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News in brief

Official Pronouncements

Federal Cabinet releases draft bill for post-covid stimulus package

The German Federal Cabinet has released the draft bill on the crisis management package aimed at mitigating the economic impact of the COVID 19 pandemic. The bill is due to have its first reading at the Bundestag on 19 June 2020, with the 2nd /3rd readings and the final decision of the Bundesrat expected on 29 June 2020. On this timetable the publication in the Federal Law Gazette should occur on 30 June 2020, with the law becoming effective on 1 July 2020.

The bill contains a number of amendments to the original draft document of the Federal Ministry of Finance as well as some additions.

Summary of the tax measures:

- Statutory increase of the amount of losses available for tax carry-back for the years 2020 and 2021 to a maximum of EUR 5 million or EUR 10 million (for jointly assessed couples); in this regard a mechanism is being introduced to allow for this carry-back to become financially effective in the 2019 tax return:
    - **<u>Adjustment of tax pre-payments for the 2019 assessment period:</u>** A **flat-rate deduction of 30%** of the total amount of income on which the tax base for the 2019 pre-payments was calculated will be available upon application. The prerequisite is that the pre-payments for 2020 have been reduced to €0. The temporary loss carry-back will not apply to income from

employment under Section 19 Income Tax Act ("ITA"). As an alternative to the flat-rate deduction of 30%, the total amount of income, on which the 2019 pre-payment assessments were based, may instead be **reduced by a higher loss carry-back,** provided the taxpayer can produce evidence of the probable loss carry-back. According to the explanatory memorandum to the government draft (page 26/27), such evidence should be provided through detailed documentation (e.g. on the basis of business management analyses). Neither the lump-sum reduction nor the reduction by a higher amount established by the taxpayer may exceed € 5 million or € 10 million (for jointly assessed couples). The provision will apply to the 2019 period of assessment. According to the explanatory memorandum issued with the original draft proposal (as of 10 June 2020 – page 25), the provisional loss carry-back for 2020 is to replace the flat-rate loss carry-back of 15% set out on the Federal Ministry of Finance letter of 24 April 2020 (in relation to trading/agricultural/self-employed/rental income), which is to be repealed when the bill becomes law.

  - **Provisional loss carry-back for 2020:** Upon application an amount of **30% of the total amount of income for the 2019 assessment period can be deducted as a loss carry-back from 2020** when the 2019 tax is assessed, provided the pre-payments for the 2020 period of assessment have been reduced to €0 (provisional loss carry-back for 2020). Income from employment under Section 19 ITA contained in the total amount of income will however be excluded. Instead of the flat-rate reduction of 30%, **a higher loss carry-back will also be permitted** provided the taxpayer can provide appropriate evidence for this higher amount. According to the explanatory memorandum to the government draft (page 27), such evidence should be provided through detailed documentation (e.g. on the basis of business management analyses). The provisional loss carry-back may not exceed the maximum amounts of € 5 million or € 10 million (for jointly assessed couples). Where the reduction of pre-payments for the 2019 period of assessment, which was based on an expected loss carry-back for 2020, subsequently leads to additional tax payments when 2019 tax is assessed, the taxpayer may apply for a tax deferment, whereby interest on the deferral will not be levied. Where the taxpayer applies for a loss carry-back under these provisions he will be obliged to file an income tax return for the 2020 period of assessment. Within the framework of the 2020 assessment procedure, the assessment for 2019 will then be adjusted to take into account the loss actually incurred in 2020 which is available for carry-back.

- Increase of the **factor under Section 35 ITA** for the calculation of a reduction of income tax in relation to trading income to four times the trade tax base, available for the 2020 period of assessment;
- **Increase** of the tax-exempt amount of **trade tax add-backs to EUR 200,000**;
- Introduction of a **degressive depreciation** to the factor of 2.5 compared to the currently applicable depreciation up to a maximum of 25% per annum for movable fixed assets in the fiscal years 2020 and 2021;
- **Reduction of the VAT** rate from 19% to 16% and from 7% to 5% for a limited period from 1.7.2020 to 31.12.2020;
- **Postponement of the due date for import VAT** to the 26th of the following month;
- A **bonus of €300** will be paid for each child entitled to **child benefits** (payable in two parts in September and October 2020);
- Limited to two years, the tax relief available to **single parents** will **increase** from €1,908 to €4,008 for the years 2020 and 2021;
- With regard to the taxation of the private use of company cars, the **maximum amount for the gross li**st price is **increased** from €40,000 to €60,000, where the vehicle has **no carbon dioxide emissions** per kilometre driven;
- **Increase i**n the assessment basis for the **tax research allowance** under the Research Allowance Act to up to € 4 million per company. The increase is effective from 1.1.2020 retroactively and is available until 31.12.2025.
- In order to avoid tax disadvantages due to corona-related reductions in investment, the **deadlines** for the use of investment deductions under **Section 7g ITA** (promotion of small and medium-sized businesses through investment

deductions and special depreciation), which were originally to expire in 2020, are to be **extended by one year.**
- The **reinvestment periods under Section 6b ITA** (rollover relief) will also be temporarily **extended by one year**. In addition, the Federal Ministry of Finance will be authorized to grant a further extension of the deadline by means of a statutory instrument with the consent of the Bundesrat where this appears necessary due to the continuing effects of the COVID 19 pandemic.
- With regard to **limitation periods** under Section 376 of the General Tax Code, the **time limit for the prosecution** of offences will be **extended** to two and a half times the legal period of limitation. Furthermore, Section 375a General Tax Code will be introduced for cases of tax evasion; under this new provision, a **confiscation of illegally obtained proceeds** can be imposed under Section 73 of Criminal Code, in cases where statute-barred tax claims have not yet been fulfilled. The new provision is intended to eliminate unequal treatment. In future, tax claims will be treated in the same way as civil claims in criminal confiscation proceedings.

See also information on the stimulus package on the Federal Ministry of Finance website:
https://www.bundesfinanzministerium.de/Web/EN/Home/home.html

Tax Court Cases

Supermarket discount model "Membership" is subject to the standard tax rate VAT

In its judgment of 18 December 2019 (XI R 21/18) published on 22 May 2020, the Supreme Tax Court ruled that the granting of a right to purchase goods at a reduced price (in the form of a "membership") constitutes an independent service for VAT purposes and not just a service ancillary to the subsequent sale of goods. Even if the supermarket sells goods that are subject to both the standard tax rate (19%) and the reduced tax rate (7%), the standard tax rate is to be applied to the membership fee.

In 2010, the appellant operated several organic supermarkets in a major German city under a common umbrella brand. In the stores, customers could either buy the goods at the normal price or at a reduced price as a "member". For the "membership", customers paid a fixed monthly fee (depending on income and marital status of between approximately € 10 and € 20).

The appellant assumed that the membership fee was a consideration for the subsequent sale of goods arguing that the granting of the right to a discount should be regarded as a necessary intermediate step in the supply of goods and thus as an ancillary service. Since more than 81% of the discounted goods supplied were subject to the reduced tax rate (e.g. for food sales), the appellant had divided the membership fees in a ratio corresponding to both tax rates. The tax office and the tax court, on the other hand, assumed that the right to a discount was a separate independent service subject to the standard tax rate.

The Supreme Tax Court confirmed the view of the tax office and the tax court. Insofar as a payment was made for the appellant's offer to supply goods at a reduced price, the appellant had provided an independent service in which the customers had a special interest. In particular, a monthly flat-rate membership fee was not a down payment for future supplies of goods, as the "whether and how" of future supplies was not sufficiently determined when the "membership" was concluded.

Economically the Supreme Tax Court's ruling gives rise to an increase in the supermarket-operator's costs for any discount models offered. The consumer is not directly affected. The Supreme Tax Court did not make any comments on other discount models in which, for example, the membership fee depends on the customer's turnover or is offset against the purchase price of the goods. Nor did the Supreme Tax Court have to decide whether the case would have had to be assessed differently if the discount had only applied to goods subject to the reduced tax rate of 7%.

Source:
Judgment of the XI Senate of 18.12.2019 – XI R 21/18 – published on 22 May 2020

Seizure of Corona emergency aid is inadmissible

The seizure of a bank account by the tax office, where the account also includes amounts received as Corona emergency aid, is unlawful. This was decided by the Münster Tax Court in a procedure for interim relief on 13 May 2020 (Az. 1 V 1286/20 AO), published in a press release on 19 May 2020.

The applicant operates a repair service and generates trading income. Due to the effects of the Corona Pandemic, the applicant was not able to accept repair orders from customers. On 27 March 2020, in order to keep his business operating, he applied to the state of North Rhine-Westphalia for immediate Corona aid available to micro-entrepreneurs and self-employed. The local government granted aid in the amount of EUR 9,000 on the same day and transferred the money to his bank account. As this account was encumbered with a seizure and collection order issued by the tax office in November 2019 for outstanding VAT debts from 2017 to 2019, the bank refused to pay out the Corona emergency aid. The applicant therefore requested the temporary suspension of the seizure of the bank account within the scope of an interlocutory injunction.

The 1st Senate of the Münster Tax Court granted the application and ordered the tax office to suspend the attachment of the current account until 27 June 2020 and to revoke the attachment and collection order. There was a need for the legal protection of a court application because Corona emergency aid was not covered by civil law provisions on protection against seizures. Furthermore, the enforcement and maintenance of the attachment and confiscation order put the applicant at an unreasonable disadvantage. An attachment of the current account credit balance, which had been increased by the Corona emergency aid, interfered with the purpose for which the aid had been granted. The Corona emergency aid was provided exclusively to alleviate the financial difficulties of the affected business arising in connection with the COVID 19 Pandemic. It was not designed to satisfy creditors' claims which arose before 1 March 2020 and thus did not have the purpose of satisfying tax office claims arising before 1 March 2020. Since the Corona emergency aid had been granted for a period of three months by the decision dated 27 March 2020, enforcement was to be suspended until 27 June 2020.

From Europe

EBA: Report and Action Plan on dividend arbitrage trading schemes such as Cum/Ex and Cum/Cum within the EU

On 12 May 2020, the European Banking Authority – EBA – published its report on the measures and reactions of the addressed authorities in the EU Member States on dividend arbitrage trading, such as Cum/Ex and Cum/Cum schemes. The report states that the relevance of dividend arbitrage trading schemes for the risk management of credit institutions is viewed differently. This is due, in particular, to the different tax systems of the Member States. Nevertheless, the EBA concludes that facilitating tax fraud is detrimental to the integrity of the financial system across the EU as a whole. The EBA is therefore presenting an action plan connected to recent legislative changes in the areas of the Capital Requirements Directive (CRD IV/V) and the Anti-Money Laundering Directive. The Action Plan, with steps taken by the EBA itself as well as and other measures suggested by the EBA, complement existing instruments used by competent authorities and credit institutions.

Background
As part of the European System of Financial Supervision, the EBA's mission is to safeguard financial stability and ensure the integrity of the banking sector through

harmonized supervision and regulation of banks within Europe. In particular, the EBA formulates draft regulatory and implementing technical standards, issues guidelines (EBA guidelines) and recommendations to the competent authorities and credit institutions. In addition, the EBA investigates inadequate application of EU law by national supervisors and acts as an independent advisor to the European Parliament. A key priority for the EBA in 2020 is to strengthen and increase consistency in anti-money laundering supervision.

On 28 November 2018, the EU Parliament mandated the EBA and the European Securities and Markets Authority (ESMA) in the form of a resolution to review the players, significance and possible breaches of national and European law with regard to dividend arbitrage transactions such as Cum/Ex and Cum/Cum schemes. From the point of view of the EBA, the objective was to:

- To assess potential threats to the integrity of financial markets and national budgets,
- to determine the nature and scale of the players in these arbitrage trading schemes,
- to assess whether there have been infringements of national or EU law,
- to evaluate the measures taken by the financial supervisory authorities in the Member States, and
- to make appropriate recommendations for reform and action to the competent authorities concerned.

The EBA then launched a first round of discussions in December 2018. It was found that few national supervisory authorities had developed an awareness of these trading schemes and were therefore more likely to assume that they were a matter for the tax authorities.
Nevertheless, the relevance for the supervisory authorities was seen on two levels: on the one hand, with regard to the prevention of money laundering and the financing of terrorism where such offences have been committed and on the other, with regard to general governance as an aspect of prudential supervision.

The Report

The EBA then decided to conduct two surveys in 2019. One survey in May 2019 was ad-dressed to the authorities responsible for combating money laundering and terrorist financing. It asked whether dividend arbitrage trading schemes were treated as tax offences in the Member State concerned and whether the treatment of the proceeds of the trading schemes was treated as money laundering. A second survey in July 2019 was ad-dressed to the competent supervisory authorities. The main question that arose here was to what extent the participation of credit institutions in such trading schemes is compatible with the requirements of their internal governance.

Not all authorities replied and those who did had not always dealt with the risks of such trading schemes. The EBA identified one rea-son for this in the different tax systems of the Member States.

In only four Member States did the competent authorities verify the way in which credit institutions deal with such trading schemes as part of their ongoing inspections.

Only one competent authority has issued guidelines for the detection of tax offences.

Most of the authorities responsible for combating money laundering and terrorist financing had not taken measures in relation to the proceeds of dividend-end arbitrage transactions. Some are waiting for the investigation results of the tax authorities or public prosecutors.

From the responses from supervisors, the EBA concluded that few of them have linked internal control system (ICS) weaknesses to more general governance arrangements and tax offences. Few authorities in the Member States have also considered tax offences as a money laundering and terrorist financing risks, irrespective of whether these tax offences have been committed domestically or abroad. In particular, it should be noted that dealing with the proceeds of tax offences may constitute money laundering, regardless of where the offence was committed. The EBA also noted that cooperation between the various supervisory authorities or between the tax authorities and the supervisory authorities only took place in a few isolated cases.

Action Plan

In response, the EBA expects a holistic approach in the future. National anti-money laundering authorities should be allowed to approach tax authorities and ask whether dividend arbitrage trading schemes constitute tax offences. If so, they should approach the relevant national supervisory authorities and report these tax offences. However, this re-quires cooperation from the authorities, which has not yet been taken into account in the CRD. Cooperation agreements may be necessary according to the report.

In addition, the EBA announced its own steps. A ten-point plan will adjust EBA guidelines on internal governance and the Supervisory Re-view and Evaluation Process (SREP).

On the basis of adapted EBA guidelines, credit institutions will, for example, be obliged to define principles and conduct in their internal governance procedures, in particular with respect to tax offences through arbitrage.

In addition to the effectiveness of internal controls, the focus is also on the EBA guidelines for the assessment of managerial suitability and, for example, the EBA guidelines for risk-based money laundering monitoring. All the proposed adjustments share the common view that greater attention should be paid to risks arising from tax offences. These measures should essentially be completed by 2021. In addition, the EBA announced that an investigation will be carried out in accordance with Article 22 of the EBA Regulation with regard to compliance with the above-mentioned requirements. However, no target date has been set for this.

First Estimate

The report and the Action Plan put Cum/Ex and Cum/Cum schemes on an equal footing and thus pose practical challenges. At least from a German point of view, it is important to differentiate between the individual dividend- arbitrage trading schemes in terms of tax law. It makes a difference whether the transactions are aimed at optimizing withholding tax (Cum/Cum) or if they are aimed at a multiple imputation of tax which had been withheld only once (Cum/Ex). Cum/Cum trading schemes, which were previously known in essence as "dividend stripping", are regarded by the tax authorities in certain constellations as abusive structuring under Section 42 Ger-man Fiscal Code (see BMF letter of 17 July 2017). However, they do not in themselves constitute tax evasion. Therefore, the handling of proceeds from Cum/Cum trading schemes should not constitute money laundering under German law.

In addition, in view of the different taxation systems, the assessment in many member states depends on the specific individual case and court decision. A framework for individual treatment can only be developed at the European level. These include the existing instruments of administrative cooperation in the field of direct taxation. In this context, the DAC 5 Directive provides for access by tax authorities to information, procedures, documents and mechanisms for combating money laundering. It is understandable that EBA is now also encouraging the creation of conditions for intensive support by the tax authorities for the bodies responsible for combating money laundering. The report and the Action Plan do not disclose the individual countries where information is already being exchanged between agencies and authorities.

It is to be welcomed that, from a supervisory point of view, greater clarity is being provided on the governance aspect of tax-induced trading schemes.

For some years now, credit institutions within the EU have been attaching increasing importance to tax compliance management. The German market has certainly taken on a pioneering role here, where tax compliance management systems have been intensively developed and optimised for several years. And not least from the perspective of a sustainable tax function, good tax governance should become even more important. Good tax governance can be expressed, for example, in regular consultations of the tax management with the risk management and compliance functions. In this way, tax compliance management is synchronized with the supervisory review and evaluation processes. This considerably reduces the risk of a credit institution being instrumentalised for tax offences and unintentionally carrying out money laundering activities.

In recent years, credit institutions in Germany have also implemented regulatory measures aimed at clarifying and avoiding undesirable arbitrage.

These include for purposes of risk management, for example, extended retention periods for documents and chat protocols, which were recorded in the relevant trading system. In this way, internal and external auditors, especially in the trading area of a credit institution, are provided with better information and a preventive effect is achieved. In addition to any internal requirements of the credit institutions to limit arbitrage trading schemes shortly before and after the dividend distribution date, these measures include the use of IT-supported monitoring systems for accounts and market conformity checks for transactions. To combat money laundering and terrorist financing, credit institutions also operate an account retrieval system (Section 24c German Banking Act). The BaFin and tax authorities have access to the data in this ac-count retrieval system in order to fulfil their supervisory tasks and their duties under the Money Laundering Act.

In addition, the mandatory disclosure of a credit institution's tax expenses broken down by individual countries, already introduced under CRD IV, should be mentioned. Manda-tory disclosure should make it more difficult for credit institutions to reduce the tax burden of cross-border transactions unnoticed by the public.

In the view of the EBA, it is therefore plausible to require credit institutions to take a holistic approach to arbitrage trading schemes in addition to individual measures. However, the implementation of the Action Plan will be a challenge due to the different tax systems in the EU Member States. Moreover, the legislative bases specifically cited by the EBA refer explicitly to the fight against money laundering and terrorist financing. Thus, only arbitrage practices that are relevant to criminal tax law can be subsumed under this heading. This depends on the individual constellation and is often controversial. The courts regularly have the last word here. For cross-border credit institutions in particular, this means that they must constantly review and update their tax governance and risk management systems.

New EU rules on the mutual recognition of goods lawfully marketed in another Member State

On 19 April 2020 simplified rules entered into force for the mutual recognition of goods in the European internal market that will enable companies to sell their products more easily throughout the EU.

Under the new regulation on the mutual recognition of goods, companies can submit a voluntary "mutual recognition declaration" to prove to competent national authorities that their products are lawfully marketed in another Member State. If companies are denied or restricted market access for their products, they can contest such decisions in a non-bureaucratic way through SOLVIT, the European Commission's network for such problems. In addition, Product Contact Points in each Member State provide online information on national technical rules.

In principle, products for which there are no EU-wide rules can be sold freely within the Internal Market. However, there have often been obstacles to the free movement of goods. For example, companies wishing to sell shoes, tableware or furniture in another Member State were often faced with delays and additional costs. The new rules aim to remove these obstacles.

Source:

Regulation (EU) 2019/515 of the European Parliament and of the Council

of 19 March 2019

News in brief	
European Commission proposes postponement of DAC 6 rules due to Coronavirus crisis	On 8 May 2020 the European Commission proposed deferring certain deadlines for filing and exchanging information under the Directive on Administrative Cooperation (DAC). *https://blogs.pwc.de/german-tax-and-legal-news/2020/05/13/european-commission-proposes-postponement-of-dac-6-rules-due-to-coronavirus-crisis/*
Government releases draft Corona – Tax Assistance Bill	At its meeting on 6 May 2020, the Federal Cabinet adopted the Corona Tax Assistance Bill, which – with the exception of editorial changes – essentially corresponds to the Federal Ministry of Finance’s original formulation. The only change worth noting here is an addition to the explanatory memorandum on the tax exemption on subventions by employers to reduced hours compensation payments and seasonal reduced hours compensation payments vis-à-vis corrections to salary withholding tax deducted prior to the Act taking effect. *https://blogs.pwc.de/german-tax-and-legal-news/2020/05/08/government-releases-draft-corona-tax-assistance-bill/*
COVID 19: Summary of measures introduced to combat the effects of the coronavirus (COVID 19/SARS-CoV-	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/*

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