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German WHT relief denied for dividends distributed by disregarded German entities

Content

The German Federal Central Tax Office rejects WHT relief if the distributing German corporation is directly held by the US and is treated as a disregarded entity for US federal income tax purposes.

The German Federal Central Tax Office (BZSt) has recently adopted a restrictive interpretation of treaty rules on applying German withholding tax (WHT) relief for certain dividend distributions of German entities which are treated as transparent i.e., as disregarded or as partnership for US federal income tax purposes under the US "check-the-box" rules. Based on current practical experiences, refund and exemption applications for German dividend WHT relief are systematically rejected by the BZSt if the distributing German corporation is directly held by the US and is treated as a disregarded entity for US federal income tax purposes.

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This recently expressed position will most likely result in rejections of applications for a German WHT refund or exemption, with the option, e.g., to appeal and potentially proceed to litigation before German tax courts. From a technical perspective, the rationale behind the revised position appears at least very doubtful.

The outcome of cases affected by the revised position remains uncertain. However, it is important for US shareholders with direct German subsidiaries treated as transparent for US federal income tax purposes to be aware of this development and to factor it into their cash repatriation strategy. The amended position of the BZSt should also be considered before making any new check-the-box elections with respect to German subsidiaries. In all cases, this development should be closely monitored as further guidance or court decisions may significantly impact the cash repatriation approaches going forward.

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Legislation

German Parliament passes Minimum Tax Adjustment Act

The Bundestag (lower house) officially passed the Minimum Tax Adjustment Act on 13 November 2025, with only minor editorial changes on German GloBE rules compared to draft legislation as introduced by the Finance Committee. The final approval by the Federal Council (upper house) is expected on 19 December 2025.

In addition to numerous detail changes, the bill aims to fully implement the 3rd, 4th and 5th OECD Agreed Administrative Guidance (AAG), including rules on deferred taxes and additional QDMTT safe harbour provisions. It also incorporates the DAC9 Directive, which introduces an automatic exchange of minimum tax reports between EU Member States and procedural rules for the Federal Central Tax Office (BZSt).

For the purposes of the CbCR safe harbour, reporting packages used in group accounting are now accepted as data sources. This means that they can be used for the calculations required to determine whether the CbCR safe harbour tests are met. As stipulated by the OECD, a uniform data source for all constituent entities per country is required.

In addition, the bill includes a "simplification rule" for calculating the recapture rule for the subsequent taxation of deferred tax liabilities (Section 50a MinStG). According to the rule, which implements the 4th AAG, deferred tax liabilities can be grouped into Aggregate DTL Categories, instead of considering each DTL individually. Detailed criteria are set out for grouping.

The Minimum Tax Adjustment Act further introduces a new Section 45 (2) no. 2, whereby taxes relating to fiscal years prior to the transition year shall not be considered as Covered Taxes and thus not be included in the calculation of the effective tax rate. However, for CbCR safe harbour purposes, such adjustment for taxes from previous years is explicitly disallowed.

Further amendments to the Minimum Tax Act may soon become necessary following the expected agreement on a "side-by-side system" for the global minimum tax in alignment with U.S. minimum tax rules. In addition, the expected permanent safe harbour as well as a potential one-year extension of the CbCR safe harbour could require domestic legislation. It remains to be seen whether the legislator in this context will reconsider some of the suggestions from associations and experts that were not incorporated during the Minimum Tax Adjustment Act legislative process. ▸

Legislation

In addition to amending the Minimum Tax Act, the bill also introduces several decluttering measures in German international tax law. Most importantly, the so-called license barrier is eliminated from the Income Tax Act as of the tax year 2025. The rule limited the tax deductibility of expenses for payments made to foreign related parties for the use of rights (e.g. intellectual property) if the recipient benefits from a preferential tax regime which is not in line with the OECD nexus approach and is therefore subject to low taxation.

Further amendments are provided within the Foreign Tax Act (AStG). For example, the CFC taxation per Section 13 AStG for direct and indirect holdings in companies that generate income of a capital investment nature will generally only apply if at least 10% of the shares in the company concerned are held.

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German legislator passes several tax bills

During the last weeks of the year, the German parliament passed or plans to pass numerous tax bills, mainly to implement announcements from its coalition agreement.

- The third Energy and Electricity Tax Amendment Act contains comprehensive adjustments which are aimed at fostering E-mobility, the storage of electricity and the simplification of the taxation process. Most importantly, the act permanently extends the electricity tax relief for companies in the manufacturing industry to the EU-wide minimum rate of EUR 0.50 per megawatt hour.
- In an additional bill, all kinds of electric vehicles registered by 31 December 2030 are exempted from vehicle tax for a maximum of 10 years and until 31 December 2035 at the latest.
- The Tax Amendment Act 2025 reduces the VAT rate for restaurant and catering services (without drinks) to 7% from 1 January 2026. Furthermore, the act includes several detailed changes in the income taxation of individuals and in the area of public or non-profit enterprises.
- In a controversially discussed bill, the governing coalition intends to introduce a rule that would exempt EUR 2,000 of monthly earnings received by pensioners from tax.
- Around the turn of the year, the coalition plans to enact new rules concerning investment funds regulation and in the investment tax act which would, among other things, extend the opportunities for special investment funds to invest in renewable energy as well as in public infrastructure.

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Recent treaty developments

OECD Multilateral Instrument
Germany is changing its approach to the OECD's BEPS Multilateral Instrument (MLI), which is designed to implement international standards against base erosion and profit shifting. When signing the MLI in 2017, Germany notified 35 Double Tax Agreements (DTAs) to be covered by the MLI. But over the course of the following implementation process, more and more agreements were removed from the list. Currently, only 9 German DTAs are modified by the MLI: The DTAs with France, Greece, Croatia, Malta, Slovakia, Spain and Hungary since 2025 and the DTAs with Japan and the Czech Republic as of 2026. In parallel to the MLI implementation, Germany added MLI content to several other DTAs in bilateral negotiations.

With a draft bill released in October 2025, the Federal Ministry of Finance (BMF) has now taken steps to significantly expand the application of the BEPS Multilateral Instrument (MLI). According to the adjustments intended in the new draft bill, Germany could apply the MLI to 62 additional treaties, including those with major trading partners such as the United States, China, and India. However, the process for these new treaties is complex and will require a two-stage implementation, meaning the MLI will likely not be effective for these agreements before 2027.

Switzerland
The amendment protocol to the DTA with Switzerland, signed on 21 August 2023, is especially relevant for cross-border workers and their employers. Key changes include the taxation of severance payments, garden leave, and the cross-border commuter regulation (taxation in the country of residence instead of the country of employment). Furthermore, the new Article 24 (3) of the DTA stipulates that income is not to be exempted from taxation if the other contracting state applies the DTA in such a way that it exempts income or assets from taxation or applies Article 10 (2) (limitation of the source state's right to tax dividends) to them. For individuals subject to unlimited tax liability in Germany, this is already the case under national law; however, for those subject to limited tax liability, this is a change.

Challenges are likely to arise in the future when cross-border commuters change employers during the year. According to the new DTA, employment relationships in the respective calendar year are to be assessed uniformly when assessing the 60-day threshold.

After the exchange of ratification documents on 27 November 2025, the amendment protocol can generally take effect as of 1 January 2026.

The Netherlands
The DTA with the Netherlands, like other German DTAs, generally allocates the right to tax income from employment to the state in which the activity is performed (Article 14 (1) DTA Netherlands). For workdays in third countries, the taxing right is usually allocated to the state where the employee is resident according to the treaty. The amendment protocol to the DTA with the Netherlands, signed on 14 April 2025, introduces a de minimis rule (the new Article 14 (1a)): If the activity is performed in the residence state or in a third country for less than 35 days, the other state may tax the proportionate remuneration for those days. This shall, in general, not apply to the extent that it contradicts the DTA of the residence state with the relevant third country. In addition, the amended protocol addresses various specifics concerning the new rule.

The de minimis rules are expected to reduce the administrative burden on employers and tax authorities. However, the risk that a permanent establishment could be created through home office activities should be kept in mind.

After the exchange of ratification documents on 28 November 2025, the amendment protocol can generally take effect as of 1 January 2026.

Serbia
In addition, Germany and Serbia have initialed a preliminary text for a revised DTA. The final text is still pending signature and implementation into national law. Details on its content and the likely effective date have not yet been released.

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Draft amendment to Ordinance on the Allocation of Profits to Permanent Establishments (BsGaV) published

The German Federal Ministry of Finance (BMF) has published a draft amendment to the Ordinance on the Allocation of Profits to Permanent Establishments (BsGaV). This move follows the German Federal Tax Court (BFH) ruling of 5 June 2024 (I R 3/22), which significantly impacted the allocation of endowment capital and investment income to German branches of foreign insurance companies.

Under Section 25 and 27 of the BsGaV, foreign insurers with German permanent establishments must allocate endowment capital, assets and investment income resulting therefrom according to the arm's length principle. The BsGaV provides two methods in this regard:

- Modified Capital Allocation Method (basic rule): Allocation of assets and endowment capital based on a share in the technical provisions.
- Minimum Capital Allocation Method: A lower endowment capital than determined by the modified capital allocation method may only be allocated to the domestic insurance permanent establishment if this leads to a result that better reflects the arm's length principle (opening clause under Section 25 (3) sentence 1 BsGaV). The domestic insurance permanent establishment must at least show endowment capital that, under supervisory law, it would have to show as equity if it were a legally independent insurance company.

Investment income is directly allocated if a direct allocation of assets is possible. If not, an indirect allocation is made based on the average investment return of the entity (Section 27 (2) BsGaV). If the allocated endowment capital deviates from the endowment capital to be allocated under Section 25 BsGaV, the allocated assets and thus also the investment income must be increased accordingly.

Historically, tax authorities required that the minimum capital amount always serve as a lower limit, often increasing taxable investment income in Germany. This interpretation was based on administrative guidance, not law. The BFH contradicted this view, holding that the minimum capital rule applies only when a lower amount than under the basic rule is chosen. If the basic rule results in a figure below the minimum capital requirement – even negative –, no upward adjustment of allocated investments and, thus, investment income is required. This interpretation favored taxpayers and reduced the risk of double taxation.

The BMF now seeks to codify its original position. Key changes to Section 25 BsGaV include:

- Minimum capital required under German supervisory law plus 20% as a binding lower limit for endowment capital.
- Clarification that the minimum capital rule applies regardless of the method used.

Foreign insurers should review allocation models and assess potential double taxation risks as well as potential countermeasures. Adjustments may be necessary if allocated endowment capital falls below the new minimum threshold.

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International mutual agreement procedures: Revised BMF information sheet

Mutual agreement and arbitration procedures are key instruments for resolving cross-border tax disputes and avoiding double taxation. In September 2025, the German Federal Ministry of Finance (BMF) published a revised information sheet introducing several important changes.

Newly added was the option to submit applications digitally. The guidance also clarifies who may file an application in cases involving fiscal unities. Generally, the tax group subsidiary must submit the request, even if income is allocated to the tax group parent company. The tax group parent company may apply only if the disputed transactions directly affect it and generate income for the parent. When implementing a mutual agreement, any legal remedies or waivers must also be declared by the tax group parent company.

The revised rules also affect the consequences of binding agreements with the tax authorities. Agreements on facts, binding information and binding commitments do not automatically result in the implementation of a mutual agreement if the underlying facts differ in the dispute settlement procedure, according to Section 175a sentence 2 of the German Fiscal Code (AO). The differing facts may be taken into consideration when concluding or executing an agreement or arbitration result.

In transfer pricing cases initiated abroad, the necessary declarations must be provided by the German-affiliated company affected by taxation in Germany. Regarding agreements on joint income or assets (in particular for partnerships that are not entitled to enter into treaties or agreements themselves), the consent of all individuals/companies authorized to appeal must be obtained, even if they are not among the applicants. Furthermore, the previous regulation on notification of the agreement has been substantiated.

A new provision under Section 175a AO states that a mutual agreement procedure becomes effective for the applicant only after all required declarations have been submitted. The updated information sheet also complements existing guidelines on equity measures under Section 163 AO in cases where mutual agreement procedures fail, noting that such measures should regularly be limited to tax deduction.

Finally, the BMF revised its application and restriction appendix on double tax agreement (DTA) arbitration clauses following the implementation of the Multilateral Instrument (MLI). For certain countries, including Greece, Malta, Hungary, and Spain, DTA arbitration proceedings are now excluded if they are in scope of the EU Dispute Resolution Directive or the EU Arbitration Convention. The information sheet is legally binding for tax authorities but not for taxpayers nor the tax courts.

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E-invoicing – New BMF letter outlines the importance of technical validation processes

After e-invoicing came into force from 1 January 2025 onwards for domestic B2B supplies, the German Federal Ministry of Finance (BMF) issued a second letter on 15 October 2025. In this letter the BMF provides further clarification with respect to the requirements with a special focus on the validation of e-invoices.

A prerequisite for an e-invoice is, amongst others, that it allows for electronic processing. Until now, the tax authorities summarized their explanations of errors under the term "readability."

Now, the BMF outlines the importance of technical validation of e-invoices in addition to the regular invoice checks with respect to the correctness and completeness of the mandatory invoice requirements according to Section 14 and 14a of the German VAT Act (UStG).

In this context three different error categories are introduced:

- Format errors: Format errors occur when the invoicing document does not comply with the obligatory syntax requirements – e.g. in case of wrong data formats etc. In case of a format error, such invoice is considered only as an ordinary invoice and not as an e-invoice. If the e-invoice is mandatory because no exceptions apply, e.g., the recipient of the service does not have a proper invoice for input tax deduction.
- Business rule errors: Such errors are assumed in case the invoice file violates the business rules applicable to this e-invoice format. According to the BMF, business rules are technical regulations for checking the logical dependencies of the information contained in an e-invoice. Business rule errors can arise if the information contained in an invoice is incomplete (e.g., no entry in the mandatory field "BT-10 Buyer reference" in an XRechnung) or if there are contradictions between pieces of information (e.g., the tax amount does not match the specified tax rate) and can be identified as a critical error during validation. Unlike format errors, business rule errors are only relevant if they lead to a violation of the VAT mandatory information (content errors).
- Content errors: Content errors occur when mandatory statements according to Sections 14 and 14a UStG are incorrect or incomplete. Such errors (content errors) can be identified in an e-invoice, e.g., as a violation of the relevant business rules during validation. However, content errors may also exist if there is no formal violation of the business rules and, as a result, no error was detected during validation (e.g., specification of an incorrect tax rate).

To detect the aforementioned errors before the invoice is issued, the BMF recommends proper checks using a suitable validation application. However, it is explicitly pointed out that validation of the e-invoice does not replace the recipient's obligation to check the invoice for completeness and correctness according to Sections 14 and 14a UStG but rather supports them in doing so. According to the BMF, an entrepreneur can rely on the technical result of a validation (with regard to format and business rules) by a suitable validation application, provided that they observe the due diligence obligations of a prudent businessman. It is advisable to keep the validation report as proof.

The letter also contains i.a. the following aspects:

- All VAT mandatory invoice information must be included in the structured XML part of the invoice. A mere reference in the structured data to an attachment containing the mandatory invoice information in unstructured form is not sufficient, as this does not allow for electronic processing.
- Change of the scope of correction vs. mere change of assessment basis: A mere reduction of the assessment basis (e.g., discount) does not require correction. On the other hand, changes in the scope or content of services do not constitute a mere reduction and therefore generally require an invoice correction, at least with regard to the service description.
- Archiving regulations

With the clear classification of error classes, the technical validation as well as the content-related verification of e-invoices gains significant importance – especially for invoice recipients. It is therefore essential to verify whether the existing technical validation and verification processes comply with the new requirements. Particularly, the technical and content-related review of incoming e-invoices is gaining importance to secure the input VAT deduction. Careful pre-validation thus becomes a central success factor for legally compliant e-invoicing.

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Full refund of German WHT on dividends for third-country corporations? BFH refers key questions to ECJ

The German Federal Tax Court (BFH) has referred fundamental questions to the European Court of Justice (ECJ) regarding the treatment of German withholding tax (WHT) on dividends paid to corporations resident outside the EU/EFTA states. The answers to these questions are likely to have significant practical implications for non-EU/EFTA companies.

In its decision dated 3 June 2025 (case ref. VIII R 21/22), the BFH examined the case of a Japanese corporation that received dividends between 2009 and 2011 from its wholly owned German subsidiary.

Under the Germany–Japan Double Tax Treaty (DTT), 15% WHT was applied to the dividends, and this tax was considered final. The Japanese company argued that this treatment violates the free movement of capital (Art. 63 TFEU), because German parent companies can credit German WHT on dividends and if applicable receive a full refund, while German WHT is not refunded to third-country corporations (i.e., corporations resident outside the EU/EFTA states).

The BFH submitted several questions to the ECJ for clarification (preliminary ruling). Specifically, the BFH seeks clarification on whether the free movement of capital supersedes the freedom of establishment – especially since only the former applies to third-country residents.

Generally, German WHT may become final for third-country corporations if they cannot claim full relief under a DTT or Section 44a (9) of the German Income Tax Act. If the ECJ rules in favor of the taxpayer, this could open the door for third-country corporations to claim full refund of German WHT based on EU law. However, if the German WHT can be credited against the recipient's domestic tax liability, it is not considered final – and therefore not a violation of EU law.

Corporations resident in third countries subject to final German WHT on dividends should consider filing refund claims based on a potential breach of EU law (free movement of capital). This development may be relevant not only for future claims, but also for prior years, provided that no full relief from German WHT was granted. Filing a further refund claim down to 0% within due time on a protective claim basis is highly recommended since domestic statute of limitation rules for such claims need to be considered (e.g., under German tax law in general refunds for WHT on payments made in the year 2021 need to be filed by 31 December 2025 at the latest).

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German Federal Tax Court facilitates loss carryback in the case of intra-year shareholder changes

Section 8c German Corporate Income Tax Act (KStG) outlines the rules regarding the deduction of losses for corporations. It is particularly relevant in the context of "harmful acquisitions of shareholdings", which refers to the transfer of more than 50% of the capital, membership rights, or voting rights to a buyer or a closely related person within five years. This transfer can result in the non-deductibility of previously unclaimed or deductible losses. The provision is frequently subject of litigation and tax debate, especially in cases involving intra-year shareholder changes. Until recently, it was unclear whether, in the event of a harmful change in shareholders during the fiscal year, a loss incurred up to the transfer date could be carried back to the previous year and be offset against the prior year's profit. The German Federal Tax Court (BFH) has now provided clarity with its decision of 16 July 2025, case ref. I R 1/23, ruling in favor of the taxpayer.

The tax authorities denied the loss carryback, referencing a circular of the German Federal Ministry of Finance (BMF) of 2017, which states that Section 8c KStG applies to all unused losses, including loss carrybacks.

The BFH rejected the tax authority's position, finding no clear exclusion of loss carrybacks in the wording of the law. Both the legislative history and the purpose of the provision support the permissibility of loss carrybacks: Section 8c KStG is intended to prevent the use of old losses in the context of a new economic engagement. However, a loss carryback for periods in which the shareholder structure remained unchanged is not affected. This decision aligns with previous BFH case law on loss carryforwards. The question of the constitutionality of Section 8c (1) sentence 1 KStG (currently pending before the Federal Constitutional Court) was not decisive in this case.

The BFH's ruling strengthens legal certainty for taxpayers facing intra-year shareholder changes and allows loss carryback for periods in which the shareholder structure remained unchanged.

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Federal Tax Court on submission of emails in tax audits

External tax audits in Germany often raise questions about the extent of a taxpayer's duty to cooperate and which documents must be provided. A recent ruling by the German Federal Tax Court (BFH) clarifies to which extent emails need to be provided during a tax audit.

The court confirmed that emails relevant for tax purposes can qualify as business or commercial letters under Section 147 of the German Fiscal Code (AO). This means they must be retained if they document the conclusion, but also the preparation or execution of a transaction. Attachments containing accounting-relevant information must always be retained. The BFH also emphasized that these obligations apply even if the content is already included in formal transfer pricing documentation under Section 90 AO. Digital documents relating to intra-group transactions, including emails that record so-called acts of performance under agreements such as sales and marketing services agreements, fall within the scope of Section 147 AO as "other documents" relevant for tax purposes. Ultimately, all documents that are relevant for transfer pricing documentation, and thus for taxation, are subject to retention.

However, the BFH rejected the tax authorities' demand for access to a so-called "General Journal", i.e., a complete list of all emails sent by the taxpayer. Section 200 AO allows auditors to request documents even if they are not subject to retention, but only if they already exist. The "General Journal" would have to be created first and therefore lies outside the scope. Taxpayers have an "initial qualification right", meaning they may select which emails are relevant for tax purposes. However, this selection will likely be the biggest point of contention in future tax audits and possibly in tax court. This applies particularly to topics such as DEMPE functions, risk control, and value-added analyses, which may be disregarded by clients and tax consultants but may appear relevant for transfer pricing in the eyes of tax auditors.

In view of the recent tax ruling it is strongly recommended that taxpayers prepare and analyze relevant documents in advance of an external tax audit. Given the volume of emails, companies will need structured internal processes and IT solutions to identify and retain tax-relevant correspondence. Failure to comply can escalate into disputes over cooperation obligations, estimations for the tax basis, or even into accusations of accounting deficiencies. Multinational enterprises operating in Germany should carefully review and examine requests from tax authorities and legal remedies available.

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The signing/closing problem: Double RETT on the same share transaction?

In the opinion of the tax authorities, the transfer of at least 90% of the shares in a real estate-owning company or partnership shall trigger real estate transfer tax (RETT) twice, once upon the signing of the SPA and once upon the closing of the share transfer. The assessment for the signing, however, can be withdrawn following the closing. According to the wording of the law, this requires that the signing and the closing are timely reported to the responsible tax office. Practice shows that the requirements for such notifications are very strict and that many taxpayers and their advisors fail to comply with the notification requirement.

Such failure to comply with the notification requirement resulted in three recent court cases, which the Federal Tax Court (BFH) had to decide (case ref. II B 13/25, II B 23/25, and 47/25). The taxpayers challenged the double RETT assessed by the tax authorities because of the taxpayer's failure to timely submit the notifications. All three court decisions only have preliminary character because they relate to suspension of payment requests. Therefore, the court only had to express serious concerns in order to grant the suspension of payment. ▸

German court decisions

Two of the decisions (II B 13/25 and II B 47/25) dealt with the signing RETT and were decided in favor of the taxpayer. The BFH expressed its view that – even if the notification requirements were not met – the signing RETT should be subordinated to the closing RETT. Therefore, RETT should only be triggered upon closing at least in those cases in which the signing tax assessment notice was issued at a point in time when the closing already occurred. In the second case (II B 47/25), this was even pointed out although the signing assessment notice was final (i.e. not under a subject to review condition).

The third case (II B 23/25) was decided in favor of the tax authorities because the taxpayer had only taken legal remedies against the closing assessment notice. The closing RETT, however, is not doubtful in the court's view.

Even though it seems that cases in which not all notifications were made in time can be defended when going to court, taxpayers should still take great care to meet their notification obligations. It also remains to be seen if the BFH confirms its view in the main proceedings dealing with the question if RETT will finally need to be paid (and not only if a suspension of payment is granted). For the near future (i.e. the beginning of 2026), it also appears likely that a legislative process will be initiated under which the signing will become the relevant RETT triggering event, hopefully ending the practice of a threat of double RETT due to missing notifications.

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Primary place of employment for leased employees with permanent employment contracts

The determination of the primary place of work is particularly significant for the question of what amount can be deducted as business expenses for travel between home and workplace, and to what extent the relevant employer contributions can be treated as tax-free.

In the (wage) tax treatment of temporary employment relationships, the question regularly arises as to where the primary place of employment is located. In the past, the Federal Tax Court (BFH) has already commented on this and generally focused on the relationship between the staffing agency and the leased employee. For example, if the staffing firm explicitly designates the assignments to the recipient as temporary, the assignment to the recipient's premises is temporary as well. This applies even if the employee is in fact only assigned to this one specific borrower. In a recent ruling, the BFH again denied the existence of a primary place of work at the recipient's premises (BFH ruling dated 17 June 2025, case ref. VI R 22/23).

The first place of employment is the fixed operational facility of the employer to which the employee is permanently assigned. A first place of employment is presumed, particularly when the employee is to be employed indefinitely, for the duration of the employment relationship, or for a period exceeding 48 months at such a place of work. The consideration of the respective periods is, according to the BFH, conducted ex-ante.

According to the BFH, a leased employee regularly cannot be permanently assigned to the recipient's premises due to the prohibition of permanent employee leasing under the Temporary Employment Act (AÜG)). An assignment for the entire duration of an employment relationship is in these cases only possible if the employment contract is for a limited period, which was not the case in the matter at hand. Finally, the assignment of the employee was for a period of less than 48 months, so this criterion for a primary place of employment also was not fulfilled.

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Inbound EU company and effective profit transfer agreement?

The Hessian Lower Tax Court has confirmed the effectiveness of a German tax group (Organschaft) involving an EU-based company with its place of management in Germany, even in the absence of registration in the German commercial register.

The case concerned the question whether a German tax group was validly established between a Dutch B.V. (as parent) and an Austrian GmbH (as subsidiary). Both entities had their place of management in Germany; the Austrian GmbH also had a branch registered in the German commercial register. The entities concluded a profit transfer agreement (PTA), stipulating that relevant German legal provisions would apply. The PTA was voluntarily registered in the Austrian commercial register, but not in the German commercial register. The German tax authorities denied the recognition of the tax group, arguing that not all requirements of the Corporate Income Tax Act (KStG) were met. Pursuant to the German Stock Corporation Act (AktG), the profit transfer agreement must be entered in the commercial register to be legally effective, i.e., under the wording of the law, the agreement only becomes effective once its existence has been recorded in the commercial register of the company's registered office; this was not the case in Germany in the case at hand. Generally, this registration is a prerequisite for the tax recognition of the fiscal unity.

The central question was whether a binding obligation to transfer profits existed, and specifically, whether voluntary registration of the PTA in Austria was sufficient. The court first established that both the B.V. and the Austrian GmbH met the legal requirements to qualify as parent and subsidiary for the tax group under German law. The Austrian GmbH, despite relocating its management to Germany, remained a legal entity under Austrian law with its statutory seat abroad and management in Germany. Any other assessment would violate the EU freedom of establishment (decision of 21 March 2024, case ref. 4 K 86/21).

Furthermore, the court decided on the above-mentioned legal question that, within the framework of an interpretation consistent with EU law, there was an effective obligation to transfer profits within the meaning of the KStG. German law is to be applied to the PTA. Both the PTA itself and its implementation met the statutory requirements of Sections 17 and 14 KStG according to the court.

This is a positive signal for practice as the requirements for PTA with inbound corporations remain controversial. The final decision of the German Federal Tax Court (BFH) is still pending. A positive decision in favor of the taxpayer could provide the decisive impetus for the legislator to abolish the requirement of a PTA, which is increasingly viewed critically in literature and considered overly formalistic.

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EU Merger Directive: Challenge to retroactive taxation of contribution gains

The Hessian lower tax court recently addressed a conflict between German national tax rules and EU law in a second round of proceedings (decision of 22 May 2025, case ref. 3 K 778/21).

When shares in a corporation are contributed to another corporation (so-called share-for-share exchange), certain lock-up, monitoring, and reporting periods must subsequently be observed. Under Section 22 (2) Reorganization Tax Act (UmwStG), a so-called "Einbringungsgewinn II" (contribution gain II) arises if the shares contributed below fair market value (usually at tax book value) are sold or otherwise transferred by the receiving entity within seven years after the contribution date and the capital gain on the contributed shares was not already tax-exempt for the transferring entity. This contribution gain II is then retroactively attributed to the transferring entity and taxed in the year of contribution.

In contrast, the EU Merger Directive (FRL) takes a different approach. According to Art. 8 (1) FRL, a share-for-share exchange between entities of different Member States should lead to a deferral of taxation at the shareholder level for the built-in gains until their later realization.

In the case at hand, the litigator was the sole shareholder of a Spanish corporation (SLU), while there was another sole shareholder of a German GmbH. Both shareholders contributed their shares to a new German holding company via a share-for-share exchange. The F-GmbH recorded the SLU shares below fair market value, triggering the seven-year holding period. The following year, the new German holding company was converted into a partnership (OHG) at book value.

The court found that the conversion constituted a harmful disposal within the seven-year period, triggering a contribution gain II. However, the court held the opinion that EU law prevails and that ultimately the taxation of a contribution gain II would be precluded by EU law in the form of the EU Merger Directive. In the case at hand, both the personal and material scope of the EU Merger Directive should be applicable.

According to the court, Section 22 (2) UmwStG conflicts with the EU Merger Directive by presuming abuse and retro-actively taxing unrealized gains without allowing counterevidence. An appeal is pending before the German Federal Tax Court (BFH, case ref. X R 18/25). In a similar domestic case, the BFH recently ruled that the EU Merger Directive does not apply to purely domestic transactions. The outcome in this cross-border scenario remains to be seen.

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Lower tax court contradicts Ministry of Finance: tax-neutral change of legal form despite built-in liabilities

In the specific case, a GmbH was retroactively converted by way of a change of legal form into an asset-managing limited partnership (KG) without a commercial character (business purpose: management of domestic real estate). The KG's partners were two foreign corporations holding their interests as business assets. The conversion was intended to be carried out tax neutrally at book values, although the tax book values of the real estate exceeded its fair market value (built-in liabilities).

In the case at hand, the dispute centered on whether a change of legal form at book values is permissible when i) built-in liabilities exist, and ii) the receiving partnership has no own business assets even though the partners hold their interests as business assets.

The tax authorities denied the recognition of book values, citing the Reorganization Tax Decree, which states that the fair market value is the upper limit, and that a non-commercial partnership without its own business assets triggers the statutory exclusion of the book values according to the Reorganization Tax Act (UmwStG).

The lower tax court disagreed (decision of 24 June 2025, case ref. 7 K 1188/21), aligning with prevailing academic opinion. Regarding built-in liabilities, the court found that the wording of the UmwStG is ambiguous, but the term "at most" refers only to the intermediate value alternative, not to the book value alternative. The court emphasized that constitutionally, unequal treatment of built-in gains and liabilities is not justified. Forcing a write-down to fair market values would destroy loss potential without legal basis.

Further, regarding the asset-managing partnership as receiving entity, the court stated that what mattered was that the assets remain subject to German taxation, whether at the partnership or partner level. Thus, the requirements could also be assessed at the partner level. The absence of a domestic permanent establishment for the partners was irrelevant, as limited tax liability applied due to domestic real estate.

An appeal is pending before the German Federal Tax Court (BFH, case ref. IX R 15/25). It remains to be seen how the BFH will address these legal questions and the contrary statements in the tax authorities' Reorganization Tax Decree.

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Lower tax court of Lower Saxony rules on procedural requirements for capital recontributions in Luxembourg S.à r.l. investments

On 3 July 2025, the lower tax court of Lower Saxony issued a decision concerning the qualification of capital recontributions in the context of German individuals investing in a Luxembourg S.à r.l. The court clarified that individual investors cannot claim a withholding tax exemption for capital recontributions in their personal tax returns if the Luxembourg S.à r.l. failed to submit a formal application within the statutory deadlines set by German law (case ref. 2 K 49/23). The decision is currently under review by the Federal Tax Court (BFH, case ref. VIII R 13/25).

The plaintiffs were German residents holding minority shares in a Luxembourg S.à r.l. In 2014, they received distributions classified by shareholder resolution as capital recontributions. However, the Luxembourg entity did not file the required application for formal recognition by the end of 2015, as mandated under German law at the time. Consequently, the Federal Tax Office and the Cologne tax court rejected the application. The plaintiffs then sought recognition in their personal tax assessments, arguing that companies from non-EU jurisdictions – being outside the direct scope of German law – should be able to claim such qualification based on administrative guidelines.

The Lower Saxony court held that the statutory deadline under German law and the German national provision take precedence over administrative guidance. Since the timeline was not met, the distribution could not be treated as a capital recontribution but as a dividend subject to German withholding tax. The court further ruled that this approach does not violate the principle of equality of the German constitution, as EU and non-EU companies were in different procedural positions, in particular non-EU companies could not apply for a formal assessment like EU companies at the time. Also, the court stated that this does not infringe the EU freedom of free movement of capital, as the restriction is justified by the need to ensure effective fiscal supervision. As such, it did not refer the case to the Court of Justice of the European Union (ECJ).

In light of this decision, taxpayers should review their positions and ensure that applications for capital recontribution determinations are filed within the applicable deadlines. From 2024 onward, the scope of Section 27 (8) German Corporate Income Tax Act has been extended to include non-EU companies, allowing them to submit formal applications for recognition.

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Trustee activities harmful to the extended trade tax deduction

The extended trade tax deduction under Section 9 no. 1 sent. 2 of the German Trade Tax Act (GewStG) allows real estate companies, under strict conditions, to be fully exempt from trade tax. The fundamental requirement is that only the company's own real estate is managed and used. The subletting of operating facilities (also known as fixtures, fittings and equipment – FF&E) is harmful if the income from such subletting exceeds 5% of the rental income that the company generates from renting out its own real estate. In its judgment dated 8 July 2025, the Berlin-Brandenburg Fiscal Court decided that the management of operating facilities (e.g., freight elevators) for a sister company on a trust basis on one's own behalf but for account of another – the so-called trust model – is harmful to the extended deduction, as this activity is neither listed in the catalogue of harmless activities nor constitutes an indispensable ancillary activity. An appeal is pending at the Federal Tax Court (BFH) under case number III R 27/25.

In comparable cases, an appeal should be filed and suspension of proceedings requested. Real estate companies with existing trust models should check whether the subletting of FF&E exceeds the 5% threshold. If this does not apply, neither currently nor in the foreseeable future, it should be envisaged to end the existing trust model in order to benefit from the de minimis rule mentioned above. However, if the de-minimis threshold is exceeded, alternative models should be established. According to current BFH case law, even an implementation of the trust model where a consideration is not stipulated, would no longer protect against harmful effects. Whenever possible under existing lease contracts, preference should be given to the so-called two-contract model, in which the property-owning company rents the areas of its real estate property and a sister company rents the FF&E directly to the tenants. According to former BFH case law this model should avoid the risk of a harmful activity.

For new lease contracts, the two-contract model should always be established from the outset, as a later exceeding of the de minimis threshold – e.g. due to changes in the use of the building – can never be completely ruled out. Transferring FF&E to the tenants themselves is conceivable, but in practice it is often difficult to implement, especially when facilities are used jointly. A prohibition on use or decommissioning of operating equipment is generally not an economically viable option.

Overall, the extended trade tax deduction remains an attractive tax planning tool but requires clean and legally secure structuring. Trust models are no longer recommended under current case law and should, if possible, be changed for the future. For future practice, the two-contract model is recommended as a sustainable and legally secure solution.

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Employer liability for wage tax — limitation to income tax liability disputed

Under German national law, any employer that is obligated to withhold German wage tax is liable for any wage tax that has been underpaid. It is debatable, however, whether the liability is reduced if a lower tax is imposed in the income tax assessment — or possibly even if a lower tax merely would be imposed (hypothetically) if an assessment was to take place. This question was addressed in a recent ruling by the lower tax court of Lower Saxony (dated 16 April 2025, case ref. 9 K 155/22). The appeal against the decision is currently pending before the German Federal Tax Court (BFH).

The plaintiff, a limited liability company, employed a managing director and an employee who were only subject to limited tax liability in Germany. Their residence (and habitual abode) was in the Netherlands. No application for treatment as being subject to unlimited tax liability had been submitted. The employer withheld wage tax and ancillary taxes according to the (favorable) wage tax class I. Following a wage tax audit, the tax office issued a liability notice and demanded payment of taxes owed.

During the proceedings, it emerged that the income tax liability from the income tax assessments for 2016 and 2019 for the employee was lower than the wage tax withheld for those years. Consequently, the tax office reduced the liability amounts accordingly.

For the years 2017 and 2018, the employer could only submit tax returns for the employee, as the statute of limitations for assessments had already expired. For the managing director, the employer provided calculation lists, which also showed that more taxes had been withheld than would have been incurred in an income tax assessment. However, the tax authority rejected any further reduction of the liability amount.

The tax court dismissed the lawsuit filed against this decision. The plaintiff had not retrieved the electronic wage tax deduction characteristics or calculated the wage tax according to the (less favorable) tax class VI, thereby violating their obligations. The employer has lodged an appeal against the tax court's decision with the BFH (case ref. VI R 8/25).

In another case, the lower tax court of Berlin-Brandenburg affirmed a limitation of liability to the income tax due but ruled out the obligation to perform a shadow assessment (ruling dated 13 November 2018).

So far, it has not been clarified by the BFH whether the wage tax liability:

- includes the entire wage tax to be withheld in every case,
- is only to be reduced to the extent that the employer proves that a lower tax was assessed during the income tax assessment,
- is to be reduced when an actual assessment or a shadow assessment (e.g., in the case of the statute of limitations) show a reduced income tax amount due.

Therefore, the decision of the BFH is eagerly awaited.

In comparable cases, it should be checked whether an income tax assessment has already been issued or at least a tax return has been submitted in a timely manner. Particularly in the case of positive foreign income sources, an assessment may also be disadvantageous. Moreover, in cases involving third countries, an income tax assessment is often not possible, or the wage tax deduction is final. This should be clarified early on before further steps are taken.

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EU introduces new information and labelling requirements for retailers – why almost every retail business needs to act

By 27 September 2026, all retailers in the B2C sector must observe new and very formalized information and labelling obligations towards consumers. For this purpose, the labels specified by the EU must be used. This applies both to statutory warranty rights (warranty) and, under certain circumstances, to durability guarantees (guarantees). The German government has already published a draft law that provides for the implementation of the EU directive into national law.

Information and labelling regarding the statutory warranty rights of the consumer is always applicable, as these mandatory rights are not at the disposal of the dealer.

Guarantees, on the other hand, are voluntary. Corresponding information and labeling obligations only apply if a guarantee is granted by the manufacturer for the entire product at no additional cost and for a period of more than two years. In addition, the information regarding the guarantee must be provided to the seller by the manufacturer.

The notice regarding the guarantee should be displayed in the physical store directly on the packaging of the goods or in a prominent manner on the shelf on which the goods covered by such guarantee are placed. In online business, the notice should be attached directly next to the picture of the goods. Regarding the guarantee, a certain product proximity is therefore required.

With regard to the statutory warranties, it is sufficient in physical stores if the notice is displayed in a prominent manner, e.g. on a poster on a wall in the store or next to the checkout counter. In online business, a general reminder on the website of the entrepreneur selling the goods is sufficient. Strict product proximity is not required.

Failure to comply with the new information and labelling obligations may result in warnings from specialized warning law firms or consumer protection associations.

In addition, there is a risk of severe fines of up to 4% of annual turnover if other conditions are met.

Every retailer who offers goods online or offline should therefore check to what extent a need for action exists regarding their product range. In particular, each dealer should check whether the goods they sell are covered by a manufacturer's guarantee and whether the manufacturer has informed the dealer of this in any way. This should be done promptly as the new obligations will already come into force on 27 September 2026.

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ECJ rules on VAT for transfer pricing adjustments in corporate groups

The VAT treatment of transfer pricing adjustments within corporate groups has been the subject of ongoing debate and practical uncertainty. In a recent judgment, the Court of Justice of the European Union (ECJ) addressed the VAT implications of such adjustments. The court confirmed that compensation payments made as part of transfer pricing systems may constitute consideration for a taxable supply, meaning VAT must be calculated on these payments.

This decision is particularly relevant for taxpayers applying transfer pricing models based on so-called "year-end adjustments," where profits are steered to a target margin or range by means of a balancing payment at the end of the year. According to the ECJ, intra-group compensation payments calculated under the transactional net margin method (TNMM) of the OECD Transfer Pricing Guidelines can represent consideration for taxable supplies (ECJ judgment of 4 September 2025, case ref. C-726/23). A legal relationship must exist, where the compensated party has provided a service to the paying entity. The fact that the remuneration is variable and linked to the achieved profit margin does not eliminate the existence ▸

of taxable consideration. It also does not eliminate VAT liability if no compensation payment is made within certain profit margins, or if payments are made in the opposite direction.

The ECJ did not decide how to treat "reverse" compensation payments, where the supplying entity pays the recipient, for example, if the result of the entity is too high from a transfer pricing perspective and a negative adjustment is required at year-end to reach the agreed target margin, or if the recipient's losses exceed certain thresholds.

Regarding input VAT deduction, the ECJ clarified that the tax authorities may require additional evidence beyond the invoice. However, any requirement for supplementary documentation must be necessary and proportionate. The authorities may not demand proof that the purchased input service is required or appropriate for the taxpayer's own output transactions.

In practice, the VAT treatment of transfer pricing compensation payments continues to raise questions and disputes with the tax authorities. Challenges arise where compensation payments are aggregated for multiple business relationships that may be subject to different VAT rates. The issue of input VAT deduction and its formal requirements also frequently leads to controversy. The present judgment does not provide further clarity in this respect. It remains to be seen how the tax authorities will interpret the decision and whether they will issue guidance.

Taxpayers are strongly advised to review their intra-group agreements and procedures for transfer pricing compensation payments from a VAT perspective and to supplement documentation where necessary, especially where a direct link to a supply exists and input VAT deduction is affected.

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VAT treatment of app store transactions: ECJ clarifies service commission structure for in-app purchases

The VAT treatment of transactions via app stores has long been a subject of debate, particularly the question of whether a commissionaire structure exists between the app developer, the app store, and the end customer. The Court of Justice of the European Union (ECJ) provided important clarification in its judgment of 9 October 2025 (C-101/24, Xyrality), a case led by EY.

In the underlying proceedings, a Germany-based game developer used an Irish app store to make its apps available free of charge to end customers. Within the game, users could make in-app purchases to obtain additional features and advantages for a fee. The case relates to transactions carried out before 2015, a period when the VAT treatment of in-app purchases was still subject to considerable uncertainty. The entire in-app purchase process was conducted via the app store, with only the store's logo displayed and payment processed by the store. After the transaction, the app store sent an order confirmation email to the customer, naming the developer as the supplier and indicating German VAT.

The ECJ ruled that the actual contractual and economic relationships are decisive for VAT purposes, not merely the presentation in the in-app purchase process or the naming of the developer as supplier in the order confirmation. The court confirmed that the app store is part of the supply chain and that the electronic service is supplied by the developer to the app store. The place of supply is determined by the location of the app store in Ireland under Article 44 of the VAT Directive (Section 3a (2) German VAT Act), rather than by the developer's location in Germany (Article 45 VAT Directive, Section 3a (1) German VAT Act). As a result, the developer's supply to the app store is taxable in Ireland, not in Germany.

Furthermore, the ECJ clarified that the developer cannot be considered liable for VAT solely because they are named as supplier in the order confirmation. This applies in particular where the end customers are non-taxable persons who are not entitled to input VAT deduction, meaning there is no risk to tax revenue.

The ECJ decision has significant practical implications, as it underscores the importance of the actual supply relationships and the VAT classification of app store transactions.

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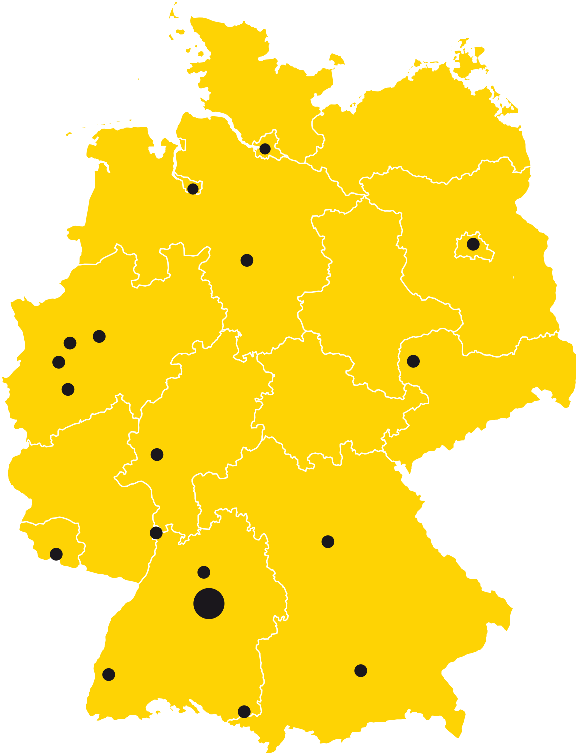

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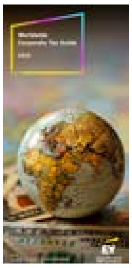

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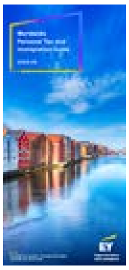

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