PKF

Newsletter

Key Issue:
Important aspects of the recapitulative statement (RS) for VAT

04|20

Dear Readers,

In the wake of the coronavirus all other issues have faded into the background for now. All time limits and deadlines are up for discussion, even the **insolvency filing deadline** (cf. under the Latest Reports section). While tax issues are thus receiving less attention than usual, nevertheless, information about current developments in the fields of German tax and law might perhaps go some way to conveying a feeling of normality by allowing you to avert your gaze, for a short while, from the all-encompassing topic of disasters.

In the Tax section, on your behalf, we have reviewed recent Federal Ministry of Finance circulars. First of all, one on the **royalty barrier** and the question of when and to what extent royalty payments are tax deductible in Germany if they have been taxed at a low rate abroad. Another circular has provided the impetus for addressing our Key Issue - **the recapitulative statement (RS)**. Here, we take a look at the RS procedural changes in connection with consignment warehouses. In the next section of the Key Issue report we point out that it is not possible to wait to submit the RS together with an **advance VAT return** where the filing deadline has been permanently extended. This is particularly important in the light of the risk of tighter sanctions for late submissions, which have been in place since the start of this year.

Next up, in the Accounting & Finance section, we discuss a Federal Fiscal Court ruling that includes important guidance on how **financial accounting leads tax**. Subsequently, we answer the question as regards the conditions under which, within a consolidated tax group, variable compensation payments to external shareholders would be permissible.

In the first report in the Legal section we present the main features of the new **German Posting of Employees Act**, which will benefit foreign workers in Germany in particular. This is then followed by an article about a ruling by a Higher Regional Court that will please **majority shareholders** because they will not have to abstain from voting on matters that relate to their own affairs if these concern their own employment contracts. Furthermore, we report on the more stringent requirements for **operational integration management** (OIM) carried out by employers.

With our best wishes for an interesting read.
Stay healthy.

Yours sincerely

Your Team at PKF

Key Issue

Important aspects of the recapitulative statement (RS) for VAT

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TAX

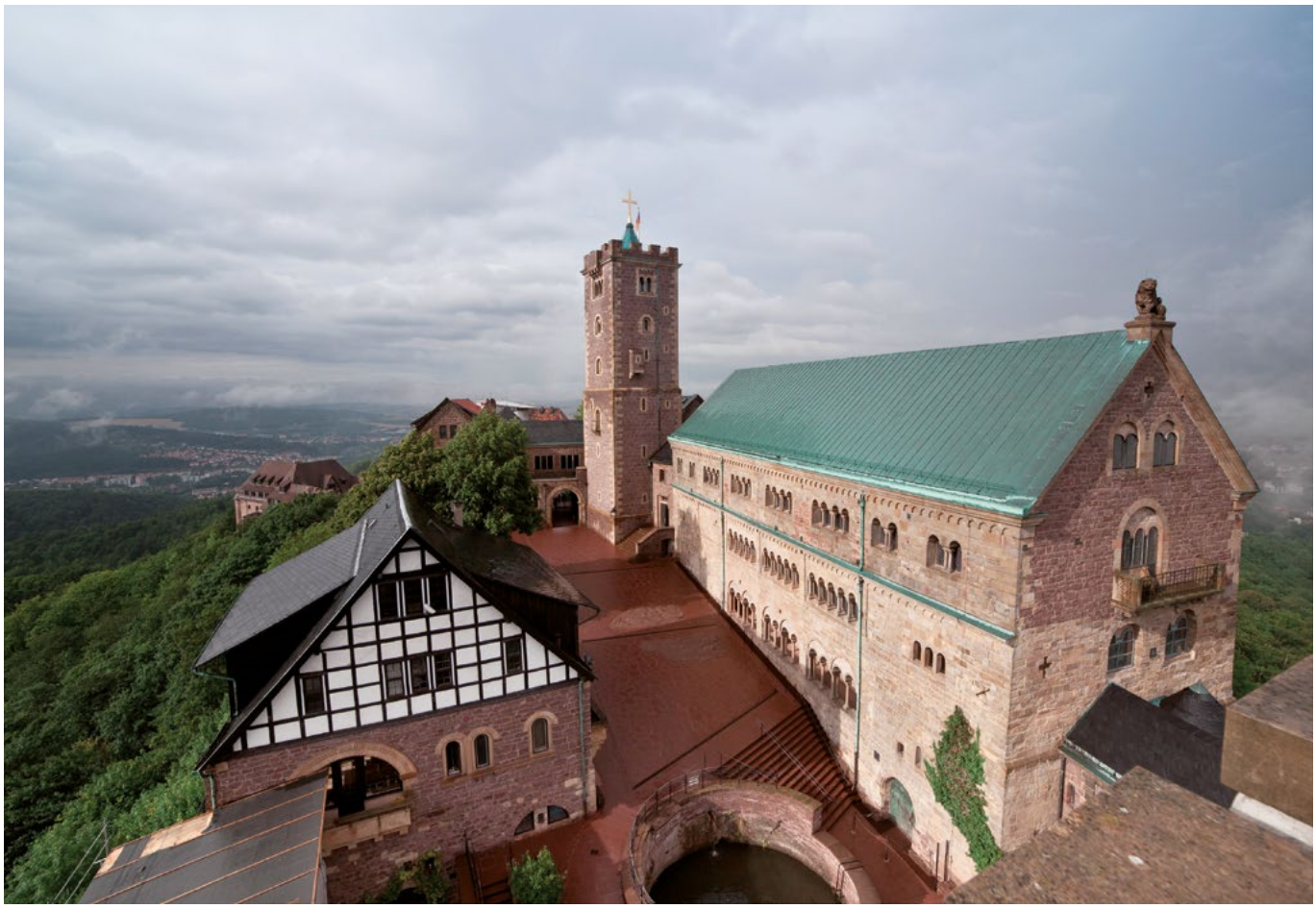
StB [German tax consultant] Thorsten Haake

The German Federal Ministry of Finance circular on the application of Section 4j of the German Income Tax Act ("royalty barrier")

Local tax laws in many countries permit preferential tax treatment for certain proceeds that are realised from intangible assets (so-called "preferential regimes"). Examples of this are the "Innovation Box" in the Netherlands and the "Patent Box" in the UK. The tax rates for such income are frequently considerably below the rates that are applicable in Germany. In practice, groups that operate internationally exploit this difference through appropriate structures (e.g. the "sale-and-lease-back" of intangible assets) in order to reduce the overall tax burden. The legislators in Germany came out against this and introduced a rule in Section 4j of the Income Tax Act (*Einkommensteuergesetz, EStG*) (the so-called "royalty barrier"), which has been effective for all expenses arising after the 31.12.2017. In addition, the Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*) has now published a letter of implementation.

1. A restriction on the business expense deduction

The expenses related to the assignment of use of, or the right to use rights and other intangible assets fall under Section 4j EStG if the creditor is a party closely related to the debtor within the meaning of Section 1(2) of the German Foreign Transaction Tax Act. This criterion will normally be met where there is a stake of at least 25% in the share capital.



Additionally, such income received by the creditor has to be subject to a low rate of tax. The limit that has been drawn by the legislators in Germany for this is an income tax rate of 25%. If the income tax burden in the other country is below this level then the taxpayer in Germany may only proportionately deduct (on a "pro rata" basis) the respective business expenses. In the case of an income tax burden of 10%, for example, the business expense deduction would have to be reduced by 60% (15/25).

2. The exemption provision (escape clause) ...

A restriction on the business expense deduction would not come into effect if the preferential regime in the other country complied with the OECD's so-called "nexus approach". This approach essentially takes into account that the intangible assets that underlie the proceeds were internally developed by the licensors themselves and not merely transferred to them.

Please note: Consequently, taxpayers in Germany face the challenge of checking that the foreign tax regulations comply with specific criteria. The law includes a reference to the guidance in the final report on Action 5 from the so-called "BEPS project" where the nexus approach is described in more detail, however, this is only helpful to a limited extent.

3. ... and the reaction of the fiscal authority

The BMF published a circular, on 19.2.2020, that included a non-exhaustive list of harmful preferential tax regimes, i.e. ones that do not comply with the OECD's nexus approach. The list, termed a "guideline", only relates to the 2018 assessment period. In this way, those who apply the law can at least find out which regimes the German fiscal authority regards as harmful for the 2018 assessment period. These include, for example, the above-mentioned regimes in the Netherlands and the UK.

Furthermore, the BMF circular contains a list of foreign regimes that are still being checked with respect to their nexus conformity. However, there is unfortunately no statement in the BMF circular on the regimes that, in the opinion of the German fiscal authority, do comply with the nexus approach.

Recommendation

It is likely that on the date when the BMF circular was issued the vast majority of tax returns for 2018 had already been submitted. However, as it is now known which preferential regimes are regarded as harmful by the fiscal authority, where the respective issues are present it would be advisable to check if, potentially, corrections need to be made to the 2018 tax returns.

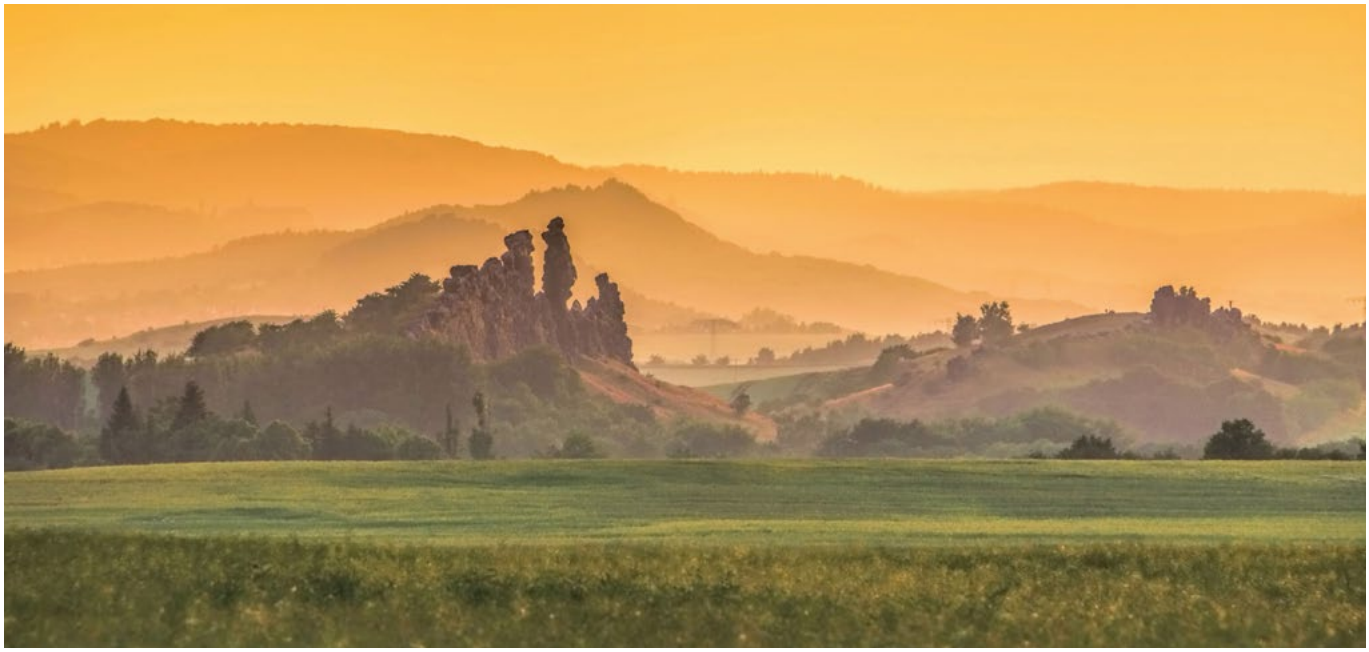
WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch /
StBin [German tax consultant] Sabine Rössler

The recapitulative statement - Information on procedures for consignment warehouses and the increased importance of the submission obligation

The German Federal Ministry of Finance (*Bundesministerium der Finanzen, BMF*) published a circular, on 28.1.2020, in connection with the information relating to consignment warehouses in the recapitulative statement (RS). The circular deals with important procedural changes following the new rules under Section 6b of the German VAT Act (*Umsatzsteuergesetz, UStG*). Furthermore, other new legal rules have to be observed according to which an intra-Community supply would only be tax-exempt if the business had complied with its obligation to submit an RS.

1. Information on procedures for consignment warehouses

A consignment warehouse is a supplier's goods depot that is located close to the customer. The legal title to the goods remains with the supplier until the customer takes them out of this depot. It is only when the goods are taken out that a supply is deemed to have taken place and this provides the basis for issuing invoices where VAT is charged in Germany. New rules were introduced under Section 6b UStG in order to simplify the taxation



of transactions linked to a consignment warehouse in the EU and have been applicable to such transactions since 1.1.2020. According to these new rules, information will have to be provided in the RS also about supplies of goods that were dispatched or transported, within the context of a consignment warehouse, to another EU member state if the recipient of those goods was already known from the outset.

The BMF, in its recent circular from 28.1.2020 (reference: III C 5 - S 7427-b/19/10001 :002), pointed out that for organisational reasons it was temporarily still not possible to enter the required details within the framework of the existing procedure for submitting the RS. As a substitute, notification in relation to the transportation and dispatching that has been realised should be submitted to the Federal Central Tax Office (Bundeszentralamt für Steuern, BZSt), in addition to the existing RS. The form that has to be used is available on the form server of the Federal Fiscal Authority. This can be completed and submitted directly online, or alternatively completed in the offline mode and then sent by e-mail to the BZSt, which will in turn confirm that the notification has been submitted.

2. Submitting the RS - Stricter requirements in 2020

Under Section 18a UStG, businesses that carry out tax-exempt intra-Community supplies of goods are obliged to submit a recapitulative statement (RS). The RS has to be submitted electronically to the Federal Central Tax Office (BZSt) no later than 25 days after the end of the reporting period (calendar month or calendar quarter). The rules on permanent extensions to the filing deadline do not apply to the RS.

According to the amended Section 4 no.1b UStG, as of 1.1.2020, the submission of a correct recapitulative statement (RS) is one of the prerequisites for the exemption from tax for intra-Community supplies.

If a supplying business does not comply with its obligation to submit an RS, or does not comply fully or correctly then the exemption from tax for the intra-Community supply will not be granted. If the business subsequently realises that an RS it has submitted is incorrect or incomplete then this business would be obliged to correct the original statement within one month. If the business does not submit an RS then the transaction would be subject to tax.

Since 2014, the BZSt has been responsible for imposing sanctions in the case of infringements of the regulations under Section 18a UStG. Owing to the increased importance of the RS it can be assumed that infringements will be punished more quickly and more severely in the form of setting fines.

Recommendation

Currently, it is yet to be clarified exactly when the tax liability for a transaction would be established in the case of an inadequate submission of an RS and over what period a subsequent correction could be made. Likewise, the above-described procedure where a consignment warehouse is used, in practice, could still give rise to many discussions and questions. So, please do not hesitate to contact us.

The amount of a provision set aside under German commercial law still constitutes the upper limit for the tax accounts

In the tax accounts, the maximum amount of a provision that may be recognised is the value permitted under German commercial law. The application of this "financial accounting leads tax" principle, also referred to as the principle of congruence (Maßgeblichkeitsprinzip), was recently expressly confirmed by the Federal Fiscal Court ***(Bundesfinanzhof, BFH)*****.**

1. Issue - Recultivation of mining sites

In the case in question, a GmbH [German private limited company] (the claimant G) created provisions, for 2010, for obligations associated with the recultivation of mining sites. More specifically, a provision in the amount of € 295,870 was set aside in the financial accounts in due consideration of both the cost increases up to the settlement date as well as a discount rate of 4.94%. For tax purposes the valuation was € 348,105, which included neither the future cost increases nor discounting to the present value. After the amount of provisions for tax purposes was reduced, in the course of an external audit, to the lower value in the financial accounts, G lodged an objection where it took the view that the higher level of provisions in the tax accounts could be applied since the German Accounting Law Modernisation Act *(Bilanzrechtsmodernisierungsgesetz, BilMoG)* had abandoned formal congruence that provided for a specific balance sheet valuation in the financial accounts being binding for the tax accounts.

2. The BFH decision confirmed the application of the "financial accounting leads tax" principle

In its ruling from 20.11.2019 (case reference: XI R 46/17), the Federal Fiscal Court confirmed the interpretation of the law according to which, in the tax accounts, the maximum amount of a provision that has to be recognised is the value permitted under German commercial law. This is based on the "financial accounting leads tax" principle according to which the recognition of business assets in the tax accounts has to conform to the value in the financial accounts unless tax requirements prevent this.

The tax requirements ensue from Section 6(1) no. 3a of the Income Tax Act (Einkommenssteuergesetz, EStG) where it says that when determining the "maximum" amount of provisions that can be recognised the following guidelines under points (a) to (f) shall be taken into account "in particular" . In the view of the BFH, the interpretation of this rule has to be made in accordance with the objectified legislative intent. Here, according to the wording, the interpretation has to be made on the basis of the history, the systematic context as well as the purpose of the norm.

3. Reasoning in detail

(1) Based on the **wording** in Section 6(1) no. 3a EStG - "maximum" and "in particular" - it would not appear that there should be no breach of the principle of congruence that would permit higher provisions in the tax accounts. Instead, the requirement permits a literal interpretation that covers an amount below that of the amount of the provision that arises in accordance with the points (a) to (f) that follow due to the measurement rules under German commercial or tax laws. By adding the words "in particular" the legislators directly expressed that there are other upper limits.
(2) Furthermore, it should also be taken into account that the **explanatory memorandum that accompanied the draft law at that time** stated that recognition in the financial accounts is applicable for the tax accounts if the provision in the financial accounts is validly lower than recognition in accordance with Section 6(1) no. 3a EStG. The judges further clarified that the introduction of BilMoG had indeed given rise to a degree of deviation in how profits were determined in the tax accounts (e.g. as a result of the discontinuation of formal congruence). In spite of this, the basic systematic logic between the financial accounts and the tax accounts had remained unchanged.
(3) Moreover, an interpretation in accordance with the **ratio legis for the norm** does not permit any other outcome. The purpose of the requirement in Section 6(1) no. 3a EStG is to achieve more realistic valuations of provisions. This objective is also satisfied by the reference to the "financial accounting leads tax" principle. Ultimately, even after the coming into force of the BilMoG, the value of a provision under German commercial law that is lower than the value of one under tax law is still based on a realistic measurement.

Variable compensation payments to external shareholders only possible to a limited extent

In a recent circular, the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* dealt in detail with issues related to the application of Section 14(2) of the German Corporation Tax Act (*Körperschaftsteuergesetz, KStG)*. These concerned, among other things, the maximum amount of compensation payments and the so-called business test.

1. The Federal Fiscal Court on the agreement of variable compensation payments

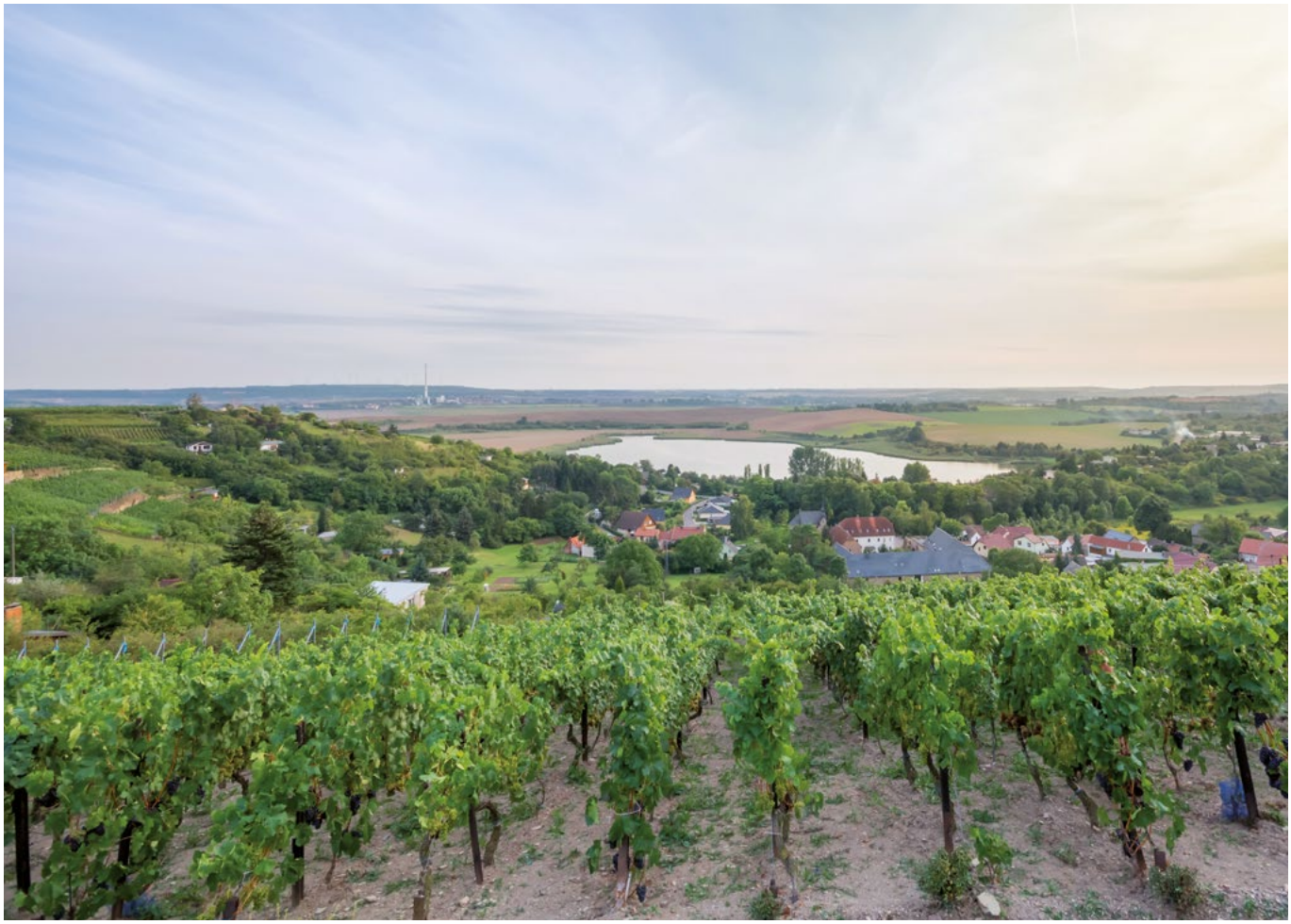
The Federal Fiscal Court *(Bundesfinanzhof, BFH)*, in it ruling from 10.5.2017 (case reference: I R 93/15) took a decision that was contrary to previous administrative opinion that the agreement of variable compensation payments by a controlling enterprise to an external shareholder is an obstacle to the recognition of consolidation for tax purposes if the compensation payments are ultimately calculated on the basis of the profit of the controlled company. As a result, the German government, via the amended version of Section 14(2) KStG - which was part of the 2018 Annual Tax Act (cf. PKF Newsletter 12/2018 p.3) - provided rules that determined the conditions, besides the fixed amount pursuant to Section 304(2) clause 1 of the Stock Corporation Act *(Aktiengesetz, "AktG")*, under variable compensation payments that had been additionally agreed and made would be permissible.

2. Important elements of the BMF circular from 4.3.2020

In the BMF circular, from 4.3.2020, the fiscal authority discussed, in particular, the following issues:

- the scope of application of Section 14(2) KStG,
- the maximum amount of compensation payments,
- the business test and
- the legal consequences.

(1) The scope of application of Section 14(2) KStG - Firstly, the fiscal authority clarified that it is unimportant whether the compensation payments are made by the subsidiary company or the parent company. Section 14(2)



KStG may only be applied if compensation payments are agreed and made. However, for the recognition of consolidation for tax purposes it would not be detrimental if, besides the minimum amount under stock corporation law, as defined in Section 304(2) clause 1 AktG, other profit-related compensation payments have been agreed but these variable components of the amount could not be paid or likewise were not actually paid in a specific financial year because, for example, the subsidiary company's earnings were low or negative.

(2) The maximum amount of the compensation payment - In this regard, the BMF holds the view that the compensation payment may not exceed the share of profits that could have been paid in the absence of a profit transfer agreement. For the calculation, using the net income for the period under commercial law before the profit transfer as the basis, adjustments will have to be made. The following items, in particular, will have to be deducted: additions to reserves, amounts subject to a payout block and notional amounts of tax on earnings. Amounts that have to be added back will be, primarily, those that have resulted from the reversal of reserves that were created during the period as a consolidated tax group.

Please note: The calculation of the maximum amount has to be carried out separately for each financial year and it is not possible to do this retroactively.

(3) Business test - According to this test, the amount in excess of the (fixed) minimum amount, as defined in Section 304(2) clause 1 AktG, has to be justified on economic grounds on the basis of a reasonable commercial assessment. In particular, purely tax-driven variable compensation payments for which there is no objective justification would not satisfy this so-called business test. If there is no close relationship between the parent company and the minority shareholder then, due to the clash of interests that exists, there will generally be objective reasons for the agreement of additional compensation payments so that, normally, the business test would not be an obstacle to the recognition of consolidation for tax purposes.

(4) Legal consequences - If the overall compensation payments made to an external shareholder exceed the maximum permitted amount under Section 14(2) KStG then this would be an obstacle to the recognition of consolidation for tax purposes

LEGAL

RAin [German lawyer] Birgit Ludwig

Planned amendments to the German Posting of Employees Act - Compensation issues and working conditions

The EU Directive on Posted Workers has to be transposed into national laws by 30.7.2020. The Federal government's draft law on this has been available since February 2020.

1. Background - The implementation of EU requirements

The EU freedom to provide services means that service providers are able to deploy their employees across borders. Amendments to the German Posting of Employees Act in accordance with the requirements of the EU Directive should, where possible, create the same pay and working conditions for employees posted to Germany. Furthermore, German employers would also be protected from, for example, wage dumping and competitive disadvantages.

2. Overview of the amendments to the German Posting of Employees Act

(1) Compensation - Up to now, the rules on minimum wage rates have been applicable to employment relationships between employers based in a foreign country and their workers employed in Germany. Under the new provisions of the Posting of Employees Act (Arbeitnehmer-Entsendegesetz, AEntG), the usual requirements with respect to compensation including overtime rates will now apply to posted employees. This means that

when posted workers perform the same work they will also have to be paid the same wage.

Please note: This includes remuneration components such as allowances (e.g. for dirty or hazardous work), supplements and bonuses.

(2) Posting-related expenses - No posting-related expenses can be credited against the compensation (such as expenses for travel, accommodation and meals). Allowances that have accrued for the posted worker as a result of the posting do not constitute a compensation component.

(3) Working conditions - Posted workers will be able to benefit not only from the amended rules in the Posting of Employees Act as regards compensation and posting-related expenses, but also with respect to the applicable working conditions. In this case, the protection of posted workers extends not only to the statutory regulatory or administrative provisions, but also the generally binding collective agreements.

Please note: As regards the accommodation that is provided for posted workers, the relevant guidelines set out in the German Workplace Ordinance have to be complied with. In particular, requirements related to hygiene and state-of-the-art equipment have to be addressed.

(4) Long-term postings - Employees who are posted for longer than 12 or 18 months will be covered by the protection afforded by all the rules on working conditions (e.g. the German Working Hours Act). Moreover, mandatory working conditions in generally binding collective agreements will also have to be complied with.

Please note: The requirements of the amended Posting of Employees Act are also supposed to apply to temporary workers who are being deployed in Germany.

Recommendation

In the future, if employees are posted to Germany you should bear in mind that they have to be paid the same wages for the same work. Accommodation that is provided has to have the minimum standards set out in the German Workplace Ordinance and employers have to assume any costs that arise as a result of the posting.

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

The ability of co-shareholders to review the managing director's remuneration

The Higher Regional Court *(Oberlandesgericht, OLG)* in Hamm handed down a landmark ruling, on 9.9.2019, on the question of whether or not and within what limits a managing director who is also the majority shareholder is able to determine his/her own remuneration (case reference: 8 U 7/17). The appropriateness test has to be performed while taking due account of fiduciary duties and multiple functions.

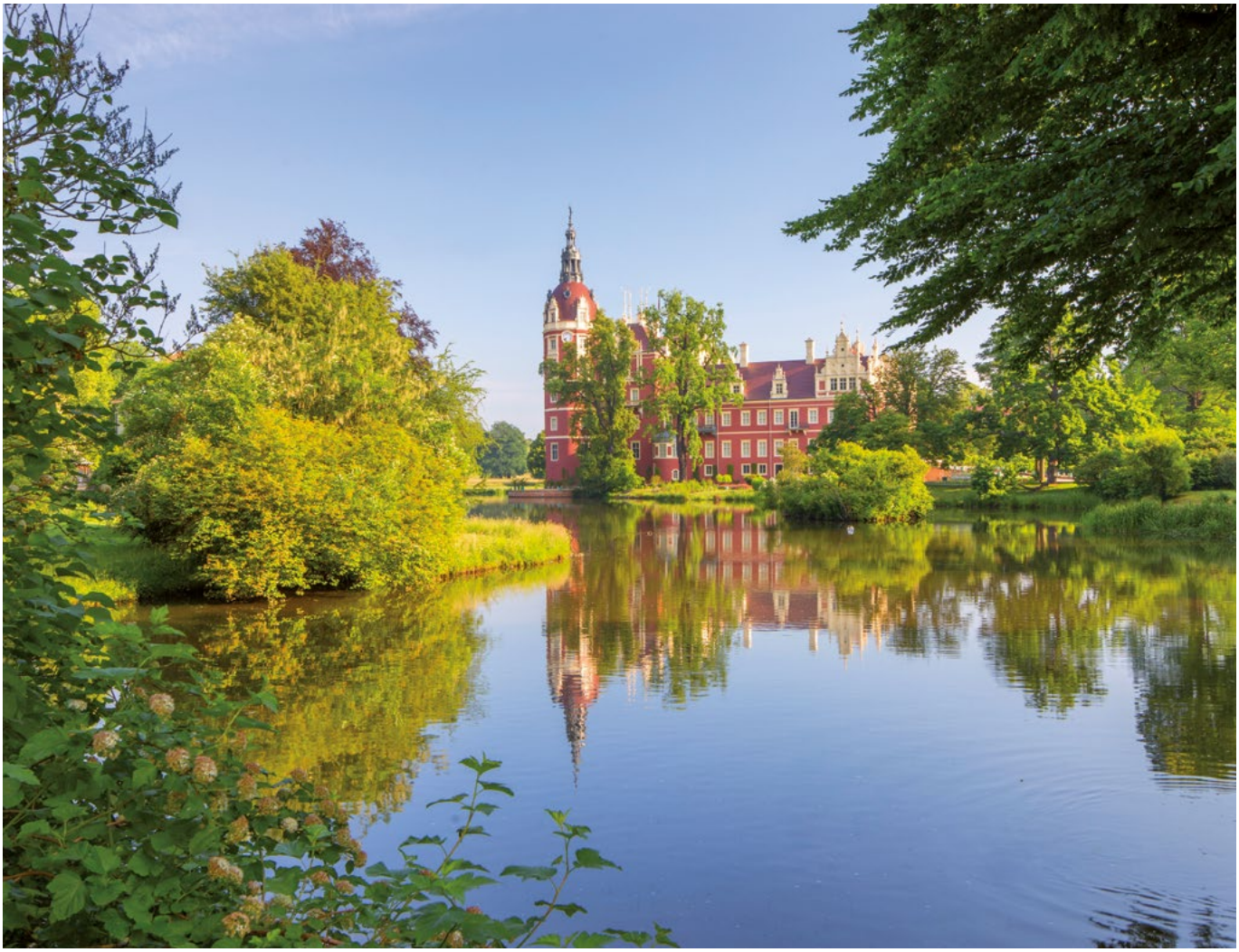
1. Issue - Exclusion of voting rights on matters of personal interest?

The claimant was a minority shareholder (40%) in a GmbH [German private limited company], which acted as the general partner company for a GmbH & Co. KG [German limited partnership with a limited liability company as a general partner]. The majority shareholder (60%) and managing director of the GmbH was the claimant's brother. His son was another managing director. Both of them already worked as managing directors in return for payment in other group companies. A dispute erupted when, for the first time, the majority shareholder - even though his brother voted against this - concluded managing director employment contracts with himself and his son that provided for remuneration, in each case, of € 60,000 p.a.

The minority shareholder asserted that his brother was excluded from voting on matters of personal interest and, moreover, that the functions did not justify the respective remuneration, therefore, this constituted a breach of corporate fiduciary duties. However, the OLG took a different view.

2. OLG ruling - No exclusion of voting rights

GmbH-shareholders are generally excluded from voting if the resolution concerns performing a legal transaction



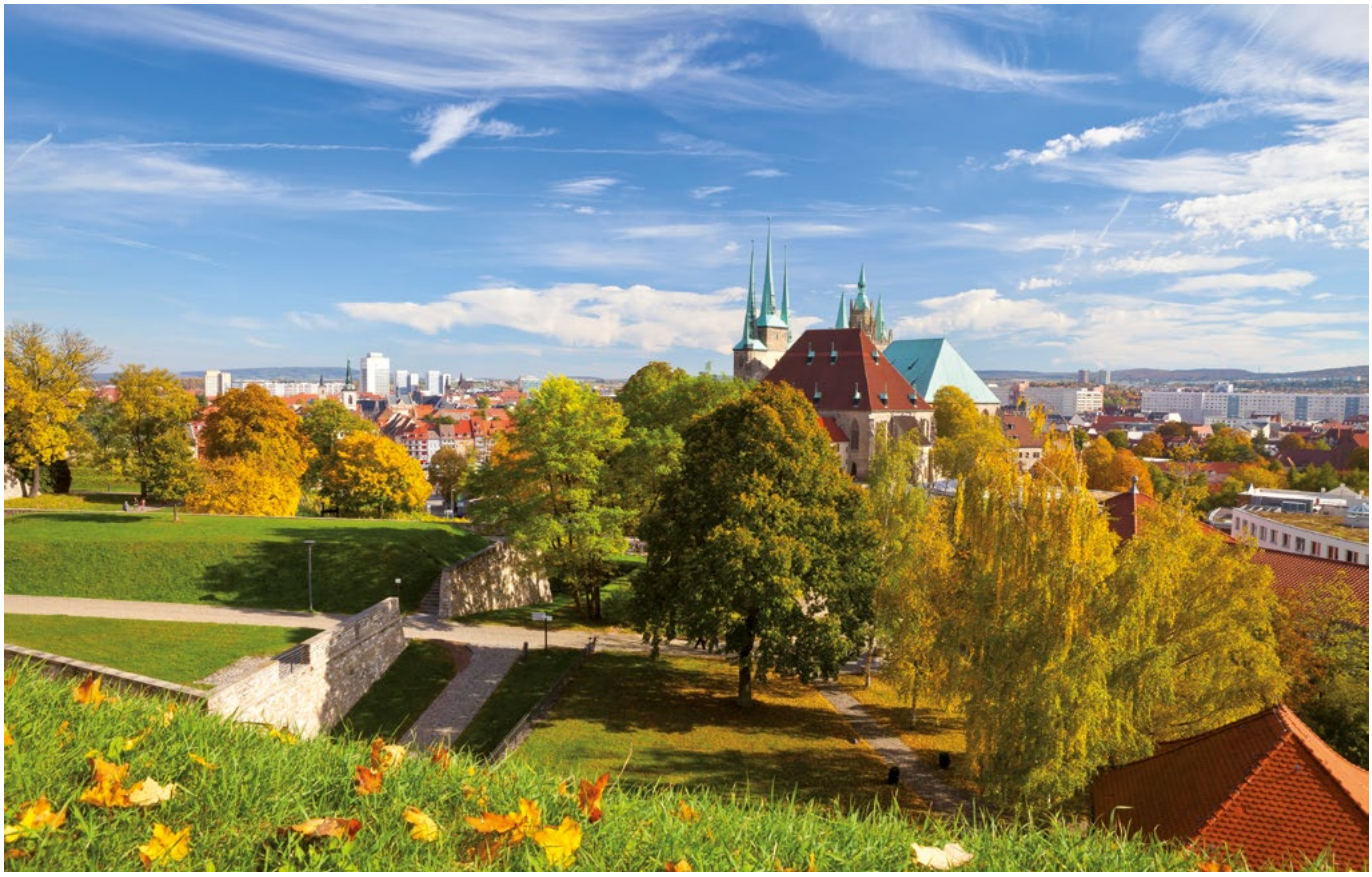
with themselves. It is however generally accepted that this does not include those legal transactions that are based in relationships under company law. According to the OLG, this also includes an employment contract for a managing director. Otherwise, determining the conditions of the managing director function of the majority shareholder would be solely in the hands of the minority shareholder. Therefore, the risk that the majority shareholder could enrich him/herself to the detriment of the minority shareholder should not be eliminated via the exclusion of voting rights but, instead, via the principles of fiduciary duty and equal treatment. These apply particularly with regard to an employment contract with a close relative. Consequently, the majority shareholder was not excluded from voting on the resolution on his own employment contract nor that of his son.

3. Appropriateness test in accordance with corporate fiduciary duties ...

Fiduciary duty prohibits setting remuneration for a shareholder that would not be granted for an equivalent activity by a third party. In this respect, fairly broad discretionary leeway exists, although the adherence to this will be subject to court review. In doing so, it is possible to draw on appropriate remuneration studies about managing director salaries as well as financial court rulings on the issue of hidden profit distribution. The court implied here that more generous criteria should be adopted under company law than under tax law. Consequently, as the limits under tax law had not been exceeded in the case in question likewise, under company law, there could not have been a breach of fiduciary duty.

... in view of several employment contracts in the group

When assessing the appropriateness, ultimately, you have to take into consideration if the person concerned is working in parallel for other affiliated companies and drawing a salary for this. Nevertheless, in the process, the allocation should not be carried out on a purely pro rata basis using the number of days worked for the respective companies. Instead, it is rather more common to use an appropriate percentage reduction for the part-time activity that does not have to correspond to the time allocation.



RAin [German lawyer] Sonja Blümel

More stringent requirements for operational integration management (OIM)

In the last few years, operational integration management (OIM for short) has gained considerably in importance for dismissals on the grounds of ill health. It has developed into a sort of unwritten condition for dismissal. If it is not properly provided and applied before the notice of termination is served then this would normally result in the notice of termination served by the employer being deemed to be void. The Federal Labour Court *(Bundesarbeitsgericht, BAG)* recently tightened up the requirements.

1. Issue - Dismissal of a pilot

The claimant and the defendant airline had a dispute over the termination of the employment relationship due to unfitness for flight duties. The latter was established by an expert consultant after frequent short spells of ill health in the spring of 2015. As the claimant was not fully fit for shift work the option of a ground job was also eliminated. The claimant had refused to undergo an OIM process. In an appraisal interview, in which no personnel representative participated, no continued employment opportunities to which both sides could agree were identified.

According to the applicable collective agreement, unfitness for flight duties constitutes a resolutive condition for the employment relationship and thus terminates it. The claimant took legal action against this termination and maintained that there were other continued employment opportunities.

2. Decision - No proper OIM

The BAG, in its ruling from 17.4.2019 (case reference: 7 AZR 292/17), decided that the resolutive condition would be present and the employment relationship would be terminated only if there were no other continued employment opportunities for the employee who was unfit for flight duties. This could have been established through a proper OIM process.

However, in the case in question, OIM was not properly provided. Moreover, the defendant was not able to pro-

vide evidence that the following points had been adequately clarified for the claimant, namely, the objectives of OIM, the nature and extent of the data that are collected and used, the claimant's right to choose between carrying out the OIM process with and without the participation of employee representatives. Therefore, in the absence of a proper invitation, the appraisal interview could not have constituted a proper OIM process. Therefore, the defendant was faced with an increased burden of presentation and of proof. The airline should have presented and analysed every conceivable continued employment opportunity as well as all the potential opportunities that had been suggested by the employee. Next, the airline should have explained in detail the reasons why the respective continued employment in a different job, or in a potential "job opening" could not be considered. The airline had not done this, which is why it could be presumed that there were continued employment opportunities and that the employment relationship had not ended.

Please note

Employers would be well advised to comply with the requirements for operational integration management and to carry out a proper OIM process in the run-up to dismissal on the grounds of ill health.

LATEST REPORTS

Suspension of the obligation to file for insolvency due to the coronavirus pandemic

According to a press release from the Federal Ministry of Justice and Consumer Protection, from 16.3.2020, the obligation to file for insolvency pursuant to Section 15a of the German Insolvency Code *(Insolvenzordnung, InsO)* would be suspended if companies experience difficulties as a result of the coronavirus pandemic.

The background to this is that, in the current exceptional situation, it would probably not be possible to complete the processing of applications for public assistance as well as financing or restructuring negotiations within the three-week period for the mandatory filing for insolvency so that, for this reason, companies might be forced to file for insolvency. Therefore, the intention is to suspend the previous three-week obligation to file for insolvency via a statutory provision for a period of up to 30.9.2020.

Please note: However, the implementation into applicable law still needs to happen. To this end, please follow our updating information at www.pkf.de. Until then, the obligation to file for insolvency in accordance with Section 15a InsO if there are grounds for insolvency will still be in effect.

Subsequent acquisition costs for a shareholding – Default on loans and collateral

Already in 2017, the Federal Fiscal Court (Bundesfinanzhof, BFH) changed its case law on subsequent acquisition costs when shareholdings in corporations are sold. Recently, the German government responded to this case law in its 2019 Annual Tax Act.

The newly added Section 17(2a) of the Income Tax Act (Einkommenssteuergesetz, EStG) specified that acquisition costs also include ancillary expenses and subsequent acquisition costs, in particular,

- open and constructive equity contributions,
- loan losses if granting a loan or a loan waiver during a time of crisis for the company was for reasons under corporate law, and
- defaults of guarantor subrogation claims and comparable claims if the commitment or waiver of the respective collateral were for reasons under corporate law.

According to the new legislation, the requirement for reasons under corporate law would generally be satisfied if, in the same circumstances, an unrelated third party would have called in or not granted the above mentioned loan or collateral.

Moreover, for cases where the shareholder makes contributions to the company's capital that are over and above the nominal amount of his/her shareholdings, there are now legal provisions for calculating the acquisition costs that require the contributions to be allocated evenly across the entire holdings of the shareholder including new shares obtained within the scope of capital increases.

Please note: The new regulations will be applicable for the first time to divestments (or similar cases) made after 31.7.2019. However, upon application, the new legal definition of acquisition costs may already be applied retroactively.

DAC6 – Letter of implementation from the Federal Ministry of Finance on reportable transactions

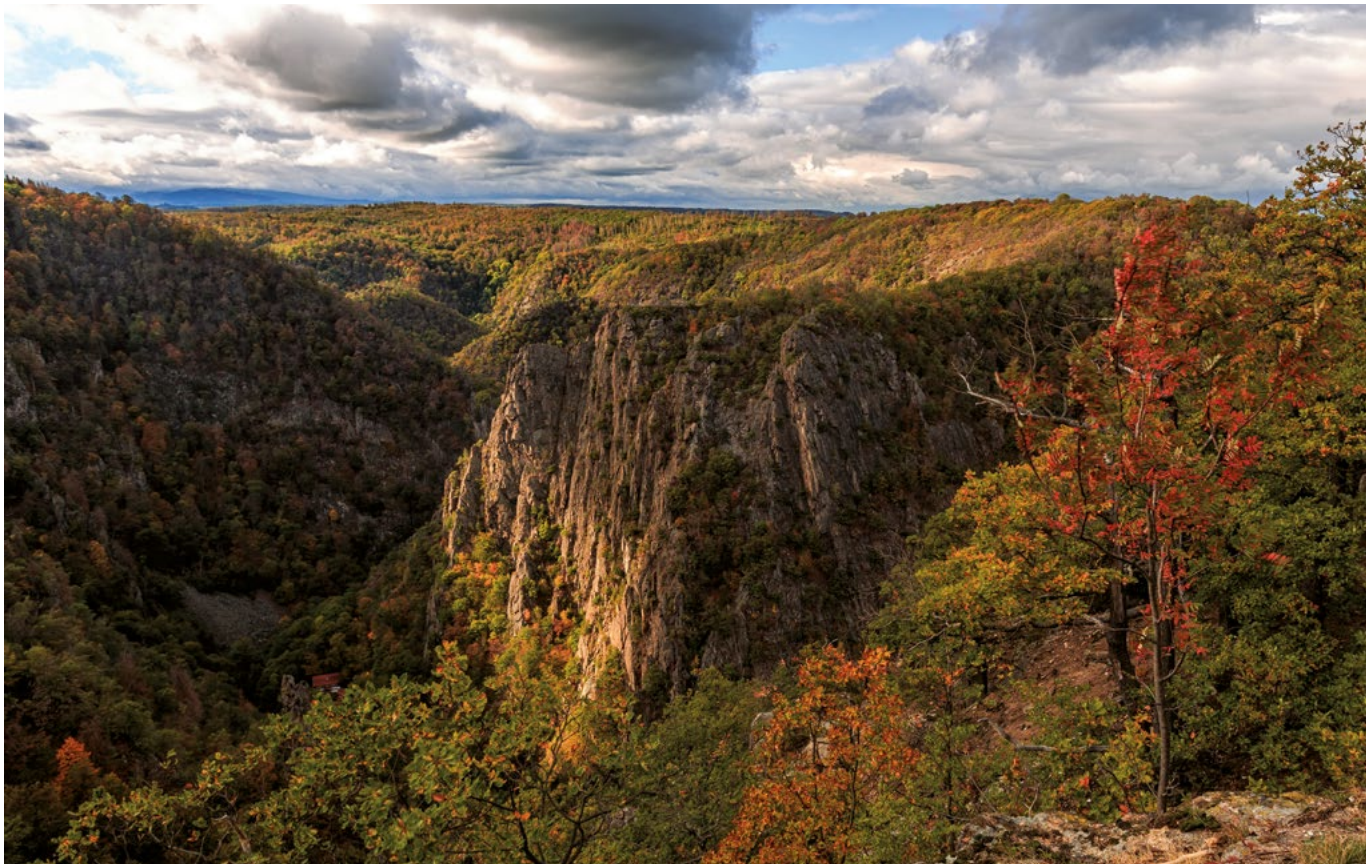
With the "Act on the Introduction of an Obligation to Disclose Cross-border Tax Arrangements" Germany transposed the respective EU Directive - known as DAC6 - into national law, on 21.12.2019 (cf. earlier report in the PKF Newsletter 05/19).

The Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) has now produced a draft discussion document for the letter of implementation that focuses on the following areas:

» material and personal scope of application
» hallmarks of reportable arrangements
» procedure for reporting cross-border tax arrangements.

The draft also includes a list of specific transactions and case groups that should be exempted from the disclosure requirement (e.g. posting of staff, granting of loans and licences).

Please note: The aim is to publish the definitive circular in June 2020. The organisations concerned were given the opportunity to submit comments.



Property in sole ownership – Internal arrangements under a matrimonial property regime govern the equalisation of accrued gains in the case of joint debts

In a marriage, the spouse who has generated more accrued gains than the other has to pay the other spouse half of the difference. Yet, what happens if a property is owned solely by one spouse but the loan agreement was jointly entered into by both spouses? The Federal Court of Justice *(Bundesgerichtshof, BGH)* had to decide on this issue.

Many couples jointly acquire a plot of land or purchase a property and also jointly enter into loan commitments. A simple case under the matrimonial property regime - the final net assets of each partner would consist of half the value of the property minus half the debts. In this respect, the accrued gains would be at the same level and the partners would "only" have to agree what they should do with the property.

If the property is owned by just one of the partners but the loan agreement was entered into jointly by both spouses then the property would be assigned to the final net assets of the respective spouse, however, both spouses would have to be liable for the debts vis à vis the bank.

The BGH, in its ruling from 6.11.2019 (case reference: XII ZB 311/18) based the compensation in this case on the internal arrangements. For the purpose of dividing up the matrimonial property the debts should be treated as belonging to the partner who is the sole owner of the property. The debts would not be taken into account for the other partner in terms of the matrimonial property regime. Subsequently, half of the difference between the value of the property and the loan value would then be paid in order to equalise the accrued gains.

Home offices – What costs have to be deducted in the case of life partners?

When life partners live together in a flat or a house the question that arises is whether or not and what amount of the costs for a home office are tax deductible.

The use-oriented costs for the space (e.g. for energy, water, cleaning, renovation) can be taken fully into account for tax purposes by the person who uses the home office. In the case of property-oriented expenses (e.g. rent, depreciation, debt interest, real estate tax, home insurance) what matters is the ownership or the tenancy situations. The Schleswig-Holstein Ministry of Finance, in a decree from 8.1.2020 (reference: VI 308 - S 2145), made the following distinction:

(1) Home office user as sole owner - If the property that is occupied is wholly owned by the user of the home office then the property-oriented expenses may be fully deducted by him/her if they are paid out of his/her bank account or out of an account jointly held with his/her partner. The costs would not be deductible only if they were being paid out of the bank account of the other partner.
(2) Home office user as joint owner - If the property is jointly owned by the partners then the user may only deduct the full amount of the expenses if s/he pays them out of his/her account. If the money comes out of the joint account of the partners then the costs may only be deducted to a limited extent, up to the proportion of the co-ownership share. When payments are made out of the account of the "non-user" then no deductions are allowed.
(3) "Non-user" as sole owner - If the property is wholly owned by that partner who does not use the home office him/herself then the user may only deduct the costs for this space if s/he pays them out of his/her own account (not a joint account).

The above-mentioned principles apply accordingly in the case of rented rooms. In that case, instead of ownership, what matters is which partner appears as the tenant. In cases where both spouses are tenants and pay the costs out of a joint account then 100% of the costs may be deducted. The cost deduction will be limited to 50% of the costs only if the home office in these cases takes up more than 50% of the overall living area.

Please note: The above-mentioned apportionment principles also apply for registered partners and unmarried cohabiting couples.

AND FINALLY...

"There is no individual freedom without social freedom. Protecting privacy as well as individual civil rights and liberties does not constitute reclusive individualism. These aspects belong to human dignity."

Dr Burkhard Hirsch, 29.5.1930 – 11.3.2020, German politician (FDP).
From 1975 to 1980 he was the Minister of the Interior of North Rhine-Westphalia and from 1994 until 1998 vice president of the German Bundestag.

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