PKF

Newsletter

Key Issues:
Special requirements for the M&A process in the case of digital disruptions

03|20

Dear Readers,

Britain's exit from the EU was accomplished relatively quietly. More extensive discussions about post-Brexit arrangements are however also likely to follow soon as will those about the legislative changes for the transposition of the ATAD, in particular, with respect to exit tax and CFC rules. This expectation gap has provided an opportunity to review a wide variety of relatively "smaller" tax issues in this edition of our newsletter.

In the first report in the 'Tax' section, we initially provide an overview of the preconditions for an **operational split** and, subsequently, we discuss the options available for avoiding the **taxation** of hidden reserves once the split has been **discontinued**. Our second report is about the **contractor status of supervisory board members** or, more specifically, about the question as to the cases where VAT has to be charged; a new Federal Fiscal Court ruling is likely to lead to uncertainties in many cases. There are also always uncertainties with respect to the distinction that we discuss subsequently, namely, whether a benefit constitutes a **cash remuneration or compensation in kind**. Our fourth article is likewise about employee compensation with respect to the question of the cases where employers are able to provide **benefits to employees free from taxes**; with regard to this issue, the fiscal authority has modified a favourable Federal Fiscal Court ruling and is pushing for codified regulations (that would be unfavourable for taxpayers). In two further articles we discuss financing issues. To begin with, as regards intra-group financing, we answer the question as to whether or not an **add-back** has to be made to the assessment base for trade tax purposes also in the case of a **transitory loan**. We subsequently analyse whether or not in cases of **0% financing** deals part of the **assessment base** can be **exempted from VAT**.

In the Legal section, we have reviewed a ruling by the Federal Court of Justice and a change to the law with the aim of protecting **older as well as pregnant managing directors**.

The Key Issue for this edition appears under the Accounting & Finance section. In certain markets, established services, products or business models are being replaced by digital innovations. **Digital disruptions** could possibly present major challenges for companies but also for consultants and could affect the **M&A process**, too.

With our best wishes for an interesting read.

Your Team at PKF

Key Issue

Special requirements for the M&A process in the case of digital disruptions

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TAX

StBin [German tax consultant] Sabine Rössler

Tax-exempt discontinuation of an operational split

When the preconditions for an operational split cease to exist this usually results in the realisation of hidden reserves at the property company. In the following section, first of all, we discuss these preconditions. We subsequently analyse the options that would make it possible to avoid the realisation of hidden reserves when the sharing of personnel ceases. In the wake of a recent Federal Fiscal Court *(Bundesfinanzhof, BFH)* ruling, the focus here is on the leasing out of a business.

1. Preconditions for an operational split and ...

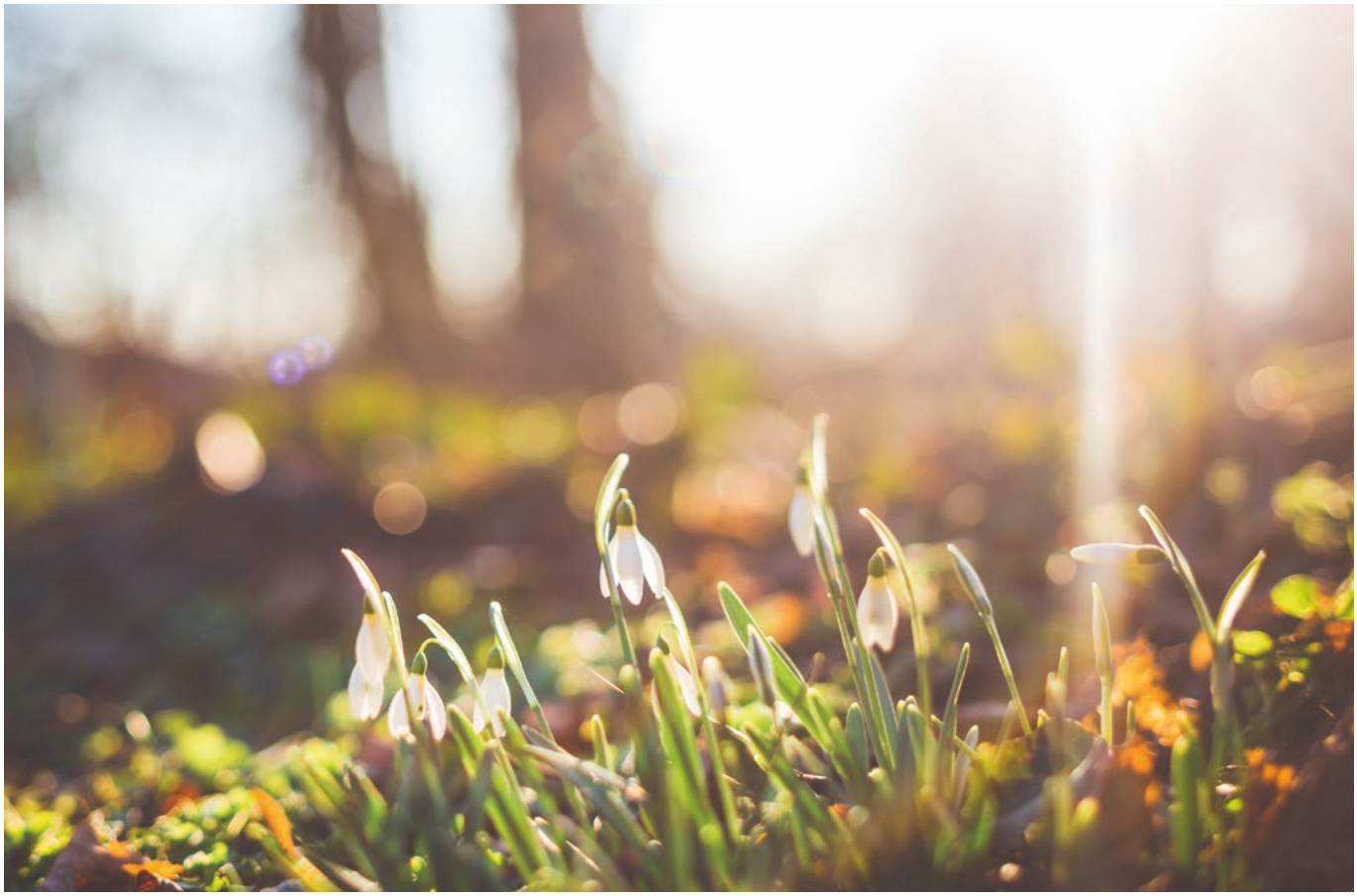
The legal consequence of an operational split is that the letting or leasing activities of the property company are considered to be commercial. An operational split would accordingly be deemed to exist if there was a relationship of interdependence in terms of material resources and personnel.

There is material interdependence if the property company makes essential business assets available to the operating enterprise. From the viewpoint of the operating enterprise, essentiality is determined on the basis of a functional assessment perspective, e.g., if a plot of land that has been developed constitutes assets that are essential for operations for the operating enterprise.

Interdependence in terms of personnel would be assumed if an individual or group of individuals controls both companies in such a way that it is possible for this individual or group to enforce consistent business and operational intentions in both companies.

... their ceasing to exist as the termination of a business

When the preconditions for an operational split cease to exist then this can be viewed as the discontinuation of business operations with the consequence that the



assets of the property company will be considered as having been transferred to private assets and its hidden reserves would have to be realised.

2. The property company's specific classification as a business

If, prior to the creation of the operational split, the property company's activity had already been deemed to be commercial then, in the event that the operational split were to be discontinued, this characteristic feature would be restored once again and the company would continue to be classified as a business. Moreover, classification as a business due to the legal form of a GmbH & Co. KG [German limited partnership with a limited liability company as a general partner], or the property company engaging in a new commercial activity could prevent the release of hidden reserves.

3. A business can been leased out even ...

If, when an operational split is discontinued, the preconditions exist for a business to be leased out in its entirety then it could be possible to avoid terminating the business. The BFH, in its ruling from 17.4.2019 (case reference: IV R 12/16), confirmed its earlier decisions. The ruling specified that Section 16(3b) of the German Income Tax Act had to be applied to operational splits discontinued after the 4.11.2011. The judges confirmed the previous rulings according to which a commercial leasing out of a business is deemed to exist if the items essential for operations that give the business its character are leased out. When the lease is terminated it should be possible for the lessor to continue business operations as before. If merely a business property has been leased out then for wholesale and retail companies, in any case, the business will be deemed to have been leased out if the property constitutes the sole asset that is essential for operations. The business will be deemed not to have been discontinued until the lessor submits a statement of termination to the local tax office, or if other facts become known to the tax office accordingly.

... in the case of a simulated operational split

If, for the operational split, the property company and the operating enterprise did not emerge from a single business (simulated operational split), nevertheless, an operational split can still thus be deemed to be harmless (from a tax point of view). For the assessment of the leasing out of the business this will depend on when the operational split was terminated. The property company would ultimately have to continue the previous commercial activity.

RA [German lawyer] Johannes Springorum

Contractor status of supervisory board members

If a supervisory board member receives non-variable fixed remuneration and, on account of this, bears no risk with respect to remuneration then s/he is not working as a contractor. This was the decision of the Federal Fiscal Court *(Bundesfinanzhof, BFH)* in its ruling from 27.11.2019 and, in this way, the court abandoned its previous case law.

1. Classification of supervisory board members for tax purposes

At the level of the paying corporation, the remuneration or expense allowance for supervisory board members constitutes business expenses for income tax purposes. Under the so-called partial income rule – the restriction on the deductibility of expenses related to tax-exempt income -, in Section 10 no. 4 of the German Corporation Tax Act, only half the amount of such expenses should be taken into account with a view to reducing the tax liability.

From an income tax perspective, supervisory board members generate self-employment income. Up to now, for VAT purposes, supervisory board members in Germany had generally been viewed as contractors with the result that they had to charge and pay VAT for their activities and the respective companies were able to deduct the input tax arising from the services provided by the supervisory boards. The supervisory board members themselves were able to deduct the input tax from incoming transactions.

2. The previous interpretation of the law by the BFH

According to the established case law of the BFH, a supervisory board member is a contractor for VAT purposes. S/he renders a service in return for payment within the meaning of Section 1(1) no.1 of the German VAT Act. A contractor is anyone who performs a commercial or professional activity independently. By contrast, an activity would not be performed independently if a natural person was so

integrated into a company that s/he would be obliged to follow the instructions of the business owner.

Up to now, such integration into the business of a company has been denied for supervisory board members and self-employment has been affirmed. In these cases, the basis of the BFH argument was that, according to Section 111 of the Stock Corporation Act (Aktiengesetz, AktG), the supervisory board is entrusted with the supervision of the management. Therefore, the supervisory board itself and its members are not bound by the instructions of the management board. Accepting a position on a supervisory board does indeed mean that a contractual relationship is established with a company; however, there is no principal or employer whose instruction or will form the basis according to which the supervisory board member has to act (cf. BFH rulings from 27.7.1972, case reference: V R 136/71, German Federal Tax Gazette (Bundessteuerblatt, BStBl) II p. 810; from 20.8.2009, case reference: V R 32/08, BStBl 2010 II p. 88).

3. New legal situation due to an ECJ judgement and ...

In its judgement from 13.6.2019 ("IO" case, reference: C – 420/18) on the contractor status of a supervisory board member at a Dutch foundation, the ECJ had rejected contractor status in view of the absence of independence for the supervisory board member. Based on the interpretation of Art. 9 of the EU Directive on the VAT system, anyone who performs such an activity in a relationship of subordination cannot be deemed to be independent. The crucial point here is whether or not the affected party performs his/her activities in his/her own name, for his/her own account and under his/her own responsibility and whether or not s/he bears the economic risk associated with performing these activities.

... its implementation by the BFH

The ECJ judgement has been endorsed by the BFH subject to its previous case law and in the event that the supervisory board member bears no economic risk. In the case in question, from 27.11.2019 (case reference: V R 23/19 and V R 62/17), the member of the supervisory board making the claim participated, as a supervisory board member, merely in the decisions of the supervisory board that had to be taken on the basis of a resolution. In addition, he bore no economic risk with respect to his work as a supervisory board member since he received the same annual fixed remuneration that did not have any variable remuneration components whatsoever. Negligent conduct would not have directly affected the remuneration but would merely have established a responsibility under Section 116 AktG, according to the BFH.

Conclusion

Whether or not a supervisory board member bears an economic risk is a question for each individual case and, consequently, leaves room for structuring. Given the circumstances of the case in question, the BFH did not have to determine the cases where the work of a supervisory board member could still be regarded as being performed on a self-employed basis and, therefore, this issue was expressly left open by the court.

RAin [German lawyer] Yvonne Sinram

When do vouchers that are given to employees constitute a benefit in kind?

Benefits in kind that employers give to their employees are exempted from tax and social security charges up to a monthly exemption threshold of € 44. The common practice of subsequently reimbursing employees € 44 upon presentation of a sales receipt and classifying this as a benefit in kind subject to preferential tax treatment has no longer been possible since 1.1.2020. The 2019 Annual Tax Act specified precisely which employee benefits should now be viewed as cash remuneration and which should be viewed as benefits in kind.

1. New rules with exceptions

In future, monetary income (cash remuneration) will also include all:

- cash payments for a specific purpose,
- subsequent reimbursements of costs,
- monetary surrogates and
- other benefits that are denominated in a cash amount.

There is however an exception to these rules: vouchers and cash cards that entitle the holders to receive goods

or services only will be considered to be a benefit in kind, in any case, if they fall under the exemption provision in Section 2(1) no. 10 of the German Payment Services Supervision Act. In this case, the cards have to entitle the employee to receive goods or services from the issuer of the voucher or at a limited number of acceptance points or from a limited range of goods or services. Therefore, items that are recognised as a benefit in kind are, e.g.:

- pre-paid gift cards for retailers,
- centre gift cards and "city cards",
- so-called station cards from petrol station operators that entitle holders to receive goods or services solely at that petrol station,
- fuel cards that only entitle holders to purchase fuel and "everything that keeps the car moving" (also throughout Europe), or
- something like cinema tickets.
- Likewise, cards that have social or tax purposes can also be regarded as benefits in kind. Examples might include a voucher to participate in rehabilitation or workplace health activities (treatment card).

2. The particularities of online stores and cash cards

However, a distinction has to be made in the case of online stores. If the payment instrument can only be used to buy goods or services that are physically provided on site then this form of benefit will acquire a tax-privileged classification (compensation in kind). By contrast, if the operator runs a pure online marketplace that provides a platform for other suppliers to offer goods and services then this would be deemed to be cash remuneration. Therefore, Amazon vouchers constitute cash remuneration and not benefits in kind.

Furthermore, it should be noted that cash cards would be deemed to be cash remuneration if they can be used as a substitute for cash within the framework of independent systems for non-cash payment transactions. In particular, certain cash cards that are equipped with a cash payment function or their own IBAN that are used for electronic transfers (e.g. PayPal) or to buy foreign currencies (e.g. pound sterling, US Dollar, Swiss franc) or that can generally be assigned as a payment instrument should, thus, be treated as cash payments. Such cards are taxable from the very first Euro onwards.

Please note: Finally, another new element is that vouchers and cash cards only fall under the € 44 rule if they are provided in addition to the remuneration that would in any case be due. The tax advantage for salary conversions thus no longer applies (cf. the next article on this).

Recommendation

In order to avoid unpleasant surprises during a subsequent tax audit you should carefully scrutinise the benefits in kind that you have given out.

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

Tax-exempt benefits provided in addition to remuneration

The Federal Fiscal Court (*Bundesfinanzhof, BFH*) only recently abandoned its view on the possibility of paying flat-rate payroll tax for benefits provided in addition to remuneration and contradicted the practice of the fiscal authority. In a letter of implementation, the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*) has now modified the case law of the court and established its own guidelines.

1. New supreme court case law – The specific use and/or purpose is relevant

In its rulings from 1.8.2019 (case references: VI R 32/18, VI R 21/17, VI R 40/17), the BFH assumed that benefits were provided "in addition to remuneration due in any case" if the benefits had a specific use and/or purpose. This interpretation of the law had opened up new possibilities for the structuring of employment contracts. It was possible to convert taxable gross salary into remuneration that was not subject to payroll tax. For details of this please refer to issue 12/2019.

2. The view of the fiscal authority

In order to ensure continuity in the application of the law, in its letter of implementation, from 5.2.2020, the BMF defined the following conditions for providing tax-exempt benefits.

- The benefit will not count towards the entitlement to remuneration.
- The entitlement to remuneration will not be reduced in favour of the benefit.
- The benefit for a specific use and/or purpose will not be provided instead of a future increase in the remuneration that has already been agreed.
- If the benefit is eliminated then the remuneration will not be increased.

The above-mentioned conditions will apply irrespective of whether or not the remuneration is subject to collective agreements. Accordingly, only genuine additional benefits from the employer will be tax-privileged.

Recommendation

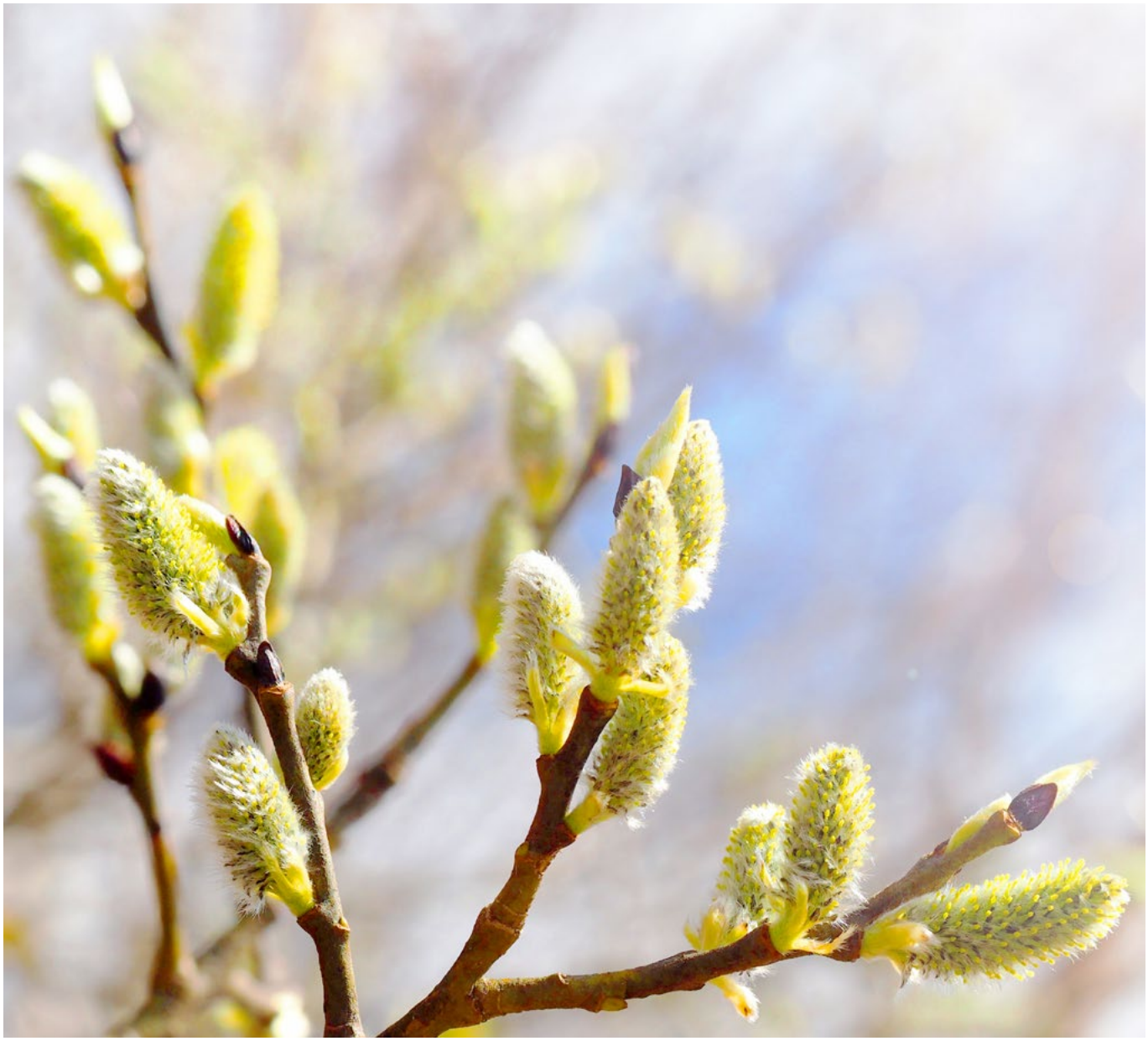
The legislative change in Section 8 to the German Income Tax Act has already been included in the draft of the German Act on the Introduction of a Basic Pension. As a result, the hurdles for models of gross-to-net remuneration optimisation will be raised once again. With a view to the legislative changes that have been announced you should therefore review new arrangements and closely monitor further developments.

Does interest on transitory loans have to be added back for trade tax purposes?

Within the framework of determining trade tax, the German Trade Tax Act provides for the adding back of debt service charges in some cases. According to the wording of Section 8 no. 1 of the Trade Tax Act (*Gewerbesteuergesetz, GewStG*) this includes all debt service charges. However, the extent to which interest on transitory loans also has to be covered is questionable under this provision. The Federal Fiscal Court (*Bundesfinanzhof, BFH*) recently examined this issue within the scope of a ruling from 17.7.2019.

1. Issue – Ship financing

The case in question was about the purchase of a ship by the company T. To finance this, the vendor had taken out a loan with a bank at that time. T did not directly assume the loan obligation as a result of the purchase. Instead, the parent company M assumed the loan and became the liable party for the loan. Furthermore, A took out a working capital loan with the bank. This was consistent with the business purpose of A whose commercial



activities consisted in taking out loans with the bank and passing them on to the subsidiary company T. When calculating the trade tax, the local tax office added back the interest expense, as debt service charges, to the trading profit in accordance with Section 8 no. 1(a) GewStG. However, the claim filed by A was dismissed by the tax court, which reasoned that, following the change to the law, add-backs were not restricted to interest on permanent debt and that transitory loans likewise had to be added back to the trading profit.

2. Not transitory loans

The BFH judges ruled, on 17.7.2019, that the interest indeed had to be added back to the trading profit, however, the case in question did not involve transitory loans. The judges based their ruling on the conditions that had previously been specified for transitory loans in BFH case law. Accordingly, a transitory loan, in particular, has to be taken out in the interest of others. Given that the business purpose of the company consisted in taking out loans and passing them on to a subsidiary company, the parent company was also acting in its own interests. Consequently, there was no transitory loan.

Please note

It remains unclear whether or not the exception with respect to the add-backs does indeed apply to transitory loans. The BFH was able to leave this open in the case in question, as it was of the opinion that a loan that has been passed on is not a transitory loan.

Sales of goods and 0% financing deals – What is the VAT assessment base?

The sale of goods is normally subject to VAT. By contrast, banking and financial services are VAT-exempt. The Hesse tax court has now decided what the VAT assessment base should be for sales of goods with the respective 0% financing deals.

1. Issue – Sale with a 0% financing deal

A retailer sold goods to diverse customers and offered them so-called 0% financing deals where despite paying in instalments the customers only paid the price for the goods that they had purchased. To this end, the retailer concluded a "General Credit Intermediation Agreement" with a bank. Under this agreement, the bank assumed all the new financing deals from the sale of goods that had been brokered to customers. As a result, a loan agreement was concluded between the customers and the bank.

Purchase contracts were concluded between the retailer and its customers for the items that were to be financed and there the purchase price was included as an overall amount. The retailer issued invoices to the customers where the net amount was mentioned and the respective VAT payable on this amount was shown. Furthermore, the invoices included a reference to the "0% instalment plan" method of payment whereby the financing amount corresponded to the overall amount. In the invoices the retailer reported an amount that was termed a discount, which was paid directly to the financing bank and reduced the assessment base of the goods supply accordingly. However, there was no entitlement to receive the discount as a cash payment.

In its VAT returns the retailer reduced the taxable revenue by the financing fees – the local tax office rejected this. The action challenging this move was unsuccessful.

2. Decision of the Hesse tax court – ancillary services

The Hesse tax court, in its ruling from 12.2.2019, (case reference: 1 K 384/14) decided that the cases of 0% financing deals did not constitute services that had to be assessed separately for tax purposes. The financing and its assumption constitute ancillary services for the taxable supply of the purchased goods as the main service. In the opinion of the judges, the financing did not fulfil a separate purpose for the customers rather the aim was merely to consume the deliveries under optimum conditions. Moreover, the tax court did not see any parallels here with price reductions in the form of cash rebates or discounts that normally result in a reduction of the assessment base.

Recommendation

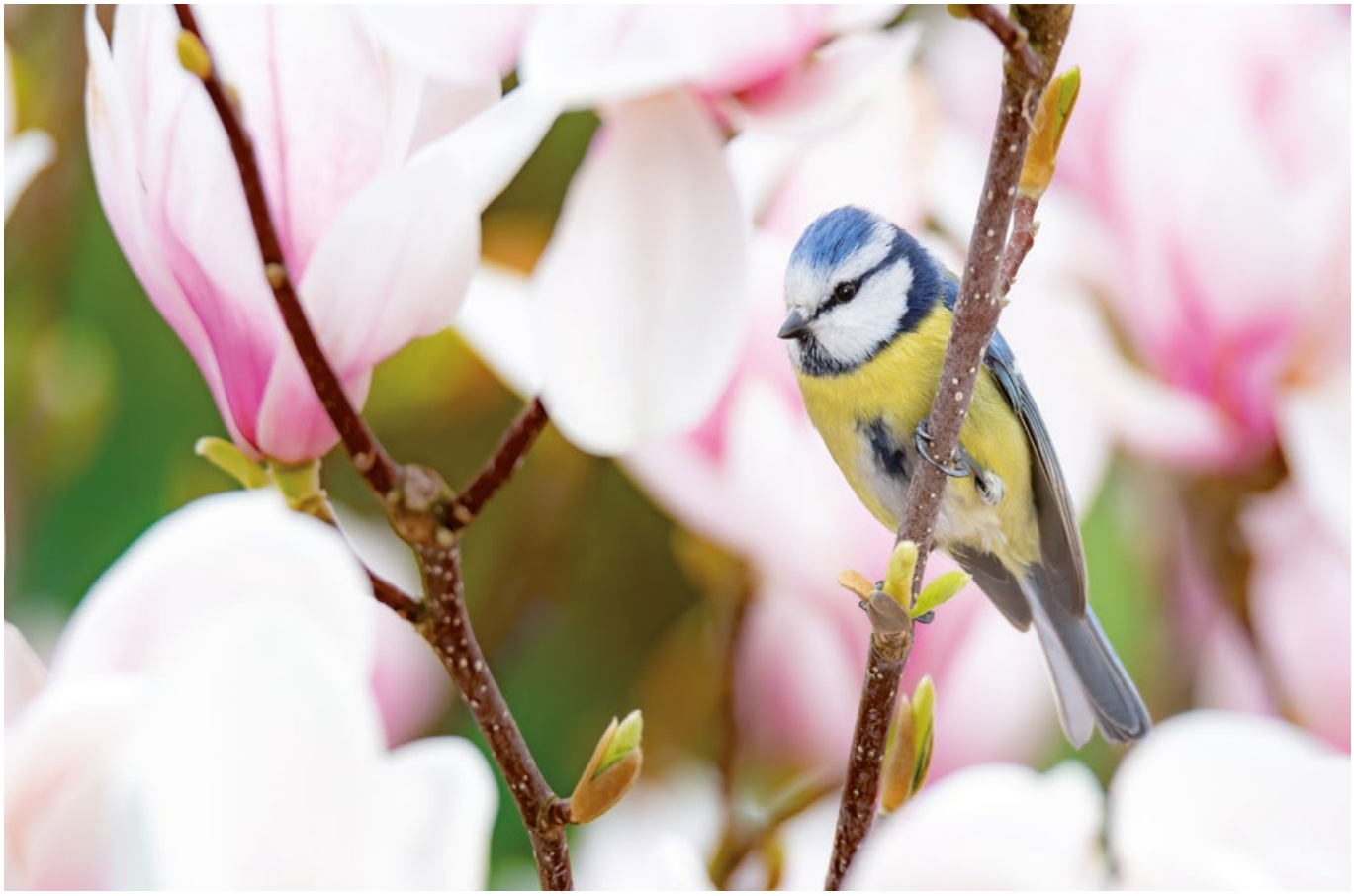
The appeal is pending at the BFH (case reference: XI R 15/19). For businesses that are affected it is recommended to follow the test case and await the supreme court ruling in this respect.

LEGAL

RAin [German lawyer] Sonja Blümel

Latest news on (external) managing directors – Maternity protection and age discrimination

In the past, the courts assumed that the executive position of managing directors ruled out having employee status. Now, owing to the influence of European law, the focus of German courts and law making is, increasingly, on determining which of the laws that protect employees should also be applied to external managing directors. One of the more recent decisions concerned the applicability of the German General Equal Treatment Act, which prohibits age discrimination, for example.



1. Age discrimination

The General Equal Treatment Act *(Allgemeine Gleichbehandlungsgesetz, AGG)* prohibits discrimination on the basis of an employee's age. Contract provisions that infringe this prohibition are invalid. The Federal Court of Justice *(Bundesgerichtshof, BGH)*, in its ruling from 26.3.2019 (case reference: II ZR 244/17) decided that, in the specific case and in compliance with European law, the AGG was applicable and the external managing director should be regarded as an employee. The agreement of termination upon reaching the age of 61 years was an invalid provision. In order for the termination to be effective the defendant would have to demonstrate that the unequal treatment on the basis of age was justified on grounds of legitimate interest, such as appreciable business-related or company-related interests.

2. Maternity protection for female managing directors

The application of the German Maternity Protection Act also to external female managing directors has been mandatory since 1.1.2018. Once this topic became the focus of intense debate, the legislators in Germany specified that the German Maternity Protection Act, including the employment restrictions, also applied to pregnant and nursing external female managing directors before as well as after the birth.

The new German Maternity Protection Act makes reference to the social security status of external female managing directors as dependent employees within the meaning of Section 7 of Volume IV of the German Social Security Code. For shareholding managing directors it is therefore crucial whether or not, through the votes allotted to them in the shareholders' meeting, they are able to stave off all resolutions, without exception, that would be disadvantageous for them. This can be ensured through a comprehensive blocking minority or a position as the controlling shareholding managing director. If that is the case then the German Maternity Protection Act will not apply.

Please note

In the case of external managing directors it would appear that through the influence of European law their status is increasingly converging with that of German employees. It is likely that this development will continue; if you have any questions on this topic then please do not hesitate to contact your PKF consultant.

ACCOUNTING & FINANCE

Norman Sträter

Special requirements for the M&A process in the case of digital disruptions

Over the last few decades, the importance of a systematic M&A process has grown steadily for compliance reasons and, in doing so, has been subject to constantly changing market conditions. With the continuing growth in the relevance of digitalisation, this process will now once again face significant adaptation requirements.

1. Introduction – High requirements due to digitalisation

In view of the digital transformation, companies have to adapt ever faster and, sometimes, even suddenly to the changing needs of their customers and to market conditions. Here, companies can initiate such a transformation process either by means of internal processes or by purchasing the requisite knowledge via specific acquisitions of technology-based start-up companies. In practice, most companies prefer the latter method. This means that there will be a massive change in the requirements placed on the M&A process. IT due diligence as well as financial due diligence, in particular, will be especially highly relevant here because the valuation of disruptive business plans and start-up companies is associated with major uncertainties as regards the future performance.

2. Industry 4.0

Disruptive technologies considerably affect earlier value chains and established business models. In the last few years, internet-based service companies have established themselves here, in particular, and online retailing has taken large market shares from bricks-and-mortar retailing. Likewise, in the producing sector a great number of opportunities are arising for enhanced competitiveness through digitalisation. Processing very large quantities of data, in particular, and implementing artificial intelligence play significant key roles here. In order to be able to participate in the transition process of a digital transformation, early on, established companies are thus increasingly acquiring shares in digital technology-based start-up companies.

3. Due Diligence

3.1 The basic problem

An essential component of the M&A process is the carrying out of due diligence. In this phase, an analysis is made of the historic development of the tax, legal, personnel and financial risks of the target business in order to ascertain whether or not this business meets the expectations and requirements of the potential buyer. In the course of this, the implications of the digital transformation for the M&A process and the need for adjustments associated with these will become particularly obvious since start-up companies as well as disruptive business models generally do not produce long-term information about the company. Up to now, this has precisely constituted the essential basis for carrying out due diligence successfully.

3.2 Financial due diligence

For due diligence based on financials, a forecast of future earnings is made using historic data, or alternatively a plausibility check is performed on a financial plan, as a result of which it is then possible to provide an overview of the financial situation of the business under review. For start-up companies and disruptive business models however such forecasts are possible only to a very limited extent. In the planning and start-up phase, these companies and business models are primarily characterised by high levels of investment and rising capital requirements for innovative products and services. It is frequently difficult to make any inferences as to the future performance on the basis of the company history to-date because it is highly likely that, in the future, there will not be a repeat of these phases and the financial results associated with them. Then again, factors such as a benchmark and market data analysis are of key importance for the valuation and the forecast.

3.3 IT due diligence

The aim of IT due diligence is to ascertain the integration capability of the entire IT environment of a potential tar-

get business. The greater the divergence here between the IT environments of two companies, the higher the costs associated with the process of integrating them will be. Here, such costs will depend, for the most part, on the compatibility or the adaptability of the various goods management/ERP systems. Other components of the analyses that take place as part of IT due diligence include recording and evaluating the existing hardware and software systems, the IT processes as well as the current projects. Moreover, the subject of data protection has gained considerably in importance, at the very latest, with the introduction of the EU General Data Protection Regulation. However, it is not only the security of personal data processing that is crucial but also the external security of company-related data, such as, for example, protection against cyber attacks.

4. Valuation Methods

Selecting the right valuation method constitutes another key component in the M&A process. When making this choice for start-up companies, the very early phase in the business cycle will be particularly relevant. During the orientation and planning phases, as well as the setting up phase, qualitative valuation methods are more likely to be applied because, during those stages, the historic financial figures will not be particularly meaningful. Such methods include, for example, an analysis of the market potential and the innovation capability of the products. By contrast, in later business cycles, the valuation is likely to be based on income-oriented methods. When valuing a start-up company it generally makes sense to analyse the weighted average of the results of several valuation methods. In the course of this, the following valuation methods should be included when carrying out such an analysis: the benchmark method, venture capital method and DCF terminal value method.

Outlook

If companies have not yet made any adjustments to their business processes to take account of digitalisation then we would urgently recommend that you rectify this soon. In this case, adjustments can be achieved, firstly, by specifically recruiting qualified expert personnel, or then again by entering into cooperation with digitally oriented start-up companies. Moreover, calling in external consultants lends itself to initiating the switch in internal processes to ones that are digitalised.

LATEST REPORTS

Income tax – Timing of provisioning for tax arrears

If a tax audit results in additional taxes then the question that arises is whether the tax arrears have to be taken into account in the year to which they belong or only once the tax arrears have been determined.

The Münster tax court recently had to deal with just such a case. The claimant had been trading mobile phone accessories and mobile phones over the course of the relevant years of 2009 to 2011. A tax audit for the relevant years took place. The managing director had previously been the subject of a preliminary investigation of fiscal offences because there had been grounds for suspecting that he had participated in so-called 'VAT carousel' fraud; these suspicions had emerged as a consequence of the conviction of one of his business partners. The claimant had deducted the input tax from the invoices of the convicted business partner.

Within the framework of the tax audit, the amounts of input tax that had been deducted from the 'VAT carousel' was disregarded and a reduction in the profit was denied for 2010 and 2011. The disallowed input tax was only offset against taxable profits in the year when the correction had been made. However, the claimant applied to be allowed to reduce profits earlier by way of provisioning already for the years when the tax charges arose.

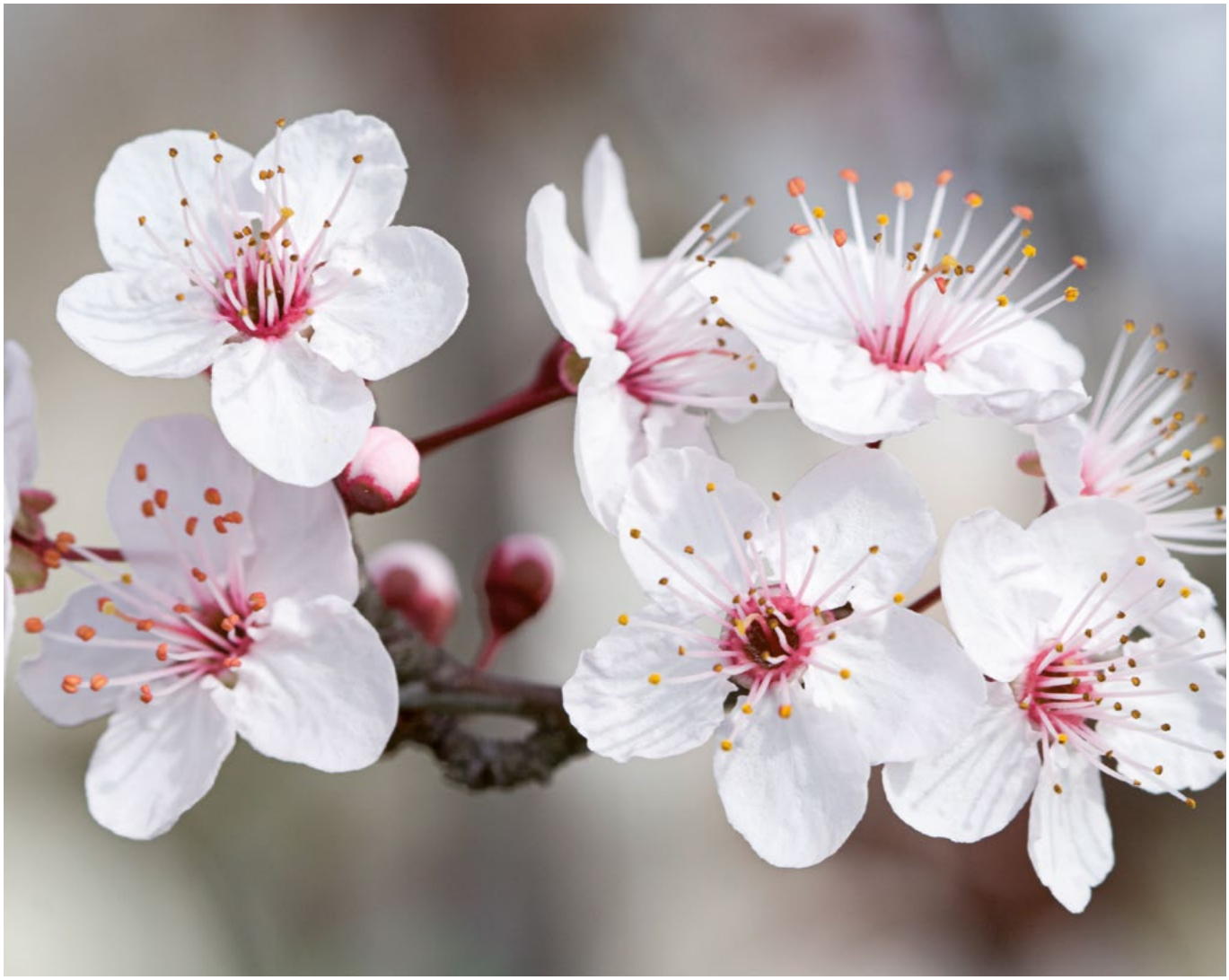
The Münster tax court dismissed the claim in its ruling from 20.8.2019 (case reference: 12 K 2903/15 G, F). Offsetting the disallowed amounts of input tax against taxable profits could not be considered in the relevant years of 2010 and 2011. The disallowed amounts of input tax could neither be included as business expenses nor as provisions for liabilities of uncertain timing or amount in 2010 and 2011. In these years there is no probability that a provision will be utilised and hence no need to create one. There was only a reasonable probability from May 2013 onwards, therefore, only once the external audit had begun. If provisions have to be created for the impending use by the taxpayer then these can only be offset against taxable profits on the balance sheet date when the offence is discovered or if its discovery is imminent.

An inadmissible requirement to carry out decorative repairs (sanding down the parquet floor) can void an entire provision

In many rental agreements the tenants are required to carry out decorative repairs. A local court in Nuremberg, in its ruling from 18.1.2019, decided that it was inadmissible to pass on to the tenant the responsibility for maintenance repairs that go beyond the scope of minor and decorative repairs. If these are nevertheless contractually required then the entire provision would be void and the tenant would not have to carry out any decorative repairs whatsoever.

In the case in question, a landlord had only refunded part of the security deposit that had been paid by his former tenants. He argued that the former tenants had not fulfilled their obligation to carry out various decorative repairs to the rental property. Namely, in the respective rental agreement, there was a provision according to which the tenants had to undertake decorative repairs. According to the wording of the provision, this included sanding down the parquet floor.

However, the local court in Nuremberg was of the view (case reference: 29 C 6568/18) that the tenants had not been under any obligation to carry out decorative repairs because the contractual provision was deemed to be an unreasonable disadvantage and was thus invalid. Namely, sanding down a parquet floor does not constitute a decorative repair. In the rental contract, landlords may pass on their basic property maintenance and repair obligation to a tenant, by way of a form, only with respect to minor and



decorative repairs. That is why, in this case, inadmissibly passing on the responsibility of the maintenance of the parquet floor led to the voiding of the entire provision. As a result, the tenants did not have to paint the flat nor bear the costs of this and were therefore entitled to a full refund of their security deposit.

Travel costs – Being accompanied by a life partner is not work related

Travel costs for work-related activities away from home are generally deductible as professional expenses. Recently, the Münster tax court dealt with the question of whether or not travel costs that arise as a result of taking your wife along with you are tax deductible.

In the case in question, the wife had accompanied her spouse to several events organised by a professional network abroad. She had indeed helped him to establish and maintain contacts to foreign professionals, however, she had no previous specialist training of any kind. Moreover, no work or employment relationship existed with her husband.

The Münster-based judges, in their ruling of 14.5.2019 (case reference: 2 K 2355/18 E), decided that these were private living expenses. Even if the wife's participation supposedly met the expectations of the other participants, the expenses were primarily occasioned by her role as a wife and any professional motivation had receded behind this as something minor.

AND FINALLY...

"The learning process continues until the day you die."

Kirk Douglas (born 9.12.1916 as Issur Danielowitsch Demsky – died 5.2.2020),
US American actor and writer.

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