By PwC Deutschland | 05. Juni 2024

Update: Federal Ministry of Finance publishes draft bill for the Finance Act 2024

On 17 May 2024, the Federal Ministry of Finance (MoF) sent a draft bill for the Finance Act 2024 (FA 2024) to the professional associations for comments by 24 May 2024. The draft has now also been published on the MoF website. The law is intended to implement changes to various areas of German tax law which need adjustment. The focus is on adjustments required by EU law and case law of the European Court of Justice (ECJ), the German Federal Constitutional Court, and the German Supreme Tax Court. Furthermore, follow-up amendments to previous legislative changes will be made. This blog summarises the key content. - Meanwhile the Federal Cabinet has approved the draft bill (see Update further below at the end of this post).

Content

Changes to the Income Tax Act

Income tax exemption for income and power extraction from photovoltaic systems (Section 3 No. 72 Sentence 1 Draft Income Tax Act “ITA-D”; Section 52 (4) ITA-D)

The conditions previously contained in Section 3 No. 72 Sentence 1 Letters a and b ITA for the application of the income tax exemption introduced with the Finance Act 2022 for income and power extraction in connection with the operation of photovoltaic systems installed on, against or inside buildings are to be combined into a single condition. By abandoning the distinction between single-family homes and other buildings, the exemption will apply to photovoltaic systems that are acquired after 31 December 2024, where the installed gross output according to the market master data register is up to 30 kW (peak) per residential or commercial unit (previously 15 kW) The total amount, however, still remains maximum of 100 kW (peak) per taxable person or partner. According to the explanatory memorandum to the draft bill, the new version is also intended to clarify that the maximum values have the effect of an exempt threshold and not a tax-exempt amount.

Tax exemption of recapitalisation income in cases of residual debt discharge (Section 3a (4) Sentence 1 and (5) Sentence 2 ITA-D)

According to the explanatory memorandum, the inclusion of a reference to Section 3a (5) ITA in Section 3a (4) Sentence 1 ITA is intended to clarify that even in cases of residual debt discharges, the amount of the recapitalisation income and the amounts reducing such recapitalisation income under Section 3a (3) Sentence 2 nos. 1 to 6 and 13 ITA are to be separately determined. According to the newly drafted Section 3a (5) Sentence 2 ITA-D, even in cases of a residual debt discharge, tax options to reduce profits must be exercised in accordance with Section 3a (1) Sentence 2 ITA and, in cases of joint taxation, the current income and loss carry forwards of the other spouse must be included when reducing the amounts in accordance with Section 3a (3) ITA.

Creation of balancing items in accordance with Section 4g ITA in cases of reorganisation (Section 4g (1) Sentence 4 ITA-D; Section 52 (8a) ITA-D)

According to the newly drafted Section 4g (1) Sentence 4 ITA-D, effective for all open cases the regulations on the creation and reversal of balancing items in accordance with Section 4g ITA will also apply to reorganisation cases in which there is a realisation of hidden reserves following a restriction or exclusion of Germany's right to taxation.

Book value transfer of assets between partnerships with identical partners (Section 6 (5) Sentence 3 No. 4 ITA-D; Section 52 (12) ITA-D)

The introduction of a new No. 4 in Section 6 (5) Sentence 3 ITA is intended to respond to the case law of the Federal Constitutional Court (2 BvL 8/13 of 28 November 2023), according to which gratuitous transfers

of assets between the jointly-held assets (“Gesamthandsvermögen) of different partnerships with identical partners must be possible at book value. The new regulation should apply to all open cases in accordance with the requirements of the Federal Constitutional Court. In order to apply the new book value rule to cases where the assets were transferred before the publication of the court decision on 12 January 2024, the acquiring partners will be able to amend their Section 180 (1 Sentence 1 No. 2 Letter (a) GTC tax assessments through a corresponding application under Section 174 (4) GTC; Section 176 (1) Sentence 1 No. 1 GTC should not preclude this. At the joint request of the partners at the time of the transfer - for reasons of protection of legitimate expectations for transfers before 12 January 2024 - Section 6 (5) Sentence 3 No. 4 ITA for transfers before 12 January 2024 will not be applied (Section 52 (12) ITA-D).

Extension of the scope of application of the tax realisation rule in Section 17 (6) ITA (Section 17 (6) nos. 1 and 2 ITA-D)

As part of the new version of Section 27 (3) Reorganisation Tax Act (“RTA”) provided for in the present bill, the previous special regulations for old shares received in a contribution transaction (continued application of Section 21 RTA in the version of the Tax Reduction Act of 23 October 2000) are to be abolished with effect from the 2025 assessment period. As a result, the scope of application of the tax realisation regulation in Section 17 (6) ITA is to be revised and extended accordingly. In future, irrespective of the time of the contribution, the scope of application of Section 17 (6) ITA will also apply to all shareholdings of less than 1% which are created in the course of a (tax-privileged) contribution in kind or a (tax-privileged) exchange of shares.

Group clause for the deferred taxation of non-cash benefits from participations in an employer’s business (Section 19a (1) Sentence 3 ITA-D)

The scope of application of the tax concession for income from employment in relation to participations in an employer’s business (Section 19a ITA) is to be extended retroactively to 1 January 2024 by introducing a group clause modelled on Section 3 No. 39 Sentence 3 ITA.

In future, employers will also be able to give their employees shares in other companies that belong to the same group within the meaning of Section 18 Stock Corporation Act (parent, sister and subsidiary companies) on a preferential basis within the scope of Section 19a ITA. However, the share in a group company will only be tax-privileged to the extent that (i) the thresholds of Section 19a (3) ITA are not exceeded with reference to the total of all group companies and (ii) no company within the group was established more than 20 years previously. The regulation was already provided for in the so-called Future Financing Act but was not implemented. Rather the necessity of such a group clause was promised in a protocol declaration.

Flat-rate wage tax for mobility benefits (Section 40 (2) Sentence 1 No. 8 and Sentence 4 ITA-D)

Section 40 (2) Sentence 1 No. 8 ITA-D will provide the option to levy wage tax at a flat rate of 25% on benefits granted – on top of wages already owed - in the form of a non-cash benefit or allowance from a so-called mobility budget .

However, the flat-rate tax option is to be limited to a maximum amount of EUR 2,400 per calendar year. Within the meaning of the section, a mobility budget refers to an offer made available to employees for the use of mobility services outside of work regardless of the form of transport (but excluding, however, aircraft, private motor vehicles and motor vehicles permanently provided to employees, including company vehicles within the meaning of Section 6 (1) No. 4 Sentence 2 ITA). A flat-rate payment of income tax in connection with the mobility budget is not permitted where a flat-rate tax payment has been made under Section 40 (2) Sentence 1 No. 2 ITA for journeys between home and first place of work. According to Section 40 (2) Sentence 4 ITA-D, the employer's expenses (including VAT) for the mobility budget made available to employees should be used as the basis of assessment.

Taxation of remuneration granted before termination of the employment relationship for periods of irrevocable/revocable leaves of absence (Section 49 (1) No. 4 Letter f ITA-D; Section 50d (15) ITA-D)

According to Section 49 (1) No. 4 Letter (a) ITA, income from employment is subject to limited tax liability if it is either exercised or utilised in German (or has been exercised/utilised in Germany). Section 49 (1) No. 4 Letter f ITA-D now states that remuneration granted for periods of leave of absence from work in connection with the termination of the employment relationship (gardening leave) will also be subject to limited tax liability where the employment activities would have been performed in Germany but for the leave of absence. This interpretation is supported by treaty law via Section 50d (15) ITA-D, Sentence 1 reflects the new Letter f. According to Sentence 2, the latter provision should not apply if a Double Tax Agreement contains a provision which explicitly deviates from the constellation regulated in Sentence 1. According to Section 50d (15) Sentence 3 ITA-D, Section 50d (9) Sentence 1 No. 1 ITA and ordinances pursuant to Section 2 (2) Sentence 1 GTC remain unaffected.

Amendments to the interpretation of states' fund clauses in DTAs (Section 50d (7) ITA-D; Section 50 (2 Sentence 2 No. 4 Letter e ITA-D)

Section 50d (7) ITA regulates the application of treaty law allocation rules vis-à-vis public services. On the one hand, the new provision is intended to follow the case law of the Supreme Tax Court (I R 42/16 of 28 March 2018), according to which Section 50d (7) ITA also applies to employment income which is only paid indirectly out of a domestic fund of a public law legal entity.

On the other hand, in future the standard will apply not only to persons with limited tax liability, but also to persons with unlimited tax liability. Furthermore in response to the case law of the Supreme Tax Court (I R 17/18 of 8 September 2021), the requirement that the financing must come entirely or essentially from public funds is to be removed. Finally, the new Section 50d (7) Sentence 2 ITA states that foreign taxes can be credited in Germany. The credit is granted for taxpayers with limited tax liability via Section 50 (2) Sentence 2 No. 4 Letter e ITA-D, which opens up the possibility of applying for an assessment, within the framework of which the set-off can then take place.

Amendments to the Corporation Tax Act

Application of the attribution rule in Section 8b (4) Sentence 3 Corporation Tax Act (“CTA”)to genuine repurchase agreements (Section 8b (4) Sentence 3 Draft Corporation Tax Act (“CTA-D”); Section 34 (5 Sentence 4 CTA-D)

If a corporation transfers shares to another entity and the other entity is obliged to return these shares or similar interests, the shares are to be attributed to the transferring corporation for the purpose of determining whether the Section 8b (4) Sentence 1 CTA participation threshold has been met. With effect for all open cases, and via the amendment of Section 8b (4) Sentence 3 CTA, clarification will be given that the attribution rule aimed at the prevention of abuse shall also apply to genuine repurchase agreements within the meaning of Section 340b (2) HGB.

Cancellation of the initial determination of the balance of the tax contribution account in reorganisation cases (Section 27 (2) Sentence 3 CTA-D):

According to Section 27 (2) Sentence 3 CTA, when a corporation becomes an unlimited taxpayer, the balance of the tax contribution account existing at the time the tax liability first arises must be separately determined; the balance thus determined balance must then be recognised as the balance of the tax contribution account at the end of the previous financial year. According to the draft bill, reorganisation cases (Section 29 CTA), during the course of which the acquiring corporation is newly created, will be excluded from the scope of the provision. An (initial) determination of the tax contribution account would not be made in these cases and the transferring tax contribution account balance would be treated as a current addition in the first financial year, so that utilisation in the first financial year of the acquiring corporation newly created by the reorganisation would not yet be available for set off in accordance with Section 27(1) Sentence 3 CTA.

Indirect Tax Groups (“Organschaft”): effects on the tax contribution account (Section 27 (6) Sentence 3 CTA-D; Section 34 (9a) CTA-D) of surplus and reduced profit transfers arising during the term of the Organschaft:

In cases of the indirect Organschaft, and following the tax authorities’ stated view, the legal consequences following on from surplus and reduced profit transfers, i.e. the contribution or the return of contributions, arising during the term of the Organschaft, should now apply to all levels of the participation chain. While this view vis-à-vis the effects of the surplus/reduced profit transfers on investment book values already has a legal basis in Section 14 (4) Sentence 4 CTA (as amended by the Finance Act 2022), no such amendment was made with regard to the effects on the tax contribution account. This loophole is now to be closed by Section 27 (6) Sentence 3 CTA, according to which - for the indirect Organschaft- surplus and reduced profit transfers occurring during the term of the Organschaft will have a corresponding effect on the tax contribution account of the intermediary company(ies), i.e. they will reduce or increase their tax contribution accounts (with priority over other payments). If the controlling company has both a direct and indirect interest in the controlled company, according to the explanatory memorandum to the bill, the effects at the level of the intermediary company should only arise if the indirect participation is necessary to achieve the necessary financial integration. The new regulation is to be applied retroactively for all surplus and reduced

profit transfers made after 31 December 2021.

Elimination of the declaration obligation pursuant to Section 29 (6) CTA for cross-border reorganisations at the level of the foreign corporation (Section 29 (6) Sentence 2 CTA-D):

In the case of cross-border reorganisations where previously no tax contribution account had to be determined for the transferring corporation or association of persons, Section 29 (6) Sentence 2 CTA provided that the provisions in Section 27 (8) CTA on the return of capital contributions were to be applied accordingly. In future, a determination of the contributions not made to the nominal capital of the transferring corporation or association of persons at the time of the transfer of assets will no longer be required at the time of the transfer of assets. Instead, the determination of the addition to the tax contribution account is now to become part of the declaration of the tax contribution account for the domestic acquiring corporation (determination of the addition via a corresponding application of the general provisions of Section 27 (1) to (5), Section 29 (1) RTA) and must (always) be taken into account as a current addition to the balance of the tax contribution account.

Federal Constitutional Court on equity reclassification at the time of the system change from the imputation method to the half-income or partial income method (Section 36 CTA-D)

In three rulings in 2022, the Federal Constitutional Court criticised individual steps in the reclassification of equity, which was necessary at the time of the system change from the imputation method to the half-income or partial income method, as incompatible with the German Constitution. In all three rulings, the legislator was requested to retroactively eliminate the identified constitutional violations by 31 December 2023. The Federal Constitutional Court expressly left the specific form of the new statutory regulation open. In the current draft of the FA 2024 changes to individual reclassification steps in Section 36 CTA are being made belatedly.

Section 36 **(4)** CTA in conjunction with Section 34 (11) CTA is now to be amended to the effect that remaining negative partial amounts from the EK 01 to EK 03 baskets will not be set off against the partial amounts in baskets EK 30, EK 40 or EK 45 to the extent that the company has a positive balance of EK 04. Where the balance of EK 04 is negative, the new regulation will therefore have no effect. The amendment relates to the Federal Constitutional Court decision (2 BvR 1424/15), in which the incompatibility of Section 36 (4) CTA (in the version of Section 34 (13f) CTA in the version of the FA 2010) was found to be incompatible with the German Constitution insofar as the provision led to a loss of corporation tax reduction potential because partial amounts of the so-called EK 04 were not included with the set off of the unencumbered partial amounts.

In addition, a comparable restriction on the set off of negative balances of the encumbered partial amounts against each other in the amount of a remaining positive EK 04 balance in Section 36 (6) in conjunction with Section 34 (11) CTA is planned. However, due to the different starting points of paragraph 4 and paragraph 6, this comparable regulatory technique raises further questions.

In the Federal Constitutional Court decision 2 BvL 29/14, the incompatibility of Section 36 (6a) CTA (in the

version of Section 34 (13f) CTA in the version of the FA 2010) with the German Constitution insofar as the provision led to a loss of corporation tax reduction potential at the time of the system change, without this being fully compensated for by the simultaneous reduction in the potential to increase corporation tax. The draft of the FA 2024 provides that Section 36 (6a) CTA, which provided for the reclassification of positive EK 45 into EK 02 and EK40 will be repealed.

>The new provisions of Section 36 (4) and (6) CTA and the repeal of Section 36 (6a) CTA are to be applied to all open cases.

In a further decision, 2 BvR 988/16, the Federal Constitutional Court ruled that the subsequent charge on the EK 02 basket under Section 38 (5) and (6) CTA (in the version of the FA 2008) irrespective of the payment of a distribution in conjunction with the exception rule of Section 34 (16) Sentence 1 CTA (in the version of the FA 2008) - according to which certain housing companies and tax-exempt corporations could continue to apply the current law (distribution-dependent subsequent charge) instead of the procedure of a corporation tax increase independent of distributions paid - is incompatible with the Constitution. To this end, the draft bill provides for the personal scope of application of the exemption rule in the current Section 34 (14) CTA to be extended so that the conditions only applying to certain companies are removed so that all companies can apply the distribution-dependent additional charge. According to the explanatory memorandum to the bill, applicants, who fall within the scope of the regulation following the amendment, which are to be reimbursed any additional charges to corporation tax actually paid. According to Section 38 (8) and (6) Sentence 8 CTA, the claim does not bear interest. However, Section 34 (14) Sentence 1 CTA only extends the personal scope of application, meaning that the intended extension only covers those taxpayers who submitted an application before the original deadline of 30 September 2008 or, if applicable, filed an appeal against a rejection of the application or took legal action.

Changes to the Trade Tax Act

In the area of trade tax, the present draft bill provides in particular for a revision of the regulations on the trade tax liability of passive permanent establishment income. According to Section 7 Sentence 8 drafts Trade Tax Act (“TTA-D”), which is to replace the previous Sentences 8 and 9,income that is generated in the foreign permanent establishment of an unlimited taxpayer within the meaning of Section 20 (2) Sentence 1 Foreign Taxes Act (“FTA”) and would be taxable under Sections 7 to 13 FTA if this permanent establishment were a foreign company within the meaning of those provisions, is to be deemed to have been generated in a domestic permanent establishment.

According to the explanatory memorandum, the amendment is intended to clarify that Sentence 8 also covers cases in which Germany has a right of taxation under the DTAs. Pursuant to Section 36 (3) Sentence 4 TTA-D, the new regulation should also apply to tax periods before 2024.

Changes to the Reorganisation Tax Act

Submission of the closing tax balance sheet for reorganisations within the meaning of Sections 3 et seq. and Sections 11 et seq. draft Reorganisation Tax Act (Section 3 (2a) RTA-D; Section 11 (3) RTA-D; Section 27 (20) RTA-D)

The deadline for the transferring corporation to submit the final tax balance sheet is to be regulated for the first time. The rule will apply to cases in which the application for entry into the public register (relevant for the respective transaction to become legally effective) is made after the date of the FA 2024 enters into force.

According to Section 3 (2a) and Section 11 (3) RTA-D, the submission must be made electronically and – analogous to the tax return deadline in Section 149 (3) General Tax Code ("GTC") in cases where tax advice is received - should occur no later than 14 months after the transfer date for tax purposes. Furthermore, in line with the previous explanations in Margin No. 03.04 Reorganisation Tax Act Application Decree 2011, the provisions of Section 5b ITA on the e-balance sheet are to be applied accordingly to the closing balance sheet.

Extension of the deemed contribution rule in Section 5 (2) RTA to shares held as private assets (Section 5 (2) RTA-D; Section 27 (21) RTA-D)

The contribution fiction in Section 5 (2) RTA, which previously only covered shares within the meaning of Section 17 ITA is to be extended to shares within the meaning of Section 20 (2) Sentence 1 No. 1 ITA effective for reorganisations the tax transfer date of which occurs after the date of the current bill's entry into force.

Taxation of shareholders in the event of the merger of a corporation (Section 13 (2) RTA-D; Section 27 (21) RTA-D)

To date, in the event of a merger or asset transfer of corporations, the shares in the transferring corporation were deemed to have been sold at fair market value in accordance with Section 13 (1) RTA and the shares in the acquiring corporation as acquired at this value. Only upon application and subject to various other conditions set out in Section 13 (2) RTA, was a book value approach possible. In a departure from this prevailing system, according to Section 13 (2) RTA-D, the book value approach is now to become the general rule. Recognition at fair market value - provided that the (unchanged) requirements for the book value approach are met - will in future only be possible upon irrevocable application by the taxpayer to be submitted by the deadline for submitting the tax return. According to Section 27 (21) RTA-D, the new regulation is to be applied for the first time to reorganisations whose tax transfer date is after the date of entry into force of this bill. The reversal of the system is limited to reorganisations falling with the scope of Section 13 RTA. For all other valuation events and provisions, the fair market value continues to be recognised as the standard value and a lower value as an application-dependent exception.

Trade tax on the indirect sale or surrender of shares in the acquiring partnership (Section 18 (3) Sentences 3 and 4 RTA-D; Section 27 (22) RTA-D)

Where the business of a partnership, which was the acquiring legal entity in the event of a transfer of assets or in the event of the change of legal form from a corporation, is sold or discontinued within five years after the reorganisation, the gain upon disposal or discontinuation is subject to trade tax in accordance with Section 18 (3) Sentence 1 RTA. In order to counteract structuring considerations to avoid trade tax through multi-level partnership structures, with effect for reorganisations whose tax transfer date is after the date of publication of the draft bill (Section 27 (22) RTA-D), Section 18 (3) Sentence 3 RTA-D will also covers cases in which a natural person holding an indirect interest in the acquiring partnership via one or more partnerships sells or surrenders a share in the partnership holding the interest. A resulting capital gain or gain on disposal at the level of the intermediary partnership will be subject to trade tax insofar as it is attributable to the share in the acquiring partnership.

Treatment of withdrawals in the retroactive period for contributions in accordance with Section 20 RTA (Section 20 (2) Sentence 5 RTA-D; Section 27 (23) RTA-D)

Section 20 (2) Sentence 5 RTA-D is intended to implement the view of the tax authorities set out in Margin No. 20.19 Reorganisation Tax Act Application Decree 2011, according to which the contributed business assets may not become negative even if this is a result of withdrawals during the redemption period; in such cases a (partial) step-up in value is to be carried out (no negative acquisition costs). This view is to be regulated for the first time after the Supreme Tax Court rejected it in its decision (I R 12/16) of 7 March 2018 due to its lack of a legal basis. According to Section 27 (23) RTA-D the regulation is already to be applied (retroactively) to contributions in which the signature of the reorganisation resolution in cases of universal succession or the conclusion of the contribution agreement in other cases occurred after 31 December 2023.

Restriction of the exception to the retroactive taxation of the so-called Contribution Gain II (Section 22 (2) Sentence 5 RTA-D)

According to Section 22 (2) Sentence 5 RTA, there is no retroactive taxation of a Contribution Gain II pursuant to Section 22 (2) RTA provided, inter alia, the transferor has sold the shares which he received as a result of the reorganisation. According to the planned amendment to the regulation, this exception should only be able to apply if that sale resulted in the realisation of hidden reserves. The planned new regulation implements the view of the tax authorities in this regard, which was included in Margin No. 22.17 of the draft for a new version of the Reorganisation Tax Act Application Decree dated 11 October 2023.

Changes in Value Added Tax law

The bill also contains important changes in VAT regulations. The changes include a new invoice requirement for outgoing invoices from taxable persons taxed on a receipts-basis (Section 20 VAT ACT “VATA”). In future, such taxable persons must state on the invoice that they tax their services on a receipts-basis. Irrespective of the form of taxation, an entrepreneur who receives a supply from a taxable person taxed on a receipts-basis may - subject to certain other requirements - in future only deduct the input tax shown in such invoices from the date of payment at the earliest. These regulations are applicable from

2026, the legislator is thus complying with the case law of the ECJ.

Other changes include the introduction of a European-wide special regulation for small businesses, which will be applicable from 2025. In future, small businesses based in Germany will be able to claim the tax exemption for their domestic turnover where this turnover does not exceed EUR 100,000 in the current calendar year and EUR 25,000 in the previous calendar year. Under certain further conditions, they will also be able to operate tax-free in other EU Member States - conversely, this should also apply to small businesses from other EU Member States which operate in Germany. To this end, a special notification procedure will be introduced for small business owners wishing to apply this regulation in other EU countries, for which a special identification number will be issued. Small businesses operating across borders will then submit a single turnover declaration for all countries in which they operate.

The place of performance for services in connection with virtual events will also be adjusted from 2025.) Cultural, artistic, scientific, educational, sporting, entertainment services and certain other services provided virtually (e.g. made available via streaming) to non-entrepreneurs and persons treated as such will be deemed provided at the place where the recipient is established or has their domicile or habitual residence. The MoF anticipated this place of supply regulation for cases prior to the named date in its 29 April 2024 circular. The granting of admission authorisations to virtual events to other entrepreneurs (and equivalent persons) is excluded from the Section 3a (3) No. 5 VATA place of supply regulation and should thus be subject to the general standard of sec. 3a (2) VATA - this corresponds to the current administrative opinion (Section 3a.7a (1) Sentence 4 of the VAT Application Decree).

Further changes are planned in the area of tax exemptions. According to the draft bill, the management of loans and loan collateral by lenders is to be explicitly listed in Section 4 No. 8 VATA. This change, which according to the explanatory memorandum to the law is primarily intended to affect services provided by consortium managers, is to come into force on 1 January 2025.

Apparently in response to an infringement procedure by the EU Commission, the tax exemption for educational services as well as school and university tuition provided by private tutors is to be harmonised with EU law. In the case of training services and closely related services that are not provided by public institutions, the tax exemption should only apply if the aim is not to make a systematic profit. This change is also due to come into force on 1 January 2025.

Numerous other measures, which primarily serve the purpose of clarification, are either intended to ensure a sufficient legal basis exists for certain interpretations and areas of application of individual provisions or are a reaction to the case law of the Supreme Tax Court or the ECJ. An abolition of the tax exemption for VAT warehouses planned for 1 January 2026 is being carried out because it is only relevant for a small number of economic operators, which is disproportionate to the considerable administrative effort involved.

Changes to the Real Estate Transfer Tax Act

In order to create legal certainty and clarity, a new Section 1 (4a) RETTA-Draft of the German Real Estate

Transfer Tax Act (RETTA) is to regulate for the first time when, for the purposes of RETT taxation of share deals (so-called supplementary facts within the meaning of Section 1 (2a) to (3a) RETTA) a property is to be considered part of the assets of a company (real estate transfer tax attribution).

Real estate should belong to a company from the point in time the company acquired it on the basis of a legal transaction in accordance with Section 1 (1) RETTA (e.g. acquisition through the conclusion of a property purchase agreement). The attribution should end when another legal entity has acquired the real estate on the basis of a legal transaction pursuant to Section 1 (1) RETTA (e.g. resale of the property) or if the conditions for attribution pursuant to Section 1 (4a) Sentence 1 RETTA-D are no longer met.

In addition, pursuant to Section 1 (4a) Sentence 4 RETTA-D, an attribution can also be established through a right to exploit the real estate within the meaning of Section 1 (2) RETTA. If the requirements for this are no longer met, the attribution should end.

In contrast to previous case law and decrees (Supreme Tax Court decisions: II R 44/18, II R 33/20 and II R 40/20 and Federal States Identical Decree of 16.10.2023), the realisation of a taxable share deal within the meaning of Section 1 (3) or (3a) RETTA should no longer result in the attribution of the relevant real estate to the assets of the acquirer. Such share deals should therefore no longer give rise to a double attribution of the real estate to the assets of two companies, which was previously considered possible (and controversially discussed) by the tax authorities.

In order to avoid abusive arrangements, the attribution rules of Section 1 (4a) Sentences 1 and 2 RETTA-D should not apply to legal transactions or to real estate which have been reversed in accordance with Section 16 (1) RETTA or reacquired in accordance with Section 16 (2) RETTA, insofar as this leads to an acquisition transaction being avoided (e.g. if the share deal takes place between the sale of the property and the reversal/repurchase). In such cases the cancellation/reacquisition should be considered a retroactive event within the meaning of Section 175 (1) Sentence 1 No. 2 GTC (Section 1 (4a) Sentence 3 RETTA-D).

Section 1 (4a) RETTA is to enter into force on the day after the publication of the FA 2024; a special application provision in Section 23 RETTA is not envisaged.

Amendments to the General Tax Code

Duties of legal representatives (Section 34 draft General Tax Code GTC-D)

Section 34 (1) Sentence 3 GTC-D is intended to clarify that the tax authorities only have to contact one of these representatives where there are several legal representatives for natural and legal persons, associations with legal capacity and estates.

Electronic communication with the tax authorities (Section 87a GTC-D)

The new Section 87a (1) Sentence 2 GTC will state, inter alia, that the transmission of electronic documents to the tax authorities by simple email, email with a qualified electronic signature or by beA/beSt outside court

proceedings will only permissible where this is specifically allowed by law.

This is intended to ensure that communication outside of court proceedings primarily takes place via Elster and ERiC and not via other electronic transmission channels.

Penalisation of violations of international agreements for the promotion of tax honesty in international matters (Section 117c GTC-D); temporary increase in fines for violations of the FATCA-USA Implementation Regulation (Section 379 GTC-D)

Section 117c (1) Sentence 1 No. 5 GTC-D is intended to create an authorisation basis for the Federal Ministry of Finance to issue - with the approval of the Bundesrat - regulations via statutory instrument, by means of which violations of reporting obligations to which financial institutions are subject under the FATCA-USA Implementation Regulation (Federal Law Gazette I 2014, 1222) can be punished as administrative offences and with a fine of up to EUR 50,000. The FATCA-USA Implementation Regulation was introduced for the purposes of the intergovernmental automatic exchange of information on financial accounts with the United States of America.

The previous maximum fine for violations of FATCA-USA Implementation Regulation reporting obligations is currently considered at odds with the possible fines for violations of comparable obligations of the same obliged entities (i.e. financial institutions) in connection with the implementation of the intergovernmental, automatic exchange of financial account information in accordance with the Common Reporting Standard (CRS) within the scope of the Financial Account Information Exchange Act (FAIEA; according to Section 28 (1) and 1a FAIEA corresponding administrative offences can be punished with a fine of up to EUR 50,000). Until the entry into force of the new regulation, a corresponding fine provision will come into force under Section 379 (8) GTC, according to which the maximum fine for wilful and reckless breaches of reporting obligations under the FATCA-USA Implementing Regulation will be temporarily increased from EUR 5,000 to EUR 30,000.

Confirmation of oral administrative acts (Section 119 (2) GTC-D)

According to Section 119 (2) GTC, oral administrative acts must be confirmed in writing where a legitimate interest exists, and the person concerned immediately requests a written confirmation. According to Section 119 (2) GTC-D, such a confirmation should also be possible in both written and electronic form.

Surcharge for the failure to submit records or the submission of essentially unusable records within the meaning of Section 90 (3) GTC (Section 162 (4) GTC-D; Art. 97 Section 37 (2) and (3) draftGTC implementation Act)

Where a taxable person submits records of a business transaction within the meaning of Section 90 (3) GTC late or not at all, or if the records submitted on a business transaction are essentially unusable, a penalty will be imposed in each case. Where after the completion of a tax audit, a further penalty for the non-submission or the submission of essentially unusable records is levied, previously determined fines for late submission under Section 162 (4) Sentence 4 GTC-D will be taken into account. According to Art. 97

Section 37 (2) and (3) GTC Implementation Act, the new regulation should generally apply to taxes and tax refunds arising after 31 December 2024, as well as to taxes and tax refunds arising earlier if the notice of the tax audit order is formally delivered after 31 December 2024.

Cancellation of the binding effect of agreements reached with the tax authorities in the context of mutual agreements (Section 175a Sentence 2 GTC-D)

Section 175a Sentence 2 GTC-D is intended to clarify (according to the explanatory memorandum to the bill) that binding rulings (Section 89 GTC), binding commitments (Section 204 GTC) or legally binding agreements between the taxpayer and the tax authorities may be corrected by assessment under Section 175a GTC for the purpose of implementing the terms of an interim mutual agreement (Section 89a GTC), a mutual agreement or an arbitration award. Where, during a dispute resolution procedure, the facts of the case or its assessment under tax law change from that previously agreed in the context of a binding ruling, a binding commitment or a legally binding agreement between the taxpayer and the tax authority, such information and findings should, according to the explanatory memorandum to the bill, be taken into account when implementing a mutual agreement or an arbitration award. Thus, the binding effect of binding rulings, binding commitments or a legally binding agreements between taxpayers and the tax authorities is withdrwan to this extent.

>In addition to the amendments outlined above, the draft bill also provides for amendments to the Investment Tax Act (including an extension of the settlement period in Section 17 (1) Sentence 4 Investment Tax Act for investment funds from five to ten years), in the Inheritance Tax and Gift Tax Act (including amendments to Section 10 (6) and Sections 13d and 28 (3), IHTA) and in the Minimum Tax Act (introduction of Section 59 (3) Minimum Tax Act) regarding the determination of the amount of labour costs for mobile employees for the determination of the substance-based tax-free amount; according to the explanatory memorandum to the law, the provision was not included in the original transposition law due to a clerical error).

Update (5 June 2024)

Today, the Federal Cabinet adopted the draft bill of the Finance Act 2024.

Schlagwörter

Finance Bill, General Tax Code, Income Tax Act, Reorganisation Tax Act, corporate income tax, real estate transfer tax, trade tax