http://blogs.pwc.de/german-tax-and-legal-news

Statutes
Cases
Decrees

Issue 1, 2020
February 2020

Tax & Legal News

Contents

Official Pronouncements

Principal tax authorities of the Federal States issue decree on the provision of electric bicycles to employees

On 9 January 2020 the principal tax authorities of the Federal States issued a decree on the monthly average value for income tax purposes of the benefit-in-kind received by employees for the provision of electric bicycles by their employer.

The Finance Act 2018 introduced an income tax exemption on the benefit-in-kind received by employees for the provision of electric bicycles for private use by their employers, where the benefit is provided in addition to any salary which the employer is already obliged to pay. The tax exemption applies for the 2019-2021 periods of assessment. The decree issued on 9 January 2020 amends an earlier decree issued on 14 March 2019 and contains instructions for determining the monthly average value of the benefit-in-kind for the period after 31 December 2018 and before 1 January 2031 in cases where the tax exemption is not applicable:

The monthly average value of private use (including private journeys, journeys between home and the primary place of work as well as journeys from home to a designated work location and journeys home as part of the double household regime) is set at 1% of the manufacturer's, importer's or wholesaler's recommended retail price, rounded down to the nearest EUR 100, including VAT, at the time the bicycle is put into service.

If the employer provides the employee with the company bicycle for the first time after 31 December 2018 and before 1 January 2031, the monthly average value of private use (including private journeys, journeys between home and the primary place of work as well as journeys from home to a designated work location and journeys home as part of the double household regime) shall be for the calendar year 2019 1% of one half, and from 1 January 2020, 1% of one quarter of the manufacturer's, importer's or wholesaler's recommended retail price, rounded down to the nearest EUR 100, including VAT, at the time the bicycle is put into service. In these cases, the date on which the employer purchased, manufactured or leased the bicycle is not relevant. Where the company bicycle had already been given by the employer to an employee for private use before 1 January 2019, the originally applicable provisions will apply where the user of the bicycle (employee) changes after 31 December 2018.

Special rules apply where the provision of bicycles for use by third parties (e.g. bicycle rental companies) is part of the employer's range of services.

In the context of the decree bicycles are electric bicycles if they are classified as bicycles under traffic law. This should generally be the case where, inter alia, the electric bicycle is not subject to compulsory registration and insurance and where its motor does not support speeds of more than 25 kilometres per hour. Where the electric bicycle is considered a motor vehicle, the general rules for the benefit-in-kind valuation of motor vehicles is applicable.

Tax Court Cases

Solidarity surcharge constitutional in 2011

The solidarity surcharge was constitutional in 2011. This was decided by the Federal Court of Finance (BFH) in two rulings of 14 November 2018 - II R 63/15 and II R 64/15.

Background

The appeals related to the year 2011. In the one case (II R 63/15) the appellant received income from employment as well as - to a small extent - trading income. In the other (II R 64/15) the appellant received employment income and income from self-employment, but no trading income.

Issue

Basing their arguments on equal treatment, they requested that the solidarity surcharge be calculated for their entire income as if it were income from a business. This would have had the result that trade tax would have been credited against income thereby reducing the solidarity surcharge.

The basis of the appeal was that the determination of the assessment basis of the solidarity surcharge pursuant to Section 3 Solidarity Surcharge Act violated the general constitutional principle of equal treatment. The asserted violation arose from the fact that trading income is partially relieved of the solidarity surcharge by a reduction of the assessment base, following a partial trade tax credit under Section 35 Income Tax Act. The appellants argued that if they had only received trading income the solidarity surcharge on the total income would have been lower. A comparison of trading income and other income showed that only at a trade tax municipal rate of 400,9 % would the total tax burden be the same. This was not constitutionally justifiable.

Decision

The Supreme Tax Court did not accept the appellants' contention. The Court considered the levying of the solidarity surcharge in 2011 to be constitutional. It also did not object to a lower the solidarity surcharge burden on trading income in the context of the typical total burden of income tax, solidarity surcharge and trade tax.

The decisions attach decisive importance to the legislature's scope for structuring the levying of supplementary taxes and its power to define the type of supplementary tax

The Supreme Tax Court noted that in tax law, in particular income tax law, the legislature's freedom of action is limited by two closely related guidelines: the principle of taxation according to financial capacity and the principle of consistency. In the interest of the constitutional requirement of equal tax burdens, the aim must be to tax taxpayers with equal financial capacity at the same rate (horizontal tax fairness), while (vertically) the taxation of higher incomes must be structured in an appropriate manner in comparison with the taxation of lower incomes. In this context, the manner in which the tax burden is structured in statute must be consistent in its implementation taking into account the principle of equal tax burdens. Exceptions from such a consistent implementation must have an objective reason.

Irrespective of why a tax standard is implemented, the legislature's power to simplify and classify must be considered: Every legal regulation must generalise. When regulating mass phenomena, the legislature is entitled to incorporate a large number of individual cases into an overall approach which, based on available experience, accurately reflects the circumstances requiring regulation. On this basis, the legislature may in principle introduce generalising, standardising and simplifying regulations without violating the general principle of equality because hardships inevitably arise in such circumstances. However, the legislature may not choose an atypical case as a model for such legal standardisation but must rather apply a typical case as a realistic standard.

According to these principles, the partial preferential treatment of trade income in this situation is not unconstitutional. The justification can be found in a blanket consideration of income tax, solidarity surcharge and trade tax. Contrary to the view of the appellants, the question is solely whether - when considering the situation as a whole - the partial overcompensation of trade tax, meets the requirements of financial capacity and consistency.

Real estate transfer tax: cancellation of a real estate transfer agreement

In its decision of 4 November 2009 (II B 48/19), published on 16 January 2020, the Supreme Tax Court held that Section 16(1) No. 2 Real Estate Transfer Act ("RETT Act") did not provide for a time limit for the cancellation of purchase transactions. The special limitation period set out in Section 16 (4) RETT related to the cancellation of the agreement itself and not to the date on which an application was made to cancel the RETT assessment. Furthermore, in the circumstances, the cancellation was not a "retroactive event" within the meaning of Section 175 (1) Sentence 1 No. 2 of the General Tax Code

Background

By notarized purchase agreement dated 29 February 2012, the appellant acquired a plot of land. A priority notice of conveyance had already been entered in the land register for third parties who had previously wanted to acquire the property. The agreement included a right to terminate in the event that this priority notice was not cancelled by 31 December 2012 at the latest. Real estate transfer tax ("RETT") was levied through an assessment dated 20 April 2012 and paid promptly by the appellant.

By notice dated 27 December 2013, the appellant cancelled the contract but only applied to the tax office for the revocation of the RETT assessment pursuant to Section 16(1)(2) of the RETT Act on 19 January 2017. The tax office rejected the application, as the limitation period for the assessment had expired on 31 December 2016.

The tax court also took the view that the limitation period had expired, noting, in particular, that the cancellation of the contract, unlike a rescission, did not constitute a retroactive event within the meaning of Section 175 (1) Sentence 1 No. 2 of the German Tax Code ("GTC"), under which the limitation period would have restarted.

The decision of the tax court to refuse leave to appeal was referred to the Supreme Tax Court, which confirmed the lower court's decision and refused leave to appeal.

Judgment

In its judgment of 18 November 2009 (II R 11/08) the Supreme Tax Court stated that Section 16(1) No. 2, RETT Act – in contrast to Section 16(1) No. 1 — did not provide for a time limit. This finding, so the Supreme Tax Court in the instant case, referred, however, to the date of the cancellation of the agreement. In its 2009 judgment, the Supreme Tax Court had not ruled that the application to revoke the tax assessment could be made without reference to the time limits by applying the general provisions on limitation periods. This is a conclusion that could not be reached, as it would contradict the whole concept of Section 16 RETT Act.

The cancellation of a purchase transaction on the basis of a legal claim in the event of non-fulfilment of the contractual conditions, which according to Section 16 (1) no. 2 RETT Act can, upon application, lead to a revocation of the tax assessment, may be executed without time limit. i.e. after the expiry of two years or even after the expiry of the limitation period. This follows from the fact that the time limit in Section 16(1) No. 1, RETT Act is not included in Section 16(1) No. 2. However, the omission of the time limit in Section 16 (1) No. 2, RETT Act only relates to the timing of the cancellation of the purchase transaction itself and not to the date by which the application for the revocation of the tax assessment must be made.

Section 16 (4) RETT Act provides that the limitation period for the issuance of an assessment under Sections 169 to 171 GTC does not end before one year after the occurrence of the event. This provides for the possibility to reverse the tax assessment in cases of late cancellation, for example shortly before or after the expiry of the limitation period. The linking of the limitation rules to the cancellation of the agreement itself meant that the relevant question was not whether the cancellation would have been possible at a later point in time under the terms of the contract, but rather when it actually took place.

The tax court did not deviate from these legal principles. The appellant had asserted her right of cancellation on 27 December 2013, so that there was no urgency with regard to the ending of the limitation period. The fact that, according to the terms of the contract, the appellant could have asserted her right of cancellation at a later date, did not impact the evaluation of the actual cancellation, neither under the terms of Section 16 (1) No 2 RETT Act nor under the terms Section 16 (4) RETT Act.

Furthermore, the finding of the tax court did not diverge from earlier Supreme Tax Court case law with regard to Section 175 (1) Sentence 1 No 2 GTC (an income tax case). In the relevant case the Supreme Tax Court had dealt with the question of whether the cancellation of a contract concerning the transfer of company shares is a "retroactive event" within the meaning of Section 175 (1) Sentence 1 No. 2 GTC and answered this question in the affirmative. However, the Court expressly stated in this regard that the tax effect for the past was based on the substantive tax law applicable in the individual case. The case related to a provision of income tax law on the sale of shares in corporations. In view of this express limitation, the tax court could not rely on that decision in a case involving the cancellation of a purchase transaction as a retroactive event for the purposes of the RETT Act and thus under the framework of a completely different substantive tax law.

The Supreme Tax Court took the view that the appellant's contention that the tax court made a mistake in substantive law in failing to hold the cancellation of the purchase transaction to be a "retroactive event" within the meaning of Section 175 (1) Sentence 1 No. 2 GTC, was in itself not a reason for granting leave to appeal. The situation would be different if the tax court had made an error in the application of the law or if the matter was of fundamental importance.

A legal question was only of fundamental importance if it was capable of and in need of clarification. The legal situation in the case before the Supreme Court was in its view clear. The cancellation of a purchase transaction within the meaning of Section 16 (1) No. 2 RETT Act was not a "retroactive event" within the meaning of Section 175 (1) Sentence 1 No. 2 GTC. This could be read from Section 16 (4) RETT Act and Section 175 (1) Sentence 2 GTC; it corresponded to the principle that the tax effect for the past should be judged independently for each respective substantive tax law.

Source:
Decision of the Supreme Tax Court on 4 November 2019 (II B 48/19) published on 16 January 2020.

From Europe

Brexit at Midnight: Prepared for what comes next?

Midnight on 31 January 2020 the United Kingdom of Great Britain and Northern Ireland left the EU. From 1 February, a transitional phase until the end of 2020 will begin, which means that for the time being, the UK will remain within the internal market and the customs union. Is your business prepared for what may come? Some many open questions. The free PwC-Brexit Readiness Assessment Application can help.

Current position – open questions

According to Article 127 of the Agreement, Union law will apply in principle both to the UK and in the UK during the transitional period. Furthermore, an extension of the transitional period may be decided before 1 July 2020, although the British government has declared its intention not to extend. The period until the end of the year is intended primarily for negotiations on the future relationship between the UK and the EU. If no agreement has been reached by the end of the transitional period and no extension is agreed, WTO rules will apply.

With regard to "the Northern Ireland Backstop" sticking point, the new protocol on Northern Ireland/Republic of Ireland provides for the UK as a whole to come out of the EU Customs Union and to exist as a single customs territory, with Northern Ireland included in any future UK trade deals. Northern Ireland will remain aligned to EU Single Market regulations in certain areas, including Single Market rules on goods (and certain EU VAT rules on goods). Goods moving directly from Great Britain to Northern Ireland won't be subject to a tariff unless the good is "at risk" of being moved into the EU afterwards. Likewise, goods from third countries entering Northern Ireland will be subject to the UK tariff, unless they are at risk of being moved to the EU.

And how has the German government prepared for Brexit? On 29 March 2019, the Act on Tax and Other Accompanying Measures to the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union (Brexit Tax Act) was enacted into German law.

The Act is intended to create legal certainty in various areas of tax and financial market law and to prevent particular disadvantages that would otherwise arise for taxpayers and financial market participants as a result of Brexit. According to the Federal Ministry of Finance, the regulations were designed to cover all conceivable scenarios of exit, both in terms of timing and manner.

Finance Ministry publication of Brexit Tax Act in English

Are you prepared? – The PwC-Brexit Readiness Assessment Application helps

Are you prepared for all this? Because Brexit is far from over.

It remains to be seen what the EU and the UK will agree on in the coming months. Various scenarios are conceivable, for which your business should be prepared. What is clear, however, is that German businesses will have to adapt to changes in the exchange of goods and services with the UK. Our free check will help you to assess your preparedness:

https://brexitapp.pwc.de/

News in brief

Outsourcing financial services – VAT exemption	Services are provided to a bank operating automated teller machines (ATMs) which consist of setting up and maintaining these machines, replenishing them with cash and equipping them with hardware and software for reading the cash card data, forwarding authorisation requests for cash withdrawals to the bank which issued the cash card used, making the desired cash withdrawal and registering withdrawal transactions are not tax exempt supplies with the meaning of Section 4 No. 8 letter d of the VAT Act. This was the finding of the Supreme Tax Court on 13 November 2019, published on 19 December 2019. https://blogs.pwc.de/german-tax-and-legal-news/2019/12/20/outsourcing-finanancial-services-vat-exemption/
Cologne Tax Court – no cut-off period for applications for continuance-bound loss carry-forwards	The Cologne Tax Court held in its decision (10 V 1706/18) published on 15 January 2020, that the wording of Section 8d (1) Sentence 5 of the Act did not contain a cut-off period according to which the application under Section 8d (1) CTA for continuance-bound loss carry-forwards must be filed in the first tax return – and only there. https://blogs.pwc.de/german-tax-and-legal-news/2020/01/15/cologne-tax-court-no-cut-off-period-for-applications-for-continuance-bound-loss-carry-forwards/
Deduction of input VAT for a home office: Does the requirement to submit the decision to allocate an asset for private or business use by a certain deadline comply with EU law?	The Supreme Tax Court has doubts as to whether EU law precludes national case law which states that the decision to allocate an asset to private or business use must be submitted to the tax office by the end of the statutory period for submission of the annual VAT return. Accordingly, in a ruling of 18 September 2019 (XI R 3/19 published on 30 January 2020) it has requested clarification from the European Union Court of Justice (ECJ). https://blogs.pwc.de/german-tax-and-legal-news/2020/01/30/deduction-of-input-vat-for-a-home-office-does-the-requirement-to-submit-the-decision-to-allocate-an-asset-for-private-or-business-use-by-a-certain-deadline-comply-with-eu-law/
Federal Finance Ministry Circular regarding the reporting of consignment stock transactions on the European Sales List	On 28 January 2020 the Federal Finance Ministry issued a circular regarding the reporting of consignment stock transactions on the European Sales List. https://blogs.pwc.de/german-tax-and-legal-news/2020/01/31/federal-finance-ministry-circular-regarding-the-reporting-of-consignment-stock-transactions-on-the-european-sales-list/

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 2017 edition of our popular Guide to Doing Business and Investing in Germany is now off the press and 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?

Then please speak to your PwC-Advisor or send an e-mail to PwC_Mandanteninformation@de.pwc.com.

The contributions are intended to serve as information for our clients. In seeking solutions to any relevant problems, please refer to the sources listed or to the support of your local PwC advisor. Parts of this publication/information may only be reprinted and reproduced with the prior written consent of the publisher. Contributions expressing an opinion reflect the opinion of the individual authors.

Editor’s Office

Emma Moesle
PricewaterhouseCoopers GmbH
Friedrich-List-Straße 20
45128 Essen
Tel.: +19 201 438-1975
emma.moesle@pwc.com

Data Protection

Data processing for the purposes of the distribution of the Newsletter is performed on the basis of your consent. You can unsubscribe from the Newsletter at any time with effect for the future and revoke your consent.

Subscribe/Unsubscribe

You may take out a new subscription to the newsletter with a simple e-mail to
SUBSCRIBE_PwC_Mandanteninformation E@de.pwc.com

Existing subscriptions may be cancelled any time at:
UNSUBSCRIBE_PwC_Mandanteninformation E@de.pwc.com