

TP Perspectives – Newsflash

Dear Readers,

On Friday, December 16, 2022, the German Federal Council approved the law already adopted by the German Parliament to implement Council Directive (EU) 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation and modernizing the law on tax procedure. Among other things, it includes amendments to the German Fiscal Code and the Introductory Act to the Fiscal Code to speed up tax audits. The legislator's goal is to ensure that tax audits are started and completed earlier in the future. In order to achieve this, the maximum duration of tax audits is generally limited to five years.

This is offset by regulations to tighten taxpayers' obligations to cooperate in the field of transfer pricing, in particular with regard to the submission of transfer pricing documentation and new sanctions for violations of obligations to cooperate. The amendments are to come into force as early as January 1, 2023 but are to apply for the first time in tax audits for the 2025 assessment period or in tax audits in which the audit order was announced after December 31, 2024.

Taxpayers have time to adapt to the new regulations - especially with regard to the submission of transfer pricing documentation. Nevertheless, there is an urgent need for action in order to align the company's internal compliance processes with the new legal requirements. In order to avoid violations of the duty to cooperate and potential sanctions, careful preparation for the tax audit will become even more important for taxpayers in the future and, in this context, in particular the timely preparation and availability of transfer pricing documentation.

The following new legal regulations have now been adopted:

30-day period for submission of transfer pricing documentation

In accordance with the newly inserted Section 90 (4) of the German Fiscal Code, the tax authorities may request the submission of transfer pricing documentation at any time in the future - i.e., outside of a tax audit. Cases of application in this context are, for example, the request for submission in the context of advance pricing agreements (APA).

In addition, German compliant transfer pricing documentation (Section 90 (3) of the German Fiscal Code) must now be submitted not only upon explicit request by the tax auditor, but always within a period of 30 days from the start of a tax audit, i.e., upon notification of the audit order. In practice, this will mean in many cases that taxpayers will have to keep the transfer pricing documentation on hand since, in many cases, the 30-day period will hardly be sufficient to prepare the obligatory documentation, or at least not to prepare it in the required quality.

Limitation of assessment no later than five years after start of tax audit

The limitation of the duration of tax audits to a maximum of five years is achieved by means of a new provision on the statute of limitations for tax assessment. According to the current legal situation, the commencement of the limitation period for the assessment of tax is suspended at the start of the tax audit (Section 171 (4) AO). According to the new regulation, the statute of limitations for the assessment of tax liability is now to begin no later than five years after the notification of the audit order. As a result, taxpayers are

generally protected from excessive tax audits, even if the period of five years is still very generous. In order to evaluate this new regulation, however, it must be taken into account that only a few tax audits already last more than five years. In addition, several exceptions are included. The five-year period is extended, for example, if the audit is interrupted or postponed at the taxpayer's request, if intergovernmental administrative assistance is used before the five-year period expires (in particular, if a joint audit is initiated), or if the taxpayer causes a delay in the tax audit by violating his duties to cooperate.

The general limitation of the duration of a tax audit to five years, which is in many cases of no practical relevance, is also accompanied by a significant expansion and tightening of the taxpayer's duty to cooperate.

Qualified request for cooperation

The new Section 200a of the German Fiscal Code introduces the elements of a "qualified request for cooperation", a "delay in cooperation" and a "fine for delay in cooperation". The tax audit can request the taxpayer to cooperate (for example, by submitting certain documents) by means of an administrative act that must be issued in writing and accompanied by instructions on how to appeal (so-called qualified request for cooperation). This is also possible in the past, but not explicitly regulated. What is new is that a violation of a qualified request for cooperation is punishable by a "fine for delay in cooperation". It amounts to 75 euros for a maximum of 150 days. However, in the case of repeated delays in cooperation or high economic capacity of the taxpayer, a surcharge of up to 25,000 euros per calendar day for a maximum of 150 days can be imposed.

The introduction of the qualified request for cooperation and the delay fee increases the pressure to comply with requirements of the tax audit. On the other hand, the qualified cooperation requirement as a contestable administrative act offers taxpayers an opportunity to seek legal protection before the fiscal courts during the tax audit and to have fundamental questions about the scope of the duty to cooperate - which often depends on material questions about the correct determination of transfer prices - clarified at an early stage.

Extension of notification and correction obligations

The obligation to correct tax returns is extended (Section 153 of the German Fiscal Code). The newly introduced paragraph 4 states that tax returns that have already been filed but were not the subject of a tax audit must be corrected if the facts underlying the incontestable audit findings of a tax audit also lead to a change in the basis of assessment in these tax returns. The taxpayer must therefore independently examine the results of the tax audit and their effects on subsequent assessment periods and, if necessary, implement them in correction statements. This applies in particular to the audit findings on transfer pricing, as these often relate to permanent matters, i.e., supplies or services that continue after the audit period.