Building a better working world

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Annual Tax Act 2022

Extraterritorial taxation of IP continues to apply in non-DTA cases

Content

On 2 December 2022, the German Bundestag, one of the two chambers of the German Parliament, approved a revised version of the Annual Tax Act 2022. Further changes to the Annual Tax Act 2022 are still possible during the discussion within the Federal Council, the second chamber of the German Parliament. However, approval is expected within the next weeks.

An important component of the Annual Tax Act 2022 is the partial termination of the nonresident taxation of certain royalty income and capital gains relating to rights solely because these rights are registered in a public German book or register. While the Government draft bill intended to largely abolish extraterritorial taxation of IP as of 2023 and retroactively for transactions between unrelated parties, the final bill falls short of the announcement. ▸

Annual Tax Act 2022

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Under the Government draft bill, extraterritorial taxation of IP was planned to be abolished to the largest extent as of 2023 and retroactively for transactions between unrelated parties. The system of extraterritorial taxation was planned to stay in place only for certain cases that involve jurisdictions from the EU blacklist of non-cooperative jurisdictions.

In the now agreed version, the Annual Tax Act 2022 provides for a solution that also retains nonresident IP taxation for intragroup cases without treaty protection. Furthermore, the coalition announced that the Federal Ministry of Finance will develop a list of non-cooperative jurisdictions that goes beyond the EU blacklist. A draft of the national blacklist is expected to be released in 2023. If the coalition agrees on such a national blacklist, extraterritorial IP taxation shall be restricted to cases that involve jurisdictions from the EU blacklist as well as the new national list. In return, newly listed tax havens could fall under the measures of the recently introduced tax haven defense act. See our *EY Global Tax Alert dated 2 December 2022* for a more detailed discussion of this development.

In addition to the new rules on IP taxation, the Annual Tax Act 2022 contains several other relevant measures:

Amortization / write-offs
The coalition implements the increase in the straight-line rate of depreciation for new residential buildings to 3%, as agreed in the coalition agreement. In the final version of the law, the regulation applies to all residential buildings completed after 30 June 2023. For buildings that serve residential purposes and were completed before the cut-off date, the previously applicable depreciation rates continue to apply.

Photovoltaic systems
The Annual Tax Act includes a tax exemption for income from the operation of small photovoltaic (PV) systems. The tax exemption applies to PV systems with a maximum output of up to 15 kW (peak) per commercial or accommodation unit and 100 kW (peak) for all units added together. Furthermore, a 0% VAT rate is introduced on supplies of solar modules to the operator of a photovoltaic system, including for the operation of essential components, which are installed on or near private dwellings, flats as well as public and other buildings used for activities serving the public good. The 0% VAT rate applies to PV systems with a maximum of 30 kW (peak).

Return of capital transactions by non-EU corporations
Furthermore, the Annual Tax Act 2022 proposes changes to the tax treatment of return of capital transactions by non-EU corporations. This had been a controversial topic in the past, as for German-owned EU corporations, strict legal requirements exist which must be met to classify a payment from such EU corporations as (non-taxable) return of capital rather than a taxable (but in a corporate context typically effectively 95% exempt) dividend (Sec. 27 para. 8 CIT-Act). Inter alia, the existence and amount of shareholder contributions available for repayment would have to be certified by the German Federal Tax Office upon application by the payor EU corporation, based on a study of the EU corporation's earnings and contribution history. No such legal requirements ▸

existed at all for non-EU corporations, which initially led the tax authorities to claim that for non-EU corporations, a non-taxable return of capital transaction was not possible at all. Therefore, all payments to shareholders would have to be classified as taxable dividends. This view was repeatedly rejected by the Federal Tax Court (BFH). The German Ministry of Finance (BMF) followed the opinion of the BFH (letter of 21 April 2022). As a result, based on the guidance, the requirements on the tax treatment of return of capital transactions by non-EU corporations were less strict than in EU cases (for more details refer to *German Tax & Legal Quarterly 2|22*).

Now the Annual Tax Act 2022 provides that also return of capital transactions by non-EU corporations are non-taxable only under the strict legal requirements according to Sec. 27 para. 8 CIT-Act. That means the less strict requirements according to the judgments of the BFH and the letter of the BMF do not apply anymore from 1 January 2023.

Non-EU corporations should analyze the new legal requirements, in particular the application by the payor corporation and the obligation of certification, which now has to be fulfilled by the payor corporation and no longer by the German Federal Tax Office. Otherwise, return of capital must be qualified as taxable dividends for German shareholders. Besides this, the Annual Tax Act 2022 eliminates the special rules applying to the repayment of stated share capital by non-EU corporations that was created through the conversion of reserves. These are captured by Sec. 27 para. 8 CIT-Act and therefore the same strict requirements will apply in the future.

The new provision shall be applicable to return of capital transactions and repayments of stated share capital that will be provided by non-EU corporations after 31 December 2022. To the return of capital transactions by non-EU corporations made before 31 December 2022, the less strict requirements of BMF letter are applicable, and the special rules apply for repayments of stated share capital by non-EU corporations.

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Act on the Modernization of Tax Procedural Law contains provisions to modernize and accelerate tax audits

The DAC7 Implementation Act (officially called "Act on the Modernization of Tax Procedural Law") contains, in addition to the implementation of the corresponding EU directive, various adjustments to tax procedural law, which are designed essentially to modernize and accelerate tax audits. In this context, the taxpayer's duty to cooperate with the tax authorities is emphasized. A selection of the new provisions is outlined in the following.

With respect to transfer pricing documentation, the legislation provides that in the event of a tax audit, the documentation must invariably be submitted, without a separate request by the tax authorities being required. In addition, the deadline for submitting the documentation will generally be shortened to only 30 days from the date of the request or disclosure of the audit order. While it is the legislator's intention to ensure that the taxpayer maintains an ongoing documentation of the transfer prices, this results in a significant tightening compared to the current legislation, which will likely increase the transfer pricing documentation burden and costs for taxpayers. ▸

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Furthermore, the legislator intends to accelerate tax audits and to achieve legal certainty at an earlier point in time. To this end, the suspension of the assessment period due to a tax audit is now limited to five years after the end of the calendar year in which the audit was announced.

In addition, taxpayers who are advised by tax advisors are to be audited in a timely manner in the future. In those cases, the audit order should be issued by the end of the calendar year following the calendar year in which the taxes were assessed.

Simultaneously with the announcement of the audit order, the tax authorities can request documents subject to record-keeping requirements to form audit priorities based on these documents.

The taxpayer is currently already obliged to cooperate with the tax authorities for purposes of a tax audit. The legislation states a specific obligation for the taxpayer to cooperate. The tax administration can ask the taxpayer for enhanced cooperation within one month. Failure to comply with this obligation is sanctioned with a penalty for delay in cooperation of EUR 75 per day, max. for 150 days.

Another adjustment in the law concerns the possibility of issuing a binding partial final assessment already during the tax audit procedure. Such partial final assessment is only issued upon reasoned request of the taxpayer.

The amendment also provides for benefits in case taxpayers have implemented an effective tax control framework (Tax CMS). During a current tax audit, taxpayers may request relief of tax audit procedures regarding type and scope in the tax audit for the subsequent period. Such relief requires the effectiveness of a Tax CMS, i.e. no or only insignificant tax risks have been identified by the tax auditor. As per legal definition, a Tax CMS consists of all internal measures that ensure that all relevant facts for the tax bases are included, correctly recorded and taxes due are paid in full and on time. For the time being, the regulation will only be in force during a testing period of alternative tax audit methodologies until the end of 2029.

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Update on German Pillar 2 implementation

On 25 November 2022, the German Federal Ministry of Finance conducted the 9th Symposium on international tax policy, entitled "Future of Taxation, Implementation of Pillar 2 in Germany".

According to the German Minister of Finance Christian Lindner, Germany will implement Pillar 2 in any case on the due date 1 January 2024, and even if no unanimous agreement is reached within the EU by the end of this year. Pillar 2 is supposed to ensure a level playing field in the international tax competition. But easing the administrative burden for taxpayers as well as for the fiscal authorities is of pivotal importance for the German competitiveness.

The first discussion draft on national Pillar 2 legislation is announced for beginning of 2023. It will be compliant with the model rules on OECD and EU level and also contain simplification and transition rules, details of which are as yet unknown, however.

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New reporting requirements for digital platform operators

From 1 January 2023, new reporting requirements for digital platform operators will come into force. The goal is to achieve greater tax transparency in the area of digital business models. Platform operators should prepare for the new regulations and adapt their processes accordingly.

EU Member States are required to transpose the EU Directive 2011/16/EU on improving administrative cooperation in the field of taxation ("DAC7") into national law by 31 December 2022. In Germany, the new Platform Tax Transparency Act (Plattformen-Steuertransparenzgesetz – "PStTG") is expected to be passed through the legislation process soon.

According to the new law, platform operators will be required to collect and report information about sellers on the platform and the sales generated through them accordingly. This generally affects all operators of digital platforms via whose platforms sellers are offered the opportunity to contact potential buyers, to perform so-called relevant activities and to conclude legal transactions. Relevant activities include in particular the sale of goods, the provision of personal services, the rental of real estate and the rental of any mode of transport (e.g. ride sharing). Platforms that only allow for the processing of payments, the listing or forwarding of users or the placement of advertisements are not affected by the reporting requirements.

The first DAC7 report is due on 31 January 2024 and includes all reportable transactions executed on or after 1 January 2023. Affected platform operators should therefore prepare for the new reporting requirements in a timely manner. On the basis of an initial impact analysis, it should be assessed whether the business model falls within the scope of the DAC7 Directive or the national PStTG and whether the activities taking place on the platform are subject to the reporting requirements. If so, processes must be implemented to collect, verify and archive the data subject to reporting.

The Finance Committee of the German lower house of parliament (Bundestag) recommended to include the possibility of requesting a binding ruling on the individual affectedness by the new reporting requirements. Such a ruling is not foreseen by the EU Directive. It would, however, provide German and non-EU operators a chance to gain legal certainty should they conclude that their platform is not covered by the scope of DAC7.

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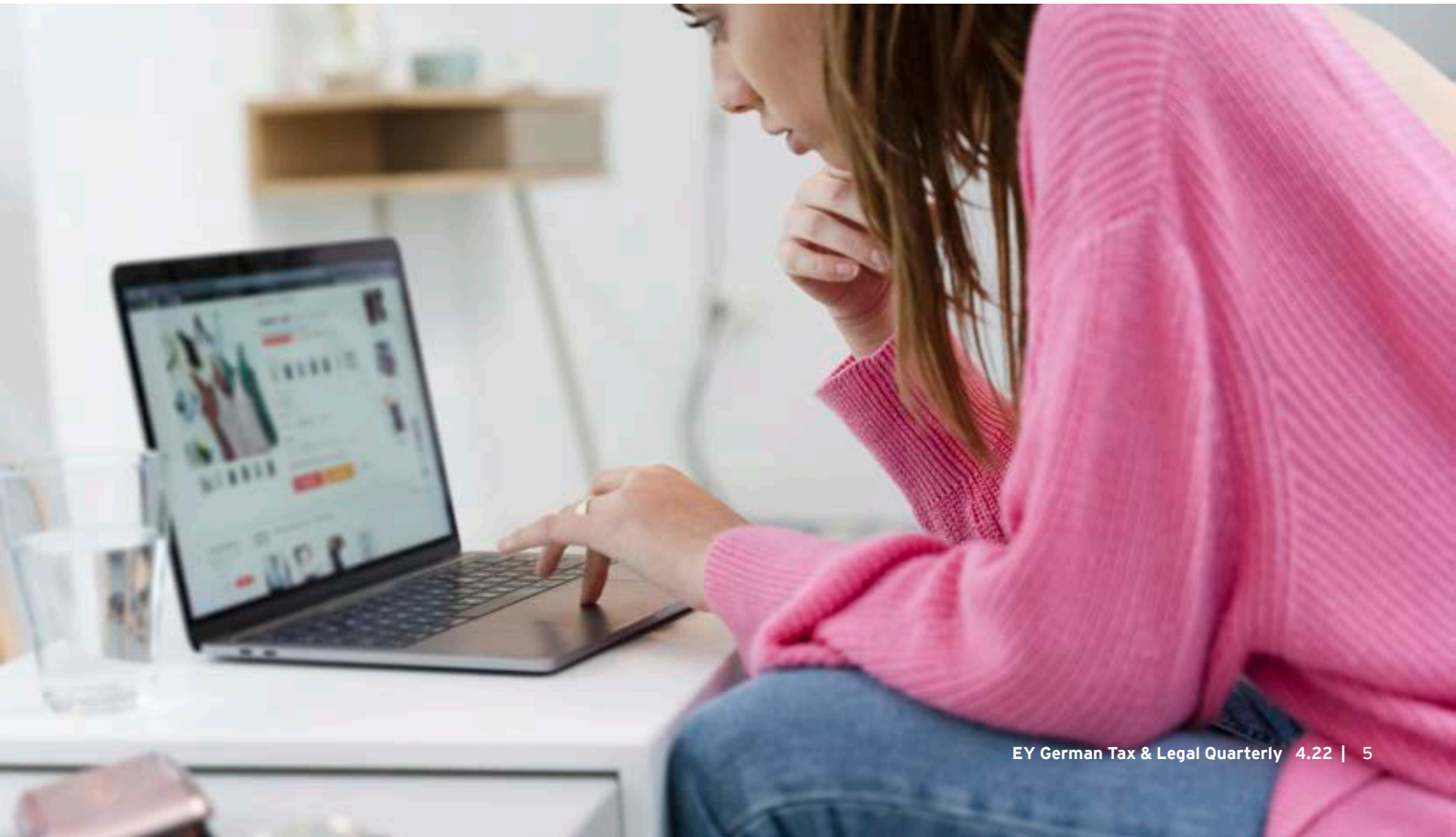

New order decree law on cross-border transfer of function/ exit taxation rules

On 25 October 2022, Germany issued a new order decree law to update the existing Order Decree Law on Transfer of Business Functions (Funktionsverlagerungsverordnung – FVerlV). The new Order Decree Law aligns the existing Order Decree Law with recent legal changes to the cross-border transfer of function rules but includes some aspects where the rules get further tightened beyond the recent legal changes and the existing Order Decree Law. For more information, please refer to the *EY Global Tax Alert dated 29 September 2022* summarizing the government draft.

With the Withholding Tax Relief Modernization Act, Germany adopted legal changes to the transfer pricing framework that came into force with effect as of 1 January 2022 including, among other modifications, changes to the cross-border transfer of function rules. These recent law changes required an update of the existing Order Decree Law on Transfer of Business Functions. An order decree law has the character of law in Germany and thus is legally binding for taxpayers and courts.

Among others, the new Order Decree Law extends the definition of a "transfer of function" and includes changes to the calculation of the transfer package, e.g., consideration of tax effects and determination of comparable third-party discount rates. In addition, certain provisions of the existing FVerlV with high relevance in practice were deleted without replacement, e.g., licensing option in cases of doubt. Further, while the existing FVerlV only required a taxpayer to provide prima facie evidence, the new Order Decree Law now shifts the burden of proof to taxpayers by requiring a taxpayer to provide full evidence under certain provisions. An increasing application of the transfer of function rules and a rise in controversial discussions in German tax audits are expected.

The updated FVerlV applies with retroactive effect for all completed transfers of functions for tax assessment periods beginning after 31 December 2021.

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The inflation compensation premium: Payment to employees of up to EUR 3,000 possible tax-free

On 30 September 2022, the German parliament approved a temporary reduction in the sales tax rate on gas supplies and the possibility of a tax-free payment of a so-called inflation compensation premium by employers of up to EUR 3,000. The measures are intended to mitigate current inflation. The law was published in the Federal Law Gazette on 25 October 2022. The inflation compensation premium, which is exempt from income tax and social security contributions, can thus be granted as of 26 October 2022.

The inflation compensation premium works similarly to the concept of the Corona special payment. In the period from 26 October 2022 to 31 December 2024, the employer may provide each employee with cash or benefits in kind up to a total amount of EUR 3,000 to mitigate the consequences of inflation, without incurring income tax or social security contributions.

However, the premium must be paid in addition to the salary owed anyway. There is therefore no possibility to reallocate bonus or other special payments and thus exempt them from tax and social security contributions. Any form of conversion, renunciation or crediting against wages would also be contrary to the requirement of additionality. But the premium may be paid in individual tranches. The payment of the inflation compensation premium must be recorded in the employee's salary account. In the case of benefits in kind, the granting must also be justified by the current inflation or the energy crisis, but the item itself does not have to be specifically related to energy costs or particular personal concerns of the employee.

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German Federal Ministry of Justice released a draft bill on implementing the public CbCR

On 30 September 2022, the German Government published a draft bill to implement the EU Public Country-by-Country Reporting (CbCR) Directive. The German implementation of the rules aligns with the EU Directive and creates an obligation for German-based multinational enterprises (MNEs) or standalone corporations operating abroad to publish a report on income tax information (Report) if their revenue exceeds for each of the last two consecutive financial years a total of EUR 750 million. If enacted, the reporting obligation will come into force for financial years starting after 21 June 2024.

Publication of the Report is required within one year after the balance sheet date of the relevant financial year for which the Report is prepared. The reporting obligation is also triggered for non-EU based MNE groups that have a medium or large sized subsidiary in Germany. Further, non-EU-based MNE groups or standalone corporations with a branch in Germany with revenues exceeding for each of the last two consecutive financial years EUR 12 million are also covered by the reporting obligation.

The Report generally includes similar information as required for the existing CbCR rules according to Section 138a General Fiscal Code (GFC), with only slight differences, e.g., revenues shall be reported including the revenues with affiliated entities. The draft bill permits to report the required information also based on the CbCR according to Section 138a GFC.

In addition, the draft bill provides the option for a company subject to the reporting obligations to temporarily omit specifically required information in the Report if the disclosure of such information would be seriously prejudicial to the commercial position of this company. An indication in the Report together with a due justification of the underlying reasons is required if specific information is not disclosed. The omitted information must be published in a later Report at the latest in the fifth financial year after the reporting period in which the information was omitted in the Report. Infringements of the preparation or publication of the Report could be subject to a penalty of up to EUR 50,000. However, it is not clear yet whether this is meant to be the maximum penalty per report or per single infringement.

Furthermore, for financial years starting after 21 June 2025, the statutory auditor of the financial statement must also assess within the scope of the audit if a company was subject to the reporting obligation and if so, whether the company has fulfilled its obligation.

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Land tax reform – filing deadline for property tax returns extended to the end of January 2023

The filing deadline for property tax returns has been extended nationwide on a one-time basis from the end of October 2022 to the end of January 2023. According to current knowledge, there will be no further extension of the deadline beyond 31 January 2023.

In 2018, the Federal Constitutional Court declared the previous property tax unconstitutional. From 2025, the property tax must therefore be calculated according to the new law. For this purpose, all properties located in Germany must be revalued as of the valuation date of 1 January 2022, and the values determined must be transmitted electronically to the tax offices for the first time by 31 January 2023.

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The new German electricity price brake

In recent weeks, the German government has been discussing various strategies to curb the drastic rise in prices on the energy markets and provide financial relief for end consumers. The high electricity costs are to be capped by an electricity price brake. The aim is to relieve the burden on all end consumers and to provide incentives to save electricity. These objectives have been incorporated into the law on the introduction of an electricity price brake. The aid is financed by the German Economic Stabilization Fund (WSF) to the tune of EUR 200 billion. In addition, under an EU regulation, certain power generators will be subject to a revenue levy on excess profits from 1 December 2022. Similar aid laws regarding natural gas and heat supplies are implemented simultaneously.

To limit electricity costs, end consumers are to be relieved of a base price quota from 1 January 2023, until at least 1 January 2024, in that each electricity withdrawal point will receive a certain amount of electricity at a guaranteed price. An extension until 30 April 2024 is possible. Relief is to begin retroactively as early as January 2023. However, payments are not to be made until March 2023.

In principle, all electricity consumers (i.e. household customers, commerce, industry) are eligible. Grid access points through which electricity is drawn for the generation, conversion or distribution of energy and where the company's total relief amount exceeds EUR 2 million are not eligible for subsidies. As long as the European Union has imposed sanctions on companies, they are also not eligible for subsidies. The application requirements, cooperation obligations, monitoring for every monthly relief amount are structured differently. Essentially this depends on the metering and electricity consumption. In simple terms, this amount is the difference between a cap and the actual electricity price. For grid access points from which up to 30,000 kilowatt hours (kWh) are drawn, this cap is 40 cents per kWh including grid charges, metering point charges and government-imposed price components. In contrast, the reference energy price for grid tapping points from which more than 30,000 kWh are tapped is to be 13 cents per kWh before grid charges, metering point charges and government-initiated price components. However, the quantities subsidized are limited: The relief quota per calendar month for network exit points to which the reference energy price of 40 cents/kWh applies is to comprise 80% of the current annual consumption forecast for the network exit point available to the electricity supply company divided by 12 (in the case of network exit points accounted for via standardized load profiles (SLP)), or 80% of the network withdrawals measured or otherwise determined by the responsible metering point operator for the 2021 calendar year divided by 12 (in the case of non-SLP exit points). The reference energy price of 13 cents/kWh, on the other hand, is to apply to 70% of the current annual consumption forecast available to the electric utility for the grid tapping point divided by 12 (SLP tapping points) or 70% of the grid tapping for the year 2021 divided by 12. ▸

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End customers then have to meet certain obligations to obtain financial aids. These are in particular - but not exclusively - notification and verification obligations. These must be provided by certain deadlines. They affect operators of power generation facilities as well as network operators, end consumers who are businesses, and electricity supply companies. Due to the EU's Temporary Crisis Framework (TCF), funding caps apply.

Since the reimbursement is made by the respective electricity supply companies, they need to be reimbursed by the responsible transmission system operator. The transmission system operators, in turn, have a claim against the Federal Republic of Germany for compensation of the difference between their actual revenues and their actual expenses.

Although the StromPBG is still at a draft stage, market players should already be aware of the various obligations arising from the new law. The law has passed the cabinet and parliamentary approval is expected before Christmas 2022. There are also comparable price braking laws for natural gas and heat. In principle, these function in a comparable manner. There are, of course, differences in terms of the quantities subsidized and the requirements. Our team is happy to assist with further information on the progress of these price brakes for electricity, gas and heat supplies.

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German tax authorities

Guidance on book/tax difference treatment in tax group structures published

On 29 September 2022, the German tax authorities issued guidance on the new rules dealing with book/tax differences arising in a German income tax group (Organschaft) and having their origin during the time of tax group's existence. These changed rules apply for the first time for book/tax differences arising on or after 1 January 2022. Broadly, the new rules apply such that all book/tax differences are to be reflected as either (generally tax-neutral) contributions by the tax group parent into the tax group subsidiary, or as repayment of contributions by the tax group subsidiary to the tax group parent. The first scenario (contribution into subsidiary) would be given if the German GAAP income of the subsidiary which is transferred under the (mandatory) profit & loss pooling agreement (PLPA) to the parent fell short of the income attributable to the parent for tax purposes (example could be an income allocation from a tax-transparent partnership held by the tax group subsidiary, which for book purposes was not yet received, as the income was retained at partnership level). In contrast, if the book income transfer under the PLPA exceeded the income attribution for tax purposes, the difference would be a deemed repayment of contributions by the subsidiary to the parent (example could be a reorganization transaction at the level of the tax group subsidiary, for which market value was chosen for book, but book value treatment for tax purposes). This would even apply if no shareholder contributions had previously been recorded at the level of the subsidiary. The deemed repayment of contributions would be offset against the tax book value of the investment in the subsidiary at the level of the tax group parent and thus generally be tax neutral unless it exceeds this investment book value. Any excess deemed repayment of contributions would lead to a gain, which would ordinarily be 95% tax exempt for a corporate shareholder. Note that in case the shareholding in the tax group subsidiary is (wholly or partially) still subject to a holding period (e.g. due to a prior book value carve-out), the deemed gain from such fictitious capital contribution repayments can cause a violation of the holding period and jeopardize the tax neutrality of the earlier reorganization which led to this holding period.

The guidance also includes specific comments on the transition rules applying to balancing amounts created to reflect book/tax differences in the past, as well as examples on how to apply the rules in indirect and multi-tier tax group structures.

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Tax relief due to war-related increase in energy costs

The consequences of the war in Ukraine are affecting the people living in Germany as well as companies located in Germany more and more, e.g. in the form of war-related increases in energy costs. Therefore, the scope of relief measures of the German tax authorities (so-called "Billigkeitsmaßnahmen") has been expanded within the current letter of the German Ministry of Finance (BMF) dated 5 October 2022.

The relief includes the reduction of advance payments for income or corporate tax, the deferral of tax payments as well as the granting of a stay of execution. A retroactive reduction of advance payments for the year 2022 is also possible within the scope of the tax authorities' decisions. In accordance with the BMF letter, the tax authorities should not apply stringent requirements when examining the conditions regarding applications for the above mentioned equity measures received by 31 March 2023 in order to facilitate taxpayer relief as quickly as possible. Moreover, deferral interest may be waived in individual cases. The requirement for a waiver of deferral interest is, amongst other things, that the taxpayer fulfilled the payment obligations in a timely manner and did not make repeated use of deferrals in the past. However, relief already granted due to the Corona crisis shall not be taken into account to the detriment of the taxpayer. In these cases, a waiver of deferral interest is usually considered if the relief is granted for a period not exceeding three months.

In addition, the supreme tax authorities of the German federal states have recently issued a statement on the granting of trade tax equity measures as a result of increased energy costs (decree dated 20 October 2022). Regarding trade tax, the tax offices are also instructed to decide on applications received by 31 March 2023 for adjustment of advance payments, in a timely manner and without strict evidence requirements.

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Update on the German RETT reform

With the latest German RETT reform, which came into force on 1 July 2021, the legislator has tightened the existing regulations for so-called share deals and thus made it even more difficult to set up share deals that are neutral in terms of German RETT. Inter alia the relevant shareholding threshold for a change of shareholder subject to German RETT was lowered from 95% to 90% and the period of consideration for the aggregation of successive share transfers was extended from five to ten years. Most important was the introduction of the new provision of sec. 1 para. 2b German RETT Act. According to this provision, changes of shareholdings in real estate corporations of at least 90% are now also subject to German RETT (i.e. it is no longer only first-time share unifications in real estate owning corporations that trigger German RETT). In this context, an exemption has been introduced for share transfers under the so-called stock exchange clause (sec. 1 para. 2c German RETT Act), according to which certain transfers of shares in corporations remain out of consideration. Currently the introduction of another provision (sec. 16 para. 4a German RETT Act) is expected, which will result in double taxation of the same transaction in the event of a temporal discrepancy between signing and closing and in the event of untimely submission of the notification. For further details regarding the stock exchange clause and the proposed introduction of sec. 16 para. 4a RETT Act, please refer to the *EY Tax Alert RETT (EN) 11/2022*.

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German Federal Tax Court on the temporal applicability of the new version of sec. 50d para. 3 ITA

In a recently published decision, the Federal Tax Court (BFH) ruled on the applicability of the (old) anti-treaty shopping rule on withholding tax on interest from convertible bonds. The BFH disagreed with the lower tax court regarding the interpretation of the anti-treaty shopping rule and ruled in favor of the tax authorities. According to the BFH, there are serious doubts as to whether the Court of Justice of the European Union's (ECJ) case law on which the lower court based its restrictive interpretation of Sec. 50d para. 3 ITA (old version) can be applied to the case without further adjustments. The ECJ's respective decisions were based exclusively on cases of dividend payments (rather than interest). The BFH argued that the difference in the taxation of interest (fully taxable for domestic investors) vs. dividends (partially taxable for domestic investors) may lead to a different view as to the interpretation of the anti-treaty shopping rule from an EU law perspective in cases of withholding tax on interest, but ultimately left the question open.

The BFH argued, however, that as the German anti-treaty shopping rule was amended with retroactive effect in 2021, also the revised rule also had to be considered so that it had to be analyzed whether it would lead to a more favorable result for the taxpayer. With the law change, a principal purpose type exception had been introduced, according to which a taxpayer was able to demonstrate the absence of tax reasons as principal reasons for the interposition of the non-resident entity. The BFH referred the case back to the lower tax court of Cologne to gather more evidence, as it held that a general reference to the economic activity of another group company in the country of residence of the recipient of the remuneration was not sufficient evidence.

In another decision relating to the German anti-treaty shopping rule, the tax court of Cologne also had to decide on the applicability of the (old) anti-treaty shopping rule in a case regarding dividend withholding tax. The tax court ultimately rejected the taxpayer's point of view – mainly because the taxpayer was unable to provide sufficient evidence for its arguments – and sided with the tax authorities.

Again, even though a case which would typically be covered by the "old" rules, the court had to review the revised anti-treaty shopping rule in addition to the old rule and made some interesting comments regarding the question what constitutes a valid business activity for purposes of the (new) rule.

The tax court stressed that a business activity may not only arise from a typical "active management holding company" but may also arise from a passive holding function. While a passive holding function is typically viewed as harmful by the tax authorities, the tax court explicitly confirmed that a passive holding function may be viewed as a valid business activity provided that (i) the income is reinvested by the foreign company and (ii) the shareholder rights are actually exercised.

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BFH decides on economic vs. legal ownership of film rights

In a decision dated 14 April 2022 (IV R 32/19), the Federal Tax Court (BFH) had to decide on the attribution of the economic ownership of film rights. Under German income tax law, the economic ownership of assets is decisive, and while it often coincides with the legal ownership, this does not have to be the case, in particular where a different person than the legal owner effectively controls the asset and benefits from it. In the case decided, a German partnership legally owned film rights, but had entered into a 29-year (later extended to 42-year) exclusive marketing and exploitation agreement regarding the film rights with a Dutch company. The annual royalty payments by the Dutch licensee under this agreement were partly fixed and partly contained an element of upside participation for the German licensor. At the end of the contract, several options were foreseen (prolongation, call option for licensee, loan grant by licensee to licensor in case neither the prolongation nor the call option was exercised). In all of these options, the licensor retained some (not currently quantifiable) upside potential.

The German licensor's tax auditor claimed that the German licensor had effectively transferred the economic ownership in the film rights to the licensee when concluding the long-term, exclusive marketing and exploitation agreement, hence had realized gain upon such transfer, and afterwards retained a financial receivable against the Dutch company. In its decision, the BFH rejected this view, and referred particularly to the fact that under the terms of the marketing and exploitation agreement, the licensor retained some (albeit uncertain) upside participation potential. While the facts of the case were quite specific, it is a good guide to the elements and terms that need to be observed in long-term licensing arrangements, especially over copyrighted works, if one wants to ensure that economic ownership is allocated between licensor and licensee as desired from a tax perspective.

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BFH rules on the question of permanent establishments maintained by non-German PropCos investing in German real estate

The German Federal Tax Court (BFH) has recently published a welcome decision regarding the involvement of local third-party German management companies/service providers in German real estate investments by non-German entities (foreign PropCo). In the opinion of the BFH, the establishment of a permanent establishment (PE) in cases of investments by foreign PropCos in German real estate assets with the involvement of a local service provider requires the foreign PropCo to carry out its own (commercial) activities on site in Germany. The mere transfer even of comprehensive tasks to a local service provider shall not be sufficient for the assumption of a PE in Germany.

In the underlying case, a foreign PropCo with its place of management in Luxembourg granted a domestic management company (Contractor) a comprehensive Power of Attorney (PoA) relating to property management activities. Among other things, the Contractor handled all contracts in connection with the management of the property and represented the foreign PropCo vis-à-vis banks and authorities. It was disputed whether the conclusion of the PoA gave rise to a domestic PE with the consequence that the rental income of the foreign PropCo would be subject to trade tax.

In its judgement of 23 March 2022 (III R 35/20), the BFH concluded that these circumstances shall not lead to the assumption of the foreign PropCo maintaining a PE in Germany. Generally, the premises of a German service provider/management company may be regarded as the domestic PE of a foreign PropCo only in certain constellations. One potentially harmful constellation would be where the foreign PropCo has authority over or use right regarding the German office premises of such service provider or management company. But even where there is no such contractual right, the BFH takes the position that such rights can be replaced by the circumstances that a foreign PropCo has own commercial ▶

activities on site of the service provider in Germany. Such own commercial activity on site may for example exist in case there is an identity of directors in both entities (i.e. foreign PropCo and the service provider). If this is not given, a German PE can still be assumed in case of own business activities performed by foreign PropCo on site in Germany, e.g. in the case of continuous and sustained supervision of the management company on site. The BFH based its decision, among other reasons, on the wording of the law, according to which the PE must directly serve the company's operating activities. According to the BFH, a certain spatial and temporal nexus of the company on site in Germany is necessary. In the present case, however, the Contractor was only monitored by the foreign PropCo by telephone or in writing from outside of Germany. The BFH concluded that this shall not to be sufficient for the assumption of a PE.

The recent case law is welcomed and seen in the market as a favorable decision supporting typical structures of foreign PropCos. Nevertheless, it must still be ensured that the operational set up and decision-making process for foreign PropCos owning German real estate and the involvement of local German services is appropriately structured and monitored to mitigate a potential trade tax risk.

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Federal Tax Court comments on the competitive relationship between double tax treaties involved in triangular constellations

In the view of the German Federal Tax Court (BFH), double tax treaties (DTTs) in triangular constellations are basically on equal footing and are to be interpreted independently of each other. The taxpayer can therefore in principle rely on any preferential treatment granted by one of these DTTs.

The BFH (decision of 1 June 2022, case ref. I R 30/18) had to decide on a case in which an employee earned income from employment in Switzerland (source state), had his center of vital interests in Germany and a (further) residence in France. The DTTs concluded between all three states, viewed in isolation, assigned the right of taxation to different states in each case (DTT Germany/Switzerland: Switzerland; DTT France/Switzerland (cross-border commuter regulation): France; and DTT Germany/France: Germany). Actual taxation took place in France. The employee invoked the exemption of income under the DTT Germany/Switzerland vis-à-vis the German tax authorities, which was confirmed by the BFH.

In a case of dual residence - as in this case -, Germany has the right to tax wages from Switzerland (income from third countries) under the DTT Germany/France on the basis of the so-called tie-breaker rule. However, this rule does not have any cross-agreement effect, but only affects the contracting states of the respective bilateral DTT (in this case Germany and France). The same applies to the allocation norms of the respective DTTs, which is why they are basically on equal footing and are to be interpreted autonomously and independently of each other. From a taxpayer's point of view, it is therefore sufficient if, under one of the treaties concluded by Germany (in this case DTT Switzerland 1971/2010), the taxpayer meets the requirements for exemption of income from domestic taxation. This exemption, in turn, cannot be cancelled by a different allocation of the right of taxation in another DTT, insofar as it concerns one and the same income. The taxpayer can, in principle, rely on any preferential treatment granted by one of these treaties. According to the BFH, a resulting non-taxation can only be avoided by special treaty or unilateral regulations.

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BFH rules on qualification of dual resident entities for trade tax purposes

Under German trade tax law, dividends that a shareholder receives from its shareholding in a corporation that has its corporate seat and place of management outside Germany are excluded from the trade tax basis, provided that a participation of at least 15% was held at the beginning of the relevant trade tax period (generally 1 January). The same applies to dividends that are received from a "domestic" corporation. However, it is doubtful under trade tax law how exactly the term "domestic" is to be interpreted.

Clearly, a corporation with legal seat and place of management in Germany qualifies as a domestic corporation. But the trade tax law does not explicitly state whether dual resident entities also qualify as domestic corporations in this regard and, hence, whether dividends received from such dual resident entities may be trade tax exempt at the level of the recipient. A dual resident entity in this regard could either be a corporation legally registered abroad and having its effective place of management in Germany ("Type 1"), or a German registered entity that has its place of management abroad ("Type 2").

In its decision dated 28 June 2022 (I R 43/18), the Federal Tax Court (BFH) clarified this question for "Type 1" entities. The court concluded that dividends received from corporations legally registered abroad with a German place of management are generally trade tax exempt. This is because the term "domestic" in the trade tax act does not necessarily require a German corporate seat. Moreover, the underlying meaning of the exemption rule is to avoid an effective double taxation; this objective can only be reached for corporations with a German place of management if its trade income is not taxed again at the level of its shareholder.

However, the court left open whether such exemption also applies to dividends from "Type 2" entities. The trade tax treatment of dividends received from such type of dual resident entities at the level of the shareholder therefore remains highly controversial, and taxpayers that are generally subject to trade tax and receive dividends from "Type 2" subsidiaries should seek an advance binding ruling or implement other structural protection mechanisms to mitigate respective trade tax risks.

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High cash compensation may disallow tax neutrality of foreign merger for German investors

A merger of two foreign entities which results in new shares in the transferee being granted to the German-resident private investors of the former transferor may be exempt from personal income taxes for these investors. However, this exemption is only granted if, amongst others, the foreign merger resembles a merger under the German Reorganization Tax Act. This means that the essential legal criteria of the foreign merger must be largely in line with the criteria that a German merger would need to fulfill from a corporate law perspective.

In a recently published decision dated 14 February 2022 (VIII R 44/18), the Federal Tax Court (BFH) ruled on the case of a side-stream merger of two listed US corporations. The plaintiff, a German joint heirship, held shares in the US transferor as private portfolio assets. Upon the merger, these shares were exchanged against new shares in the US transferee. However, apart from the new shares, the plaintiff was also granted a significant amount of cash which accounted for approx. 250% of the value of the newly received shares. As cash compensation under German corporate law would generally not be allowed in excess of 10% of the newly issued share capital of the transferee, the tax office held the view that this significant cash element resulted in the US merger not being comparable with a German merger under the Reorganization Tax Act. Consequently, the tax authorities disallowed the tax neutrality and assessed income tax on the entire cash compensation. ▶

German court decisions

The court essentially followed this view. On the one side, it emphasized that cash elements would not as a matter of principle disallow such comparability; hence, the court stuck to its previously held opinion that not individual legal elements but rather an overall evaluation of all relevant criteria under corporate law is decisive for fulfilling the merger comparability test. On the other side, however, the court concluded that the relatively high amount of the cash component in the specific case gave the US merger the character of a disguised sale. It was, therefore, not comparable to a merger under German corporate law. As such, the German investors were not allowed to benefit from the favorable rule that grants tax neutrality for certain foreign reorganizations.

The decision follows a series of cases where the BFH ruled on the comparability of foreign reorganizations with German mergers (also refer to the US spin-off cases dated 1 July 2021). Still, in practice, the required comparability tests continue to provide a significant level of uncertainty for German taxpayers; not only for individual portfolio investors as in the given case, but also for controlling shareholders where foreign mergers may result in passive CFC income for German shareholders if the legal comparability is not given.

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Receipt of profit shares in foreign corporations by a controlling shareholder

For German income tax purposes, the controlling shareholder of a foreign corporation generally receives a share of the profits at the time of the profit distribution resolution. However, according to the Federal Tax Court (BFH), the prerequisite is that he can economically dispose of the profit share in accordance with the foreign law.

In its ruling of 14 February 2022 (case ref. VIII R 32/19), the BFH confirms that the general legal principles on the timing of the inflow of investment income (sec. 11, 20 Income Tax Act) in the case of controlling shareholders must also be applied to profit shares of a foreign (in the case in dispute: Croatian) corporation. Accordingly, profit shares from German corporations and from foreign corporations are to be treated in the same way. According to this, the receipt is generally already to be assumed at the time of the resolution on the appropriation of profits if the claim for payment of profits is clear, undisputed and due and is directed against a solvent company. An indispensable condition for the receipt of open profit distributions to the controlling shareholder is that the shareholder can economically dispose of the profit shares, both in Germany and abroad.

However according to the BFH, in cases in which an actual payment of the profit shares has not yet taken place, a (taxable) receipt is only to be assumed and justified if and to the extent that there are no legal or factual impediments that prevent an economic power of disposal and disposition of the profit shares. Insofar and as long as the circumstances of the foreign law prevent the controlling shareholder from obtaining the economic power of disposal over the distribution amount, there is still no receipt for him pursuant to the German Income Tax Act.

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Binding rulings subject to fees

In case of uncertainty about the tax consequences of a planned structuring, it is common practice to request a binding ruling from the tax authorities. The ruling must be requested before the implementation of the transaction is started and is only binding for the tax authorities if the underlying facts are correct and do not change upon implementation of the structuring.

A binding ruling request is subject to official fees of currently up to EUR 120,721. Generally, the fee is calculated on the basis of a fixed table, taking into account the respective tax risk. The application of a fee on a time-spent basis is considered only in exceptional cases. The determination of the fee is a recurring source of dispute in practice as the following two recent court decisions show.

In the first case, a conversion of a partnership was enacted in several individual steps, which is why the tax office increased the fee taking into consideration multiple transaction steps. The Muenster regional tax court decided (decision of 26 July 2022, case ref. 13 K 1563/20 AO) that in cases of conversions in several steps the ruling is provided uniformly to the companies involved and therefore the costs cannot be increased. It remains to be seen whether an appeal will be lodged and, if so, what position the Federal Tax Court (BFH) will take.

In another case, the BFH (decision of 4 May 2022, case ref. I R 46/18) ruled that even in cases where the application for the issuance of a binding ruling is withdrawn, fees are incurred if the tax authority has already started processing the application. According to the BFH, the possibility of a (pro rata) reduction of the fee does not provide for a general limitation to the (lower) time fee. The fee can be reduced to zero if the tax authority has not yet started processing the application.

Taxpayers should therefore carefully consider the fee that will be triggered beforehand.

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BFH comments on requirement of economic integration into German VAT group

A German VAT group ensures that transactions between the integrated companies are non-taxable for VAT purposes. It requires financial, organizational and economic integration of members into a VAT group parent.

On 1 February 2022, the German Federal Tax Court (BFH) commented on the requirement of economic integration. According to the BFH, not every lease of business premises between the companies to be integrated is sufficient for such economic integration.

An economic integration is given if there is a sufficient economic connection between the companies to be integrated. Even if the financial and organizational integration are clearly met, the economic integration requires the existence of more than merely insignificant relationships between the businesses.

In the case at hand, it was questionable whether a real estate rental between two potential VAT group members would create an economic integration. In this regard, the BFH ruled that indeed the economic integration of two VAT group members into a VAT group parent can be based on transactions between the members. But these transactions must have a more than insignificant effect for the counterparts. Rentals of real estate that is not individually designed for the recipient and can be easily replaced by other real estate, shall not be significant enough to create an economic integration. ▶

German court decisions

The BFH further stressed again that two sister companies cannot establish a German VAT group without integration into the common parent company.

This case shows that the relationships between parent and sister companies respectively between the sister companies should be reviewed and assessed thoroughly as regards their meaning for a potential German VAT group. To some extent it appears surprising that the BFH neglects a sufficient integrative effect even for real estate rentals. Obviously the BFH requires a deeper analysis of the individual significance of the rental.

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Hamamatsu case: The end or the beginning of the customs-related questions?

The recent decision of the German Federal Tax Court (BFH) dated 17 May 2022 on the Hamamatsu case is currently of great relevance in the European customs and transfer pricing (TP) world. Although a BFH ruling does not per se have any effect in other European countries, it must be considered that the decision follows the European Court of Justice ruling (ECJ, C-529/16) dated December 2017.

The case gives rise to strategic questions when considering customs disclosures where retrospective TP modifications or balancing payments are made retroactively, denying the possibility of adjusting the custom value initially declared. The facts and circumstances of the case as well as the key take-aways are summarized below:

Hamamatsu Photonics Deutschland GmbH (HPD) is a German subsidiary of the Japanese group. During the period October 2009 until September 2010, HPD declared the prices invoiced by the headquarter as the custom value. This did not consider the TP set-up covered in the Advance Pricing Agreement (APA) concluded in 2009 in agreement with the relevant tax authorities. Said APA covered the group's TP policy, which ultimately resulted in a downward retroactive adjustment for HPD. In view of the higher customs duties paid, HPD filed a refund claim. This refund was initially refused and has ultimately been rejected in the case under review.

Following the ECJ judgment, the BFH rejects the determination of customs value based on the transaction value method whenever the value of the imported goods is not conclusively determined at the time of importation. Following this logic, TP adjustments that take place subsequently would then also not be relevant to customs value. In this regard, and as explicitly indicated in the BFH decision, upward adjustments are also considered irrelevant for customs valuation purposes. Thus, retrospective increases would not entail an increase in customs value ex post.

Although this could have been the end of a long customs dispute, it seems to be the beginning of a list of many questions: What will happen with current cases where the customs administration is considering levying customs duties based on retroactive TP adjustments? How will the new approach followed by the German customs authorities affect corporate income tax returns in the long run? When considering new custom disclosures in Germany for inbound cases, should TP arrangements reflect a lower transfer price for purchase of tangible goods (if subsequent upward adjustments are considered as irrelevant)?

This ultimately creates tax uncertainty. It remains to be seen how other customs administrations respond and whether this judgement will be considered in Germany as a "one-fits-all" rule.

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German loss of taxing right due to tax treaty change cannot trigger exit taxation

The lower tax court of Münster (decision of 10 August 2022, 13 K 559/19 G,F) had to decide on a question heavily discussed in German tax literature for many years: Does a loss or limitation of Germany's taxing right to the income from an asset as a consequence of a tax treaty change automatically lead to a taxation of any built-in gains in such asset? In the case decided, a German resident held shares in a Spanish real estate company. With effect from 2013, Germany and Spain concluded a new tax treaty, which for the first time included a provision according to which the source state (here Spain) could tax a gain on the alienation of the real estate company shares. This treaty change led the German tax authorities to assess tax on a deemed share disposal gain against the German individual, who appealed against the assessment and claimed that there was no taxable event at all.

The court sided with the taxpayer in its decision and held that a loss or restriction of Germany's taxing right can only lead to a taxable event if the change in the taxing right position is due to an action by the taxpayer. That would not be the case where the changed taxation right is due to a tax treaty change, which clearly is not a taxpayer-triggered event. The court left open whether the legal situation could have changed from 2021, where a law amendment referenced to German exit taxation also applying in treaty change situations. The case has been referred to the highest German tax court, which will now have the chance to finally clarify this important question.

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ECJ: Germany may deny a deduction of final losses of a permanent establishment in the EU

On 22 September 2022, the European Court of Justice (ECJ) rendered its judgment in the case C-538/20 (W AG). Upon request of the German Federal Tax Court (BFH), the court ruled that a Member State may deny a deduction of final losses of a permanent establishment (PE) situated in another Member State where the Member State of residence of the company has waived its power to tax profits of the PE under a double tax agreement (DTA).

The request for a preliminary ruling of the BFH had been made because of the refusal of the German tax office to take into account, for the calculation of W AG's tax payable for the year 2007, the losses incurred by a PE in the UK which was closed during that year and therefore could not be utilized in the UK anymore (so-called final losses). Although W AG was liable to corporation tax on its entire income in Germany, the losses incurred by its PE were excluded from the basis of assessment of its corporation tax under the DTA Germany/UK, which exempts foreign PE income from corporation tax. However, the BFH was unsure whether such final losses must be deductible in Germany under the EU freedom of establishment and decided to ask the ECJ for clarification.

According to the ECJ, the freedom of establishment must be interpreted as not precluding a tax system of a Member State under which a company resident in that Member State may not deduct from its taxable profits the final losses incurred by its PE situated in another Member State where the Member State of residence has waived its power to tax the profits of that PE under a DTA. The ECJ stated that a resident company which has such a PE is not in a situation comparable to that of a resident company which has a PE situated in Germany in the light of the objective of preventing or mitigating the double taxation of profits and, symmetrically, of losses. However, where a Member State had not, by means of a DTA, waived its power to tax profits of a foreign PE, the situation would be different. In such a case, the Member State had decided unilaterally not to take into account the profits made and losses incurred by a non-resident PE of a resident company, even though that Member State would have been in general competent to do so. This would result in a comparable situation which could constitute a violation of the freedom of establishment.

The judgment is a landmark decision for final losses in a situation where the DTA provides for a tax exemption of the income of a PE. However, it leaves open if final losses must be deductible under EU law in case of the application of a switch-over or subject-to-tax clause under a DTA or a treaty override by domestic law. In addition, the judgment should not apply to final losses of a subsidiary resident in another Member State where a national group relief system exists like in the Marks & Spencer case (C-446/03).

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Penalty for violation of transfer pricing documentation requirements in line with EU law

With decision dated 7 July 2021, the Bremen tax court asked the Court of Justice of the European Union (ECJ) whether the penalty stipulated in sec. 162 para. 4 General Fiscal Code (GFC) if no, late or insufficient transfer pricing (TP) documentation is submitted violates existing EU law because of a different treatment between cross-border and domestic transactions.

On 13 October 2022, the ECJ now confirmed that this penalty is, in principle, in line with EU law. However, the Bremen tax court must now examine whether the specific German TP documentation requirements lead to excessive administrative burden.

In this case, the Bremen tax court had doubts as to whether the application of a penalty for taxpayers engaged in cross-border transactions with related parties according to sec. 162 para. 4 GFC in addition to the already existing right to estimate of the tax authority based on sec. 162 para. 3 GFC is in line with EU law given that for purely domestic transactions between related parties, a TP documentation requirement does not exist in German tax law. Consequently, there is also no penalty regime in place in the absence of this compliance requirement for domestic transactions. According to sec. 162 para. 4 GFC a penalty of 5% to 10% on the income adjustment may be applied, with a minimum penalty of EUR 5,000, if the taxpayer fails to submit TP documentation or if the documentation submitted is insufficient or essentially unusable. In addition, for late filing, the taxpayer may face a penalty of up to EUR 1 million (minimum penalty of EUR 100 per day of delay).

The ECJ has now denied in this decision (C-431/21) an unjustified infringement of the freedom of establishment by sec. 162 para. 4 GFC. The ECJ confirms its previously settled case law, according to which the difference in treatment of cross-border and domestic cases can be justified by overriding reasons in the public interest, in particular to preserve the balanced allocation of the power of taxation between Member States. However, the ECJ also states that the TP documentation requirements must not go beyond what is necessary to achieve the objective pursued. In particular, the fulfilment of the obligation must not be associated with excessive administrative constraints for the taxpayer. The ECJ therefore instructs the Bremen tax court to examine whether the German TP documentation requirements lead to such excessive administrative constraints for taxpayers. In principle, however, the German TP documentation requirements stipulated in sec. 90 para. 3 GFC are in line with the freedom of establishment.

Unfortunately, the ECJ does not explicitly comment on the question as to whether the double penalty for the violation of the documentation obligations according to sec. 162 para. 3 and para. 4 GFC is in line with EU law.

It should be noted that the German legislator is currently contemplating to further tighten both the TP documentation requirements under sec. 90 para. 3 GFC and the penalties under sec. 162 para. 4 GFC with the proposed "Implementation of DAC7 and Modernization of Tax Procedure Law".

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Employment law news – increased obligations for employers

Comprehensive additional obligations were imposed on employers in 2022 by Federal Labour Court case law as well as by the legislator. As a result, two significant developments have increased the obligations of employers:

Employers are obliged to implement a system to record the time worked by their employees. This obligation results from an interpretation of the German Occupational Safety Act (Arbeitsschutzgesetz, ArbSchG) in conformity with EU law, as the Federal Labour Court ruled in a landmark decision on 13 September 2022 (1 ABR 22/21).

The background to this decision is as follows: Under German law, the employer was previously only expressly required to record working time exceeding the employees' eight-hour working day pursuant to sec. 16 para 2 of the German Working Hours Act (Arbeitszeitgesetz). However, the European Court of Justice (ECJ) had already ruled on 14 May 2019 (C-55/18) that employers must establish a system for recording the daily working time of each employee. Without such a system, so the ECJ, it is not possible to determine objectively and reliably either the number of hours worked by an employee and when that work was performed, or the number of hours worked beyond normal working hours, as overtime. Following the ECJ's decision, there was uncertainty in Germany as to whether the ECJ ruling directly binds employers or only obliges member states to pass a corresponding law. With its decision dated 13 September 2022 (1 ABR 22/21), the Federal Labour Court positioned itself clearly in this regard and ruled that employers are obliged to implement a system recording the total working time of employees, without the need for a law implementing the ECJ ruling of 14 May 2019. The Federal Labour Court argued that sec. 3 para 2 no. 1 ArbSchG, which defines basic obligations of the employer, must be interpreted in conformity with EU law to the effect that the employer is obliged to introduce a system for recording the total working time of each employee.

The effects of this decision are far-reaching. As a result, companies cannot wait for the legislator to implement the statements made by the ECJ in its ruling of 14 May 2019, as the Federal Labour Court has clarified that employers are already obliged under the existing laws to set up a system to record the actual working hours of each employee, including overtime.

Besides that, the requirements for employers' information obligations were tightened by law in 2022, as the legislator has implemented the Directive (EU) 2019/1152 of the European Parliament and of the Council of 20 June 2019 on transparent and predictable working conditions in the European Union (Working Conditions Directive) into German law.

The aim of the Working Conditions Directive is to improve working conditions in the European Union through more transparent and predictable employment while ensuring labour market adaptability. The Working Conditions Directive is mainly implemented through amendments to the Verification Act (Nachweisgesetz, NachwG), however, other laws such as the Temporary Employment Act (Arbeitnehmerüberlassungsgesetz) or the Part-Time Work and Fixed-Term Employment Act (Teilzeit- und Befristungsgesetz) are also amended. These changes became effective as of 1 August 2022. ▸

The new law provides in particular for an extension of the employer's obligation to inform employees of the essential aspects of the employment relationship. The employers' obligations to provide information, which are listed in sec. 2 NachwG, were supplemented and some new information obligations were imposed. Thereafter, in particular the intended end date of an employment relationship, the place of work or that the employee is free to determine his or her place of work, if so, the duration and conditions of the probationary period, the remuneration of overtime as well as the agreement on rest periods and, in the case of agreed shift work, the shift system, shift rhythm and prerequisites for shift changes, must be put down in writing, signed and handed over to the employee.

The amendment to the law affects existing employment relationships as well as new hires. Since 1 August 2022, employers must comply with the new information requirements for every new hire and, for employment relationships that already existed before the law came into force, employers must provide the legally required information upon request of the employee within the newly defined deadlines. Violations of the information obligations can be punished with a fine of up to EUR 2,000. Since the amendments introduced with this new law came into force this August, employers should already be familiar with the new regulations and have implemented them. If not, this should be done as soon as possible to avoid fines.

Both the case law of the Federal Labour Court and the new law implementing the Working Conditions Directive show that employers should reconsider the changes to their obligations that occurred this year and critically examine whether they are compliant.

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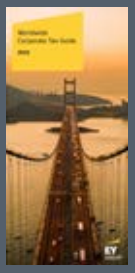

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