German Tax Monthly

Information on the latest tax developments in Germany

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Draft Act for a Third Coronavirus Tax Assistance Act

On 9 February 2021 the coalition's parliamentary groups have submitted the draft of a "third act to implement tax relief measures for coping with the coronavirus crisis" (Third Coronavirus Tax Assistance Act). The act will enable tax measures to further combat the consequences of coronavirus and to boost domestic demand. Other measures had previously been implemented through the First and Second Coronavirus Tax Assistance Acts.

The Third Coronavirus Tax Assistance Act includes in particular the following key points:

Loss carryback: The tax loss carryback (for income and corporation tax) will be increased to EUR 10 million or EUR 20 million for joint assessment. The increase applies only for 2020 and 2021, i.e. for loss carrybacks from 2020 resp. 2021 to 2019 resp. 2020. The Second Coronavirus Tax Assistance Act had already raised the amounts from an initial EUR 1 million (EUR 2 million for joint assessment) to EUR 5 million (EUR 10 million for joint assessment). The new increase applies also for the limits concerning the adjustment of advance payments for the 2019 assessment period and for the preliminary loss carryback for 2020. From the 2022 tax assessment period onwards, the upper limits will return to the old legal status of EUR 1 million and EUR 2 million.

Extension of the VAT rate reduction: to 7 percent for restaurant and catering services with the exception of beverages, extended past 30 June 2021 until 31 December 2022. The First Coronavirus Tax Assistance Act had originally introduced a reduction for the period from 1 July 2020 to 30 June 2021.

The draft act will be introduced directly to the Bundestag by the coalition's parliamentary groups to speed up the legislative process. It could therefore be possible to quickly conclude these legislative procedures. The Act shall in principle enter into force on the day after its promulgation.

Content

Coronavirus Bridging Assistance – Phase 3

The application for the Phase 3 of the Coronavirus Bridging Assistance ('Überbrückungshilfe') has recently started. The Bridging Assistance is an aid programme of the German Federal Ministry for Economic Affairs and Energy [BMWi] to secure the economic existence of enterprises that suffer significant sales losses due to COVID-19-related complete or partial closures or impositions.

In Phase 3 (eligibility period: November 2020 to June 2021), businesses and organisations from all sectors with, amongst others, an annual turnover of up to EUR 750 million in 2020 (consolidated), can apply for Bridging Assistance (an increase or abolition of the turnover limitation is in discussion). Further requirements are a domestic permanent establishment or a domestic registered office registered with a German tax office, the activity was taken up before 1 May 2020 and that the applicant was not already in difficulties on 31 December 2019 according to the EU definition. In the case of affiliated companies, only one of the affiliated companies may submit an application for all of the affiliated companies combined.

Applicants can claim Bridging Assistance III for each month in the eligibility period in which they suffered a loss in turnover due to coronavirus of at least 30% in principle compared to the reference month in 2019. Eligible are continuous fixed costs incurred during the eligibility period based on a contract or set by the authorities that cannot be changed unilaterally, e.g. rents and leases, interest, operational licence fees, insurance, expenses for essential repairs, maintenance or storage of assets and leased assets, subscriptions, expenses for electricity, water, heating, cleaning and hygiene measures and other fixed costs. Costs paid to affiliated companies are not eligible for assistance. Special provisions apply for certain sectors (travel sector, events and culture industry, retail and pyrotechnics sectors).

The assistance grants a non-repayable grant between 40% and 90% of the fixed costs, depending on the turnover loss in the respective month. The calculation is made for each month separately.

The maximum amount of assistance is EUR 1,500,000 per month resp. EUR 3,000,000 per month for affiliated companies. However, the maximum limits under state aid law must be observed.

There are several state aid regulations approved by the European Commission of relevance for the Bridging Assistance with different maximum amounts and different prerequisites. Depending on the applicability of the regulation(s), the Phase 3 of the Coronavirus Bridging Assistance can amount up to EUR 12,000,000 in total. The maximum amounts of assistance can be claimed only once by affiliated companies as a whole.

Applying for and providing documentation for the loss in turnover substantiating the claim and the reimbursable fixed costs is a two-stage process using an online portal created for the purpose. In the first step (application), fulfilment of the conditions for application and the amount of reimbursable fixed costs must be demonstrated with the assistance of a tax advisor or accountant, and in the second step (final settlement) this must be proven with the assistance of a tax advisor or accountant.

The deadline for application is 31 August 2021. The final settlement must be submitted by 30 June 2022 at the latest via a tax advisor or accountant. If the final settlement deviates from the turnover forecast in the application, grants paid in excess must be repaid or they are adjusted upwards retroactively.

Limited Tax Liability when Granting Rights Listed in Domestic Registers

Companies domiciled abroad may generate domestic income in Germany through the granting of rights and thereby be subject to non-resident tax liability if there is a domestic nexus to Germany. Apart from establishing a domestic nexus through exploitation of the rights in Germany, for example by using them in a German permanent establishment, this also applies to rights that are listed in a domestic public register. The question is whether this also applies when the rights are granted and used exclusively abroad.

By guidance dated 6 November 2020, the German Federal Ministry of Finance [BMF] confirmed a tax liability in cases where the right is solely entered into a domestic public register.

The ministerial draft of an Act to Modernise the Relief from Withholding Tax and the Certification of Capital Gains Tax of 20 November 2020 provided for the repeal of non-resident tax liability for granting of rights based on the mere entry in a domestic register. This legislative change was not, however, adopted in the government bill of 20 January 2021.

With its guidance of 11 February 2021, the BMF has now issued a **simplification rule** for certain cases and for a limited period. If the conditions of the simplification rule are met, a tax must not be withheld.

The simplification rule covers cases which are subject to non-resident tax liability and withholding tax solely on the basis of entry in a domestic register and for which, on account of a **double taxation agreement** (DTA), no German tax liability ultimately arises. No other domestic nexus (e.g. use of the rights in a domestic permanent establishment) may exist.

The rule applies for considerations already received by the licensor (creditor) or still to be received **up to and including 30 September 2021**. In these cases, the withholding of tax, remittance of tax, and reporting of tax to the German Federal Central Tax Office [BZSt] may be waived if certain requirements regarding the payment debtor and creditor are satisfied. For example, the p**ayment debtor may not be resident** (residence or habitual abode or place of management) **in Germany** at the time the receipt consideration is received.

The basis of assessment for the withholding tax is generally the respective **gross consideration** for the granting of the right registered in Germany. If necessary, the consideration paid is to be apportioned appropriately.

The **sale of rights** entered in a public register in Germany also fulfils the condition of non-resident tax liability. For these sales transactions, which are not subject to withholding tax, tax returns must be submitted by the non-resident taxpayer (licensor). There need be no electronic submission until 30 September 2021 unless the tax authority explicitly requests it. If a DTA accords the sole right to taxation for these capital gains to the country of residence, a nil tax return can be submitted.

The possibility of a future **legal amendment** is still given. According to reports, the number of cases affected (both for DTA as well as non-DTA countries) and the total amount of the tax incurred must first be evaluated by the BMF. Any amendments are expected to be decided by the new German federal government only after the parliamentary election in September 2021.

Trade Tax Treatment of the Addition Amount under CFC Rules

In its ruling of 11 March 2015 (I R 10/14), the Federal Tax Court (BFH) decided that the addition amount under German CFC Rules is part of the profit of a domestic commercial business but must be deducted for trade tax purposes. As a result, the addition amount is not subject to trade tax. The supreme tax authorities of the federal states reacted to this with a non-application decree dated 14 December 2015.

In the meantime, it has been legally regulated that the addition amount under German CFC Rules is subject to trade tax. The regulations apply to assessment periods from 2017 onwards.

For earlier assessment periods, the principles of the BFH ruling are now generally applicable in all open cases for assessment periods up to and including 2016 following the repeal of the non-application decree.

Ministerial Draft Bill for an Act to Combat Tax Avoidance and Unfair Tax Competition

The Federal Ministry of Finance (BMF) has published a ministerial draft bill for an Act to Combat Tax Avoidance and Unfair Tax Competition and to amend other laws. The aim of this Act is to urge countries and territories to observe and implement recognised standards in terms of **transparency in tax matters** and **fair tax competition** as well as **BEPS minimum standards**.

To this end, targeted administrative and substantive tax measures shall be used to deter individuals and enterprises from entering into or maintaining business relationships with non-cooperative tax jurisdictions. The grounds for this move are the defensive measures agreed at EU level in respect of **non-cooperative jurisdictions** (known as the 'blacklist'). The Act provides for various so-called **defensive measures** and **duties to cooperate.**

The provisions of the Act to Combat Tax Havens are intended to apply to **all taxpayers** and covers all taxes, with the exception of VAT (incl. import VAT), import and export duties and excise taxes.

A **legislative decree** shall set out the list of non-cooperative tax jurisdictions and the point in time as of which a jurisdiction previously deemed to be non-cooperative no longer fulfils the criteria. Should a tax jurisdiction be newly included in the legislative decree, the defensive measures and increased duties to cooperate associated shall apply for the first time as of the beginning of the following year (or financial year) from the legislative decree taking effect. In the reverse case of a jurisdiction being removed from

the list, the regulations shall already cease to apply as at 1 January (or the beginning of the financial year). The point in time as of which the jurisdiction ceases to fulfil the criteria for classification as non-cooperative is decisive in this regard.

The **business transactions to which the law pertains** are business relationships or ownership interests undertaken in or having a nexus to a non-cooperative jurisdiction.

The Act to Combat Tax Havens includes the following **defensive measures** for business transactions concerned:

- Denial of tax deduction of expenses
- extended withholding tax measures (no withholding tax relief, extended non-resident taxation)
- tighter CFC rules and
- measures concerning dividends and sales of ownership interests.

The Act to Combat Tax Havens provides for a range of **record-keeping requirements** within the framework of **increased duties to cooperate** for taxpayers who/which pursue business transactions having a nexus to a non-cooperative tax jurisdiction. The records are to be submitted to the tax authorities or Federal Central Tax Office (BZSt) one year after the end of the respective calendar year at the latest. The tax authorities shall have the option to assess a surcharge within the scope of estimating the basis for taxation should the duties to cooperate be infringed. Further, the tax authorities shall also have the option to require taxpayers to submit **a sworn statement** that their records are correct and complete and to authorise the authorities to assert their existing **right to information.**

In principle, the Act shall enter into force on **1 January 2022.** With regard to tax jurisdictions that were not named on the 'blacklist' as at 1 January 2021, the Act shall only apply from **1 January 2023.**

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