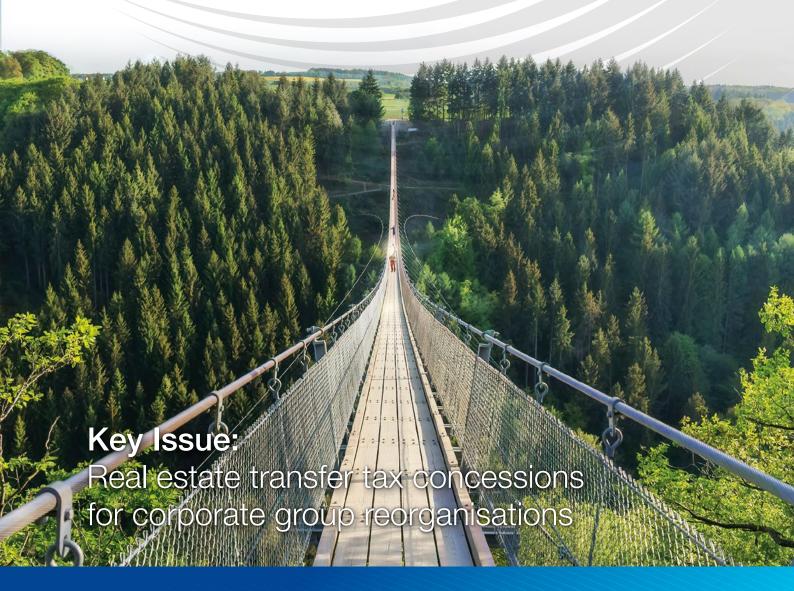
Vervsletter



Dear Readers,

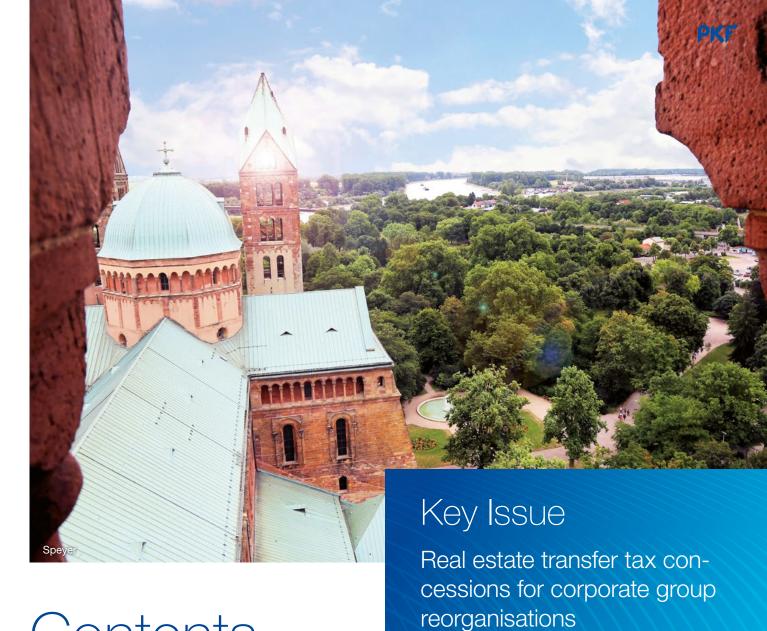
In view of the return to normality, more articles that have nothing to do with coronavirus have found their way into this edition of the newsletter. So, our Key Issue, this time in the Tax section, deals with a series of Federal Fiscal Court rulings that have increased the leeway for intragroup restructurings but in a way that will not trigger real estate transfer tax. That is all the more interesting given that the lawmakers are working on legislation according to which the number of factual situations would be increased and the hurdles lowered. The second article examines aspects of the transfer of tax-privileged assets in cases where coronavirus has also infected inheritance and gift tax. The subsequent topic is the continuation of an article that appeared in the last newsletter about tax concessions for R&D. For this edition we have produced a systematic overview of which research projects and which costs would generally be eligible for tax concessions; here, it would appear that for many innovative enterprises the prospect of funding worth up to € 500,000 per year has now opened up. Attentive readers will also be expecting to continue reading a report series on transfer pricing, which we started in the last newsletter. However, due to a lack of space, we have had to postpone the inclusion of a detailed presentation on the changes to the approach for precisely defining the arm's length principle. This will now appear in our next newsletter (which as usual will be published as a double edition 7-8/2020). We conclude our Tax section with a report on the German Coronavirus Tax-Related Assis**tance Act**, which was passed by the lower house of the German parliament, on 28.5.2020, but has largely disappointed. This is because the new regulations provide only a few concessions (e.g. for restaurants and employees on short-time working).

The first topic in the Legal section concerns the issue of what would happen to the funds that have been accrued for the financial settlement for a partner who has exited if the company were to become insolvent. Following on from this, there is an article about something that was previously reserved for forensic analysis, namely, fingerprint identification, which is increasingly finding its way into our lives. In this connection, we have used a recent ruling to demonstrate that, at all events, boundaries will have to be set if employees feel that their rights have been violated.

Speaking of boundaries, while the borders with neighbouring countries will be opening up at least partially in the middle of the month, nevertheless, for very many people a holiday in Germany will be seen as the safe option. That is why, in this newsletter, you will see impressions from the federal states of Rhineland-Palatinate and Hesse.

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

Your Team at PKF



Contents

Tax

Tax concessions for corporate group reorganisations

Latest Reports

Reorganisation tax legislation – Reversal of negative supplementary partner tax accounts when a partner leaves	12
Inheritance and gift tax: Applicable tax class for an acquisition from the biological father	13
VAT – Revenues may only be reduced by bonus points once they have been redeemed	13
Coronavirus I – Compensation for loss of earnings due to a lack of childcare services	14
Coronavirus II – Employers may not prevent the wearing of masks and gloves	14
Dismissal without notice is justified for the misuse of customer data	15
Maintenance for adult children during vocational training – Mandatory income disclosures	15

TAX

RA [German lawyer] Johannes Springorum

Tax concessions for corporate group reorganisations under Section 6a of the German Real Estate Transfer Tax Act

The Federal Fiscal Court (Bundesfinanzhof, BFH) has ruled on seven cases, which were pending, related to the real estate transfer tax (RETT) corporate group clause. In doing so, the Court broadly interpreted the provisions on the exemption from RETT in Section 6a of the Real Estate Transfer Tax Act (Grunderwerbsteuergesetz, GrEStG).

1. Application of the corporate group clause

Under the so-called corporate group clause in Section 6a GrEStG, legal transactions as part of reorganisations (pursuant to Section 1(1) no. 3, (2a) or (3) GrEStG, in principle, taxable events such as demergers, carve-outs, spin-offs and asset transfers) are exempt from RETT. The tax exemption requires the reorganisation transaction to involve only one controlling company and one or more enterprises that are dependent on one controlling company. Within the meaning of the provision, an enterprise

would be deemed here to be dependent on the controlling company if, for five years prior to and five years following a legal transaction (so-called prior and subsequent holding periods), the controlling company had continuously owned (directly or indirectly and/or partly directly, partly indirectly) a stake in this enterprise of at least 95%.

Please note: Following a request from the BFH, the ECJ ruled that the tax concession from Section 6a GrEStG does not constitute state aid that violates EU law (ECJ ruling from 19.12.2018, case: C-374/17, A-Brauerei).

2. Fiscal authority

The opinion of the fiscal authority (set out in an identical decree of the federal states from 19.6.2012) is that for a specific reorganisation transaction the respective "association", consisting of the controlling company and the dependent enterprise(s) involved in the reorganisation,





has to be determined. Under Section 6a GrEStG, reorganisation transactions through which such an "association" is either established in the first place or terminated are not eligible for tax concessions. Moreover, the fiscal authority strictly insists that the controlling company has to observe the prior and subsequent holding periods relating to its stake(s) in the dependent enterprise(s).

3. BFH rulings

3.1 Basic applicability of Section 6a GrEStG

In one of the rulings from 21 and 22.8.2019 (the case references are II R 15/19 to 21/19) the BFH argued against the fiscal authority's restrictive interpretation of the concept of a corporate group ("association") and clarified that, under Section 6a GrEStG, both horizontal as well as vertical mergers should be eligible for tax concessions.

The BFH expressly accepted the applicability of Section 6a GrEStG to reorganisation transactions where the new legal entity emerges, e.g., as a result of a spin-off/carve out from the controlling company, or the legal entity ceases to exist as a result of merging with the controlling company.

3.2 Observing the holding periods

Furthermore, in the above-mentioned rulings, the BFH examined the prior and subsequent holding periods, under Section 6a GrEStG, in various constellations. According to this, the holding periods have to be observed to the extent that, based on the purpose of the provision on tax concessions for reorganisation transactions, it is possible to observe them at all and specifically in the following cases.

- (1) The merger of a dependent enterprise into the controlling company here, the controlling company making the acquisition has to comply with the 5-year prior holding period requirement. The 5-year subsequent holding period requirement (that cannot be met) will be obsolete because the dependent enterprise will cease to exist after its merger.
- (2) The merger of a dependent enterprise into another dependent enterprise here, the controlling company has to comply with the 5-year prior holding period requirement with respect to both dependent enterprises. Here, the controlling company will have to comply with the 5-year subsequent holding period requirement solely with respect to the dependent enterprise making the acquisition. The subsequent holding period requirement will be obsolete because the other dependent enterprise will cease to exist after its merger.

- (3) Spin-off by the controlling company to form a dependent enterprise here, the controlling company carrying out the spin-off transaction has to comply with the 5-year subsequent holding period requirement. The 5-year prior holding period requirement will be obsolete in view of the formation of the dependent enterprise that will emerge as a result of the spin-off transaction.
- (4) Carve-out by the controlling company to form a dependent enterprise here, the controlling company carrying out the carve-out transaction has to comply with the 5-year subsequent holding period requirement. The 5-year prior holding period requirement will be obsolete in view of the formation of the dependent enterprise that will emerge as a result of the carve-out transaction.

4. Structuring possibilities

In view of the BFH rulings and, thus, the broad interpretation of Section 6a GrEStG, the following intragroup restructuring measures, in particular, will be tax-exempt:

- » The merger of a 100%-owned property-owning subsidiary into the parent company in the course of an upstream merger.
- » A parent company merging two 100%-owned property-owning subsidiaries with each other.
- » Carving out of a branch of activity, including property, by a 100% parent company in order to set up a new affiliated company in this way.
- » Spinning off a branch of activity, including property, by a 100% parent company in order to set up a new affiliated company in this way

Conclusion

The intention of the legislators behind Section 6a GrEStG was to make restructuring simpler. Subsequently, the fiscal authority, through its restrictive interpretation of this provision, placed considerable limits on the applicability of the tax concessions. This is not compatible with the intention and purpose of the provision, namely, to make intragroup restructurings simpler. Therefore, the BFH rightly rejected, in every respect, the fiscal authority's restrictive view on the interpretation of the provision. The fiscal authority will now have to radically revise its administrative guidance in order to meet the requirements of the legislation once again.



RAin/StBin [German lawyer/tax consultant] Beate Jost

The potential ramifications of coronavirus for inheritance and gift tax

The many tax breaks introduced to mitigate the economic consequences of coronavirus have, so far, not included inheritance and gift tax, even though there could be serious ramifications in terms of inheritance and gift tax, in particular, for family enterprises. In the following section we give an overview of the potential risk cases and provide recommendations for action here. However, it would appear that, essentially, it will only be possible to mitigate the consequences through the actions of legislators and through the equitable measures of the fiscal authority; yet, even seeking to make use of these would require preparation.

1. Triggering of shortfall assessments

1.1 Distress sales and insolvency

In view of the coronavirus crisis, a number of company successors have been forced to sell stakes in companies or essential business assets, or even to file for insolvency. Under existing law, violations of the 5-year or 7-year holding period – for whatever reason – would lead to the triggering of a shortfall assessment and to a pro rata tax payment on the transfer of business assets that was previously tax-privileged. Besides being severely affected by coronavirus, company successors will be additionally burdened by inheritance tax.

1.2 Risk of excess withdrawals during periods when there is a lack of profits

During periods when there is a lack of profits, withdrawals from reserves or advanced distributions of profits in order to protect private liquidity could easily result in excess withdrawals. Such excess withdrawals (defined as those withdrawals/dividends that, during the holding period, exceed the sum of the profits and capital contributions by more than \in 150,000) would constitute a shortfall assessment trigger.

Recommendation: Since it is possible to rectify a situation where excess withdrawals have occurred by making a timely capital contribution before the end of the holding period, we would strongly recommend monitoring withdrawals, as this is the only way to ensure a response at the right time.

1.3. Sharp decline in aggregate wages

Compulsory staff cutbacks, lower wages and short-time working due to the coronavirus crisis could result in non-compliance with the mandatory minimum aggregate wage level and you could, thus, reach a stage where a shortfall assessment is triggered.



Recommendation: Aggregate wage levels should be monitored on a regular basis and it will be necessary to check whether or not counter measures should be considered.

2. Liquidity through capital contributions – taxation of so-called recent funds

Family business owners, above all, are currently supporting their businesses with capital contributions from their private assets so that, despite the coronavirus crisis, their enterprises will be able to continue functioning and the wages can be paid. If the business owner were to die suddenly then these recent funds would be taxed as private assets without any kind of relief. Admittedly, under the so-called investment clause (Section 13b(5) of the German Inheritance Tax Act) there are tax privileges. These are however linked to tight preconditions that cannot readily be fulfilled and are not applicable to the coronavirus predicament (in particular, the testator's previous specific investment plan, or liquidity outflows because of wages in the case of seasonal fluctuations).

Recommendation: In such a case, successors should be able to document that the funds were contributed in order to provide support to the distressed family enterprise.

3. Succession planning - tax relief for business assets ("90% test") will be refused if there are falls in value

Financial projections (of enterprise values, the non-operating assets ratio and notional inheritance and gift tax charges) that were carried out even at the end of 2019 and which, under the circumstances at that time, would

have resulted in full tax relief could now depict a completely different outcome due to the coronavirus crisis. Instead of theoretically being able to claim the full amount of tax relief that would have been applicable a few months ago, now, in view of the falls in value and, in individual cases, the sharp declines in prices, no tax exemptions whatsoever are possible any more because the ratio of non-operating assets to enterprise value is too high.

Recommendation: Any plans for accelerated inheritance should be carefully reviewed once again and – insofar as is reasonable – the gifting should potentially be postponed, or you should come to an agreement with the local tax office within the framework of an advance ruling.

Conclusion

The coronavirus crisis will have a serious impact on inheritance and gift tax that, under existing law, it will not be possible to avoid. Taxpayers will only be able to keep an eye on the risks during the holding periods through tighter monitoring of shortfall assessment triggers and by actively preparing for any equitable measures on the part of the local tax office by documenting the causality of the coronavirus crisis. That is why legislators should now be urged, because of the coronavirus crisis, to bring about mitigating measures into the inheritance and gift tax arena. In the meanwhile, until this happens, the fiscal authority is requested to enable proper outcomes within the framework of equitable measures.

WP/StB [German public auditor/ tax consultant] Dr Matthias Heinrich/ StBin [German tax consultant] Julia Hellwig

Important aspects of the German Research Allowance Act – Part II: Examples of R&D projects that qualify for tax concessions and eligibility conditions

In the last edition of our newsletter, we provided a definition of R&D projects that would be tax-privileged under the Research Allowance Act (Forschungszulagengesetz, FZulG). In the following, Part II, we list positive and negative examples of such projects. Furthermore, we examine the individual eligibility conditions.

1. Examples of tax-privileged R&D projects

An official agency will determine whether or not an R&D project is eligible for tax privileges and will confirm this by means of a certificate. Such decisions will thus be subject to case-by-case assessments at all times.

The following examples can be cited of **potential** R&D projects from the services sector:

- » development of new programming languages, operating systems and application software;
- » elaboration of significant enhancements for operating systems and application programs;
- » creation of new/more efficient algorithms based on new technologies;
- » mathematical research related to financial risk analysis;
- » development of new data collection methods/tools.

In distinction to the above, there now follow examples of projects that basically **do not constitute** R&D:

- » patent applications, licensing and market research;
- » projects where a product or a method essentially already exists and it is merely a question of market development;
- » development of application software and information systems for companies involving the use of established methods and already existing software tools;
- » addition of user-specific functions to existing application programs (especially, basic functions in the area of data entry);
- » web development involving the use of existing tools.

2. Expenses eligible for tax concessions

Expenses that are eligible for tax concessions include, in particular, the remuneration that is subject to payroll tax of those employees who perform the tax-privileged R&D activities. The respective verified own research activities of a sole proprietor or a partner in a partnership shall be allocated to the expenses eligible for tax concessions up to an amount of \in 1,600 per week (max. 40 hours/week multiplied by \in 40/hour). In order to be able to provide proof of the work that has been performed, regular records have to be maintained that document precisely and promptly the (total) hours worked.

In the case of contract research, 60% of the remuneration paid by the ordering party to the contractor would be regarded as expenses that are eligible for tax concessions. Other expenses, in particular those claimed under other funding programmes or state aid shall not be eligible for tax concessions.

3. An overview of other funding modalities

(1) Non-exempt taxable persons within the meaning of the German Income Tax Act as well as the German Corporation Tax Act are **entitled** to the tax benefits insofar as they generate profit income and fulfil the other requirements of the FZulG.

- **(2)** The **assessment base** for the eligible expenses incurred in a financial year is limited to a maximum of € 2 m.
- (3) The level of support has been fixed at 25% of the assessment base, thus a maximum of \in 500,000 in each financial year.
- (4) Application procedure The application for a research allowance has to be made using an officially prescribed set of data via an officially designated interface at the competent local tax office; in terms of timing, the application shall be filed after the end of the financial year in which the expenses eligible for a tax concession arose.
- (5) Assessment and payment It is envisaged that, within the scope of the next tax assessment, the research allowance will be offset against the income tax or corporation tax that has been determined. The research allowance will be paid out if it exceeds the income tax or corporation tax that has been determined.
- (6) Restrictions Only those R&D projects will be eligible for tax concessions where the work commenced after 1.1.2020, or for which a contract was awarded after 1.1.2020; the tax concession will generally be possible in addition to other funding programmes or state aid at an overall maximum of € 15 m per year and per project.
- (7) Tax treatment The research allowance is tax-exempt and is not subject to the exemption-with-progression rule; eligible R&D expenses will be tax deductible.

Conclusion and Outlook

The fact that Germany is now also providing tax incentives for research is to be welcomed. The extent to which taxable persons will be able to avail themselves of the research allowance will always arise as a result of case-by-case assessments. Making the final assessment will be the function of the agency, still to be designated, that will be responsible for issuing the above-mentioned certificates. Further information is available, in particular, on the website of the Federal Ministry of Education and Research. Recently, this Ministry together with the Federal Ministry of Finance published a set of FAQs, however, these contained little news with respect to the question of when an R&D project would be deemed to be eligible for tax concessions.



The key points of the German Coronavirus Tax-Related Assistance Act

Amendments to tax regulations are planned that are aimed at overcoming the coronavirus crisis, including, a reduction in the VAT rate charged by restaurants and the food service industry. The focus areas of the draft law that was passed by the Bundestag (lower house of German parliament) on 28.5.2020 are presented in the overview below.

- (1) VAT on restaurant and catering services would be reduced from 19% to 7% for one year starting from 1.7.2020. However, the reduction would only apply to food; the sale of drinks has been explicitly excluded (Section 12(2) no.15 of the German VAT Act-draft).
- (2) Up to now, payments by the employer to top-up the short-time working allowance have been treated as taxable remuneration. There are plans to exempt 80% of these top-up payments from tax until the end of 2020

(Section 3 no. 28a of the German Income Tax Act-draft). As a result, the tax treatment of the top-up payments will then mirror how they are treated under social security law.

(3) For reorganisations in 2020 it will be possible for the reporting date of the final balance sheet, which forms the basis for taxation, to be at most twelve months prior to the date of the registration of the reorganisation (modified application of Section 17(2) clause 4 of the Reorganisation Act (*Umwandlungsgesetz*, UmwG)). This extended retroactive period will also have a tax effect if the Reorganisation Tax Act (Umwandlungssteuergesetz, UmwStG) is applied to reorganisations within the meaning of the UmwG. In addition, in 2020, where the legal form changes and a partnership is set up as well as in the case of contributions, an extension of twelve months to the retroactive period for tax purposes will be put in place (Section 27(15) UmwStG-draft).

LEGAL

WP/StB [German public auditor/ tax consultant] Frank Moormann

A partner's financial settlement claim in the event of insolvency

In the event that a partner leaves a company, the outgoing party is generally entitled to a financial settlement that corresponds to the fair market value of his/her stake. In a recent judgement, the Federal Court of Justice (Bundesgerichtshof, BGH) had to decide how to deal with an as yet unpaid financial settlement claim in the event of insolvency.

1. Principle of the payment deadline for financial settlements

A financial settlement claim generally becomes due and payable when the departure takes effect. However, company agreements normally provide for restrictions not only on the amount of the entitlement but also the payment modalities in order to keep the drain on the company's liquidity small. Arrangements for instalment payments and deferrals are, in principle, permissible as long as the settlement interests of the outgoing party are not unduly compromised. Under

current case law, payment periods of up to five years are unproblematic, however, periods of ten or more years, as a general rule, are unenforceable. For time periods that lie in between, what matters are the circumstances in each individual case.

2. What would apply if the company subsequently became insolvent?

Up to now, how an as yet unpaid financial settlement claim should be classified in the event that the company becomes insolvent has been a matter of dispute. The BGH, in its ruling of 28.1.2020 (case reference: IX ZR 10/19) redressed this lack of clarity to the disadvantage of the former partner. The partner's claim can neither be listed as an insolvency claim nor does it constitute a subordinated loan receivable within the meaning of Section 39(1) no. 5 of the German Insolvency Code (partner loans). It could thus only be paid out on a pro rata basis in the case of any final distribution –





once all the insolvency creditors have been satisfied – and, as a rule, would therefore be of no value.

The Court argued that the rules on liability and capital maintenance that constituted an obstacle to the payment of the settlement continued to remain in force, at all events, in the case of a GmbH [a limited company] and a GmbH & Co. KG [German limited partnership with a limited liability company as a general partner] (as in the case in question). This would also apply even if, on the departure date and even one year later, it would have been possible to pay for the financial settlement out of the company's free net assets.

3. Recourse against the remaining partners?

According to the BGH ruling, in principle, the personal liability of the company's remaining partners for the payment of the settlement claim of the outgoing party could be considered. However, this would presuppose that the conduct

of the remaining partners had constituted a breach of trust. The mere deterioration in the financial situation including the subsequent opening of insolvency proceedings would not be sufficient for that. The outgoing party would thus get nothing unless, in exceptional circumstances, there has been an unreasonable delay in filing for insolvency proceedings.

Recommendation

Partners who are ready to resign should therefore think carefully about whether or not the sale of their stakes to the remaining partners should also be considered. No capital maintenance rules apply to the relationship between partners and ensuring that the claim is satisfied would possibly be more readily feasible.

RAin [German lawyer] Birgit Ludwig

Is it permissible to use fingerprints to record working time?

Electronically signing in to a smartphone, tablet or laptop is, in practice, happening more and more frequently via a personal fingerprint. However, in one specific case, the Berlin labour court recently ruled that using fingerprints to record working time is not permissible.

1. Introduction of a new time recording system

The employer, against whom the complaint was filed, had introduced a new time recording system in August 2018. Employees signed in and out by placing their fingers on a terminal. Here, so-called minutiae (individual, not inheritable finger line bifurcations) are extracted from the employee's fingerprint using a special algorithm. This minutiae data record is stored in the terminal, although not the fingerprint itself. It is not possible to generate the fingerprint from the stored data record. The fingerprint is then compared with the stored data.

One employee refused to use the time recording system and also declined to grant a declaration of consent, whereupon the employer issued several warnings to the claimant. The employee making the claim requested that the warnings should be removed from his personnel file.

2. Admissibility limits

The Berlin labour court, in its ruling from 16.10.2019 (case reference: 229 Ca 5451/19) held the view that, in the case in question, using fingerprints to record time was not necessary and upheld the case. The minutiae data record constitutes biometric data within the meaning of Art. 9(1) GDPR. These belong to special categories of personal data in accordance with Section 26(3) of the Federal Data Protection Act. The processing of such data in the context of employment circumstances is only permissible if the processing is necessary for the purpose of exercising rights or fulfilling legal obligations arising out of the employment relationship and if there are no grounds for assuming that the employee has an overriding legitimate interest in excluding such processing. The employee can also grant his/her consent for this.

Please note

Here and in similar cases the applicable principle is that the more intense the interference with the personal rights of the employee, the more important the purpose pursued by the employer has to be (e.g. the protection of secrets related to trade, production and development).

LATEST REPORTS

Reorganisation tax legislation – Reversal of negative supplementary partner tax accounts when a partner leaves

If a partner who still had a positive supplementary tax account leaves then, where the so-called net method is used, this will result in the negative supplementary tax accounts of the remaining partners having to be reversed. This will lead to tax being paid on the hidden reserves that could have be avoided with a basis rollover.

In cases of reorganisations or contributions of assets at partnerships, upon application, the acquired business assets can be recognised at their book values. Accordingly, no realisation and taxation of hidden reserves takes place. In this connection, a distinction has to be made between the gross and net methods.

If the **gross method** is used then, in the joint partnership accounts, the assets are recognised at their fair market value. At the level of the contributing partner, a negative supplementary partner tax account is created in the amount of the unrealised hidden reserves. In the case of the **net method**, the assets are recognised at their book values in the joint partnership accounts. A positive supplementary tax account has to be created for the partner who has made a capital contribution and, for the partner who has made a contribution in kind, a negative supplementary partner tax account.

In a case that the tax court of Lower Saxony ruled on,

the incoming partner initially contributed cash in return for admission into an existing KG and, a few years later, she withdrew from the KG in return for the payment of a financial settlement. Her positive supplementary partner tax account was quite rightly reversed in the course of her departure. However, the previous partners continued to maintain their negative supplementary partner tax accounts.

The tax court, in its decision of 9.9.2019 (case reference: 3 K 52/17), accepted the argument made by the tax office according to which a negative supplementary partner tax account should not only be reversed accordingly when assets are removed from the joint partnership accounts, but also in those cases where the corresponding positive supplementary tax account of the other partner is reversed in the income statement due to the partner's exit from the partnership. Consequently, the tax audit resulted in amendments to the tax assessments and increased the profits due to the elimination of the negative supplementary partner tax accounts. An appeal against the tax court's ruling has been lodged with the Federal Fiscal Court (case reference: IV R 27/19).

Please note: If the gross method is selected then it is likely that there would be no such realisation and taxation of the hidden reserves because of the lack of corresponding positive and negative supplementary partner tax accounts.





Inheritance and gift tax – Applicable tax class for an acquisition from the biological father

Inheritance tax class I may only be claimed for acquisitions from a legal parent. The Federal Fiscal Court (Bundesfinanzhof, BFH) decided this, on 5.12.2019 (case reference: II R 5/17) and, in this respect, excluded acquisitions from a biological parent.

The amount of inheritance and gift tax payable will depend on the tax class, among other things. In tax class I, children and stepchildren initially receive a tax-free amount of \in 400,000 and, beyond that, tax is payable at a rate of only 7% on amounts up to \in 75,000. In tax class III, the tax-free amount is just \in 20,000 and the tax payable on the next \in 75,000 is already at a rate of 30%.

In the case that reached the BFH, the legal action had been brought by a man from Hesse who was admittedly the biological father of a daughter but not her legal one. The legal father of a child is the man who was married to the child's mother at the time of the child's birth. The

biological father had gifted his daughter an amount of \in 30,000 and had agreed to bear the cost of the gift tax payable. He wanted to claim tax class I for this.

However, the BFH grouped him under the unfavourable tax class III. Tax class I could only be applied in relation to the legal father because for tax class grouping purposes the regulations under civil law on parentage and kinship are relevant. Accordingly, it is up to the legal father to pay maintenance. Moreover, the child is entitled to inherit and to a compulsory share only from the legal father. Therefore, in terms of inheritance and gift tax, financial concessions solely for the legal father are justified.

Please note: The BFH pointed out that if children with "two fathers" were able to receive gifts or inherit from both the biological as well as the legal father under tax class I then this would result in unjustified double concessions.

VAT – Revenues may only be reduced by bonus points once they have been redeemed

Retailers frequently offer their customers rebate programmes with which they can collect points and receive loyalty bonus gifts. The Federal Fiscal Court (Bundesfinanzhof, BFH) has now examined such a rebate programme in greater detail.

In the case requiring clarification, a retailer (the claimant) had offered its customers the chance of taking part in the bonus and rebate programme of an external company. The participating customers were given a points account where they were credited with one point (worth one cent) for each € 2 that they spent on purchases. In 90% of cases, the points that had been collected by the customers were redeemed once again for a subsequent purchase. The points that had been collected and redeemed by the customers were settled between the retailer and the external programme provider via monthly "points clearing". The retailer treated the points that had been issued for its customers and the corresponding amount that was owed for this (that had been determined via "points clearing") as a reduction in the VAT charge.

The local tax office was of the opinion that the VAT charge should not be reduced because the promotional expenditure in respect of the points programme was negligible under VAT law. The Munich tax court had upheld the case. The BFH however, in its ruling from 16.1.2020 (case reference: V R 42/17), decided that the retailer's VAT assessment base could be reduced, although not during "points clearing".

The BFH was of the opinion that the reduction could only happen once the customer had actually redeemed the points. This is because, according to ECJ case law, when granting discounts the assessment base can only be changed once the customer has actually been credited with the points.

Please note: The BFH referred the matter back to the tax court that, in a second hearing, will now have to clarify the extent to which the customers have actually redeemed the points awarded to them for a second purchase.

Coronavirus I – Compensation for loss of earnings due to a lack of childcare services

In the course of the coronavirus crisis, the German "Act on the Protection of the Population in the Event of an Epidemic Situation of National Importance", from 27.3.2020, added a new compensation regime for particular loss of earnings situations to the German Infectious Diseases Protection Act.

As is generally known, due to coronavirus, facilities for the care of children or schools have been temporarily closed in order to prevent the spread of infections or communicable diseases. The aim of the provision in the Infectious Diseases Protection Act is to mitigate the loss of earnings suffered by employees, who are entitled to the custody of children, in cases where the employees were unable to pursue their professional activities. Those eligible for compensation are employees who are entitled to the custody of children who are under the age of twelve years, or who are disabled and therefore need help.

In order for employees to qualify for compensation they have to provide sufficient documentary evidence that, during the period of closure of or prohibition on entering the facilities for the care of children or schools, it was not possible to guarantee any other reasonable care options for the child. A childcare option that would be deemed to be reasonable could be, for example, if there was entitlement to so-called emergency childcare in a kindergarten or school, or if it was possible to turn to the other parent

or other family members/relatives to ask them to assume the care of the child. As a general rule, grandparents should be classified as a risk group and, therefore, cannot be considered as a childcare option.

There would be no entitlement to compensation

- » if the working time of those entitled to custody has been reduced due to the imposition of short-time working, or
- » employees who are entitled to custody are still due time credits, or
- » if there is an option to work from home.

In terms of duration, the right to compensation is limited to a period of no longer than six weeks and, in terms of the amount, to 67% of the loss of earnings incurred by employees who are entitled to custody, up to a maximum amount of € 2,016 per month. If the closure or prohibition on entering ends before the time period expires then the right to compensation would cease to apply. This right will be granted by the regional authority responsible for the implementation of the Infectious Diseases Protection Act.

Please note: From a tax perspective, under the Infectious Diseases Protection Act, the compensation payment will initially be tax-exempt. However, it will be subject to the exemption-with-progression rule so that it will ultimately entail a tax payment to a certain extent.

Coronavirus II – Employers may not prevent the wearing of masks and gloves

The coronavirus crisis has reached the German labour courts. The Berlin labour court recently had to rule on a dispute between a duty-free shop operator and its works council.

At the start of the coronavirus crisis, during working hours, the staff at the duty-free shop had begun wearing masks and gloves for incoming flights from China. The employer issued a ban on wearing such protective clothing. In the opinion of the works council, by issuing the ban the employer had also flouted the rights of co-determination; the works council applied for a preliminary injunction

to be issued with the aim of having the ban revoked.

However, shortly before the oral proceedings, the employer did however clarify that there was no such ban. The wearing of gloves would be expressly allowed. The works council viewed this statement as an admission and declared that the proceedings had been conclusively resolved. The labour court concurred with this view in its decision from 4.3.2020 (case reference: 55 BVGa 2341/20) and thus asked the employer in turn, within ten days, likewise to declare that the proceedings had been conclusively resolved.



Dismissal without notice is justified for the misuse of customer data

Employees are required to handle personal data sensitively. A violation of these requirements will generally justify a termination of your employment without notice by the employer. A ruling by the Siegburg labour court has clarified that the misuse of customer data could entail far-reaching consequences.

A consultant employed at an IT company (M) had discovered a security vulnerability in a customer's IT system. Thereafter, M used personal data to warn the customer about this flaw. To this end, on the basis of this vulnerability, M obtained personal data related to the customer's executives and, subsequently, used their account details

to order headache pills in their names. In the context of this order for pills, M advised the customer's executives of the serious security vulnerability. Thereupon, the reaction of the employer of the IT consultant M was termination of his employment without notice.

The Siegburg court rejected the action for unfair dismissal in its ruling from 15.1.2020 (case reference: 3 Ca 1793/19, see under www.justiz.nrw.de). While pointing out a security vulnerability is indeed legitimate, nevertheless, the means chosen to do so was disproportionate. Through his actions the IT consultant M had undermined the customer's trust in his employer and had thus jeopardised the customer relationship.

Maintenance for adult children during vocational training – Mandatory income disclosures

In the context of maintenance claims for adult children, it is not uncommon for the extent of mandatory income disclosures of the parents to be disputed. Such a case recently came before the Higher Regional Court (Oberlandesgericht, OLG) in Düsseldorf.

Children who are undergoing vocational training have the right to claim maintenance from their parents even after the children have come of age. They are entitled to this until they are financially independent, i.e. have completed their vocational training and are earning their own money. The entitlement is based on the premise that they, more or less, purposefully undergo their vocational training.

In the case in question, at the Youth Welfare Office, a father had obtained an official document where the child maintenance payment for his under-age son had been determined. When the son came of age, the father wanted the son to waive the rights in this official document. The son did not comply with this request and, instead, notified his father that he was studying and sent his BAföG [federal education assistance loan] assessment to the father. Thereupon, the father initiated legal proceedings in which he requested, in particular, information about the financial situation of the child's mother.

The OLG, in its decision from 14.11.2019 (case reference:

3 UF 96/19) ruled in favour of the father and granted him the right to information. For the maintenance claim of an adult child – unlike that of an under-age child – the financial situation of both parents is relevant. That is why each parent has to know what income is generated by the other parent in order to be able to calculate his/her share of the child's needs. According to the OLG, in the case law it is not entirely clear whether or not one parent is able to directly request this information from the other one. Notwithstanding this, the child that requests maintenance from one parent would have to ensure that s/he obtains information about the income of the other parent.





AND FINALLY...

"So I think the winners in recession are the people who produce new technology that does things better, which people really want."

Sir James Dyson, born 2.5.1947, British designer, inventor, entrepreneur and self-made billionaire.



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