PKF

# Newsletter

**Key Issue**

Sustainability reporting – An example of its application in the SME sector

06|22

# Dear Readers,

The German government has responded to the variety of causes of the dramatic hikes in energy prices. Our first report in this newsletter contains information on the changes resulting from the **2022 German Tax Relief Act** of 20.5.2022. On the same date, the 4th Coronavirus Tax-Related Assistance Act **abolished the requirement to discount liabilities in the tax accounts**. You can find details of this in the second report in our Tax section.

The subsequent report is also about the application of interest rates, namely, the necessary amendments to the regulations on the **interest on additional tax payments** –these are now nearing completion. We then address the issue of the taxability of the **repayment of nominal capital** and the return of capital contributions from **corporations** in **third-countries**. The fiscal administration had to bow to a Federal Fiscal Court ruling here. In the last contribution on the subject of tax we take a look at the consequences of **relocating to** Germany and the question of the circumstances under which it would be possible, in the event of a disposal in Germany, to make use, for tax purposes, of the **hidden reserves that have been transferred from other EU countries**.

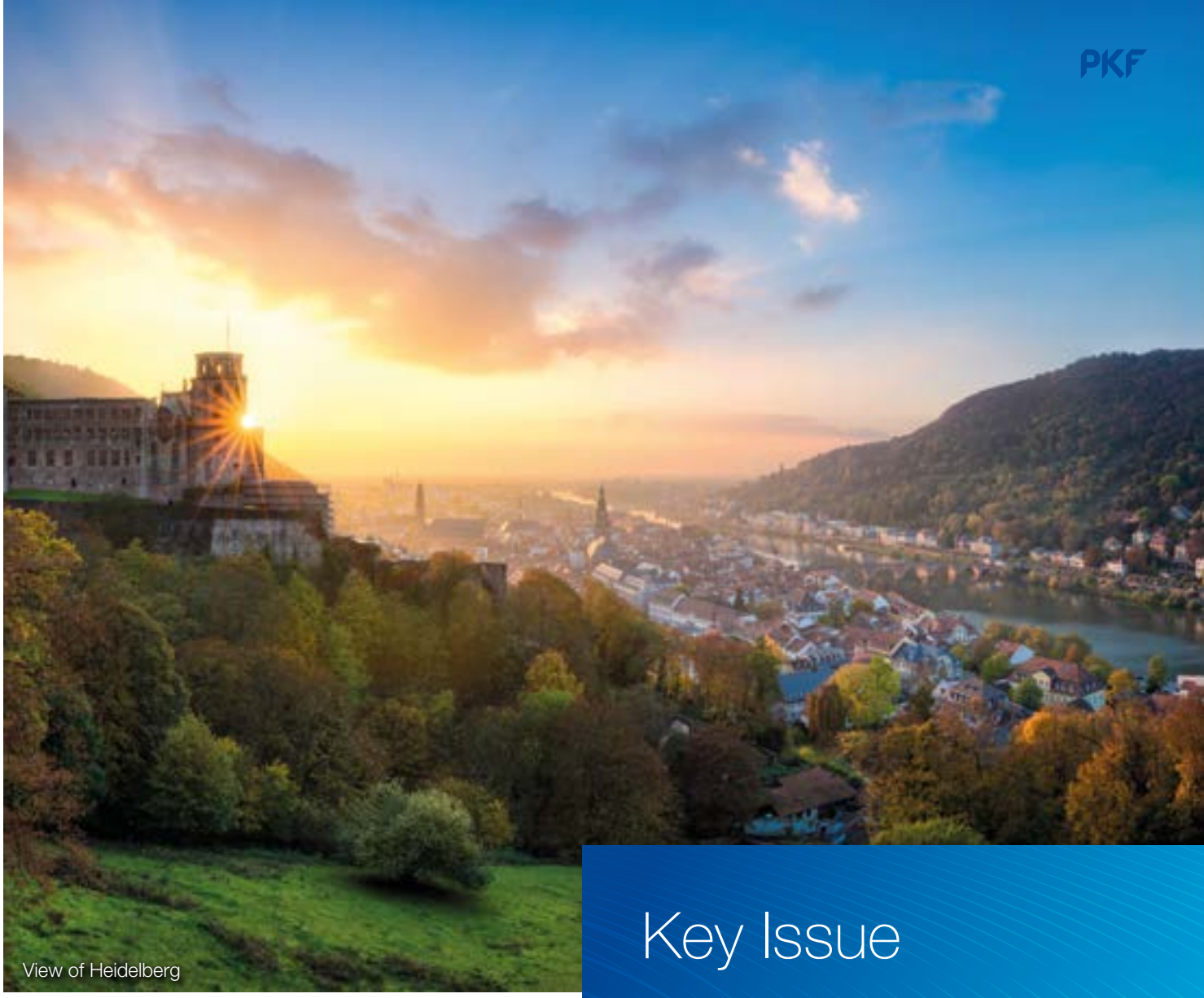
The Key Issue report in our June newsletter appears under the Accounting section. In this contribution we conclude our series of three articles on **sustainability reporting** with a practice report about the opportunities and challenges for small and medium-sized enterprises. Our report clearly demonstrates that the legal requirements are, admittedly, frequently not directly applicable to a company, however, a sustainability reporting process should nonetheless be put in place because companies both upstream and downstream in the value chain and/or other stakeholders will expect information.

In our Legal section, the topic is, once more, the further legal developments concerning the potential **expiry of entitlements to leave.**

We continue again our journey around the PKF locations in Germany through the illustrations that break up the reports from our experts – this time we visit Heidelberg.

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

Your Team at
PKF




Front cover photo: Heidelberg Castle with statue of Athena

## Key Issue

On the pathway to sustainability reporting – An example of its application in the SME sector

# Contents

TAX

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

# Measures in the 2022 German Tax Relief Act

**In view of high energy costs, on 16.3.2022, the German Federal Cabinet approved a draft of the 2022 Tax Relief Act and, on 20.5.2022, the *Bundesrat* [upper house of the German parliament] likewise gave its approval.**

## 1. Relief packages already previously drafted

On 23.2.2022 as well as 24.3.2022, in view of high energy costs, the governing coalition had already agreed to provide relief to consumers. In doing so they came to a specific agreement on various support measures as part of a relief package (cf. PKF newsletter 4/2022). Standing at the heart of this relief package is the elimination of the renewable energy levy already by 1.7.2022 (cf. PKF newsletters 5/2022).

## 2. 2022 Tax Relief Act

Three income-tax-related measures, in particular, will enter into force through the 2022 Tax Relief Act:

**(1)** For 2022, the **employee allowance** for work-related expenses for income tax purposes will be increased by €200 to €1,200.

**(2) Basic personal tax allowance** – This will go up retroactively, from 1.1.2022, by €363 from currently €9,984 to €10,347.

**(3) Long-distance commuter tax allowance** – In view of higher mobility costs, the increase in the long-distance

View over the Neckar river with the Old Bridge, Castle, Old City Gate and Church of the Holy Spirit

commuter tax allowance that was previously due to come into force on 1.1.2024 (from the 21st kilometre) as well as the mobility bonus uplift will be brought forward. The long-distance commuter tax allowance will now be raised to €0.38 retroactively from 1.1.2022.

At the same time, the government also finalised the following provisions in the relief package that had already been announced (cf. PKF newsletter 4/2022).

**(4) One-off child bonus** – In July, a one-off bonus in the amount of €100 per child will automatically be paid out together with the child benefit. The child bonus will be offset against the child tax allowance.

**(5) One-off taxable energy cost lump sum payments** – Under Sections 112 to 122 of the German Income Tax Act, as amended, all employees whose income is subject to tax will be paid a taxable energy cost lump sum in the amount of €300 for 2022. For those who are eligible, the entitlement to this will arise as of 1.9.2022. The lump sum amount should be paid to employees by their employers in September 2022. Employers should take the energy lump sum payments from the overall amount of payroll tax that has to be withheld or, if necessary, any excess amounts should be refunded to employers by the local tax office. For everyone else who is eligible, the energy cost lump sum amount will be determined along with the income tax assessment for the 2022 assessment period and offset against the income tax that has been determined.

**(6) One-off reduction for advance payments of income tax** – An advance payment via a one-off reduction of advance payments of income tax has also been provided for.

**(7) Nine-euro ticket** – As of 1.6.2022, in June, July and August, it will be possible to buy public transport tickets valid throughout Germany for €9 each month.

**(8) Fuel price cuts** – At filling stations, the energy tax included in the fuel prices will be cut by €0.30 per litre for petrol and by €0.14 for diesel for a limited period of three months starting on 1.6.2022.

StB [German tax consultant] Sabine Rössler

# Abolition of the requirement to discount liabilities in the tax accounts

**The 4th Coronavirus Tax-Related Assistance Act was passed by the *Bundestag* [lower house of the German parliament] on 20.5.2022. The abolition of the requirement to discount liabilities in the tax accounts ranks among the proposed amendments that have remained largely unnoticed by the general public.**

## 1. Requirement to discount liabilities in the tax accounts

Under Section 6(1) no. 3 of the Income Tax Act (Einkommenssteuergesetz, EStG) non-interest-bearing liabilities with a remaining term of more than one year have to be discounted (in the tax accounts) at an interest rate of 5.5%. This applies accordingly to provisions in the accounts. A liability that only has to be settled in the future is less of a burden for the debtor than one that has to be settled immediately. Even without an explicit interest rate arrangement, besides a redemption component, an interest component will also be included. Here, the requirement to discount is based on the principle that payments that do not have to be made until the future have to be shown at their present value today (this was also what the Federal Fiscal Court (Bundesfinanzhof, BFH) decided in its ruling of 22.5.2019, case reference: X 19/17, German Federal Tax Gazette II 2019 p. 795).

For years, numerous proceedings before the BFH have documented the doubts about, among other things, the interest rate level and its rigidity. The BFH was of the view that the requirement to discount non-interest-bearing operating liabilities at an interest rate of 5.5% for financial years up to and including 2010 was constitutional. According to the Münster tax court, for 2013 there were likewise no serious doubts about the constitutionality of Section 6(1) no. 3 sentence 1 EStG with its standardised fixed discount rate of 5.5% (decision of 5.5.2021, case reference: 13 V 505/2).

## 2. Amendment only for liabilities and not for provisions

In the future, liabilities and provisions will be treated differently. Under Section 6(1) no. 3 EStG, as amended, from now on liabilities will have to be recognised at the cost of acquisition, like land, shareholdings and current assets. The requirement to discount non-interesting-bearing liabilities with a remaining term of more than one year has


Heidelberg University

been abolished. However, for provisions, the rules that hitherto were explicitly for liabilities will still apply. Provisions for liabilities have to be discounted at an interest rate of 5.5%; provisions with a remaining term of less than one year, or provisions for interest-bearing liabilities are exempted from the discounting requirement.

### 3. Scope of application and background

The new regulations described here will have to be implemented for the first time for financial years ending after 31.12.2022. Upon application, it would be possible to also implement these rules for earlier years. An application would however then have to be made for any and all financial years on a uniform basis.

The abolition of the discounting requirement for liabilities was based on an initiative of the Bundesrat. An additional tax charge resulting from the discounting in the year when the liability is recognised for the first time will no longer be necessary in view of the already protracted run of very low interest rates. The elimination of the requirement to discount liabilities is moreover an effective contribution towards the de-bureaucratization of tax law and towards tax simplification.

**Please note**

Insofar as there is a liability from previous years then a reduction in taxable profit will occur in the amount of the discounting volume that still existed at the end of the last financial year. Transitional arrangements, for example, in the form of spreading the expense over several years, are currently not anticipated.

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

# Interest on tax refunds and on tax arrears – Reduction in the interest rate to 1.8% per year

**In our December newsletter we already had a report on a ruling by the Federal Constitutional Court *(Bundesverfassungsgericht, BVerfG)* where interest on tax arrears and tax refunds of 6% per year was classified as being unconstitutional. With the draft of the Second Act Amending the German Tax Code, of 30.3.2022, the German Federal Cabinet has initiated the reduction in this interest rate to 0.15% per month, or 1.8% per year.**

### 1. New regulation pertaining to the interest rate

The new regulation will apply retroactively from 1.1.2019 to all open cases of interest on tax arrears and on tax refunds. Accordingly, the interest rate should be reduced to 0.15% per month (= 1.8% per year) – (this is currently still 0.5% per month or 6% per year). Furthermore, the regulation stipulates that this new interest rate has to be evaluated for appropriateness at least every three years taking into account developments in the basic rate of interest with effect for subsequent interest periods. Therefore, it would have to be reviewed for the first time by 1.1.2026 at the very latest.

### 2. Further procedure

The amendment to the legislation solely affects interest on tax arrears and on tax refunds not, however, interest on deferred taxes, evaded taxes or suspended taxes nor on interest relating to judicial proceedings. The definitive implementation of the lower interest rate still requires the Bundestag (lower house of the German parliament) to pass the legislation (planned for 24.6.2022) as well as the Bundesrat to give its approval (planned for 8.7.2022).

**Please note**

As soon as the Bundesrat has given its approval and the legislation has been adjusted accordingly, it is likely that a large number of tax assessment notices where the interest assessment had hitherto been set 'to zero' in reference to the ruling by the BVerfG, or was still provisional, will be adjusted by the tax office.

RA/StB [German lawyer/tax consultant] Lars Heymann
WP/StB [German public auditor/tax consultant] Dr Dietrich Jacobs

# Federal Ministry of Finance on the repayment of nominal capital and the return of capital contributions in the case of third-country companies – Prospect of tax neutrality

**Previously, the German fiscal administration held the view that in the case of corporations outside of the EU (so-called 'third-country companies') payments not made to nominal capital could generally not be returned in a way that would not affect the operating result for tax purposes. Following contradictory rulings by the Federal Fiscal Court *(Bundesfinanzhof, BFH),* the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* has now acknowledged this case law and put in place rules for the repayment of nominal capital. Nevertheless, various pitfalls can be found in the details as regards, among other things, the potentially exacting verification requirements.**

### 1. Repayment of nominal capital

Generally, in the documentation, payments that have been made in a foreign currency at the level of the distributing company will have to be converted into Euro at the middle rate of the forex bid price. For the shareholder, repayments of nominal capital will normally result in a reduction in acquisition costs that would not be subject to income tax. There are two relevant exceptions to this.

- If the repayments of nominal capital exceed the acquisition costs then the excess amount would generally be liable for tax.
- Amounts that are repaid within five years after a capital increase from company funds have to be classified as income from capital assets up to the amount of this capital increase.

The BMF, in its circular of 21.4.2022 (reference: IV C 2 – S 2836/20/10001 :002), stipulated that in order to be able to benefit from basic tax neutrality the nominal capital reduction and repayment resolutions, among other things, would have to be provided as proof of the repayment of nominal capital.

### 2. Repayment of contributions not made to nominal capital

The fiscal administration has acknowledged that, in principle, the possibility of a tax-neutral repayment does exist. However, the authority wants to allow this, in accordance

with BFH case law, only when and to the extent that, in accordance with the so-called 'appropriation sequence' – which is also of relevance for domestic (German) corporations -, profits are not paid out first. Since, in Germany, no assessments are made of the contribution account for tax purposes for third-country companies, the required amounts should be determined on the basis of foreign financial accounts on the last reporting date prior to the distribution and, therefore, carried out as follows:

Equity
– nominal capital
– additional capital contributions not made to nominal capital
= distributable profit

The BMF circular specifies the extensive evidence that could be required if a tax-neutral repayment is supposed to be presumed. In particular, this could include:

1. proof of the unlimited tax liability of the distributing corporation or association of persons in a third-country for the requested period,
2. the size of the domestic shareholder's participation,
3. resolutions and evidence of distributions made and
4. the balance sheet of the company making the payment.

**Please note:** The fiscal administration does not require financial accounts prepared according to German law nor a reconciliation to notional tax accounts.

### 3. Particular feature – Corporations from EEA countries effectively have a right to choose

It is the view of the BMF that, upon application, it would be possible to also apply the provisions on the return of capital contributions to the corporations from EEA states that have to be taken into account by foreign EU corporations. If this has not been effectively requested then the principles described above would be applied.

*Recommendation*

The new BMF circular has provided increased application certainty. It is however likely that the fiscal administration will place strict requirements for producing proof on taxpayers who want to benefit from the above-mentioned tax neutrality. Therefore, you should make sure early on that you can secure access to the documents that might be requested.

StB [German tax consultant] Dr Dirk Altenbeck / StBin [German tax consultant] Stephan Lüneburg

# The taxation of shareholdings when relocating to Germany from another EU country

**It is generally known that when you are planning to relocate out of Germany you will need timely tax advice including a review and structuring options. The importance of such advice in cases where the relocation is to Germany has been made clear by a Federal Fiscal Court *(Bundesfinanzhof, BFH)* ruling; in the case in question, the supreme court addressed, for the first time, the issue of the recognition of notional acquisition costs for shares in corporations that are held as private assets. In the wake of the change in the law for national exit tax within the EU, as of 2022, by implication the importance of the ruling should not be underestimated because, in the future, taxation deferral without interest will no longer be possible, but instead taxation will become the general rule. Accordingly, this has however raised concerns under EU law.**

### 1. Basic principles

If a shareholder with shares in corporations that are held as private assets transfers their place of residence to another country then there, normally, the shareholder will create an unrestricted right for the destination country to tax all their domestic and foreign income in accordance with the so-called world income principle. The country of departure as well as the destination country are able to settle the right to tax in such a case via a provision in their double taxation agreement whereby the right to tax the disposal gains from such shares is usually conferred on the destination country if the disposal occurs after the relocation. In order to protect itself against the cessation of this right to tax, the country of departure is able to tax the capital gain in the shares in a corporation up until the relocation happens. Some EU countries do not have exit

tax regimes and others, after a certain period, waive the tax that has been determined.

Therefore, in the run-up to the relocation, it will be important to take into account how the exit tax regimes have been specifically designed by the individual member states. If the final levying of tax takes place in the country of departure then Section 17(2) sentence 3 of the German Income Tax Act mandates that there has to be a link between the departure country and the destination country with respect to the economic value of the taxed shares in order to avoid double taxation in principle. This occurs via a notional increase in the acquisition costs for the shares in corporations that are held and this has the effect of reducing tax when there is a subsequent (actual) disposal in Germany.

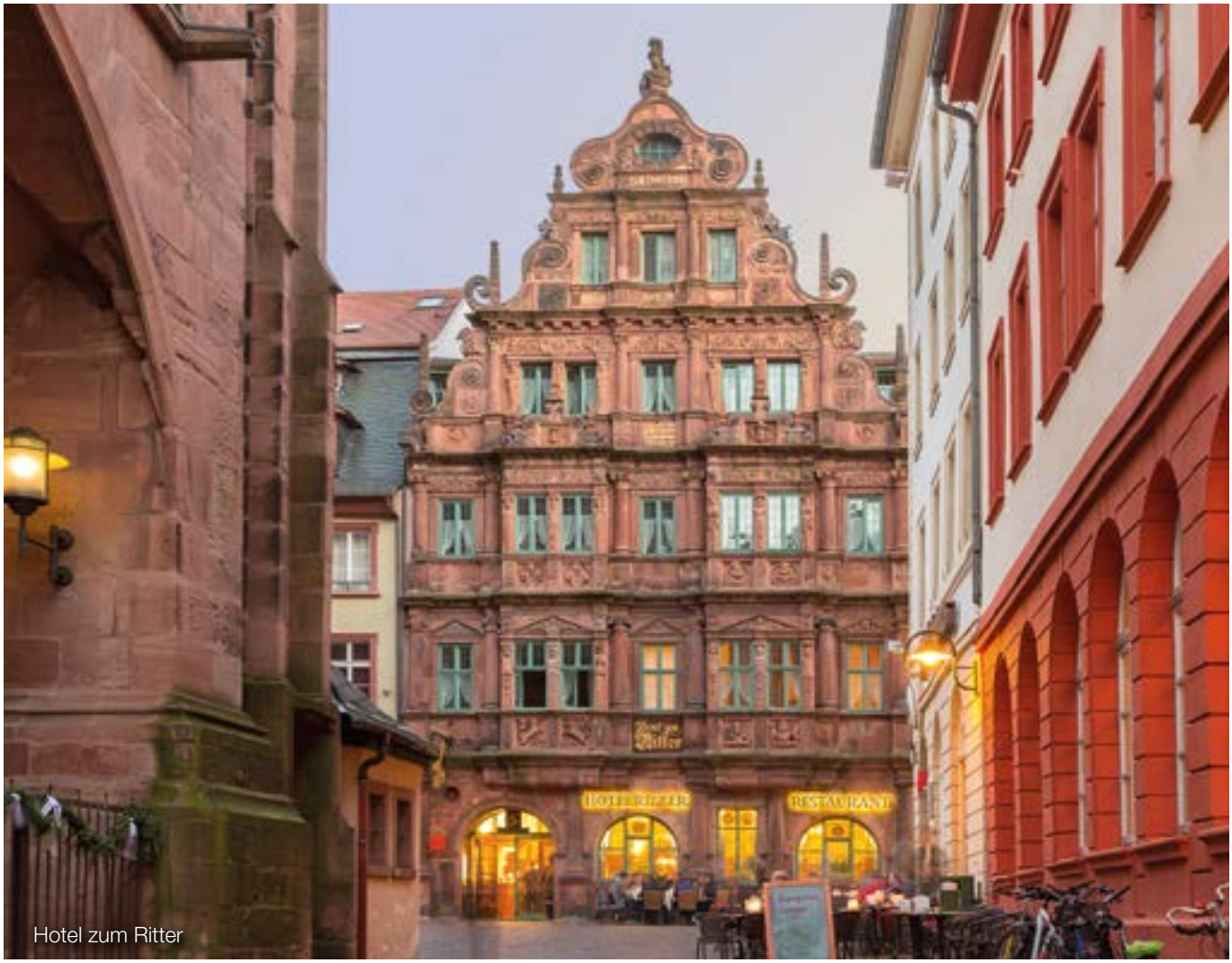
## 2. BFH ruling on the economic value link

The BFH, in its ruling of 26.10.2021 (case reference: IX R 13/20), had to decide for the first time what requirements should be set for this value link. Legislators in Germany require that the shares have to have been subject to a comparable tax regime in the departure country within the meaning of Section 6 of the German External Tax Relations Act. To this end, it is necessary for the foreign fiscal authorities to calculate and determine the amount of tax that is due upon departure and to provide this in a tax assessment notice.

In the view of the BFH, it is however not important for the tax to have actually been paid. The tax office and the tax court previously held this view. In the case in question, a certificate or an official letter from the Dutch fiscal administration was not deemed to be sufficient for this purpose because it was not a tax assessment notice within the meaning of the so-called 'preservation assessment notice' [Konservierungsbescheid] for the purpose of linking both countries with respect to the economic value.

## 3. Implications in practice

In order to achieve the best possible outcome in a targeted manner it would be absolutely essential for tax consultants in the departure country as well as the destination country to coordinate with each other, in advance, on



Hotel zum Ritter

the respective applicable tax regulations; in particular, if in the departure country it would be possible for taxes to be waived after ten years, or if the country of origin does not have an exit tax regime. Under the world income principle, Germany would also impose a comprehensive tax for the capital gains during the period when the place of residence was still abroad and Germany therefore did not have the right to tax.

Ultimately, the ECJ will have to examine not only the question as to whether or not Germany is violating the freedom of establishment through its national regulation, applicable since 2022, pertaining to exit taxation without interest-free deferral, but also the question as to whether or not Germany may impose comprehensive taxes in the absence of a point of reference. This was not addressed in the BFH ruling.

## Recommendation

For such scenarios, it would be advisable to lodge an appeal first and, in the event of further pending cases, to request a suspension of proceedings, or to review the prospects of success of an action with respect to the tax implications. In the context of planning a relocation to Germany, it could make sense to generate an increase in the acquisition costs through a sale or a qualified exchange of shares at fair market value if the tax law of the foreign country permits this in a tax-neutral way or provides for other concessions or, in the best case, does not even tax capital gains from the sale of shares in corporations.

## ACCOUNTING & FINANCE

Sandra Bala / Norman Sträter

# On the pathway to sustainability reporting – Part III: An example of its application in the SME sector

**In Part I of this series of articles, we discussed the evolution of non-financial reporting towards sustainability reporting (CSR Directive) in the management report. The practical challenges as well as the opportunities of expanding reporting requirements for small and medium-sized enterprises were the subject of Part II. In the following section, we outline, by way of example, the requirements that one of the world's largest car manufacturers lays down for its supplier companies and the steps that the suppliers need to implement in order for them to continue to be taken into consideration in the contract award process.**

### 1. Spillover effects for small and medium-sized enterprises (SMEs)

The further development of sustainability reporting has initially been addressed only to large undertakings and listed companies. Industries with distinctive supply chains – like the automotive industry – can be required to monitor the non-financial aspects of supply chains that relate to the sustainability performance of vehicle manufacturers. In such a case, companies that are neither large nor listed would then also be affected by sustainability reporting.

By carrying out an evaluation of suppliers based on their sustainability performance it will be possible to identify risks in the supplier chain at an early stage and, consequently, to take preventative action in relation to suppliers, thus before any shortcomings appear in the media. One means of early detection is the self-assessment questionnaire (SAQ); this has been standardised for the automotive industry and is intended to give vehicle manufacturers an indication of the sustainability of the operations of the respective suppliers with regard to social, environmental and business ethics aspects.

Communication – that is, replying to the SAQ and uploading the required documents as well as the validation of the SAQ – is processed via the NQC SupplierAssurance internet platform. Establishing business relationships and qualifying as a supplier or service provider for large car manufacturers will then depend on achieving a positive rating.

**Interim conclusion:** Therefore, SMEs could likewise be affected, albeit indirectly, by the German Act to Transpose the CSR Directive.

## 2. Checking the rating requirements

The requirements in the SAQ are based on standards relating to management, working conditions and human rights, occupational health and safety, business ethics, the environment and supplier management. The scope of the requirements that have to be satisfied depends to a large extent on the size of the company (in terms of number of employees). The S(ustainability)-Rating is applicable to companies with more than nine employees. Business partners with 10 to 99 employees can already obtain a positive rating if they satisfy the minimum requirements. Tougher requirements apply to companies with 100 or more employees and up to 500 employees respectively. In addition, a distinction is made between manufacturing and service companies. The latter have to satisfy a shorter profile of requirements because they do not have to explain and provide proof of responsible raw material procurement.

**Example:** The present case involved a company that provides services for industrial manufacturing and has less than 100 employees. In view of the fact that this was a service sector company and that the level of compliance was limited to satisfying the minimum requirements, ultimately, the applicable eligibility criteria for the award of contracts were simpler. That is why the efforts were focused on checking that the minimum requirements had been satisfied; these requirements are discussed in more detail below.

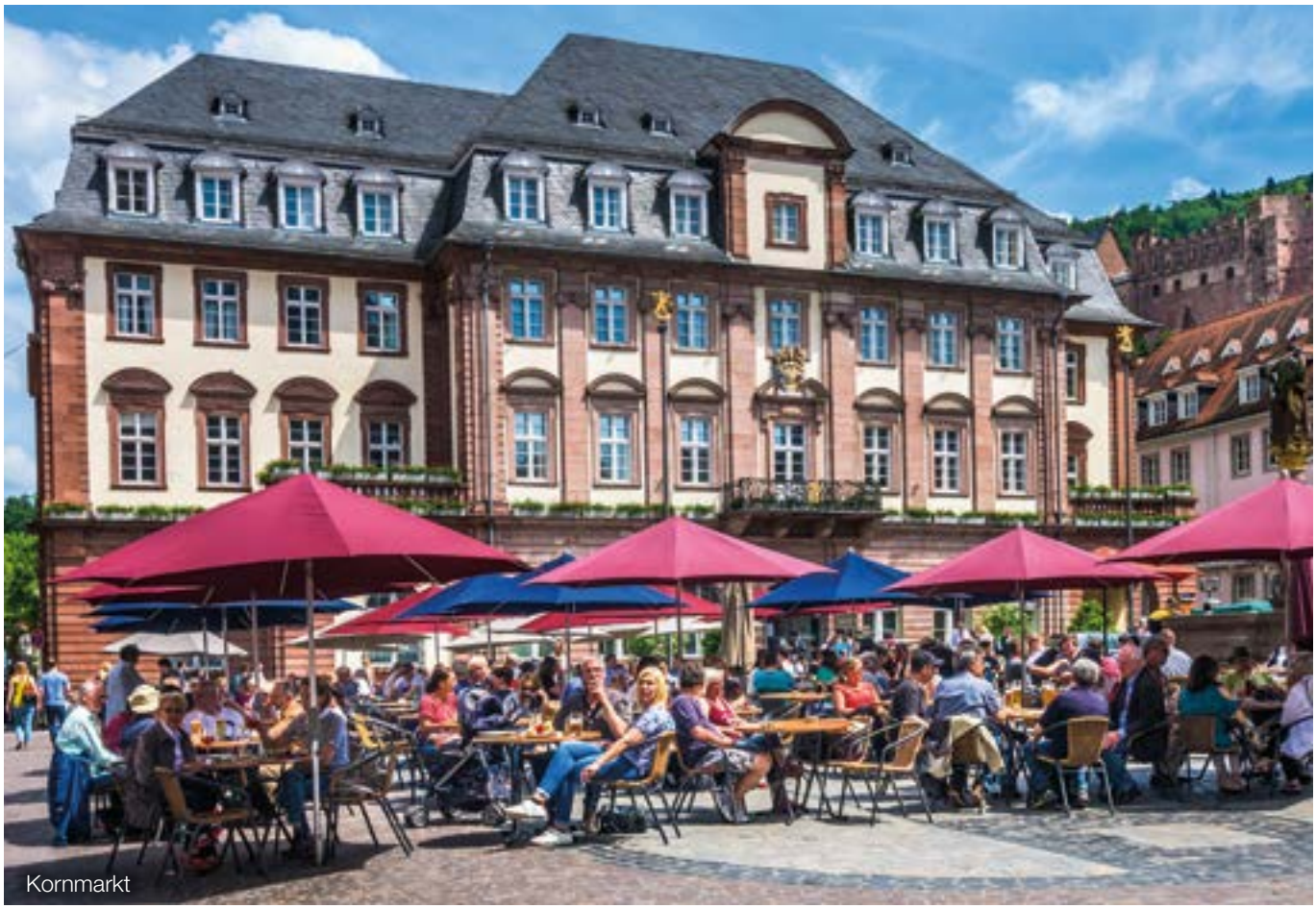
## 3. Minimum requirements to be complied with

### 3.1 Management – Code of conduct

In the area of management, the minimum requirements provide for the existence of a code of conduct. Clients would only expect supplier companies with 100 or more employees to explicitly appoint senior executives who have overall responsibility for sustainability and compliance. Expectations related to the CSR/sustainability report are oriented towards EU guidelines on the disclosure of non-financial information and would only be relevant for large companies with 500 or more employees.

A code of conduct defines behavioural guidelines that embody a company's ethical principles. They are intended to provide guidance to employees, but also to business partners on how to deal with the existing company rules.

**Please note:** You can use the requisite code of conduct to report on sustainable operations with regard to social, environmental and business ethics aspects. The guide-



Kornmarkt

lines referred to below were a constituent part of the code of conduct in the specific case.

### 3.2 Working conditions and human rights

Business partners have to, at least, have a policy on working conditions and human rights that covers the topic areas of child labour and young workers, wages and social security benefits, working hours, modern slavery, freedom of association and collective bargaining as well as harassment and non-discrimination.

In so doing, companies have to undertake to adhere to high standards when respecting human rights and to appropriate working conditions.

**Please note:** In Germany, given that human rights and labour standards have already been legally established and accepted, satisfying these criteria should not normally prove difficult for domestic (German) companies. Nevertheless, it should be kept in mind that all the topic areas have to be included in the policy and that the company has to explicitly commit itself to respecting human rights and good working conditions.

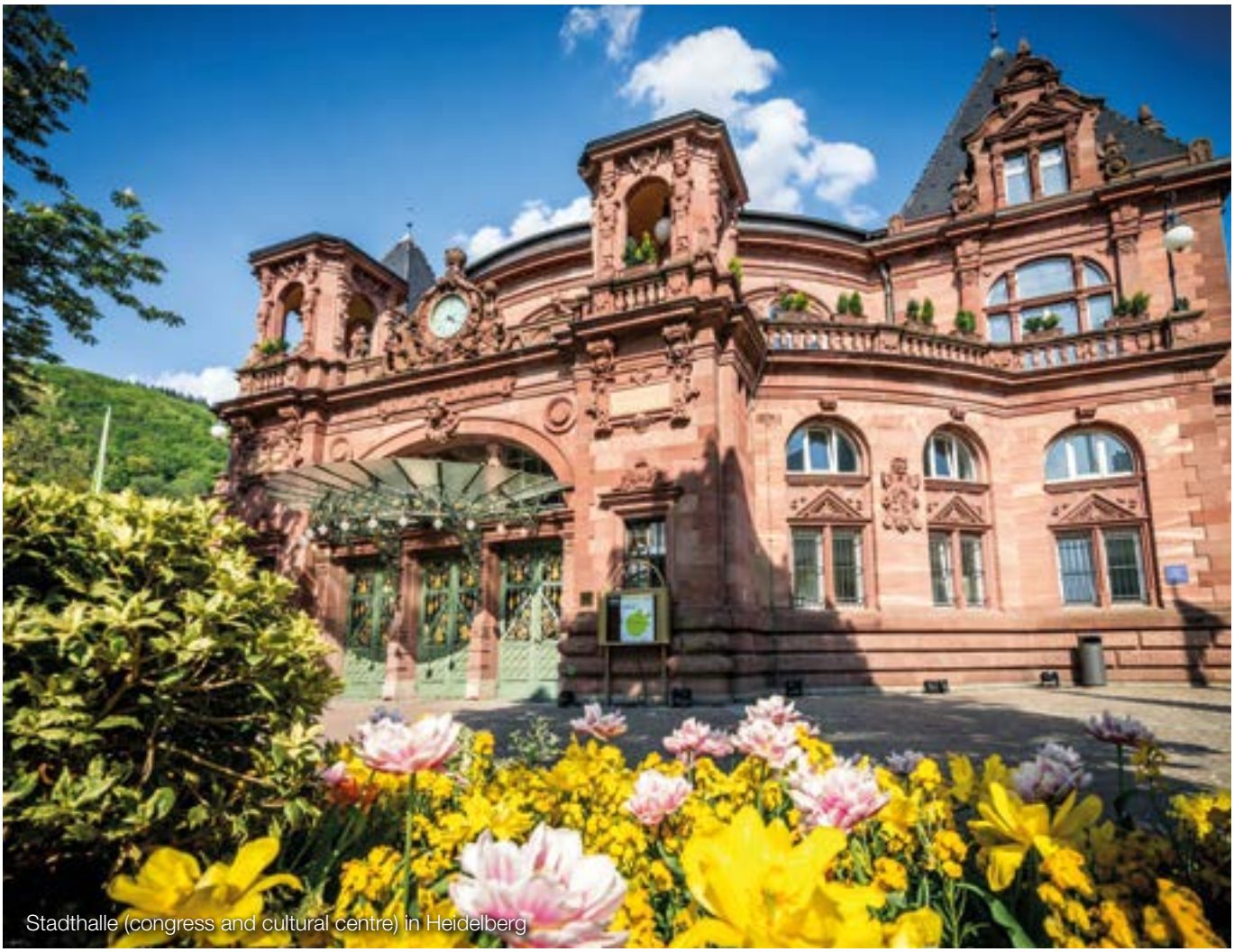
### 3.3 Occupational health and safety

Occupational health and safety refers to the recognition, evaluation and control of hazards arising in the workplace that could impair the health and well-being of employees. A business partner will be able to satisfy these requirements by means of an occupational health and safety policy that includes, at least, the topic areas of emergency preparedness and response, accident and failure management, workplace ergonomics as well as fire safety.

**Recommendation:** The policy should point out the specific measures in the area of occupational health and safety that will be taken in order to a provide a healthy and safe workplace.

### 3.4 Business ethics and the environment

Furthermore, the company needs to have a formal policy covering business ethics. This should address the measures that the company has put in place to specifically



Stadthalle (congress and cultural centre) in Heidelberg

prevent corruption, extortion, bribery and data breaches. The requisite policy on environmental protection should moreover demonstrate that the company takes responsibility for the environment by conserving natural resources and striving to keep the ecological footprint of products and services small.

### 4. Conclusion on the implementation in the case in question

All in all, in the specific case in question here, the company was able to comply with the requirements for the different standards by developing a code of conduct that included the various policies. In the case in question, the applicable eligibility criteria for the award of contracts were simpler because the company was small. In view of the fact that the company undergoing the check was moreover German, translating the policies into measures that comply with the contents of the standards proved not difficult. The eligibility criteria for the award of contracts can be tougher; this will depend on the size classification of the company.

**Please note**

Irrespective of the size classifications, in practice, the difficulty arises in having to interpret the respective data that are provided for evaluative purposes so as to be able, in this way, to identify the relevant requirements and proofs that are necessary for achieving the required degree of compliance.

## LEGAL

RAin [German lawyer] Birgit Ludwig

# Is unexpired leave subject to the standard limitation period?

**In recent years, the supreme court already clarified that statutory minimum leave may only expire at the end of the year if employers have complied with their duty to inform. The question of whether or not unexpired leave is subject to the standard limitation period has now been referred to the ECJ by the Federal Labour Court *(Bundesarbeitsgericht, BAG)*.**

### 1. Issue

The claimant was employed by the defendant in the period from 1.11.1996 to 31.7.2017. The claimant's annual paid leave entitlement was 24 working days. On the 1.3.2012, the defendant certified to the claimant that the claimant's remaining leave entitlement of 76 days from 2011 and previous years would not expire on 31.3.2012 because the claimant had not been able to take her holiday due to the high volume of work. In 2012 to 2017, the defendant granted the claimant leave on 95 working days. In February 2018, the claimant asserted a claim for payment in lieu of the remaining leave entitlement of another 101 days from 2017 and previous years. The defendant argued against this by invoking the limitation period. The standard limitation period of three years, under Section 195 of the German Civil Code, for the claim that had been asserted had already expired prior to the termination of the employment relationship.

### 2. Decisions by the lower courts

The Higher Labour Court (Landesarbeitsgericht, LAG) in Düsseldorf admitted part of the claim and ordered the defendant to make a payment in lieu of 76 leave days from 2013 to 12016. The claimant was able to provide indisputable evidence for (only) these 76 leave days. The defendant had not complied with his duties of cooperation (to inform about annual leave and request people to use it). The claimant's entitlement to leave had therefore also not expired. Statutory leave may only expire by the end of the year or by 31.3 of the subsequent year if the employer has requested their employees to take their leave in good time and has pointed out that otherwise the leave will expire at the end of the year. Furthermore, the Higher Labour Court held the view that the employer would not be able to invoke the limitation period if they had not complied with their duties of cooperation in subsequent years, too.

The defendant lodged an appeal with the BAG against this. The latter suspended the ruling and referred to the ECJ for a preliminary ruling on the question of whether or not leave entitlement that cannot already expire, in accordance with Section 7(3) of the German Federal Act Regulating Holiday Time, because of the employer's failure to comply with their duties of cooperation could, at least, when taking into account the requirements under European law, expire by limitation. The appeal proceedings at the BAG have been suspended until the ECJ has issued its ruling.

### 3. Opinion of the Advocate General at the ECJ

In his opinion on the preliminary ruling, the Advocate General at the ECJ held the view that the German limitation periods were contrary to EU law. At any rate, if the employer has failed to comply with the duty, which is incumbent on them, to inform employees of the (statutory minimum) leave that they should take. It is only through information provided by the employer that employees find out about their entitlement to paid annual leave. Once information about the entitlement to paid annual leave has been provided the limitation period then commences.

**Please note**

Until the ECJ makes a final decision it would be advisable, purely as a precautionary measure, to provide information about annual leave that still has to be taken and combine this with a request to also take this leave. Otherwise the minimum leave will expire neither at the end of the year nor within the standard limitation period of three years.

## IN BRIEF

# The consequences under German insurance law of an accident in a home office

**Those who pursue professional activities within their own four walls should be aware that accidents in a home office will be covered by an employer's statutory accident insurance insofar as the triggering event took place in the interests of the company and not for purely private reasons. A ruling in 2021 by the Federal Social Court underpinned this accident insurance protection in home offices. Carrying out work in a home office has been put on an equal footing with doing the same activity in the workplace.**

In the case in question, one morning in 2018, an employee fell on the spiral staircase that led to his workroom and consequently fractured a thoracic vertebra. His employer's statutory trade association for health and safety at work and employer liability insurance [Berufsgenossenschaft] refused an insurance pay-out even though the employee had been on the way to his workroom for the purpose of working. The Berufsgenossenschaft had argued that insurance protection only starts in the workroom and that the accident had not occurred on a route that was insured. The employee brought proceedings before the courts and, in the first instance, was successful. The judges at the Social Court considered that, in this case, there had been a work-related accident since the claimant had been on his direct way to work. However, in the second instance, the Higher Social Court disagreed and argued that routes within your own home were not covered by insurance protection.

In the third instance, the supreme Federal Social Court then ultimately confirmed the opinion of the court of first instance, namely, that taking the stairs was for the purpose of starting work and, as this was something that needed to be performed in the interests of the employer, the stairs constituted an insured route to the workplace. Therefore, the judges at the supreme social court classified the fall as a work-related accident that was covered by the protection of statutory accident insurance.

**Result:** Therefore, when working in a home office the routes within the household are the equivalent of routes to the workplace if they are directly connected with the work. On the basis of an amendment to the law, since June 2021, these routes are now also explicitly covered by insurance under the law. Moreover, the court ruling will apply retroactively to work-related accidents that occurred prior to the amendment. In the meantime, it is not just the route you use so that you can start working but the route to work also includes the route to the kitchen to fetch coffee, the way that is taken to go for lunch or to the toilet.

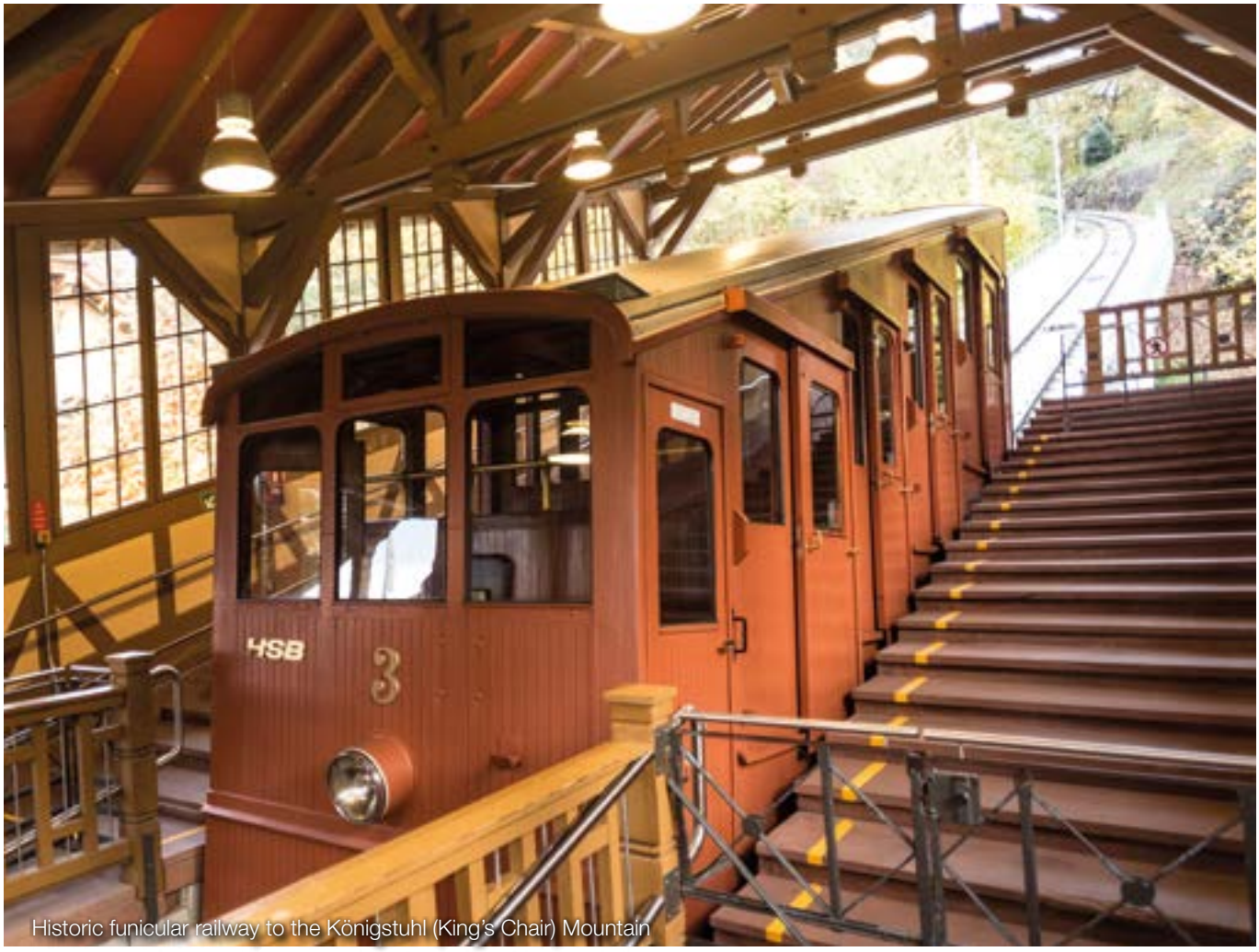
# Information shown on an invoice – The issue of the usual commercial designation

**The German VAT Act stipulates that business owners have to ensure that their invoices show the quantity and type (usual commercial designation) of the items supplied, or the extent and nature of other supplies. The Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)*, in a recent circular, endorsed the opinion of the Federal Fiscal Court (*Bundesfinanzhof, BFH)* with respect to the matter of the usual commercial designation.**

It is the view of the BMF, which was expressed in its circular of 1.12.2021 (reference: III C 2 – S 7280-a/19/10002 :001) and of the BFH that the usual commercial designation should not be considered as a tightening up for business owners with respect to the information that has to be disclosed on invoices. A distinction needs to be made between goods in medium and higher price segments, on the one hand, and trading in goods in the low-price segment, on the other hand. The commercial conventionality of a designation will always depend on the circumstances in a particular case. This could include, for example, the distribution channel, the nature and content of the business as well as the value of the individual goods.

The BMF further explained that it was not possible to make any generally applicable statements in respect of when a designation could be regarded as being commercially conventional. In cases of uncertainty, the business owner would be required to provide proof that the designation specified on an invoice is commercially conventional in the distribution channel concerned.

**Please note:** You have to be able to exclude the possibility of charging more than once for supplies. It has to be possible to clearly and easily verify the supplies. The goods supplied or services performed do not however have to be exhaustively described.



Historic funicular railway to the Königstuhl (King's Chair) Mountain

## AND FINALLY...

*"You can only grow if you are massively innovative."*

**Hasso Plattner,** born 21.1.1944 in Berlin. German businessman, co-founder of the IT company SAP and a philanthropist. From 1997 to 2003 he was the spokesman of SAP's executive board and, since then, chairman of its supervisory board.

# Legal Notice

**PKF Deutschland GmbH** Wirtschaftsprüfungsgesellschaft

EUREF-Campus 10/11 | 10829 Berlin | Tel. +49 30 306 907 - 0 | www.pkf.de

Please send any enquiries and comments to: pkf-nachrichten@pkf.de