PKF

Newsletter

Key Issue

On the pathway to sustainability reporting

04|22

Dear Readers,

The war in Ukraine has brought endless suffering to the people in that country. A huge wave of refugees and sanctions against Russia are already having a major impact on the EU. It has been encouraging to see the willingness to help not only in Poland but also in Germany and other countries. Our first report in the Tax section provides an overview of the **tax treatment** that should be applied to the **support measures** for the victims of the war. The fiscal administration has been called on to give a generous interpretation of the rules and regulations here. In our second report, we discuss the **tax relief measures** that have been approved for families and employees in view of, in particular, the increase in energy prices. Next up, the last report in our Tax section looks at the **taxation of pensions** and how German lawmakers have been required to eliminate the double taxation here.

In our Accounting section, the first issue we discuss is the **accounting implications of the war in Ukraine**. In particular, it is likely that obligations will arise for businesses, which are subject to statutory audits, to give an account of the effects in the supplementary report, and in the management report there will be a need for amendments and/or additions in the sections on risk and expected developments. In doing so, simplifications will also be possible because, by way of exception, comparative forecasts will be permissible. There then follows the Key Issue section of our April newsletter where we present the first in a series of three articles on **sustainability reporting**. The first part in our series provides an **overview** of the various EU **regulatory initiatives**. It is striking here that the threshold above which, in future, mandatory information on sustainability will have to be provided in the management report has been lowered.

In view of higher procurement prices, some **energy providers** have **terminated agreements with customers without giving notice**. In our Legal section you can read about how you can defend yourself against such terminations.

Once again, we continue our journey around the PKF locations in Germany through the illustrations that break up the reports from our experts – this time we visit Cologne.

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

Your Team at PKF

Front cover photo: Rheinau harbour with crane-shaped buildings

Key Issue

On the pathway to sustainability reporting

Contents

TAX

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

Ukraine War – Tax treatment of the support measures

In a circular of 17.3.2022, the Federal Ministry of Finance *(Bundesministerium der Finanzen, BMF)* instructed the fiscal administration on how to deal with the various measures to provide support for victims of the war in Ukraine for the period from 24.2 until 31.12.2022.

1. Documentary proof of donation

For donations paid via a special account opened for this purpose by an independent social welfare association that is recognised in Germany, by its member organisations, by a German public agency or a German public sector company, a paying-in slip or a bank payment confirmation (e.g. a bank statement or a printout from a PC in the case of online banking) would provide sufficient proof of a donation. The respective documentary proof would have to be provided upon request by the fiscal administration and retained for up to one year following the issue of a tax assessment notice. Special regulations apply for donations paid via trust accounts.

2. Donations from business assets

Spending on support measures for victims may be tax-deductible as business costs under the conditions of the 'Sponsoring Regulation' (Sponsoring-Erlass), i.e., if the enterprise aims to generate economic benefits for its business via the spending. Such benefits could be, for example, ensuring or enhancing the reputation of the business and this could be achieved via, among other things, a highly visible public display of the company's services.

If, on the basis of such criteria, these amounts cannot be deemed to be a business expense then they may be deducted as donations in accordance with the general requirements as well as the ones mentioned above.

3. The waiving of salaries and supervisory board remuneration

If employees waive payment of parts of their salaries or parts of their accumulated working time credits so that their employer can provide tax-free financial assistance and support to victims of the war in Ukraine who are employees of the company or of affiliated companies, or are employees of business partners then these amounts would not constitute taxable remuneration of the waiving parties. This would be on condition that the employer uses the amounts that have been waived by the employees accordingly and also documents this. These amounts would not constitute donations on the part of the employees. The same would apply if employees waived their salaries or working time credits on condition that the employer donates the equivalent amount to an organisation that is authorised to receive donations. The same would ultimately apply if a supervisory board member waived part of their remuneration before its due date or prior to its payment. From the point of view of the company, it should however be noted that, pursuant to the German Corporation Tax Act, the non-deductibility of half of a supervisory board member's remuneration would also extend to the amount that is waived by the member of the supervisory board.

4. VAT aspects

If a company provides items or personnel free of charge, for example, to relief agencies, facilities for refugees and for the care of the wounded, or something similar, then no VAT would be levied on the unpaid benefits in kind. If a business already intends to use a resource in this way when it is obtained then the company would nevertheless still be entitled to deduct input tax.

If hotels and providers who let out holiday homes, etc., and normally charge VAT when they rent out their accommodation, make their accommodation available to war refugees free of charge then no VAT should be levied on the unpaid benefits in kind and no adjustments made to the input tax deduction.

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch/ Luca Gallus

Another relief package from Germany's governing coalition

In the March issue of our PKF newsletter, we reported on the relief package introduced by Germany's governing coalition, on 23.2.2022, in view of rising energy costs and inflation. In view of the further dramatic increase in energy prices in the wake of the war in Ukraine, another relief package was approved, on 24.3.2022, that will commence on 1.6.2022. There now follows an overview of the measures.

(1) Energy price lump sum – All employees whose income is subject to tax will be paid a one-off energy price lump sum in the amount of €300 in the form of a grant in addition to their salary. This lump sum will be subject to income tax.

(2) Fuel price cuts – At filling stations, the energy tax included in the fuel prices will be cut by €0.30 per litre for petrol and by €0.14 for diesel for a limited period of three months.

(3) Nine-euro ticket – Funds will be made available to the German federal states so that they can provide the so-called nine-euro ticket for public transport. For a limited period of 90 days it will then be possible to purchase a ticket for €9 per month. It remains to be seen how this will actually be implemented in the federal states and in what time frame (following the initial reactions, there is now also talk of a 'zero-euro ticket'). It is likely that vouchers would be issued for annual season ticket holders.

(4) One-off child bonus payment – An additional one-off bonus in the amount of €100 will be paid per child, in addition to child benefit, via the Family Benefits Office *(Familienkasse)* as quickly as possible.

(5) Heating cost subsidy – When compared with the first relief package, the heating cost subsidy has been doubled for housing benefit recipients, for apprentices and students in receipt of BAföG [a federal education assistance loan]. For example, housing benefit recipients will now get a one-off subsidy in the amount of €270.

(6) Subsidies for welfare benefit recipients – The one-off payment for welfare benefit recipients in the amount of €100, which had already been approved in the previous relief package, will be increased again by €100 per person.

Please note: Furthermore, the aim is to create a framework so that property owners will be able to replace their heating systems that are more than 20 years old. As of 1.1.2024, every newly installed heating system should, if possible, be 65% powered by renewable energies.

Angelika Mühlhoff

Pension contributions in income tax returns

In the coalition agreement as well as in interviews with Finance Minister Lindner, recently, the message has consistently been that, as of 2023, pension contributions that have been paid should be completely tax free. Yet, how new is this idea actually and what would be the implications for your income tax return?

1. Current taxation of pensions and the German Retirement Income Act

The way pensions are taxed at present is a result of the pension reform in early summer 2004. At that time, the aim was to switch over from taxation in the accrual phase to a system of deferred taxation. However, for constitutional reasons, this may not give rise to double taxation at any time.

Currently, it is not possible to claim full tax benefits in an income tax return for the pension contributions that have been paid. Instead, merely a percentage – variable according to the year when retirement starts – of the contribution payments obtain a tax exemption. Conversely, only a certain percentage of the pension that is paid in the future to the taxpayer would be taxed.

In the Retirement Income Act *(Alterseinkünftegesetz, AltEinkG)* German lawmakers introduced long-term transitional rules, which came into effect on 1.1.2005. The aim of these rules was to bring about the incremental taxation of pensions and, in parallel, increase the level of tax deductibility of pension contributions that have to be paid.

- While 50% of pension amounts that started to be paid up to and including 2005 were tax exempt, now, it is only 18% of the pension amounts that started to be paid out in 2021. Pensions that will start to be paid out in 2040 will have to be fully taxed.
- Conversely, in 2005, it was only possible to claim a tax benefit for 60% of pension contributions paid by way of a special expenses deduction. For 2021 it will already be possible to deduct 92% of contributions as special expenses.
- The original intention was for the contributions that had been paid to be fully deductible as of the 2025 assessment period.

2. The ‘traffic light’ coalition agreement

The new coalition agreement provides for pension contributions that have been paid to be fully tax deductible as of 2023 already via the special expenses deduction. Furthermore, from this point in time, the portion of the pension that is taxable would only go up by 0.5 percentage points per year and no longer – as originally envisaged – by 1 percentage point per year. The consideration here resulted from the fact that, in a considerable number of cases, there could be a situation of so-called double taxation if the original timetable was adhered to.

According to the established case law of the Federal Fiscal Court *(Bundesfinanzhof, BFH)* – see, e.g., ruling of 19.5.2021, case reference: X R 20/19, margin number 48 – there would be no double taxation if the sum of the pension inflows likely to remain tax-exempt was at least as high as the sum of pension contributions made from taxed income.

According to the BFH, when calculating the pension inflows that will remain tax-exempt, items such as the basic personal tax allowance, special expenses for contributions to health insurance and long-term care insurance schemes or the standard deduction for allowable costs should not be included – this was in contrast to what the German lawmakers had first started to think about and had previously also been applied – (ruling of 19.5.2021, case reference: X R 33/19, margin number 33).

The calculation involves multiplying the (tax-exempt) pension drawn by the statistical life expectancy, which is taken from the official mortality tables. To this are added the amounts that will probably have to be paid out to surviving dependants. If a comparison with this sum shows that the amount from pension contributions made from taxed income is higher then this would be deemed to be a case of double taxation that, from the perspective of constitutional law, would have to be objected to (cf. Federal Constitutional Court ruling of 6.3.2002, case reference: 2 BvL 17/99, BVerfGE [Federal Constitutional Court Decisions] 105 p. 73, margin number 206).

Conclusion

All that glitters is not new. The changes to the way pensions are taxed, which were announced in the coalition agreement, more likely serve the purpose of preventing constitutional complaints with regard to inadmissible double taxation from being lodged on a massive scale in the future.

WP/StB [German public auditor/ tax consultant] Daniel Scheffbuch / Christina Schultz

Accounting implications of the war in Ukraine

The war in Ukraine and the massive sanctions against Russia will have a severe impact on the global economy. The question that arises here is if and to what extent companies that are directly and indirectly affected may or will have to include these effects in their annual financial statements as at 31.12.2021 and in their management reports.

1. The effects on the balance sheet and P&L as well as ...

The first question to be considered is whether or not the effects of the war in Ukraine have to be reported already in the annual financial statements that have to be prepared, in accordance with German commercial law, for the financial year ending 31.12.2021. According to German GAAP, the invasion by Russian forces of the sovereign state of Ukraine, on 24.2.2022, has to be regarded as a significant development and thus a non-adjusting event.

As a result of the principle of the cut-off date, the accounting consequences thus generally only have to be included in the balance sheet and P&L of the annual financial statements for financial years that end after 23.2.2022. This would not apply solely in those cases where, due to the impact of the war, it is no longer possible to maintain the going concern assumption. An indication of such a situation could be a massive deterioration in the financial position, cash flows and results of operations after the reporting date.

Brightly-coloured houses in the old town with the Great St. Martin Church

Please note: Technical Guidance recently issued by the Institute of Public Auditors in Germany *(Institut der Wirtschaftsprüfer in Deutschland e.V., IDW)*, on 8.3.2022, should also be considered in addition to our guidelines. Moreover, it should be noted that the guidelines apply analogously for group accounting and accounting under IFRS.

... on the notes to the financial statements

The notes form part of the annual financial statements and fulfil a variety of functions. These include, for example, adjustments to the balance sheet and P&L. The adjustment function – in accordance with Section 285 no. 33 of the German Commercial Code *(Handelsgesetzbuch, HGB)* – is performed through so-called supplementary reporting of: "events of particular significance that occurred after the end of the financial year and that have not been taken into account either in the profit and loss statement or the balance sheet, indicating their nature and financial effects."

Within the scope of supplementary reporting, the nature and financial effects of an event should generally be explained. In doing so, the war in Ukraine and its significance for the business should be described in the individual case. If it is not yet possible to specifically quantify the financial effects then it would be sufficient to provide a qualitative description of the impact on the company's overall business situation.

2. Cross-referencing between the notes and the management report

In principle, in view of the similar nature of the contents, it is possible that a reporting requirement will arise for both the notes and the management report. To avoid duplication and to increase the transparency of forward-looking information it is possible to present the effects in a prominent place. The IDW, in its Technical Guidance, clarified that in the supplementary report it would be permissible to refer to the descriptions in the management report if identical information would otherwise have had to be included in both reports. This would be on condition that the references in the supplementary report to the management report and/or those in the management report to the supplementary report would have to be unambiguous and clearly identifiable.

The comments on the impact on the business situation would have to be adequately presented. In this case, the time period for which the effects have to be presented should cover the start of the subsequent financial year

Hohenzollern Bridge with Trade Fair Tower

(normally 1.1.2022) up to the date of the completion of the preparation of the annual financial statements.

Please note: In view of the explicit legal exemption regulations with respect to supplementary reporting and the management report, small and micro enterprises as well as companies that prepare their annual financial statements in accordance with the requirements that apply to all businesses under German commercial law are, accordingly, not required to prepare such reports. Those who prepare accounts only have to report on risks to the company as a going-concern and they are required to provide information on this fact as well as on how they plan to deal with these risks.

3. Specific implications for the management report

In the case of medium-sized companies and large companies, the management report complements the backward-looking information in the annual financial statements. According to Section 289(1) clause 4 HGB "the management report has to provide an evaluation and explanation of the developments that are expected as well as their main opportunities and risks". A distinction has to be made here between the reporting requirements in the risk report, on the one hand, and in the report on expected developments, on the other hand.

3.1 Risk report

In the risk report, the following risk categories, in particular, are reportable:

- possible further developments that could lead to negative deviations from the company's forecasts or targets,
- the occurrence of a material individual risk,
- no accurate picture of the company's risk situation is conveyed,
- the existence of risks to the company as a going-concern, such as e.g., imminent illiquidity or impending over-indebtedness, as well as
- risks that could materially affect the company's financial position, cash flows and results of operations.

The documentation of the liquidity risk or the risk of illiquidity is especially important. This can be done, e.g., in liquidity and financial plans extending at least to the end of the new financial year.

3.2 Report on expected developments

In the report on expected developments, the management has to make statements about the anticipated (i.e. the planned) development of sales and earnings for at least the first year after the balance sheet date. If current events and the effects of sanctions have already resulted in a change in management's expectations with regard to the forecast performance indicators then this would have to be appropriately reflected in the report on expected developments.

Generally, the only types of forecasts that may be introduced are the following:

- point forecasts (e.g. EBIT €1m),
- interval forecasts (e.g. EBIT €1 – €2m),
- qualified comparative forecasts (e.g. considerably higher EBIT when compared with the previous year).

Companies may deviate from this if with respect to the effects of the war in Ukraine all of the following preconditions have been met:

- exceptionally high level of uncertainty as regards the future outlook due to the macroeconomic conditions and
- the company's forecasting ability is significantly impaired.

In this case, a comparative forecast would be sufficient, such as, e.g., "... for the financial year 2022, in view of the war in Ukraine, we expect lower revenues … strongly negative EBIT…".

Please note: In the opinion of the IDW, a general reference to the war in Ukraine and its consequences would not be sufficient. Totally dispensing with reporting on expected developments would likewise not be permissible.

Conclusion

There is neither a requirement nor a possibility to take into account the war in Ukraine in the balance sheet and P&L as at 31.12.2021. Nevertheless, you will have to give an account of the effects in the notes to the financial statements, in the so-called supplementary report as well as in the management report. The greater challenge is likely to be the preparation of the risk report where statements will have to be made as to whether or not, if all the risks are aggregated, the risk-bearing capacity can be ensured and the extent to which there are developments that could jeopardize the company as a going-concern.

WPin [German public auditor] Julia Hörl / Patricia Locher

On the pathway to sustainability reporting – Part I: Current regulatory initiatives at the EU level will be implemented shortly

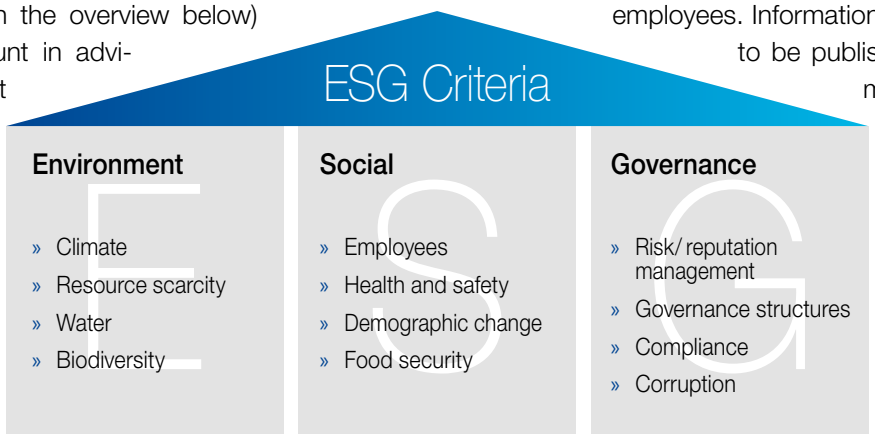
The EU Commission's current proposal for a Directive has fleshed out sustainability reporting by 2023 with standards and extended the scope of application by 2026 to SMEs. The following explanations relating to the background and the legislative acts that already exist bring to light the requirements that will have to be observed here and how they will have to be complied with.

1. Background

The first initiatives to develop environmental and social targets were launched at a global level already in 1999. In 2015, the key topics in this respect were defined in the UN 2030 Agenda and in the Sustainable Development Goals that were included in it. Since then, the key topics have continued to be developed further – most recently in November 2021 at COP 21, in Glasgow. Building on the UN 2030 Agenda and other global agreements, the EU Commission drew up a number of action plans, e.g., the 'EU Green Deal', which gave rise to, in particular, the following legislative acts: the Disclosure Regulation, the Taxonomy Regulation and the Non-Financial Reporting Directive.

2. Disclosure Regulation and Taxonomy Regulation

The Disclosure Regulation, which came into force in December 2019, promotes the establishment of consistent disclosure requirements in the context of sustainability. This Regulation covers all financial market participants and its objective is to ensure that ESG factors (see their contents in the overview below) are taken into account in advisory and investment decision-making processes.



Here, this concerns predetermined information – such as for example, the strategy for integrating sustainability risks and a statement on compliance with due diligence obligations in the event of adverse impacts on sustainability factors for investment decisions – that has to be published on the website. Currently, this obligation covers all financial market participants with more than 500 employees. In addition to taking ESG factors into account in decision-making processes, the actual business operations also matter. With the Taxonomy Regulation, the EU Commission created a legislative act to enable economic activities to be classified as being environmentally sustainable and to assess them according to their degree of environmental sustainability. In so doing, a distinction is made between three types of financial products:

» **dark green** – have a sustainability aspiration,
» **light green** – environmental and social criteria are taken into account in the investment decision, and
» **other,** that do not satisfy the requirements of the EU criteria.

In this way, private investments in green and sustainable projects, in particular, should thus also be facilitated. The Taxonomy Regulation came into force in July 2020.

Both regulations are being implemented in several phases. They also provide the basis for sustainability reporting that, with new adjustments and additions, will assume an important role in accounting in the next few years.

3. Non-financial reporting

Since 2014 already, non-financial reporting has been a requirement for companies with more than 500 employees. Information on ESG factors has to be published in the management report or in a separate non-financial report. Up to now, there have been no specific standards for the reporting; as a consequence, at present it is frequently not possi-

Cologne's 'dancing fountain' in the Rhine Park

ble to make a comparison between companies and their reports. Furthermore, the information contained in these reports is not included in the audit of financial statements. For this reason, non-financial reporting is currently being enhanced. Building on the previous Directive and using different terminology, the EU Commission has presented a proposal for a Corporate Sustainability Reporting Directive (CSRD).

4. Sustainability reporting

At present, the Corporate Sustainability Reporting Directive (CSRD) is still a proposal, which was presented in April 2021. It essentially addresses the widening of the scope of application and the points that have remained open as regards non-financial reporting. A key aspect of expanding the scope of application is the distinction between large undertakings, on the one hand, and small and medium sized enterprises (SMEs), on the other hand.

From now on, the following companies, which satisfy at least two of the following three criteria, will have to comply with the requirements.

» **Large undertakings, from 2023:**
- balance sheet assets €20m
- net turnover €40m
- 250 employees/annual average

» **SMEs, if listed, from 2026:**
- balance sheet assets: € 350k
- net turnover: € 700k
- 10 employees/annual average

Please note: Furthermore, the Directive includes proposals for voluntary reporting by non-listed SMEs.

The new proposed directive also provides for significant changes as regards the contents and format. For one thing, it will now be mandatory for sustainability information to be included in the management report and a separate report will no longer be permitted. In this connection, a requirement will be introduced for this information to be verified by the external auditor. Moreover, the information will be specified through the definition of standards and a clear qualitative and quantitative basis for the audit will be created. Currently, the Directive is in the phase of being negotiated in the European Council and in the European Parliament.

5. Standard-setting developments

The setting of reporting standards is a key aspect of the new CSR Directive. For some time now, there have been initiatives and proposals for setting these standards, however, these have not yet developed into ones that have been globally implemented. For the planned implementation by 31.10.2023, the EU Commission assigned the role of developing the standards for the CSR Directive to the European Financial Reporting Advisory Group (EFRAG), a private organisation that is funded by the EU. Moreover, the IFRS Foundation is currently focusing on global standards with the International Sustainability Standards Board, which was set up in November 2021.

6. Conclusion

Sustainability is increasingly gaining importance at the global as well as European and national levels. The objectives and legislative acts are becoming more specific and are already being applied to some extent. The proposed Directive will close the gaps that have shown up in sustainability reporting and widen its application areas. Nevertheless, at this juncture, there is still no clear idea what form a standardised qualitative and quantitative sustainability reporting should take. As a result, we still have to wait for the further developments before its application commences in October 2023.

Outlook

For medium-sized enterprises, sustainability reporting will entail not just the costs that result from the widening of reporting obligations but also great opportunities. These consist in the possibility of increasingly taking into account social and environmental aspects in the decision-making of the stakeholders (capital providers, employees and customers). In this respect, sustainability reporting will play a role in maintaining competitiveness and safeguarding the business model in the long term. What this means specifically will be the subject of Part II of this series of articles. In Part III, we plan to publish a case study based on a sustainability report that has already been prepared for an SME.

The Cologne cable car connects the zoo with the Rhine Park on the other bank of the Rhine

RA [German lawyer] Jan Bernd Schulze Wartenhorst

(Special) termination rights of energy providers – Pre-conditions and contestation options

In view of the war in Ukraine and the tense situation on the energy markets, currently, some providers in the electricity and gas segments are invoking (special) termination rights with respect to existing supply contracts with large customers. Such contracts are normally concluded for a fixed period and with fixed terms and conditions of supply. In the following section we discuss whether or not such a termination is rightful and proper.

1. Do changes in the purchase prices constitute good cause?

As a justification for exercising their presumed (special) termination rights, providers normally cite force majeure. They argue that this is what is preventing them from supplying energy as per the agreement because, for commercial reasons, they cannot reasonably be expected to do so at the agreed conditions. The terminations are based either on the respective clauses in the general terms and conditions of the utility companies, or on the statutory provisions of Sections 313 and 314 of the German Civil Code (interference with the basis of the transaction), which open up possibilities for termination within the scope of continuous obligations.

First of all, it should be noted that, legally speaking, the providers cannot be deemed to be prevented from carrying out the energy supply. In fact, supplying large-scale consumers at the contractually agreed fixed terms is currently simply not profitable for the utility companies. However, non-profitability on its own is not considered to be a sufficient reason for terminating a contract. In fact, on the basis of the existing supply contracts, the providers are generally obliged to continue supplying electricity and gas.

This is because even if an extraordinary notice of termination is generally possible in the case of energy supply contracts there has to be good cause for this. In such a case, it could not reasonably be expected that the terminating party would have to continue executing the contract up to the end of the agreed period. Yet, an extraordinary notice of termination may only be based on reasons that lie in the sphere of risks of the party receiving the notice. However, the procurement cost risk and thus the economic or profitability risks do not lie in the customer's sphere, as the party receiving the notice, but instead in the provider's sphere, i.e. the energy supplier.

Please note: Furthermore, these principles also apply to private customers. Although, in the case of supply agreements with private households it is more likely that the suppliers will adjust prices. This could likewise be inadmissible if the aim is to pass on the economic risk to customers.

2. Recommendation on what action to take in the event of a termination of contract

(Large) customers affected by contract terminations should assert their claims against their respective providers, in writing, for continued supply under the existing terms and conditions of the contract. In the event that supply is discontinued and the points of delivery are deregistered by the previous provider then, in accordance with the German Electricity Default Supply Regulation and the German Gas Default Supply Regulation, a replacement supply provided by the default supplier would kick in – which may be cancelled at any time without prior notice – so that the energy supply is ensured.

A claim for continued supply can then be asserted in court by way of a declaratory judgement action and prior to this, if necessary, through a preliminary (emergency) injunction. An application can be made for the court to establish that the termination is invalid and that the supply should continue until the end of the fixed period at the contractually agreed terms and conditions.

For those customers who conclude a supply agreement with a third-party provider in order to have planning security, there is the possibility of judicial enforcement of the claims for damages against the energy provider that wrongfully terminated the supply agreement.

IN BRIEF

Construction costs or maintenance expenses for property that is rented out?

During periods of low interest rates and inflation, property is a sought-after investment. For tax optimisation, the question to be considered is how the costs of a rental property may be offset in order to reduce the tax liability – as acquisition and construction costs, or as immediately deductible maintenance expenses?

If acquisition and construction costs are attributable to the building then these would have to be apportioned over the useful life of the property. In most cases, the depreciation charge that can be offset annually against tax only accounts for 2% of the costs. By contrast, landlords are able to immediately deduct their maintenance expenses for the year in which they were paid and thus reduce their tax liability. This includes costs that do not change the character of the building, keep the building in good order and occur at regular intervals and are anticipated.

The Federal Fiscal Court *(Bundesfinanzhof, BFH)*, in its ruling of 8.12.2021 (case reference: IX B 81/20), recently reaffirmed that the distinction between construction costs and maintenance costs has been made sufficiently clear in supreme court case law and that there are thus no grounds for refining this any further. Moreover, the rules governing acquisition-related production costs likewise have to be complied with. Within three years after a house has been purchased, if costs are incurred in connection with maintenance or modernisation that (without VAT) exceed 15% of the building acquisition cost then these costs will be retroactively recharacterized as construction costs so that they can only reduce the tax liability via depreciation.

Please note: If these costs have been immediately deducted as maintenance expenses then the local tax office would potentially reverse this.

Love locks on the railings of the Hohenzollern Bridge

A pre-study internship that is an admission requirement is not subject to the Minimum Wage Act

These days, many internships have to be paid at the minimum wage, which is making it difficult for some employers to provide internships. In the following case, a decision had to be made as to whether or not a pre-study internship had fallen under the Minimum Wage Act *(Mindestlohngesetz, MiLoG)*.

The Federal Labour Court *(Bundesarbeitsgericht, BAG)*, in its ruling of 19.1.2022 (case reference: 5 AZR 217/21), had to make a decision about a student who wanted to apply to a private, state approved university for a place on a medical degree course. Under the rules and regulations of the study programme, one of the admission requirements for the course was a six-month nursing internship. The prospective student thus completed an internship on a nursing ward in a hospital. The payment of remuneration was not agreed. Subsequently, the student instituted legal proceedings and sought remuneration of a gross amount in excess of €10,000 and, in the course of this, made reference to the MiLoG.

Outcome: The BAG took a different view of the matter than the prospective physician. This was because interns that complete a pre-study internship that, under the legal regulations of colleges and universities, constitutes an admission requirement for the purpose of study are not entitled to be paid the statutory minimum wage. In doing so, the BAG made explicit reference to state approved private universities.

Threat of penalty payments – Even 'dormant' corporations have to file tax returns

The Federal Fiscal Court *(Bundesfinanzhof, BFH)* recently confirmed that local tax offices can threaten to impose penalties in order to ensure that 'dormant' corporations file their tax returns.

If a local tax office wants to ensure that a taxpayer takes specific actions (e.g. files their tax return) then it may resort to penalty payments. As a first step, the tax office has to threaten penalty payments and, in this connection, set an appropriate deadline for the taxpayer so that the required action can subsequently be taken. If this deadline passes without any result then the tax offices are supposed to set the amount of the penalty payment within two weeks.

In the case in question, (BFH ruling of 19.8.2021, case reference: VII R 34/20), the last time a single-member GmbH [German private limited company] had filed its tax returns was for 2011. Subsequently, the GmbH had notified the local tax office that its business operations had been discontinued and that only a 'shell GmbH with no commercial activity' would be maintained. A 'zero report' was filed together with the notification. At first, the tax office was satisfied with this statement, some years later however, it asked the GmbH to file tax returns for 2017 and underscored its request with the threat of a penalty payment.

The BFH endorsed the approach of the local tax office and decided that the threat of a penalty payment had been rightful and proper. The company had rightly been requested to file tax returns. According to the established case law, abuse of discretion may only be deemed to exist if the local tax office demands that a tax return be filed even though it has been clearly and properly established that there is no tax liability.

That was however precisely not the situation in the present case because it was a matter of dispute between the tax office and the GmbH whether or not there was a tax liability. Moreover, it had not been unequivocally demonstrated that the business operations had been discontinued.

Please note: An explicit declaration of termination of business operations had not been provided. The local tax office had to perform this check as part of its tax assessment procedure and, to this end, it was necessary for a tax return to be filed.

AND FINALLY...

"Democracy is however not something that is easily achieved. And nor is it something just for spectators. It requires that people participate. The agreement is that the political leaders shoulder their responsibility and the people theirs. We were not paying enough attention – principally because we had mistakenly assumed that democracy happens semi-automatically."

Madeleine Korbel Albright, born 15.5.1937, in Prague, as Marie Jana Körbelová, died 23.3.2022 in Washington, D.C. She was a US American politician and, from 1997 to 2001, United States secretary of state – the first woman to hold this office.

Legal Notice

PKF Deutschland GmbH Wirtschaftsprüfungsgesellschaft

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

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