PKF

Newsletter

Key Issue

The German Real Estate Tax Reform Act – An overview of the important changes

02|22

Dear Readers,

The method for calculating **real estate tax as of 1.1.2025** constitutes the subject of the Key Issue section in the February edition of our newsletter. This date appears initially to be a long way off. Yet, declarations already have to be submitted from July of this year. Recording and sending the data to the authorities, in many cases, will require an IT solution.

The reports that then follow in the Tax section concern two recent Federal Fiscal Court rulings. In the ruling on the **arm's length nature of interest rates on intra-group loans**, the court has modified the fiscal administration's view - which was too one-sided - in respect of deriving the interest rate. Subsequently, we report on a ruling on tax law governing German accounting treatment where the judges have allocated the **maintenance and service costs for tools** to the tools and not to the parts that are produced with them; this has given rise to the possibility of creating a **provision** and not just recording the expense over time.

We start off the Legal section with a discussion of the new German government's **legislative proposals** in the area of **corporate law** which, besides the tax plans, have so far received little attention. Nevertheless, the use of digitalisation to simplify company formations as well as the introduction of new legal forms for businesses are likely to be very important in practice. In the second report we examine the new **German Telecommunications-Telemedia Data Protection Act** that - although also somewhat unnoticed - has already been in force since the start of the year; its implementation will moreover often require several process steps. The third report provides an overview of the procedure under which it is now possible to clarify with the authorities, early on, **whether a person should be considered as an employee or an independent contractor**. In the final report in this section, we examine why the **managing directors of a *Komplementär-GmbH*** [general partner private limited company] could be **liable to pay damages** not only to the *GmbH* [private limited company] but also to the *Kommanditgesellschaft* [limited partnership].

Once again, we continue our journey around the PKF locations in Germany through the illustrations that break up the reports from our experts - this time we visit Hamburg.

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

Your Team at PKF

Front cover photo: *Elbphilharmonie* Hamburg concert hall

Key Issue

The German Real Estate Tax Reform Act – An overview of the important changes

Contents

TAX

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

Application of the German Real Estate Tax Reform Act as of 1.1.2022 – An overview of important changes

After the Federal Constitutional Court *(Bundesverfassungsgericht, BVerfG)*, in its ruling of 10.4.2018, declared the previous valuation system for real estate tax to be unconstitutional, German lawmakers took action. The reformed real estate tax system has to be applied as of 1.1.2025. The implementation of the legislation has however already begun and the responsibility for this now essentially lies with the individual German federal states and the municipalities that benefit from real estate tax. They are able to exert a greater degree of influence on the real estate tax model in their separate states through a so-called opening clause that allows them to deviate from the federal model.

1. Implementation and calculation model

The majority of the federal states are implementing the new real estate tax system in accordance with the so-called federal model, which was introduced through the Real Estate Tax Reform Act. This is particularly true of the real estate tax 'A' (agricultural and forestry land assets / agriculture and forestry businesses). As regards real estate tax 'B' (real estate assets / pieces of real estate), the federal states of Saarland and Saxony deviate from the federal model only with respect to the base rates for tax purposes. By contrast, the federal states of Baden-Württemberg, Bavaria, Hamburg, Hesse and Lower Saxony will be applying their own real estate tax models. Specifically:

» In its Real Estate Tax Act, which has only just been passed, **Bavaria** favours an even simpler model that is based purely on the area of the real estate. Here, a distinction has been made between land, on the one hand, as well as living space and usable space, on the other hand.

» By contrast, in **Baden-Württemberg**, a valuation model will be applied that is essentially based on the plot area and the indicative land value. Both of these values will then be multiplied with each other for the calculation. In a further step, the statutory base rate for tax purposes will be applied – this will be modified according to the type of use of the real estate. There will be a discount for real estate that is used mainly for residential purposes. The advantages of the model that has been chosen by Baden-Württemberg lie in preventing higher taxation of newly created living space.

» **Hamburg** however will be using the 'real estate area and location model', which has already been enshrined in law, where the plot size and building area are multiplied by an equivalence number (€0.02 for the land and €0.40 for the building). Differentiating between good and ordinary residential locations means that potential increases in market prices are left out of the calculation.

» **Hesse** and **Lower Saxony** have likewise opted for the 'real estate area and location model'. The starting point here is the plot area and a factor will be applied to this that is supposed to take the location into account.

2. Implementation phase 2020 until 2024 – Statements illustrating the determination of the bases for tax assessment as of 1.7.2022

All the economic entities of real estate holdings (agriculture and forestry businesses as well as plots) have to be separately assessed, as at 1.1.2022, on the basis of the real estate tax values in accordance with the reformed real estate tax and valuation legislation. In order to carry out this initial main assessment of real estate tax values, as of 1.7.2022, taxpayers will have to submit statements illustrating the determination of the bases for tax assessment using officially prescribed sets of data and by means of remote data transmission. The local tax offices will then use the information provided in these statements to determine the real estate tax values and will then issue real estate tax assessment notices.

Thereafter, the local tax offices will use the legally specified base rate for tax purposes to calculate the real estate tax


The Alster Arcades with a view of the City Hall

basis amount and will issue basic real estate tax assessment notices. In doing so, the real estate tax values determined as at 1.1.2022 will be used as the basis for the main assessment of the tax assessment bases as at 1.1.2025.

3. Current need for action

Action is needed now already in order to ensure the timely filing of your tax return. The relevant information for calculating the real estate tax has to be compiled and other documents/data (such as, for example, indicative land values or the gross floor area) should be obtained or determined. According to Section 247(2) of the German Valuation Act, the indicative land values, which may still change depending on the municipality, have to be determined and published by the respective committees of valuation experts. In principle, this information is free of charge and available online, although, there are exceptions. Not all of the indicative land values for the whole of Germany have been determined and published yet.

Please note: Up to the end of 2024, real estate tax will still be determined on the basis of the previous standardised values.

4. Calculation of real estate tax from 2025 onwards

The city or municipality will determine the real estate tax that has to be paid. To this end, the real estate tax basis amount will be multiplied by a tax factor specified by the city/municipality. This will result in the real estate tax that has to be paid and, normally, a real estate tax assessment notice for this amount will be sent to the owner.

The new rules will change the overall real estate tax revenue in the Federal Republic. In order to prevent tax increases some local authorities therefore want to adjust the previous tax factors. The Federal Ministry of Finance – as an appeal to the municipalities – has indeed been promoting the overall revenue neutrality of the reform. Yet, the real estate tax reform will nevertheless impact both tenants as well as landlords.

Conclusion

The reform fulfils all the requirements of the BVerfG and, in view of the severely outdated standardised valuations dating back to 1964, was long overdue. It is however questionable if, after the revaluation of their land and buildings, real estate owners will be in an even less favourable position. In particular, in big cities where the prices keep on going up it is likely that owners can expect to pay higher real estate tax. It is hoped that the individual municipalities will offset dramatic increases with appropriate changes to the tax factors.


The warehouse district

Angelika Mühlhoff / StB [German tax consultant] Steffen Heft

Once again – Arm's length interest rates for intra-group loans

As a follow up to our report 'Interest rates for shareholder loans under scrutiny at the Federal Fiscal Court' in the PKF newsletter 12/21, in the next section, we discuss a further ruling by the Federal Fiscal Court *(Bundesfinanzhof, BFH)* of 18.5.2021 (case reference: I R 4/17) on classifying and assessing the arm's length nature of interest rates in the case of intra-group loans.

1. Issue – Granting of intra-group loans

In the case in question, the legal action had been brought by a GmbH [private limited company] whose parent company was a Dutch holding company. The claimant had obtained several interest-bearing loans from an affiliated Dutch company that acted as the financing company for the group. The interest rates were between 4.375% and 6.45%.

The local tax office *(Finanzamt, FA)* deemed the agreed interest rates to be too high. The tax court (Finanzgericht, FG) that dealt with the action challenging the tax assessment likewise concluded that a constructive dividend had arisen. When calculating the arm's length interest rates, both the FA as well as the FG had applied the cost-plus method where, as a first step, the costs incurred by the lender have to be determined. A reasonable profit mark-up has to be added to these costs.

Here, the FG was of the opinion that it was not possible to make either an internal price comparison or an external one; therefore, neither a comparison of similar or the same transactions of the business concerned with third parties nor with so-called general business transactions could be taken into account. Rather, in the case in question, the cost-plus method was the only feasible one.

2. The BFH has a preference for the comparable uncontrolled price method

The BFH did not agree with the view of the FA and the FG. Generally, for the calculation of arm's length interest

rates, the comparable uncontrolled price method should normally be applied; however, if it is not possible to apply this method only then may the cost-plus method be used. The arm's length interest rate here would be one that would have been granted by an unrelated third party on the date when the loan agreement was concluded. Both an internal price comparison as well as an external one may be used.

According to the BFH, when calculating arm's length interest rates on loans, the comparable uncontrolled price method should be the method of choice because, essentially, the purpose of the service provided – to make funds available for a specific period – does not vary. Moreover, there are many markets where information and analyses on interest rates are available. If, on the basis of such data, it is possible to determine a price then it would also be relevant if it was above or below the rate calculated on the basis of the cost-plus method (costs incurred by the lender plus a profit mark-up).

» If the market price is above the price calculated on the basis of the cost-plus method then the provider would ask for the market price and keep the difference.

» If the market price is below the price calculated on the basis of the cost-plus method then, normally, the provider would refrain altogether from concluding the transaction because otherwise they would sustain a loss for their company.

According to the BFH, use of the comparable uncontrolled price method may not be rejected, without any further checking, by arguing that there is a lack of comparability of the services provided. If, for example, a group parent company has provided collateral such as a guarantee and, for this reason, a bank loan has been granted at a lower rate of interest, it may still be possible to compare the agreed rate of interest if adjustment calculations can be made.

3. Standalone analysis

The BFH clarified that in the case of the creditworthiness assessment, normally, the credit rating of the group as a whole is not important. Rather, it is solely the creditworthiness of the individual borrower that has to be taken into account (the so-called standalone rating). According to the more recent BFH ruling, group support that is not underpinned by legally binding guarantee commitments from other group companies cannot be seen to constitute recoverable collateral. Rational lenders, in their creditworthiness assessments, would generally only include such factors that they would also be able to rely on in a crisis situation.

Yet, the BFH also stressed that group affiliation would potentially be taken into account by unrelated third parties when calculating interest rates and, therefore, when compared with a purely standalone analysis, adjustments could possibly be made.

Please note

In practice, when calculating interest rates that conform to arm's length principles, the German fiscal authority's 'Administrative principles governing transfer pricing' of 14.7.2021 (there, Chapter III Point J. 'Financing relationships') would also have to be taken into account as a matter of course.

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

Provisioning for subsequent costs in the case of tool manufacturing

The Federal Fiscal Court *(BFH)* recently had to decide whether or not a provision should be created for the cost of service, maintenance and storage of tools that a supplier has provided to its customer; the court ruled that the recognition of such provisions is permissible.

1. Provisioning for tools as the object of dispute

In the case in question, a supplier (the claimant) developed and produced parts for an industrial company. In addition, the supplier also manufactured the customer-specific tools required for the production of these parts. It had been contractually agreed that, upon completion, ownership of the manufactured tools would be transferred to the customer and that the volume of the parts that were actually produced should not affect the price that had to be paid for the tools. The tool agreements stipulated that the supplier had to insure the tools and bear the costs of regular service, maintenance and repairs without any separate payments to cover this.

The supplier created a provision for tool costs for the anticipated expenses. The local tax office disallowed this provision on the grounds that, under Section 5(4b) sentence 1 of the Income Tax Act *(Einkommenssteuergesetz, EStG),* provisions may not be created for expenses that have to be capitalised in future financial years as purchase or production costs for capital assets.

2. The BFH determined the expenses for which provisions may be created ...

The tax court however was of the opinion that these were expenses for which provisions may be created because this was a case of performance arrears. The BFH, in its ruling of 2.7.2021 (case reference: XI R 21/19, not published), confirmed that, on account of the performance arrears, provisions had to be created for the subsequent costs of the tools. The future costs and the expenses accrued by the supplier had arisen for economic reasons prior to the balance sheet date. An economic reason that had arisen in the past resulted in an accessory obligation once the agreement on the sale of the tools had been concluded. The sales revenue had already covered the expenses for these obligations.

3. ... also include those anticipated to arise from maintenance obligations

Moreover, the provision for expenses that will be incurred in the future does not conflict with the regulation under Section 5(4b) sentence 1 EStG according to which provisioning would not be allowed if the expenses were purchase or production costs in future financial years for another capital asset. As per the sales agreement, the accrued expenses would have had no impact on the calculation of the amount charged for the production of the parts and were, therefore, not included in the determination of the production costs of the parts. In fact, the costs had been covered in the calculation of the consideration for the tools.

LEGAL

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

Legislative proposals of the ‘traffic light coalition’ with respect to corporate law – An overview

When a new government gets to work, measures in the field of fundamentally established corporate law are not necessarily right at the top of the list of priorities. Nevertheless, in the coalition agreement of 7.12.2021, there are plans for changes in this respect, too. In the following section we report on the key aspects.

1. Simplified company formation through digitalisation

Under the old government still, a law had been passed with the aim of facilitating future company formations on the basis of cash contributions via remote online notarisation; this will apply to *GmbHs* – [private limited companies] and *Unternehmergesellschaften (haftungsbeschränkt)* [limited liability enterprise companies, which are less complicated to set up than a GmbH with a share capital requirement of just €1]. Online notarisation will be valid as of 1.8.2022 and is intended to be conducted via a video communication system that has already been made available by the Federal Chamber of Notaries *(Bundesnotarkammer*). It will thus be possible to execute a company formation without the founders having to be physically present before the notary. The same will then also apply to commercial register entries for corporations that have to be authenticated by a notary. The new coalition would now like to go one step further and likewise allow certification via video communication for company formations on the basis of contributions in kind as well as for other resolutions.

Furthermore, there is an intention to set up so-called one-stop shops as contact points for prospective company founders where they would be able to obtain advice and funding for company formation and also to register their businesses. The aim is to facilitate company formations within 24 hours. It remains to be seen how exactly this will be implemented in this case. Setting up an appropriate online portal, for example, could be considered.

Please note: Other measures aimed at establishing Germany as a location for start-up investments include simplifying IPOs and capital increases, in particular, for growth companies and SMEs, too. Furthermore, the introduction of shares with different voting rights has also been announced.

2. New legal forms for businesses

There are moreover plans to introduce new legal forms for businesses such as, e.g., social enterprises or asset-locked organisations. The latter form has been under discussion for a long time already from the perspective of sustainable business practices and corporate social responsibility. In the case of this legal form variant, the profits that are generated remain in the organisation for the long term and may not be accessed by the shareholders. They essentially see themselves as trustees for the next business generation. The legal basis that has to be created for this would however expressly exclude tax planning arrangements.

3. Other relevant proposals related to corporate law

Beyond the above-mentioned areas of law, there are plans for changes with respect to the procedure for conducting annual general meetings (AGMs), the co-determination regulations as well as the rules in the field of compliance.

(1) Online annual general meetings – There are plans to turn the possibility of having a virtual AGM – which was introduced as a pandemic-induced measure – into a permanent option, although shareholders' rights would have to be fully safeguarded. However, there is no mention of the – desirable – extension of the regulations to also include GmbHs.

(2) Co-determination – There is an intention to further develop co-determination in enterprises. It is envisaged that, e.g., the legal form of the SE *(societas europaea)* could progressively become subject to the co-determination requirements for supervisory boards; up to now these have only been applicable in exceptional cases.

(3) Compliance – Furthermore, the coalition agreement provides for a revision of the rules on sanctions imposed on businesses for breaches of compliance obligations, including the amount of the penalty. In addition, there is an intention to create a precise legal framework for internal investigations.

Outlook

We will keep you updated about the implementation of the agreed reforms. This could however occasionally call for a degree of patience. The plans for the 'one-stop shop' contact points for company founders, for example, had already been included in the coalition agreements of both of the previous governments (!).

Container Terminal Burchard Quay

RA/StB [German lawyer/tax consultant] Sascha Wegener

The German Telecommunications-Telemedia Data Protection Act – Overhaul of the regulations governing the use of cookies

The new Telecommunications-Telemedia Data Protection Act *(Telekommunikations-Telemedien- Datenschutz-Gesetz, TTDSG)* has been in force since 1.12.2021. The scope of application of the TTDSG is however alongside that of the GDPR. The previous data protection provisions of the Telecommunications Act *(Telekommunikationsgesetz, TKG)* and the Telemedia Act *(Telemediengesetz, TMG)* were combined and adapted to European legal requirements. The following overview provides information on the legislative changes whose impact will however be limited for most website operators.

1. A new element – OTT services are covered by the legislation

Most of the regulations in the previously applicable TMG were transferred to the TTDSG, which is aimed at all telemedia providers. By contrast, a new element is the widening of the definition of the terms telecommunication service providers and telecommunication services. The latter category now also includes – via the term 'interpersonal communications services' – so-called over-the-top services (OTT services). The legal definition covers those OTT services that are offered over the internet without the involvement of the internet service provider in the process. This means, primarily, apps for e-mail services, instant messengers and internet telephony offerings, but also smart home devices such as, e.g., light bulbs that can be controlled via Alexa and other voice-controlled systems.

2. Consent under Section 25 TDSSG constitutes the most important regulation

Explicit consent for the use of cookies and tracking services is still the most important regulation here for telemedia providers. This requirement has already existed pursuant to the supreme court rulings of the Federal Court of Justice *(Bundesgerichtshof, BGH)* and the ECJ with respect to the interpretation of Section 15(3) of the Telemedia Act – which was applicable until 30.11.2021 – in conformity with European law (cf. also the BGH ruling of 28.5.2020, case reference: I ZR 7/16). Consent has now been explicitly legally stipulated for the first time in the TTDSG.

As previously, website operators will need to obtain the consent of users in order to be able to store information in the terminal equipment of an end user, or if they wish to have access to this. This will not apply in the case of cookies whose sole purpose is to carry out the transmission of a communication over a public telecommunications network or ones that are strictly necessary for technical purposes.

3. What are cookies that are necessary for technical purposes?

Cookies that are necessary for technical purposes are all those without which the website would not function. According to the respective EU Directive (Art. 5(3) sentence 2 of the Directive 2002/58/EC – ePrivacy Directive) the following cookies, for example, are necessary for technical purposes:

- session cookies that store certain settings of a user (e.g., the shopping basket, language settings or login data);
- flash cookies for delivering media content playback features;
- cookies that are used by integrated payment service providers (irrespective of any specific payment) insofar as they do not analyse any particular usage behaviour but, instead, are solely for the purpose of preparing potential payments or checking payment authentications.

4. The personal information management system (PIMS) and the single sign-on solution

Under Section 26 TTDSG, in the future, the intention is to give approval for services that would make it possible for website users to specify the circumstances under which they wish to consent to or reject the use of cookies. This would only need to be done once. Providers of such 'personal information management services' (PIMS) would automatically forward this information to all websites.

Please note: As a result, users would generally gain more control over their personal data and third-parties' access to their information.

A possible consequence would then be that cookie banners for giving consent would be rendered superfluous.


Old Elbe Tunnel

However, this may still take some time because these services will have to be approved first. Certain requirements will have to be met in order to obtain approval (e.g., no economic self-interest in consent being given on the part of the provider, the provider's security concept, etc.). A procedure for approving the services is yet to be established.

An example of such a service is mentioned in the preamble to the TTDSG. Several entities band together and organise a facility. It provides so-called single sign-on solutions for the entities via which users can organise their consent. Specifically, this means that those who log into their computers via the single sign-on service would, at the same time, be able to sign in to several services and applications without having to provide their login data separately for each individual service.

5. Other changes

Furthermore, the TTDSG regulates further aspects such as, e.g., in Section 3 TTDSG where a new provision on the secrecy of telecommunications has expanded the target group of those affected by this regulation. Moreover, Section 4 TTDSG is worth mentioning because it means that legal heirs will now be expressly authorised to access the data of the deceased persons.

6. Conclusion

The TTDSG has provided greater clarity about the data protection requirements for telemedia and telecommunications services. As regards the content of the legislation, there are only a few changes in the TTDSG, so that it is likely that nothing will change for many website operators. The complicated interpretation, in conformity with European law, of Section 15(3) TMG is now not needed any more and the coexistence of regulations in different legislative acts is likewise a thing of the past.

Recommendation

Against the backdrop of a legal situation that is now clear, we would recommend currently not only reviewing the requirements for consent and the up-to-dateness of your data privacy statement, but moreover setting up an ongoing process to ensure that, in the future, all technical changes with respect to consent and also your data privacy statement are taken into account. Furthermore, it should be noted that there are still plans at the EU level for an ePrivacy Regulation; as a result, there could been new changes that would, at least partially, also relate to the TTDSG.

RAin [German lawyer] Katharina Stock

Reform of the status determination procedure – New upfront determination of employment status

The status determination procedure of the German Federal Pension Scheme *(Deutsche Rentenversicherung Bund, DRV Bund),* for determining whether employment status is that of an employee or an independent contractor, will be further developed with effect from 1.4.2022 by including, among other things, a prior predictive decision.

1. Legal situation until 31.3.2022

In the context of social security, the status determination procedure makes it possible for the parties involved in an existing contractual relationship to establish, in a legally binding manner, whether or not work that is subject to mandatory social insurance contributions is deemed to exist. The status determination procedure is only available once a contract has been concluded; it is free of charge for the parties involved.

2. Enhancement as of 1.4.2022

The reform of the status determination procedure is intended to establish legal certainty and confidence with respect to planning for all contracting parties early on, more simply and, in particular, more swiftly.

2.1 Employment status instead of insurance obligation

The new up-front procedure will determine the employment status as part of a potential social insurance obligation, however, it will not determine if there actually is an insurance obligation. The procedure will thus determine whether a person should basically be considered as an employee or an independent contractor. As a result, the parties involved and the clearing units will be relieved of administrative red tape, moreover, the procedure will be simplified, speeded up and already possible prior to the commencement of a contract.

If a person is deemed to be an employee and therefore generally subject to mandatory social insurance contributions then the employer would be obliged to register them in accordance with the requirements. A separate determination of the insurance obligation by the collecting agency or by the DRV Bund will now only be necessary in special circumstances.

Please note: Independent contractor status does not necessarily mean exemption from social security contributions. For example, employee-like status for independent contractors – such as artists, teachers, home-based busi-

Reeperbahn with the Davidwache police station

nesses and tradespeople at building and construction service companies, those who are economically dependent with no employees subject to mandatory social insurance – are subject to mandatory pension insurance contributions (Section 2 of Volume VI of the Social Security Code *[Sozialgesetzbuch, SGB*]). Here, the obligation to transfer these contributions lies with the independent contractors.

2.2 Introduction of predictive decisions

In the future, it will be possible to determine employment status already prior to the start of the contract (cf. Section 7a(4a) Volume IV SGB, as amended). The aim is to limit or even prevent the creation of so-called 'bogus self-employment' situations. To this end, the contractual conditions will have to be sufficiently specifically clarified. If it appears that there are discrepancies with respect to the actual performance of an activity or the contractual arrangements when compared with the basis of the previous prediction then the DRV Bund may reverse the predictive decision. If there are changes in the contractual agreements or in the conditions for the performance of the contract in a period of up to one month following the commencement of any activity, then the parties involved would have to immediately notify the DRV Bund.

Please note: The DRV Bund would check whether or not this would give rise to an amended decision. Should this be the case then the decision would be adjusted with future effect. If the notification is not made immediately because of wilful intent or gross negligence then the decision would be reversed retroactively back to the date of the commencement of activities.

2.3 Introduction of a group determination procedure

Another new instrument for providing certainty about the employment status as early and as comprehensively as possible is the so-called group determination procedure pursuant to Section 7a(4b) Volume IV SGB, as amended. Such a procedure could be considered if the contracts were essentially to be implemented on the basis of uniform conditions. As a result, it would be possible to drop multiple individual decisions in similar cases.

2.4. Determination procedure in the case of triangular relationships

If the agreed work is performed for a third party then it will likewise be established whether the employment relationship is with the contracting entity or the third party. In doing so, separate status determination procedures can also be avoided.

Outlook

The changes will initially be valid until 30.6.2027. Thereafter, the DRV Bund will evaluate them and submit an in-depth report to the Federal Ministry of Labour and Social Affairs. Yet, once again, lawmakers have not formulated differentiation criteria that could provide an explicit indication for or against the employment status of an employee or an independent contractor. This will continue to be reserved for case law.

RA/StB [German lawyer/tax consultant] Dr. Dirk Moldenhauer

The liability of the managing director of a *Komplementär-GmbH* compared to that of the managing director of a *GmbH & Co. KG*

The legal form of the *GmbH & Co. KG* [limited partnership with a private limited company as a general partner] is very popular in Germany. In particular, the partner-friendly limitation of liability constitutes a huge advantage here when compared with the legal forms of the *OHG* [ordinary partnership], the *KG* [limited partnership] or the *GbR* [a partnership under German civil law]. Not long ago, Hamburg's higher regional court *(Oberlandesgericht, OLG)* decided, on 17.9.2021, that the managing director of a managing limited partner *GmbH* [private limited company] is generally liable towards the *GmbH & Co. KG* under the same principles as for the managing director of a *Komplementär-GmbH [general partner private limited company]*. This was reason enough to take a closer look at the liability of a managing director towards a GmbH & Co. KG.

1. Background

If a managing director of a GmbH fails to properly comply

with their business management obligations then, according to general principles, they would be liable for the breach of their managing director employment contract or their service agreement towards their contractual partner in this respect. Besides the Komplementär-GmbH itself, this could also be the KG. With regard to the obligations that have to be complied with by the managing director, Section 43(1) of the Limited Liability Companies Act *(Gesetz betreffend die Gesellschaften mit beschränkter Haftung, GmbHG)* contains a general catch-all provision ("due care of a prudent business person"). The duties of a managing director include the obligation to comply with legal requirements (duty to act lawfully), the obligation to properly manage the business as well as corporate fiduciary duties.

Moreover, under the legal rules of Section 43(2) GmbHG, the managing director is liable to a GmbH on the basis of their corporate position as the managing director of the company. Section 43(2) GmbHG is the key liability provision for managing directors of a GmbH. However, losses that arise because of a breach of duty do not normally arise at the Komplementär-GmbH but rather at the KG.

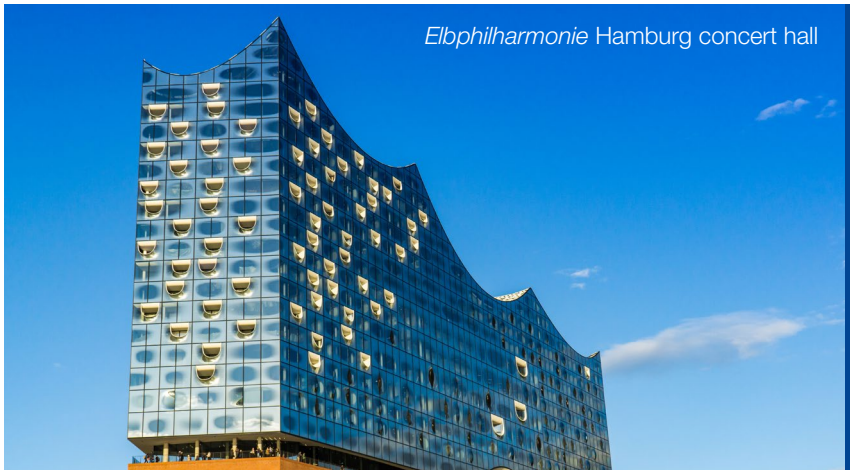
2. Extension of the liability towards a KG

In case law, the liability provision under Section 43(2) GmbHG has been extended, if certain conditions are met, to include the relationship between the managing director and a KG so that Section 43(2) GmbHG will, in practice, not be ineffective for a GmbH & Co. KG and, moreover, a KG without a contractual agreement between the managing director and the KG will ultimately not be left without any possibility to claim compensation (cf. Federal Court of Justice *[Bundesgerichtshof, BGH]* ruling of 18.6.2013, case reference II ZR 86/11). At any rate, according to the above ruling, where the "sole or principal duty" of a Komplementär-GmbH consists in managing the business of a KG then the scope of protection of the special legal corporate relationship between the Komplementär-GmbH and its managing director, which is established when they are appointed, will extend to the KG with respect to the liability under Section 43(2) GmbHG in the event of management without due care (BGH ruling of 22.9.2020, case ref: II ZR 141/19).

3. The ruling by the Hamburg OLG of 17.9.2021

The Hamburg OLG, in its ruling of 17.9.2021 (case reference: 11 U 71/20; appeal lodged, BGH case reference II ZR 162/21) clarified that the BGH case law on the liability of a managing director of a Komplementär-GmbH may be transferred to the managing director – according to the partnership agreement – of the managing limited partner company. In the case under dispute, a GmbH & Co. KG or an insolvency administrator had claimed compensation for damages pertaining to the assets of the GmbH & Co. KG against both the managing director of a Komplementär-GmbH as well as the managing director of the managing limited partner GmbH (the managing limited partner was a GmbH). Both of the managing directors had been accused of breaching due diligence obligations in the context of loans granted with insufficient collateral.

Drawing upon the BGH ruling, the 11th senate of the Hamburg OLG clarified that the liability provision under Section 43(2) GmbHG, through analogous application, would also have to be applied to the managing limited partner. What matters is that the managing limited partner GmbH has to likewise be under obligation to the GmbH & Co. KG to manage the business with due care and diligence. In any case if, in connection with the purported breach of duty, there was no conflict of interest for the managing director of the managing limited partner GmbH then it would not matter that they are still deployed as a managing director in other companies. A managing director who takes no action whatsoever when an agreement for the provision of a dubious loan is concluded cannot, at the same time, argue that nobody would have listened to them anyway.



Elbphilharmonie Hamburg concert hall

Please note

The Hamburg OLG granted permission for this case to be referred to the BGH for an appeal in respect of the question of whether or not the defendant, as the managing director of the managing limited partner, was liable towards the GmbH & Co. KG even though this limited partner was also responsible for managing other KGs.

The Federal Fiscal Court's doubts about the constitutionality of late payment penalties

The Federal Fiscal Court *(Bundesfinanzhof, BFH)* had already expressed its doubts about the constitutionality of interest rates on tax arrears and, following on from this, has now used the same argument with respect to the level of late payment penalties.

The case that gave rise to the BFH decision was concerned with the suspension of late payment penalties on VAT for August 2018. The BFH has made reference to the rulings it had issued, shortly before, on doubts about the constitutionality of the level of standardised interest rates under Section 233a of the Fiscal Code [Abgabenordnung, AO] and Section 238(1) sentence 1 AO, as from 2012. For the dispute that is still pending, in their resolution of 26.5.2021 (case reference: VII B 13/21) the Munich-based judges stated that, in the light of their ruling, there were also doubts about the constitutionality of the statutory level of late payment penalties pursuant to Section 240(1) sentence 1 AO. In any case, this applies to the extent that the function of late payment penalties is not to be a means for exerting pressure but, instead, to be the consideration or compensation for postponing the payment of tax liabilities that are due and, therefore, they have an interest-like function. Against this backdrop, the enforcement of a disputed notice of settlement in respect of late payment penalties on VAT for August 2018 at half the level requested (interest component at 6%) had to be rescinded. The appeal proceedings are pending (case reference: VII R 55/20).

Please note: In comparable cases, you should first request a notice of settlement in respect of the late payment penalties. The subsequent appeals procedure would then be based on a reference to the above-mentioned proceedings pending at the BFH by operation of law.

Tax requirements for influencers

Influencers who operate on social medial networks where they earn their money by promoting products or lifestyles should be aware of the tax pitfalls that such activities may entail.

(1) Document the receipt of gifts – When influencers get invitations to events, for restaurant visits and hotel stays these are usually free of charge. In such cases, however, in return the host would like the influencer to create publicity by presenting the respective venues in the best possible light and then posting this. Thus, a service is expected in return. These are therefore not deemed to be gifts for tax purposes. The same applies to free products that are sent to influencers, such as, cosmetics, outfits from fashion brands or mobile phones. When influencers keep these products and present them on their channels then the products are deemed to be income that has to be documented, in a list, by the influencer. This list has to include the date of receipt, the donor, the type of gift and its cash value. The value of such gifts has to be recorded at the usual final price at the point of sale (taking into account the standard discounts). If you fail to keep a log of the gifts and if they are not properly taxed then the local tax office may make an estimate on the basis of the postings on the internet. This could turn out to be disadvantageous for the influencer. Such non-cash incomes are generally liable for tax. If they are not declared then, potentially, influencers run the risk of being accused of tax evasion.

Please note: Gifts with a value of less than €10 are generally tax-exempt and do not have to be documented. The same applies if, after the public presentation, a product is returned to the sender.

(2) Document business expenses – Influencers frequently give rise to the impression that their postings originate from their private lives. However, these postings are often commercial advertisements. If influencers incur costs for advertisement postings (e.g. for a trip with an overnight stay) then the local tax office might not accept them as business expenses because of the appearance of something private, as it is assumed that the trip was private.

(3) Travelling for a mix of reasons – If influencers combine a business trip with private vacation days then the private and business expenses would have to be kept separate.

Please note: For all business expenses, receipts should be collected as documentary evidence.

AND FINALLY...

“I think for me, the key is setting really big goals.”

Lawrence ‘Larry’ Edward Page, born on 26.3.1973, American computer scientist, co-founder and long-time CEO of Google and Alphabet Inc

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