defined under German data protection law, businesses that employ above a certain number of staff who are involved with the processing of personal data have to appoint a data protection officer. The case that gave rise to the BAG decision was about the dismissal of a data protection officer in accordance with the old Federal Data Protection Act (threshold level of ten people). The employee took the view that the employer had not taken into account the employee's protection from dismissal. The employer did not share this view and in his argumentation explained that, at the time of the dismissal, only eight staff members were employed. Accordingly, there was in fact no need to appoint data protection officer.

Please note: The threshold level was raised in May 2018 from ten to 20 people. If the appointed data protection officer is an employee then s/he benefits from protection against dismissal during his/her term in office and once this expires from so-called ongoing protection against dismissal.

2. Ongoing special protection against dismissal?

According to the BAG ruling from 5.12.2019 (case reference: 2 AZR 223/19), the employee was not able to invoke special protection against dismissal given that only eight people were constantly engaged in the automated processing of personal data. If while working as a data protection officer the number of employees falls below the threshold level this would thus admittedly result in the officer's special protection against dismissal ceasing to apply without any requirement for the employer to revoke this appointment. However, if the data protection officer function eases to exist because the number of employees falls below the threshold level then the ongoing special protection against dismissal commences. The lower court will now have to consider whether or not such an ongoing special protection against dismissal existed in this case. If it did then the termination of employment would be unenforceable and the court would rule in favour of the employee.

IN BRIEF

Reduced VAT for continuous services – An addendum is necessary for agreements without a dynamic clause

If continuous services are separable services and these can be invoiced for shorter time periods then, according to the 2nd Coronavirus Tax-Related Assistance Act (please see the Key Issue section in this edition), from 1.7.2020 to 31.12.2020 this has to be done on the basis of the reduced VAT rate. That is why urgent action is now needed if a fixed VAT rate has been specified in a framework agreement.

Continuous services are services that extend over a longer period of time, e.g. rentals and maintenance. The transactions will be deemed to have been carried out on the day when the agreed performance period ends. If a dynamic clause is agreed with no separately disclosed VAT then no action is required, for example: "The monthly rent is € 10,000 plus VAT at the statutory rate." However, frequently there are agreements without a dynamic clause where the VAT has been separately disclosed, for example these state: "The monthly rent is € 10,000 plus € 1,900."

If in such cases (continuous) invoices have been issued then it would be sufficient to adjust the continuous invoice by stating the modified VAT rates for the respective period – insofar as there is no express written form requirement for an amendment to the agreement. If the agreement

is being used as an invoice document and if there is an underlying written form requirement for any adjustments to the agreement then an addendum to the agreement will be necessary. The modified VAT would have to be specified here for the respective time period.

In the Federal Ministry of Finance (*Bundesministerium der Finanzen*, BMF) draft letter of implementation with respect to the reduction in the VAT rates, from 26.6.2020, it states that where agreements for continuous services are regarded as invoices then for the purpose of adjusting the agreement it is sufficient to provide a supplementary document. However, in the draft letter the BMF does not deal with the question – discussed in practice – if and in what cases this addendum to the agreement has to be signed by both parties to the agreement.

Example of a supplementary agreement

"In addition to the rental agreement from ..., the parties hereby agree that during the period 1.7.2020 to 31.12.2020 the monthly rent payable shall be € 10,000 plus € 1,600 (= 16 % VAT). The total amount of rent will then be € 11,600. The rent set out in the rental agreement in the amount of € 10,000 + € 1,900 = € 11,900 shall not apply during this period of time."

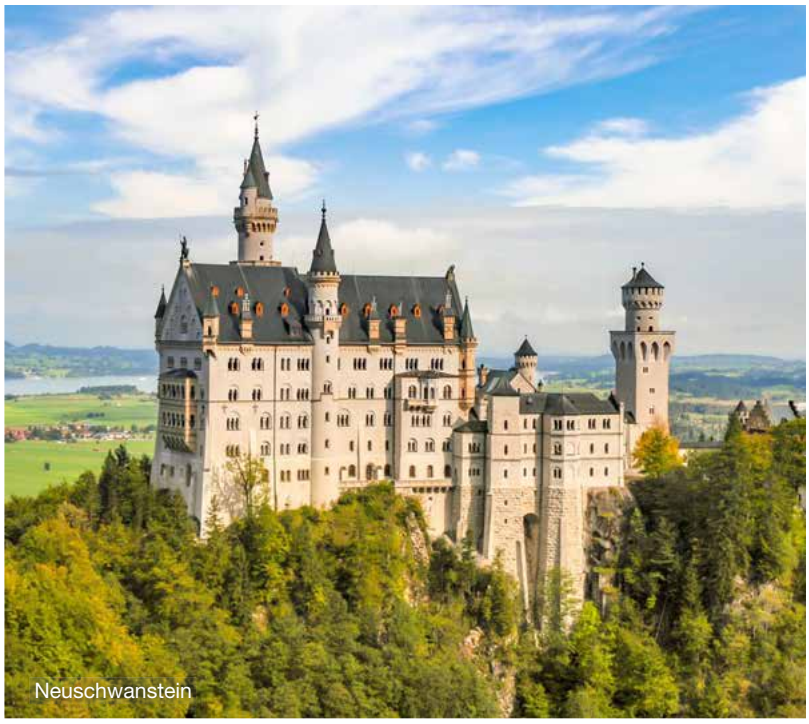
Intra-Community triangular transactions – Retroactive rectification in the case of invoice correction?

In the context of an intra-Community triangular transaction, an invoice correction has a retroactive effect back to the date on which the invoice was originally issued.

This was what the tax court in Rhineland-Palatinate decided in a ruling from 28.11.2019 (case reference: 6 K 1767/17). The case in question was about a delivery by an Italian company to a German GmbH [a limited company]. Some of the goods were sold on by the GmbH to a Slovak business and some of them were taken to a warehouse in the Czech Republic. All the concerned parties used the VAT identification numbers issued to them by the member states where they were based. The goods transport was undertaken on behalf of the GmbH. This company treated the transactions with the Slovak company as deliveries within the meaning of an intra-Community triangular transaction.

In the absence of proper invoices, the local tax office did not recognise the goods deliveries to Slovakia and the Czech Republic as being intra-Community triangular transactions. In this case, the GmbH had to tax an intra-Community purchase in Slovakia and in the Czech Republic.

The case before the tax court was partially successful. The goods deliveries to the Czech Republic did constitute an intra-Community purchase by the GmbH that was subject to VAT in that country. The tax court explained that the delivery by the Italian company to the GmbH had been the active delivery. In view of the classification of this movement of goods it cannot be considered as a intra-Community triangular transaction.


Neuschwanstein

The goods delivery to Slovakia was deemed to have been an intra-Community triangular transaction and already taxed in the relevant year given that the invoice had been corrected. The tax court was of the opinion that if there was an invoice that could be corrected then a proper invoice correction would have a retroactive effect to the date when the invoice was issued for the first time. Therefore, retroactive rectification would be possible and, in the view of the court, the intra-Community purchase was thus cancelled in the relevant year, too.

Please note: Permission was granted to lodge an appeal with the Federal Fiscal Court because the supreme court has not yet clarified the question of whether or not an invoice correction can result in a retroactive rectification in the event of a so-called unsuccessful triangular transaction.

Extended trade tax deduction – Letting of operating equipment along with a building is excluded

When business enterprises calculate their trading profit (the assessment base for trade tax) they are allowed to deduct a flat rate of 1.2% of the assessed value of their commercial real estate so that the real estate that forms part of their business assets is not simultaneously burdened by real estate tax and trade tax. Within the framework of the extended trade tax deduction, companies that exclusively manage their own real estate are able to make a deduction of that part of their trading profits that is attributable to the management and use of their own real estate.

According to the established supreme court case law, if a company also lets out operating equipment or other movable assets in addition to the real estate then such an activity would preclude an extended deduction. This shall also apply even if this happens to a negligible extent because, under German valuation law, operating equipment is not a part of real estate. According to a ruling by the Federal Fiscal Court (*Bundesfinanzhof*, BFH) from 28.11.2019 (case reference: III R 34/17), in the case in question the extended trade tax deduction was however not cancelled because, under the terms of the rental agreement for the real estate where the building was still to be constructed, all expenses related to the operating equipment were to be borne by the tenant, there was no intention to let out the operating equipment together with the real estate and the tenant would be the beneficial owner of the equipment. In the case in question, a negligible amount of costs for the operating equipment was not passed on to the tenant. The local tax office and the tax court considered this to be harmful from a tax point of view; by contrast, the BFH clarified that the letting of operating equipment along with a building can be effectively excluded under both civil and tax law.

Result: Therefore, beneficial ownership is generally decisive for an extended trade tax deduction. It will still be necessary to ensure that real estate and operating equipment are kept strictly separate, however, inadvertently failing to transfer operating equipment to the tenant is not harmful if there is an agreement where it is stipulated that the expenses for the operating equipment will generally be borne by the tenant.

Rights to information where a subletting request is refused

If tenants wish to sublet their flats they generally have to request permission from their landlords. As a general rule, the landlords should then also agree to the plan. However, the District Court in Munich recently ruled that landlords may withhold permission for subletting if certain personal information about the potential subtenants has not been provided.

A tenant who wished to sublet one room asked permission of his landlady and in doing so stated the name and address of the candidate. Apart from that, he merely stated that the person was a “housewife aged around 50 to 55 years with a fixed income” who would thus be able to pay the € 400 in rent per month that he was seeking. However, after the landlady refused to give her approval, the tenant demanded compensation for unjustly withholding her permission for the room in his flat to be sublet. In the case in question, the District Court, in its ruling from 11.12.2019 (case reference: 425 C 4118/19), found in favour of the landlady. She was allowed to refuse permission because she had not been provided with sufficient information about the subtenant. Landlords should generally be provided with the name, date of birth, last address and likewise the professional activity performed by the subtenant.

Conclusion: Landlords may thus withhold permission for subletting if they are not given important personal information about the tenant. At all events, this should include the professional activity.

AND FINALLY...

"Something that potential investors must understand: we do not chase revenue as the primary driver of our business. Shopify has been about empowering merchants since it was founded, and we have always prioritized long-term value over short-term revenue opportunities. We don't see this changing."

Tobias Lütke, born 16.7.1980, German founder and CEO of Shopify, self-made billionaire. Shopify is an e-commerce software that small and medium-sized retailers can use by themselves to set up online stores.

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