PKF

Newsletter

Key Issue
Changes in the taxation of photovoltaic systems

02|23

Dear Readers,

The **taxation of photovoltaic systems** constitutes the Key Issue in this edition of our newsletter. In the January edition, our focus was on the new regulations applicable to income tax, while this time round we look at the changes relating to **VAT** as of 1.1.2023 as well as other tax aspects.

Subsequently, we clarify how the **customs value** is calculated **for deliveries of supplies to affiliated companies** in third countries. You can read about the views of the German tax administration and of the Federal Fiscal Court in this respect and, particularly, in cases where changes in the prices subsequently occur. In our third contribution we address the issue of studying abroad, something that more and more students are doing to a greater or lesser extent in the wake of internationalisation. As this is frequently associated with high **tuition fees and living costs** it is worthwhile taking a systematic look at if and to what extent these costs can be offset against tax. Next up, we have compiled for you the **conditions** that the Federal Fiscal Court has linked to contributions that exceed mandatory capital **contributions** and are made in order to **apply to losses**. At the end of the Tax section we have provided information about a recent ECJ judgement on a VAT-related issue, namely, the extent to which an **agreement** can be recognised **as an invoice**.

In the Accounting & Finance section we take a look at the **guidelines** that will have to be observed by ***Wirtschaftsprüfer*** **[German public auditors]** in the future when conducting audits. Here, too, there is a trend towards internationalisation and harmonisation.

Flexible working time models, trust-based ones and mobile working are becoming increasingly prevalent. In the first contribution in the Legal section you can read about the **key points** that have now been set out by judges on the **recording of working hours**. Our second report is about the **binding effect of business e-mails** and the narrow scope in which adjustments can be made here.

We then continue our journey around the international PKF locations through the illustrations that break up the reports from our experts; this time we visit Limassol, in Cyprus, where the first European PKF meeting after COVID took place in May 2022.

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

Your Team at PKF

Front cover photo: View over Limassol's Old Port

Key Issue

Changes in the taxation of photovoltaic systems

Contents

TAX

StBin [German tax consultant] Anna Karin Spångberg Zepezauer

Changes in the taxation rules applicable to photovoltaic systems – Part II – VAT treatment

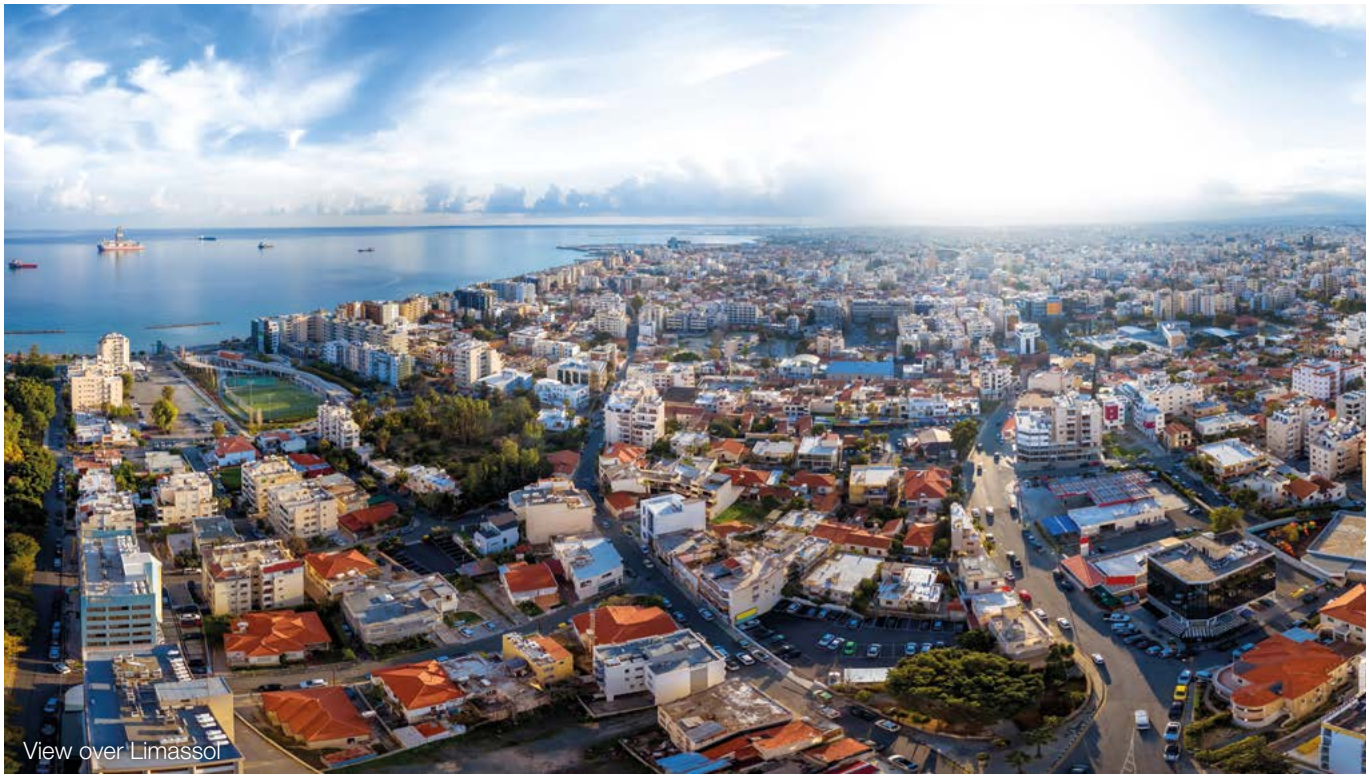
In the last issue of our newsletter, in January, with regard to the taxation of photovoltaic systems, we looked at the new regulations applicable to income tax that were introduced via the German 2022 Annual Tax Act with retroactive effect as of 1.1.2022. In the following section we now discuss the changes to VAT that have been applicable since 1.1.2023. The legislation left many questions about invoicing and input tax deduction unanswered and so, on 16.12.2022 already, the fiscal administration published a list of FAQs and, on 26.1.2023, a Federal Ministry of Finance (Bundesministerium der Finanzen, BMF) draft circular was published.

1. Zero rate of VAT and self-consumption

In principle, for all PV systems that are supplied and installed as of 1.1.2023, the legislation provides for a zero rate of VAT to be applied to the supply, installation, import and intra-Community purchase of tax-privileged solar modules as well as other main components including the battery bank. The eligibility criterion for the application of a zero VAT rate is – as a so-called property-related condition – that the PV system has to be installed on or close to private dwellings, apartments and public and other buildings used for activities in the public interest. This criterion will be deemed as fulfilled if the gross capacity of the PV systems that are installed does/will not exceed 30 kWp (peak) according to the core energy market data register. The BMF is planning to review the 30 kWp limit on a system-specific basis. If, after the 1.1.2023, an existing system is expanded then VAT would not be applicable on the purchase of components including the installation.

Please note: The previous provisions and options concerning VAT will continue to apply in full to PV systems that were already supplied or installed before 1.1.2023.

Up to now, PV system operators were able to completely allocate their systems to business assets, irrespective of the share of self-consumption, and thus also deduct the input tax in full (Section 15(1) no. 1 and (2) sentence 2



View over Limassol

of the VAT Act [Umsatzsteuergesetz, UStG]). However, in principle, the electricity used for private purposes had to be reported as a free benefit ('self-consumption').

The fiscal administration is planning the following approach. With respect to a free benefit in relation to a service that is subject to a zero VAT rate (Section 12(3) UStG), a distinction has to be made as follows:
(1) If, when the item was purchased, there was an entitlement to full or partial input tax deduction (zero VAT rate not applied) then the subsequent withdrawal and free-of-charge contribution or use of the item, under the other conditions, would constitute a free benefit. A withdrawal is only possible if at least 90% of the generated electricity is used for non-commercial purposes. Under the conditions of Section 12(3) UStG, this free benefit is subject to the zero VAT rate.
(2) If the purchase of the item was subject to the zero VAT rate then the subsequent withdrawal, free-of-charge contribution or use of the item would not constitute a free benefit.

2. Other types of tax

All in all, it can be stated that, in the course of the installation and operation of a PV system, the operator will encounter (almost) the entire spectrum of German tax law.
(1) Corporation tax – Under the legislation, the exemptions in the case of income tax will also apply to businesses as well as other organisations that are subject to corporation tax.
(2) Trade tax – A tax exemption is also applicable for trade tax. However, according to the current legal situation, Section 3 no. 32 of the German Trade Tax Act, which is restricted to PV systems with installed capacity of up to 10 kWp, has not yet been dropped. Up to now, the purpose of this provision was, in particular, to allow operators of PV systems to avoid the obligation to pay contributions to the Chambers of Industry and Commerce.

Please note

The aim of the BMF circular is, admittedly, to provide more clarity. However, even with this there are individual issues, such as how to deal with pre-payment invoices as well as the possible effects on the withholding tax for construction services (Bauabzugsteuer), that have not yet been clarified.

RA/FAStR [German lawyer/Specialist German tax lawyer] Ralf Lüdeke

Determining customs values for transactions between affiliated companies – Are subsequent adjustments allowed?

In the case of transactions between affiliated companies, the fiscal administration likes to presume that these companies invoice each other not in the way that unrelated third parties would but, instead, so that the profit arises in the country where the taxation rate is lower. In the following report, we provide information about the calculation of the so-called customs value that ensues from the invoices between affiliated companies.

1. Customs value in the case of transactions between affiliated companies

The fiscal administration requires affiliated companies to draw up and document a transfer pricing concept so that it will be able to check whether or not the allocation of profits stands up to an arm's length comparison. This requirement also applies to cross-border goods transactions; in such cases, the so-called transaction value has to reported to the customs authorities. This transaction value is the customs value on the basis of which import duties, such as the tariff and the import VAT on the goods, are charged. In a transfer pricing concept between affiliated companies it is possible to specify that the provisional transfer price on the date of the border-crossing will only be definitively determined at the end of the year (the so-called fall-back method); alternatively, this can be agreed in a so-called advance pricing agreement (APA). The local tax offices will accept such arrangements. Then, however, the customs authorities are faced with the question of whether or not the original transaction value on which the duty paid was based likewise has to be subsequently adjusted. Frequently, it is not possible to apportion the amount of the adjustment to specific imported goods so that, for example, in the case of different rates of duty for individual imported goods it is difficult to reassess the customs duty.

A case concerning this issue was referred to the Federal Fiscal Court (Bundesfinanzhof, BFH); in its ruling of 17.5.2022 (case reference: VII R 2/9, so-called 'Hamamatsu' case), the court decided that there should be no adjustment. This was because customs debt on imports occurs when goods that are liable for import duties are released for free circulation. The assessment base for customs is the transaction value on the date when the customs debt occurs. However, this transaction value may not be judged to be unacceptable solely because the buyer and seller are connected with each other.

2. Method for determining the customs value

In principle, the transaction value has to be entered as the customs value, i.e. the price actually paid or payable for the goods when sold for export in the customs territory of the Union, where necessary, adjusted for add-backs and deductible items. This transaction value includes all payments actually made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller.

Where the customs value cannot thus be determined, the transaction value for identical or similar goods will be applicable, or the customs value will have to be determined on the basis of a deductive process or a calculated value. If it is likewise not possible to calculate the customs value according to these methods then it would have to be calculated on the basis of data that are available in the Union using appropriate methods for which there are guidelines.

3. Limitations on adjustments on the basis of flat-rate adjustments

In the opinion of the BFH, the respective factors that affect the transaction value amount have to be ascertainable at the time of importation. Changes in the factual or legal circumstances that arise only once the duties have been paid should not be used to justify a refund (or subsequent payment). Consequently, subsequent adjustments to the transaction value should only be permitted in exceptional cases. In cases where a flat-rate adjustment to the purchase price has been agreed, but at the time of importation it is not clear if the adjustment will be up or down then, according to the BFH, an adjustment of the customs value would not be permissible. Instead, surcharges and deductions should only be taken into account if objective and quantifiable indications for these were already available at the time of importation.

Please note

Subsequent adjustments to transfer prices on the basis of an advance pricing agreement would not satisfy these requirements if, based on this APA, it were not possible to establish already at the time of importation whether or not the purchase price would have to be adjusted and if the potential adjustment would be made by increasing or by decreasing the price. In the context of methods for determining customs values, such transfer price adjustments would not affect the relevant customs value.

StBin [German tax consultant] Elena Müller

Recognition for tax purposes of the costs of studying abroad

A course of study in a foreign country usually entails additional costs. Whether or not and to what extent the costs of studying abroad – especially tuition fees, which are often very high – may be offset against tax will depend on many factors. In the following section we give an overview of the deduction options that would be effective for tax purposes.

1. Basic requirements

The foreign university basically needs to be an institution that has been recognised in Germany (so-called equivalence within the meaning of the German Framework Act for Higher Education). At the same time, there has to be an identifiable link with a (where applicable, subsequently intended) business or professional activity and not merely a realisation of personal motives and interests. Furthermore, what matters is whether the course of study is a first degree or a postgraduate/second degree and whether or not it is taking place within the scope of the employment relationship. Moreover, the student has to be subject to income tax liability in Germany, thus, be domiciled, or ordinarily resident in Germany. Many of the costs of education abroad can be offset against tax, irrespective


The Oval on the promenade in Limassol

of whether an entire course of study is completed abroad or just a semester (if certain conditions have been met).

2. Limited special expenses deduction

Outlay costs for your own first degree when there is no employment relationship may only be deducted to a limited extent as special expenses. The special expenses deduction for the costs of initial vocational training is up to an amount of €6,000 annually and is only permitted in the year in which they were paid. If, at the same time, no taxable income is generated then the costs would be irrelevant for tax purposes.

3. Deduction of work-related costs particularly for a second degree

According to the Federal Fiscal Court (Bundesfinanzhof, BFH), in its ruling of 14.5.2020 (case reference: VI R 3/18), studying abroad can give rise to (anticipated) work-related costs in Germany. The crucial factor here is, most notably, that the stay abroad has to take place not during the first degree course but, instead, during the advanced second degree. This includes, for example, a master's degree course or a bachelor's degree course following the completion of vocational training or some other completed course of study.

Please note: In the case of a first degree course, the deduction of work-related costs would only be permitted if such a programme had been completed within the framework of an employment relationship, for example, as a 'dual' course of study [the combination of company training and studying at the same time]. Here, there is no blanket maximum amount that can be deducted to reduce the tax liability.

Besides tuition fees and the costs for the accompanying course materials, other costs incurred in connection with studying abroad can also be deducted as anticipated work-related costs. However, they may be subject to specific limits on deductibility, for example, travel to the foreign country as well as the costs of travelling within it, accommodation costs and the fees for visas and language tests. Any subsidies, scholarships and grants that are paid for that purpose would have to be offset against the costs.

Please note: If such costs can be considered as anticipated work-related costs then this would have to be claimed within the scope of the submission of a tax return so that the local tax office could make the respective assessment of the losses to be carried forward.

4. Business expense deduction solely in exceptional cases

The tax courts have rejected, on a number of occasions, the recognition of studying costs as business expenses. The studying costs of own children cannot be deducted as business expenses even if the children undertake to work at their parents' company for a certain period of time following the completion of their courses of study (Münster tax court, ruling of 15.1.2016, case reference: 4 K 2091/13, EFG 2016 S. 551). Moreover, deduct-

ing the expenses as own (anticipated) special business expenses, later on, as a member of a partnership would also be ruled out if this circumstance had not been the case during the course of study.

Third parties – and also parents – could only bear the costs of studying and vocational training and deduct these as business expenses under very strict conditions, namely, if they were able to demonstrate that these costs were entirely, or to a predominant extent, related to business activities. Care must be taken, in particular, when making the respective contractual arrangements (arm's length principles, repayment clause, implementation).

5. Extraordinary burdens only for parents with maintenance obligations

When certain costs are taken into account as extraordinary burdens there is always a presumption that they are inevitable. According to a landmark decision by the BFH, of 21.7.1987, the costs of a taxpayer's own vocational training do not inevitably arise because, ultimately, a taxpayer is able to freely determine which type of vocational training they choose. Consequently, the tuition fees for attending a (private/foreign) university cannot be deducted as their own extraordinary burdens. However, in the context of maintenance payments, parents with maintenance obligations may, potentially, deduct the vocational training costs (e.g. tuition fees) of their dependent children up to the maximum amount allowed, as an extraordinary burden. This would nevertheless be on condition that the recipients of the maintenance payments require support, i.e. they would not be allowed to have any assets or only a very small amount and could not have sufficient income.

Please note

You can find more information [in German] on equivalent classifications for and recognition of foreign universities as well as courses of study and exam services in the 'anabin' database of the Central Office for Foreign Education of the Standing Conference of the Ministers of Education and Cultural Affairs at www.anabin.de.

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

Voluntary capital contributions to increase the amount of loss relief in the case of partnerships

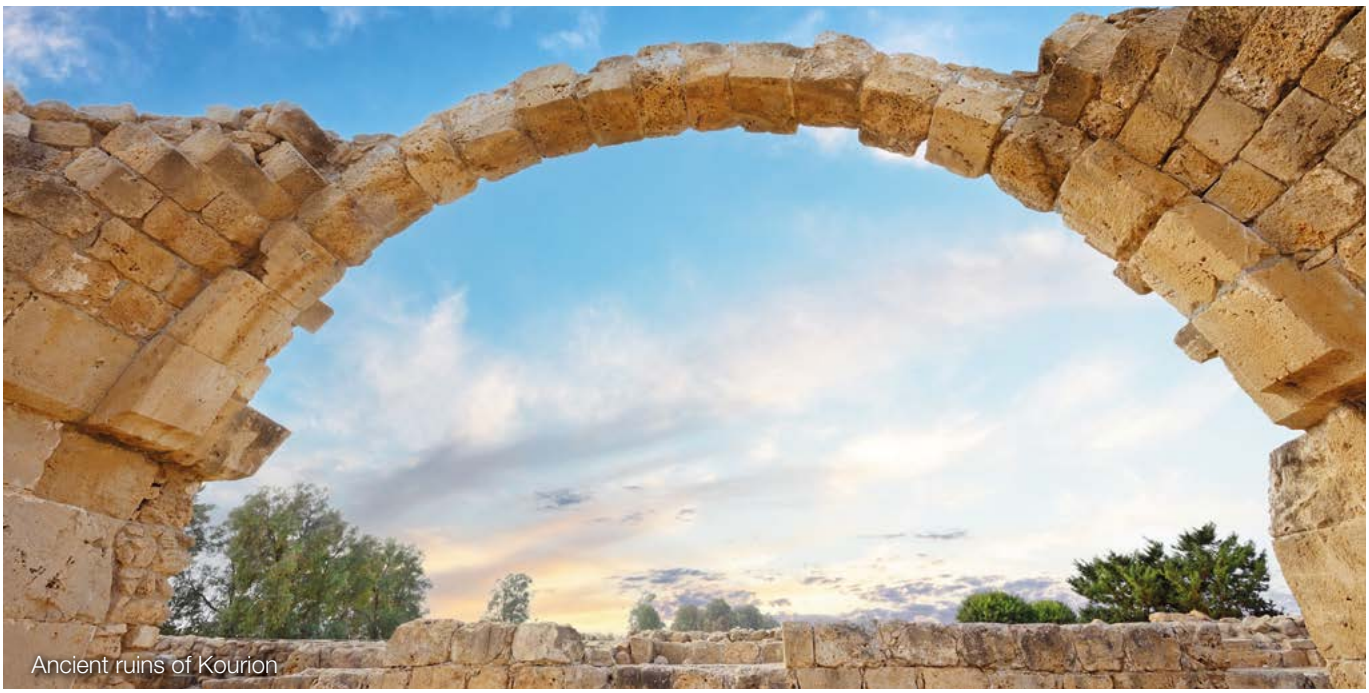
In the case of partnerships, a partner may normally deduct losses, for tax purposes, solely up to the amount of the contractually agreed capital contribution. Losses that exceed this amount may only be carried forward. The Federal Fiscal Court (Bundesfinanzhof, BFH) recently had to give a ruling on the conditions under which a partner's voluntary capital contribution could increase the amount of their loss relief.

1. Issue – Capital contribution made through a reclassification and without a payment transaction

The claimant was a GmbH & Co. KG [German limited partnership with a limited liability company as a general partner] that had generated losses for years. B, as a limited partner, held a 40% stake in this partnership. In 2006, B had contributed rights that he had acquired and whose purchase he had financed by using debt. In return, the partnership assumed a loan to B at the same conditions that B had financed the purchase of the rights. At the end of 2008, it was agreed between the partnership and B that the loan in the amount of €185,000 would be cancelled. Furthermore, at the same time, it was agreed that B would make a contribution to his variable capital account II in the amount of €185,000. It was agreed that the payment transaction could be omitted here. The agreement was supposed to be executed via a timely reclassification in the company's financial accounts. Consequently, B's share of the claimant's current losses was treated as if it could be fully compensated for and offset against taxes in the amount of this contribution via reclassification.

2. BFH ruling on an (in)effective adoption of a resolution

The local tax office was of the opinion that the accounting transaction in respect of the capital contribution, which was carried out in the relevant year of 2008, should not be regarded as being in accordance with Section 15a(1) sentence 1 of the Income Tax Act (Einkommenssteuergesetz, EStG), that loss relief for B was not possible and that solely the loss that could be offset against future profits would go up. The action brought before the Hessian tax court – after B had failed with his objection against the decision by the local tax office – was successful. However, in the


Ancient ruins of Kourion

appeal, the BFH, in its judgement of 10.11.2022 (case reference: IV R 8/19) ruled in favour of the local tax office. The tax court had wrongly assumed that B had made a capital contribution within the meaning of Section 15a(1) sentence 1 EStG in the amount of €185,000 and that this had resulted in B being able to fully compensate for and offset against taxes the claimant's losses that were attributable to B. In their ruling, the Munich-based BFH judges provided a detailed justification – besides the mandatory capital contributions that are posted to the so-called capital account I, other capital contributions (in particular voluntary capital contributions in the variable capital account) are also eligible for loss relief. The conditions require that the capital contribution is able to hold its value and that it constitutes an economic burden for the limited partners. Furthermore, the payment of a voluntary capital contribution by the limited partner has to be admissible. This admissibility can be established via a provision in the partnership agreement or a resolution adopted by the partners.

In the case in question, the partnership agreement did admittedly contain a provision that partners were able to make a voluntary contribution to the joint assets of the partnership; however, this was solely on the basis of an effective supplementary resolution that had to be adopted by the partners. It was not possible to demonstrate that such a resolution had been effectively adopted. There was

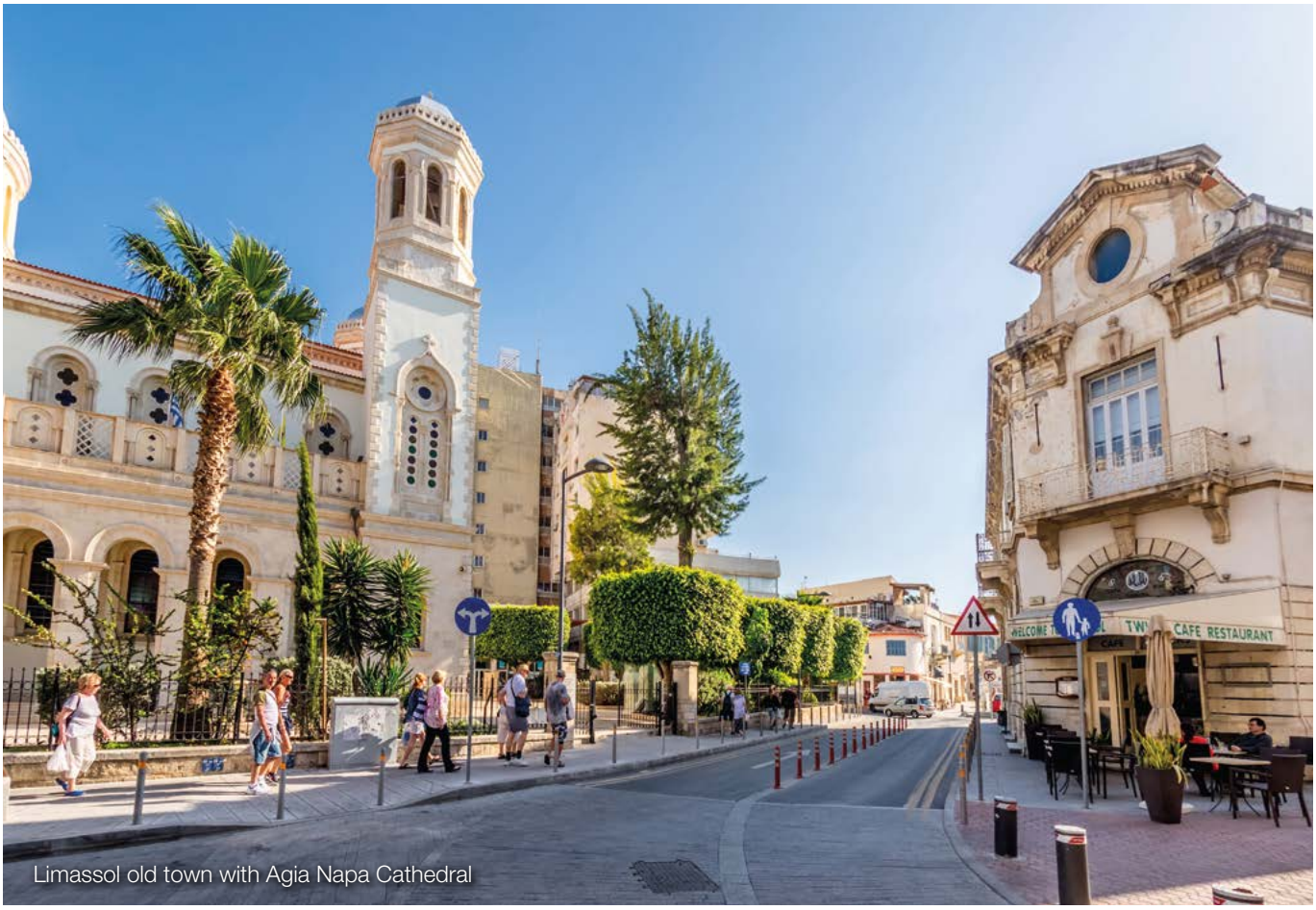
- neither any indication that the contractual agreement between the company and B, as represented in the partner's accounts at the end of 2008, met the requirements for a resolution by the partners,
- nor that the respective supplementary resolution had been adopted by the partners.

Ultimately, the contractual agreement that was specified, at the end of 2008, under the exclusion of the other partners should merely be regarded as an agreement in accordance with the German law governing obligations that does not satisfy the rules under company law on the adoption of partners' resolutions. By contrast, posting a capital contribution that has been made voluntarily by a limited partner to the variable (equity) capital account II would then only result in a contribution within the meaning of Section 15a(1) sentence 1 EStG if this contribution constituted an admissible contribution to joint assets under company law and, in particular, in accordance with the partners' agreement.

Recommendations

If a partner is planning to make the partnership's losses eligible for compensation in the year that they arise via a capital contribution then they should bear in mind the principles set out in the BFH ruling (see, in particular, marginal no. 38f of the statement of justification). An adequate basis under company law could

- be developed by explicitly allowing, in the partnership agreement, voluntary capital contributions by the limited partners, or by deriving a base from provisions, under company law, on the management of capital accounts (thus, a partnership agreement could, for example, provide for the voluntary capital contributions by the limited partners to be reported as a portion of the equity interests or else as a reserve);
- lie in the effective adoption of a partners' resolution on the admissibility of the respective capital contribution.



Limassol old town with Agia Napa Cathedral

Recognition of an agreement as an invoice – Current ECJ requirements

The ECJ has expressed its view on the question of whether or not an agreement may be regarded as an invoice and the criteria that would have to be fulfilled for this. In the underlying case, the Supreme Court of the Republic of Slovenia had referred a question to the ECJ concerning the information that would necessarily have to be included in a contractual sale-and-lease back agreement, the conclusion of which was not followed by the issue of an invoice, for such an agreement to be considered an invoice.

1. Contractual sale-and-lease back agreement with the content of an invoice

In the case for which the ECJ published its judgement on 29.9.2022 (case: C-235/21), the legal action had been brought by a company P that was the owner of a plot of land and a residential building in Slovenia. The company wanted to erect new buildings at this location and, to that end, concluded a contractual sale-and-lease back agreement with Raiffeisen Leasing (RL). According to this agreement, RL was required to buy the plot of land at a pre-determined price. The P company was required to pay the monthly lease instalments until the value of the land and the buildings to be constructed were repaid in full. The VAT amount was stated in this agreement. RL, as the lessor, did not subsequently issue an invoice and nor did it pay any VAT. However, the P company claimed input tax deduction on the basis of the contractual sale-and-lease back agreement because it believed that the agreement constituted an invoice.

2. Input tax deduction refused

The Slovenian tax authority refused the application for input tax deduction on the grounds that the transaction covered by the contract for sale was exempt from VAT. At the same time, the tax authority established that RL, as the lessor, had thus far not yet paid any VAT and now ordered RL to pay interest on the tax debt.

3. ECJ criteria for recognition as an invoice

In the view of the ECJ, as set out in detail in its judgement

of 29.9.2022, a contractual sale-and-lease back agreement, the conclusion of which was not followed by the issue of an invoice, may be regarded as an invoice within the meaning of the Directive on the VAT System. The prerequisite for this is that, besides the VAT being stated, the agreement must contain all the information necessary for the tax authorities to be able to establish whether or not, in a specific case, the substantive conditions for the input tax deduction have been satisfied.

Please note: The ECJ's judgement will also have to be consulted in the context of German contracts. Up to now, it has already been the case that in the event of the non-fulfilment of the obligation to provide all mandatory information within the meaning of the German VAT Act, the necessary information from a reference, in the agreement, to other documents has to be made accessible.

ACCOUNTING & FINANCE

WPin [German public auditor] Julia Hörl / Dominik Römer

Application of International Standards on Auditing (ISA) in Germany

The auditing standards of the Institute of Public Auditors in Germany (Institut der Wirtschaftsprüfer, IDW) (IDW AuS) that are currently applicable for the statutory audits of financial statements constitute a set of guidelines that were developed over time and where the individual standards do not follow a uniform format. For example, in some of the IDW AuS, a clear distinction is made between requirements and application guidance – in line with the International Standards on Auditing (ISA [DE]) – in others this is however not the case.

1. The background to the introduction of ISA [DE] or the new 'GoA'

The ISA [DE] constitute a consistent and clearly structured German language version of the generally accepted standards for audits of financial statements set by the IAASB [referred to in German as: Grundsätze ordnungsmäßiger Abschlussprüfung, or GoA for short]. The previous transformation methods that had been applied to the IDW auditing standards (IDW AuS) will be stopped. The 26 ISA [DE] together with the 16 IDW AuS will make up the German Generally Accepted Standards for Financial Statement Audits (GoA) established by the IDW. These IDW AuS will always be applied if there is no other rule for a specific issue in the ISA [DE] such as, for example, for the management report, which is a national financial reporting tool.

2. Benefits resulting from the introduction of ISA [DE]

From the point of view of the IDW, the benefits that will ensue from the introduction of ISA [DE] will be, in particular, the following:

- discontinuation of the parallel existence of national and international standards along with an end to the corresponding need for coordination because the globally accepted standards will be used directly,
- enhanced consistency of audits,
- elimination of the duplication of work arising from the application of ISA [DE] and IDW AuS,
- use of standardised audit manuals and quality assurance methods in the international network,
- national law requirements will ne taken into account via 'D paragraphs' in the ISA [DE].

3. Timing of the transition to ISA in German auditing practice

First of all, the practical implications of the transition will play a role in the decision about its timing. These implications include adapting the following documents and/or audit resources to the new GoA:

- internal audit manuals,
- standardised worksheets,
- any audit software that is used.

4. Application

After having been postponed twice, the first-time application of ISA [DE] will be for audits of financial statements for periods starting after 15.12.2021 (PIEs) or after 15.12.2022 (Non-PIEs). Voluntary early application is allowed. The decision in favour of voluntary early application will have to be recorded in the engagement documentation or a central office in the auditing practice.

LEGAL

RAin [German lawyer] Yvonne Sinram

Recording working hours – The Federal Labour Court has clarified key points

In 2019 already, the ECJ decided that Member States would have to adopt national legislation that would oblige employers to set up a system for recording the daily working hours of every single employee. German lawmakers have so far failed to act. Meanwhile, the Federal Labour Court (Bundesarbeitsgericht, BAG) has taken the initiative of drawing up a list of key points.

After the press release on the BAG decision of 13.9.2022 (case reference: 1 ABR 22/21) threw up a number of questions and still failed to shed light on plenty of issues, the reasons for the court's decision have now also been published. This has provided a clearer picture of the specific requirements for employers and these are outlined below.

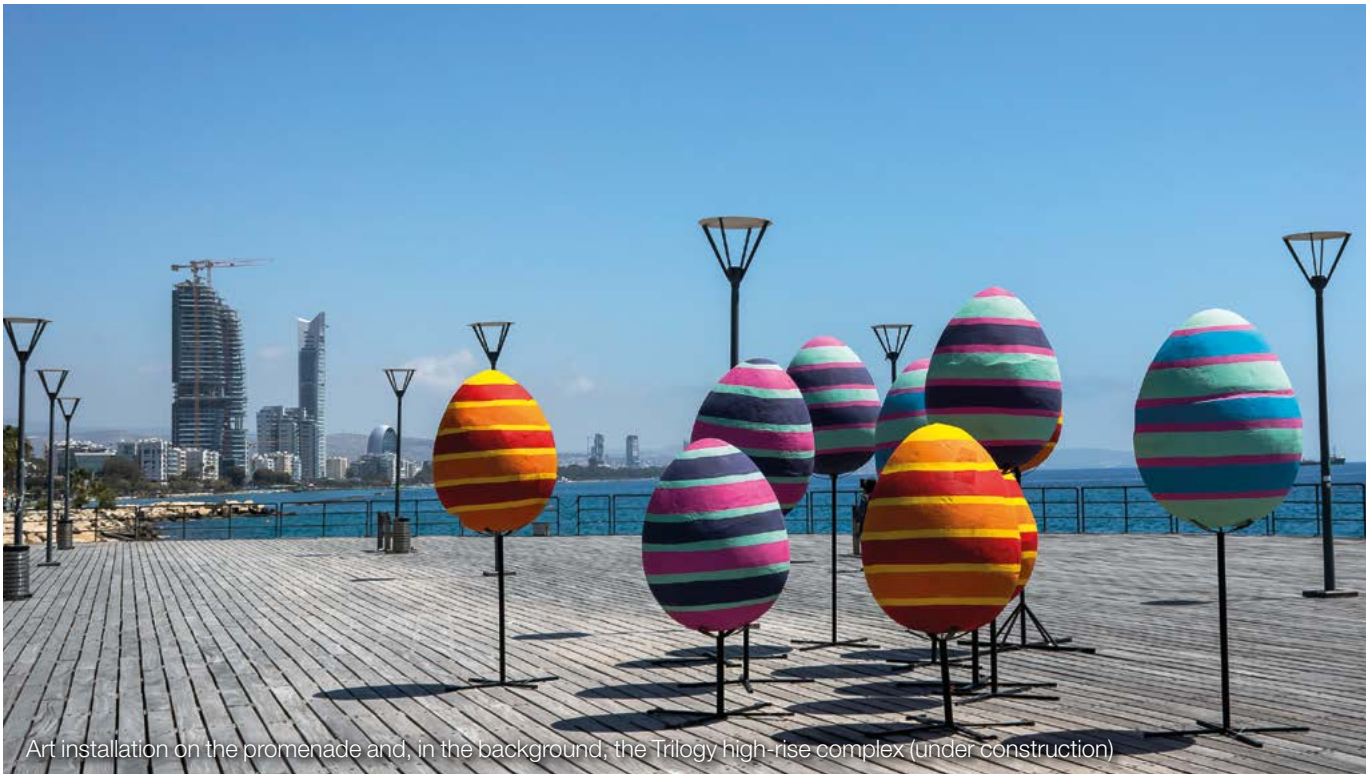
1. Obligation to record working hours even without a new statutory provision

Germany has not yet responded to the requirements stipulated by the ECJ and has not issued any new regulations that would oblige employers to set up an objective, reliable and accessible system for documenting the daily working hours of every single employee. In the opinion of the BAG this is however not even necessary. According to its above-mentioned decision, this obligation to record working hours already exists by virtue of the current occupational health and safety legislation and, therefore, has to be complied with by all employers with immediate effect(!).

Please note: The Federal Ministry of Labour and Social Affairs has however announced that it will soon present a pragmatic proposal for arrangements to record working hours in the German Working Hours Act.

2. Scope of the obligation to record working hours

The actual daily working hours of the employees have to be recorded, thus, the start and end of the respective workday (incl. overtime) in order to be able to monitor compliance with the maximum working time and the prescribed rest periods. According to the BAG, recording merely the duration of the daily working period would not be sufficient.



Art installation on the promenade and, in the background, the Trilogy high-rise complex (under construction)

The court did not specify just how precisely the recording needs to be carried out. It would make sense here to give preference to digital recording systems, but it would also be possible, for example, to keep paper records. The works council has a co-determination right in respect of working out the arrangements.

It is expressly permitted to delegate the responsibility for recording working hours to the employees themselves. In this respect, it should however be assumed that it will be incumbent on the employer to monitor the situation and, at the very least, to carry out random checks.

Please note: It is yet to be clarified whether or not the obligation to record working hours will also apply to executive staff. It is to be hoped that this and other questions will be settled in the legislation that has been announced.

3. Legal consequences in the case of infringements

Sanctions for infringements will then also probably be settled on in the legislation that has been announced. Currently, an infringement would not yet immediately result in a fine. The occupational health and safety authorities are merely able to demand corrective actions and only in the event of non-compliance then impose fines.

Please note

No consequences are expected to arise for flexible working time models, trust-based ones or mobile working as a result of the BAG decision. This is because the aim of the obligation is to record working hours merely to comply with the German Working Hours Act that is in any case applicable and not to monitor compliance with contractually stipulated working hours. Therefore, flexible self-determination of working hours would not preclude a documentation requirement. In terms of 'trust', however, careful communication with employees will be necessary.

RA [German lawyer] Prof. Heiko Hellwege

Receipt of e-mails within the scope of business dealings – This could be a matter of minutes

These days, correspondence between companies mainly takes place via e-mail. However, you should be aware that e-mails quickly make their way to the recipients and have a binding effect that frequently cannot be reversed anymore. This was strikingly demonstrated in a case that was recently ruled on by the Federal Court of Justice (Bundesgerichtshof, BGH) where a settlement offer was withdrawn soon after – to no avail.

1. Issue – A withdrawn settlement offer

In view of an invoice dispute, a company submitted a settlement offer to its client via e-mail at 9:19. Some minutes later, the author of this e-mail regretted submitting the offer and withdrew it via an e-mail at 9:56. A week later, the client paid the settlement amount and refused to pay any further amount that had been claimed.

2. BGH ruling – Effectiveness of the initial offer

The BGH, in its judgement of 5.9.2022 (case reference: VII TR 895/21), ruled in favour of the client. This was because at 9:19, when the e-mail was received on the recipient's server, the settlement offer was deemed to have been received; thereafter, a declaration of intent cannot be revoked anymore. By paying the settlement amount without comment, a week later, the customer had implicitly, promptly and effectively accepted the settlement offer. The settlement had thus been reached. Therefore, the company making the claim had waived the additional amount.

The BAG thus ruled on a question that, up to now, had not been clarified by the supreme court, namely: when is an e-mail deemed to have been received by the recipient? According to the ruling, an e-mail would in any case generally be deemed to have been received when, in the course of commercial dealings and during normal business hours, it is made available for retrieval on the recipient's mail server that is used for correspondence. Thus, it does not matter when the e-mail is read. The situation would be different if the e-mail was received during off-hours or outside of normal business hours. Then – it could thus be concluded – the e-mail would not be received until the next business day. If, in the case in question, the writer had sent out the settlement offer in the middle of the night and then, early in the morning, had immediately revoked it then it still would have been possible to effectively withdraw the e-mail or the settlement offer within a few minutes.

3. Practical consequences

Even if it is still basically possible to withdraw an e-mail there remains a risk because the sender would have to demonstrate if and when the e-mails were actually received on the recipient's server. This played no role in the case in question, as the recipient made particular reference to the receipt of the e-mail on his server at a specific time and the sender referred to the e-mail he had sent shortly before.

An interesting side question arises for declarations that are not included in the e-mail itself but, instead, in the attachment, for example as a PDF, for that purpose. The Hamm court of appeals, in its decision of 9.3.2022 (case reference: 4 W 119/20) in a competition case, took the view that the arrival of an e-mail from a hitherto unknown sender without a clear subject line and without a meaningful description of the attachment would anyway not be construed as receipt. In view of the fact that, generally, we are warned not to open attachments in e-mails from unknown senders because of the risk of viruses, therefore, the recipient could not have been expected to open the file attachment. This sounds plausible and should be a reason, in critical cases, to include the message directly (where appropriate, additionally) in the main text section of the e-mail programme.

Recommendation

In order to be able to provide proof of delivery for important matters when deadlines are tight, the means of choice remains traditional registered mail, or at least the electronic read receipt (this can however be switched off by the recipient).

IN BRIEF

German Real Estate Transfer Tax – Notification of a unification of shares

Real estate transfer tax (RETT) is payable not just on property acquisitions. It can also arise if, for example, as a result of a unification of shares [Anteilsvereinigung] a shareholder ends up holding more than 95% of the shares (90% since 1.7.2021) in a company. The Münster tax court had to clarify how the local tax office would be informed of a unification of shares and what should be taken into account.

In the case that the Münster tax court decided, on 19.5.2022 (case reference: 8 K 2516/20 GrE), the legal action had been brought by a GmbH [private limited company] that, as the main shareholder, held a 94.73% stake in the property-owning X-GmbH. In 2010, X-GmbH acquired shares in itself so that the shareholding of the GmbH that was the claimant increased to 95.26%. Subsequently, a notary sent the local tax office a certified copy and a simple copy of the purchase and transfer agreement. Here, the simple copy was supposed to be treated as a notification in accordance with the Real Estate Transfer Tax Act and forwarded to the RETT office. However, the copy was not forwarded. In 2016, the claimant reported the purchase and transfer transaction and, in 2017, following a tax audit, a RETT assessment notice was issued. The claimant appealed against the tax assessment and argued that, first of all, the statute of limitations on tax assessments had expired because the notary had provided notification of the acquisition transaction in 2010 already. Secondly, no unification of shares had occurred because there had been no changes to the legal arrangements. The purchase of its own shares by X-GmbH had not resulted in any changes with respect to the possibility to influence, the ability to control nor the opportunity to assert authority.

The case before the tax court was unsuccessful (please note that the judgement was issued for the old legal situation; as of 1.7.2021, the shareholding threshold level was lowered from 95% down to 90%). A legal transaction that is subject to RETT becomes liable for RETT if at least 95% of the shares of the company are unified in the hands of the buyer. For the calculation of the proportion of shares, own company shares that are held by a corporation as a property-owning company or intermediate company are however not taken into account. Therefore, in the case in question, a unification of shares had occurred because the claimant's shareholding had increased to more than 95%. The claimant's argument that it was previously already a majority shareholder would not result in any other outcome. The crucial factor was that the claimant's

shares that had been part of the assets of X-GmbH had initially been donated. Moreover, the statute of limitations on tax assessments had not yet expired.

Please note: Furthermore, the Münster-based tax court judges concluded that the requirements for proper notification by the notary, which are clearly stipulated in the legislation, had not been complied with here. The notary had admittedly attached a copy of the purchase agreement for the RETT office. However, in view of the fact that information was missing there, this copy did not constitute adequate notification in terms of its contents.

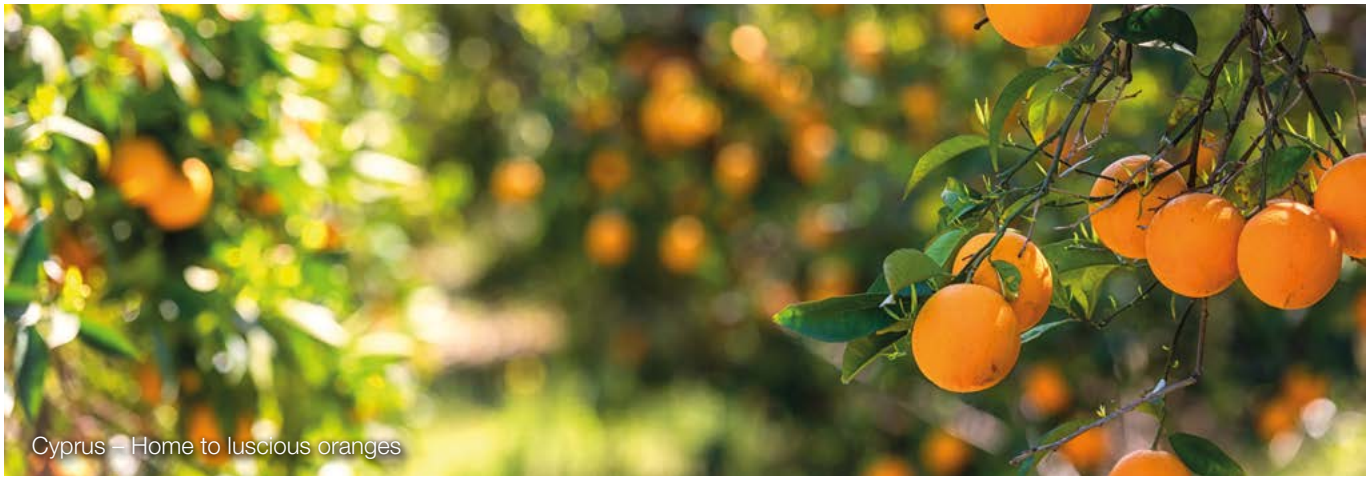
Refurbishment expenses that can be immediately deducted after withdrawal of a residential property

If extensive maintenance and modernisation measures are carried out at rental properties within three years of acquiring them then there would be a risk that the costs, which would actually be immediately deductible as maintenance expenses, could be re-characterised by the local tax office as acquisition-related production costs if (when VAT is excluded) they exceed 15% of the original acquisition costs.

Classifying maintenance expenses as production costs would mean that the maintenance and modernisation costs would only reduce the tax liability via the scheduled depreciation of the building. It would then no longer be possible to immediately offset the costs against tax. The Federal Fiscal Court (Bundesfinanzhof, BFH), in its ruling of 3.5.2022 (case reference: IX R 7/21), considered whether or not the three-year period could also be initiated by withdrawing a residential property from business assets. In the underlying case, the claimant had withdrawn a residential property from his agricultural business assets and had subsequently completely refurbished it. In the first three years following the withdrawal, the overall cost of this came to €83,000 and the claimant offset this amount as immediately deductible maintenance expenses against his income from letting and leasing.

The local tax office took the view that the claimant was only able to amortise the expenses as acquisition-related production costs and spread them linearly at 2% per year over the useful life of the property. The claimant argued against this by pointing out that the residential property had not been acquired for consideration and the three-year period, within which acquisition-related production costs could be incurred, had thus not been initiated. The claimant was of the view that this was not a transaction that was characteristic of an acquisition.

Outcome: The BFH likewise ruled that the withdrawal of a residential property from business assets does not constitute an acquisition within the meaning of the regulations on acquisition-related production costs so that the building costs had been wrongly classified as such. An acquisition could not be presumed because the necessary consideration was not paid and there was no change in the legal arrangements inasmuch as the asset was transferred to the taxpayer's private assets. The BFH referred the matter back to the lower court, as it still had to be clarified whether or not the building costs, based on the measurement benchmark of the German Commercial Code, could possibly come under the production costs. Should this not be the case then, from the perspective of the BFH, the claimant would be able to deduct his expenses immediately in the years in which they were paid.



Cyprus – Home to luscious oranges

AND FINALLY...

"When someone decides on a career they need to be aware of what life they'll have to lead and what freedoms they'll have to give up. Because advancement requires great commitment. Without the willingness to perform and to learn continuously every manager will remain stuck in a routine and in mediocrity."

Prof. Dr. Carl H. Hahn, 1.7.1926 – 14.1.2023. As Chairman of the Board of Management of Volkswagen AG and a member of the supervisory board for numerous national and international companies, Carl Hahn was one of the most important European entrepreneurs. He had a lasting impact on the Volkswagen Group and its suppliers, but also understood that his social responsibility had to be put into practice in a sustainable way.

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