PKF

Newsletter

Key Issue:
The concept of a permanent establishment or fixed establishment in VAT law

10|20

Dear Readers,

There are frequently small yet subtle differences between the individual types of tax in terms of concepts and requirements. In the Key Issue for this edition we have provided a detailed presentation on the distinction between **permanent establishments for VAT purposes and for profit tax purposes**, especially because, in turn, this frequently has implications for - often not easily identifiable - consolidated VAT groups.

Next up, in the tax section, we have a review of the **Federal Ministry of Finance's draft guidance on the application of Section 8d of the German Corporation Tax Act**. This exemption provision, which is subject to an application, allows you to salvage losses that have not already been spared via the corporate group and hidden reserves clauses. Subsequently, we address the younger generation and outline the **tax obligations of bloggers and influencers**.

This is then followed by the second part of an article that is more likely to be of interest to the older generation. If a **gift was made with reservation of usufruct** and the asset that was donated is supposed to be sold then the parties would normally extinguish the usufructuary rights. In our last newsletter, we described the legal classification of a surrogate and gifting with the reservation of usufruct. In this edition, we discuss the effects of a waiver and the granting of a surrogate. We conclude our Tax section with the very latest **Federal Ministry of Finance circular**, from 18.9.2020, on the topic of **corrections to an invoice with retroactive effect** with which the fiscal authority has finally accepted current case law.

In our Legal section, we kick off with two coronavirus-related reports. First of all, we distinguish between cases where employees who **return from a holiday in a coronavirus risk area** can then expect their **wages and salaries to continue being paid**. Secondly, we go into detail about the potential need to make adjustments to **living wills** in order to make them **coronavirus-proof**. The third report deals with the issue of the **continuing liability for a partner who resigns** - this can go further than is generally assumed.

The source selected for the impressions in this October issue is in keeping with the season, namely, wine growing in Germany.

We hope that you will find the information in this edition to be interesting.

Your Team at PKF

Volkach on the Main, pilgrimage church Maria im Weingarten

Cover image: Rems Valley, Wuerttemberg

Key Issue

The concept of a permanent establishment or fixed establishment in VAT law

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TAX

RAin/StBin [German lawyer/tax consultant] Antje Ahlert

The concept of a permanent establishment or fixed establishment in VAT law

From a VAT perspective, determining whether or not and where a permanent establishment (fixed establishment) exists has a material influence on the question about the extent to which a service is VATable and, if applicable, not exempt from VAT. Taxpayers frequently fail to appreciate that a fixed establishment and a permanent establishment for profit tax purposes are not always identical. A recent Federal Fiscal Court (Bundesfinanzhof, BFH) ruling is a good reason to review whether or not permanent establishments for VAT purposes exist outside of Germany (EU territory or also third countries).

1. New BFH ruling on the concept of a permanent establishment

According to current BFH case law, a business shall be deemed to maintain a permanent establishment or fixed establishment, in any case, if the business has full access to a facility that has a sufficient degree of permanence and displays a structure that, in terms of human and technical resources, enables the respective service to be provided autonomously (BFH ruling from 29.4.2020, case reference: XI R 3/18).

2. The fixed establishment in VAT law

The (German) national concept of a permanent establishment must be interpreted, in conformity with the EU Directive, like the concept of the "fixed establishment". The assumption of a fixed establishment does not require the taxpayer to have there at its disposal staff that are directly employed by the taxpayer or physical resources owned by the taxpayer. However, it is necessary for the taxpayer to have a comparable power of disposition over the human and physical resources.

Kaiserstuh hills!, Ihringen, Breisgau

Therefore, a permanent establishment can also exist if such resources are made available via service providers or the client. This would be the case if the taxpayer

» has free access to the premises,
» is able exert influence on procurement, or alternatively,
» is authorised to issue instructions.

Moreover, the structure has to have a certain consistency.

Interim conclusion: Consequently, the appropriate structure and thus the legal consequences of a fixed establishment could already arise on the basis of a contract.

3. Implications for consolidated VAT groups

A tax group for VAT purposes exists if, within the actual overall circumstances, a legal entity is integrated financially, economically and organisationally into a company. The subordinated legal entity - subsidiary - has to be regarded as being dependent in relation to the superordinated - parent - company. From a VAT point of view, the parent company is the sole business entity.

The effects of a consolidated VAT group are limited to its constituent parts based in Germany. The criterion for determining whether a parent company or a subsidiary is based in Germany or a foreign country is the location of the main office of the management board. If the parent company is based in Germany then its business will include the parent company itself (including the German and foreign fixed establishments) and the German subsidiaries. Foreign subsidiaries as well as permanent establishments for VAT purposes of subsidiaries based abroad are not part of the parent company's business (cf. Section 2.9(6) of the German ordinance on the application of VAT).

Please note: It follows from the above that correctly classifying an entity as a fixed establishment could also have far reaching consequences with respect to internal sales in group companies as well as with respect to the extent of the value added tax group to be declared.

Recommendation

Individual businesses as well as groups of companies should check to see whether or not foreign permanent establishments are present. This is because a potentially erroneous classification would entail VAT consequences both in Germany and abroad. Besides paying potentially no VAT or too much VAT, these could also include offences that are punishable with fines or consequences under criminal law for tax offences.

StBin [German tax consultant] Sabine Rössler

Loss carry-forwards under Sec. 8d of the German Corporation Tax Act – BMF currently preparing guidance letter on the application of this provision

Since 1.1.2016, it has been possible to apply the exemption in Section 8d of the German Corporation Tax Act *(Körperschaftsteuergesetz, KStG)* to prevent the derecognition of losses in accordance with Section 8c KStG for harmful acquisitions of shareholdings (cf. PKF newsletters 02/2018 and 03/2019). Under this exemption provision, continuity of a corporation's business operations preserves those tax loss carry-forwards that would otherwise be derecognised on account of a harmful change of ownership. The "loss carry-forward tied to the continuation of a business" is assessed separately. In this connection, on 14.8.2020, the BMF *(Bundesministerium der Finanzen)* sent a draft of the explanatory letter to business confederations and associations with a request for their comments.

1. The connection between Section 8d KStG and Section 8c KStG

Sections 8c and 8d KStG coexist as two complementary but separate provisions. Unlike the earlier Section 8(4) KStG (old version), there is no requirement for a connection between the transfer of shares and a structural change at the company level.

Under Section 8c KStG, unused tax losses are derecognised if, within a period of five years, more than 50% of the shares in the corporation are acquired ("harmful acquisition of a shareholding"). This restriction does not apply to

» certain intra-group transfers ("corporate group clause") and also not


Mosel valley near Piesport

» if, at the time of the harmful acquisition, hidden reserves were available ("hidden reserves clause").

Please note: Section 8c(1) clause 1 KStG, which related to acquisitions of shareholdings below 50%, was repealed on 11.12.2018. Applications in accordance with Section 8d KStG under this old legal framework have become invalid; it is unclear how such applications can be withdrawn.

Section 8d KStG contains an exemption provision, subject to an application, for the limitation on the loss deduction in Section 8c KStG that applies in addition to the corporate group and hidden reserves clauses that have already been regulated in Section 8c KStG.

Interim conclusion: Consequently, Section 8d KStG constitutes a possibility to salvage losses that have not already been spared via the corporate group and hidden reserves clauses.

2. Trade tax loss carry-forwards

Section 8d KStG is also supposed to apply to trade tax - the BMF announced that the German federal states would issue the appropriate decrees. Ever since the introduction of Section 8d KStG, it has been unclear, among other things, whether or not an application to continue carrying forward losses may also be filed in cases where the corporation has only trade tax loss carry-forwards. The BMF has asked the confederations for information as to whether or not there are regulatory requirements in this respect.

3. Hidden reserves

Under Section 8c(1) clause 5 KStG, in the event of a harmful acquisition of a shareholding it is possible to avoid a derecognition of losses in the amount of the hidden reserves. Should there be any excess losses then it would not be possible to submit an application in accordance with Section 8d KStG.

Please note: Use of the hidden reserves clause and an application in accordance with Section 8d KStG are mutually exclusive.

4. Concept of business operations

4.1 Definition

The definition of business operations is of key importance for the application of Section 8d KStG. Accordingly, a cor-

poration's business operations will be determined on the basis of its ongoing and complementary activities that are sustained by a consistent aim to generate a profit. Qualitative features such as the product offering, customer and supplier bases, markets or staff qualifications should substantiate the business operations. Here, the BMF guidance letter has taken up the principles of the case law of the German Federal Fiscal Court with respect to the trade tax concept of trading activity and a company's identity.

Please note: The definition of the branch of activity does not matter here.

4.2 Several business operations

Section 8d KStG can be applied only if the corporation maintains a consistent business operation, however, not in the case of several business operations. According to the BMF, a number of a corporation's activities can also be regarded as a business operation. The BMF guidance letter includes numerous examples for this set of issues.

Please note: Following the initial comments from industry, there is nevertheless still a need for clarification; the definition previously envisaged by the BMF could be too narrow.

4.3 Future business operations (observation period)

In the BMF draft guidance, on the basis of many different examples, the events that would lead to the derecognition of an assessed loss carry-forward tied to the continuation of a business are explained, namely,

» if the business operations were to be discontinued
» or other harmful events should occur, e.g.
  · if the business operations were to be suspended or served a different purpose,
  · if the corporation were to start an additional business operation, and much else besides.

5. Filing the application

It should be possible to file an application for one assessment period, solely collectively for all the loss carry-forwards that would otherwise be derecognised under Section 8c KStG. The application should generally be filed together with the tax return for the respective assessment period. In the draft, the BMF has clarified that the application for the use of losses can be rectified or withdrawn up until the tax assessment becomes incontestable or the assessment of the loss carry-forward becomes incontestable.

Please note: It remains unclear which form would have to be selected here.

Outlook

In many respects the BMF has provided clarity and, thus, has simplified the filing of applications in accordance with Section 8d KStG. It should be noted that there is an appeal pending at the German Federal Constitutional Court in respect of proceedings concerning the potential unconstitutionality of Section 8c(1) clause 2 KStG. The outcome of this appeal is likely to have implications for the application of Section 8d KStG.

WP/StB [German public auditor/tax consultant] Dr. Dietrich Jacobs

Influencers and taxes

Anyone who operates in the internet or on social networks as a multiplier for the dissemination of opinions and, thus, as a carrier for advertising and marketing is designated an influencer. The following considerations give an overview of the tax consequences of such an activity.

1. Classification for income tax purposes

Operating, as an influencer, autonomously and in a sustained manner in general commerce with the aim of generating a profit will result in income from **trading activities.** In that case, it is not only the cash income (e.g. such as that from affiliate marketing) that has to be reported as revenues or operating income but also, if applicable, payments in kind or non-cash benefits (e.g. "gifts" for which reviews have to be submitted or free trips).

Then again, business-related expenses (e.g. travel costs) are generally deductible as operating costs, although expenses related to the acquisition/production of any items that can be used for a long time (e.g. computers) have to be spread over the period of their useful lives (depreciation). The resulting net amount from revenues minus expenses or operating income minus costs forms the basis for the income from trading activities ("**profit from commercial operations**").

2. Income tax and trade tax

Generally, the total income that an influencer generates minus certain deductions such as, for example, some personal pension insurance expenditures, will amount to his/her taxable income. If this is more than the basic tax-free allowance (for 2020 this is € 9,408) then this will incur income tax, the solidarity surcharge and, if applicable, church tax. If this amount exceeds € 24,500 then trade tax will become chargeable based on the rounded-down profit from commercial operations adjusted for certain add-ons or reductions.

3. Value Added Tax

Provided that the influencer wants to generate revenues in a sustained manner and autonomously (in contrast to the income tax perspective, the aim of generating a profit is therefore immaterial here) s/he would be a business owner that has to register for VAT. If the influencer's revenues plus the respective amounts of value added tax payable thereon were a max. € 22 k in the preceding year (until 2019: € 17.5 k) and, in the current year, were not expected to exceed € 50 k then s/he would be considered a small business owner. If **small business owners** do not allow themselves to be treated like standard (non-small) business owners then VAT will generally not be collected from them; however, likewise they may not charge VAT on their invoices and may not deduct input tax.

If a small business owner opts for the **standard VAT regime** or if the business exceeds the aforementioned limits then VAT is normally charged on his/her invoices and s/he has to pay VAT to the local tax office; conversely, however, the business owner may generally also claim input tax on the incoming supplies received for the business once s/he has an invoice. In principle, such a business owner has to regularly file advance VAT returns with the local tax office.

More Information: Information about the tax obligations of influencers can be found in the FAQs published (in German) by the Federal Ministry of Finance under the title "Ich bin Influencer. Muss ich Steuern zahlen?" [I'm an influencer. Do I have to pay tax?] on its website at www.bundesfinanzministerium.de.

Recommendation

Influencers are not always aware of their tax obligations. It is therefore recommended that they get in touch with a tax consultant in order to avoid unpleasant surprises on the part of the local tax office.

StB [German tax consultant] Edgar Weis / WP/StB [German public auditor/ tax consultant] André Jänichen

Gift tax issues related to the reservation of usufruct Part II: Waiver, renunciation and re-establishment

In part one of our series (see PKF newsletter 09/2020) the main focus was on the issue of extinguishing a reserved right of usufruct in the context of gifting. In the following section we explain the consequences of a waiver of usufruct or its renunciation and re-establishment with respect to gift tax.

1. Consequences of the waiver of a reserved right of usufruct during the usufructuary's lifetime

The early waiver of a reserved right of usufruct fulfils the elements of gifting if it takes place without payment, thus for no consideration. The waiver is then a further separate taxable gift from the waiving party to the (previous) beneficiary and could thus potentially attract gift tax. As a further gift, under Section 14(1) of the Inheritance Tax Act (Erbschaftsteuergesetz, ErbStG), the waiver by the previous donor would result in this new gift having to be added to the prior acquisition, at any rate, if ten years had not yet elapsed since the date of the gifting with reservation.

Particularities will apply in the case of a non-remunerated waiver of the right of usufruct reserved before 1.1.2009 because, as a result of Section 25 ErbStG (old version), it had not been possible to deduct the usufructuary encumbrance, or the tax on this had been deferred. In this respect, a taxable transaction would only arise if, at the time when the right of usufruct was waved, its cash value were higher than at the time when it was established. In practice, this is rather rarely likely to be the case as the

Dürkheimer Fuchsmantel, Palatinate region

donor will be older and, thus, the multiplier in the mortality table lower, which means that when the usufructuary rights are waived their cash value is normally lower than at the time when they were established.

Please note: It has been clarified that the case law of the Federal Fiscal Court (Bundesfinanzhof, BFH) relating to Section 25 ErbStG (old version) does not cover those waiver cases where the usufruct was established after 31.12.2008.

2. Consequences of a renunciation of the right of usufruct and its re-establishment

2.1 Not a termination of the right of usufruct

In cases of in rem surrogation (in exceptional circumstances) mandated by law, it can be assumed that under civil law as well as from a gift tax perspective the right of usufruct would not be terminated. In rem surrogation therefore does not create any gift tax consequences. It is not the case that the previous donor has been given a gift.

2.2 In personam surrogation

However, since in rem surrogation mandated by law is not normally the case, in personam surrogation provides a possibility for avoiding gift tax. In such a case, the first step, namely, the waiver would likewise not result in a (another) donation to the previous beneficiary that would be subject to gift tax. This situation arises because, in this case, the waiver would not take place without payment. The counter-performance could lie either in the re-establishment of usufruct over a new asset (= surrogate) or a compensation payment. Committing to re-establish a usufruct is thus a counter-performance that the previous beneficiary owes (as “payment”) to the waiving party. As a result of this causal link made in the waiving agreement, the waiver of the reserved right by the donor is not unremunerated. In that respect, it cannot be viewed as a gift.

Please note: At all events, something else would ensue if the cash value of the usufructuary right when it is waived were higher than the value of the replacement asset. In that case, in accordance with the principles of partial gifting, a donation to the previous beneficiary would be deemed to have occurred in the amount of the non-remunerated portion.

2.3 The point of view of the beneficiary

The tax treatment is also questionable from the point of view of the beneficiary. If the value of the donated usu-

fructuary right over a replacement asset is higher than the value of the original reserved right of usufruct then it could be deemed that the beneficiary has made a gift to the donor.

Recommendation: That is why the values should correspond to each other as closely as possible. In such a case, proportional usufruct rights could provide a potential solution.

2.4 The implications in the case of re-establishment

Currently, it is yet to be clarified whether or not a re-established usufruct should (continue) to be regarded as a reserved right of usufruct for gift tax purposes. Based on the BFH ruling on Section 25 ErbStG (old version) (BFH judgement of 11.11.2009, case reference: II R 31/07) it may be inferred that, at least in legacy cases (until 31.12.2008), a reserved right continues to exist where usufruct has been re-established over a replacement asset.

2.5 Orientation towards the requirements under civil law

In addition, gift tax law is oriented towards the requirements under civil law. Under civil law, at all events, the previous right is renounced and a new one is established. However, this is of no great significance for the calculation of the values that are relevant for gift tax purposes as the calculation methods are alike. By contrast, for the consequences under income tax law, the classification under civil law is of great significance.

Please note

As Section 25 ErbStG (old version) was deleted under the new law, what (still) matters for gift tax assessments for a lifetime waiver since 1.1.2009 is solely whether this is done in return for payment or for no consideration.

StB [German tax consultant] Martin Krebs

Retroactive effect of an invoice correction and input tax deduction without an invoice

The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) issued a new circular under the heading: "Invoice correction with retroactive effect from the original date of issue of the invoice and input tax deduction when not in possession of a proper invoice", on 18.9.2020 (case reference: III C 2 - S 7286-a/19/10001 :001). In this way, the fiscal authority has put an end to long-standing uncertainty by now implementing the important ECJ judgements from 2016 onwards as well as the more recent German case law on this issue.

The content relates, in particular, to proper invoices as a precondition for input tax deduction and exceptions to this (objective proof of the individual material preconditions for input tax deduction) and, moreover, alternative ways to rectify invoices or cancel and reissue them. Here is a summary of the main points:

- Inaccurate invoices may be corrected with retroactive effect if they include the five key elements (the supplying business, the recipient of the goods or services, a description of what was supplied, the price and the amount of VAT charged shown separately). According to the BMF, invoices may be corrected in the traditional way as well as by means of cancelling and reissuing. In both cases the correction can have a retroactive effect
- Even if the invoice is not rectified, input tax deduction from an inaccurate invoice is generally possible if the business owner produces additional objective proof.
- However, the BMF is of the view that it is of greater importance to openly state the VAT amount. This cannot be replaced by any other proof (preventing the retroactive effect in the case of corrections of initially VAT-exempt transactions that are subsequently changed to being subject to VAT).
- Furthermore, input tax deduction without an invoice remains precluded.
- Simplification concerning the correction date and the advance return: If an invoice correction has a retroactive effect then the rectification of the old VATable period can be dispensed with and the correction can be made in the current VAT accounting period. This simplification does not however apply from one year to the next.

Please note: The wide-ranging BMF circular with its 32 marginal numbers goes into numerous details and also includes the respective amendments to the German ordinance on the application of VAT (UStAE). Your PKF partner would be pleased to answer any questions in this respect.

RAin [German lawyer] Birgit Ludwig

Is there an entitlement to continued remuneration following a holiday in a coronavirus risk area?

With the autumn holidays we are approaching the end of the holiday season. The question that arises here is whether or not you would be entitled to continued remuneration even if you had gone on holiday to a coronavirus risk area. And what would be the effect on the obligation to pay remuneration if, during your trip, the holiday destination was declared to be a coronavirus risk area?

1. A holiday in a coronavirus risk area

If employees knowingly travel to a destination that has been declared a coronavirus risk area by the Robert Koch Institute then the obligation to pay remuneration may cease to apply. If, upon their return from the risk area, employees have to go into quarantine for up to 14 days then these employees would not receive any remuneration for that period. Claims under both Section 616 clause 1 of the Civil Code [Bürgerliches Gesetzbuch, BGB] (insofar as these have not been excluded in the employment contract) as well as under Section 56 of the Infectious Diseases Protection Act [Infektionsschutzgesetz, IfSG] would likely be ruled out in such a case. This is because, according to Section 616 clause1 BGB, an employee's remuneration would only continue to be paid if, through no fault of his/her own, s/he had been prevented from performing his/her duties. According to Section 56(1) clause 3 IfSG, a compensation payment would be excluded if it had been possible to avoid quarantine.

The employment law principle of "no work, no pay" applies. By contrast, there could be an obligation to pay remuneration if it is possible to work from home.

Abbey of St Hildegard, Rüdesheim on Rhine

2. During the holiday, the destination is declared to be a coronavirus risk area

If employees travel to a region that is only declared to be a coronavirus risk area during the holiday they are likely to keep their entitlement to remuneration. In such a case, the employee will be entitled to compensation under Section 56 IfSG if s/he self isolates at home and the necessary conditions are present. Likewise, a claim under Section 616 clause1 BGB could be considered if this has not been contractually waived.

If, after having consulted with his/her employer, the employee is able to carry out his/her work from a home office then s/he would be entitled to be paid remuneration.

If the employee falls ill, without this being his/her fault, there may be a claim for continued remuneration under the conditions of the German Continued Payment of Wages and Salaries Act.

3. Employer's question about the holiday destination

Generally, employees admittedly do not have to give their employers any information about their travel destinations. However, under coronavirus conditions, an employer's question, prior to the start of a trip, about where the employee will be spending his/her holiday could indeed be a valid one in view of the employer's duty of care. This is because, under Section 618 BGB, employers have a duty to protect their employees against dangers to life and health. By asking if an employee had stayed in a coronavirus risk area the employer would be able to take appropriate protective measures. Moreover, the employer would be able to plan for any period of absence or reallocate duties. Furthermore, the question concerning possible claims for remuneration or compensation could be considered to be relevant.

Please note

The obligation to quarantine for up to 14 days after returning from a risk area can be ended earlier following a negative test result. In this respect, the German federal government decided that, as of 1.10.2020, quarantine could be ended on the basis of a test, at the earliest, 5 days after returning.

RAin [German lawyer] Claudia Auinger

Living wills on the coronavirus test bench

In a written living will you can specify, as a precaution, the medical interventions that should or should not be carried out in the event that you are no longer able to communicate because of an accident or an illness. In these coronavirus times, the question that arises is whether specific living wills have to be drafted to cover the treatment associated with succumbing to the SARS-CoV-2 virus or whether existing living wills have to be updated in order to reflect the reality of such treatment.

1. Typical cases where a living will be consulted

A living will is generally drafted for cases where a patient is irreversibly unconscious, has suffered permanent brain damage, or in all probability has become terminally ill. Since the patient will not be able to communicate any more in the above-mentioned situations, the living will can determine, for example, if life-sustaining or life-prolonging measures are desired, such as resuscitation, ventilation, organ transplants, dialysis, blood transfusion, drug administration or artificial feeding.

2. Temporary artificial ventilation in the case of COVID-19

Temporary artificial ventilation in the case of a COVID-19 infection is not covered by the typical cases where a living will would be consulted because the goal of the treatment is to completely eliminate the lung infection. Even severe cases would thus not initially be regarded as terminal illnesses. Furthermore, in most cases, patients would still be able to communicate and, beforehand, consent to ventilation and being put into a medically induced coma.

3. The risk of longer-lasting artificial ventilation in the case of COVID-19

The risks that result from an existing living will could then arise if the treatment is not effective or has to be continued for longer than usual. In such a case, if the physicians are of the view that a cure or regaining consciousness is unlikely then the provisions in a living will that was drafted before the time of COVID-19 may apply. If, in the living will, the patient has specified that s/he would not wish to

have life-prolonging ICU measures, or only for a certain period then the treatment may be discontinued.

4. Specific patient provision for a case of COVID-19

Existing living wills should be adapted to take account of the current situation of a COVID-19 infection that requires treatment. In addition to amending an existing living will, there is also the option of drafting a separate living will for a case of COVID-19. In this connection, it should also be specified if experimental doses of new drugs or those that have not been approved for the treatment of COVID-19 would or would not be desired.

5. Creation and effects of a living will

Living wills can be privately recorded in writing. Moreover, many institutions provide templates. Ideally, you should first talk to a physician and get help from a lawyer because living wills should contain sufficiently specific requirements in order to be legally effective.

Besides creating a living will, you should also give a particular person who you trust power of attorney for health care. The person who acts as the attorney would then be able to ensure that the wishes laid down in the living by the patient are fully respected in the decisive case.

RA/StB [German lawyer/tax consultant] Frank Moormann

Please take note – Tighter continuing liability for partners

Partners who have left a partnership (GbR [company under German civil law], OHG [German ordinary partnership] or KG [German limited partnership]) continue to be still liable for five years for the old obligations of the company. The extent of the liability here is frequently wider than is generally assumed. This was made particularly clear in a recent Federal Court of Justice (Bundesgerichtshof, BGH) ruling.

1. Subsequent claims from a property owners' association

In the case in question, from 3.7.2020, (case reference: V R 250/19), a company under German civil law (GbR) held a co-ownership share in a property. From 2013 to 2015, the property owners' association adopted budgets and annual statements of service charges from which pay-

Wuerzburg, Main

ment obligations accordingly arose for the GbR - it did not however fulfil them. Subsequently, the property owners' association sued one of the former partners in the GbR - who had left the GbR in 2002 (!) already - for payment of the service charge claims and the association was successful.

2. Definition of old obligations according to the legal basis for their creation

To begin with, a relevant question was whether or not the payment obligations that had arisen long after the departure of the partner could be a case of old obligations within the meaning of the continuing liability rules. The court affirmed this and, in doing so, pointed out that it is not the creation or the due date of the obligations that matter, but rather whether or not the legal basis for the obligation had been established prior to the departure of the partner. This was the case here since the legal basis for the payment of the costs that had to be borne jointly was established already when the ownership of the residential flats was acquired. At this point in time the defendant was still a partner in the GbR. The adoption of resolutions with respect to the specific amount then no longer matters.

Please note: The same also applies, e.g, to continuous obligations. For example, if a rental agreement was thus concluded prior to the departure of a partner then the latter would also be liable for the company's rental obligations that result from this but arise only after his/her departure.

3. Assertion of claims even after the expiry of the five-year period

Generally, liability claims have to be asserted within a period of five years following the departure of the partner. In the case of commercial partnerships (OHG, KG) this time period commences once the departure has been entered into the commercial register.

As there is not (yet) an equivalent register for German companies under civil law, the crucial point as regards when this time period starts is the date when the respective creditor had positive knowledge of the partner's departure. In this case, the defendant was not able to prove that the property owners' association had been notified of his departure from the GbR and that is why he had to accept liability for the service charge claims that had arisen more than 10 years after his departure.

Recommendation

Outgoing GbR partners are therefore advised to inform at least the company's main creditors promptly and verifiably about their departure. Outgoing partners in an OHG or KG should make sure that their departure is swiftly entered into the commercial register.

Vineyards at Wackerbarth Castle, Radebeul near Dresden

Rights to information for employee-like persons in accordance with the German Pay Transparency Act

The German Pay Transparency Act gives employees in larger companies the right to access information about the wage structure of other employees. The field of application of this Act has now been extended by the Federal Labour Court (Bundesarbeitsgericht, BAG) in order to make it compatible with European law and to facilitate comparability with employment circumstances that are not wholly identical.

A female television journalist felt that she was being treated unfairly and, in accordance with the German Pay Transparency Act, requested information about what comparable employees were earning. The problem here was that the journalist operated as an employee-like person and not like a comparable employee. The BAG, in its landmark ruling from 25.6.2020 (case reference: 8 AZR 145/19), strengthened the employee right to access information in the case of disputes over equal pay for women and men. Besides employees, very many self-employed people who derive their income predominantly from one employer now have the right to access information about the earnings of colleagues with comparable jobs. This is because the concept of an employee, with a view towards European law, should be interpreted more broadly than it has been in Germany. European law, namely, makes no distinction between employees and employee-like persons.

Please note: Employee-like persons often include journalists, computer scientists, lawyers, architects as well as a range of service providers insofar as they normally only work for one employer.

The WhatsApp tick mark - Delivery of declarations of intent via messaging app services

The Bonn Regional Court had to evaluate the extent to which messaging app services constitute a valid alternative to post, telephone and fax for the purpose of being able to track the dispatch and, particularly, the receipt of important information - provided that this does not involve matters where the written form requirement needs to be satisfied.

The case in question was about whether or not, in the course of dealing with a property matter, a declaration of intent that had been sent or received via WhatsApp had indeed been delivered. In answering this question, it was not immaterial that the concerned parties had already exchanged information with each other via this service, therefore, this communication channel was already deemed to be have been established by both sides. The sender of the WhatsApp message took the view that the two blue tick marks indicated that the message had been delivered and read while the other side maintained that it had absolutely no knowledge of having received this message.

The Bonn Regional Court, in its ruling from 9.1.2020, (case reference: 17 O 323/19), confirmed that a declaration of intent is delivered as soon as it is arrives at the recipient's domain in such a way that, under normal circumstances, the recipient would have the possibility to acknowledge this. Accordingly, WhatsApp messages are delivered when they reach the addressee's smartphone, are stored and available there permanently and the recipient had esentially opened up this communication channel. Specifically, this means that for this purpose WhatsApp uses not only a number of tick marks but also displays them in colour. This was thus the case here. Two blue tick marks were an indication the message had been opened, while two grey tick marks merely that the message had been delivered. Conversely, a single grey tick mark means that while the sender has dispatched the message, nevertheless, it has not yet been delivered to the recipient. As this was not the case here, the declaration of intent was deemed to have been not only delivered but also acknowledged.

Result: Consequently, declarations of intent may be delivered via messaging app services insofar as the written form requirement does not need to be satisfied.

AND FINALLY...

"I maintain that the EU is the best example in the history of the world of conflict resolution"

John Hume, 18.1.1937 – 3.8.2020, former Northern Irish politician. For decades, he advocated for the non-violent reunification of Ireland and, in 1998, he was awarded the Nobel Peace Prize for his efforts to find a peaceful solution to the conflict in Northern Ireland.

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EUREF-Campus 10/11 | 10829 Berlin | Tel. +49 30 306 907-0 | www.pkf.de

Please send any enquiries and comments to: pkf-nachrichten@pkf.de

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