PKF

Newsletter

Key Issue:

Corporation & Co. KGaA as a legal form for family enterprises

The renaissance of an old company form

02|19

Dear Readers,

The world and with it also the work environment are changing more and more quickly. The mobility of employees and other modern forms of working, in particular, are challenging employers, case law and the legislator, in equal measure, to strike out in new directions, to find compromises and, in this way, to **build various bridges**, which are also necessary at many points in this edition of our newsletter.

In the Tax section, first of all, we present the **changes to the German Tax Law on Travel Expenses** that were specified by the Federal Ministry of Finance at the beginning of the year. According to the Federal Ministry of Finance circular, the rules on travel expenses apply accordingly where two households are maintained abroad. With that, a link is established to our second report on a tax court ruling that sought to clarify whether or not the **running of two households** may be recognised for tax purposes if the whole family accompanies the working parents. Following on from that, we discuss a landmark decision by the **ECJ** according to which **input tax** could still be **deductible** not only if the invoice, formally, is not correct but even if there is **no invoice** at all.

We start off the Legal section with the Key Issue for this edition. The **KGaA** [partnership limited by shares] is an old legal form that, in practice, has been enjoying **growing popularity**. In particular, businesses that were previously owner-managed that want to tap (equity) capital markets more intensively will see the benefits. This legal form with its different versions is able to bridge the divide between, on the one hand, reducing shareholdings to below 50% and, on the other hand, retaining influence over important decisions. The second article deals with the question of whether or not there is a bridge between an **employee who works (exclusively) abroad** and the works council of a domestic (German) employer and its scope of protection. With respect to **home offices**, there are indications that we have reached a tipping point here. While, up to now, this place of work has been the exception, there could soon be a basic right to work from home if the Federal Ministry of Labour, which is run by the SPD, has its way and if specific rules, which essentially relate to data protection, are complied with. We conclude with an article that is suited to the season where you can read about the things that **employees** should bear in mind when there is **snow and ice** on the ground and how employees and employers can get through such a chaotic day.

With our best wishes for an interesting read,

Your Team at PKF

Key Issue

Corporation & Co. KGaA [partnership limited by shares] as a legal form for family enterprises – The renaissance of an old company form

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TAX

RAin [German lawyer] Maha Steinfeld

New regulations on travel expenses for trips abroad as of 1.1.2019

As of 1.1.2019, new rules have been applicable for the tax treatment of travel expenses and travel expense allowances. The Federal Ministry of Finance (*Bundesministerium* der Finanzen, BMF), in its circular from 28.11.2018, increased the "flat-rate amounts" for subsistence and accommodation costs for foreign business trips and adjusted them to the current conditions. The BMF circular likewise gave a concise summary of the current guidelines.

1. Applying country-specific rates

The BMF circular lists the current daily meal allowances and accommodation rates, in tabular form, for the individual countries and, in some cases, for foreign cities and regions. Moreover, the circular specifies that the flat-rate amount for Luxembourg should be applied in the case of countries that are not covered in the list and that the flat-rate amount for the mother country in the case of overseas territories and insular areas of a country.

It should be noted that the flat-rate amounts for accommodation costs are applicable solely in cases of employer reimbursement. By contrast, the actual overnight costs will always be applicable for the deduction of work-related costs and business expenses irrespectively of whether these are higher or lower than the flat-rate amounts.

Please note: The regulations in the circular from 28.11.2018 (case reference: IV C 5 – S 2353/08/10006:009, see under www.bundesfinanzministerium.de (German version only)) apply accordingly where two households are maintained abroad.

2. Regulations for one-day and multi-day trips

For one-day trips abroad, the appropriate flat-rate amount for the last place of work abroad is relevant. In the case of multi-day trips to various countries, for the calculation of daily meal allowances the following is now applicable on the arrival day and the departure day as well as the interim days (days with 24 hours of absence):

- when travelling from the home country to a foreign country, or the other way round, (without working in either place) the appropriate flat-rate amount that is relevant is the one for the location at which the employee arrives before 24:00 local time;
- when departing the foreign country to go to the home country or departing the home country to go to the foreign country, the appropriate flat-rate amount for the last place of work is applicable;
- for the interim days, the appropriate flat-rate amount for the location at which the employee arrives before 24:00 local time is usually applicable.

After having worked away for several days, if on the day when the employee returns back home or to the primary workplace there follows another period of one or more days working away then a higher daily meal allowance should be taken into account for this day only. Furthermore, the BMF circular makes reference to the current payroll tax guidelines, particularly with respect to air and sea travel.

3. Reduction in the daily meal allowance

If meals are provided by the employer or by a third party at the employer's request then the daily meal allowances shall be reduced regardless of the country in which the respective meal is made available.

StB [German tax consultant] Markus Hass / Florian Exner

Maintaining two households with the whole family at the workplace location

The Münster tax court recently expressed its view on a special case that involved the maintenance of two households. According to the ruling from 26.9.2018 (case reference: 7 K 3215/16 E), the costs of running two households may be recognised even if not just one family member moves into the (second) dwelling, separate from the rest of the family, at the workplace location but, instead, both working spouses live in this dwelling together with their child. Here, in order for this to be recognised for tax purposes, the dwelling at the workplace location may not be the family's habitual abode.

The facts of the case in question were that, besides the dwelling at the workplace location, the family had a jointly owned bungalow in a municipality some 300 km away (its place of residence). This bungalow, which had a living area of 125 sq m, was occupied both by the family and also one grandparent.

At the bungalow, besides the rooms that were used communally, the working family also had sole use of three rooms that were available there. While the dwelling at the workplace location was mostly used on working days when the couple's daughter also went to the school at the workplace location, at least part of the family regularly stayed at the place of residence at the weekends and on other free days.

The tax authority had initially refused to take into account the costs for the rented dwelling at the workplace location because the authority took the view that the family's habitual abode was the workplace location and their stays at the place of residence should be classified as mere visits. In particular, the tax authority refused to acknowledge that the family had a household at its place of residence.

However, the tax court accepted the taxpayers' arguments, which were presented convincingly, that their habitual abode was still their own household at their place of residence. In this case, the existence of a separate household was substantiated both by the right (at least) to the joint and equal use of the rooms as well as by the financial contribution to the living costs and

the assumption of maintenance costs. The taxpayers were able to present arguments that proved that the bungalow was their habitual abode, in particular, based on the social contacts at that location (family members, a circle of friends, medical care, etc.) that were almost exclusively maintained there, but also through indicators such as the size and fixtures and fittings of the dwellings.

Therefore, according to the tax court, the costs of running two households (in this case, family journeys home in the amount of the distance-related tax allowance for both spouses as well as half the accommodation expenses at the workplace location, in each case) may be deducted as work-related costs.

Recommendation

In order for the maintenance of two households to be recognised for tax purposes you have to ensure that a separate household is maintained outside of the primary workplace location that also constitutes the taxpayer's habitual abode. You will have to provide documented proof of this. Please bear in mind that under the current legal situation (since 2014), if two households are maintained, then a "separate household" would only be recognised for tax purposes if the taxpayer makes at least financial contributions to the household (Section 9(1) no. 5 of the German Income Tax Act 2014).

WP/StB [German public auditor/ tax consultant] Dr. Matthias Heinrich/ Julia Hellwig

Input tax can be deducted even if no invoice is presented

The availability of an invoice is not absolutely necessary. The ECJ recently decided this, for the first time, in its ruling from 21.11.2018 (case reference: C-664/16 "Vâdan"). This decision thus constitutes a further development in the case law in two judgements, likewise on the formal requirements for input tax deduction, that were issued on 15.9.2016 (case reference: C-518/14 "Senatex" and case reference: C-516/14 "Barlis") where the formal requirements for input tax deduction had already been eased.

1. New landmark ECJ ruling

The backdrop to the new decision was Article 167 of the Directive on the VAT System according to which the taxpayer's right to deduction arises at the time the deductible tax becomes chargeable. The necessary substantive requirements for this right to arise are defined in Article 168 of the Directive on the VAT System.

- Firstly, the person concerned has to be a taxpayer within the meaning of the Directive on the VAT System.
- Secondly, in order to establish the right to deduct input tax, the goods or services supplied by another taxpayer that give rise to the deduction have to be used for the purposes of the taxed transactions of the taxpayer.

Under Article 178 of the Directive on the VAT System, the right that generally arises by satisfying these conditions may however only be exercised if the taxpayer holds an invoice drawn up in accordance with Article 226 of the Directive on the VAT System.

In the matter on which the ECJ ruled this time, a Romanian business owner was seeking input tax deduction from incoming transactions in connection with the subsequent sale of residential properties and building plots even though he was unable to produce any invoices for this and, thus, could not satisfy the above-mentioned conditions.

The ECJ was supposed decide whether or not an input tax deduction could also be claimed even if no invoices were presented and whether or not the amount of input tax could potentially be determined on the basis of an assessment within the context of an expert report. Previously, the ECJ had already ruled several times that the basic principle of VAT neutrality requires that input tax deduction should be allowed if the substantive requirements have been satisfied even if the taxpayer is unable to comply with "certain" formal conditions. According to the ECJ, in its recent judgement, it thus follows that the strict application of the formal requirement to present an invoice (at all) constitutes a violation of this basic principle. The main idea behind the common system of value added tax was to tax the economic activities of taxpayers in a neutral way and an overriding requirement to be in possession of an invoice would prevent this.

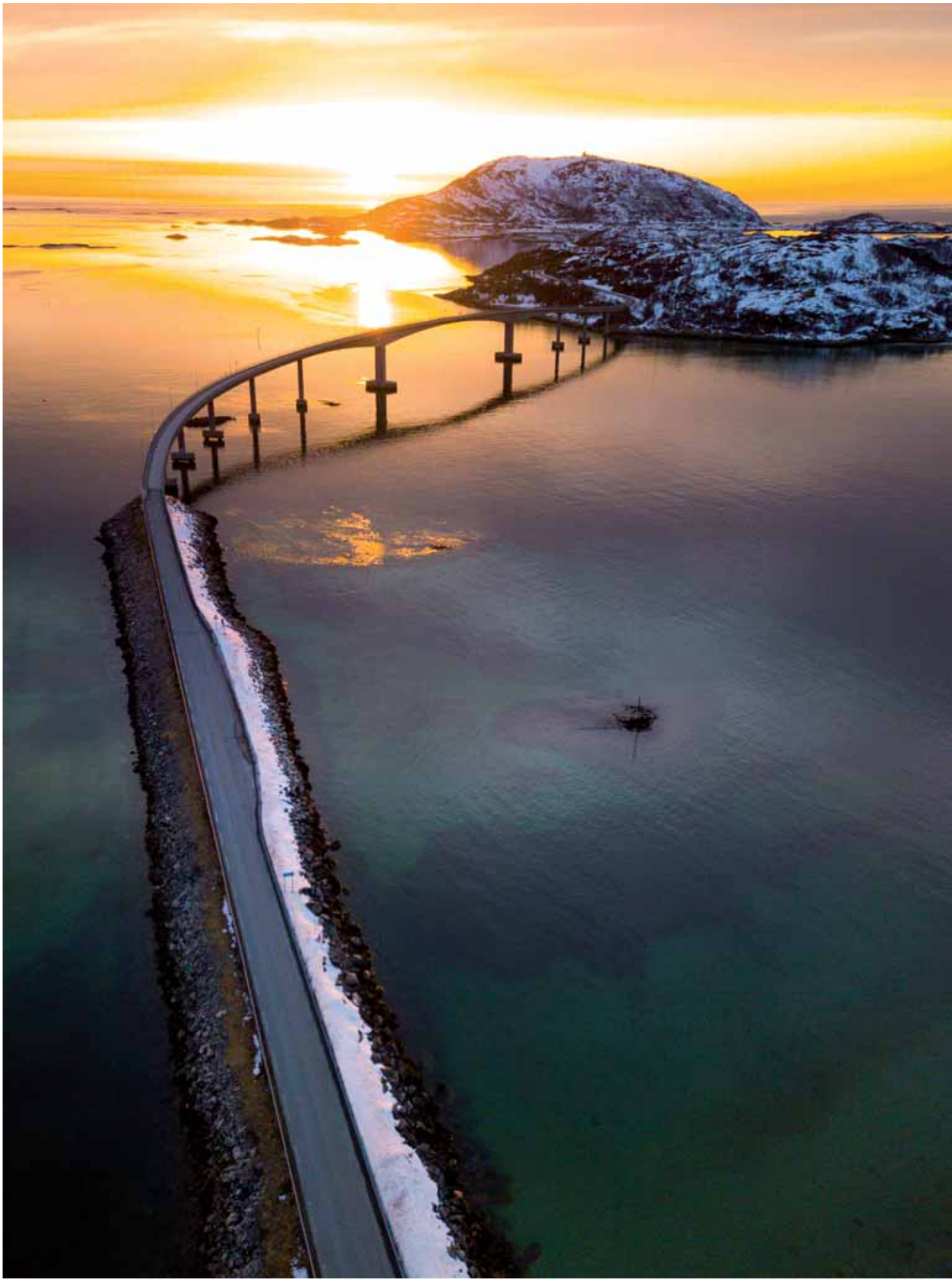
Nevertheless, taxpayers have to provide objective evidence that the above-mentioned substantive requirements have been satisfied. The ECJ provided a non-exhaustive list of examples of appropriate evidence; this included documents held by the suppliers or service providers from whom the taxpayers have acquired the goods or services in respect of which they have paid VAT. Nevertheless, the expert report that was requested in this case did not satisfy the requirements.

2. National law

Up to now, in Germany, presenting an invoice has been mandatory for exercising the right to deduct input tax pursuant to Section 15.2(2) clause 1 no. 4 of the German ordinance on the application of VAT. However, the Federal Fiscal Court, in its ruling from 13.6.2018 (case reference: XI R 20/14; see issue 1/2019) eased the eligibility criteria for exercising the right to deduct input tax with respect to the invoice elements in the national context, too.

Recommendation

As a result of the ECJ ruling, taxpayers whose input tax deduction has been refused by the tax authority on the grounds that no invoice was presented will now have a basis for argumentation. It will be necessary to check whether or not it is possible to provide objective evidence that the substantive requirements have been satisfied and, thus, that the right to deduct input tax can be exercised despite not having an invoice. It should be possible to apply the above-mentioned principles to invoices that are erroneous in formal terms



RA/StB [German lawyer/tax consultant] Reinhard Ewert / RA [German lawyer] Johannes Springorum

Corporation & Co. KGaA [partnership limited by shares] for family enterprises

The renaissance of an old company form

The partnership limited by shares (*Kommanditgesellschaft auf Aktien, KGaA*) is a legal entity of a hybrid legal nature. On the one hand, it is a corporation (a public limited company or *Aktiengesellschaft*, AG) but, on the other hand, it exhibits the elements of a partnership in key areas, such as management.

1. Concept and advantages of this legal form

A KGaA consists of, firstly, limited liability partnership shareholders who hold stakes in the registered share capital that is divided into shares and, secondly, a personally liable general partner (*persönlich haftenden Gesellschafter*, phG) as an executive and representative body. The KGaA is now a very popular company form for many family enterprises.

A Corp. & Co. KGaA is a combination of a limited liability corporation (e.g. a GmbH – a private limited company) as the phG and the limited liability partnership shareholders as limited partners.

Practical examples – In January 2019, the number of KGaAs recorded in the commercial register was 289, of which the vast majority were organised as a Corporation & Co. KGaA (Kap & Co. KGaA).

At present, Fresenius Medical Care AG & Co. KGaA, Fresenius SE & Co. KGaA, Henkel AG & Co. KGaA and Merck KGaA are four companies with the legal form of a KGaA – thereof three Corp. & Co. KGaAs – that are constituents of the DAX 30 stock exchange index.

The shareholders of the above-mentioned companies thus benefit from a key advantage of a (Corp. & Co.) KGaA by, on the one hand, securing access to the capital market without, on the other hand, losing business influence or assuming the risk of personal liability.

The structuring options under company law described below allow optimal adaptation to the particular needs of a business and its shareholders.

2. Applicable rules under company law

For the general partner, the applicable rules are mainly those for limited partnerships under partnership law (cf. Section 278(2) of the German Stock Corporation Act (*Aktiengesetz, AktG*)). The general partner is liable for the company's debts to an unlimited extent and is basically responsible for the management function and for representing the KGaA although individual phGs can be excluded from this via the appropriate provisions in the articles of association.

By contrast, the limited liability partnership shareholders are comparable to the shareholders of a 'normal' AG (Section 278(3) AktG), i.e. they accept shares in return for capital contributions, their liability is limited to their capital contributions and they are excluded from the management function. The registered share capital has to be at least € 50,000 (like for an AG).

3. Structuring options for family enterprises

An important distinction in relation to an AG that is especially interesting for family enterprises is the allocation of duties between the groups of shareholders and the position of the general partner that is potentially more powerful when compared with the executive board of an AG. With the right of veto enshrined accordingly in the articles of association, no significant measures can be adopted and/or carried out without the approval of or against the will of the general partner. Moreover, with the appropriate structure in place, another phG could only be dismissed or appointed with the approval of all the shareholders (including the general partner).

The primary function of the supervisory board – whose members have to be elected by the AGM of the limited liability partnership shareholders – is solely to monitor the activities of the general partner. However, with appropriately configured articles of association, the supervisory board can also restrict the legal status of the general partner. Another advantage is that the co-determination

in accordance with employee rights is only relevant at the level of the KGaA; however, there does not have to be an impact from this on the functioning of the general partner. In particular, the general partner is not required to form a supervisory board.

While the articles of association of an AG are subject to relatively strict formalities, a KGaA has the option of regulating the interests of the general partner and the limited liability partnership shareholders to a greater degree in the articles of association. Although, under the legal provisions related to the KGaA, the self-governing body principle is applicable, i.e. not all the shareholders can be excluded from representing the company.

Within the framework of the autonomy to formulate its own articles of association, a company is able to shape the basis of its governance to make it

» personalised (in the area of management the focus of power is placed on the general partners), or
» capitalistic and guided by the AGM (strong limited liability partnership shareholders who are able to exert influence on management by issuing a catalogue of business transactions requiring approval, or via the authority to issue instructions to the management).

As a result of this, particularly in the case of a family enterprise, it is possible to grant the family, in accordance with its needs – whether this be as a general partner or also limited liability partnership shareholders – far reaching powers and thus to guarantee the individual influence that is desired.

4. Control despite a stock exchange listing

In order to be able to exercise control over an AG or a GmbH a 50% majority, or at least an effective majority is required, whereas in the case of a KGaA this does not apply. Arrangements that enable control can be put in place in a way that is unconnected to the size of the shareholding so that the general partner is able to control the company irrespective of the size of its shareholding. A family can thus retain control over the company – via a majority holding in the general partner GmbH or as a personally liable shareholder – even if more than 50% of the limited partnership shares are, for example, floated on the stock exchange.

Recommendation: By having a dual structure (general partner and limited liability partnership shareholders) it is also possible for the family to arrange a succession plan in accordance with its wishes even after it has ceded its majority of the shares. Thus, – if this is provided for in the articles of association – another general partner can be nominated, or a legal heir who is a limited liability partnership shareholder can be vested with the appropriate powers.

5. Tax aspects

(1) Basic principles – Generally, a KGaA is treated like a corporation and benefits from the separation principle in tax law, i.e. separating the corporate level from the shareholder level for tax purposes. A KGaA is subject to unlimited tax liability if its management or registered office are based in Germany. As corporations, according to German law, generate solely income from business activities a KGaA is also subject to trade tax.

(2) Taxation at the level of the company – If a general partner has made capital contributions to the KGaA that have not been allotted to a stake in the limited partnership capital then the share of the profits paid out by the KGaA on this account as well as any other remuneration (for work or for providing loans or business assets) will be tax deductible at the KGaA – unlike in the case of the classic GmbH & Co. KG where such types of remuneration, as extraordinary operating income, are not tax deductible but would instead have to be treated as a profit distribution. By contrast, when calculating the trading profit, the remuneration paid to a general partner has to be added back (Section 8 no. 4 of the German Trade Tax Act (*Gewerbesteuergesetz, GewStG*)).

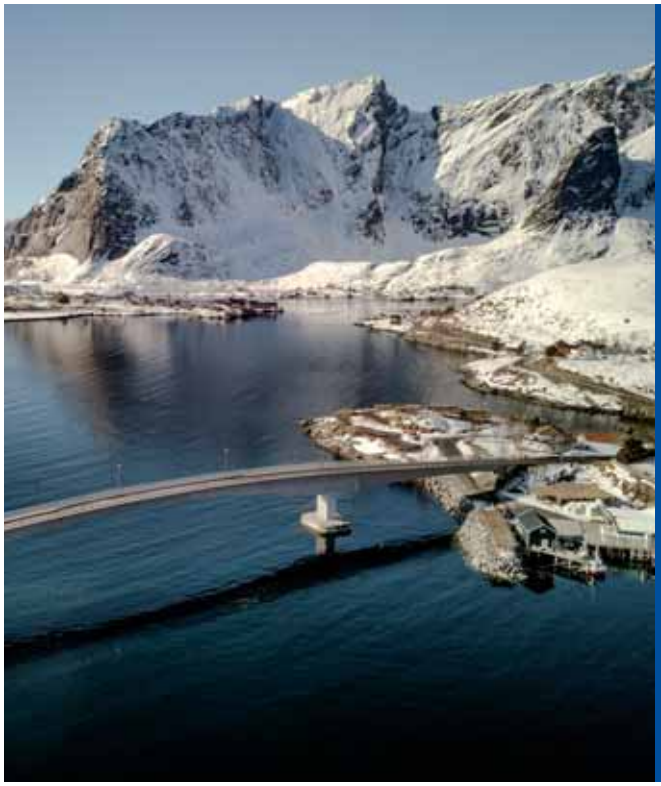
(3) Taxation at the level of the general partner – A distinction has to be made here between income from the limited partnership shares (if these have been subscribed by the general partner) and other income (remuneration for work or the share of profits from capital contributions other than those paid into the limited partnership capital):

» any dividends on the shares will constitute income from capital assets (analogous to a regular shareholder);
» with respect to other income, according to Section 15(1) no. 3 of the German Income Tax Act, this constitutes business income (i.e. taxation will be analogous to a co-partner in proportion to the stakes held in a partnership that is engaged in business activity or deemed to be of a commercial nature).

If the general partner is subject to trade tax (general partner GmbH) then, in order to avoid trade tax being levied twice, the general partner's remuneration is reduced in accordance with Section 9(1) no. 2b GewStG.

(4) Taxation at the level of the limited partner – Limited liability partnership shareholders, if they hold their stakes as private assets, are deemed to have generated income from capital assets that are subject to withholding tax.

If the stakes are held as the business assets of natural persons then profit income is deemed to have been generated and the partial income method shall be applicable here. Dividends for corporations that are limited liability partnership shareholders are 95% fully tax exempt (5% is deducted as a flat-rate amount to cover business expenses) if the corporation holds at least 10% of the share capital.



Conclusion

As described above, a (Corp. & Co.) KGaA combines the advantages of a commercial partnership (in particular, freedom with respect to the formulation of the articles of association, customisable means of control) with the advantages of a corporation (in particular, the limitation of liability, stock exchange marketability, the retention of earnings and favourable tax treatment of the disposal gains of the limited liability partnership shareholders). It is therefore not surprising that no fewer than 4 of the 30 DAX corporations have opted for this company form. The autonomy with respect to the articles of association, as described above, can however also provide small and medium-sized enterprises with flexible options for organising their financing, controlling various groups of shareholders and putting an adequate succession plan in place.

LEGAL

RA [German lawyer] Frederic Schneider

Purview of the works council extended to foreign countries?

The extent to which the Works Council Constitution Act (*Betriebsverfassungsgesetz, BetrVG*) also applies to employees who work outside of Germany and whether or not the works council is also responsible for these employees was recently the subject of a decision by the Federal Labour Court (Bundesarbeitsgericht, BAG). In its ruling from 24.5.2018 (case reference: 2 AZR 54/18) the court made a decision about an internationally active group with operations in Germany that had given an employee – who had worked abroad continuously on its behalf – statutory notice of termination without having consulted the works council beforehand.

1. Coverage by the BetrVG of employees working abroad

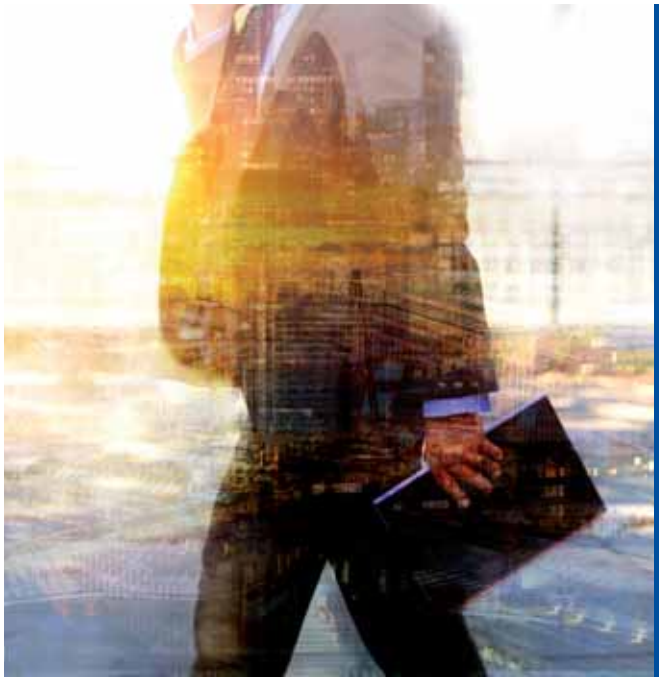
The BAG indeed proceeded on the basis that the works council has to be consulted prior to the issue of each notice of termination, which would moreover otherwise be unenforceable under the BetrVG. However, the obligation to consult the works council only exists within the sphere of application of the BetrVG for employees of establishments that are based in Germany. Regarding the question of whether or not the purview also extends to those employees working abroad of such establishments that are based in Germany, the BAG, in its ruling from 24.5.2018, reiterated an opinion it had already held in the past that neither the proper law of a contract, a collective agreement nor an employment contract can either constrain or extend the scope of application of the BetrVG. Only those employees abroad are covered whose work constitutes an expatriate assignment for the domestic (German) business. Such an expatriate assignment would be deemed not yet to exist on the

basis of continuous employment abroad only (BAG from 21.8.2017, case reference: 3 AZR 269/06) but it would require the employee to be integrated into the business operation in Germany. Here it is important with respect to the place, duration, time and content of the assumed duties that the employee should report to individuals who have the complete right to issue instructions and who work in the business that is located in Germany.

The domestic (German) employer has to actually hold the relevant employer status, under the Works Council Constitution Act, vis à vis the employee who is working abroad. The connection to Germany is already deemed to exist if the business located there is exercising its right to give instructions to the employee who is working abroad. A pre-existing affiliation to a domestic (German) company can likewise be retained if the right to recall the employee is reserved for the employer provided that this has practical significance.

2. A recall option by itself is of no practical significance

In the underlying case, the BAG decided that the appeal was well founded. The employment contract did indeed provide a recall option that could establish a connection to Germany and thus justify applying the BetrVG. However, this had not been conclusively clarified in the contract. It thus did not provide any conditions that would have to be fulfilled for a recall and did not specify whether, in this case, the assignment would be permanent or merely temporary. Moreover, the above-mentioned recall option was not of practical significance as, at no time, had the employer pointed out to the employee that there was any intention to make use of this right. The recall option was set out in writing in the contract but not actually put into practice and therefore, according to the BAG, did not become effective. The scope of application of the BetrVG thus did not cover this employee abroad and the works council did not have to be consulted prior to the notice of termination being issued.



Conclusion

The BAG ultimately provided the following guide. It is generally not the case that employees who are continuously employed abroad and allocated to a business operation in Germany will thus be covered by the scope of the BetrVG. Nevertheless, in order for the BetrVG to be applicable to an employee who works abroad continuously, an employer would have to integrate the employee into the domestic (German) work organisation. This would include having the employee report to individuals who have the right to issue instructions and who work in the business operation in Germany. In the opinion of the BAG, in this case, it is the employee who bears the burden of proof with respect to the connection to Germany.

RAin [German lawyer] Claudia Auinger

The home office - a future working model?

Many employed people wish to work from home (so-called home office activities). However, according to a recent analysis by the Federal Statistical Office, in 2017 only 11% of employees aged 20 to 64 worked mainly or occasionally in a home office. This percentage might increase substantially very soon (source: Federal Statistical Office, brochure "*Arbeitsmarkt auf einen Blick*" [The Labour Market at a Glance]).

1. To date, no statutory right to a home office

There is no legal entitlement to a home office in Germany. Now, Björn Böhning, an SPD politician (State Secretary at the Federal Ministry of Labour) would like to change this. According to a press release, the Federal Ministry of Labour is planning to introduce a statutory right to a home office. The law is supposed to be based on the

model that has been applicable in the Netherlands since July 2015. Employees would then be entitled to work from home apart from in justified exceptional cases.

2. Important rules for a home office ...

The home office arrangements have to be set out in a supplemental agreement, between the employer and employee, to the employment contract. Depending on the arrangements that are agreed, the employee would then accordingly work from home occasionally or exclusively. The home office arrangements should be regulated and specified in writing. It will be important for the employer to agree core hours during which the employer would be able to reach the employee at home. Moreover, it would be advisable to agree a requirement for the working hours worked to be documented within the framework of a time recording system. The purpose of this is not only monitoring by the employer but also the documentation of the compliance with the working hours requirements under the German Working Hours Act (e.g. an uninterrupted period of rest of at least eleven hours after the end of the daily working time) that would generally fully apply when working from home, too.

... particularly in respect of data protection

Ever since the coming into force of the GDPR and the Federal Data Protection Act, on 25.5.2018, more stringent data protection requirements have had to be imposed on employees working from home who process personal data – such as employee data and/or customer data. In such a case, attention should be paid to the following aspects:

- There should be a separate lockable work room available.
- The hard drive and the operating system as well as external data carriers should be encrypted.
- A secure connection to the company network via a VPN should be used.
- Data should be processed/stored exclusively on the PC, laptop, smartphone, tablet, USB stick etc. provided by the employer.
- Official documents, external data carriers as well as the IT equipment has to be protected from third-party access.

Employers are responsible for data protection requirements being complied with at their companies. As a result of this, in the home office sphere the need arises for employers and/or their data protection officers as well as the competent data protection authorities (after prior notification) to be granted access to employees' private dwellings in order to verify that the data protection requirements are being complied with. The appropriate access rights should be agreed in writing with all employees as well as with all the individuals who live in the employees' households.

Recommendation

A home office agreement should always be set up in writing prior to the start of any activity and should take into account mandatory statutory provisions. It remains to be seen whether or not, in the future, there will indeed be a legal entitlement to a home office.

RAin [German lawyer] Judith Bratzel-Jäger

Rights and obligations in a snow chaos situation – What employees have to bear in mind in winter

If employees are surprised by the sudden onset of winter, delays on the way to work can easily occur. The question that arises then is what consequences could emerge for employees and employers.

1. Limits on the employer's obligation to pay remuneration

Under labour law the "no work, no pay" principle applies. Therefore, normally, an employee who does not perform any work will not be remunerated either. However, there are numerous exceptions to this principle. Accordingly, Section 616 of the Civil Code (Bürgerliches Gesetzbuch, BGB) grants entitlement to remuneration without the required work being performed in the case of miscellaneous personal reasons as an excuse.

However, the impossibility of starting work due to the weather does not constitute a personal excuse according to Section 616 BGB but the reason lies in the objective traffic situation. The employer would therefore be entitled to withhold the wages for the period of time when no work was performed. In established case law, this is consistent with the settled view of the Federal Labour Court.

2. Obligation to work extra hours

Employees have to ensure that they are able to start work on time. They bear the so-called journey risk with the consequence that even in a situation of snow chaos, basically, they have to take all reasonable measures in order to arrive at their places of work punctually. Generally, in view of the fixed nature of the obligation to perform work, in the case of delays, it is not possible to make up for the lost working time. However, special rules could arise out of a collective agreement or an employment contract. In the case of a flexitime agreement it would generally be possible to shift the point in time when the work is performed and to catch up the missed working hours.

3. An employer's right to issue warnings/notices of termination?

A warning about starting work late implies culpable conduct, thus wilful or negligent conduct. If an employee has done everything in his/her power in order to arrive punctually at work, by being late s/he would indeed have committed a breach of duty although s/he would not be at fault. S/he cannot thus be given a warning about his/her conduct.

This would not apply if the employee, for example, had failed to make use of alternative means of transport, which would have been reasonable, or had delayed starting work in another way or, during a prolonged period of bad weather, had repeatedly shown up too late for work without consultation.

The above-mentioned conduct can likewise constitute a reason for termination on the grounds of conduct. Moreover, termination on the grounds of conduct relates to a breach of duty that was culpably committed. However, in accordance with the principle of proportionality, a relevant warning usually has to be issued prior to any termination on the grounds of conduct.

Recommendation

Employees should pay attention to the latest weather reports and do everything that is reasonable in order to arrive punctually for work. In case of delays you should notify your employer immediately. Generally, solutions that benefit all the parties involved can be found. Appropriate options are specifically, working extra hours on another day to make up for the missed time, reducing overtime, taking a day of holiday or a flexi day, or working from home.

The Federal Ministry of Finance has updated its letter of implementation in respect of the income tax treatment of the division of assets

The Federal Ministry of Finance (*Bundesministerium der Finanzen*, BMF), in its circular from 19.12.2018, updated its previous guidelines on the withdrawal of shareholders from a commercial partnership without impacting on income. Against the background of the latest ruling, the application of the predecessor accounting method has been made possible not only in the case of a "true" division of assets but, in the future, also in the case of a so-called "fictitious" division of assets. If a co-partner withdraws from a commercial partnership in return for an asset as compensation then a tax-privileged division of assets shall be deemed to exist if the assets thus obtained continue to be used as business assets. The continued operation of the company that is to be physically divided thus no longer necessarily results in the realisation of hidden reserves. Unlike previously, it is no longer necessary that each divider of assets also obtains essential business assets from the disappearing company.

Please note: The new BMF circular replaces the version from 20.12.2016 and should be used in all cases that are still open. For more information on the amendments that have been set out in detail we would refer you to the original text of the BMF circular (from 19.12.2018, case reference: IV C 6 – S 2242/07/10002). Your PKF partner would be pleased to answer any questions in this respect.

The reversion of taxing rights to Germany with respect to tax-exempt income under a DTA also applies to losses

The German legislator counters the fiscal risk of so-called 'white income', i.e. untaxed income, through a type of safeguard clause in Section 50d(9) clause 1 of the German Income Tax Act. Under the terms of tax treaties, the tax exemption on income for taxpayers with unlimited tax liability is accordingly, among other things, subject to the requirement that the taxation occurs in the foreign state. If the taxation is omitted, e.g. due to diverging views on the circumstances or different interpretations of the provisions of the agreement by the states involved then, despite the DTA, the income may not be excluded from the assessment base for German tax.

The Federal Fiscal Court, in a ruling from 11.7.2018, published in December of last year (case reference: I R 52/16), has now clarified that the term 'income' within the meaning of this provision covers both positive as well as negative income. Losses that have been tax exempted under the terms of the tax treaties may therefore be deducted in Germany if all the other requirements have been satisfied.

AND FINALLY...

"Most entrepreneurial ideas will sound crazy, stupid and uneconomic, and then they'll turn out to be right."

Wilmot Reed Hastings Jr., born 8.10.1960 in Boston, US-American entrepreneur, co-founder and CEO of online video rental service Netflix

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