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Tax & Legal News

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Official Pronouncements

Joint ministerial notice released introducing support measures against the impact of the Corona Virus

The Federal Ministry of Finance has agreed with the Federal Ministry of Economics ("the Ministries") on a far-reaching bundle of measures to protect jobs and safeguard companies of all sizes and in all sectors. These measures include tax liquidity support for companies. The measures were set out in a notice released on 13 March 2020

The Protective "shield" for employees and companies

For employees and companies affected by the effects of the corona virus, support will be available under what the Ministries refer to as a "protective shield". This shield will be constructed around four pillars:

1. Making reduced working-hours allowance more flexible

The Ministries point out that Germany has a strong social security system. These associated buttresses support the economy. The Federal Government will ensure that this system is able to operate without restriction. Uncertainty and short-term disruptions in trade flows should not lead to employees losing their jobs. The Federal Government is able to draw on tried and tested measures to achieve this. By the beginning of April, the reduced working-hours scheme will be adjusted in a targeted manner. This will involve a simplification of the requirements for accessing the reduced working-hours allowance:

Reduction of the quorum of employees affected by loss of working hours in the company to up to 10%.
Partial or complete waiver of an accumulation of negative working time balances
Reduced working-hours allowance also for temporary employees
Full reimbursement of social security contributions by the Federal Employment Agency

2. Tax liquidity aid for companies

In order to improve the liquidity of companies, the options for the deferral of tax payments, the reduction of advance payments and for the enforcement will be made more taxpayer friendly. The measures will provide companies with potential tax deferrals with a total value in the billions. The Finance Ministry has initiated the necessary coordination with the Federal States ("the Länder") on this issue.

In detail:

The authorisation of tax deferrals will be made easier. The tax authorities can defer taxes if its collection would give rise to considerable hardship. The tax authorities are instructed not to impose strict requirements in this respect. This supports the liquidity of taxpayers by postponing the date of tax payment.
Advance payments can be amended more easily. As soon as it is clear that the taxpayers' income is likely to be lower in the current year, the advance tax payments will be reduced quickly without complication. This will improve the liquidity situation.
Enforcement measures (e.g. account seizures, garnishment) or default surcharges will be waived until 31.12.2020 provided the debtor of the tax payment due is directly impacted by the effects of the corona virus.

For taxes administered by the Customs Authorities (e.g. energy tax and air transport tax), the General Customs Directorate has been instructed to meet the taxpayers' needs in an appropriate manner. The same applies to the Federal Central Tax Office, which will proceed appropriately in its administration of insurance tax and value added tax.

3. Billion-euro shield for businesses and companies

The notice observes that many companies and businesses are currently suffering from a slow-down in turnover through no fault of their own – either due to disruptions in supply chains or a significant drop in demand; this has affected many sectors of the German economy. At the same time, running costs often cannot be reduced at all or only incrementally. As a result, healthy companies can find themselves in financial difficulties through no fault of their own, especially when it comes to their cash position. The Ministries have given assurances that it will protect companies and employees with new and unlimited liquidity measures. Due to the high level of uncertainty in the current situation, the Ministries have made the conscious decision not to put an upper limit on the level of the measures. They have stated that this very important decision is supported the entire Federal Government.

First existing programmes for liquidity support will be expanded in order to make it easier for companies to access favourable loans. These funds can be used to mobilize a considerable amount of liquidity-stimulating loans from private banks. To this end, the Ministries' established instruments for supporting the credit offerings by private banks will be expanded and made available to more companies:

The conditions for the Kreditanstalt für Wiederaufbau ("KfW" – the Credit Institute for Reconstruction, the largest German public development bank) loans to entrepreneurs (for existing enterprises) and ERP Universal Start-up Loans (for new businesses of under 5 years standing) will be relaxed by increasing risk assumption (indemnity against liability) for working capital loans and by opening the instruments up to large enterprises with a turnover of up to EUR 2 billion (previously: EUR 500 million). Higher risk assumptions of up to 80% for working capital loans of up to 200 million Euros should stimulate the willingness of house banks to grant loans.
In relation to the programme for larger companies, the previous turnover limit of two billion Euros will be raised to 5 billion Euros. The KfW programme " Loan for Growth" will be converted and made available in future to projects by way of syndicated financing

without restriction to a specific area (up to now these were only available for innovation and digitisation). Risk assumption will be increased to up to 70% (previously 50%). This should facilitate the access of larger companies to syndicated financing.
For companies with a turnover of more than five billion Euros, support will continue to be provided on a case-by-case basis.

For Bürgschaftsbanken (private banks supported by a Federal State which offer guarantees), the maximum guarantee amount will be doubled to EUR 2.5 million. The Federal Government will increase its risk share in the guarantee banks by 10% so that risks, which are difficult to assess during the crisis, can be assumed more easily. The upper limit of 35% working capital in the total exposure of the guarantee banks will be increased to 50%. In order to accelerate the provision of liquidity, the Federal Government is will now allow the guarantee banks to make guarantee decisions up to an amount of EUR 250,000 independently and within 3 days.

The large guarantee programme (parallel federation and federal state guarantees), which has so far been limited to companies in structurally weak regions, will be opened up to companies outside these regions. In this regard, the Federal Government will make it possible to secure working capital financing and investment capital for guarantee requirements of EUR 50 million upwards and with a guarantee ratio of up to 80%.

These measures are covered by the previous state aid regulations.

For enterprises which are temporarily experiencing more serious difficulties in obtaining finance due to the crisis and which as a result do not have easy access to the existing promotional programmes, the Ministries will set up additional special programmes for all such enterprises at KfW. This will be made possible by increasing KfW's risk tolerance in line with the crisis. To this end, the risk assumption for investment capital (release from liability) will be significantly improved and will be available for up to 80% for working capital and even up to 90% for investment capital. In addition, syndicate structures are to be offered to these enterprises.

These special programmes are now being reported to the EU Commission for approval. The President of the Commission has already signalled that she wants to ensure flexibility in the application of state aid rules in the wake of the corona crisis. The EU and Eurogroup finance ministers will work to ensure that the EU Commission shows the necessary degree of flexibility.

The Federal Government will provide KfW with the necessary guarantee volumes so that it can implement these programmes accordingly. This say the Ministries will be possible without any difficulty. The federal budget has a guarantee volume available of around EUR 460 billion. If necessary, this framework can be increased by up to EUR 93 billion.

With export credit guarantees (referred to as "Hermes Cover") the Federal Government will provide the business community with flexible, effective and comprehensive support which is sufficient to cope with a situation that may be comparable in its seriousness to the years after the financial crisis in 2009. The Ministries note that these instruments proved successful then and the funds available in the 2020 budget are sufficient for a comparable increase in any necessary volume of support. This will be supported by a fully backed KfW programme for refinancing export transactions. Where there is any additional demand for export cover and refinancing, the authorisation framework can be increased very quickly.

4. Strengthening European Cohesion

In close cooperation with its European partners, the German Government will interlink its corona measures at European level.

The German Government has stated it welcomes the European Commission's idea of setting up a "Corona Response Initiative" with a volume of 25 billion Euro.

It also welcomes the announcement by the European Banking Supervisory Authorities to use existing capabilities to enable banks to continue to provide reliable liquidity to the

economy, as well as the measures announced yesterday by the European Central Bank to provide liquidity to banks.

The German Government welcomes the EIB Group using instruments, which have been tried and tested in past crises, to help companies affected by the corona virus across Europe to deal with liquidity shortages. In particular, the tried and tested EIF portfolio guarantees should be used to secure corporate liquidity.

Source: Federal Ministry of Finance notice of 13 March 2020.

Tax Authorities release tax measures to combat the effects of coronavirus (COVID 19/ SARS-CoV-2)

On 19 March 2020 both the Federal Ministry of Finance and the Supreme Tax Authorities of the Federal States ("the Länder") released a circular and a decree (respectively) introducing tax measures to combat the effects of the coronavirus (COVID- 19 /SARS-CoV-2). In this Newsflash we would like to inform you of the measures.

Ministry of Finance Circular

In an effort to mitigate the considerable damage to the economy already caused by the coronavirus in large parts of the Federal Republic of Germany and also to mitigate the damage, which is still likely to ensue, the Federal Ministry of Finance issued a circular aimed at helping taxpayers avoid undue hardship.

In agreement with the Supreme Tax Authorities of the Länder, the following now applies to tax deferral applications and enforcement measures as well as to application for the adjustment of prepayments for those taxes administered by the state tax authorities on behalf of the federal government:

- Taxable persons who can be shown to be directly and significantly affected by the impact of the coronavirus may - until 31 December 2020 – submit applications for the deferral of those taxes already due or becoming due up to that date, which are administered by the state financial authorities on behalf of the federal government, (income tax, corporation tax, solidarity surcharge and VAT). In addition, applications for the adjustment of prepayments on income and corporation tax may be made.

- The decree further states that such requests may not be refused on the ground that the taxpayer cannot prove in detail the value of the damage incurred. The examination of the conditions for deferrals is not to be subjected to strict requirements. As a rule, interest on deferral can be waived.

- However, Section 222 Sentences 3 and 4 General Tax Code will remain unaffected. These provisions state that tax claims against the taxpayer may not be deferred if a third party has to pay the tax for the account of the taxpayer, in particular in cases where the tax is to be withheld and remitted (e.g. payroll tax – with the exception of lump-sum payroll tax – and withholding tax). A deferral of a tax liability claim is not available to persons liable to pay where that person has withheld tax or collected amounts containing tax.

- Applications for the deferral of taxes due after 31 December 2020 and applications for the adjustment of prepayments relating to periods after 31 December 2020 will have to be specifically justified.

- Where the tax office is informed by a taxpayer subject to enforcement proceedings or where it otherwise becomes aware, that the taxpayer is directly and not insignificantly affected, no enforcement should be executed for periods up to and including 31 December 2020. This should apply to all taxes in arrears or due by that date. It applies to all taxes covered by this circular.
- Where in the period from the publication of this circular to 31 December 2020, late payment penalties are charged, these are to be waived.

In contrast the general principles will continue to apply to those who are indirectly affected by the coronavirus. It should be noted that the circular does not contain any guidance on what "indirectly affected" means.

Decree of the Supreme Tax Authorities of the Länder

Also, on 19 March 2020 the Supreme Tax Authorities of the Länder also released a degree in relation to the effects of coronavirus in relation to the assessment of the trade tax
base for the purpose of trade tax prepayments. The decree states:

- Tax offices can adjust the trade tax base for purposes of trade tax prepayments, where they become aware of a change of circumstances in the current period of assessment. This will apply where the tax office is adjusting the amount of income tax or corporation tax prepayments payable.

- Against this background, taxpayers who can show that they are directly and significantly affected by the coronavirus may - until 31 December 2020 -apply for a reduction of the trade tax base for trade tax prepayment purposes. The application is to include a description of the circumstances applicable to the taxpayer.

- These applications may not be refused purely on the grounds that the taxpayer is not able to prove the value of the damage suffered in detail.

- Where the tax office issues an assessment of the trade tax base for trade tax prepayment purposes, the relevant municipality will be bound by this when assessing the trade tax prepayments.

- Where a taxpayer is affected by the coronavirus and wishes as a result to apply for a deferral or waiver of trade tax, he must make his application to the responsible municipality. An application for deferral/waiver of trade tax is only to be made to the local tax office where the determination and collection of trade tax has not been transferred to the municipality.

Source:
1. Federal Ministry of Finance circular (GZ : IV A 3 - S 0336/19/10007 :002 - DOC 2020/0265898) published on 19 March 2020.
2. Decree of the Supreme Tax Authorities of the Länder on the trade tax measures to combat the effects of the Coronavirus (COVID19/SARS-CoV2) published on 19 March 2020
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Tax Court Cases

Tax exemption for group restructurings under Section 6a Real Estate Transfer Act: Supreme Tax Court applies a broad interpretation.

The tax exemption from real estate transfer tax (RETT) in the event of restructuring within a group under Section 6a of the Real Estate Transfer Tax Act (RETTA) does not constitute State Aid prohibited by EU law. It can also apply to cases where a dependent company is merged with a controlling company. This was decided by the Supreme Tax Court in its ruling of 22 August 2019 – II R 18/19, published on 13 February 2020.

Background

For more than five years, the appellant had been the sole shareholder of a subsidiary that was merged into it. As a result, the real estate of the subsidiary was transferred to the appellant. The tax office took the view that the conditions for a RETT exemption under Section 6a RETTA had not been met. In contrast, the tax court decided that the RETT exemption was available and the tax office appealed the decision.

Judgment

The Supreme Tax Court confirmed the tax court's decision. It stated that according to Section 6a Real Estate Transfer Tax Act RETT is not levied on certain taxable acquisitions arising by reason of a restructuring (e.g. merger). One of the prerequisites was that a controlling company and a dependent company are involved in the restructuring process and that the controlling company's participation in the dependent company must be at least 95% in the five years before the transaction and the five years after. The European Court of Justice (ECJ) has ruled, the tax exemption granted by Section 6a RETTA did not constitute State Aid prohibited by EU law.

Contrary to the view of the tax authorities, the Supreme Tax Court considered that the merger of the subsidiary into the appellant could benefit from the RETT exemption. The fact that the controlling company could no longer hold a share in the merged subsidiary following the restructuring and thus meet the 5-year post transaction holding period did not harm its entitlement to the RETT exemption. The holding periods set out in Section 6a Sentence 4 RETTA need only be observed to the extent that they can in fact possibly be observed as a result of the restructuring process.

Source: Judgment of 22 August 2019 II R 18/19, published on 13 February 2020

Also interesting…

In contrast to the Federal Ministry of Finance, the Supreme Tax Court also applied a broad interpretation of the RETT exemption in the taxpayer's favour in five other proceedings (II R 15/19, II R 16/19, II R 19/19, II R 20/19 and II R 21/19). This applied both to the interpretation of the term "controlling enterprise" used in the provision and to the question of which restructurings are covered by the RETT exemption. Only in one case (II R 17/19), did the Supreme Tax Court did not consider that the conditions for the RETT exemption had been met.

In case II R 15/19 (decision of 21 August 2019 also published on 13 February 2020) the Supreme Tax Court ruled that the RETT exemption could be applied where the real-estate-holding subsidiary was merged into a controlling enterprise, where the "controlling enterprise" an individual who was a registered trader. The Court ruled that the RETT exemption applied to all legal entities within the meaning of RETTA which are economically active. It is irrelevant whether the participation in the dependent company is held as private or business assets.

In cases II R 16/19 and II R 21/19 (both decisions of 21 August 2019 also published on 13 February 2020) the Supreme Tax Court ruled that the fact that the controlling company could not have held a 95% share in the subsidiary in the 5 years prior to the restructuring because the subsidiary had been newly established through a spin-off did not harm the entitlement to the RETT exemption. The holding periods set out in Section 6a Sentence 4 RETTA need only be observed to the extent that they can in fact possibly be observed as a result of the restructuring process.

In case II R 19/19 (decision of 21 August 2019 also published on 13 February 2020) the Court held that the RETT exemption could be applied in a case where a subsidiary was merged into a sister company – the pre-transaction holding period having been met – where the sole shareholder of both companies was a charitable trust. The Court ruled that ruled again that the RETT exemption applied to all legal entities within the meaning of RETTA which are economically active. There was no requirement in Section 6a RETTA that the controlling enterprise had to be an entrepreneur within the meaning of the VAT Act.

The case II R 20/19 (decision of 21 August 2019 also published on 13 February 2020) also related to a merger where – again – it would have been impossible for the controlling company to hold shares in the subsidiary in the 5 years post-restructuring because the subsidiary had been merged into the controlling company and thus no longer existed. The Court again came down in favour of the taxpayer and allowed the RETT exemption.

The case II R 17/19 (decision of 22 August 2019 also published on 13 February 2020) was the only case of the seven which the Supreme Tax Court did not rule in favour of the taxpayer. This case involved the merger of two sister companies, whereby the controlling company had held its 100% interest in the transferring subsidiary for the full 5-year pre-restructuring holding period but had held its 95% interest in the absorbing company for less than five years prior to the merger. The Court held that the conditions of Section 6a RETTA had not been met as the holding period must apply to both companies; this was the case even though the absorbing company had been financially, economically and organisationally integrated into the undertaking of the controlling company for at least five years (i.e. but with a holding of less than 95%).

From Europe

ECJ: VAT treatment of medical telephone consultations

In a judgment of 5 March 2020, the European Court of Justice (ECJ) dealt with the question whether telephone advisory services provided by a company on behalf of state health insurance funds through so-called "health coaches" may be free from VAT. The ECJ held that VAT exemption may indeed apply, provided the services have a therapeutic or curative objective and are of a comparable level of quality as the services provided by other suppliers in this field.

Background

In September 2018 the Supreme Tax Court asked the ECJ to determine whether the medical advice provided by an entrepreneur to insured persons on various health and disease issues by telephone on behalf of state health insurance funds is a VAT-exempt activity under Article 132 (1) on the common system of value added tax (first question submitted) . According to Article 132 (1) "Member States shall exempt the following transactions....(c) the provision of medical care in the exercise of the medical and paramedical professions as defined by the Member State concerned."

Furthermore the Supreme Tax Court wished to know (second question submitted), whether it is sufficient for a qualification in this respect (i.e.as required under EU-law) that the telephone consultations are carried out by "health coaches" (medical assistants, nurses) and that ultimately a doctor is consulted only in about one third of the cases. On behalf of state health insurance funds, the appellant operated a specific "telephone-hotline" to provide medical advice to insured persons. It also conducted patient support programs under which certain insured persons received situation-related information about their medical condition via a medical hotline and based on certain billing data and pathological pictures and symptoms.

ECJ judgment

Consultancy services relating to health and illness provided by telephone may be covered by the VAT exemption rule of Article 132(1)(c) of the Directive if they pursue a therapeutic objective, which is a matter for the national court to examine in detail (first question submitted).

Furthermore, Article 132(1)(a) C of the directive does not, in principle, set additional requirements as to professional qualifications for the nurses and paramedical assistants concerned while providing those services by telephone (second question submitted). However, this would apply only so far as the information and guidance given can be regarded as offering a level of quality comparable to that of the services provided by other suppliers, which is a matter for the national court to determine. The Member

States would ultimately have to ensure that the VAT exemption applies only to medical treatment of a sufficient quality in the field of human medicine. The latter applies irrespective of the method of communication chosen for providing the medical advice. Finally, the ECJ pointed out that the principle of neutrality must be respected while answering the relevant questions. The principle of neutrality prohibits treating similar and therefore competing services differently in terms of VAT.

It will now be for the Supreme Tax Court to finally decide based on the specific circumstances in the case of the appellant. We will keep you further informed as soon as the case is dealt with and decided by the Supreme Tax Court.

Source: ECJ judgment of 5 March 2020 (C-48/19, X-GmbH)

News in brief	
COVID 19: Summary of measures introduced to combat the effects of the coronavirus (COVID 19/SARS-CoV-2)	This article is intended to provide an overview of the current measures taken in connection with the spread of the coronavirus, particularly in tax law. A: Material on tax measures in Germany; B: Measures in other areas in Germany; C: Measures at European level. D: Measures worldwide *https://blogs.pwc.de/german-tax-and-legal-news/2020/04/01/covid-19-summary-of-measures-introduced-to-combat-the-effects-of-the-coronavirus-covid-19-sars-cov-2/*
Entrepreneurial status of members of the Supervisory Board	Where a member of a supervisory board receives a non-variable fixed salary for his services and as a result does not bear any risks vis-à-vis his remuneration, he is not acting as an entrepreneur. This was decided by the Supreme Tax Court in its ruling of November 27, 2019 – (V R 23/19 / R 62/17), thereby abandoning earlier case law. https://blogs.pwc.de/german-tax-and-legal-news/2020/02/07/entrepreneurial-status-of-members-of-the-supervisory-board/
Supreme Tax Court discontinues proceedings with regard to the referral to the European Court of Justice on the State Aid character of tax privilege for public undertakings	The Supreme Tax Court had asked (decision of 13.03.2019 – I R 18/19) the European Court of Justice (ECJ) whether Article 107(1) Treaty on the Functioning of the European Union (TFEU) was to be interpreted as meaning that State Aid existed where, under the rules of a Member State, (permanent) losses – incurred by a company from an economic activity maintained without receiving sufficient remuneration to cover its costs – are in principle to be regarded as hidden dividend distributions and accordingly may not reduce the profit of the company, but, in the case of companies in which the majority of voting rights are held directly or indirectly by legal persons governed by public law, those legal consequences are not to be applied to permanent losses arising if such "public" corporations carry on the activities for reasons of transport, environmental, social, cultural, educational or health policy. https://blogs.pwc.de/german-tax-and-legal-news/2020/02/12/supreme-tax-court-discontinues-proceedings-with-regard-to-the-referral-to-the-european-court-of-justice-on-the-state-aid-character-of-tax-privilege-for-public-undertakings
Deductibility of double-household expenses incurred in advance	Expenses for an apartment are only deductible as double-household expenses incurred in advance if the taxpayer has made a conclusive decision to use the apartment in the future as part of a double-household deductible for tax purposes. Whether this is the case must be decided through an overall assessment of the objective circumstances of the individual case. https://blogs.pwc.de/german-tax-and-legal-news/2020/02/14/deductibility-of-double-household-expenses-incurred-in-advance/

No correction of incorrect income tax assessment in the event of correct declaration of a capital gain by the taxpayer	The Supreme Tax Court held in its ruling of 10 December 2019 (IX R 23/18) that a final tax assessment can no longer be corrected by the tax office under Section 129 of the German Tax Code ("GTC" – obvious errors while issuing administrative acts) if the incorrect assessment of a capital gain which was correctly declared by the taxpayer under 17 of the German Income Tax Act was not based on a mere "mechanical error". https://blogs.pwc.de/german-tax-and-legal-news/2020/02/06/no-correction-of-incorrect-income-tax-assessment-in-the-event-of-correct-declaration-of-a-capital-gain-by-the-taxpayer/

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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

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