PKF

Newsletter

Key Issue

New forms of working – 'Remote Work' and the 'Workation'

09|23

Dear Readers,

We hope you had a relaxing holiday and are now ready to start the busy last third of the year with renewed vigour. We kick off this edition of our September newsletter with an overview of the planned changes to international tax law. Firstly, some of these changes relate to the legal requirement whereby **large corporate groups will be subject to a global minimum tax rate of 15%**. Secondly, there are changes that stem from this requirement that will benefit German businesses, in particular, for example, that in foreign countries only tax rates below 15% will be considered to be low tax rates (rather than the 25% hitherto).

In our second report in the Tax section, we discuss the plans of German lawmakers for **e-invoicing**. According to these plans, German companies could soon already be required to issue invoices solely in a structured electronic format when supplying goods or services to other German companies.

The article that follows, in the Accounting and Finance section, focuses on how to derive the **fair value of a business.** Here you can read about if or how valuation models can be adjusted in order to take account of the current extraordinarily deep uncertainties such as the war in Ukraine, high inflation, rising interest rates and increasing market volatility.

The first contribution in our Legal section is likewise our Key Issue report. Working remotely and not always only from a German home office but also from abroad is increasingly becoming an issue which employers are having to address. In this month's issue of our newsletter, we take a look at the **aspects of employment law and data protection law that relate to remote work and the workation** (in the next issue the focus will then be on the consequences in respect of tax and social security regulations for these new forms of working). In the subsequent report, given the major **changes in German partnership law** that will come into force at the start of next year, we provide you with information about the possibilities that will thus open up, in particular, for **partnerships under German civil law *(Gesellschaft bürgerlichen Rechts, GbR).*** This includes, notably, the strengthening of the legal personality. Finally, we summarise and assess a recent ruling on **the renting out of living space via online portals**.

We then continue our journey around the PKF locations in the neighbouring European countries through the illustrations that break up the reports from our experts – this time we visit Italy.

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

Your Team at PKF

Rome – The Colosseum

Front cover photo: Venice – Rialto Bridge over the Grand Canal

Key Issue

New forms of working – 'Remote Work' and the 'Workation'

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TAX

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

Major changes to international tax law as of 1.1.2024

The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) published a draft omnibus act (Artikelgesetz) through which tax regulations that have an international dimension will be formulated for the first time or redefined. The draft act provides for a minimum rate of tax on the worldwide income of large companies. Yet, all other internationally-oriented companies could likewise be affected by the omnibus act. For example, the 'royalty barrier' rule will be abolished and the low tax threshold will be reduced.

1. Minimum tax rate will apply to large companies

1.1 Background

The OECD developed a two-pillar model for reforming internationally applicable tax law. The objective behind Pillar One is the expansion and reallocation of taxing rights among the home countries and market jurisdictions for groups of companies with consolidated annual revenues of at least €750 m. Pillar Two provides for a global minimum tax rate for such groups of companies.

A discussion draft on the German domestic implementation of the Pillar Two directive was published in March 2023; this was criticised, in particular, for the numerous content-related ambiguities and the lack of subsequent amendments to other tax legislation. The draft act now includes a number of revisions.

1.2 Minimum taxation regulations

According to the draft act, the minimum tax will be implemented as a separate tax in the Minimum Tax Act (Mindeststeuergesetz, MinStG). This should ensure that the consolidated income of all the business units of a group of companies will be taxed at a rate of at least 15%. If this min-

View over the Eternal City

imum tax rate is not achieved in the course of the normal taxation of earnings then additional tax would be charged.

The tax would be levied irrespective of the legal form. Within a group of companies it will be possible to assert rights to compensation that will not increase or reduce income under either the Income Tax Act (Einkommensteuergesetz, EStG) or the Corporation Tax Act (Körperschaftsteuergesetz, KStG).

Please note: Business units whose top-up tax amounts are attributed to the tax group parent would then be obliged to make compensation payments to the business units that pay the minimum tax rate.

2. New regulations for internationally-oriented companies

2.1 Abolition of 'royalty barrier' rule

Moreover, the draft act provides for the abolition of the so-called 'royalty barrier' rule, stipulated in Section 4j EStG, with effect for expenses that arise after 31.12.2023.

Please note: Irrespective of any existing DTA, the 'royalty barrier' rule, which has been applicable since 1.1.2018, means that royalties may only be deducted as business expenses if the income of the related party that is the royalty creditor has been taxed at a rate of at least 25%. Given that the minimum tax rate has been specified at 15%, the abolition of this provision is logical and thus a welcome development.

2.2 CFC rules

The CFC rules aim to prevent profits generated from passive operations evading taxation in Germany by shifting them to a country with low taxes. For example, interest income in Germany is subject to tax once again if the tax rate in the foreign country is below a certain level.

Up to now, this tax rate was 25%. As of the 2024 assessment period, this low tax threshold in Section 8(5) of the Foreign Transactions Tax Act (Außensteuergesetz, AStG) will be reduced to 15%. This should bring about substantial simplification and de-bureaucratization. Furthermore, this should establish coherence between German CFC rules and the global minimum effective tax rate with reference to the taxation of foreign operations.

As a consequence of this reduction of the low tax rate to the currently applicable corporation tax rate, the CFC income will likewise cease to be subject to trade tax. In this respect, the draft act provides for the cancellation of sentences 7-9 in Section 7 of the German Trade Tax Act and, thus, terminates the liability for trade tax of AStG-related CFC income.

Please note: This adjustment likewise aims to establish coherence between minimum tax and taxation of CFC income because the minimum tax rate will not result in an increase in trade tax.

Outlook

It is thus likely that the German cabinet will adopt the draft act by a resolution in September 2023 already. The new rules will be applicable as of the 2024 assessment period.

Katinka Kammerer

E-invoicing in Germany – Preparations are required

In the April edition of our newsletter we already had a report on the EU's VAT in the Digital Age (ViDA) initiative and plans by the EU Commission to introduce e-invoicing throughout Europe along with the related digital reporting requirements. The implementation will be carried out between 2024 and 2028. Notwithstanding this, Germany plans to introduce e-invoicing beforehand to a limited extent.

1. German implementation proposal

The roll-out of e-invoicing in Germany will entail considerable effort not only on the part of businesses but also at the official level. In order to respond to these components in the best possible way Germany has already introduced the initial action steps. The recently published draft Act to Strengthen Growth Opportunities, Investment and Innovation and to Simplify the Tax System and Create Tax Fairness *[Gesetz zur Stärkung von Wachstumschancen, Investitionen und Innovation sowie Steuervereinfachung und Steuerfairness (Wachstumschancengesetz)]* proposes the introduction of e-invoicing as of 1.1.2026 (for now, exclusively) for German domestic B2B transactions between businesses that are resident in Germany for tax purposes.

The EU Council's implementing decision of 25.7.2023 paved the way for Germany to focus on the accelerated roll-out of e-invoicing independently of the ViDA implementation date and the relevant regulations contained therein.

2. Definition

As of 2025, invoices that can be issued, transmitted and received in a structured electronic format will be considered to be e-invoices. In addition, the definition requires the possibility of electronic processing. E-invoices have to be drawn up according to Directive 2014/55/EU, i.e. in accordance with the European Norm (EN) 16931 [developed and published by the European Committee for Standardization (CEN)]. During a transitional period that lasts until 31.12.2027, the above-mentioned CEN EN does not have to be complied with as long as the e-invoice is transmitted via an EDI channel.

PDF invoices, which are currently commonplace, are not considered to be e-invoices and they along with the classic paper invoices will then be regarded as so-called 'other invoices'. According to the current draft legislation, such formats would still be permissible for the respective business transactions until the end of 2025. However, these formats will remain valid for all other business transactions that are not affected by the e-invoicing regulations.

Also as previously, businesses that are obliged to issue invoices will still have six months time to issue e-invoices.

3. Scope of application

The new regulations will affect businesses that are resident in Germany for tax purposes (the main office of the management board is located there or they have permanent establishments there that generate sales) and that execute transactions that are taxable and liable to taxation with business customers that are likewise resident in Germany for tax purposes. For example, if a French

Milan – The cathedral

business customer is registered for VAT in Germany and receives goods from a business that is tax resident in Germany then the invoice for the French business would not have to be issued in the form of an e-invoice because the status of this business would not fulfil the 'tax residency requirement'.

Please note: Travel tickets and invoices for small amounts will be exempt from the e-invoicing requirements.

4. Other e-invoicing requirements

The draft legislation does not provide for any new rules for the mode of transmission. The classic requirements of authenticity of origin and integrity of content will remain unchanged. Consequently, it will still be possible to send e-invoices as e-mails, too. This will apply, at least, until reporting has to be done via a separate reporting system – as envisaged by the ViDA proposal.

Recommendation

Businesses that are affected should now already address the roll-out of e-invoicing and, in particular, the IT aspects – also in view of the digital reporting system (via private or state providers), which is likewise on the ViDA implementation agenda. Moreover, a look at our neighbouring countries – notably Italy – could be helpful in the course of implementation considerations.

ACCOUNTING & FINANCE

Dr. Ulrike Engelmeyer / Henning Kruse

Determining 'fair' business value – Adjustments for heightened uncertainty

Business valuation already previously frequently resulted in arguments about the 'correct' or 'fair' value. In our times of war in Ukraine, high inflation, rising interest rates and increasing market volatility the issues related to determining business value are taking on greater significance.

1. Introduction

Current market conditions mean that great uncertainty prevails as regards future developments and many businesses are not able to make reliable forecasts for the coming years. Yet, for the dominant valuation models, such as the income capitalisation method or the discounted cash flow technique, it is the future developments that form the basis for the mathematical determination of the business value. The question that arises is if, or how valuation models should be adjusted to take into account the above-mentioned uncertainties. Within the scope of business valuation, allowances can be made for risks by adjusting the aforementioned business valuation models – which are based on the calculation of net present value – both on the level of the numerator (the income or cash flow to be valued) and of the denominator (the capitalisation rate).

2. Impact on the cash flow to be valued or the income to be valued

It is basically common practice to derive forecasts from the most recent past of a business. However, in view of the events of recent years, for many businesses the 'typical' financial year was several years ago. Moreover, it might be necessary to take into consideration changes in the business model or the market environment so that it would not make sense to extrapolate the past into future years. Consequently, detailed forecasting for a business constitutes a major challenge for current business valuations.

In a statement, of 20.3.2022, the Expert Committee on Business Valuation and Economics (Fachausschuss Unternehmensbewertung und Betriebswirtschaft, FAUB) of the Institute of Public Auditors in Germany (Institut der Wirtschaftsprüfer, IDW) recommended carrying out a review of business forecasts in order to ascertain if the current uncertainties have been adequately taken into account, or to work towards having these taken into account or, as the valuer, to do so yourself where necessary. Furthermore, when drawing up the forecasts it may be helpful to create different scenarios. Here, for example, it might be appropriate to adjust the cash flows that have

been reported to date for state subsidies and financial support, as extraordinary effects for the years with actual data, and not to take these into account for the years with forecast data. If sectors, such as retail or tourism, are going to be affected by the consequences of the crisis also in the long term, – for example, because of fundamental changes in consumer behaviour or in the distribution channels – then these effects should likewise be individually analysed and factored into the forecasts. In this connection, particular diligence is called for when deriving the perpetuity. Here, for the detailed forecasting phase it would appear to be prudent to choose an appropriate length of time until the business achieves a steady state.

Recommendation: Small and medium-sized enterprises, in particular, frequently do not prepare any standardised business forecasts. However, such forecasting can be helpful, especially during times that are fraught with uncertainty. This would apply, in particular, if a company succession is pending, or the sale of a business is being planned. Standardised forecasting also forms the basis for effective financial management and liquidity management.

3. Impact on the capitalisation rate

Furthermore, for a fair business valuation it is crucial to determine an appropriate capitalisation rate. As interest rates are currently rising this will tend to result in an increase in the capitalisation rate and, thus, in falling business values. In this respect, the IDW's Expert Committee, in its statement of 20.3.2022, pointed out that in the case of the long-term present value of future profits methods *[Zukunftserfolgswertverfahren]* (such as the income capitalisation method or the DCF technique) the capital market data should be valued on the basis of long-term returns analyses even in times of crisis. Short-term fluctuations and possible overreactions in the capital markets should be regarded as transient indicators of sentiment and not necessarily long-term ones. Consequently, the IDW does not see any need to adjust the methodology that has been hitherto used to determine the capital costs.

Blanket risk premiums on the capitalisation rate have been rejected by the IDW and also other leading valuation practitioners. Instead, risks should be taken into account in the course of forecasting and, where appropriate, in specific risk scenarios. The debt situation of a business that has changed as a result of the crisis will be reflected when determining the capitalisation rate. Moreover, it is already apparent that certain sector-specific beta factors have undergone crisis-induced changes.

4. Conclusion: Impact on transactions and prices

The above-mentioned aspects are increasingly leading to valuation problems for businesses that are under pressure to sell, for example, for reasons of upcoming succession planning. Currently, the business values that have been determined, frequently, cannot be realised in the transaction market. That is why it is important for a vendor to develop a realistic price expectation. The scenarios that are created in the course of the business valuation can be taken up once again during the purchase price negotiations. In view of the current uncertain market situation, in this context, payment mechanisms are frequently being used where portions of the purchase price have to be paid at a later point in time and these payments are contingent on certain conditions being met.

LEGAL

RAin [German lawyer] Yvonne Sinram

New forms of working – 'Remote Work' and the 'Workation' (Part I)

Advances in technology have made it possible for employees in various professional fields to work remotely – from virtually anywhere in the world – for their employers. The 'workation' and 'remote work' are forms of working that are found more and more frequently in the world of work ever since the Coronavirus (COVID-19) pandemic. In the following section we first define these concepts and consider the relevant aspects of employment law and data protection law. In the second part of this series, in the next issue of our newsletter, the focus will be on the consequences in respect of tax and social security regulations.

1. Conceptual basics

The term 'remote work' means working from a freely cho-

sen location in the world. The term 'workation' blends work and a vacation and is characterised by working in a location where others go on holiday, or by combining work with a vacation.

In this report, in view of the various international agreements with individual states, our discussion of the legal specificities and risks will provide a closer examination solely of an employee's work performed from a foreign EU state for a German company.

To begin with, it should be noted that an employee basically has no entitlement to a workation or nor a right to work remotely from abroad. Such entitlement can only arise from an agreement, company practice or the right to equal treatment.

2. Employment law aspects

2.1 Contract law/place of jurisdiction

In cross-border situations, a question that usually arises is which law should be applied to the employment contract. Under the so-called Rome I Regulation, individual employment contracts shall be governed by the law chosen by the parties. Although, the freedom to choose the applicable law may not lead to the circumvention of the mandatory applicable employment protection provisions (e.g. protection against dismissal, leave entitlement, minimum wage, or maximum working time) of the country where the employee habitually carries out their work. The habitual place of work is the one where an employee performs the essential part of their work, thus, where they work for more than half their working time. Agreements that differ from this may be made only after a dispute has arisen.

Please note: Furthermore, it should be noted that in the case of a workation the employer can also be sued in the country where the place of work is (thus, e.g., Spain). However, legal actions against employees may only be brought before a court in the Member State where the employee is domiciled.

2.2 Working time and occupational health and safety

The Working Time Act (Arbeitszeitgesetz, ArbZG) and Occupational Health and Safety Act (Arbeitsschutzgesetz, ArbSchG) are not applicable to work activities outside of Germany. Instead, the law of the county from which the employee performs their work shall apply (=

Pompeii ruins and Mount Vesuvius

The Amalfi coast

country where the work is performed). Although it would be possible to contractually agree a higher level of protection than is afforded under the law of the country where the work is performed.

(1) Recording working time – Even if the German Working Time Act (ArbZG) is not applicable, nevertheless, the Health and Safety at Work Directive will apply within the EU. National regulations are not allowed to set up lower levels of protection. Ultimately, it is likely that the respective national laws will differ only slightly from the German Working Time Act. Moreover, working time has to be recorded according to the requirements of supreme court rulings (ECJ, judgement of 14.5.2019, case reference: C-55/18; Federal Labour Court decision of 13.9.2022, case reference: 1 ABR 22/21). As regards what is deemed to be working time, it is likely that there is hardly any difference between national regulations in this respect and those of the ArbZG.

(2) Occupational health and safety – In the case of occupational health and safety, the law of the country from which the employee performs their work for the German company likewise has to be complied with. Insofar as there are lower occupational health and safety standards in the country where the work is performed, it would be possible to contractually agree that the German ArbSchG will apply. However, the health and safety standards of the country where the work is performed may not be undercut.

Recommendations: Consequently, the employer will have to check what requirements with respect to both working time as well as occupational health and safety are imposed by the respective law of the country where the work is performed and then comply with these requirements. Any obligation to cooperate that results from this should be contractually agreed with the employee if necessary. It would also be possible to specify in the employment contract that the German working time regulations and occupational health and safety regulations will apply if these requirements set standards that are at least as high as the respective regulations of the country where the work is performed.

3. Requirements under the German Act on the Notification of Conditions Governing the Employment Relationship and data protection law

If employees are to perform their work outside of Germany for a period longer than four consecutive weeks then, prior to the start of any activity abroad, under the German Act on the Notification of Conditions Governing the Employment Relationship, employers would have to send a doc-

ument to employees with the following information:
» the country and duration of the planned stay,
» the currency in which the compensation will be paid,
» cash payments and benefits in kind related to the stay abroad (foreign posting allowance, reimbursement of expenses for travel, meals and accommodation)
» as well as information as to whether or not it is anticipated that the employee will return and, if yes, under what conditions this would take place.

Communication with employees working abroad would, in all likelihood, take place to a considerable extent via video conferencing, e-mails, etc. In doing so, the parties should refrain from recording the conferences for reasons of data privacy. Moreover, employees should be instructed to organise their backgrounds in such a way that no sensitive information would be included.

Please note: Working across state borders constitutes an even bigger challenge for IT security. Under data protection law, employers are responsible for the personal data of customers and employees (Art. 4 No. 7 GDPR). Employers are responsible for these data even in a third country (Art. 44 sentence 1 GDPR).

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

The modernisation of German partnership law – A need to review the GbR and other partnerships

The Act on the Modernisation of Partnership Law (Gesetz zur Modernisierung des Personengesellschaftsrechts, MoPeG) has now been approved by the Bundestag [lower house of German parliament] and will become legally binding on 1.1.2024. The amendments to legislation that will come into force as a result of the omnibus act mean that many changes are imminent for partnerships. Besides the selective changes to professional partnerships *(Personenhandelsgesellschaften, a German type of professional corporation such as the OHG)* [German general partnership with unlimited liability] and KG [German limited partnership], the partnership legislation relating to the GbR *(Gesellschaft bürgerlichen Rechts)* will be completely overhauled.

1. Changes to partnerships under German civil law

1.1 Legal capacity

For a long time, it was disputed whether or not a GbR (under Sections 705 ff. of the Civil Code [Bürgerliches Gesetzbuch, BGB]) could be considered to have legal capacity since – in contrast to the OHG or the KG – the legal capacity of a GbR was not specifically stated. Guidance on liability issues relating to this type of partnership was hitherto provided by court rulings and not the wording of legislation. The aim of the German lawmakers is now to align the codified rules with the existing case law. In the new legislation a distinction will basically be made between a GbR with legal capacity (Sections 706-739 BGB in its amended version) and one with no legal capacity (Sections 740-740c BGB in its amended version).

According to Section 705(2) BGB in its amended version, a condition for a GbR with legal capacity shall be a shared will to engage in legal transactions. There shall be a presumption of this shared will if the business purpose of the partnership, according to Section 705(3) BGB in its amended version, is the operation of a business under a common name. According to Section 713 BGB in its amended version, contributions (usually deposits) by the partners as well as rights acquired by the partnership and the obligations established against these shall constitute the assets of the partnership. Jointly-held assets will be replaced by the concept of partnership assets. This will result in the abolition of the joint ownership principle as well as a clear separation between partnership assets and private assets. It will now be possible to assign rights and obligations to the partnership.

If there is no shared will to engage in legal transactions then the entity would be an undisclosed partnership (Innengesellschaft) with no legal capacity within the meaning of the amended version of Section 740 BGB. In this case, the legal form shall serve the purpose of organising the relationships between the partners.

1.2 Public Register for GbRs (Gesellschaftsregister)

While OHGs and KGs have always had to be registered in the Commercial Register (Handelsregister), for GbRs there had hitherto been no possibility to have an entry in a public register. Therefore, within the scope of MoPeG, a new register will be introduced – the so-called Gesellschaftsregister – in which a GbR may indicate registration by means of a specific name affix of eingetragene Gesellschaft bürgerlichen Rechts, or eGbR [registered partnership under German civil law]. The GbR legal form has thus been divided into three

different types, as shown in Fig. 1. There is admittedly no registration obligation, nevertheless, in the future registering the GbR in the Gesellschaftsregister will be a mandatory requirement for the acquisition of title to holdings in a GmbH, shares, real estate or other rights registered in public registers.

Please note: Consequently, in many cases, there will effectively be a registration obligation.

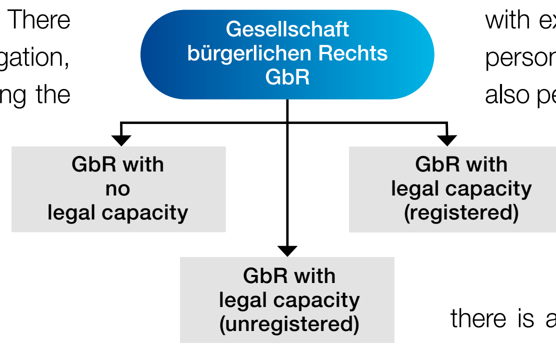

Fig.1 New differentiation for the GbR

1.3 Legal representation and partners

In the future, there will be separate regulations for management (Section 708 ff. BGB in its amended version) and representation (Sections 715 f., 720 BGB in its amended version). While management concerns internal relationships, representation governs external relationships. In doing so, the self-governing body principle still needs to be complied with. This means that at least one of the partners with unlimited liability also has to be a representative.

With respect to liability for the obligations of the partnership, there will be no change in practice when compared with existing legislation. The partners will be personally liable with their private assets and also personally liable as accessories. A creditor will have the option of asserting their entire claim against one, several or all the partners (Section 421 BGB) and execute it against their entire private assets. As there is accessorial liability, amounts owed by the partnership will be basically owed by each individual partner in the full amount.

Please note: To date, this principle has been implemented through the analogous application of Sections 128 ff. of the Commercial Code (Handelsgesetzbuch, HGB), in the future however, Sections 721 ff. BGB in its amended version will apply. Since solely a GbR with legal capacity will likewise be able to engage in legal transactions, liability for the partnerships' obligations could only arise there.

2. Changes for other types of partnerships

2.1 Allocation of profits

Currently, the law regulates profit distributions as follows: Each partner receives advance profit at a rate of 4% of their share of the capital. Apart from that, the annual profit is allocated on a per head basis.

Brunelleschi's Dome of the Cathedral of Florence

Under MoPeG the allocation of profits will be newly regulated. Instead of advance profit payments and the allocation of the residual profit on a per head basis, profits will be allocated according to the agreed sizes of the stakes in the partnership or, in cases of doubt, in proportion to the agreed values of the capital contributions. The allocation on a per head basis would remain only if no values had been agreed for the capital contributions either, in accordance with Section 713 BGB in its amended version.

2.2 Opening up for freelancers

Up to now, carrying on a commercial business pursuant to Section 105(1) HGB was a requirement for an OHG, KG or GmbH & Co. KG [German limited partnership with a limited liability company as a general partner]. Now, as a result of the reform, freelancers will also be able to organise themselves in the legal form of a professional partnership (Section 107(1) HGB in its amended version). The requirement for freelancers will be the opening up of the respective relevant professional practice regulations as well as an entry in the Commercial Register.

Please note: The GmbH & Co. KG, in particular, could be an interesting structure in view of the limitation of liability. In the case of a limited partnership, the liability related to the professional activity is limited but there is no general liability exclusion, however, the use of a Komplementär-GmbH [general partner private limited company] can make it possible for this liability to be limited to the amount of your capital. Nevertheless, use can be made of the benefits of a partnership when compared with a corporation.

2.3 Switching between legal forms – a GbR with legal capacity and an OHG

A registered GbR can be transformed into an OHG by way of a so-called change of status if it is voluntarily registered in the Commercial Register. The Gesellschaftsregister will pass on the eGbR, under preservation of its legal identity, to the Commercial Register where it will subsequently be registered in its new legal form.

It is also possible to switch the legal form from an OHG into an eGbR. The requirements here relate to the characteristics of the so-called optionally registrable business person (Kann-Kaufmann). The absence of a commercial enterprise and the voluntary registration in the Commercial Register mean that freelancers and asset management partnerships will always able to shed their commercial status. However, in the future, the partnership will no longer simply be able to cease to exist pursuant to Section 31(2) sentence 1 HGB, instead it will have to go through a change of status pursuant to Section 107(2) sentence 2 HGB and be registered as a GbR in the Gesellschaftsregister. The cancellation of the eGbR that has switched its legal form can only be done in the Gesellschaftsregister in accordance with the general provisions, – thus, for example, after a liquidation has been completed – (cf. Section 707a(4) BGB in its amended version).

Please note: The aim of this legislation is to prevent firms from being 'buried' – a process where companies cease to exist outside of the insolvency proceedings without undergoing liquidation.

Recommendation

The many changes in GbR legislation give rise to implications and recommendations for action for consulting practice. In particular, during the transitional period until 1.1.2024, a check should be performed to determine whether or not registering in the Gesellschaftsregister is an option, or will become necessary in the future. The new register will enhance legal certainty and the protection of legitimate expectations and, therefore, it would be interesting for partnerships that engage in general legal transactions on a daily basis.

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

Is living space illegally repurposed when it is used by holidaymakers?

When rental apartments are rented out via online portals there is a risk that the actual use of the living space will be different to the one that was approved and there could be a case of illegal repurposing. In a recent court case, a definition was provided as to when short-term subletting is harmful or still harmless.

1. When is there a case of illegal repurposing?

A holiday home is generally understood to be, usually, a furnished living space where, against payment, guests are able to spend their holiday for a specific period. Such holiday homes are normally made available as accommoda-

tion for booking and renting in online portals (such as, for example, traum-ferienwohnungen.de).

If somewhere that was originally intended and approved as living space is used for something else then this would constitute illegal repurposing. Therefore, a typical example of illegal repurposing is when owner-occupied residential property or rental apartments are converted into holiday homes.

In towns or regions with tight housing markets, converting properties into holiday homes can result in less living space being available for local residents and this, in turn, can cause rents to go up. Furthermore, the social fabric and the neighbourhood structure may change because fewer permanent residents and more short-term visitors are present.

That is why German lawmakers responded a long time ago already and imposed bans on, or rules against the illegal repurposing of living space. If a living space is used as a holiday home only for a short period of time in one year then this would normally not constitute illegal repurposing.

Please note: However, these rules and exceptions vary depending on the Federal State and municipality so that you should acquaint yourself with the local rules beforehand.

2. Current ruling on the application of the German Act on the Prohibition of Illegal Repurposing

In a recent publication of court proceedings, the administrative court in Freiburg (decision of 16.6.2023, case reference: 4 K 1365/23) provided an important clarification in respect of the Act on the Prohibition of Illegal Repurposing. This legislation, which is applicable in Baden-Württemberg, defines illegal repurposing as the use of living space to provide accommodation for tourists and other visitors for more than a total of ten weeks in a calendar year. There has hitherto been uncertainty about the interpretation of this limit. The issue was whether or not advertising an apartment as a holiday home for rent in a respective specialised portal for more than ten weeks could already be regarded as a breach of this limit.

The specific case concerned a tenant in Baden-Württemberg who had advertised his apartment for rent on AirBnB. While the apartment was available on the platform for a period of more than ten weeks it was actually used by holiday makers for a considerably shorter period. Nevertheless, the local authority saw this as a violation of the prohibition on illegal repurposing whereupon the tenant instigated legal proceedings.

However, the administrative court in Freiburg ruled in favour of the tenant. The court clarified that the crucial factor for the ten-week limit was not the length of the advertising period but the actual occupancy (use) by holidaymakers. Merely advertising an apartment for rent does not necessarily mean that it cannot also be used for residential purposes. This will then be the case if, in particular, the living space – as in the above-mentioned case – is only rented out to guests while the main tenant is temporarily absent.

Recommendation: For property owners and tenants it is crucially important to monitor the actual length of the rental period rather than the length of the advertising period in order to prevent potential disputes related to the prohibition on illegal repurposing. This will apply not only in Baden-Württemberg, as in the case where there was a ruling, since there are corresponding rules in the other Federal States, too.

IN BRIEF

Shorter useful life – How faster tax depreciation of real estate can be achieved

Fixed tax depreciation rates based on standardised useful lives mean that real estate users have only limited scope to provide proof of an actual useful life that is shorter. The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) has set out the conditions under which the local tax offices would accept a shorter useful life.

Privately-held real estate that is rented out and where the development was completed as of 2023 may generally be depreciated at an annual rate of 3%. If the completion was prior to 2023 then a tax depreciation rate of 2% will apply. Old buildings that were constructed prior to 1925 can be depreciated at 2.5%. If the real estate is a business asset and is not used for residential purposes then a

standard tax depreciation rate of 3% applies for the construction years as of 1985 (if the start of construction or the purchase was prior to 2001: 4 %). Therefore, by law and depending on the situation, a standard useful life of 25, 33, 40 or 50 years will be assumed. The fixed tax depreciation rates have to be applied irrespective of the actual age of the building. The rates also apply to existing real estate that has been acquired. However, real estate owners have the option of deviating from the standardised tax depreciation rates, within very narrow limits, and providing proof of an actual useful life that is shorter so that the depreciation can be accelerated. The proof has to be provided in the form of an expert appraisal from which it has to be possible to infer the relevant factors for the shorter useful life (e.g. technical wear and tear, commercial devaluation of the real estate or legal restrictions on use). The BMF, in its circular of 22.2.2023 (reference: IV C 3 – S 2196/22/10006 :005) set out when the local tax offices would accept a shorter useful life:

» There needs to be a definite and specific justification for the actual useful life that is shorter. The owner has to demonstrate that the building will be technically or commercially obsolete before the end of the standardised time periods. A shorter useful life can be acceptable if, for example, the owner is already required to demolish the building.
» In the case of special factory buildings (e.g. lightweight construction halls) a shorter useful life may already be shown in official German tax depreciation tables. The same will apply to parts of buildings that are standalone immovable capital assets (e.g. shop fixtures).
» Where there is a limited tenancy, a shorter useful life may be deduced for fixtures added by tenants.
» The actual useful life will also be affected by the technical wear and tear. For this, an assessment would have to be made, for instance, of the extent to which the supporting structure of the building (especially the walls and the roof) restricts its usability.

Please note: Proof of a shorter useful life has to be provided in the form of an appraisal by either a publicly appointed and sworn expert in the valuation of (un)developed real estate, or by a person who is similarly accredited.

Reciprocal sales – Rotating holdings at below their value will not be recognised for tax purposes

Tax saving potential cannot be generated by rotating the holdings of two shareholders in a GmbH [German private limited company] among each other if the purchase prices fall significantly short of realistic value ratios.

The facts of the case that formed the basis of the correspondingly formulated decision by the Federal Fiscal Court (Bundesfinanzhof, BFH) of 20.9.2022 (case reference: IX R 18/21) were that two shareholders who each held a 50% interest in a GmbH both sold their holdings to each other by way of a rotation of their holdings at a purchase price of €12,500. The previously recognised acquisition costs for the GmbH holdings had been €500,000 so that, for tax purposes, the rotation had resulted in a ‘loss’ of €487,500 prior to applying the partial income rule. The fair market value of the GmbH when calculated on the basis of the simplified income capitalisation method was approx. €1.5m. The local tax office, the tax court in Saxony and then also the BFH considered these transactions to be abusive structuring within the meaning of Section 42 of the Fiscal Code (Abgabenordnung, AO).

Background If a ‘loss’ arises within the meaning of Section 17 of the German Income Tax Act in the course of a rotation of holdings because of a purchase price that reflects the true value of the holdings in the GmbH that have been sold then this loss should also be taken into account for tax purposes. In principle, rotating holdings does not constitute abusive structuring within the meaning of Section 42 AO since the shareholders are free to choose if, when and to whom they sell their holdings. This will admittedly apply even if the sale results in a loss, however, not if the price falls significantly short of realistic value ratios.

Siena – Palazzo Pubblico on the Piazza del Campo

AND FINALLY...

“Communicate, communicate, communicate.”

Samuel Moore ‘Sam’ Walton (29.3.1918 – 5.4.1992) was a US American entrepreneur. He founded and ran the US American supermarket chain Wal-Mart, the world's largest corporation by revenue

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