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Issue 3, 2019
3 June

Tax & Legal News

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Official Pronouncements

R&D Subsidy Bill

The government draft bill, published on 22 May 2019, provides for the introduction of a subsidy for research and development (R&D). The subsidy – up to a maximum amount of €500,000 – should be available to all taxpaying businesses regardless size, profitability or purpose. The aim is to make Germany more attractive for investment generally and in particular for start-ups. The promotion of small and medium-sized enterprises is a particular focus but the desire remains to promote larger enterprises also. The planned law is to be re-evaluated five years after its entry into force to examine whether its aims, in particular its contribution to the promotion of Germany as a centre of innovation, are met.

The new regulations are intended to promote R&D, specifically the categories of basic research, applied research and experimental development as defined by the legislation. The allowance is calculated on the basis of staff costs. The proposed regulations should be introduced in an independent statute ancillary to the Income Tax and Corporation Tax Acts, and will be referred to as the R&D Subsidy Act.

Overview of the main provisions of the cabinet draft

Eligible persons

Both unlimited and limited taxpayers within the meaning of the Income Tax Act and the Corporation Tax Act are eligible for relief. Only persons with business assets or with income from a trade or profession. Where the business is in the form of a partnership, the partnership itself will be the eligible person. As this is a tax incentive, exempt companies will not fall within the scope of this Act. Eligibility does not depend on the size of the enterprise or the nature of the activity carried out.

Eligible projects

Eligible R&D projects are specifically defined. The subsidy will only be available to R&D activities, which fall entirely within at least one of the categories of: basic research, applied research and experimental development. Cooperation between researching companies or with other institutions for the dissemination of research and knowledge, such as universities, etc., will also be supported.

Basis of assessment

The basis of assessment is limited to a maximum of EUR 2 000 000 per beneficiary per financial year. If the sum of the eligible costs is less than EUR 2 000 000, the lower amount will be the basis of assessment. For cooperation projects, each of the cooperation partners can apply in principle the EUR 2,000,000 assessment base for itself, provided that the cooperation partners are not affiliated companies. According to the present government draft, salaries/wages subject to salary withholding tax will form the basis of the calculation increased by a factor of 1.2. In addition to the salaries of employees working upon applicable R&D activities, the assessment basis will also include the personal contribution of individual entrepreneurs (at flat-rate hourly rate of € 30) with a maximum of 40 working hours per week. Furthermore the activities of partners in a partnership (hourly rate according to agreed remuneration but limited to € 30 per hour and a maximum of 40 working hours per week). Salaries paid by third parties are not eligible expenditure. Affiliated companies can only make use of the tax base once in total (group view).

Amount of subsidy

The proposed research subsidy is set at 25% of the assessment basis. The maximum research subsidy per financial year for all R&D projects is thus € 500,000. In the case of associated enterprises, the subsidy will be calculated after deduction of the assessment bases already applied to calculate the bases of the other associated enterprises. If the maximum permissible assessment basis for affiliated companies has already been exhausted, the tax base for the beneficiary is reduced to zero.

Application for subsidy

The research subsidy will be granted upon application. The application should be submitted to the local tax office of the claimant. In the case of partnerships, the application should be submitted to the tax office responsible for the uniform and separate determination. The application may be submitted immediately after the end of the financial year in which the eligible costs were incurred.

In order to obtain the subsidy, a certificate of eligibility will have to be filed on a standard prescribed form. The decision on eligibility will be carried out by a body selected by the Ministry of Education and Research.

Interaction with other subsidies

The research subsidy may generally be granted in addition to other project funding (accumulation). However, eligible expenditure under the future R&D Subsidy Act may not be included in the assessment basis for other grants (no double funding of the same expenditure).

Determination of subsidy

The subsidy will be determined in a separate R&D subsidy assessment after the end of the financial year and paid out within one month of the notification of the decision.

Tax treatment of subsidy

The subsidy will not constitute taxable income. The expenditure, which serves as the basis of assessment for the calculation of the subsidy, remains deductible. The subsidy will also not be included in the calculation of the progressive income tax rate.

Reclamation of subsidy

A research subsidy paid incorrectly may be reclaimed by revoking or amending the R&D subsidy assessment. In such cases, the claim for repayment will bear interest at 0.5 percent for each full month.

Period of application and entry into force

The Act will come into force after its publication in the Federal Law Gazette. The subsidy will only be available for eligible R&D projects starting after the Act has come into force. Furthermore, only expenditure incurred after 31 December 2019 i.e. salaries received by employees/individual entrepreneurs/partners working on eligible projects after 31 December 2019. If the Act only enters into force after 31 December 2019, expenditure will be eligible only from the date of entry into force of the Act.

Source:
Government Draft Research & Development Subsidy Bill, published 22 May 2019

Draft Finance Bill 2019: Bill for the Further Tax Stimulation of Electric Mobility and on the Amendment of Further Tax Regulations

On 8 May 2019, the Federal Ministry of Finance published a draft bill for the proposed legislation on the further tax stimulation of electro-mobility and changes to other tax regulations. The proposed Act on the Further Tax Stimulation of Electric Mobility and on the Amendment of Further Tax Regulations provides for measures for to give tax incentives to environmentally friendly mobility, as well as providing amendments to various areas of tax legislation requiring technical adjustments. The draft also looks to introduce legislation to combat tax-structuring schemes and secure tax revenue. Furthermore, the draft bill integrates makes necessary alignments to EU law and case law of the European Court of Justice (ECJ). The draft bill also contains the expected regulations to limit of the avoidance of real estate transfer tax through so-called share deals.

In the following, you will find a first short overview of the main points:

Tax incentives for environmentally friendly mobility

- Special depreciation for all-electric delivery vehicles,
- New flat-rate taxation without a reduction of the commuter lump-sum allowance, especially for job tickets,
- 50% reduction of the tax base for the private use of electric or externally rechargeable hybrid electric company cars: period of relief extended
- Tax exemption on benefits arising from the electric charging of an electric vehicle or hybrid at the premises of the employer or associated company: period of relief extended.

Combating tax structuring and securing tax revenues

- Scope of liability of controlled companies in multilevel tax groups (Organschaft) extended,

- Modernisation of the withholding tax regulations, including applicability to interest on receivables acquired via an internet service platform (defined as a web-based medium, which arranges the buying and selling of shares and other financial instruments, or which acts as a broker between borrowers and lenders),
- Tightening of rules on share deals in respect of transfers of real estate.

Amendments following Supreme Tax Court rulings

- Rules regulating the regional jurisdiction of the tax authorities,
- Losses should not impact the assumption of a deemed trade,
- New regulations in respect of debt defaults arising in connection with capital investments.

Adaptations following EU law and ECJ case law

- Amendment of Trade Tax Act with the creation of a level playing field between participations in domestic entities and those in foreign entities vis-à-vis the regulations permitting the deduction of profits arising from such participations,
- Quick VAT Fixes vis-à-vis direct deliveries to consignment warehouses, chain transactions and intra-Community deliveries,
- Changes to regulations on the tour operators VAT margin scheme,
- VAT exemption on services provided by independent associations to their members.

Other

- Extension of the reduced VAT rate to e-books.

Source:
Draft bill published by the Ministry of Finance on 8 May 2019

Finance Bill 2019: proposed changes to the real estate transfer tax regulations in the case of so-called shares deals

Following the discussions of the Conference of Finance Ministers of the Federal States, the government has included in the Finance Bill 2019 amended regulations in respect of so-called "share deals" in real estate transactions. Aim of the proposed rules is a tightening of the financial framework around the indirect "transfers" of real estate held through companies and other associations of persons. The draft bill includes the following amendments:

- Introduction of a provision according to which a transfer of property will be deemed to occur where the shareholder composition of a real-estate holding corporation changes directly or indirectly in a 10-year period in such a way that at least 90% of the shares are transferred to new shareholders.
- Lowering of the investment threshold from 95% to 90%, above which a transfer of real estate will be deemed to occur where there is a change in partner interests in a partnership or where a so-called consolidation of holdings occurs.
- Extension of the holding period from 5 to 10 years during which changes of the interests in a partnership are deemed to be a transfer of real estate.
- Extension of the holding period from 5 to 10 years for transfers of real estate, which are made between different types of joint owners or from joint ownership to sole ownership, or where fixed parcels of real property are allocated between joint owners.
- Introduction of a new chargeable event. This applies to certain types of consolidations of holdings, which do not constitute a chargeable change of a partnership interest, as they do not exceed the 95% threshold. The new provision imposes a pre-transfer holding period of 15 years in these circumstances.
- Application of a substitute basis of assessment under the Valuation Act in certain circumstances, where the real estate is sold for an undervalue.

The proposed provisions to lower the participation limits and extend the holding periods should apply, in principle, to transfers occurring after the 31 December 2019. However, the proposal also includes rules for staggered implementation which are aimed at reducing hardship or unfairness and which should protect the principle of legitimate expectation.

Source:
Draft bill published by the Ministry of Finance on 8 May 2019

Tax Court Cases

Supreme Tax Court changes its case law regarding the blocking effect of Art. 9 (1) of the OECD Model Tax Convention

According to the Supreme Tax Court in its ruling of 27 February 2019, published on 15 May 2019, and contrary to its previous case law, Article 9 (1) of the OECD Model Tax Convention, does not prohibit an income adjustment under domestic transfer pricing rules, where the write-off of an unsecured group loan is not recognised as a deduction from taxable profits.

In the case, which concerns the year 2005, a German GmbH operated an unsecured clearing account for a Belgian subsidiary. After the Belgian subsidiary had run into financial difficulties, the GmbH waived its claims arising from the clearing account and wrote off the receivable. However, the tax office neutralised this reduction in profits according to the transfer pricing rules. The tax court, following the previous case law of the Supreme Tax Court, saw the matter differently and upheld the GmbH's appeal.

Previously, the Supreme Tax Court had assumed that, in situations involving a double taxation agreement, Art. 9 (1) of the OECD Model Tax Convention specifically only applied to the correction of prices, so that an income adjustment neutralising a profit-reducing write off of a loan claim or a partial write-down was prohibited (this was referred to as the "blocking effect").

The Supreme Tax Court now views the matter differently and thus set aside the judgment of the tax court. The Court did admit that it would no longer be possible for the tax court to determine whether the loan in question really could be recognised for tax purposes or whether it should be considered as a capital injection into the Belgian subsidiary (i.e. as equity). However, this was not important in the circumstances of the case, as the write off by the German GmbH had to be corrected in any event in accordance with transfer pricing rules. The lack of collateral constituted per se a (loan) condition, which would not be usual between independent third parties. A restriction to price adjustments alone cannot be inferred either from the wording or from the meaning and purpose of Article 9(1) of the OECD Model Tax Convention. Furthermore, EU law did not impede a correction of the income.

The decision has a significant impact on the financing of foreign subsidiaries by domestic shareholders. In a number of other cases, the Supreme Tax Court will shortly be giving concrete form to its new principles.

Source:
Decision of the Supreme Tax Court of 27 February 2019 (I R 73/16), published on 15 May 2019

From Europe

VAT refund: One-month period for submission of additional information not a deadline

In a French case the ECJ held that failure by a taxable person to provide additional information on the VAT refund application and to answer further questions within the one-month period provided for under Council Directive 2008/9 does not automatically lead to the forfeiture of his entitlement to a VAT refund.

Sea Chefs Cruise Services GmbH applied to the French tax authorities for a refund of input VAT, which the latter refused because the taxpayer had failed to respond within the one-month time limit as provided in Article 20(2) of Council Directive 2008/9 of 12 February 2008. Article 20(2) of Council Directive 2008/9 of 12 February 2008 sets out the conditions under which a taxable person established in one Member State can obtain a VAT refund in another Member State.

The ECJ pointed out that the claim for a VAT refund, mirroring the right to deduct input tax, is a fundamental right of the common system of value added tax; it reflects the principle of neutrality as a key point underlying the whole EU VAT system and thus cannot generally be restricted.

The period of one month as provided for in Article 20(2) of Directive 2008/9/EC for the submission of information is not a filing deadline, and failure to comply with that period does not therefore mean that the claim to a refund is no longer valid. According to Art. 20(2) "the Member State of refund shall be provided with the information requested under paragraph 1 within one month of the date on which the request reaches the person to whom it is addressed". The ECJ concludes that the absence of the words 'at the latest/no later than' (in contrast to Article 15(1), which states that the refund application shall be submitted "not later than" 30 September) is a clear indication that the EU legislature did not wish to fix a time limit here.

In the opinion of the Court a deadline would also lead to practical problems if, say, the additional information is requested from third parties or by the authorities of the Member State in which the taxable person is established. This may make it impossible for the taxpayer to meet the deadline; he could lose the right through no fault of his own, as he has no chance to influence the course of events.

Source

The ECJ case reference is C-133/18 Sea Chefs Cruise Services judgment of May 2, 2019.

News in brief	
German Finance Minister talks "minimum taxation"	According to various statements of the German Finance Minister Olaf Scholz on 22 May 2019, a system of international minimum taxation will be discussed at the forthcoming G20 (June 2019) and G7 (August 2019) meetings. The aim is to agree such a system (within the terms of the Global Anti-Base Erosion "GloBE" agenda and given the name "BEPS 2.0") with the other 128 states of the OECD in the Summer of 2020 https://blogs.pwc.de/german-tax-and-legal-news/2019/05/24/german-finance-minister-talks-minimum-taxation/
State of Lower Saxony Tax Authorities issue directive announcing deviation from the rule of discounting certain liabilities during low-/negative- interest phases for banks	According to Section 6(1) no. 3 Income Tax Act, non-interest-bearing liabilities with terms of at least 12 months, which do not constitute a deposit or advance payment, are to be discounted, i.e. a fictitious interest component (interest rate 5.5%) is initially deducted from profits and added back to profits in subsequent years as notional interest over the term of the loan.

	The directive states that, for certain liabilities of banks, no discounting within the meaning of Section 6(1) no. 3 Income Tax Act should occur. https://blogs.pwc.de/german-tax-and-legal-news/2019/05/24/state-of-lower-saxony-tax-authorities-issue-directive-announcing-deviation-from-the-rule-of-discounting-certain-liabilities-during-low-negative-interest-phases-for-banks/
Ministry of Finance release new form for reporting foreign relationships	The Ministry of Finance has published a new form for reporting foreign relationships according to Section 138 (2) of the General Tax Code (GTC). The new form replaces the form originally included in the Ministry of Finance's guidelines on the application of Section 138 (2) and Section 138b of the GTC dated 5 February 2018 https://blogs.pwc.de/german-tax-and-legal-news/2019/05/23/ministry-of-finance-release-new-form-for-reporting-foreign-relationships/
Tax exemption on gains from share disposals available to financial undertakings resident in third countries	Gains realised by financial undertakings resident in third countries on the disposal of shares are fully exempt from corporation tax. In these proceedings, the Hessian Tax Court considered whether the exclusion from the benefit of the participation exemption under Section 8b (7) of the Corporation Tax Act also applied to credit institutions and financial services institutions not resident in the EU/EEA. https://blogs.pwc.de/german-tax-and-legal-news/2019/05/17/tax-exemption-on-gains-from-share-disposals-available-to-financial-undertakings-resident-in-third-countries/
Sky subscription for German football league games may constitute income-generating costs	The Supreme Tax Court has ruled the expenses of a football trainer for a Sky subscription to German football league ("Bundes League") games may be treated as tax-deductible expenses from self-employed income. The appellant was a full-time trainer of goalkeepers working in licensed football. https://blogs.pwc.de/german-tax-and-legal-news/2019/05/08/sky-subscription-for-german-football-league-games-may-constitute-income-generating-costs/
Written warnings in respect of breach of copyright are subject to VAT	The Supreme Tax Court has ruled that written warnings issued by a copyright holder in order to enforce his copyright following a breach are subject to VAT. The consideration for the written warning (deemed a service) was the payment from the person charged with breaching the copyright. https://blogs.pwc.de/german-tax-and-legal-news/2019/05/08/written-warnings-in-respect-of-breach-of-copyright-are-subject-to-vat/
Refinancing by leasing companies: treatment of notional interest portion of leasing instalments	According to a decision of the Supreme Tax Court, the leasing instalments paid in cases of refinancing by a leasing company were also to be included in the calculation of the trade tax base. The bank privilege in the Trade Tax Implementation Ordinance did not apply to the notional interest portion of the leasing instalment. https://blogs.pwc.de/german-tax-and-legal-news/2019/05/03/refinancing-by-leasing-companies-treatment-of-notional-interest-portion-of-leasing-instalments/
Final confirmation – Online advertising not subject to withholding tax	The Federal Ministry of Finance has officially clarified in a circular published in April that fees or remunerations paid for the placement of online advertising are not subject to German withholding tax under Section 50a paragraph 1 No. 3 Income Tax Act. https://blogs.pwc.de/german-tax-and-legal-news/2019/04/11/no-withholding-tax-on-fees-for-online-advertising/

If you would like to follow the latest news on German tax as it breaks, please visit our Tax & Legal News site at https://blogs.pwc.de/german-tax-and-legal-news/

From PwC

Guide to Doing Business and Investing in Germany

The 2018 edition of our popular Guide to Doing Business and Investing in Germany is freely available to those interested. It can be downloaded from https://www.pwc.de/de/internationale-maerkte/doing-business-in-germany-guide-2018.pdf

Do you have any questions?

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