

German Tax Monthly

Information on the latest tax developments
in Germany

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Bundestag passes Fourth Coronavirus Tax Assistance Act

The Bundestag adopted the **Fourth Coronavirus Tax Assistance Act to implement tax relief measures for coping with the coronavirus crisis** on 19 May 2022.

Against the backdrop of the ongoing pandemic-related restrictions, the people as well as the economy are to be supported in overcoming the corresponding economic ramifications. The measures are especially intended to support economic recovery, provide additional investment incentives and reduce the burden on employees. The bill includes new measures as well as extension of existing measures from previous legislative procedures.

Key points of the Fourth Coronavirus Tax Assistance Act

Discounting of non-interest bearing liabilities: The obligation under tax law to discount non-interest bearing liabilities with a remaining term of more than 12 months is abolished. Previously, such liabilities were required to be discounted at an interest rate of 5.5 percent in the tax balance sheet,

resulting in a taxable income. Irrespective of whether they are interest-bearing or non-interest bearing, liabilities are to be stated at acquisition/production cost or an equivalent value under the new regulation. As a rule, this is the nominal value (repayment amount).

Extension of declining-balance method of depreciation: The option of using the declining-balance method of depreciation for movable fixed assets is extended by one year. Accordingly, assets that are acquired or manufactured also still in 2022 (currently 2020 and 2021) can be depreciated by up to two and a half times the depreciation on a straight-line basis, but 25% at most.

Loss utilisation:

- **Extending the loss carry-back:** The option of recognising loss carry-backs is extended indefinitely from one to two years. Thus, a loss carry-back is possible in both years directly preceding the year in which the loss was incurred. This is to apply for the first time for losses that are incurred in 2022, i.e. loss carry-backs from 2022 to 2021 and 2020.

Content

Bundestag passes Fourth Coronavirus Tax Assistance Act

Tax Relief Act and Energy Price Lump Sum

BMF Guidance dated 21 April 2022: Repayment of Contributions for Third-Country Corporations

German Federal Tax Court: Withholding Tax for Provision of the Use of Know-How for an unlimited Period of Time

Infringement Proceedings against Germany in Respect of Taxation of Dividends and Interest paid to Charitable Organisations

- **Extending expanded loss off-setting:** The Third Coronavirus Tax Assistance Act raised the maximum amount of the loss carry-back to EUR 10 million and EUR 20 million in the case of joint assessment for 2020 and 2021. These upper limits are now extended to the end of 2023, which means for loss carry-backs from 2023 to 2022 and 2021.

Extending the deadline for tax-privileged (re)investments: The deadlines for tax-privileged (re)investments pursuant to Section 6b of the German Income Tax Act [EStG] and Section 7g EStG are extended by another year (until 2023).

Subsidies granted for compensation for short-time work: The tax exemption for employer's grants to increase short-time allowance is extended by six months until the end of June 2022 (from previously the end of December 2021).

"Carer bonus": Special benefits granted by employers to employees working in specific areas (especially hospitals) in recognition of their special contribution during the coronavirus crisis (so-called carer bonus) are allowed tax-free up to an amount of EUR 4,500 in the period from 18 November 2021 until 31 December 2022.

Extending the filing deadline for tax returns: The bill provides for various extensions of filing deadlines for tax returns from 2020 to 2024.

Wage tax deduction in maritime transport: In order to implement the agreement with the European Commission, the **register reference for merchant vessels** will be expanded from Germany to include EU/EEA countries.

Outlook

Following adoption by the Bundestag, the Bundesrat still has to ap-

prove the law. After the Bundestag and Bundesrat have passed the law, it has to be promulgated in the Federal Law Gazette. The Fourth Coronavirus Tax Assistance Act includes the first tax measures from the new German government's coalition agreement: including expansion of loss carry-backs and extension of expanded loss offsetting. The "super depreciation" for climate protection and digital assets, announced in the government's coalition agreement is not included, but "is being elaborated upon" to bring it to fruition.

Tax Relief Act and Energy Price Lump Sum

The Bundestag adopted a Tax Relief Act on 12 May 2022. The act also includes a lump sum for energy prices which is to be paid out by employers to their employees in September 2022. The aim of the act is to provide relief to citizens in view of significant price rises, especially in the energy sector.

All those actively employed are entitled to the lump sum for energy costs in the amount of EUR 300. In principle, employees will receive payment of the lump sum for energy costs from their employer in September 2022. As a rule, employers will be compensated for this payment through a deduction from the total amount of payroll tax to be withheld for the payroll tax filing for August 2022.

In addition, the act also provides for an increase in the employee lump sum allowance by EUR 200 to EUR 1,200 and an increase in the basic tax-free allowance by EUR 363 to EUR 10,347 – both measures apply retroactively from 1 January 2022. As a result, these retroactive increases have an impact on payroll tax deductions already made.

In April 2022, the German federal government also adopted a package of measures for companies affected by the consequences of the war in Ukraine as part of a protective shield ("Schutzschild"); this includes an energy price allowance for companies from specific sectors facing high additional costs due to the rise in gas and electricity prices. The precise arrangement and form of application for this has not yet been announced.

BMF Guidance dated 21 April 2022: Repayment of Contributions for Third-Country Corporations

Under German tax law, it is necessary to make a distinction between the distribution of dividends and repayment of contributions (nominal capital, capital reserve) for corporations:

Repaid contributions are exempt from tax for shareholders. By contrast, depending on the legal form of the shareholder, dividends are subject, at least in part, to taxation. Corporations domiciled in an EU Member State may also make a tax-exempt repayment of contribution to domestic shareholders. The requirement for this is an application within a set period by the foreign corporation for separate assessment of the amount of repayment of contribution (Section 27 (8) of the German Corporation Tax Act [KStG]). However, to date there has been no conclusive clarification over whether a corporation domiciled in a third country may also make a tax-exempt repayment of contribution.

To this end, the BMF guidance dated 21 April 2022 issued the opinion below which makes a distinction between repayments of contributions to nominal capital and those not made to nominal capital:

Nominal capital repayments

Tax exemption is possible if the presence of a nominal capital repayment can be substantiated using suitable documents (in particular the resolution on the nominal capital reduction and repayment).

However, if the foreign corporation reduces its capital within five years of issuing new share rights and repays in part or in full the funds made available through this, the repaid amounts are deemed dividends for shareholders to the extent they do not exceed the amount of the capital increase.

Repayment of contributions not made to nominal capital

The amount of the distributable profit, the subscribed capital and the contributions not made to nominal capital (e.g. capital reserve) are to be derived from the foreign balance sheet which precedes the year of payment to the shareholders.

A repayment of contribution may only be tax-exempt if it exceeds the distributable profit of the foreign company (appropriation sequence).

For a repayment of contribution to be assessed, the shareholder must submit the following information and documents in German: Domicile of the distributing corporation in a third country for the requested period, amount of the investment of the domestic shareholder, resolutions and substantiation of the distribution paid as well as its foreign balance sheet.

EEA countries

For corporations domiciled in an EEA country, the relevant provisions for corporations domiciled in an EU Member State generally apply. The provisions described for third country corporations are also

applied for EEA corporations if these have failed to make an application within the set time period.

Translation of payments into euro is made at the average rate of the buying rate at the date of effective execution at the level of the distributing company.

The BMF guidance is applicable to all open cases.

German Federal Tax Court: Withholding Tax for Provision of the Use of Know-How for an unlimited Period of Time

The German Federal Tax Court (BFH) ruled that the provision of the use of know-how for an unlimited period of time by a foreign payment creditor can result in income subject to non-resident tax liability, for which withholding tax is to be retained (ruling of 13 October 2021, file ref I R 18/18). In this regard, the legal requirement for "actual use" of the know-how in Germany did not depend on the know-how having the agreed scope and/or agreed quality in order to meet the goal pursued in Germany.

A German GmbH (plaintiff) concluded an "agreement on the exclusive transfer of a process for making an active ingredient X coupled with the transfer of know-how and all process documentation as well as supply of X and intermediate stages" (technology transfer contract) with a corporation (HUN) domiciled in Hungary in 2007. HUN developed a process of making the pharmaceutical active ingredient X. This process was based on the international patent application of another company (A) for the active ingredient Y. Under this contract, the plaintiff acquired the unlimited right to use of the know-how developed by HUN for producing Y and X, respectively. HUN undertook not to

pass on information on the process to third parties, even at a later date. In addition, HUN was to supply the plaintiff, among other things, with a specified amount of the active ingredients X and Y.

Following disagreements between the plaintiff and HUN over the quality of the active ingredients produced by HUN, the contractual relationship was terminated during 2009. The plaintiff paid a consideration to HUN for the technology transfer in August 2007. No tax was withheld at source for this by the plaintiff. However, the tax office held that the plaintiff was obliged to deduct tax for the payment made for the technology transfer.

The BFH upheld the opinion of the tax office. HUN had non-resident tax status in Germany for the income arising from the transfer of know-how (Section 49 (1) no. 9 of the German Income Tax Act [EStG]). This also applies where the use of the know-how has been provided for an unlimited period of time. The sale of know-how (which is not subject to withholding tax) must be differentiated from the provision of the use of know-how for an unlimited period of time. According to the binding findings of the lower court, there were no indications that the know-how had been sold by HUN to the plaintiff. Further, the BFH affirmed a sufficient domestic nexus. Use in Germany is deemed sufficient to assume proper use of the know-how in Germany. Use does not mean, however, that the use of the know-how must also have led to the outcome intended by the payment debtor. A sufficient domestic nexus is deemed to exist even if the outcome for the payment debtor fails to materialise. Regardless of its early termination, the technology transfer agreement resulted in an exchange of goods and services,

which is deemed sufficient for actual use.

Consideration was thus subject to withholding tax at source. With respect to the obligation to withhold tax, it is not relevant whether the factual non-resident tax liability (provision of the use of know-how) was already fully met at the date of payment of the consideration, according to the BFH. It applies also where – as in the case under dispute – payments for the provision of the use of know-how are due upon conclusion of the contract and by extension possibly before actual use in Germany. If the withholding tax is not deducted, as in the case at hand, from the consideration and transferred to the tax office, the payment debtor – in the case at hand the plaintiff – is liable for the withholding tax afterwards.

Infringement Proceedings against Germany in Respect of Taxation of Dividends and Interest paid to Charitable Organisations

Under German tax law, dividends and interest paid to charities having their legal seat or the place of management in Germany are either exempt from withholding tax or the withholding tax is refunded. However, dividends and interest paid to comparable charities established in other EU or EEA Member States or third countries are taxed at a rate of 25% unless a relevant Double Tax Agreement provides for a reduced rate. In the opinion of the EU Commission, this difference in treatment of domestic and cross-border dividend and interest distributions to charities constitutes a restriction on the free movement of capital, guaranteed in Article 63 of the Treaty on the Functioning of the European Union [TFEU] and Article 40 of the Agreement on the European Economic Area.

The European Commission formally requested Germany in April to bring its rules on taxation of dividends and interest paid to charities, which in its view are discriminatory, in line with EU law.

If Germany does not provide a satisfactory response within the next two months, the Commission may decide to send a reasoned opinion.

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