PKF

Newsletter

Key Issue

New clarifications with respect to transfer pricing

01|24

Dear Readers,

We hope that 2024 has started well for you. We kick off the January edition of our newsletter in the Tax section with the problems of transfer pricing as our Key Issue report. This is because, during tax audits, the focus is increasingly on cross-border issues and the allocation of income. The fact that the Federal Fiscal Court only rarely expresses its opinion on **transfer pricing issues** is all the more reason why attention should be paid to the latest ruling concerning manufacturing abroad. In the report that then follows, a current Federal Fiscal Court ruling likewise provides an opportunity to examine an issue more closely, namely, what you should take into account when **transferring assets to children under reservation of usufruct.** Here, we provide information about appropriate structures for tax optimisation.

In the Accounting & Finance section we have Part II of our report on large-scale project planning, which is discussed in the context of the **construction of a logistics centre**. In Part I, in the December issue of our newsletter, we considered alternative forms of financing and the basic accounting aspects. In this issue we now have a closer analysis of the **special features in cases of leasing** and of the **tax aspects**. We also discuss how the different forms of financing affect the equity ratio.

In the Legal section our first report is on changes to the **German Whistleblower Protection Act** and this is followed by an article on the **German Act on Corporate Due Diligence Obligations in Supply Chains**. The two reports provide information on which companies will have to comply with this legislation and on the potential consequences of violations. In both cases it will be necessary to design a reporting system and put it into action in order to implement the legislative specifications.

Our brief reports section sets out not only information on the new thresholds under social security regulations, but more particularly, the distinguishing features of commercial trading in property and the issue of estimates of additional income in the case of non-sequential invoice numbering.

We then continue our journey, which we started last year, around the PKF locations in the neighbouring European countries through the illustrations that break up the reports from our experts. In January we visit Sweden.

With our best wishes for a healthy and prosperous year.

Your Team at PKF

Öresund Bridge between Malmö and Copenhagen

Front cover photo: Colourful houses on ‘Stortorget’ or Grand Square in Stockholm

Key Issue

New clarifications with respect to transfer pricing

Contents

TAX

WP/StB [German public auditor /tax consultant] Dr Dietrich Jacobs

New clarifications with respect to transfer pricing

Federal Fiscal Court *(Bundesfinanzhof, BFH)* rulings on transfer pricing issues are rare and, therefore, generally deserve special attention. In a recently published decision, the BFH has now given its view on various transfer pricing topics. Even though the ruling relates to the distant past and thus, in some cases, to old versions of legislative provisions, it is nevertheless possible to gain insights from it that are still valid at the present time and, as a result, also bring clarity to current cases of transfer pricing structures.

1. The (simplified) case

A GmbH *[German private limited company]* allowed labour- and energy-intensive production stages to be performed by a Bosnian sister corporation. According to this corporation's functional and risk profile, it basically acted as a contract manufacturer for the GmbH. In the course of this, the GmbH sold materials to the Bosnian company at cost price and the return delivery of semi-finished or finished products took place on the basis of analyses of the value added and 'contribution margin calculations'. From the perspective of the German fiscal administration however, ultimately, too much profit remained with the Bosnian company. From 2013, the Bosnian company also sold to and supplied a previous customer of the GmbH because the latter was no longer able to offer this customer competitive prices.

2. Key statements by the BFH on transfer price formation

The arrangements described above gave the court an opportunity to adopt a position on many points. In this context, we would like to highlight the following four aspects:

Uppsala Cathedral

2.1 Relationship between individual adjustment rules

First of all, the BFH clarified that the specific regulation for making adjustments for foreign transactions tax purposes (Section 1 Foreign Transactions Tax Act *[Außensteuergesetz, AStG]*) would generally be subordinated to other regulations for making adjustments to income (e.g. from a constructive dividend) and would only apply when and to the extent that the scope of the other regulation for making adjustments was smaller.

Please note: These statements by the BFH are thus, for example, important because different types of legal consequences are linked to the various regulations for making adjustments. For instance, a constructive dividend would possibly result in capital gains tax arising, however an adjustment in accordance with 1 AStG would not.

2.2 Aspects pertaining to contract manufacturing

The BFH took the view that it is possible to make an overall assessment of individual business transactions if their separation would not be appropriate for the economic content. The BFH thus, in economic terms, combined the sale of raw materials by the GmbH to the Bosnian company with the selling back by the latter of semi-finished/finished products to the GmbH into one business relationship of 'contract manufacturing'.

Furthermore, the BFH confirmed that in the case of contract manufacturing it is appropriate to use the cost-plus method for the transfer pricing structure, preferably on the basis of planned costs, whereby the costs of the material that is supplied (economically by the ordering party), as non-value added costs, are not included in the cost base.

The BFH ultimately rejected an estimate of the profit mark-ups based on 'general principles derived from experience' or on 'internet research'. Instead, the court stipulated that such estimates need to be based on companies with comparable functional and risk profiles or on comparable sectors.

Recommendation: While the BFH ruling basically does not contain any radical new insights with respect to the aforementioned details about contract manufacturing, nevertheless it does provide a reliable basis for argumentation and structuring. It should be particularly noted that, in its ruling, the BFH clearly rejected, among other things, the above-mentioned blanket estimates based on 'general principles derived from experience'. Therefore, in practice, it is likely that the importance of database analyses will continue to increase for small and medium-sized centerprises, too. If and when such analyses have to be prepared please do not hesitate to contact your PKF consultants; they can of course arrange for qualified and experienced staff to support you.

2.3 Pure sale of materials

Insofar as, from 2013, the materials supplied by the GmbH were used by the foreign corporation not for the contract manufacturing but, instead, for its own production (i.e. for the purpose of the subsequent sale to the aforementioned third party customer) the BFH had no objection to the 5% mark-up rate on the cost price. However, from this it should not be deduced that a 5% mark-up on the cost price of materials purchased for the benefit of third parties is generally appropriate. Rather, the BFH pointed out that, in the case in question, the purchasing benefits generated by higher volumes had remained (almost) entirely with the GmbH.

Please note: It would therefore appear that the 5% mark-up was (only) accepted against this background, while otherwise, at any rate, higher mark-ups would likewise be possible or necessary.

2.4 Customer transfer potentially requires the payment of royalties

Moreover, the BFH considers it conceivable that the Bosnian company should have had to pay royalties to its sister company for the referral of the customer supplied from Bosnia-Herzegovina as of 2013. The BFH was however unable to decide this, instead, the case has been referred back to the Munich tax court in this respect.

More Information: Apart from the aspects mentioned above, the BFH ruling includes a variety of statements on, among other things, the topic of the transfer of functions. However, for reasons of simplicity, these points are not discussed here.

Please note

The ruling makes clear in different ways that in the case of cross-border business transactions, in particular when over time the circumstances undergo changes, greater vigilance is necessary with respect to the potential tax burdens associated with the changes. This would still apply even if – as argued by the GmbH in the case in question – continuing doing business from Germany would not have been economically viable.

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

Tax planning by means of a usufruct in favour of children

The transfer of a source of income to (under-age) children via the establishment of a gratuitous usufruct has to be recognised for tax purposes if no further tax advantage arises for the provider of this benefit apart from the transfer of taxable income. This was the decision of the Federal Fiscal Court *(Bundesfinanzhof, BFH)*, in its ruling of 20.6.2023 (case reference: IX R 8/22) and, in this respect, it has opened up structuring options for tax optimisation within a family. There are however a number of pitfalls that you need to watch out for here.

1. Issue – Transferring income to children

The parents were the owners of a property rented out to third parties and, for a limited period, they granted both of their under-age children a usufruct related to the property (usufruct of a benefit). This meant that, for the duration of the usufruct, the children would assume the position of the landlord, be entitled to the rental income and it would also be allocated to them for tax purposes. In the case in question, as the children did not have any other income, after applying the basic personal tax allowances, no tax arose on the rental income, whereas this income would have been subject to a high rate of tax if it had been allocated to the parents. The local tax office however viewed the arrangements as an abuse of structuring options and refused to recognise the transfer of the income to the children.

2. Transferring a source of income by way of the usufruct of a benefit does not constitute an abuse of the law

The BFH however took a different view of the arrangements. In the context of an overall assessment, the transfer of a source of income that results in a tax advantage will be the consequence of a situation that has to be recognised for tax purposes and, in this respect, it is 'provided for' under the law and, therefore, will not constitute an abuse of the law. This would only be different if further

Port of Gothenburg

tax advantages accrued that it would otherwise not have been possible to use. This would have been the case, for example, if the parents had leased back the property from the children for commercial purposes and would thus have been able to deduct the rent as a business expense – something that would otherwise not have been possible.

By contrast, the court did not view the transfer of a source of income that likewise serves the purpose of fulfilling a maintenance obligation as being detrimental from a tax point of view. Parents may decide whether they provide support for their children in the form of cash or by (temporarily) giving them a source of income.

3. Helpful information on tax depreciation and gift tax

(1) Tax depreciation – It should be noted that in the case of a gratuitous usufruct of a benefit related to a property it would no longer be possible to make use of the depreciation of the building for tax purposes. The owners (parents) would no longer generate any income from the property and the children would not have to bear any depreciation in value. The arrangement would therefore be considered mainly for properties that have already been fully depreciated.

(2) Avoiding gift tax – The granting of a gratuitous usufruct is subject to gift tax. However, in this case, a tax-exempt amount of €400k is available to each parent and child; moreover, this exempt amount can be claimed once every 10 years. That is why, in the case in question, the usufruct was accordingly granted for a limited period of time in order to keep the value of the gift within the tax-exempt parameters.

Please note

As always with close relatives, in order for the agreements that are made to be recognised for tax purposes they have to be legally effective in terms of civil law, seriously intended and actually implemented as agreed. In the case of property, the usufruct agreement including the entry in the land register has to be certified by a notary. In the case of children who are still under age, it will additionally be necessary to appoint a supplementary guardian.

ACCOUNTING & FINANCE

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

Large-scale project planning – the construction of a logistics centre

Financing – Accounting – Taxation (Part II – Lease accounting, equity ratio and particular tax aspects)

When planning large-scale projects – such as the construction of a logistics centre -, besides structural engineering and logistical aspects etc., other fundamental matters can arise, for example, the financing of the project, questions about the accounting or also tax issues. After providing a short overview of alternative possible forms of financing and outlining the basic recognition and measurement issues for the financial accounts in sections 1 and 2 of Part I of our report, now, in Part II, we discuss the special features in cases of leasing, the impact on the equity ratio as well as the particular tax aspects.

*(Please note: For Part I with sections 1 and 2 please see the PKF newsletter 12/2023 or look under **www.pkf.de**)*

3. Accounting aspects in cases of leasing

3.1 Attribution – the key issue for the financial and tax accounts

Under German accounting law (under both the Commercial Code *[Handelsgesetzbuch, HGB]* as well as under tax law) the key question in lease accounting is normally: to whom is the leased asset (economically) attributable – the lessor or the lessee? The answer to this question determines the further legal consequences, in particular, who has to recognise the leased asset. Here, the so-called leasing decrees issued by the German fiscal administration play a major role in the lease accounting assessment.

Malmö skyline with the Turning Torso

3.2 Special lease model in the case of the construction of a logistics centre

Given that a – yet to be built – logistics centre is generally very specifically tailored to the needs of the (future) lessee and that it would only be appropriate for them and that, normally, it is scarcely likely that there would be any other possible economically viable use for or exploitation of the building, in such cases, a so-called special lease model applies. Consequently, the economic ownership of the leased asset – so, here, the logistics centre – would generally have to be attributed to the lessee irrespective of any questions about the basic lease term, or something similar. However, there are exceptions here in the case of land. Here, depending on the specific leasing arrangement, it would be necessary to determine separately in each case, on the basis of the leasing decree of 21.3.1972, whether the land should be recognised by the lessor or the lessee.

If the lessee, as the economic owner of the logistics centre has to recognise its acquisition and construction costs (the starting point for this would be the lessor's acquisition and construction costs that were used as the basis for the calculation of the lease payments) then the lessee would likewise have to recognise the corresponding liability to the lessor.

3.3 No special lease model

If the situation does not warrant the special lease model – for example, if the logistics centre is not tailored to the particular needs of the lessee -, then it would be necessary to check, on the basis of the contractual arrangements, whether for reporting purposes the logistics centre in question should be attributed to the lessor or to the lessee. To this end, important criteria for the attribution to the lessee are, in particular:

- the ratio of the basic lease term to the average operating life (as the leasing decree specifies that for buildings this is generally a period of 50 years) and
- the presence of and arrangements for options to purchase and extend the lease.

If, as in the case of a special lease, the leased asset has to be attributed to the lessee then the lease payments that are made would have to be divided up in the lessee's financial accounts into the interest and principal components and the logistics centre would also have to be recognised by the lessee.

3.4 Sale-and-lease-back – a special case

If the contract arrangements have been selected so that the lessee remains the economic owner – this is normally the case with sale-and-lease-back – then the leased asset will remain continuously with the lessee. In such cases, a transfer of the leased asset to the financial accounts of the lessor and then back again to those of the lessee does not take place. The lease payments then have to be regarded as pure financing and reported under the other liabilities item. The lease payments made by the lessee have to be divided up into the principal and interest components.

3.5 IFRS Accounting

In accounts prepared according to IFRS the lease accounting is determined by IFRS 16. Lessees now no longer need to divide up their leases into operating and finance leases, as previously under IAS 17; moreover the question of the attribution of the asset – such an important one under German accounting law – does not arise here. Instead, at the commencement of the term of the lease agreement, the lessee has to recognise or report the right of use as well as the lease liability. The starting point for the recognition or measurement of the right of use and the lease liability, in each case, is the present value of the lease payments.

With regards to the subsequent measurement, in terms of the lease liability it will be necessary to split the regular payments into the interest and principal components. The right of use has to be amortised like a 'normal' fixed asset on a scheduled basis and (if necessary) on an unscheduled basis.

4. Impact of the form of financing on the equity ratio

In terms of the financial reporting for a logistics centre construction project, especially when selecting an appropriate type of financing, it is also necessary to focus on the consequences for the equity ratio since, in individual cases, this could play an important role in the context of financial covenants, for instance. By way of example, four cases can be mentioned here:

- insofar as the project is financed by accumulated earnings (non-debt financing in the form of internal financing) then this will not affect the equity ratio because, in this case, financial resources would simply be redeployed into tangible fixed assets (logistics centre) on the asset side of the balance sheet (so-called accounting exchange on the assets side).
- Insofar as the non-debt financing occurs via an inflow of new funds from outside (via capital contributions from partners/shareholders or from capital increases) this would generally mean that the equity ratio would be strengthened.
- By contrast, financing via a bank loan would push down the equity ratio because there would then be more debt in relation to equity.
- Given that in lease accounting – under both German accounting law, where it is assumed that the lessee is the economic owner, as well as under IFRS –, the liability to the lessor has to be recognised, the equity ratio will likewise contract in the event of lease financing.

Please note: In practice, it is not uncommon here to choose structures to sidestep this; these involve transferring capital goods to so called special purpose vehicles (SPVs). One of the purposes is that these companies are structured in such a way that they do not have to be included in the consolidated financial statements and, therefore, do not affect the equity ratio there.

5. Tax aspects

For reasons of complexity, the tax aspects discussed below are limited solely to issues related to tax on earnings.

5.1 Impact of depreciation on tax on earnings

From the perspective of tax on earnings it must be noted that the main ramifications in this respect will already be apparent once the type of financing has been selected and, consequently, also those for the (tax) accounting treatment, such as, for example:

- the distinction between the components of a building and the operating equipment,
- the capitalisation of interest that arises during the construction period of an asset,
- the size of the leasing payments or amount of depreciation and
- the financing interest.

The only way the capitalised costs of the capital asset are able to have the effect of reducing the tax liability is normally via scheduled depreciation. While land (and thus also the ancillary costs of acquisition, such as real estate transfer tax) cannot actually be depreciated on a scheduled basis, a building is normally depreciated over a period of 33.3 years for tax purposes. It is only capitalised operating equipment that can usually be depreciated over a shorter period of time.

If the capital asset appears on the balance sheet of the finance provider (e.g., in the case of a lease this would be the lessor) then the leasing payments can generally

be immediately deducted, as business expenses, from the assessment base for the tax on earnings (please see below for particularities in the case of trade tax).

5.2 Option with respect to the recognition of financing interest.

Financing interest generally lowers the tax assessment base and thus the tax burden if, in the financial accounts and in the tax accounts, it has not been exceptionally capitalised as construction costs (option), insofar as this was permissible. The option would have to be exercised consistently in both the financial accounts and in the tax accounts because of the German principle of Maßgeblichkeit [under which financial accounting leads tax] (cf. margin no. 6 of the Federal Ministry of Finance circular of 12.3.2010).

Recommendation: The capitalisation of the interest that arises during the construction period of an asset may, in specific cases, be an attractive option, in particular, with regards to avoiding the pro-rata add-back of interest expenses that would otherwise be incurred in the context of trade tax (ultimately a neutralising effect) and temporarily strengthening the equity ratio.

Financing interest, just as the interest component contained in lease payments, has to be partially added back again to increase profits in off-balance-sheet accounts for trade tax purposes. However, if the option is exercised and the interest that arises during the construction period is capitalised then, for trade tax purposes, it does not have to be partially added back again to profits either in the year when it is capitalised or in the years when it has an impact on profits via amortisation.

Please note: For the sake of completeness, it should also be noted that depending on the size of the business or of the interest expense the so-called interest barrier (Section 4h of the German Income Tax Act) could potentially result in a limitation on the deductible amount (at least temporarily).

LEGAL

RA [German lawyer] Andy Weichler

German Whistleblower Protection Act – Reporting channel is required where there are at least 50 employees

On 17.12.2023, the statutory provisions in the Whistleblower Protection Act *(Hinweisgeberschutzgesetz, HinSchG),* which first came into force on 2.7.2023, were tightened up once again. Consequently, since the beginning of December companies have not only faced the risk of being fined up to €50,000 for not implementing the HinSchG in conformity with the law, but since the middle of December companies with at least 50 employees have also been obliged to apply this legislation.

1. Developments in the legal situation

The HinSchG has been applicable in Germany since 2.7.2023 and it aims to enable employees to confidentially report violations of the law at their companies. In connection with this, companies with at least 250 employees were initially obliged to establish and operate internal reporting channels so that employees would be able to submit their confidential reports to a specially designated body. By submitting a report under the HinSchG employees should be protected, in particular, against subsequent retaliatory measures on account of their reports.

This legislation was considerably expanded now in the middle of December 2023. Since 17.12.2023, companies with at least 50 employees have now also been obliged to establish and operate internal reporting channels for reports under the HinSchG. In this case, the number of employees is calculated on a per head basis and not according to the number of full-time and part-time jobs. Furthermore, this provision applies irrespective of the legal form.

Moreover, the provision in the HinSchG on fines likewise came into force on 2.12.2023. Companies thus now face the risk of being fined up to €50,000 if the legal requirements are not or not properly implemented.

2. Set-up of the reporting channel

The internal reporting channel has to be set up in such a way that the persons who process the reports have access to them, but the information cannot be passed on to third parties in the company. In any event, the confidentiality of the report has to be ensured. The reports may be submitted in text form or verbally.

Access to the whistleblower system should generally be made as straightforward as possible so as to enable every employee to submit information. A web-based whistleblower system would be particularly suitable here. The information has to be erased after three years.

Please note: Contrary to widespread opinion, companies are not obliged to set up the reporting channel in such a way that makes it possible to submit anonymous reports since, shortly before the Act came into force, German lawmakers had already removed the obligation to receive and process information provided on an anonymous basis.

Recommendation

If an internal reporting channel has not yet been set up we would strongly recommend that you do so right away. Here, it would be advisable to use a web-based solution because this frequently makes a swift and cost-effective implementation in the company possible while ensuring confidentiality.

RA [German lawyer] Andy Weichler

Expansion of the scope of the German Act on Corporate Due Diligence Obligations in Supply Chains

The Act on Corporate Due Diligence Obligations in Supply Chains *(Lieferkettensorgfaltspflichtengesetz, LkSG),* which regulates corporate responsibility for observing human rights in global supply chains, was expanded in scope, as of 1.1.2024, to cover companies with at least 1,000 employees.

1. Expansion of the scope of application

The LkSG requires companies to identify, evaluate and prioritise risks in their supply chains. On the basis of the results the companies have to take measures to prevent or minimise human rights violations and environmental damage.

Drottningholm Palace,
the Swedish King's place of residence

The Act, which came into force on 1.1.2023, initially only applied to companies with at least 3,000 employees. By reducing the limit on the number of employees to 1,000 – as a result of the expansion of the scope of application which has now taken place – the intention is to further bolster human rights and the protection of the natural environment in global supply chains. When calculating the number of employees of the parent company it is necessary to include all the employees of the affiliated companies.

2. Implementation of the requirements under the LkSG – Policy statement, complaints body and implementation report

The implementation of the many obligations under the LkSG necessitates a close examination of all the business relationships in the course of carrying out the above-mentioned risk analyses. Building on the analyses, first of all, a policy statement then has to be issued in which the company acknowledges that it has obligations under the LkSG and describes how the safeguarding of human rights and protection against environmental risks will be implemented in the company.

Secondly, at the same time, a complaints body has to be set up for potential violations. This complaints body has to be open to anyone who would be able to identify a violation of the provisions under the LkSG. Here, a human rights officer then has to be appointed at the company to track the corresponding reports.

In addition, thirdly, four months after the end of the financial year, at the very latest, a report on the implementation of the LkSG and the monitoring of the obligations has to be published. The report then also has to be published on the company's website.

Please note

If the implementation is not completed by the deadline then there would be a risk of heavy fines of up to €800,000; in the case of companies with annual revenues of more than €400m the fines could even be up to 2% of annual revenues.

Reindeers in Swedish Lapland

Maintaining two households – Costs for a parking space included in the accommodation costs?

If the place of residence and the place of work are far apart from each other it sometimes makes sense to rent a second home at the workplace location. The costs for this can be partially taken into consideration as work-related costs. However, there are limits to this because German legislators have capped accommodation costs at €1,000 per month. In the case described in the following section the question that arose was: can the costs incurred for a parking space likewise be allocated to accommodation costs?

In 2019, the claimant worked at C. He maintained a residence in E and a residence in G. In G, he rented a car parking space at a cost of €60 per month. While his home there was on a different plot it was nevertheless within walking distance. In his 2019 income tax return, the claimant declared income from employment of around €96,400. Moreover, he claimed the costs of running two households in the amount of around €42,100. These included, among other things, refurbishment costs in the amount of €34,000 as well as the costs for the parking space in the amount of €720 (12 x €60). However, the local tax office reduced the amount of costs that had been claimed to the maximum permissible amount for accommodation costs of €1,000 per month and, in addition, included depreciation for the furnishings and equipment in the amount of around €430. The claimant refused to accept this because, in his opinion, the costs for the parking space in the amount of €720 should have likewise been taken into consideration.

His legal action before the Mecklenburg-Vorpommern tax court (ruling of 21.9.2022, case reference 3 K 48/22) was successful. According to the court, his costs for the parking space constituted necessary additional expenditure for the maintenance of two households that was work related. Such costs are not subject to the monthly limit of €1,000 as they are not accommodation costs. Even if the explanatory memorandum for the legislation states that rent for a parking space is included in accommodation costs this does justifies no other outcome. This is not stated actually in the legislation itself. Moreover, the Federal Ministry of Finance circular on this topic does not alter the fact that the courts are not bound by administrative guidance. Leave to appeal was granted.

Documentary evidence of arrival for intra-Community deliveries – Using the EMCS procedure

Under the German VAT Implementing Ordinance, a business owner can provide documentary evidence of the arrival of intra-Community deliveries for the delivery of excise goods under suspension of payment of excise duties and when the IT procedure EMCS is used – this is a computerised movement and control system for excise goods – via an EMCS Report of Receipt that has been validated by the competent authority of the other Member State. The Federal Ministry of Finance, in its circular of 11.7.2023 (reference: III C 3 – S 7141/21/10002:001) gave its view on the mandatory fields in the EMCS Report of Receipt, in particular on the destination.

According to the circular, it is only mandatory to enter the destination in the case of deliveries to a tax warehouse, direct deliveries or deliveries to certified consignees. For all other deliveries the place of supply is not a mandatory field in the EMCS Report of Receipt. In these cases, validation will therefore also be given if no place of supply has been entered. The transport can only begin after the validation of the draft of the electronic Administrative Document (eAD) or the simplified electronic Administrative Document (SEAD).

Here, the Report of Receipt has to be created by the one who is entered as the consignee in the eAD or the SEAD. Following the receipt of the excise goods at a permissible destination the consignee will issue a Report of Receipt using officially prescribed sets of data.

Please note: The information in the Report of Receipt will be automatically checked by the EMCS application. Insofar as no errors occur, the Report of Receipt will then be automatically validated.

Non-sequential invoice numbers could justify estimates of additional income

If the place of residence and the place of work are far Invoice numbers generally have to be assigned sequentially. As the Federal Fiscal Court (Bundesfinanzhof, BFH) once again confirmed, in specific cases, numbering gaps could justify estimates of additional income by the local tax office.

In the case in question, a caretaker service was subjected to a tax audit that found non-sequential numbering of the outgoing invoices. Furthermore, a cash flow calculation that showed deficits and considerable unexplained deposits was examined and this prompted the tax auditors to make estimates of additional operating income, which were roughly in the amount of the annual deficits from the cash flow calculation. In his case before the tax court, the claimant arrived at a reduction of the estimates of additional income in terms of the amount, however, his claim was without merit and the estimate of additional income remained – and this has now been confirmed by the BFH in its decision of 31.5.2023 (case reference: 1X B 111/22).

The BFH ruling demonstrates that it is indeed only in individual cases that non-sequential invoice numbers can justify estimates of additional income, but not generally. However, the judges have still not given a clear answer to the question of whether or not gaps in the invoicing system alone would provide sufficient grounds for making estimates of additional income. In this as well as in another case there were, in addition, other defects in the accounting process.

Please note: It cannot be ruled out that even without such other circumstances an estimate would be right and proper if it seems that a complete record of the income cannot be ensured.

Five-year period and three properties limit – Criteria for commercial trading in property

When a property is purchased and sold shortly afterwards this could give rise to a taxable capital gain. If there are several properties then the local tax office could potentially assume that commercial trading in property has taken place. In this case trade tax would also have to be paid. Recently, the Münster tax court had to rule on whether or not commercial trading in property had taken place.

In its judgement of 26.4.2023 (case reference: 13 K 3367/20 G) the tax court ruled in the case of a claimant who was the legal successor to a GmbH [German limited liability company] and who, in 2013, had sold 13 properties via a notarial agreement. All the properties had been purchased in 2007. The five-year period between acquisition and sale had indeed been exceeded by a few months for all the properties. Nevertheless, the local tax office refused to grant the extended trade tax deduction that had been claimed. The business activities of the GmbH had gone beyond those of a pure asset management company and had therefore breached the threshold to commercial trading in property. The claimant explained that the sale of the properties had been due to the sudden death of the managing director of the GmbH. The proceeds from the sale of the properties had to be used to pay off loans.

The legal action was successful; the Münster tax court was of the opinion that the limits of the asset management business had not been exceeded. All of the 13 properties had been sold only after the end of the five-year period. Moreover, contrary to the view of the local tax office, there had been no special circumstances on the basis of which it would have been possible to assume that commercial trading in property had taken place despite the five-year period having been exceeded. Nor had the five-year period been just marginally exceeded.

The fact that a longer term had been agreed for the loans that were taken out was an argument against there having been an intention to sell the properties already at the time of their acquisition. Prepayment penalties therefore had had to be paid as a result of the earlier repayment of the loans.

Please note: In the opinion of the judges at the Münster tax court, on its own the high number of properties that were sold could not lead to the assumption that commercial trading in property had taken place. The circumstances also had to be taken into consideration. Here, the intention to sell only emerged after the unexpected death of a shareholding managing director. Furthermore, the extended trade tax deduction should thus likewise not be refused.

Social security – Important thresholds 2024

All data in EUR and monthly, except where otherwise specified.

Type of Contribution	Old Federal States	New Federal States
Income threshold for compulsory insurance in the statutory health insurance scheme		
A) General. annual*	69,300.00	69,300.00
B) For those with private health insurance on 31.12.2002 due to breaching the 2002 threshold **	62,100.00	62,100.00
Contribution assessment ceiling (Beitragsbemessungsgrenze)		
Statutory Pension Insurance and Unemployment Insurance monthly	7,550.00	7,450.00
annual	90,600.00	89,400.00
Health Insurance and Long-term care Insurance monthly	5,175.00	5,175.00
annual	62,100.00	62,100.00
Contribution Rates		
Statutory Pension Insurance (of which employer and employee pay ½ each)	18.6%	18.6%
Unemployment Insurance (of which employer and employee pay ½ each)	2.6%	2.6%
Health Insurance + supplementary contribution set by individual health insurers (of which employer and employee pay ½ each)	14.6%	14.6%
Average supplementary contribution	1.7%	1.7%
Long-term Care Insurance (of which employer and employee pay ½ each)***	3.40%	3.40%
for childless employees on reaching the age of 23	4.00%	4.00%
for childless employees prior to reaching the age of 23	3.40%	3.40%
employees with min. 1 child	3.40%	3.40%
employees with 2 children below the age of 25	3.15%	3.15%
employees with 3 children below the age of 25	2.90%	2.90%
employees with 4 children below the age of 25	2.65%	2.65%
employees with 5 and more children below the age of 25	2.40%	2.40%
Max. employer-paid subsidy voluntary statutory health insurance	377.78 + ½ of individual supplementary contribution	
Max. employer-paid subsidy for private health insurance****	421.76	421.76
Max. employer-paid subsidy long-term care insurance (apart from Saxony)	87.98	87.98
long-term care insurance (only Saxony)		62.10
Reference values for statutory pension insurance/ unemployment insurance (monthly)	3,535.00	3,465.00

Mini Jobs

Type of Contribution	Amount
Contributions for low-wage employees (mini jobs) Employer's flat-rate contribution	
Health insurance Statutory pension insurance Flat-rate tax (including church tax and the solidarity surcharge)	13% 15% 2%
Remuneration threshold for marginal jobs (Mini Jobs)	538.00
Minimum basis for assessment of statutory pension insurance for marginal employees	175.00
Minimum contribution/month (175 € x 18.6 %)	32.55
Sliding scale (1.10.2022 - 31.12.2022) Sliding scale (from 1.1.2023) Sliding scale (from 1.1.2024)	520.01 bis 1,600.00 520.01 bis 2,000.00 538.01 bis 2,000.00
Low earners threshold for trainees (social security contributions are borne by employers alone)	325.00
Maximum contribution for direct insurance schemes annually 8 % of the tax-exempt contribution assessment ceiling for pension insurance thereof max. exempt from social security charge	7,248.00 3,624.00
Minimum payment amount for the obligation to make contributions for pension benefits in health insurance and long-term care insurance schemes	176.75
Allocation to statutory insolvency insurance	0.06%
Allocation to social security contributions for artists	5.0%

Reference values for benefits in kind 2024

Meal allowance in EUR

Employees and adult family members

	Breakfast	Lunch	Dinner	Meals overall
monthly	65.00	124.00	124.00	313.00
daily	2.17	4.13	4.13	10.43

Accommodation allowance in EUR

monthly	278.00
per calendar day	9.27

* Section 6(6) of Volume V of the German Social Security Code
** Section 6(7) of Volume V of the German Social Security Code
*** In Saxony the contribution costs are borne differently: employer 1.20%
**** the average supplementary contribution of 1.7 % is included in this contribution

AND FINALLY...

“Sometimes a taxpayer’s imagination is greater than the government’s ability to regulate.“

Wolfgang Schäuble (18.9.1942 – 26.12.2023) was a Member of the German Bundestag [lower house of German parliament] continuously from 1972 up to his death in 2023 and, thus, the longest-serving member in the history of national German parliaments. From 1984 to 1989 he was Federal Minister for Special Affairs and Head of the Office of the German Chancellery, from 1989 to 1991 Federal Minister of the Interior, from 1991 to 2000 chairman of the CDU/CSU parliamentary group in the German Bundestag and from 1988 to 2000 also the CDU party leader. In 2005 he became Minister of the Interior, once again, and Finance Minister from 2009 to 2017. In 1990, Schäuble had a prominent role in the negotiation of the Unification Treaty.

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