PKF

Newsletter

Key Issue
Legal tech applications for companies

12|22

Dear Readers,

The year is drawing to a close. Since February, the war in Ukraine has almost completely eclipsed the previously dominant topic of COVID-19. As a result, the PKF newsletters have been characterised by reports on tax and accounting changes in view of the economic impact of altered supply chains, severe inflation generally and, especially, energy price inflation. Our first report in the Tax section is thus about the scheduled **regulatory changes that aim to provide relief** to citizens and companies from high **energy prices.** One of the after-effects of COVID-19 has been the dynamic development in home offices and other forms of working. In our second contribution, our Austrian colleagues report on a positive ruling by Austria's Supreme Administrative Court that has given clarity with respect to **employees working across the border** between **Austria** and **Germany**. We then once again discuss a change in the law in cases of a **tainting effect from a commercial activity** on other types of income where the de minimis threshold level has been exceeded.

In our Accounting & Finance section we take a look at **revenue recognition in the case of long-term contracts** and we point out possible ways that sales and profits can be reported periodically and not just after acceptance of the work.

Our Key Issue appears under the Legal section and concerns digitalisation, which has already transformed many business processes. For the legal departments of companies and for law firms **legal tech** simultaneously represents both a challenge and an opportunity and, in doing so, bears the hallmarks of artificial intelligence.

Next up, we review the rules for the **Citizens' Basic Income** [in German: *Bürgergeld*] that will replace Hartz IV, which was the previous means-tested scheme for ensuring basic income. In our third contribution we have a report on an ECJ judgement that has now finally brought the case law on the **expiration of unused leave** to a conclusion.

With the illustrating photos in the first eleven issues of our newsletter in 2022 we conveyed impressions from towns and cities where PKF has a presence. In this issue, we take you on a journey around the Christmas markets that we had to forgo visiting in the last two years.

With this in mind, we would like to wish you and your families a lovely Christmas season combined with the hope that many things will be better in 2023.

Your Team at PKF

Front cover photo: Nuremberg Christmas Market

Key Issue

Legal tech applications for companies

Contents

TAX

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

Relief provisions to address rising energy prices

The German Federal government has agreed on price brakes for gas, heating and electricity with a view to providing relief to citizens and companies from the considerable increases in energy prices. However, as the price brakes will take a few months more to implement, to begin with there will be a one-off payment in the form of emergency aid in December 2022. In the following section we present a summary of all the planned new provisions.

1. An overview of the legal provisions

At the first stage of the package of measures, on 14.11.2022, the Bundesrat approved the Act on Emergency Aid for End-Consumers of Grid-Bound Natural Gas and for Heating Customers (abbreviated to: Natural Gas and Heating Emergency Aid Act, *Erdgas-Wärme-Sofort-hilfegesetz, EWSG*), which had been adopted by the Bundestag (lower house of the German parliament) on 10.11.2022. This is supposed to bridge the period until the price brakes for gas and heating come into force.

Then in the coming year, at the second stage, the so-called 'price brakes' for gas, heating and electricity will be implemented via a Natural Gas and Heating Price Brakes Act *(Erdgas-Wärme- Preisbremsengesetz, EWPBG)*. According to information about the draft version, which has not yet been published, the price brakes for industrial gas and heating customers will already apply from January 2023. However, it is likely that the publication of the official draft of the EWPBG will be deferred on account of delays in the political process.

2. Package of measures at the first stage

2.1 Implementation of emergency aid

The emergency aid is aimed at end-consumers of natural gas for their own consumption. In principle, there will thus also be financial support for the use of natural gas in commercial contexts (e.g., to heat sales premises). Emergency aid is only precluded for natural gas used for the commercial operation of electricity and heat generation plants.

Christmas market at Cologne cathedral

Gas or heating customers will not have to file an application to receive the financial support because suppliers will be legally obliged to credit the relevant amounts of relief. The funding for the financial support will be provided by the public sector although the processing of the payments will be carried out entirely by the suppliers.

2.2 Amount of financial support

The amount will be determined independently of the current usage so that consumers will continue to be motivated to save energy. According to information from the Federal Ministry for Economic Affairs, the relief will be calculated on the basis of one-twelfth of annual consumption in 2022. For the calculation it will be necessary to differentiate between the gas and heating sectors.

In the gas sector a distinction is made between SLP customers (= gas consumption invoiced via standard load profiles [in German: *Standardlastprofile, SLP*]) and RLM customers (companies with real-time metering [in German: *registrierender Leistungsbemessung, RLM*] whose annual consumption per withdrawal point does not exceed 1.5 million kWh). For SLP customers the support will be based on one-twelfth of the annual consumption forecast by the gas supplier in September 2022. By contrast, for RLM customers, one-twelfth of the measured withdrawal from the grid from November 2021 up to and including October 2022 will form the basis for the calculation. The value that is determined will be multiplied by the gas price contractually agreed as at 1.12.2022.

In the case of heating supply, the relief for December 2022 will be in the form of a lump sum payment essentially based on the amount of the instalment paid in September.

2.3 Emergency aid for renters

For private households with rental contracts that have not concluded their own agreements with energy suppliers and whose energy consumption is covered by their apartment service charges, there are plans for detailed special rules that will depend on the contractual arrangements with the landlord. The residents will thus only receive their emergency aid together with their next heating cost statement, for which landlords have a period of one year. However, the aim is also to provide relief for these households from price increases as promptly as possible.

3. Package of measures at the second stage

3.1 Implementation of the price brakes

The financial support under the EWPBG is expected to be processed according to a mechanism similar to the one for emergency aid for natural gas customers. Here, too, an amount of relief to be determined by the supplier will be credited monthly to gas or heating customers. There are plans for the price brakes to apply from March 2023 up to and including April 2024, although customers will indeed be provided with relief retroactively for January and February 2023 to the same extent.

3.2 Amount of the price brakes

The draft of the EWPBG provides for a specific portion in the amount of 80% of annual consumption (industry: 70%) where the price will be capped. The contractually agreed price will apply to the remaining consumption volume that exceeds this quantity. For the portion where the prices will be capped, the basis will be a gross gas price of 12 ct/kWh and a gross heating price of 9.5 ct/kWh. To determine the price brake for electricity, a distinction will be made between households and smaller companies as well as larger metered companies. When determining the price brake for electricity for households and companies, an energy rate of 40 ct/kWh for 80% of historic consumption will form the basis of the calculation. For larger metered companies, an energy rate of 13 ct/kWh will be applied to a 70% share of historic consumption.

3.3 Financing of the price brakes

The price brakes for gas will be financed by skimming off windfall profits in the area of renewable energies, mine gas-fired power plants, waste-to-energy plants, nuclear power plants, lignite-fired power plants and plants that burn oil. To calculate the amount of profits to be skimmed off, the plan is to use the capital costs of the operators and then to add a ‘safety margin’. Subsequently, 90% of the profits that exceed the amount calculated in this way would be skimmed off.

Outlook

According to the German Federal government, from 2023, the state relief will be taxed as a non-cash benefit in the case of households with annual income of more than €75,000. Moreover, the German federal and state governments are planning to implement a hardship provision for small and medium-sized enterprises that, despite the price brakes on electricity and gas, have been particularly badly affected by increased energy prices.

WP/StB [Austrian public auditor/ tax consultant] Stephan Rößlhuber / StB [Austrian tax consultant] Ewald Hacksteiner

Cross-border home office – Austria has defused the permanent establishment issue

The COVID-19 pandemic has changed the world of work. While, during the pandemic, many employees were exceptionally allowed to work from home, now, new working models and opportunities are emerging from the infrastructure that was created. Internationally, familiar delimitation problems are coming into focus. Austria's Supreme Administrative Court *(Verwaltungsgerichtshof, VwGH)* has now defused the permanent establishment issue in the case of working across a border in the context of a home office.

1. Basic principles - Home office-driven permanent establishment?

In cases where the home office is across the border, the question that immediately arises is whether or not a home office-driven permanent establishment could exist. Austria, when compared with Germany, has traditionally interpreted the concept of a permanent establishment (PE) more broadly. Here, the 'de facto power of disposal' had hitherto been put on an equal footing with the 'effective possibility for use'. Accordingly, the mere possibility for use was already viewed as being sufficient for the creation of a permanent establishment.

The OECD, in its guidance on 'tax treaties and the impact of the COVID-19 pandemic', clarified that: "the exceptional and temporary change of the location where employees exercise their employment because of the COVID-19 pandemic, such as working from home, should not create new PEs for the employer." However, there was no statement about the period following the pandemic.

2. Clarification by the VwGH

The VwGH, in its ruling of 22.6.2022 (case reference: Ro

Christmas market in Stuttgart

2020/13/0004-7), which is now available, provided an unequivocal clarification of the situation during the period following the pandemic, too.

The case that was brought before the VwGH concerned a person resident in Hungary who had worked in Austria, in the period from 2013 to 2016, as a translator and interpreter. She had exercised the option to have unlimited tax liability status and, in accordance with Section 1(4) of the Austrian Income Tax Act, had declared her income from commercial operations. The Hungarian interpreter explained that she had been able to share the use of the office infrastructure of her Austrian client in order to provide language services for Hungarian nationals and to help them when they communicated with the authorities in Austria.

In its ruling, the VwGH stated that the possibility to share the use of a desk at the office premises of another taxpayer was not sufficient to affirm that the power of disposal over a fixed place of business exists.

Please note: We therefore believe that this also constitutes a clear rejection of the notion of a home office-driven permanent establishment. It thus does not matter whether employees work at their kitchen tables or at desks that have been made available for them to use by their employers because the business owners will not be able to acquire either de facto power of disposal over nor the effective possibility for use of the private premises of the employees.

3. Home office by virtue of the managing director

However, a permanent establishment issue can emerge if the sole managing director of a GmbH [German private limited company] that is headquartered in Germany works mainly in Austria or vice versa and, on account of the scope of their activity, the place of effective management changes. “The place of effective management is the place where key management and commercial decisions that are necessary for the conduct of the entity’s business as a whole are in substance made.” (margin no. 24 in the OECD Commentaries on the Articles of the MTC on Art. 4 OECD MTC 2014).

Consequently, what matters is the place where these decisions are made and not, for instance, the place where management instructions are received. Therefore, if the sole managing director makes all the key management and commercial decisions while working in Austria then, according to Art. 4(3) of the DTA with Germany, the GmbH would be deemed to be based in Austria.

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

An about-turn on the tax tainting rule on losses from commercial activity

The Federal Fiscal Court *(Bundesfinanzhof, BFH)* abandoned its earlier ruling and decided that not just profits but also losses from a commercial activity that exceed the so-called de minimis threshold level would result in the tax treatment of a GbR’s [company under German civil law] other activity, namely asset management, being recharacterized.

1. The issue – Recharacterization of the income from letting?

In the specific case, the court had to determine whether or not the income of an asset management GbR that was derived from renting out a property had to be recharacterized as commercial income because of the (commercial) operation of a photovoltaic system on the rental property. In 2012, the operation of the photovoltaic system resulted in commercial losses. Consequently, the GbR submitted two sets of income calculation for 2012 - one for income from letting and leasing and one for income from commercial activity. However, both the local tax office as well as the tax court, in deviation from previous case-law, determined that there had been solely commercial income since the commercial operation had exceeded the accepted de minimis threshold level of 3% of overall net revenues. Not so long ago, the BFH, in its ruling of 12.4.2018 (case reference: IV R 5/15) had still been of the opinion in this matter that losses from a commercial activity would not result in the tax treatment of a GbR’s asset management activity being recharacterized.

2. New legal situation – Tax tainting also in the case of losses

Contrary to its previous case law, the BFH, in its ruling of 30.6.2022 (case reference: IV R 42/19) affirmed in the

case in question that there was a tainting effect for tax purposes. The amendment to the tax tainting rule at the end of 2019 (Section 15(3) no. 1 sentence 2 alternative 1 of the German Income Tax Act) had clarified that the original commercial activity will have a tainting effect for tax purposes irrespective of whether a profit or a loss is derived from this activity. For the court, reporting a loss when the de minimis threshold level has been exceeded does not preclude the tax treatment for the other activity, namely asset management, being recharacterized. Accordingly, the previous de minimis threshold with its absolute and relative revenue thresholds should be taken into account for both profits as well as for losses. Should the de minimis threshold level be exceeded then commercial profits and commercial losses would have similar tainting effects.

3. No inadmissible retroactive effect

Although this non-application legislation was introduced with a so-called genuine retroactive effect, which is basically unconstitutional, the BFH considers that, "from the perspective of constitutional law, there is exceptionally no objection to it." The new legal situation merely means that supreme court settled case law prior to the BFH ruling of 2018 has been codified. There is no protection of legitimate expectations for the case where there was a ruling in 2022 because of the issue that the court ruled on in 2018.

ACCOUNTING AND FINANCE

WP/StB [German public auditor/ tax consultant] Dr. Harald Riedel / StB [German tax consultant] Steffen Heft

Revenue recognition in the case of long-term contracts

Large projects normally extend over longer time periods. From a financial accounting perspective, the question that arises is: in which financial year will the revenues from this project arise or have to be reported? On the one hand, this question is of importance when assessing potential profit distributions. On the other hand, the answer to the question will also be the main determinant for the timing and the amount of a tax charge.

1. Principles of German accounting law

German accounting law is strongly characterised by the principle of prudence. In order to protect creditors, in cases of doubt, asset valuations should rather be conservative while liabilities should be recognised at high values. Revenues should only be taken into account here if they have been realised on the reporting date (the so-called realisation principle). The revenues should be 'virtually certain' in this case. In the area of works contracts, under German accounting law, revenues are thus only realised after a project has been completed. That is normally when the work has been accepted. This means that, up to that point, any progress payments received for the project should be recognised as a liability under 'advance payments received' in a way that does not affect the operating result for tax purposes and the services performed should be capitalised as work in progress. Revenues would only be realised in the year of completion or acceptance of the work in one go (the so-called completed contract method). If as a result of this there is a significant distortion of the profit situation then this would have to be explained in the notes to the accounts by providing appropriate information.

2. Alternative courses of action

The question that now arises is to what extent is it possible, under German law, - beyond reporting in the notes to the accounts - to lessen any severe distortions of the profit situation. Here, there are the following courses of action.

2.1 Sub-projects for partial revenue recognition

First of all, already in the course of formulating long-term contracts, you could try to define sub-projects and invoice and accept them separately. In the case of such partial acceptances, the contractual objects would have to be legally and economically transferred to the customer (transfer of risk). Insofar as it is thus possible to transfer the risk to the customer, the revenues would then be partially realised. The necessary transfer of risk would, moreover, require partial performance that could be identified on a stand-alone basis and would be self-contained; there could not be any functional connection between each individual partial performance.

Please note: Whether or not this can be achieved will depend on the contract arrangements and the customer's willingness to split up the project and assume the transfer of risk in several steps.

2.2 Breach of the realisation principle?

According to a minority viewpoint that can found in specialist literature (cf., for example: IDW, WP-Handbuch, Section F, marginal no. 1351; ADS, HGB-Kommentar, Section 252, marginal no. 88 [only available in German]), under very strict conditions, there is a further possibility to breach the realisation principle described above. The following conditions are cited:

- These have to be long-term productions that constitute a substantial part of the company's activities.
- Invoices issued in accordance with the realisation principle would lead to the presentation of the earnings situation becoming skewed to a not inconsiderable extent.
- It has to be possible to reliably calculate the revenues from the long-term production without risk.
- It has to be possible to break up the total performance into notional partial performances and carefully determined partial revenues.
- There is no indication that there are objections from the customer that could have implications for the overall results.

However, among experts, the acceptability of accounting in such a way is considered to be controversial.

Please note: This approach – splitting up total performance (for example, a large project) into several partial performances and bringing about partial recognitions according to the degree of completion - is also referred to as the percentage of completion method (PoC).

Summary

In summary, it can be said that there are indeed possible ways to spread out the revenues over time from a large project where there is long-term production. However, in a specific case it is likely that this could only be realised under very restrictive conditions so that, normally, the 'revenues arising in one go' approach would apply, thus once the project is accepted after having been completed. This is also the viewpoint for tax purposes. This means that the revenues from these types of projects will likewise arise only once the work has been accepted right at the end and this will accordingly trigger high tax charges. This can nevertheless have a positive effect in terms of liquidity (under the heading of: tax credit).

Christmas atmosphere in Frankfurt am Main

LEGAL

RAin [German lawyer] Maike Frank

Legal tech applications for companies

Processes in personnel and legal departments can be digitalised and speeded up by using legal tech. In the following section we outline legal tech applications and the benefits associated with them.

1. Benefits of digitalisation

Legal tech helps companies to digitalise paper-based agreements. In particular, legal tech offers the possibility for agreements to be signed electronically. This would however only apply to those agreements where the law does not provide that they have to be in writing in order to be effective. Nevertheless, the use of legal tech can thus make an overall contribution to sustainability.

Please note: All in all, legal tech provides a wide range of possibilities for optimising the drafting and negotiation of contracts as well as for enabling companies to push digitalisation forward and, thus, to make savings in terms of time and costs.

2. Collaborative working and tracking

Legal tech provides, in particular, a variety of simplifications related to the conclusion, management and also the termination of agreements. For example, legal tech can be used for the collaborative drafting, negotiation, electronic signing and data-driven analysis of legal documents (such as, e.g., employment contracts, target agreements and non-disclosure agreements) and for making such documents available across an organisation. Consequently, legal tech enables, for example, salary structures, target agreements and company cars to be monitored simply and clearly (so-called tracking).

Erfurt – Christmas market

Please note: Furthermore, legal tech users are automatically reminded of durations and notice periods.

3. Rapid agreement drafting

Through the application of legal tech, personnel and legal departments can use a legal hub (understood as an online legal service area); such a hub consists of automated processes and, moreover, standard forms can be made available for download there. Thus, for example, by answering an easy-to-understand list of questions it would be possible to create, within minutes and in the respective corporate design, a perfectly formatted draft agreement with all the customised contents and variants. Up to now, when agreeing individual parameters with a contractual partner, the big time guzzlers have frequently been the purely administrative activities and inefficient document processing.

Please note: The possibility of being able to negotiate and coordinate agreements between parties, in real time, on an online platform provides an attractive and efficient alternative to the usual process hitherto of sending alternately overly processed Word documents in markup mode and by way of a circulation procedure.

4. Updating agreements

Keeping standard form agreements up to date - and therefore providing greater legal certainty when they are used - is facilitated because individual clauses only have to be adjusted once (e.g., for changes in legislation or the ongoing evolution in case law). Subsequently, through 'streamlining', it is possible to automatically optimise all the standard forms with the desired changes.

Recommendation

Legal tech makes intelligent communication via a digital legal hub possible. This enables more efficient work when drafting legal documents and managing them. In particular, it means that it is no longer necessary to enter new clauses and text modules in a variety of individual documents - something which is frequently time-consuming and convoluted.

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

Citizens' Basic Income – An overview of the eligibility criteria and standard rates

On 1.1.2023, Germany will replace Hartz IV [its means-tested basic income scheme] with the so-called Citizens' Basic Income [in German: *Bürgergeld*] as the form of social and state welfare in order to ensure basic income or a basic income benefit for those able to work and who require support. The rules that will arise here are discussed in the following section.

1. Eligibility criteria

Citizens' Basic Income payments will be subject to certain conditions and will thus not constitute unconditional basic income. According to the 2023 Citizen's Income Act *(Bürgergeld-Gesetz 2023)*, in order to be able to claim Citizens' Basic Income the following requirements will have to be satisfied.

(1) Need for support – A major prerequisite for entitlement to Citizens' Basic Income for people who are able to work is the need for support. People deemed to be in need of support are those who are not able to cover, or not sufficiently, their living expenses from the income or assets to be taken into account and who do not receive the requisite help from others, in particular, from relatives or providers of social security benefits (e.g., housing benefit or supplementary child allowance).

(2) Obligation to take up work – If a recipient of Citizens' Basic Income payments is able to work then they are obliged to take up work. People deemed able to work are those who, in the foreseeable future, are not incapable, because of sickness or disability, of working for at least three hours every day under the usual conditions of the general labour market. However, the recipient generally has to take on any job insofar as it is reasonable – the benefit recipient thus has to be physically, mentally and emotionally able to perform the work.

(3) Habitually resident in Germany – The claimant has to have their habitual residence in Germany. Therefore, foreign nationals will generally also have the same entitlement to Citizens' Basic Income as German nationals.

2. Amount and duration of Citizens' Basic Income

According to the draft legislation, which was approved on 10.11.2022, the standard rate of Citizens' Basic Income for single persons will be €502. This corresponds to a monthly increase of €53 on the previous standard rate.

An Overview of the Standard Rates	
Single persons	€502
Spouses / Live-in relationships	€451
Children from 14-17 years	€420
Children from 6-13 years	€348
Children up to and including 5 years	€318

Citizens' Basic Income will generally be authorised for a period of six months and up to one year. Thereafter, a subsequent application will have to be filed. If there is no entitlement to Citizens' Basic Income for a full month then the benefits would be paid out according to daily rates.

3. Grace period and protected assets

As described above, the needs test is based on an assessment of whether or not an applicant is able to ensure that their living costs are covered. If there is no income but, instead, assets are available then these basically have to be used to cover living costs. During the so-called grace period, which covers the period of twelve months following the initial receipt of benefits, the state will refrain from making recipients of Citizens' Basic Income use their entire assets to cover their living costs. These assets that are not to be used are referred to as protected assets.

During the grace period, the claimant can have protected assets worth up to €40,000 and for each member of the shared household (referred to in German as a Bedarfsgemeinschaft, or community of dependence) the amount is €15,000. Here, the community of dependence is viewed as a whole. If one person in the community of dependence does not make full use of their asset protection allowance then the unused portion would be transferred to the other persons in the community of dependence. Furthermore, during the grace period, no reasonableness test will be applied to the accommodation costs. Although, the job centre will only assume a reasonable amount of heating costs. After the end of the grace period, the asset allowance will be €15,000 for each member of the community of dependence – including for the benefit recipient.

Christmas market in Munich

RAin [German lawyer] Birgit Grups

Conditions under which a limitation period can apply to unexpired leave

The June edition of the PKF newsletter already included a report about a question relating to the application of the limitation period to unexpired leave entitlement that was referred by the Federal Labour Court (Bundesarbeitsgericht, BAG) to the ECJ. In its judgement of 22.9.2022, the ECJ has now reached a decision in this matter.

1. Issue

The subject of this decision was a claim for payment in lieu of leave not taken in 2017 and previous years that the claimant had initially asserted by instituting proceedings in the competent labour court. The claimant was employed by the defendant in the period from 1.11.1996 to 31.7.2017. In view of the high volume of work, the claimant had not been able to take the leave to which she was entitled. The employer, against whom the complaint was filed, was of the view that the claims that had been asserted were already statute barred.

2. Decisions by the lower courts

After the court of first instance had dismissed the claim, the Higher Labour Court (Landesarbeitsgericht, LAG) in Düsseldorf had set aside that judgement and admitted part of the claim. The defendant had not complied with his duties of cooperation, specifically, the duty to inform employees about annual leave and request them to use it up. For this reason, the defendant had also not been able to invoke the time limitation. The defendant lodged an appeal with the BAG – this court suspended the ruling and referred to the ECJ for a preliminary ruling. The ECJ had to clarify whether or not leave entitlement that cannot expire because of the employer's failure to comply with their duties of cooperation could, when taking into account the requirements under European law, expire by limitation.

3. The judgement of the ECJ

The Advocate General at the ECJ, in his opinion on the preliminary ruling, already held the view that the German limitation periods were contrary to EU law. Employers may however not invoke the time limitation of any leave entitlement if they have failed to comply with their duties of cooperation.

The ECJ, in its decision of 22.9.2022 (case: C-120/21), agreed with the opinion of the Advocate General. The ECJ came to the view that leave entitlement can indeed be subject to the standard limitation period of three years. Nevertheless, an employer can only invoke cessation of entitlement after expiry of the limitation period if employees have generally had the chance to use their holiday entitlement. Employees would only be put in such a position once they have been informed accordingly by their employers.

Please note

If employers comply with their duties of cooperation, then the statutory minimum leave entitlement can expire by limitation. The limitation period commences only after information about the entitlement to paid annual leave has been provided.

IN BRIEF

Accelerated inheritance – Avoiding assets being classified as non-operating

When business assets are gifted or inherited, the non-operating assets will be of particular importance because it is not be possible to make an application for preferential tax treatment in this respect. For this reason, it is understandable that efforts are made to avoid assets being classified as non-operating.

Non-operating assets are understood to be assets that are not required in the normal operations of the business itself. In the context of accelerated inheritance, under certain circumstances, it could be possible to avoid non-operating assets being created when property is made available for use to a third party. The prerequisites for this,

where appropriate, are the existence of a lease agreement and the appointment of the third party as the heir.

Recently, the Munich tax court, in its ruling of 20.4.2022 (case reference: 4 K 361/20) had had to reach a decision on this type of accelerated inheritance. In the case in question, the claimant was the nephew of the deceased husband of Mrs X; the nephew had leased a workshop form the latter since 28.10.2007. Mrs X had transferred the workshop and her other assets by way of accelerated inheritance, via a notarial agreement from 9.8.2017, to the claimant. He was however not appointed as an heir. In an assessment notice dated 16.5.2019, the local tax office determined the value of the real estate and the sum total of non-operating assets. The claimant unsuccessfully appealed against the assessment of the non-operating assets.

The Munich-based judges considered the claim to be unfounded. According to the law, properties that have been made available for use to third parties are generally included under non-operating assets. Making property available for use to a third party would not give rise to non-operating assets only if this were to happen within the scope of the leasing of an entire business that would result in income from commercial operations for the lessor, and if the lessor of the business, in conjunction with leasing for an indefinite term, were to appoint the lessee as the heir. In the view of the court, this exception also covers gifts made in the context of accelerated inheritance.

Outcome: In the case in question, the lessee was however neither appointed as an heir to X within the scope of testamentary inheritance, nor was it possible to draw on any legal status as an heir. Moreover, according to the tax court, the fact that Mrs X had transferred all the assets to the claimant by way of accelerated inheritance and that there were no other assets did not change the situation.

Recording corrections in the German land register – Implications of the Dieterle clause

The 'Dieterle clause' is primarily used for the last will and testament of divorced persons. In doing so, a testator can ensure that a divorced spouse would not be able to indirectly possess and enjoy the testator's assets in the event that a (joint) child post deceases the testator. This clause can however also be applied as a safeguard to other inheritance constellations.

The purpose of the Dieterle clause is to safeguard the inherited prior interest and the inherited remainder interest, although the aim is generally to exclude specific persons. Here, the child is appointed as the sole preliminary heir and the people who are designated as subsequent heirs are those who the child themself will appoint as their own legal heirs. In a case that was decided on by the Court of Appeal (Kammergericht, KG) in Berlin, in its ruling of 26.8.2022 (case reference: 1 W 262/22), a testator, who passed away in 2021, had already specified in 2016, via a notarial agreement, that her grandson, who was four years old at the time, would be her exempt preliminary heir. The subsequent heirs after his death were supposed to be the grandson's own (any desired) legal heirs, or alternatively the testator's daughter. When the testator's will was ultimately opened, a co-heir requested that a correction should be made in the land register because, in his opinion, the will had contravened the rules on subsequent inheritance. Thereupon the Land Registry asked for a certificate of inheritance to be provided.

However, the KG lifted the Land Registry's interim injunction. While the Land Registry has to check whether or not the stated claim to the inheritance exists at all, however, the requirement for an own interpretation does not apply if the actual circumstances have yet to be determined. Such investigations as to whether or not the order of succession of the subsequent heirs is correct is not required when the Dieterle clause is used. The KG also argued that, according to Section 2065(2) of the German Civil Code, what generally matters when making testamentary disposition arrangements is that the beneficiary and the object of the benefit should be stated so specifically that it is possible for a third party to objectively identify these persons or objects. Against this backdrop, it is still disputed whether or not it would be allowed to designate subsequent heirs conditionally such that the preliminary heir would have to first appoint them as their legal heirs. However, according to the tax court, in the last will and testament, the testator does not need to specifically designate the beneficiary if it is possible to determine who this is from the circumstances outside of the document.

Outcome: By using the Dieterle clause it is possible to take precisely these circumstances into account. The subsequent heirs will either be persons designated by the preliminary heir as their own heirs, or alternatively the daughter who was specifically designated by the testator. Therefore in the absence of any grounds for refusing registration, the correction had to be made in the land register.

The taxation of a financial settlement when an employee in Germany moves abroad

When an employee commences a new job abroad and has thus given up a previous job in Germany and receives payment of a financial settlement, the question that arises is which of the two countries will have the right to tax. In the case that is described in the following section, residence in Germany was given up on the day that a financial settlement was paid out. The Hamburg tax court had to decide which country would be entitled to tax the settlement.

The claimant before the Hamburg tax court (ruling of 12.5.2022, case reference 5 K 141/18) paid their employee A a financial settlement, for the loss of his job, in three instalments. The first payment was made when the (fixed-term) employment agreement was terminated and the other two payments in both of the subsequent years. In February 2003, the termination agreement was concluded at the end of that month. On 8.2.2003, A signed an employment agreement with a new employer in China and selected a house for himself there. He returned once more to Germany and then, on 20.2.2003, flew to China together with his wife in order to take up his new job there. A also received the first instalment of the financial settlement on 20.2.2003.

The local tax office held the claimant liable for the payroll tax due on this payment of the financial settlement.

The tax court considered the previous employer's claim to be unfounded. The notice of liability had been legitimate. The financial settlement constituted remuneration for which the relevant date is when it is actually received. The payment was received at a point in time when A still had unlimited tax liability because he had given up his residence in Germany on this date, at the earliest, and had only ceased to be habitually resident in Germany on this date.

Outcome: Residence only ends when it has actually been given up. After giving up residence, if a person keeps living in Germany for a short while then habitual residence will continue until the actual departure. A received the first instalment of the financial settlement in his account still prior to his departure from Germany. Moreover, the DTA with China does not give rise to any restriction on the German right to tax. Irrespective of the reasons for the financial settlement, the claimant and A had concluded a net pay agreement on the basis of which the assumed tax had accrued.

Christmas market in Braunschweig

AND FINALLY...

"Our main focus still lies not on hierarchies and reporting systems, but rather on personal responsibility, motivation and the corresponding sense of achievement."

Dietrich Markwart Eberhart "Didi" Mateschitz, 20.5.1944 – 22.10.2022, was an Austrian businessman and made the Red Bull brand internationally famous.

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