PKF

Newsletter

Key Issue:
Non-financial reporting – Rising importance in the context of sustainable finance

02|21

Dear Readers,

The coronavirus pandemic and the issues of lockdown, the easing of restrictions, vaccine manufacturers and immunisation strategies continue to dominate the media. The German Government and the OECD have responded with regulatory changes and in this issue of our newsletter we have outlined three of these revisions. For the Key Issue in this edition, we have however selected **non-financial reporting**, which – against a backdrop of sustainability and social responsibility – is increasingly growing in importance and not just for large companies but also for those in the Mittelstand sector. To this end, in the Accounting & Finance section, we report on current developments that also follow the trend towards **sustainable finance** and taking greater account of the so-called **ESG factors** (environmental, social and governance).

The first report in the Tax section deals with the question of if and under what circumstances an employee's **home office** could create a permanent establishment for the employer. Here it is possible to discern a general tendency towards the presumption of a permanent establishment. Although, the OECD has clarified that in the case of an increase in working from home prompted by the **pandemic** there **should be no presumption of a permanent establishment.** The OECD's legal interpretation should also be noted in our second contribution in the Tax section. This concerns the area of transfer pricing where there could be upheavals due to the impact of **coronavirus**. Here, when certain criteria are met, the OECD has opened up the **possibility of retrospective adjustments.**

The first report in the Legal section likewise had the potential to be highlighted in our Key Issue section because it concerns plans for the sweeping reforms to **German partnership law** and for according the partnership its own legal personality. The Federal Government's draft law in this respect, presented on 21.1.2021, includes among other things nothing less than a revision of the legislation in respect of the GbR (acronym for *Gesellschaft bürgerlichen Rechts*, a partnership under German civil law) and the introduction of a company register for GbRs (registration option).

Subsequently, we turn once more to the context of **coronavirus**. In this connection, lawmakers have given tenants some breathing space – however only under specific conditions and only to a certain extent.

In the next article after that, we take a look at a new occupation that has been created within the framework of digitalisation, namely, **crowdworking**. The Federal Labour Court recently discussed the principles under employment law for classifying such work.

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

Your Team at PKF

Key Issue

Non-financial reporting – Rising importance in the context of sustainable finance

Contents

TAX

WP/StB [German public auditor/ tax consultant] Dr Matthias Heinrich
StB [German tax consultant] Stephan Lüneburg

Will coronavirus cause the home office to become a permanent establishment?

In view of the global pandemic, in some cases, employees are working exclusively from a home office (HO). If an employee lives in another country then the company will have to deal with the issue of if and when a permanent establishment with tax consequences is created in another country.

1. Basic classification

Generally, the question as to whether or not a home office (HO) creates a permanent establishment can only be determined via an overall assessment of the national regulations of the respective individual countries and of the international regulations (including double taxation agreements as well as OECD pronouncements) and, thus, would have to be examined separately for each country.

If the work that is performed for a company is place-specific and has a degree of constancy then a permanent establishment could be deemed to exist if the employer had sufficient authority to dispose over the place. According to settled case-law, this would not normally be the case for an HO, unless the employer has been granted an actual or legal possibility in this respect.

Please note: If the service that is provided for the company is 'merely' preparatory in nature or constitutes an ancillary activity, even then the HO would not normally become a permanent establishment.

2. Exceptions: agency permanent establishments and permanent establishments as the place of effective management

However, the situation would be different if it involved persons who, in relation to third parties, were authorised to represent the company and conclude contracts. In such a case, the HO could create a so-called agency permanent establishment. If a company's management works exclusively or almost exclusively in an HO then the place of management could have been shifted to the HO and would constitute a permanent establishment for each managing director.

Please note: In both these cases – an agency permanent establishment and a permanent establishment as the place of effective management – business facilities are not required to create a legal basis for a permanent establishment.

3. Tax consequences when the HO is classified as a permanent establishment

If the HO becomes a permanent establishment across a border then this would result in tax liability in the foreign country via the permanent establishment prerogative – with the risk of double taxation. Moreover, there are obligations in respect of registration and tax declaration in the foreign country with separate determination of income for each permanent establishment.

4. The trend and changes due to the coronavirus

In recent times, it has been possible to discern a trend with respect to the question of whether or not a permanent establishment exists, namely, that the power of disposition requirement is no longer taken into account. The commentary on the OECD model, from 21.11.2017, (still currently applicable, please see: https://doi.org/10.1787/mtc_cond-2017-en) identified, for the first time, the conditions under which an HO could constitute a permanent establishment. This would be the case

- if employees regularly or continuously use an HO when instructed to do so by the employer, or
- if no office is made available to them even though this is required for the activity.

Last year, in a circular from 3.4.2020, the OECD published a policy response to the changed circumstances in the work environment; in this, the OECD stated that, considering the extraordinary nature of this global pandemic, working temporarily or permanently from a home office for the purpose of reducing contacts and, thus, for public health reasons would not generally create a permanent establishment because a pandemic is, in principle, a case of *force majeure.*

Please note

It should be noted that the OECD's statements have no legally binding effect. Generally, HOs will however become increasingly important for cross-border taxation even in the post-coronavirus future. Therefore, we will have to await further developments when the pandemic over.

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

OECD guidance on the coronavirus implications for transfer pricing

It is essential for businesses that operate internationally to continuously examine the transfer pricing rules. New situations such as, in particular, the current coronavirus pandemic will give grounds for reviewing and adjusting transfer prices. The OECD recently responded to the pandemic and published extensive guidelines on the consequences for determining transfer prices.

1. Implementation

The OECD, in its circular from 18.12.2020, specified the application of the arm's length principle and the OECD Transfer Pricing Guidelines to situations that may arise or be exacerbated in the context of the COVID-19 pandemic. The circular includes a discussion of, among other things, the following four pandemic-related subject areas.

2. Comparability analysis

For many companies the economic changes due to the coronavirus crisis impede comparability between the historic figures and the 2020 financial figures. To this end, the

OECD recommends a transaction-based case-by-case analysis. To provide help during the coronavirus crisis the OECD allows comparisons with budgeted values in order to determine plausibility. Furthermore, loss-making comparables would also generally be accepted and transfer prices may be calculated on the basis of the outcome testing approach (instead of the price setting approach, which is the preferred alternative in Germany). It is moreover possible to retrospectively adjust transfer prices or to use several transfer pricing methods.

Please note: By contrast, the OECD strongly advises against using financial figures from the financial crisis as a basis for comparability since this is not comparable with the coronavirus crisis.

3. Allocation of pandemic-induced losses

When dealing with losses, a distinction generally has to be made between losses caused by the coronavirus crisis and losses arising irrespectively of or only indirectly in connection with the coronavirus pandemic, e.g., as a result of declining demand.

To this end, the OECD provides for losses within a group of companies to be allocated on the basis of a functional and risk analysis. The coronavirus crisis has, in particular, huge repercussions for the risks associated with demand, supply chains and production shutdowns as well as for financing risks. Specifically, the risks that have persisted since the beginning of the coronavirus crisis could be compared with the risks prior to the coronavirus crisis and then reassessed. Entities that perform routine functions will be allowed to generate losses, too, in the short term.

4. Treatment of government assistance programmes

In the course of the coronavirus crisis, companies were and/or will be given support through various assistance programmes, e.g., short-time work schemes, lending, investment grants or tax breaks. Such benefits have to be examined on a case-by-case basis to determine if they

reduce the cost base or increase sales and/or should be treated as extraordinary income.

Please note: Furthermore, when carrying out the transfer pricing analysis you should check if the measures have an effect on pricing because the benefits are passed on to customers or suppliers, and for how long the measures will last.

5. Advance pricing agreement procedure

Even in times of economic crisis, arrangement agreements generally continue. Consequently, despite the coronavirus crisis, advance pricing agreements that have already been concluded have to be complied with. Nevertheless, there has to be a case-by-case review as to whether or not the agreed conditions are being breached because of the changed market situation. It is recommended that you seek dialogue with the fiscal authority early on if it is foreseeable that the underlying assumptions are no longer appropriate.

Outlook

Against the background of these developments, you should check to see in which areas a "coronavirus-induced" need to make adjustments could arise. Pointers for a structured approach were already discussed in the 12/2020 issue of the PKF newsletter. Appropriate focus areas are accordingly:

- changes to target profit margins for entities that perform routine functions,
- adjustments to regular royalty payments and intragroup service charges as well as
- aspects of safeguarding liquidity and financing.

ACCOUNTING & FINANCE

WPin [German public auditor] Julia Hörl / Sebastian Vor

Non-financial reporting – Rising importance in the context of sustainable finance

Non-financial reporting is growing in importance in the public perception of annual reporting by companies. The coronavirus pandemic and climate change are increasingly widening the focus on social and regulatory aspects, too. There is less tolerance for non-sustainable operations than ever before.

1. Sustainable finance

1.1 Concept of sustainable finance

'Sustainable finance' is generally understood as a 'sustainable financial industry' and 'sustainable funding' that are not guided solely by quantitative economic criteria, but instead, increasingly also by different sustainability aspects. This includes reducing damage to the environment and the climate, promoting social participation and sustainable corporate governance. Based on these aspects it is possible to discern that the term 'sustainable finance' is a metaconcept that encapsulates related terms such as 'green finance', 'climate finance' and 'carbon finance'.

1.2 The EU's endeavours

While the evolution of corporate reporting requirements has indeed also embraced NGO activities, however, it does particularly track the current endeavours by the EU to guide substantial financial assets into sustainable investments. The EU is thus attempting to increasingly include in its guidance those high-profile issues that are being discussed on which it is discernible that future generations will place higher importance.

1.3 An explanation of ESG factors

The so-called ESG factors make it possible to differentiate between a corporation's sustainability-related business areas as follows:

- **Environmental** – this refers to those factors that stand for the prevention of environmental pollution or environmental risk as well as for energy efficiency targets.
- **Social** – the spheres that fall within this category include ones such as occupational safety, health protection, social engagement and diversity.

» **Governance** – this term is understood to mean sustainable corporate governance that combines, in particular, related individual fields such as determining company values as well as management and monitoring processes.

2. Influences on reporting in corporations

External reporting by corporations is increasingly moving away from pure financial reporting towards more comprehensive reporting that likewise places special emphasis on the consideration of ESG factors within the scope of non-financial reporting.

This therefore takes into account the current development whereby the various target readers of external corporate reports (stakeholders) have a growing interest in corporations that are managed transparently and sustainably. There is demand for information on the effects that arise in the corporations when complying with the ecological, social and regulatory requirements.

Corporations should thus expand their reporting to include the direct and indirect effects of such requirements on the corporation and its environment. The starting points for the respective non-financial reporting are the existing concepts at the corporation and the established processes as well as their implementation.

Please note: In the context of reporting, corporations should pay particular attention to the reputational impact. For example,

» business activities in certain regions and with particular contractual partners, or
» products or services that are considered to be problematic from a sustainability perspective

could negatively affect the reputation of a corporation.

The measures that have to be taken in respect of non-financial reporting thus result from the imperative to forge positions in future markets, whether directly vis-à-vis environmentally conscious customers, or indirectly in relation to investors and shareholders who are increasingly measuring the value and/or future performance of a global corporation on the basis of ESG criteria. For example,

» enhancing transparency through sustainability reporting can help to improve the competitive position and

» expanding non-financial reporting can increase the attractiveness of the respective corporations as employers or as business partners.

For this reason, voluntary non-financial reporting, or going above and beyond the legal requirements should also be considered here.

3. CSR Reporting

The EU had already responded to this paradigm shift in reporting in 2014 and with its CSR Directive (Corporate Social Responsibility) had obliged certain capital market-oriented companies and large financial service providers to prepare non-financial reports. Germany transposed the Directive into national law with the CSR Directive Implementation Act *(CSR-Richtlinien-Umsetzungsgesetz, CSR-RUG*). This has been applicable to management reports since the 2017 financial year.

The CSR-RUG affects capital market-oriented companies (Section 264d of the Commercial Code *[Handelsgesetzbuch, HGB])* and corporate groups (Section 293 HGB) averaging more than 500 employees during the financial year (Art.19a and Art. 29a CSR Directive) as well as financial service providers; these entities now have to include non-financial issues, such as the environment, employees, social matters, human rights, anti-corruption/bribery as well as diversity, in their reports.

The reporting on these issues can be either integrated into the management report at various points, or presented in a separate section, or published in a self-contained non-financial report in the Federal Gazette *(Bundesanzeiger),* or on the company's website.

However, internationally there is a lack sufficient comparability as there is no standard criteria catalogue that could provide guidance on the content and nature of the reporting. International institutions such as, e.g., the IIRC (International Integrated Reporting Council) have already recognised this and it can thus be assumed that there will be other regulations in this area.

Please note: Empirical studies have indeed shown that those responsible for preparing a company's annual financial statements are increasingly focusing on the non-financial reporting. Yet, this part of the reporting frequently falls short of the expectations of many investors because little information is included on, for example, CO2 emissions, the issue of inclusion or the appropriateness of wages and salaries.

4. Important for the *Mittelstand* sector, too

Currently, the statutory obligation to prepare a non-financial report admittedly only directly affects the above-mentioned (few) large capital market-oriented companies as well as financial service providers. While medium-sized enterprises have thus hitherto not been directly affected by CSR reporting, nevertheless, the respective reporting done on a voluntary basis could have a positive impact on investors' perceptions.

It should also be noted that for medium-sized enterprises that have been integrated into group structures, if a statutory obligation exists for their parent companies then this will extend to such enterprises because non-financial information will then be internally requested.

Given that strong sustainability is anyway very frequently already a distinguishing feature of the organisational culture of medium-sized enterprises in particular – especially in the case of family enterprises that wish to ensure the continued existence and growth for future generations in this way -, in many cases, the basis for expanding the reporting activities will accordingly already be present.

Recommendation

Therefore, for medium-sized enterprises it could be a perfectly sensible course of action to veer from a traditionally cautious information policy and take an in-depth look into CSR issues even without being legally obliged to do so. Furthermore, capital providers are increasingly attaching importance to the respective information.

LEGAL

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

On the horizon – The modernisation of German partnership law

The revision of German partnership law has been on the political agenda for a long time already. Now, however, the first milestone has been achieved – the German Federal Government presented a draft of the Act on the Modernisation of Partnership Law on 20.1.2021. The draft was based on the proposal from the Expert Committee (the so-called Maurach draft) and is presented in the next section.

1. An introduction to and overview of the regulatory areas

Many companies – especially small and medium-sized as well as those managed by liberal professionals – are organised in the legal form of a partnership. The reason for this is frequently the greater flexibility when compared with corporations; however, sometimes tax-driven motives are also behind the decision.

The key elements of the draft Act on the Modernisation of Partnership Law are:

- a revision of the legislation in respect of the GbR (acronym for *Gesellschaft bürgerlichen Rechts*, a partnership under German civil law) (registration option);
- generally opening up commercial partnerships for the joint practice of liberal professions;
- regulations for dealing with partners' resolutions that are defective

2. Revision of the legislation in respect of the GbR

A partnership under German civil law (GbR, or also called: a BGB *[Bürgerliches Gesetzbuch, or Civil Code*] partnership) is the basic form for all partnerships. Its legal capacity was a matter of dispute for many years and then, in 2001, the Federal Court of Justice confirmed that GbRs did have legal capacity.

2.1 Two variant legal forms

In future, the partners will be able to choose whether the GbR, as a partnership with legal capacity, should engage in legal transactions, or whether this legal from should merely serve the purpose of organising the relationship of the partners to each other ((undisclosed) partnership without legal capacity). Only a GbR with legal capacity would be able by itself to exercise rights and be subject to obligations and have its own partnership assets.

2.2 Registration option

A GbR that accordingly has legal capacity could then be registered in a new Company Register *(Gesellschaftsregister)* maintained by the competent local court *(Amtsgericht)*. Registration would then have to be indicated by means of a name suffix (e.g., eGbR [*eingetragene Gesellschaft bürgerlichen Rechts,* or registered partnership under German civil law]) While registration would be voluntary, nevertheless, it would be required for certain legal transactions such as, e.g., a reorganisation in accordance with the German Reorganisation Act, the acquisition of shareholdings in other companies or of properties. For the latter, the requirement according to which, besides the GbR, all the names of the partners have to be listed in the land register would then cease to apply in the future.

Please note: However, registration would not change anything with respect to either the partners' unlimited personal liability to the extent also of their private assets, or the transparent taxation as a partnership.

3. Commercial partnerships for liberal professionals

The draft law provides for the legal forms of commercial partnerships (*OHG* [German ordinary partnership], *KG* [German limited partnership] and *GmbH & Co. KG* [German limited partnership with a limited company as general partner]) also to be opened up in the future for the joint practice of liberal professions if the professional practice regulations so permit. The German Federal Government has already provided for the respective opening up for lawyers, tax consultants and patent attorneys in a parallel draft law. Such professionals could then achieve a more extensive limitation of liability than with a Partnerschaft mbB (a partnership with limited professional liability) without having to forgo the tax advantages of partnerships. For other liberal professionals (e.g., physicians,

architects) the opening up would have to be implemented at the level of the federal states.

However, it would still not be possible to hold straight equity investments in professional practice companies; in this respect there would be no change in the active collaboration requirement.

Please note: It is envisaged that the requirement that the name of a partnership has to include at least the name of one partner will cease to apply for professional partnerships in the future, almost like a kind of small compensation.

4. Laying down legal rules relating to defective resolutions

To-date, German partnership law has contained no provisions in respect of dealing with partners' resolutions that are defective. A legally erroneous resolution is therefore normally null and void if the partnership agreement does not provide for any different regulations.

Now, separate rules relating to defective resolutions – based on German stock corporation law – will be codified for commercial partnerships, at least. Accordingly, violations of the law or the partnership agreement would, in principle, only result in the contestability (i.e., provisional validity) of the resolutions. Challenges to resolutions could then be brought by means of a claim before a district court (Landgericht) that has to be filed within three months after notification or becoming aware of the resolution.

Nevertheless, particularly serious violations would still result in the resolution having to be regarded as null and void from the outset. This would be the case if the content of the resolution violated legal provisions where it was not possible for the partners to waive compliance. This could be construed as referring to violations that affect core areas for the partners such as, for example, the right to participate in a meeting of the company partners.

The new legal rules relating to defective resolutions would not apply to GbRs or partnerships without further action. Although the partners could agree to these in the partnership agreement.

It is generally true to say that, even after the modernisation, the flexibility that the legal form of a partnership provides would remain unaffected to a large extent and that most of the regulations would be dispositive, i.e., may be altered by agreement of the partners.

Outlook

Since it is likely there is consensus across the board that partnership law basically needs to be modernised it is hoped that this Act can still be passed before the end of the current legislative period in the autumn. Even if this is the case, this Act would however only come into force on 1.1.2023 in order to give the competent courts time to set up the new electronic Company Register.

RA [German lawyer] Andy Weichler

Adaptation of rental payments due to COVID-19-induced measures

To mitigate business closures during the pandemic, German lawmakers have decided to bolster the negotiation options of commercial tenants and lessees. To this end, a Section 7 has been added to Art. 240 of the Introductory Act to the Civil Code *(Einführungsgesetz zum Bürgerlichen Gesetzbuch, EG-BGB).*

1. New regulations

Since 1.1.2021, there has now been a legal presumption that the circumstances forming the basis of a contract will be deemed to have significantly changed within the meaning of Section 313 of the German Civil Code if a business activity in rented or leased premises is prohibited because of the government's measures for combating the COVID-19 pandemic. This shall apply even if the business operation is subject "merely" to considerable restrictions. Should a closure ensue then the tenant may become entitled to an adaptation of the contract if it is deemed that there is interference with the basis of the contract.

This however does not mean that the rent may be automatically deferred, or alternatively that only a reduced rent has to be paid. Rather, the question that has to be asked is what would the parties have agreed if they had foreseen this interference. Therefore, there has to be a case-by-case assessment of what agreements would still be reasonable for the landlord and the tenant. In the course of this, any government subsidies have to be taken into account and the financial situation of the tenant and the landlord have to be weighed up against each other. There is therefore a need to examine the financial situation of both parties.

2. Faster judicial enforcement

If the tenant and the landlord are not able to reach an a greement out of court then it would also be possible to bring a claim before a civil court. In this regard, the German Government has provided for an amendment in Section 44 of the Introductory Act to the Civil Procedure Code according to which such claims have to be accorded preferential treatment and the first appointment has to be scheduled within one month following the filing of an action. The tenant can thus be brought to the negotiating table as quickly as possible.

Recommendations

It should be noted that the above-mentioned right to the adaptation of the contract does indeed only exist for contracts that were concluded prior to the outbreak of the COVID-19 pandemic. Therefore, in the future, all rental or lease agreements should include an individual contractual clause that contains specific arrangements in the case that business premises have to close because of measures by the government.

RA [German lawyer] Jan-Erik Twehues

Classification under employment law of crowd-workers in the case of control methods typical for employees

The term crowdworkers refers to workers who take on assignments that are made available to a group of people (crowd). The assignments are generally offered via internet platforms (so-called crowdsourcing platforms). In practice, crowdworkers frequently work on a self-employed basis and not as employees. The Federal Labour Court (Bundesarbeitsgericht, BAG) recently fundamentally clarified the status of crowd-workers under employment law for the first time.

1. Clicking on an internet platform to get work assignments

The case that the court had to rule on related to crowd-worker C, who had made the claim, and the defendant crowdsourcing company; the two parties had concluded a basic agreement together with supplementary GT&Cs. C thus obtained access to work assignments on an internet platform in the form of an app installed on his mobile phone. On the work assignment platform C was able to take on work assignments with a simple click. His work consisted in carrying out checks on merchandise presentation at retail outlets and petrol stations. There was no agreement in respect of the volume of work assignments and nor was C under any obligation to take on specific work assignments. In the space of 11 months, he thus took on approximately 3,000 work assignments and for 20 hours of work per week he generated on average € 1,750 per month. After some inconsistencies, the company terminated the collaboration with the crowdworker whereupon the latter launched legal action over unfair dismissal.

2. Previous case-law – crowdworkers are not bound by any instructions

According to the case-law, crowdworkers had not had employee status up to now since, in each case, they had been able to decide by themselves whether or not to work for a crowdsourcing platform. This was likewise the assessment of both of the lower courts (Munich Labour Court, ruling from 20.2.2019, case reference: 19 Ca 6915/18; Munich Regional Labour Court, ruling from 4.12.2019, case reference: 8 Sa 146/19), namely, that C should not be regarded as an employee. According to the courts, the basic agreement did not meet the requirements for an employment contract since it was not possible to infer from the agreement that C was obliged to perform any services. Therefore, the claimant was neither bound by any instructions nor integrated into the defendant's operational processes. Accordingly, employee status should not be presumed.

3. BAG – Crowdworkers as employees

However, in its ruling from 1.12.2020 (case reference: 9 AZR 102/20), the BAG now assumed that there was an employment relationship in accordance with Section 611a of the Civil Code (Bürgerliches Gesetzbuch, BGB) since the crowdsourcing company steered the collaboration via the online work assignment platform, which it operated, in such a way that the worker was not able to freely organise his work in terms of its place, time and content. For the BAG, it was not relevant here whether or not the person concerned was contractually obliged to accept the offers of work. The decisive factor was the organisational structure of the work assignment platform. According to this, it was only possible for the users to move up to a higher level in the rating system once they had increased the number of assignments performed by completing several assignments on one single route; consequently, they would, in effect, be able to generate a higher hourly wage.

Through this incentive system the worker was induced to carry out inspections continuously; therefore, according to the BAG, in such cases, crowdworkers should be regarded as employees. Nevertheless, the BAG rejected C's complaint because by cancelling the contract as a precautionary measure the crowdsourcing company had effectively terminated the employment relationship.

Please note

In this case it was still possible to resolve the structure for issuing instructions on the basis of the current 611a BGB. At the same time, the court did not bring the debate about statutory provisions to an end but rather opened it up further – especially taking into consideration the evidentiary problems of workers in less transparent cases.

IN BRIEF

Pension provisions – Salary sacrifice arrangements where there is a sole shareholding managing director

The recognition of a pension provision requires a salary sacrifice within the meaning of the Occupational Pensions Improvement Act (*Gesetz zur Verbesserung der betrieblichen Altersversorgung, BetrAVG).* If a GmbH (a German limited company) enters into a pension commitment for its sole shareholding managing director on the basis of salary sacrifices then this requirement cannot be fulfilled because s/he is not an employee within the meaning of the BetrAVG.

The maximum amount at which pension provisions may be recognised is the net present value of the pension obligation. In the case of a pension beneficiary who is still working, the net present value of the pension obligation is the product of the present value of the future pension payments at the end of the financial year minus the present value of the constant annual amounts on the same date. In the case of salary sacrifice, however, the applicable amount is at least the present value of the vested future pension benefits, in accordance with the provisions of BetrAVG, at the close of the financial year.

The Federal Fiscal Court, in its ruling from 27.5.2020 (case reference: XI R 9/19), had to decide if the provision for an employee-financed pension commitment of a GmbH to its controlling shareholding managing director should be recognised at the lower net present value. This provision was the result of providing a pension commitment on the basis of salary sacrifices that included a contractual agreement with respect to the vesting of future pension benefits. Contrary to the view of the fiscal court, the judges concluded that, in the case of a controlling shareholding managing director, the provision for the employee-financed pension commitment should not be measured at the (higher) present value, but instead at the net present value. To substantiate this, the court argued that salary sacrifice is not subject to the provisions under BetrAVG, rather that the pension commitment is vested (only) because of a contractual agreement.

Please note: The BFH expressly emphasised that it considered the inherent preference given to pension provisions for employees within the meaning of the BetrAVG to be constitutional.

Corporate advertising on private cars – When do employees (not) have to pay tax on the money they receive?

If employers pay employees to advertise on their private cars then they do not necessarily have to pay tax on the payments they receive. The crucial factor is whether or not the payments received have to be classed as remuneration or as the employees' other income.

If there is no separate agreement for the car advertising between the working parties then the local tax office will allocate an employee's advertising revenues to the existing employment relationship. The payments then have to be taxed as remuneration and the social insurance contributions must be paid accordingly.

In order to avoid this additional burden and to enable employees to receive the advertising revenues tax-free, the employer and employee have to conclude a rental agreement relating solely to car advertising. The agreement has to describe the benefits of the advertising for the employer, e.g., provisions such as parking the car in a way for the advertising to be effective, a minimum number of kilometres driven per year or excluding other advertising partners for the car. A small sticker with the company logo is not sufficient in this case – clearly visible advertising placed over a large area is recommended. Furthermore, the terms of the agreement have to comply with the arm's length principle and thus be consistent with the standard conditions on the free advertising market.

If as a result of the "advertising agreement" this activity is separated from the employment relationship then the advertising revenues have to be allocated to the employee's other income, which remains tax-free up to a maximum amount of € 255.

Please note: If this tax exemption limit is exceeded then the entire revenues have to be fully taxed and not just the amount in excess of the tax exemption limit.

Foreign currency transactions – Currency hedging gains may be almost tax-free

Cross-border transactions with companies outside of the eurozone normally have an inherent currency risk. To reduce this currency risk, currency futures lend themselves to hedging such foreign currency risks particularly in the case of larger amounts.

Example: A German GmbH acquired a stake in a US-based company on the basis of an agreement dated January 2020. Since various bodies still had to give their approval, the performance of the contract (payment of purchase price and transfer of ownership) was expected in June 2020. The purchase price in dollars was determined in January. Immediately upon signing the agreement the buyer entered into a currency forward contract with a bank to hedge the currency risk.

The Federal Fiscal Court *(Bundesfinanzhof, BFH)* had to make a decision on just such a case in its ruling from 10.4.2019 (case reference: I R 20/16). In the underlying case, the German company subsequently sold the previously acquired stake and closed out the currency future contract. In doing so it generated an additional currency profit in the process that, in the view of the BFH, was likewise subject to the tax exemption for the sale of shares. The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF), in its circular from 5.10.2020 (reference: IV C – S 2750-a/19/10005 :002) expressed its opinion on when currency transactions are subject to tax exemptions.

This should only be the case if there is an instigating relationship between the acquisition of the shareholding and the currency hedging transaction. In the BMF circular such an instigating relationship would be assumed if, when entering into the respective hedging agreement, the taxpayer wanted solely to hedge the subsequent specifically expected proceeds from the sale of shareholdings within the meaning of Section 8b(2) of the German Corporation Tax Act against currency fluctuations.

Please note: Conversely, losses from currency hedging transactions (just like losses from the sale of shareholdings themselves) are not deductible if there is such an instigating relationship.

AND FINALLY...

"Put your consumers in focus, and listen to what they're actually saying, not what they tell you."

Daniel Ek, born 21.2.1983 in Stockholm, Sweden. Together with Martin Lorentzon, he founded the company Spotify AB in Stockholm, in 2006, and is still the CEO there today.

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