

# German Tax Monthly

Information on the latest tax developments  
in Germany

November | 2021

## German Federal Ministry of Finance: Guidance on Interest on Back Taxes and Tax Refunds

With its decision dated 8 July 2021 (file ref. 1 BvR 2237/14, 1 BvR 2422/17), the German Federal Constitutional Court ruled that the interest on back taxes and tax refunds of 6% annually (0.5% per month) is **unconstitutional** for interest calculation periods starting as from 2014. However, the current legislation remains applicable for interest calculation periods up through 2018. The regulations are no longer applicable for interest calculation periods as from 2019. The German Federal Constitutional Court has stipulated that the legislator must pass an amendment by 31 July 2022. The interest rate's unconstitutionality generally applies in both directions: in the case of both interest on back taxes as well as interest on refunds, both to the benefit as well as the disadvantage of the taxpayer.

The German Federal Ministry of Finance (BMF) has now issued guidance on the determination of interest on back taxes and tax refunds in view of the decision of

the German Federal Constitutional Court (BMF guidance as of 17 September 2021).

For interest incurred until 31 December 2018, the previous interest rate of 6% annually (0.5% per month) continues to apply. Interest that has been provisionally assessed with a view to the court proceedings or has been contested by an appeal must now be finally assessed. If interest on back taxes has not yet been paid (suspension of enforcement), the suspension of enforcement must end, i.e. the interest on back taxes must be paid.

The current legislation is inapplicable for interest periods beginning on or after 1 January 2019. Courts and administrative authorities are no longer permitted to apply these rules. The general rule is:

- Initial assessment of interest: "new" interest on back taxes and tax refunds may no longer be charged at a rate of 0.5% per month. The interest rate has to be set as soon as the new interest rate regulation is in effect due to retroactive amendment of the law.

## Content

German Federal Ministry of Finance: Guidance on Interest on Back Taxes and Tax Refunds

Lower Tax Court of Bremen (2 K 187/17 (3)): Referral to the ECJ regarding Surcharges in the event of Violation of Duties to cooperate

Special Coronavirus Rules for Cross-Border Commuters: Current Status of Consultation Agreements between Germany and Neighbouring Countries

- Unappealable interest assessments: If interest has already been determined prior to the decision of the Federal Constitutional Court and these interest assessments are incontestable (e.g. because the objection period has expired), they are neither to be revoked nor amended. However, if the interest has not yet been paid, the interest determined may no longer be enforced.

In addition, the BMF guidance contains detailed rules on objections and various cases of amended assessments of interest, i.e. interest that was already assessed prior to publication of the Federal Constitutional Court's decision and is now to be amended.

It is to be expected that a draft bill for amendment of the interest rate will not be presented until after the new federal government has been formed. Coalition negotiations are still ongoing.

### **Lower Tax Court of Bremen (2 K 187/17 (3)): Referral to the ECJ regarding Surcharges in the event of Violation of Duties to cooperate**

If a taxpayer breaches his duties to cooperate in connection with transfer pricing documentation, a surcharge shall be imposed by the tax authorities (Section 162 (4) of the German Fiscal Code [AO]).

Taxpayers shall keep records on the nature and content of their cross-border business relations with related parties (Section 90 (3) AO). The duty to keep records encompasses the presentation of business transactions (documentation of facts) and the economic and legal basis for any arm's length agreement of terms and conditions (compliance documentation).

Taxpayers are in breach of their duties to cooperate when the records are not submitted or are (largely) unusable.

In accordance with its decision of 7 July 2021, the Lower Tax Court of Bremen has now referred the question to the European Court of Justice (ECJ) as to whether such a surcharge on unsubmitted or unusable documentation pursuant to Section 162 (4) AO is consistent with the freedom of establishment pursuant to Article 49 of the Treaty on the Functioning of the European Union (TFEU) and the freedom to provide services pursuant to Article 56 TFEU. The proceedings are listed under ECJ case number C-431/21.

#### *Decision to refer*

The lower tax court's decision to refer the question demonstrates its reservations about the consistency of Section 162 (4) AO with the European freedom to provide services and freedom of establishment on the following grounds:

- The surcharges apply only to resident taxpayers with related party transactions abroad, however not to domestic related party transactions.
- Moreover, justifying such surcharges seems doubtful because, although a surcharge is suitable to combat tax avoidance and to ensure allocating the tax base between member states, the tax authorities have sufficient means at their disposal by virtue of their authority to estimate the tax base pursuant to Section 162 (3) AO. According to this provision, the tax authorities already have the power to exhaust the estimate within the determined price range to the detriment of the taxpayer (so-called

unfavourable assessment).

In the opinion of the lower tax court, the additional surcharge specified in Section 162 (4) no longer contributes to the prevention of tax avoidance.

- Furthermore, the amount of the surcharge does not seem reasonable to the tax court, as neither a maximum amount is determined nor a connection is made to the tax implications of the determination. For example, the surcharge can amount to 5,000 euros, even if no additional income is determined.

#### *Conclusion*

In its decision to refer, the referring lower tax court of Bremen expresses its doubts as to the necessity of the surcharge and considers the powers and means of the tax authorities under Section 162 (3) AO to be sufficient.

In objection proceedings against the imposition of surcharges pursuant to Section 162 (4) AO, the tax authorities are required by law to adjourn the objection proceedings in cases where proceedings are pending before the Court of Justice of the European Union with respect to the compatibility of a legal question with EU law (Section 363 (2) sentence 2 AO). Reference can be made in objection proceedings to the Bremen lower tax court's decision to refer and the proceedings pending before the ECJ (C-431/21).

### **Special Coronavirus Rules for Cross-Border Commuters: Current Status of Consultation Agreements between Germany and Neighbouring Countries**

Since the beginning of the coronavirus pandemic, various tax

measures were taken in Germany to mitigate the effects of the coronavirus. These also include special arrangements for cross-border commuters through agreements with neighbouring countries.

The coronavirus pandemic presents particular challenges for cross-border commuters who normally commute daily from their country of residence to work in another country. If these individuals now increasingly work from home, this can also have tax consequences. This is the case for example when according to the applicable provisions of the double taxation agreement between the two countries concerned, exceeding a certain number of days on which the actual country of performance is not visited leads to a partial change in the right to tax. With regard to the double taxation agreements with Luxembourg, the Netherlands and Austria, for example, an increased number of home office days can lead to a change in the attribution of taxation rights and thereby to a change in the tax situation of the employees concerned.

For this reason, the German Federal Ministry of Finance [BMF] has concluded temporary consultation agreements with neighbouring countries for cross-border commuters in order to prevent salaries and wages from becoming taxable in the country of residence of the cross-border commuters due to working from home. Accordingly, working days for which salary or wages are received and on which cross-border commuters only work from home because of measures to combat the coronavirus epidemic are considered working days spent in the contracting state in which the employees would normally have carried out their work. Germany has concluded such mutual agreements with

Luxembourg, the Netherlands, Austria, Belgium, France, Switzerland and Poland. The agreements apply to working days from 11 March 2020 and have already been extended (several times).

Current status of the existing consultation agreements:

#### **Austria, Switzerland:**

- applicable until at least **31 December 2021**
- automatically renewed by one month if not terminated
- also applicable to public sector employees
- explanation of situations when a home office is considered a permanent establishment

#### **Luxembourg:**

- applicable until at least **31 December 2021**
- automatically renewed by one month if not terminated
- also applicable to public sector employees

#### **France, the Netherlands:**

- applicable until at least **31 December 2021**
- automatically renewed by one month if not terminated

#### **Belgium:**

- applicable until at least **31 December 2021**
- no automatic renewal, however optional to do so

#### **Poland**

- automatically renewed by one month if not terminated
- also applicable to public sector employees

As soon as the measures taken in response to the coronavirus

pandemic will be reduced again, the special arrangements for cross-border commuters are also to be lifted again.

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