PKF

Newsletter

Key Issue:
The reporting deadline for cross-border tax arrangements under DAC6 is 31.8.2020

08|20

Dear Readers,

Our August edition is likewise characterised by various issues related to the coronavirus. Our main focus here is on legal issues. First of all, however, our Key Issue in the Tax section is once again about the so-called **DAC6 Directive**. Only the German federal government and Finland have not availed themselves of the EU option of postponing the reporting deadlines on account of the coronavirus. Consequently, **cross-border arrangements** set up since the end of June 2018 will have to be reported **by the end August**, at the latest. We have summarised for you the most important key points, including the hallmarks according to which a report will have to be made.

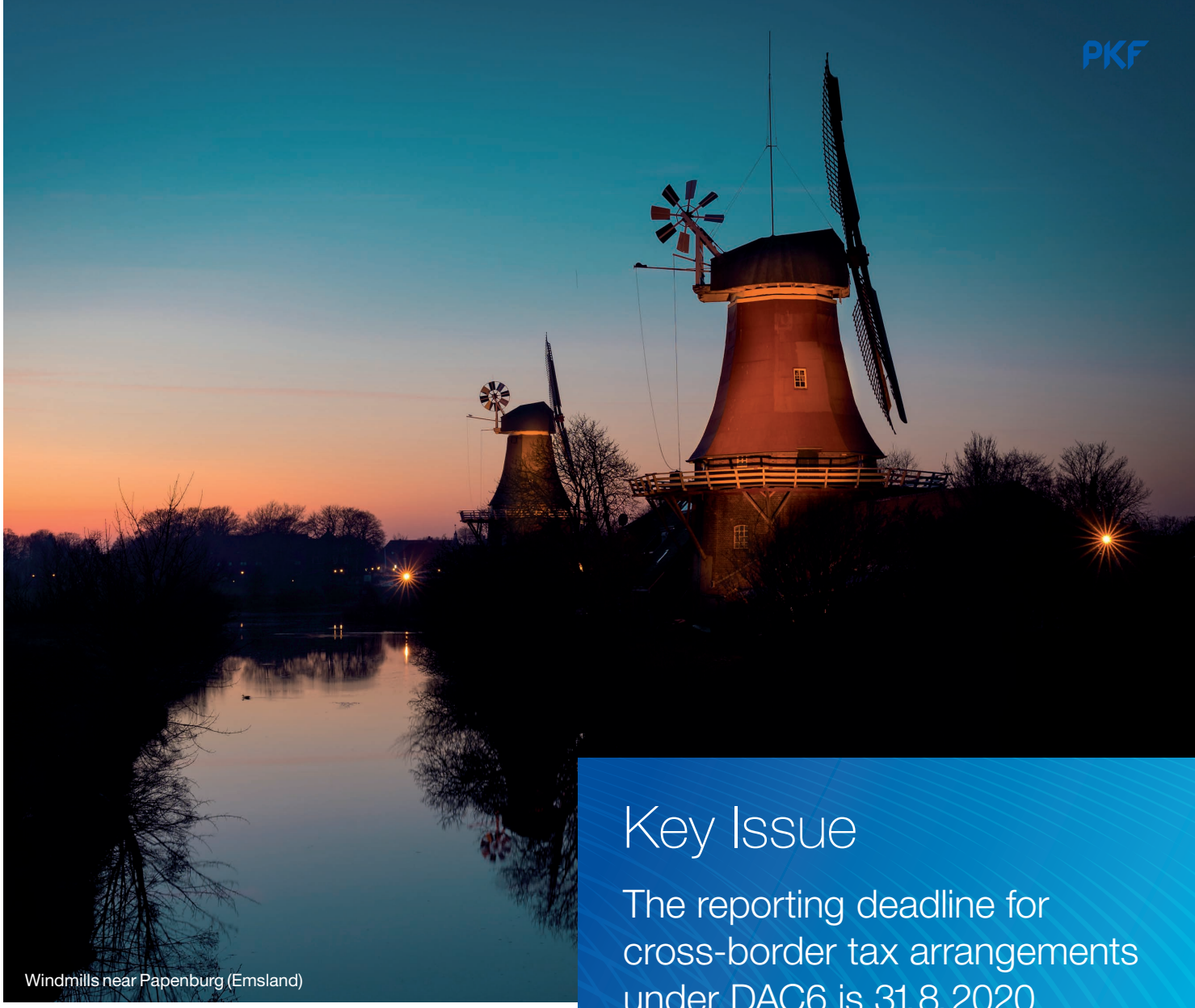
In the second contribution, we go into detail about the possibilities of how, thanks to special coronavirus-related rules, an **anticipated loss for 2020** may already be used now to **improve liquidity**. Next we present the explanations of the fiscal authority with respect to the **special depreciation under Section 7b of the German Income Tax Act** that can be claimed for the acquisition and construction costs for subsidised living space. The last report in the Tax section is an encouraging one; after long hesitation, the fiscal authority has adopted the modified German Federal Fiscal Court ruling according to which an invoice that entitles the recipient to deduct input tax does not require an address where the operational activities take place, but instead one where **the issuer can be contacted by post** may be sufficient.

We start off the Legal section with a discussion of the overhaul of **contracts for work and services as well as subcontractor agreements**. As a result of the COVID-19 outbreaks in the meat industry there has been public focus on these dubious agreements and they have induced the lawmakers to make changes. Subsequently we discuss the **protection of data** that are collected on account of the coronavirus in the course of the hygiene measures, in particular, in restaurants and the food service industry. Here, too, data has to be collected discretely and systematic data destruction has to be ensured. The third report deals with the issue of whether or not and under what conditions **business interruption insurance** coverage would take effect if business activity were to be interrupted because of coronavirus. Here, it is particularly important whether or not the (un)insured cases were agreed on a dynamic or definitive basis.

We continue the coronavirus-related photo series with a view to providing inspiration for holiday destinations in Germany with impressions from the regions of Westphalia and Lower Saxony.

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

Your Team at PKF



Windmills near Papenburg (Emsland)

Key Issue

The reporting deadline for cross-border tax arrangements under DAC6 is 31.8.2020

Contents

TAX

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

Please take note – The reporting deadline for cross-border tax arrangements under DAC6 is 31.8.2020

Since 1.7.2020, on the basis of an EU Directive ("Directive on Administrative Cooperation – DAC 6"), companies and their advisers have been obliged to disclose cross-border tax arrangements. This means that all legacy arrangements (from 25.6.2018 up to 30.6.2020) have to be disclosed already by 31.8.2020. Arrangements that have been newly introduced since 1.7.2020 generally have to be disclosed within 30 days.

1. Consequences of violating the disclosure requirements

The EU Council admittedly gave member states the option of postponing the planned deadlines for disclosures by six months. Nevertheless, Germany did not take up this option. Therefore, for new cases here you should bear in mind that violations of the disclosure requirements may be punished by the imposition of a fine of up to € 25,000. While in Germany breaches of reporting deadlines for legacy cases are not punishable by a fine, nevertheless, breaches of the respective disclosure requirements in other EU member states may incur penalties.

Please note: The ceilings for fines in other EU states, in some cases, are significantly higher and can reach seven-figure sums (e.g. Poland).

2. Conditions for arrangements that are subject to disclosure requirements

It is easier to describe how to check whether or not transactions are cross-border arrangements by answering the following questions:

» Is the tax involved one of the ones to which the EU Administrative Assistance Act applies? Essentially these are income tax, corporation tax, trade tax, real estate transfer tax and inheritance tax.

» Is there a tax arrangement? That would be the case if an actual or legal event has been modified because of the tax implications – a structure, a process or a situation has been deliberately created for the user that results in implications under tax law that would not otherwise have arisen.

» Who is involved in the tax arrangement? The following should be considered: users, parties involved and so-called intermediaries (normally consultants).

» Is there a cross-border dimension? The precondition is that one EU member state and at least one other EU state or third country are involved. In the course of this, German tax revenues may not be affected. What matters is whether or not the intermediary or the user has a connection to Germany.

» Is a so-called hallmark (characteristic) within the meaning of Section 138d(2) clause 1 no. 3 of the Fiscal Code *[Abgabenordnung, AO]* present (cf. Fig.1)?
- If a conditional hallmark pursuant to Section 138e(1) AO is present – reportable if a tax advantage exists.
- If an unconditional hallmark pursuant to Section 138e(2) AO is present – reportable without any further checking.

More information on this can be found in an unpublished Federal Ministry of Finance *[Bundesministerium der Finanzen, BMF]* circular from 15.6.2020. In an annex attached to this circular there is a so-called "white list", which had not yet been included in the previously published BMF circular from 2.3.2020. There are case groups mentioned on this white list that are exempted from the disclosure requirement. Examples are the exercise of options or the creation of a single entity for profit tax purposes. It is striking that the list, with altogether 16 points, scarcely has an international point of reference but, instead, predominantly applies to the area of tax related to personal income or inheritance. This list thus provides little further help so that, ultimately, you will have to go through the above checks to determine whether or not hallmarks pursuant to Section 138d AO are present.

Please note: Checking to see if the relevant hallmark is present and performing a so-called "main benefit test" in the event of conditional hallmarks can be very work-intensive in individual cases. If a cross-border arrangement does indeed exist then using an officially prescribed set of data the disclosure has to be made to the Federal Central Tax Office *[Bundeszentralamt für Steuern, BZSt]* via the BZSt online portal (BOP).

Recommendation

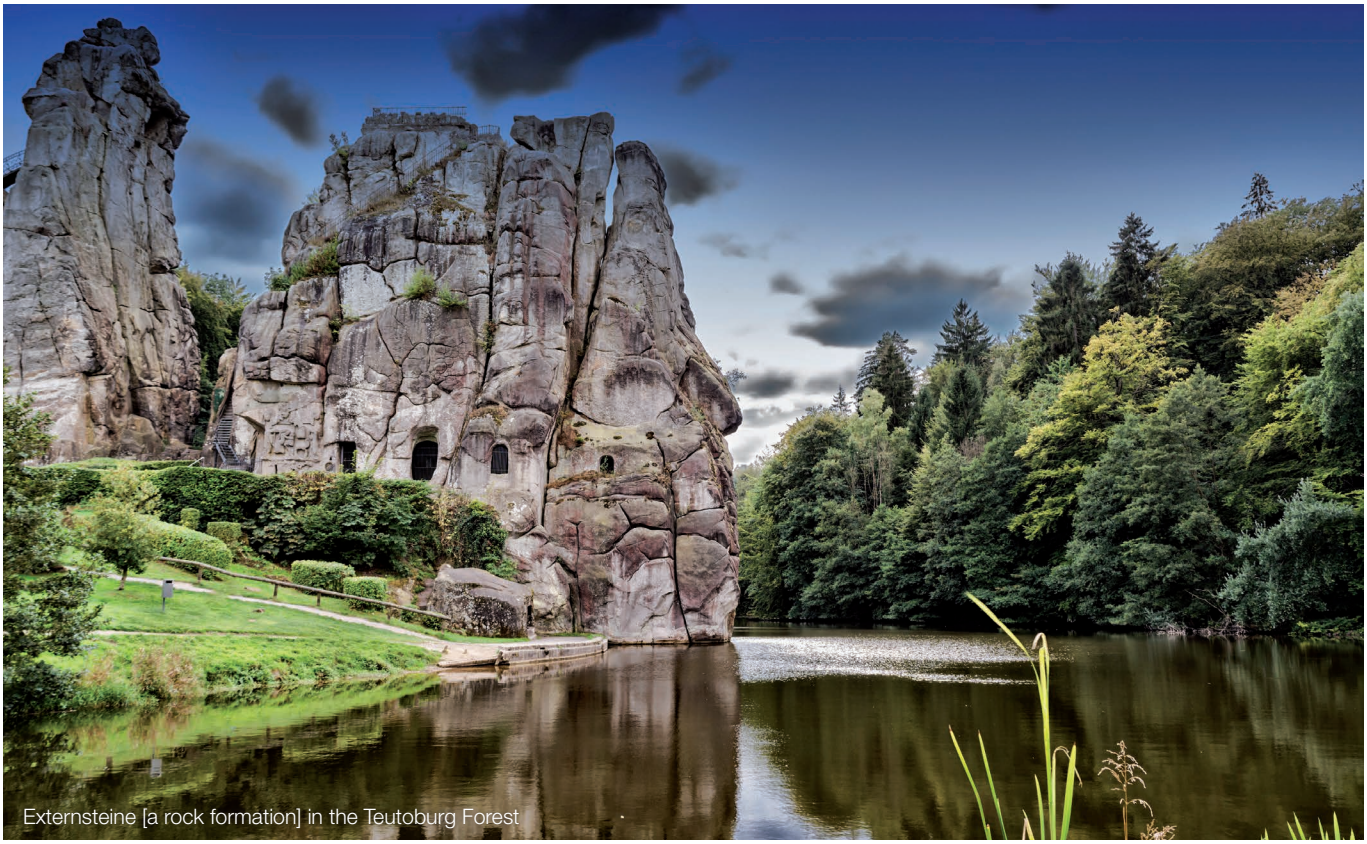
If you believe that a cross-border tax arrangement might have taken place at your company since 25.8.2018 and that the reporting process in this respect has not yet been started then please contact your PKF consultant as soon as possible.

Fig. 1: DAC6 hallmarks pursuant to Section 138d – Section138k AO

A. General hallmarks Sec. 138e(1) no.1 a), b), no. 2 AO	B. Specific hallmarks Sec. 138e(1) no.3 a)-c) AO	C.1 Specific hallmarks in conjunction with cross-border transactions Sec 138e(1) no.3 d)-e) AO	C.2 Specific hallmarks in conjunction with cross-border transactions Sec. 138e(2) no.1 a)-c) AO	D. Specific hallmarks – financial accounts Sec. 138e(2) no. 2 a)-f), no. 3 a)-b) AO	E. Specific hallmarks – transfer pricing Sec. 138e(2) no. 4 a)-c) AO
Arrangement with **qualified non-disclosure clause** with regard to the tax advantage	Arrangement with targeted acquisition of a **loss-making enterprise**	Cross-border payment between associated enterprises, where ...	Cross-border payment between associated enterprises, where ...	Arrangement that involves undermining the automatic exchange of information about financial accounts	Arrangement that involves the use of unilateral safe harbour rules
Arrangement with **qualified contingency fee agreement** with regard to the tax advantage	Arrangement for converting income into **untaxed income or income taxed at a low rate**	» the recipient is taxed at a corporation tax rate of 0% or almost 0% » payments at the level of the recipient are fully tax exempt » payments at the level of the recipient are subject to a preferential tax regime	» the recipient is not based in any tax jurisdiction » the recipient is based in a jurisdiction that is on the EU/OECD list of non-cooperative jurisdictions for tax purposes (the so-called "black-list")	Arrangement where the legal or beneficial ownership chains are opaque	Arrangement involving the transfer of hard-to-value intangible assets
Arrangement with **standard documentation/ structure**	Arrangement with circular transactions **("round-tripping")**		Arrangements where in more than one tax jurisdiction... » it is possible to claim depreciation for the same asset » exemption from double taxation takes place for the same assets » a transfer or assignment takes place of assets assessed differently for tax purposes with respect to the valuation		Transfer of functions/ risks and/ or assets with EBIT decrease for the transferor of >50%

Additionally required

"Main benefit" test as defined in Sec. 138d(2) no. 3 a) AO


Externsteine [a rock formation] in the Teutoburg Forest

StBin [German tax consultant] Sabine Rössler

Amount of loss carry-back to 2019 has been increased

The July edition of the PKF newsletter already included an overview of the possibilities for carrying back income/corporation tax losses from 2020 into 2019 in accordance with the provisions of the 2nd German Coronavirus Tax-Related Assistance Act. In this edition we go into detail about the various options and the respective procedures.

1. Increased amount of loss carry-back under Section 10d of the German Income Tax Act

The loss carry-backs previously deductible under Section 10d of the Income Tax Act *[Einkommensteuergesetz, EStG]* were raised in the 2nd Tax-Related Assistance Act for the assessment periods 2020 and 2021 to € 5,000,000 in the case of corporations and to € 5,000,000/10,000,000 in the case of natural persons filing separately and jointly respectively; the carry-back possibilities have thus been considerably expanded.

2. Prepayments for 2020 reduced to zero

As “first aid” to safeguard liquidity, besides the many tax deferrals that have been granted, the fiscal authority has provided for an application to reduce prepayments of profit tax for 2020 to € 0.00. With this companies demonstrate that they are not anticipating any taxable income for 2020.

3. Provisional loss carry-back as a new instrument

3.1 Starting situation

Under the hitherto applicable law, when the tax assessment (assessment notice) is being produced for the loss year, then deducting the amount of the loss carry-back from the taxable prior year profit results in a tax refund for the previous year. In principle, businesses could thus expect a refund from such loss carry-backs from 2020 into the 2019 assessment period, at the earliest, in spring 2021.

The Tax-Related Assistance Act brings forward the date of the refund even though the loss year of 2020 is not even over yet. To this end, an additional instrument, namely, the “provisional loss carry-back” has been made available for income tax and corporation tax (not however for trade tax).

Please note: The conditions for a provisional loss carry-back no longer include – unlike in the original relevant Federal Ministry of Finance circular from 24.4.2020 – a direct and material burden on the taxpayer due to the coronavirus crisis.

3.2 Implications

(1) Retroactive reduction in prepayments for 2019 – Through a "provisional loss carry-back" it is possible to achieve liquidity relief. An application can be made to reduce the overall amount of income for 2019, which is used as the basis to calculate the prepayments for 2019, either by a flat rate of 30% or by a "provisional loss carry-back" for 2020 of a higher amount for which proof would have to be provided. Prepayments for 2019 can still be modified up to 31.3.2021.

(2) Provisional loss carry-back in the tax return for 2019 – Upon application, when the tax assessment for 2019 is being produced, the overall amount of income for 2019 can either be reduced by a flat rate of 30% or by a higher amount of "provisional loss carry-back" from 2020 for which proof has to be provided. This application can be made in the tax return for 2019 or even separately in the course of the assessment procedure.

(3) Amendment of tax assessment notices for 2019 that have already been issued – Up to 1.8.2020, lawmakers were allowing retroactive applications for the deduction of a "provisional loss carry-back" if tax assessment notices for 2019 had already been issued and had become definitive prior to 15.7.2020.

(4) Deferral for 2019 – Additional payments for 2019 – e.g. if, in the course of the prepayment procedure, it had been possible to demonstrate that there was a (higher) provisional loss carry-back, but within the framework of the tax assessment the (lower) flat rate provisional loss carry-back was claimed – will be deferred, upon application, by up to one month after the assessment of the tax for 2020.

Outlook

The mitigating measures described above will end once the tax assessment notice for 2020 has been issued. The "provisional loss carry-back" will then, if applicable, be replaced by the actual one – in this respect the previous legal situation remains unchanged here.

StBin [German tax consultant] Sabine Rössler

New special depreciation for rental housing construction

In many regions of Germany, the scarcity of affordable housing is becoming an ever more urgent issue. In 2019, a new Section 7b of the Income Tax Act *[Einkommensteuergesetz, EStG]* introduced special depreciation for the acquisition or construction of new rented dwellings and, still in the same year, this was extended to the 2018 assessment period. In a circular, the Federal Ministry of Finance *[Bundesministerium der Finanzen, BMF]* has explained details on the application of Section 7b.

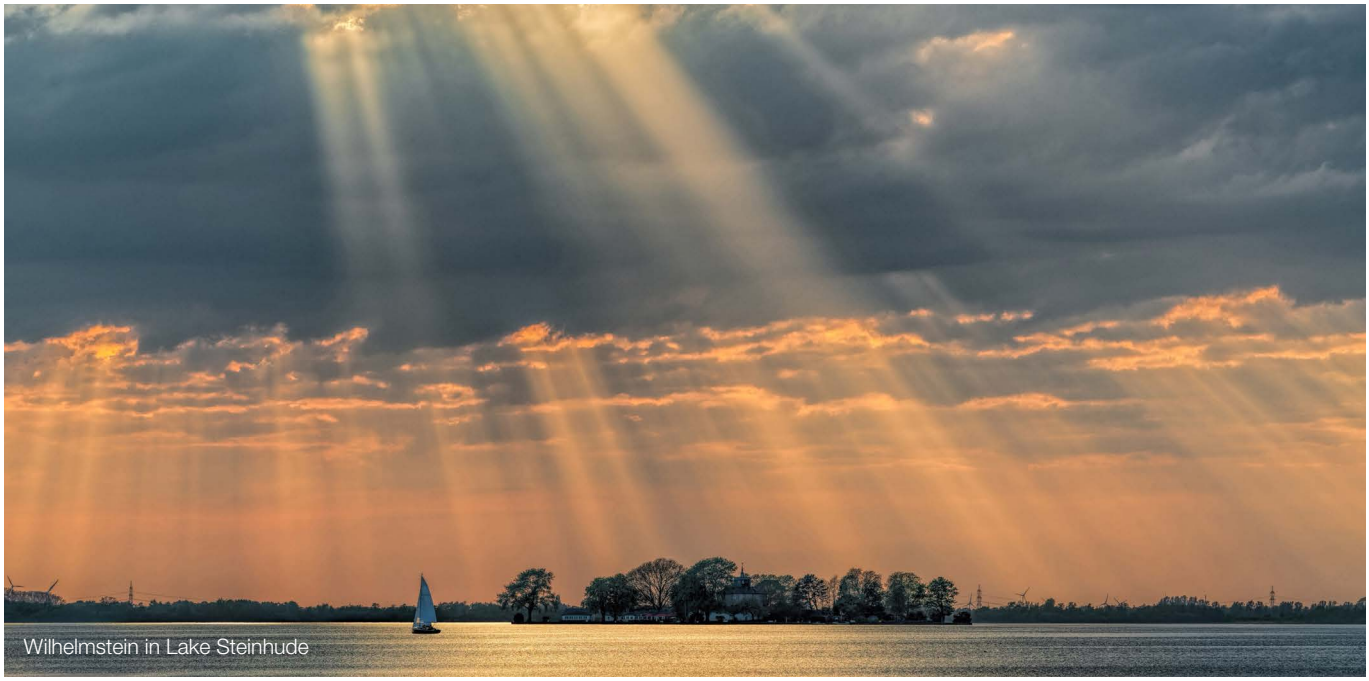
1. Subject matter of the amendment

Subsidies will be provided for new dwellings for which the applications for building permits were filed between 31.8.2018 and 1.1.2022. Under Section 7b EStG, in the year of acquisition or construction and in the following three years it will be possible to make use of special depreciation of up to 5% of the assessment base in addition to the depreciation under Section 7(4) EStG. The special depreciation is applicable to the acquisition or construction of new dwellings in Germany, foreign countries within the EU and in other countries that permit the conditions described here to be verified.

2. Upper limit for construction costs

The upper limit for construction costs is € 3,000 per sq m of living area (Section 7b(2) no. 2 EStG). Subsequent acquisition or construction costs that arise in the first three years following the year of acquisition likewise have to be included. If the construction costs per sq m of living area turn out to be higher then the subsidy will cease to apply entirely.

Please note: The assessment base for special depreciation is lower; it is limited to a maximum of € 2,000 per sq m of living area.


Wilhelmstein in Lake Steinhude

3. Usage solely for residential purposes

The dwelling has to be intended for rental to third parties in return for payment. It can be rented out privately or commercially. Self-usage or making the dwellings available for use for no consideration or at a large discount would make them ineligible for special depreciation.

A building can be used for residential purposes if it is intended for this and provides people with appropriate accommodation for a permanent place of residence. Therefore, holiday home rentals, boarding houses and the like cannot be used for residential purposes.

Dwellings that are made available for use by employees can benefit from the concession (e.g. dwellings for caretakers, specialist staff, for members of a company fire brigade and for other persons in the event that, for operational reasons, they have to be constantly on standby directly on the business/factory premises).

4. A 10-year period has to be observed

The dwelling that benefits from the concession has to be used for residential purposes, as described, in the year of acquisition or construction and in the following nine years. The claimant of the special depreciation allowance has to provide proof every year that the requirements are being met and, indeed, even if the building is sold within this time period. In such a case, the beneficiary would have to provide proof that the purchaser is renting out the dwelling that benefits from the concession to a third party for residential purposes.

5. Reversal of special depreciation

The special depreciation will have to be reversed if, during the period of mandatory designated use (10 years), the dwelling or building with dwellings that benefits from the concession is sold and the sale proceeds are not taxable. This could be the case, e.g., property held in private assets for a long time into which a dwelling that benefits from the concession has been otherwise integrated.

Invoice address – Being able to contact issuers of invoices by post is sufficient

In a recent circular, the Federal Ministry of Finance created the long-anticipated legal certainty for recipients of invoices. The circular states that a supplying company does not have to perform its delivery or service from the address on the sales invoice. Instead, it is sufficient if the supplying company can be contacted at this address.

1. Modified German Federal Fiscal Court ruling on address details on invoices

Already in 2018, the Federal Fiscal Court *[Bundesfinanzhof, BFH]* ruled that an invoice that entitles the recipient to deduct input tax does not require the commercial activities of the supplying company to be carried out at the

address provided on the invoice issued by it (cf. rulings from 13.6 and 21.6.2018, case references: XI R 20/14 and V R 25/15, previous report on this in PKF newsletter 1/2019). According to the rulings, any type of address – including a so-called letterbox address – is sufficient provided that the supplying company can be contacted at this address. In its rulings, with reference to the ECJ (ruling from 15.11.2017, case: C-374/16), the BFH explained that the identity of the issuer of the invoice and of the supplying company were necessary for input tax deduction. What matters here with respect to checking the criterion of contactability is the date of the issue of the invoice, although the burden of adducing evidence for contactability by post is on the recipient.

It is also worth noting the somewhat relativizing BFH rulings from 5.12.2018 (case reference: XI R22/14) and 14.2.2019 (case reference: V R 47/16). The date when the invoice is issued also gives rise to the requirement for the party wishing to deduct the input tax to obtain documentary evidence of the issuer of the invoice being contactable by post. Furthermore, the issuer of the invoice and the supplying company have to be identical.

2. BMF circular has created legal certainty in practice

The fiscal authority, in the BMF circular from 13.7.2020, just recently responded to the BFH ruling on the identity of the issuer of the invoice and the supplying company as well as on the invoice element of a complete address for the supplying company. The principles set out by the BFH have been adopted by the BMF in Section 14.5(2) and Section 15.2a(2) of the ordinance on the application of VAT *[Umsatzsteueranwendungserlass, UStAE]*. These should be applied to all open cases.

Please note

The adoption of the BFH ruling by the fiscal authority has effectively resulted in a reversal of the burden of proof. In the case of a subsequent review, proving that the supplying company could not be contacted at the address provided on the invoice would thus lie with the fiscal authority.

LEGAL

RA/StB [German lawyer/tax consultant] Frank Moormann

Contracts for work and services/subcontractor agreements in the political spotlight

The outsourcing of processes to external companies has come to the fore of politics more strongly once again having been sparked off by the coronavirus cases in meat production plants. Lawmakers are planning to completely outlaw such models for the meat industry from 1.1.2021. In view of these current developments we have provided an overview here of the current legal situation and we have outlined the changes that can be expected.

1. The background to the problem

Essentially, the issue is about the allocation and outsourcing of responsibilities for people who ultimately work in a factory, particularly with respect to working conditions and compliance with legal minimum standards. The involvement of subcontractors engaged to carry out specific stages of production (e.g.: slaughtering, dismembering and processing) means that responsibilities are delegated away from the actual company (slaughterhouse operator) and become fragmented; accordingly, this then makes it more difficult to monitor compliance with regulations.

2. Legal Framework

Engaging subcontractors to fulfil specific operational functions is generally permitted by law and is common practice in a wide variety of industries. This ranges from contracts for specific project phases being awarded by general contractors in the construction sector through to the outsourcing of IT services and subcontracting the running of a company's canteen. Frequently, this is a way to meet the increased requirements with respect to the specialisation of operating processes in a more flexible manner.

Whether or not such agreements actually constitute contracts for works and services within the meaning of the German Civil Code – where there is a commitment to exe-

cute works, thus to provide a specific outcome – does not ultimately play a decisive role. It is likewise possible to engage subcontractors on the basis of service agreements or similar types of agreements where, essentially, there is no undertaking to provide an outcome but instead to carry out an activity.

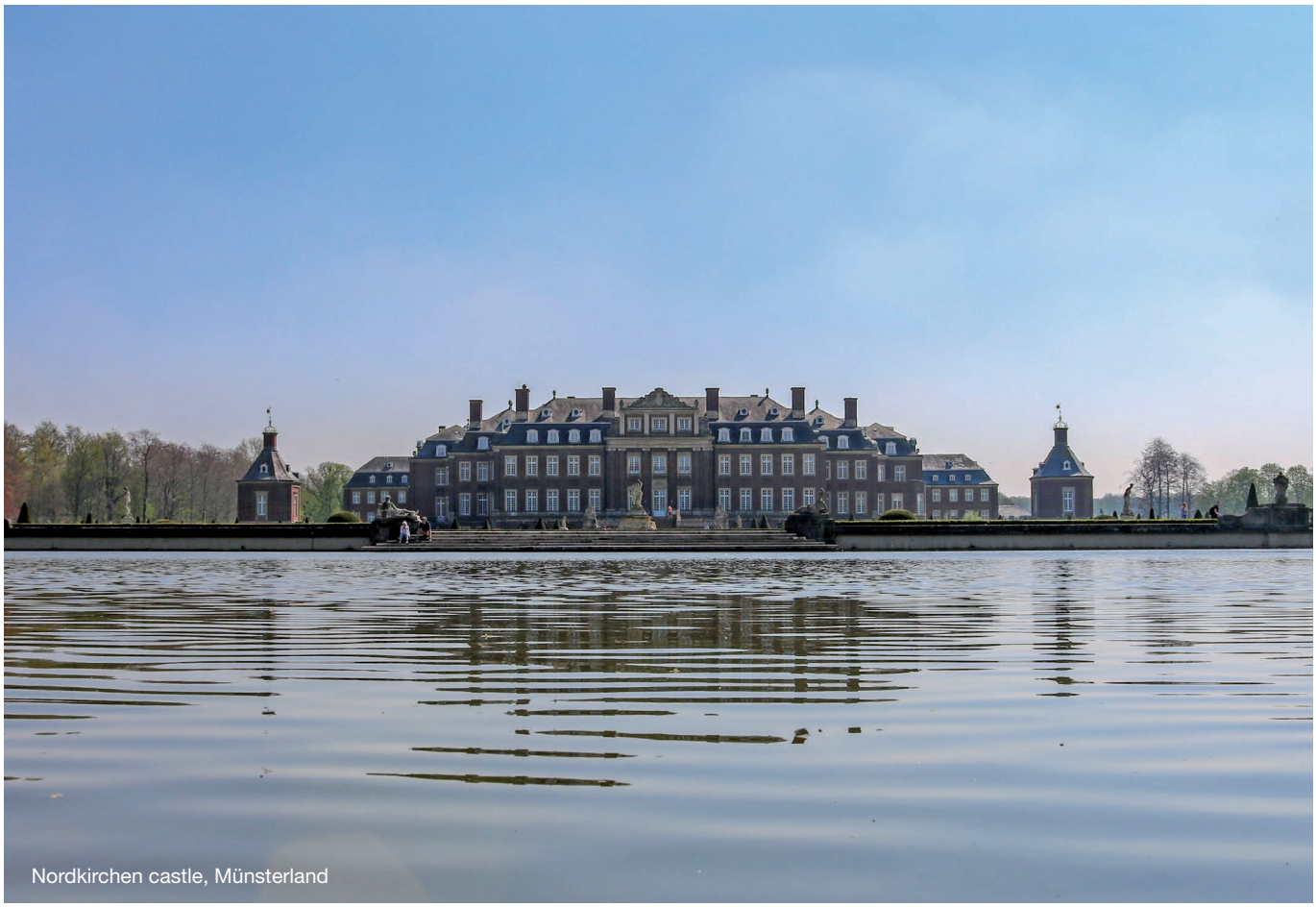
Please note: Admittedly, the term "contract for work and services" is rather more suitable for disguising that the actual undertaking is to perform work and that, in fact, temporary workers are being illegally hired out.

3. The hiring out of temporary workers – distinguishing features

The hiring out of temporary workers ("subcontracted labour") is subject to the special rules of the German Temporary Employment Act according to which, in particular, it is necessary for the staffing agency to obtain authorisation from the competent office of the German Federal Employment Agency. If this has not been provided then the contractual relationships between the staffing agency and the hiring company would be rendered null and void and, according to German law, it would be assumed that there is an employment relationship between the hiring company and the subcontracted worker; this would come with all the usual tax, social security and employment law consequences.

The designation of the contract does not matter here. Even an agreement that is termed a contract for work and services, according to factual circumstances, can be based on an (illegal) hiring out of workers. It is here that we start getting into a grey area and it is frequently difficult to draw a clear dividing line. The questions that need to be asked, among others, are:

- Who plans and organises the workflows – the client or the contractor?
- Does the contractor's organisational business structure make it even possible for the contractor to fulfil the contract for work and services autonomously?
- Does the contractor bear the commercial responsibility for a specific outcome?
- Is the contractor exposed to warranty claims in this regard?
- Have the subcontracted personnel been integrated into the client's operational processes or operational structures?
- Who is able to exercise the authority to issue instructions to the subcontracted personnel?
- Who supervises and monitors attendance and work performance?



Nordkirchen castle, Münsterland

» Who provides the requisite work equipment (tools, devices)?

The specific criteria may be weighted differently depending on the individual case and the court so that, in many cases, there will still be legal uncertainty.

Recommendation: At any rate, for ambiguous cases we would recommend commissioning an assessment by an expert consultant. Please do not hesitate to contact your PKF consultant.

4. Possible changes to the law

Lawmakers have likewise known about the current legal uncertainties and the grey areas for a long time, although no appropriate solutions have yet been found. In 2017 already, the "Act to secure employee rights in the meat industry" was passed. The introduction of a type of general contractor liability was aimed at addressing the improper use of subcontractors. However, the new rules would appear not to have had the desired effect.

Following the recent public debate sparked by the conditions in individual factories, the deployment of subcontractors will now generally be declared to be illegal, in the meat industry at any rate, starting from 1.1.2021. As a result, even officially hiring out workers (with authorisation) will no longer be an option.

Outlook

Apparently, the goal is to achieve direct permanent employment with the respective slaughterhouse operators for all those working in the meat industry. Only micro-entities with up to 30 employees would be exempted. Furthermore, the draft law to this end developed by the Federal Ministry of Labour requires there to be a considerably greater number of checks. It remains to be seen whether the desired goals will be achieved in this way or whether new grey areas will open up.

RA [German lawyer] Andy Weichler

Data-protection-compliant documentation of customer data during the coronavirus crisis

Currently, a great number of business people are required to collect the contact data of their customers. The aim of this is to ensure that in the event of a COVID-19 disease outbreak it would be possible to reliably trace potential contacts. The collection and processing of these customer data fall within the scope of data protection laws. The example of the applicable provisions in Lower Saxony is intended to illustrate what data has to be collected and how to prevent potential privacy breaches.

1. Customer data collection

When collecting customer data you already have to pay attention to some particularities so that the collection of this data can be done in a way that is compliant with data protection requirements.

» If lists are used to collect data for a number of customers then the next customer will see the respective contact data for the prior customer. To prevent such a privacy breach, the customer data can be recorded on separate pages in each case.

» Collecting data by means of a continuous list is only allowed if the prior customer's respective details are covered up.

» It should also be noted that not all kinds of data may be collected but solely those mentioned in the coronavirus regulation. These are: surname, first name, full address, a telephone number as well as the time of entry into and departure from the establishment. The coronavirus regulation in Lower Saxony, at any rate, does not include recording the e-mail address as well.

Recommendations: Customer data should be collected anew each day, since this is the only way that defined deletion deadlines can be complied with. Furthermore, when data is collected, under Art. 13 GDPR it is necessary to provide customers with information about this. To this end, a notice with data protection information should be displayed at the point where the contact data are collected.

2. Processing of data

As regards the processing of data, it should be noted, in particular, that data may only be processed for the pur-

pose intended in the respective coronavirus regulation. This is basically for distribution to the competent public health authority in order to prevent the further spread of the virus. Under no circumstances may the collected data be used for promotional purposes.

If a public health authority requests the data then you should bear in mind that they have to be submitted via a secure transmission channel.

Please note: Sending the data via a simple e-mail is not adequate in this case. It is recommended that the data be sent by post or by e-mail with end-to-end encryption.

3. Erasure of data

The contact data should be retained for at least three weeks. After a maximum of one month the contact data should be erased in a way that is compliant with data protection requirements. The lists used to collect the data should at least be shredded in a data document shredder.

If the contact data have been digitally collected then the erasure has to be carried out securely. Erasure via the wastebasket function is not adequate in this case. If the structure created here for managing the contact data is not adequate then this could quickly lead to a GDPR violation, which could result in a fine.

Conclusion

Since it must be assumed that the requirement to collect contact data will continue to be applicable, we strongly recommend taking an in-depth look into how to collect data in a manner that conforms to the data protection provisions. To this end, for example, the relevant web page of the federal state of Lower Saxony would be helpful – see the link: https://lfd.niedersachsen.de/startseite/themen/wirtschaft/corona-kontakdaten-187846.html.

RA [German lawyer] Sven Hoischen

Does a coronavirus-induced business closure constitute the occurrence of an insured event?

If the general terms and conditions of insurance (GTCI) make a blanket reference to Sections 6 and 7 of the Infectious Diseases Protection Act *[Infektionsschutzgesetzes, IfSG]* then the GTCI will cover the SARS-associated coronavirus pathogens that did not yet fall within the scope of the law when the insurance cover was taken out. This was the conclusion of Mannheim's Regional Court *[Landesgericht, LG]* in its ruling from 29.4.2020 (case reference: 11 O 66/20). Moreover, the court also commented on what constitutes a business closure.

1. The terms and conditions of insurance required interpretation in the case of the closure of a hotel business

An hotelier took legal action, by way of temporary legal protection, against an insurance company for payment arising from the business closure agreement that had been concluded. It was the view of the Mannheim LG that the prerequisites for proceedings for temporary legal protection were not present. The court did however clarify that, in the course of ordinary court proceedings, it would have ordered the insurance company to make the payment. The insurance company's terms and conditions of insurance made a blanket reference to the diseases and pathogens mentioned by name in Sec. 6 and 7 IfSG. It was the opinion of the court that this reference required interpretation. The benchmark for this interpretation was the level of understanding of an average policyholder with no special knowledge of insurance law that arises as a result of a reasonable assessment, attentive review and consideration of the discernible interrelationship of the respective contract clauses. Any remaining doubts will be to the detriment of the user.

In due consideration of this benchmark, the LG viewed the respective clause as a dynamic reference. Such a dynamic reference would include all reportable diseases and pathogens – even in the case of subsequent amendments to the legislation. Indeed, the terms and conditions of insurance did not contain a table with a list of the various pathogens or diseases. In this respect, the coronavirus may constitute grounds for a business closure by means of the blanket clause contained in the IfSG that is applicable to other diseases that have not been expressly mentioned.

Furthermore, the Mannheim LG assumed that the impact from the restriction on hotel operations that occurred due

to the ban on tourist overnight stays was effectively like that of a business closure. Such a de facto business closure would constitute an insured business closure under the terms and conditions. In this respect, an official order to close was not required.

2. Classification of the ruling

2.1 Partial operating ban as a business closure

First of all, there is a need to clarify if the restrictions imposed by way of a general directive or an ordinance that apply to an essential part of the business operations and, in this respect, definitely enable the (uneconomic) continuation of operations would, in principle, be likely to cause an insured event. It is not possible to give a general answer to this question but instead case specific responses have to be provided. From the relevant perspective of an average policyholder, a ban on an essential part of the business operations that economically is tantamount to a de facto business closure would constitute an insured business closure. The definition of business interruption in the insurance provisions makes a possible interpretation in favour of the insurance company more difficult.

2.2 Lack of legally designated events

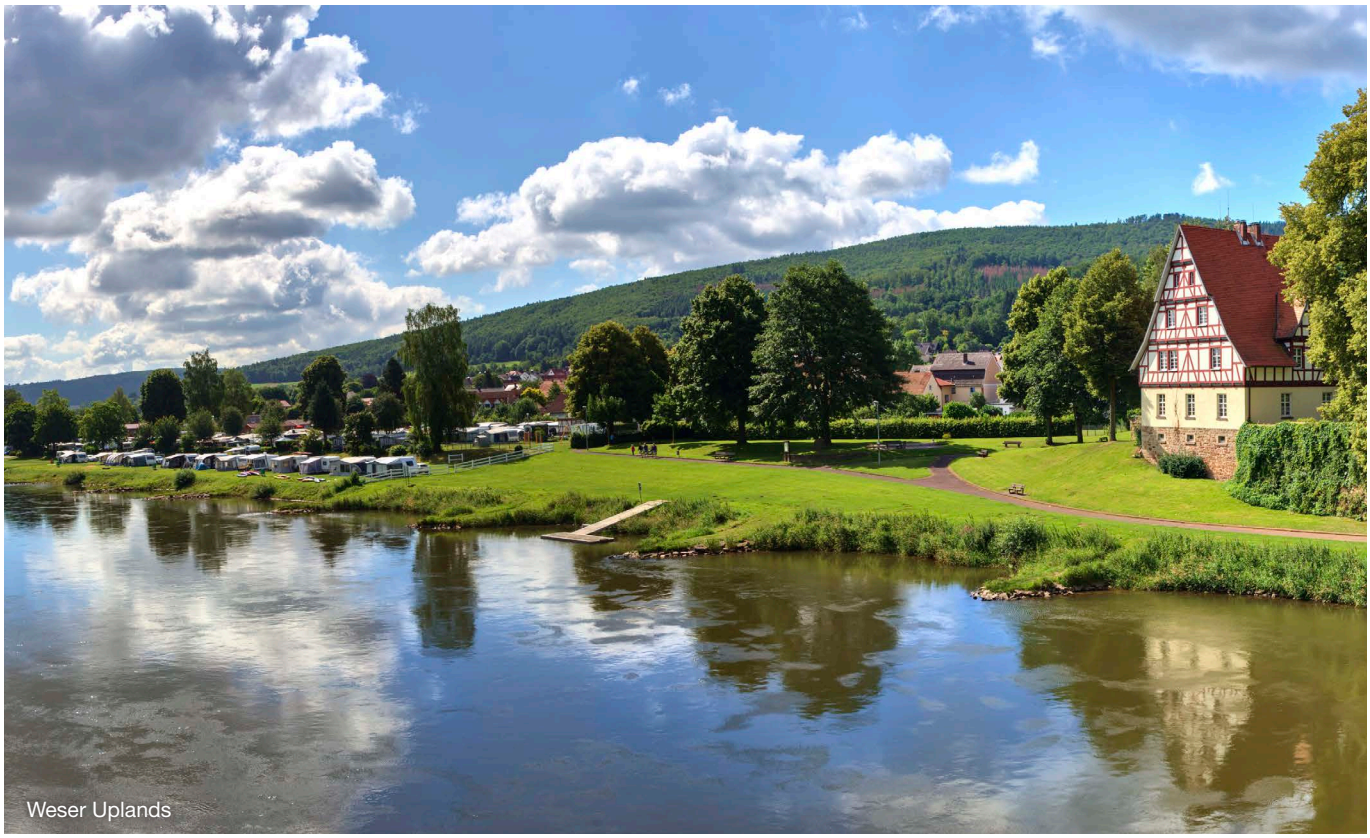
Furthermore, it is of relevance whether or not it was possible to insure against the coronavirus when the insurance cover was taken out given that it was not an expressly designated pathogen in Sec. 7 IfSG and the illness induced by it was not listed in Sec. 6 IfSG as one that was immediately reportable.

In the case of a blanket reference to Sec. 6 and 7 IfSG and the lack of a table with a list of the specific diseases or pathogens, the general clause there covers the diseases that have not yet been listed there. In this respect, the presumption by the Mannheim LG that the reference is dynamic is correct.

SARS-CoV-2 has now been added to the legal text as a reportable pathogen. Insurance provisions that include tables with exhaustive lists or a clear definition of diseases, in this respect, should be able to exclude the obligation to provide insurance coverage in the case of a pathogen/disease that has not been recorded in the list.

Please note:

A generally applicable definition of the spectrum of insurance cover is scarcely possible given the many different coverage concepts. There is still a need to clarify the obligation for insurance companies to provide coverage for business closures in the case of diseases and pathogens that do not yet fall within the scope of the legislation. This should be taken into consideration when taking out insurance cover.



Weser Uplands

IN BRIEF

Lockdown – New voucher scheme for cancelled events

The general lockdown resulted in the cancellation of a considerable number of events for which tickets had already been sold. In the legislation to mitigate the consequences of the COVID-19 pandemic, the government recently created a voucher scheme for event contracts under the law relating to event contracts.

According to this scheme, event organisers will be able to issue a voucher if a ticket was bought prior to 8.3.2020 and the event was cancelled as a result of the COVID-19 pandemic. The voucher can be redeemed either for the same event at a later date or, alternatively, for a different event by the same organiser.

The scheme will apply to leisure events such as concerts, festivals, theatrical performances, film screenings, readings, sports competitions and the like. The scheme will apply not only for single tickets but also for season tickets.

Example: An arts and culture association sold season tickets for 10 concerts in 2020. After two concerts had already taken place at the start of the year, five other concerts had to be initially cancelled. The association will be able to issue a voucher for the cancelled concerts that has to cover the value of these five concerts (thus also the advance booking fees). It will not be possible to issue a voucher for goods (e.g. for a purchase in the association's online shop). The voucher must include a reference that it was issued because of the COVID-19 pandemic. Moreover, the voucher has to be handed over to the holder of the ticket or the season ticket, e.g. personally at an advance booking office. Alternatively, the voucher can be sent via mail or e-mail.

Please note: The holder of the voucher can request that the value of the voucher be paid out if accepting the voucher is unreasonable for him/her due to his/her personal life circumstances, or if the voucher has not been redeemed by 31.12.2021.

Employers bound by collective agreements – Court sets new standards for when employment contracts are newly concluded

Collective agreements are binding and employers may not dilute them by means of reference clauses. As a result of a ruling by the Federal Labour Court *[Bundesarbeitsgericht, BAG]* from 13.5.2020 (case reference: 4 AZR 489/19), a number of companies will have to make adjustments.

An employee had been a member of IG Metall *[metalworkers' union in Germany]* since 1999. Her employment contract contained no reference to collective agreements as the employer had initially not been bound by a collective agreement. Subsequently however, in 2015, the employer concluded a collective agreement with IG Metall. Yet, there were only supposed to be entitlements under the collective agreement if the applicability of the collective agreements had been agreed in individual employment contracts. That is why the employer also made an offer to the employee to conclude a new employment contract with a dynamic reference clause according to which the employment relationship would be based on the collective agreement package as applicable to the business.

However, the employee did not accept the offer but, instead, instituted legal proceedings and sought payment directly from the collective agreement. The BAG ruled in favour of the claimant because she already had a right to entitlements under the collective agreement in view of the fact that both sides were bound by the collective agreement.

Conclusion: It should be noted that in a collective agreement it is not possible to effectively agree that the entitlements under the collective agreement, despite the fact that both sides are bound by the collective agreement, should only exist if reference is made in the employment contracts to the collective agreement.

Refunds of German VAT for 2019 – Pay attention to deadlines

Businesses based in a foreign country and that themselves do not owe any VAT here in Germany can have the VAT that they have paid in Germany reimbursed via the so-called input tax refund procedure at the Federal Central Tax Office [Bundeszentralamt für Steuern, BZSt].

The BZSt has pointed out that businesses based in a third territory would normally have had to apply for the refund for the 2019 calendar year by 30.6.2020. During that period (normally) the electronic application for an input tax refund and the original invoices as well as import documents would have had to have been provided. In a press release from 14.5.2020, in view of the coronavirus pandemic the BZSt published rules in relation to a loosened deadline. Under these rules the following applies.

- If the normal deadline has lapsed then businesses should nevertheless submit their application documents as soon as possible to the BZSt.
- In applications that arrive between 1.7.2020 and 30.9.2020, businesses should give reasons as to why the application deadline could not be complied with. It can be assumed that justifications that are specifically linked to the coronavirus crisis will be accepted by the BZSt.
- If the application still has not been submitted by 30.9.2020 then the business should submit the application documents within at least one month following the elimination of the obstacle to the filing of the application. Moreover, the business should provide significant reasons as to why the application deadline could not be complied with.

Please note: Applications for input tax refunds have to be filed electronically via the BZSt online portal. Before the portal can be used the business has to register as a user with the BZSt and then it will be able to access the portal using the login data that it receives. Due to longer postal delivery times when the login data are sent abroad, in particular, it could be a number of weeks or even months before the registration process is completed. Businesses should thus register on the portal in good time.

Liability of Deutsche Post for delayed deliveries

If the post office, despite an agreed delivery deadline, delivers a letter that is evidently time-sensitive too late then the post office can be liable to pay compensation for any loss that arises as a result of the delayed delivery.

In 2017, a post office customer in Bavaria wanted to assert her claim against her employer for € 20,000 for holiday, within the time stipulated and in written form, by the 30.9.2017. On Friday, 29.9.2017 she sent a letter by "express delivery with the additional service of Saturday delivery" and for this paid postage of € 23.80. However, the letter did not arrive until after the deadline had expired on 4.10.2017. The employer rejected the claim with reference to the failure to comply with the deadline as at 30.9.2017 and did not make a payment.

The customer demanded compensation from Deutsche Post. The latter merely refunded the postage and attempted to use the excuse that the term GmbH [limited company] was missing at the end of the company name of the recipient and that the letterbox had not been labelled.

The Higher Regional Court of Cologne, in its decision of 16.4.2020 (case reference: 3 U 225/19), first of all clarified that in view of the amount of postage and the agreed additional service of "Saturday delivery" it would have been obvious that, in this case, complying with the delivery deadline was particularly important. There was only this recipient at the address and the nameplate on the doorbell was labelled in exactly the same way as the letter and the company nameplate on the building, too. There had not been an inaccuracy with respect to the address. Moreover, the delivery person could at least have enquired once at the reception desk. The Higher Regional Court of Cologne was of the view that those who pay extra postage for a Saturday delivery should also be able to rely on the package being delivered on time – the delivery person has to put in some effort when making the delivery. The Post Office subsequently withdrew its appeal.

Result: Deutsche Post had to pay approx. € 18,000 in compensation for the delayed delivery of a time-sensitive letter.

AND FINALLY...

"There is no disgrace if you allow yourself to be persuaded and also admit this."

Dr. Hans-Jochen Vogel, 3.2.1926 – 26.7.2020, SPD politician, from 1960 – 1972 First Mayor of Munich, 1972 – 1974 Federal Minister of Federal Construction, thereafter until 1981 Federal Minister of Justice, Governing Mayor of West Berlin 1981, SPD Leader from 14.6.1987 – 29.5.1991.

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