

# German Tax Monthly

Information on the latest tax developments  
in Germany

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## Lower Tax Court of Münster (9 K 1816/18 G): (No) Add-Back for Trade Tax Purposes when Renting a Trade Fair Stand

In its judgment of 9 June 2020 (9 K 1816/18 G), the Lower Tax Court of Münster ruled that the costs of renting a trade fair stand are not subject to adding back for trade tax purposes under certain conditions.

In principle, every trading entity operated domestically is subject to German trade tax. Trade tax is calculated based on trade income. According to the German Corporation Tax Act [KStG], trade income refers to the calculated profit from business operations, which is increased or decreased through add-backs or reductions pursuant to the German Trade Tax Act [GewStG]. In particular, rental expenses for the use of an immovable fixed asset owned by another person are to be added back to trade income (§ 8 no. 1 lit. e GewStG).

The plaintiff (GmbH) produces and sells agricultural machinery. Nevertheless, it has no direct sales but sells its machinery via an existing dealer network. In 2009 to

2011 (years under dispute), it repeatedly participated at trade fairs to present its machinery there. In dispute was whether the cost of renting the trade fair stand was subject to adding back for trade tax purposes.

When examining whether fictitious fixed assets exist, the business purpose of the company must be taken into account, as well as the particular features of each specific case, e.g. the frequency of trade fair visits or the marketing channels used. The question is whether the business purpose requires the permanent holding of such assets. It does not, however, depend on the duration of the rental, meaning that an asset can also be a fictitious fixed asset if it is only hired out for a short time.

According to these principles, the rented trade fair stand in the present case did not form part of the fictitious fixed assets of the plaintiff. According to the Lower Tax Court, the business purpose of the company does not require such a space to be kept permanently for use in its business or to take part at trade fairs. As the plaintiff does not conduct direct sales, its primary

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business purpose is the production of agricultural equipment. For this activity, trade fair visits are not necessary. By not participating at trade fairs, the business operations of the plaintiff (production of agricultural machinery) would not be significantly affected.

Appeal to the German Federal Tax Court was not permitted as this matter depends on other proceedings already at the German Federal Tax Court under reference III R 15/19 (Lower Tax Court of Düsseldorf, 10 K 2717/17).

### **Draft of a German Federal Ministry of Finance Guidance on the Application of § 8d of the German Corporation Tax Act**

The German Federal Ministry of Finance (BMF) has submitted the draft of a guidance on the application of § 8d of the German Corporation Tax Act (KStG) to unions for their opinion. The provision is generally already to be applied to detrimental changes in ownership since 1 January 2016, although the tax authorities have not yet issued guidance on application.

According to § 8c KStG unused tax losses and tax loss carry forwards are forfeited if more than 50% of the shares in a loss corporation are transferred directly or indirectly to a (single) acquirer or related person within a period of five years. However, there are exemptions from this, such as the group exemption provision, the hidden reserve clause or § 8d KStG. Pursuant to § 8d KStG, losses and interest carryforwards should be retained on application, despite a detrimental change in ownership within the meaning of § 8c KStG, if the corporation since its inception or for at least three years has not changed its

business operation. Another prerequisite is that no detrimental event within the meaning of § 8d (2) KStG has occurred during that period until the end of the tax assessment period.

The draft of the guidance on application (as yet not published) on § 8d KStG includes guidance on the application procedure, the term business operation and the catalogue of events which conflict with the application of § 8d KStG or result in the forfeiture of a loss carryforward dependent on continuation [fortführungsgebundener Verlustvortrag].

According to the draft of the guidance, an application is expected to be futile if no detrimental change in ownership exists (for example due to the application of the intra-group clause [Konzernklausel] (§ 8c (1) sent. 4 KStG) or the restructuring clause [Sanierungsklausel] (§ 8c (1a) KStG). The hidden reserves clause, however, does not exclude a detrimental change in ownership but maintains a loss that would otherwise be forfeited. For this reason, the taxpayer has an option of either the application of the hidden reserves clause or an application according to § 8d KStG. An application according to § 8d KStG for the remaining losses after application of the hidden reserves clause (partial application) is therefore to be excluded.

The application of § 8d KStG is to be made in the tax return for the assessment period in which the detrimental change in ownership occurs and may generally be made up to the date of the tax assessment becoming incontestable. The application is to be made in the corporation tax return and may be withdrawn up to the date of the tax assessment becoming incontestable by way of

a submission in due form of an amended corporate tax return.

The term business operation is to be understood as relating to activity. A corporation may have several business operations if it pursues several independent activities. This is to be determined according to the overall view of the circumstances. If several business operations are in place, the scope of application of § 8d KStG does not take effect. By contrast, a uniform business operation subject to preferential treatment is given if a mutual support and factual connection between the activities is given. Similar activities are not sufficient, there must be a substantive link. A mutual support and factual connection generally exist if the independent activities are mutually dependent or mutually support each other as principal and ancillary activity. An additional other practised activity is non-detrimental if the net revenue from this activity does not exceed 3% of the total net revenue of the loss-making operation and the amount of EUR 24,500 in the assessment period.

Further, the BMF takes a position on detrimental events within the meaning of § 8 (2) KStG and clarifies the legal consequences of maintaining the loss and forfeiture of loss. The unions can comment the draft until 11 September 2020. The BMF will then work through the responses and is expected to issue the final BMF guidance.

### **Requirements of Electronic Cash Register Systems**

As a result of the law on protecting digital source documents from manipulation dated 22 December 2016, the obligation was introduced from 1 January 2020 to protect each deployed electronic recording system and the digital records to

be maintained thereby using a certified technical safety device. The German Federal Ministry of Finance (BMF) had issued a safe harbour provision according to which electronic recording systems are permitted to continue to be used without a certified technical safety device until 30 September 2020. The BMF has rejected a further extension of this deadline.

The majority of German federal states has therefore created their own hardship provisions which grant companies an extension to modify their cash register systems until 31 March 2021. The conditions for the extension of the modification deadline are structured differently in the individual German federal states. In Bavaria, North Rhine-Westphalia, Hesse and Hamburg, this condition is that companies have a substantiated binding order for the technical safety device with a cash register dealer, a cash register producer or another service provider by 30 September 2020 or have placed a binding order for the installation. If the installation of a cloud-based technical safety device is intended, evidence suffices that such is not yet available. Other German federal states require the order to be placed by 30 August or 31 August 2020. Berlin and Brandenburg even require that no criminal or administrative offence proceedings owing to tax evasion or minor tax fraud for the tax assessment periods 2010 to 2020 were conducted that ended with a conviction, a penalty order, a condition or a fine.

An application to the responsible tax office for the transitional provisions of the German federal states is not necessary.

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